

Privy Council Appeal No. 10 of 1964

Western Transport Pty. Ltd. - - - - - - - *Appellants*

v.

Norman Eggert Kropp - - - - - - - *Respondent*

AND

Maranoa Transport Pty. Ltd. - - - - - - - *Appellants*

v.

Norman Eggert Kropp - - - - - - - *Respondent*

(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 15th OCTOBER 1964**

Present at the Hearing:

VISCOUNT RADCLIFFE.

LORD MORRIS OF BORTH-Y-GEST.

LORD GUEST.

LORD PEARCE.

LORD UPJOHN.

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

The appellants, Western Transport Pty. Ltd., a company incorporated in the State of Queensland and having its registered office at Toowoomba, by a Writ of Summons dated the 7th October 1963 brought an action against the respondent (who is the nominal defendant for the Government of the State of Queensland) claiming sums totalling £449,238 6s. 10d. The claim of the appellants was that they had made payments involuntarily and under compulsion. Between the 30th September 1957 and the 1st May 1961 they had made payments totalling £138,236 15s. 2d. in respect of a licence which had been issued under Part IV of "The State Transport Facilities Acts 1946 to 1959" (which for convenience may be referred to as The Facilities Acts) and which they said had never had any lawful operation. Between the 1st May 1961 and the 28th August 1963 they had made payments totalling £311,001 11s. 8d. in respect of goods permits issued under "The State Transport Act of 1960" (which for convenience may be referred to as The Transport Act) and which also they said had never had any lawful operation. The respondent demurred to the whole of the statement of claim on the ground that it was bad in law and showed no cause of action. In his demurrer the respondent pleaded that the respective acts so far as material to the case were at all relevant times valid and in operation or alternatively so far as material were validated and made operative.

The appellants Maranoa Transport Pty. Ltd., a company also incorporated in the State of Queensland and also having its registered office in Toowoomba, by a Writ of Summons dated the 7th October 1963 brought an action against the respondent claiming the sum of £138,579 14s. 6d. which represented the total of payments made in respect of a licence issued under Part IV of The Facilities Acts. The claim and the demurrer to it raised the same issues as those raised in the other action.

The demurrers came on for hearing on the 29th November 1963 before the Full Court of the Supreme Court of the State of Queensland (Sir Alan Mansfield C.J., Jeffriess and Lucas J.J.). The demurrers were heard together

and the same counsel represented both appellants. Counsel for the appellants conceded that having regard to certain decisions (to which their Lordships will later refer) the Full Court was bound to allow the demurrers. Without further argument the Full Court ordered that judgment be entered in each action in favour of the respondent with costs to be taxed. On the same day, upon motion made by counsel for the appellants, the Full Court granted leave to appeal to Her Majesty in Council.

The object of The Facilities Acts was to provide for the improvement and extension of transport facilities within the State by controlling and regulating various means of transport. The Acts provided for the appointment of a Commissioner for Transport and "with a view to ensuring that such and so many transport facilities will be available throughout and in all parts of the State of Queensland as are reasonably adequate to meet the convenience and requirements of the public for the carriage of themselves and their goods" (see section 18) the Commissioner was charged with the duty of regulating and controlling such carriage within the State "by road, by air, and by water". Different parts of the Acts were concerned with different forms of transport. Part IV dealt with the licensing of services for the carriage of passengers or goods or both. The Transport Act (which was assented to on the 30th December 1960) was an Act to consolidate and amend the law relating to transport. It repealed The Facilities Acts. As in the case of those repealed Acts The Transport Act dealt in its different parts with road services and with water transport and with air transport. Though the business of each appellant is that of a road transport contractor carrying goods for reward on motor vehicles used on roads and though their claims in the two actions were for the recovery of sums paid in connection with their licences for motor vehicles used on roads, the basis for their claims has been founded upon an examination of parts of the Acts which are concerned not with vehicles on roads but with water transport. Shortly stated the reason why the appellants directed their attention and scrutiny to the parts of the Acts relating to water transport was that they contended that certain sections, having regard to their subject matter and content, could not be validly enacted unless they complied with the requirements of section 736 of the Merchant Shipping Act (Imp.) of 1894 and that a failure of compliance brought about the result that the whole of the provisions of the Acts, including the provisions relating to carriage of goods by road, were invalid.

