THE TRANSPORT CASES AND THE PRIVY COUNCIL

HUGHES AND VALE PTY. LTD. v. *N.S.W.*

In a long opinion delivered by the Judicial Committee of the Privy Council on 17th November, 1954, in the appeal *Hughes and Vale Pty. Ltd.* v. *The State of New South Wales*[1], it was held (reversing the decision of the High Court[2]) that the State Transport (Co-ordination) Act, 1931-1951 (N.S.W.) could not validly apply to persons operating vehicles in the course of inter-state trade or to vehicles while so operated. This long-awaited decision has set at rest a conflict in the High Court of more than twenty years' standing and has overruled a series of decisions of that court ranging from *The King* v. *Vizzard*[3] to *McCarter* v. *Brodie*.[4] The overruling of these cases is all the more remarkable because three of them had been brought to the Privy Council on petitions for special leave to appeal and in each instance the Judicial Committee refused to grant leave.[5]

The judicial conflict which the Privy Council has endeavoured to set at rest was first manifested in *Willard* v. *Rawson*[6], which found Dixon, J., who had then been on the High Court bench four years, the sole dissentient from a judgment upholding the validity of sections of the Motor Car Act, 1930 (Vic). In the later decisions[7] relating to the validity of transport legislation in the several States, Dixon, J. was joined in dissent by Starke, J., but, after *James* v. *The Commonwealth*[8], Dixon, J. seems to have tired of the role of dissenter and fell into line with the majority.[9] The decision in the *Banking Case*[10], with its repudiation of characterisation of legislation as a test of validity in the face of s. 92, revived Dixon, J.'s dissent in the next major case involving s. 92, namely, *McCarter* v. *Brodie*. Starke, J. had by this time retired from the High Court, but Dixon, J.'s dissent was echoed by Fullagar, J., one of the latter's disciples, in rather more forceful terms than the master had ever used.[11]

One would have imagined that the subsequent refusal of the Privy Council to grant leave to appeal from the High Court's decision on *McCarter* v. *Brodie* would have given a quietus to the voice of dissent. But when the demurrer in *Hughes and Vale Pty. Ltd.* v. *The State of New South Wales* came to be argued in October, 1952, there were two new members on the Court, Kitto and Taylor, JJ., both of whom joined the ranks of dissent and treated *McCarter* v. *Brodie* as having no bearing on the questions at issue.[12] The balance in the Court rested

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[1] (1954) 28 A.L.J. 385; (1954) 3 W.L.R. 824. [2] (1953) 87 C.L.R. 49.
[3] (1933) 50 C.L.R. 30. [4] (1950) 80 C.L.R. 432.
[5] *O. Gilpin Ltd.* v. *Commissioner of Road Transport and Tramways (N.S.W.)* (1935) 53 C.L.R. 189; *Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (1935) 53 *C.L.R.* 493; leave refused in both cases 5th December, 1935, 56 C.L.R., v, vi; *McCarter* v. *Brodie*, leave refused 22nd November, 1950, 80 C.L.R. v.
[6] (1933) 48 C.L.R. 316.
[7] *The King* v. *Vizzard*; *O. Gilpin Ltd.* v. *Commissioner of Road Transport and Tramways (N.S.W.)*; *Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard*, all cited *supra*; *Bessell* v. *Dayman* (1935) 52 C.L.R. 215.
[8] (1936) A.C. 578, 55 C.L.R. 1.
[9] *Riverina Transport Pty. Ltd.* v. *The State of Victoria* (1937) 57 C.L.R. 327.
[10] *The Commonwealth* v. *Bank of New South Wales* (1950) A.C. 235; 79 C.L.R. 497.
[11] In *McCarter* v. *Brodie*, Fullagar J. referred to *The King* v. *Vizzard* as the "*fons et origo*" (80 C.L.R. at p. 487); in *Hughes and Vale Pty. Ltd.* v. *The State of New South Wales* he said: "I do not repent of referring to *The King* v. *Vizzard* as *fons et origo malorum* (87 C.L.R. at 94).
[12] Kitto, J., said: "It would be difficult, I should think, to find a case in relation to which the cry *stare decisis* would sound more hollow (87 C.L.R. at 105). Taylor, J. said: "If the views expressed in *McCarter* v. *Brodie* had established some common principle, I would hesitatingly regard myself as bound to apply it. But the Court was divided and the reasons of the majority do not appear to me to establish any clear or common principle

with the presiding Judge, Dixon, C.J., who had become Chief Justice after the retirement of Sir John Latham. In a judgment of admitted compromise and expediency, Dixon, C.J., joined McTiernan, Williams and Webb, JJ. in favouring the validity of the legislation on the basis of authority rather than principle;[13] but in his judgment he reiterated the view he had previously maintained as affording the only logical approach to the construction and application of s. 92.[14]

When the appeal came before the Privy Council, the Commonwealth and two other States intervened to support the validity of the legislation under attack, but the Commonwealth explicitly disclaimed any desire to question the *Banking Case* and, indeed, expressly affirmed its authority. The hearing occupied twenty days in all, which exceeded the time spent on the discussion of s. 92 in the *Banking Case* in 1949; and, in the light of this, it was fair to expect a clear and logical exposition of the application of s. 92 in relation to the Transport Acts and the decisions given by the High Court since the *Banking Case*. In all these respects the judgment of the Privy Council is most disappointing.