It may here be mentioned that "The State Transport Facilities Act of 1946" (which was assented to on the 24th December 1946) contained a provision that except as otherwise provided the Act should come into operation on a date to be fixed by the Governor in Council by proclamation published in the *Gazette*. It is not necessary to refer to any comparable provision in any other Act which is comprehended within the citation The State Transport Facilities Acts 1946 to 1959. The Transport Act (i.e. "The State Transport Act of 1960", assented to on the 30th December 1960) likewise contained a provision for a proclamation to be published in the *Gazette*. By that machinery the Governor in Council fixed the date for the coming into operation of the Act.

The Facilities Act contained a section (section 3) dealing with its construction. It was provided that both the Act and (shortly stated) everything done under it should be construed so as not to exceed the legislative power of the State and so as to be valid to the extent to which it was not in excess of that power. The Transport Act contained a section (section 2) which likewise dealt with its construction.

For an appreciation of the questions which were raised before their Lordships' Board it now becomes necessary to mention the course of certain proceedings in the Courts. On the 17th May 1962 the Full Court of the Supreme Court of Queensland gave judgment in the case of *The Queen v. The Commissioner for Transport, ex parte Cobb & Co. Limited and others* 56 Queensland Law Reporter 547. The prosecutors (Cobb & Co. Limited and others) obtained orders nisi calling upon the Commissioner for Transport to show cause why writs of prohibition should not be directed to him restraining him from proceeding further upon or implementing or otherwise giving force to section 43 of The Transport Act (a section dealing with the

cancellation and suspension of permits concerning vehicles on roads) on the grounds that, by reason of the provisions of section 736 of The Merchant Shipping Act of 1894, The Transport Act (i.e. "The State Transport Act of 1960") was invalid or alternatively had not yet come into operation because it contained no suspending clause as required by section 736 and because Her Majesty had not publicly signified her pleasure thereon.

The decision of the Court was that The Transport Act was invalid and inoperative and that the prosecutors were entitled to the relief that they claimed. The main reasons (so far as relevant for present purposes) which directed the Court to this conclusion may be briefly mentioned.

Section 736 of The Merchant Shipping Act 1894 (Imp.) provides, *inter alia*: "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."

In Part VIII of the Transport Act (which has the heading "Water or Air Transport") and in Division 1 (which deals with "Water Transport") section 56 provides that "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 . . . except under and in accordance with the terms and conditions of a licence under this Part . . ." The Full Court having considered The Interpretation Act 1889 (Imp.) held that Queensland is a British possession within the terms of section 736 of The Merchant Shipping Act and that the Parliament of Queensland is a legislature of a British possession within the meaning of that section, that the provisions of Part VIII of The Transport Act regulate the coasting trade of Queensland, and that as The Transport Act did not contain a suspending clause it was invalid by reason of its non-compliance with the provisions of section 736 of The Merchant Shipping Act 1894. The Court also held that the provisions of Part VIII of The Transport Act were not severable from the rest of the Act so as to allow the rest of the Act to be valid.

From that decision the High Court of Australia granted special leave to appeal.

Thereafter an Act was passed in Queensland "to validate the operation of certain laws relating to transport and for other incidental purposes." That Act (Act No. 24 of 1962) was "The Transport Laws Validation Act of 1962". It was assented to on the 8th June 1962. Sections 2, 3, 4 and 5 of the Act were as follows:—

"2. In this act, unless the context otherwise indicates or requires—

(a) "Act" includes any purported act and "enactment" includes any purported enactment;

(b) "Excepted sections" means the sections, or parts of sections, shown as excepted in the third column of the schedule;

(c) "Schedule" means the schedule to this act.

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 3 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 4 of "The Acts Interpretation Acts, 1954 to 1960."

The excepted sections of "The State Transport Facilities Act of 1946" were sections 49, 50, 51 and, so far as it related to the carriage of passengers, or goods, or both passengers and goods by water, section 55. Sections 49, 50 and 51 all appeared in Part V and in Division I of that part which had the heading "Water Transport". Section 55 was in Division III which had the heading "When Transport by Air or Water Unlawful".

The excepted sections of "The State Transport Act of 1960" were sections 56 and 57 and so far as it relates to the carriage of passengers or goods, or both passengers and goods, by water, section 60. Sections 56 and 57 of The Transport Act are in Part VIII which deals with water or air transport and are in Division I which has the heading "Water Transport". Section 60 is in Division III (of Part VIII) and has the heading "When Transport by Water or Air Unlawful".

By section 8 of The Validation Act it was provided that nothing in the Act was to "prejudice or affect the rights *inter se* of the parties in the proceedings in the Order to Show Cause No. 36 of 1961" (which was the case *The Queen v. The Commissioner for Transport, ex parte Cobb & Co. Limited*, referred to above) . . . "in relation to such proceedings, including any right of appeal in respect of the judgment in such proceedings" (given on the 17th May 1962 by the Full Court of the Supreme Court of Queensland) "and in relation to the sum of £73,948 12s. 7d. paid into Court in respect of such proceedings".

On the 7th September 1962 the case (*ex parte Cobb & Co. Limited*) came before the High Court of Australia. The High Court rescinded the special leave to appeal which they had granted. The judgment of the Court (Dixon C.J., Kitto, Taylor, Windeyer and Owen J.J.) was delivered by Dixon C.J. In the course of his judgment he said:—

"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 section 8 of the act, operates upon the rights of the parties in the present case."

In regard to section 8 the High Court decided that on its proper construction it did not preserve the substantive rights of the parties from the effect of the validation of the main Act. Dixon C.J. said:—

"The sum paid into Court considered as a fund is the subject of section 8 but not the antecedent liability. The payment of that fund into court did not discharge the antecedent liability. If the money were paid back, the antecedent liability would continue, and would remain to be discharged, that is unless the decision of the Supreme Court that the old Act was invalid were upheld and the new Act validating the old provisions were ignored.

We therefore think that so far as the substantive rights and liabilities of the parties are concerned, they are governed by the validation Act, and any decision we gave as to the correctness or incorrectness of the

decision of the Supreme Court would have no effect on substantive rights at all. We therefore think that special leave should be rescinded. That does not mean that we indicate or imply any view in favour of the correctness of the decision of the Supreme Court appealed from, considered as at the date when it was given”.

In May and June 1963 the cases of *Bolton v. Madsen* and *Turner v. Madsen* were before the High Court of Australia (Dixon C.J., Kitto, Taylor, Menzies, Windeyer and Owen J.J.). The cases arose out of the use by Turner on a Queensland road of a vehicle to carry goods without having a permit under section 39 of The Transport Act. It was said that the reason for not having the permit was that the fee which had been demanded for the permit was a duty of excise which, upon constitutional grounds, Turner was justified in refusing to pay. The High Court held that the fee was not a duty of excise within the meaning of section 90 of the Constitution. The point was also taken that The Transport Laws Validation Act of 1962 (which for convenience may be referred to as The Validation Act) had failed to validate The Transport Act. In regard to this point it was said in the joint judgment of the High Court:—“ 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 had emerged to require reconsideration of that decision.”

The question of the effectiveness of The Validation Act was amongst the points raised before the Full Court of the Supreme Court of Queensland (Philp A.C.J., Wanstall J., Hart J.) in *Madsen v. Western Interstate Pty. Limited, ex parte Western Interstate Pty. Limited* (56 Queensland Law Reporter 434). The judgment was given on the 9th July 1963. The court rejected the submission that The Validation Act had not achieved its purpose.

As stated above it was conceded in the Full Court of the Supreme Court of Queensland on behalf of the appellants in the present cases that the state of the authorities obliged the Full Court to allow the demurrers.

Before their Lordships' Board three points were argued on behalf of the appellants. In the first place it was submitted that for the reasons given by the Full Court in *The Queen v. The Commissioner for Transport: ex parte Cobb & Co. Limited and others* (supra) (which may be referred to as the Cobb case) The Transport Act was invalid and that for the like reasons The Facilities Acts were similarly invalid. Secondly that The Validation Act was inoperative and did not validate or make operative either The Facilities Acts or The Transport Act. Thirdly 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 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 could not cure so fundamental an invalidity.

It is to be observed that the third point was not canvassed at all before the Full Court. If their Lordships had embarked upon a full examination of the contentions raised they could only have done so without having the advantage of studying the considered opinions of the Full Court in regard to them. In all the circumstances and bearing in mind what has been said on other occasions (see *North Staffordshire Railway Co. v. Edge* [1920] A.C. 254,263 and *United Marketing Co. v. Kara* [1963] W.L.R. 523), their Lordships intimated that they could not allow this new point to be raised and accordingly did not invite counsel for the respondent to reply to the submissions advanced in support of it.

Counsel for the respondent was desirous in the first place of addressing argument in support of his submission that the judgment of the Full Court in the Cobb case was erroneous. It seemed to their Lordships however that it was more appropriate to examine first the question whether, having regard to the passing of The Validation Act, the appellants could on any footing succeed in their claims. It was conceded that if The Validation Act achieved its apparent purpose it was a complete answer to the claims—

unless they could be supported on some new basis not hitherto advanced. In requesting counsel for the respondent to present first his submissions in regard to The Validation Act their Lordships noted also that the High Court rescinded their grant of special leave to appeal in the Cobb case upon being satisfied that The Validation Act was complete and retrospective and that it operated upon the rights of the parties in that case so that any decision given in the High Court "as to the correctness or incorrectness of the decision of the Supreme Court would have no effect on substantive rights at all".

Their Lordships turn therefore to an examination of the arguments advanced on behalf of the appellants in regard to The Validation Act.

Reference was made to the concluding words of section 3 of The Validation Act, i.e. the words "but subject to any amendment or repeal of any such act by another such act" and it was submitted that all the Acts in the schedule except The Transport Act had previously been repealed by the latter and that as a matter of construction, even if they were to be treated as re-enacted in an unexceptionable form, they nevertheless remained repealed so that even fictionally they were not being revived.

Their Lordships cannot accept this reasoning. It seems to their Lordships that the effect of section 3 of The Validation Act was to ensure the validity and operation of the scheduled Acts (without the excepted sections) to such extent as was necessary and that in the cases of any Acts that had been repealed any validation was to cover the period from enactment to repeal.

In regard to The Transport Act it was submitted that though the passing of The Validation Act could result in a valid enactment of a truncated form of The Transport Act the further result would follow that section 3 of The Validation Act would speak prospectively and not retrospectively so that the truncated Transport Act (i.e. the act without the excepted sections) could not be in force before the date (8th June 1962) of assent to The Validation Act. Section 4 of The Validation Act, it was submitted, could not be interpreted more widely than section 3 and was no more than a validation of acts done under the authority conferred by the Acts in the schedule which owed their validity to section 3.

The further submissions that were advanced in regard to The Validation Act directed attention to the provisions both in The Facilities Acts (see section 1(2)) and in The Transport Act (see section 1(2)) that the Acts were to come into operation on dates to be fixed by the Governor in Council by proclamation published in the *Gazette*. It was said that the proclamations that were in fact made were of the whole Acts and it was further said that if section 3 of The Validation Act re-enacted The Facilities Acts and The Transport Act in a new form (i.e. without the excepted sections) then those Acts in their new form required a new proclamation to bring them into operation. Nowhere, it was said, in The Validation Act is there a provision capable of being read as validating a proclamation previously made or as validating a proclamation limited in its terms to such parts of the Acts as were made valid by The Validation Act.

Further submissions were developed based upon a consideration of sections 6 and 7 of The Validation Act and it was pointed out that though sections 56 and 57 of The Transport Act were excepted sections, the heading of Part VIII ("Water or Air Transport") remained as did the heading "Division I—Water Transport" and that section 61 (which is in Part VIII) which begins with the words "With respect to licenses under this Part the Commissioner shall have and may exercise the powers and authorities conferred upon him by Part IV" remained. It was also submitted that by section 18 of The Facilities Acts (which is not an excepted section) it was provided that the Commissioner was charged with the duty of regulating and controlling the carriage of passengers and goods within the State "by road, by air, and by water".

In considering the various contentions to which their Lordships have referred it is relevant to bear in mind some of the provisions of The Acts Interpretation Acts 1954 to 1962. Section 5(2) provides that "In any act every reference to any other act where the context admits and unless the contrary intention appears, shall include a reference to all proclamations, orders in council regulations, rules, by-laws, and ordinances, if any, made under that other act." Section 10(1) provides that "All acts made and passed may be divided into sections if there are more enactments than one" and section 10(2) provides that "Every section of an act shall have effect as a substantive enactment without any introductory words".

Their Lordships are unable to accept the contentions carefully and amply advanced by the appellants. They agree with Wanstall J. who in *Madsen v. Western Interstate Pty. Limited, ex parte Western Interstate Pty. Limited* (supra) at page 450 said:—"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 section 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 in so far as it may be necessary to ensure the . . . operation thereof". The concluding words are capable of an extensive construction carrying the declaration as far as may be necessary to ensure the operation of the Acts . . ."

Their Lordships do not accept that any new or further proclamation was necessary after the passing of The Validation Act. The respective previous proclamations had fixed the dates on which the Acts or purported Acts (see section 2 of The Validation Act) came into operation: the proclamations covered each section of the Acts or purported Acts. The clear intention of The Validation Act was, to any such extent as was necessary, to re-instate the transport enactments less the excepted sections, and to sustain and validate the whole process of past administration.

The general intention of the legislature is abundantly manifest. The necessary intendment of The Validation Act is, as their Lordships think, overwhelmingly clear. Section 3 shows that the purpose was "to ensure the validity and operation" of the Acts set out in the schedule other than the excepted sections. The scheduled Acts, in their truncated form, were validated as from their enactment and were declared and deemed to have been good and valid down to the dates (in such cases as this applied) of their repeal. The validation by section 4 of Acts and things done, included, so far as necessary, and to the extent necessary, the proclamations, the grant of licences, the issue of permits and the recovery of fees. Nor do their Lordships consider that any difficulty is occasioned by the retention of the headings or sections or words to which reference has been made: nor is it necessary to deal specifically with each reference. If any words have become mere surplusage no problem arises. Words which remain in regard to water may have scope and content in relation to purely internal waters. Even without having recourse to or considering the effect of the sections concerning "Construction" (section 3 of The Facilities Acts and section 2 of The Transport Act) or section 4 of The Acts Interpretation Acts 1954 to 1962, the over-all intendment of The Validation Act would warrant the reading of words in such manner and with such meanings as would make them valid legislative enactments.

The conclusion which their Lordships reached is that validation of the Acts (less the excepted sections) was complete and effective and that 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 Acts.

The submissions addressed to their Lordships on this point were perhaps even more comprehensive than those addressed on various occasions in the courts in Australia but in the result their Lordships endorse and concur in the opinion expressed by the High Court of Australia in the *Cobb & Co.* case

that validation was complete and retrospective. As their Lordships formed this clear view at the conclusion of the submissions of learned counsel and as admittedly this view was on any footing fatal to the appellants' case their Lordships did not, for reasons already indicated, ask counsel for the respondent to elaborate his other arguments.

Their Lordships will therefore humbly advise Her Majesty that the appeals should be dismissed and that the judgment of the Supreme Court of Queensland dismissing the claims be affirmed. The appellants must pay the costs.

In the Privy Council

WESTERN TRANSPORT PTY. LTD.

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NORMAN EGGERT KROPP

AND

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DELIVERED BY

LORD MORRIS OF BORTH-Y-GEST

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