It is convenient and not unfair to summarize the judgment of the Privy Council in the following way:

1. It affirms the authority of the *Banking Case* and every part of the judgment in that case so far as it dealt with s. 92.[15]
2. It resolves the conflict in the High Court on the Transport Acts by holding that the minority was correct, and (subject to a qualification) it approved the minority views of Dixon and Fullagar, JJ. in *McCarter* v. *Brodie*.[16]
3. It suggests that the minority judgments in *McCarter* v. *Brodie* should be read subject to the qualification that a licensing system restricting the number of vehicles on the roads might possibly be valid as regulatory in character.[17]
4. It approves the reasons given by Taylor, J. in the High Court for the view that the licensing system in question was not regulatory in character.[18]
5. It expressly disclaims the necessity for passing upon the validity of mileage charges levied on the use of commercial motor vehicles, but, oddly enough, simultaneously approves passages of Dixon, C.J. and Fullagar, J., which seem to condemn such charges.[19]

Ever since *James* v. *The Commonwealth* decided that s. 92 did not create a legislative void, the High Court has striven to fomulate some concept which

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concerning the proposition which, in this case, has given me the most concern." (87 C.L.R. at 108.)

[13] 87 C.L.R. at 70-76. In the course of argument shortly after the plaintiff's case had been opened, Dixon, C.J. said: "It is *McCarter* v. *Brodie* that troubles me. What you appear to me to be doing is to take a very recent decision of the Court which reveals the whole ground. I would see no reason at all why, in view of the *Banking Case*, if *McCarter* v. *Brodie* had not been decided, you could not take decisions which lay behind the *Banking Case* on the ground that they were inconsistent with the *Banking Case*, but I do not like the decisions of the Court being ripped up even if I do not agree with them."

[14] "I do not waver at all in my belief that the Transport Cases cannot be reconciled with principle, or in the opinion that the grounds on which they were in fact decided have for the most part been expressly rejected in the judgment of the Privy Council in the *Banking Case*." (87 C.L.R. at 70.)

[15] " . . . their Lordships accept without qualification everything that was said by the Board in the *Banking Case*." (28 A.L.J. at 389, (1954) 3 W.L.R. at 854.)

[16] The passages expressly approved are 80 C.L.R. at 465-467 (Dixon, J.) and 80 C.L.R. at 495-499 (Fullagar, J.).

[17] See *infra* n. 23.

[18] The critical passage states that "legislation of this character must infringe s. 92 unless the discretion to refuse a licence is limited to or confined within the ambit constituted by these matters which should properly be regarded as regulatory of the trade or commerce concerned." (87 C.L.R. at 112.)

[19] "My personal opinion has long been that, in the case of provisions of this description prohibiting transport, unless licensed, and authorizing the imposition of such a levy, the question must be answered that neither the prohibition nor the levy is consistent with s. 92."

will distinguish those laws which are valid although they directly impede inter-state trade. After much debate, Latham, C.J., found a useful test in the "regulatory" character of the law, and in the *Milk Case* said[20]:

> One proposition which I regard as established is that simple legislative prohibition (Federal or State), as distinct from regulation, of inter-State trade and commerce is invalid. Further, a law which is "directed against" inter-State trade and commerce is invalid. Such a law does not regulate such trade, it merely prevents it. But a law prescribing rules as to the manner in which trade (including transport) is to be conducted is not a mere prohibition and may be valid in its application to inter-State trade notwithstanding s. 92. *The King* v. *Vizzard, ex parte Hill* is an outstanding example of this class of case.

This passage, with the extraordinary omission of the last sentence, was adopted in the *Airlines Case*[21] and by the Privy Council in the *Banking Case*,[22] but it fails to give any criterion of a regulatory law, and this has been the major difficulty in the application of s. 92 for many years. It is on this aspect, more than any other, that the Privy Council's recent decision is disappointing. The members of the Board heard long discussions from counsel on philosophical and legal concepts of regulation but they have not adopted any of the views put and have not made any major contribution to the solution of the problem. The only clue offered is to be found in the passage referred to in paragraph 3 of the summary above of the judgment, which reads as follows[23]:

> Their Lordships can imagine circumstances in which it might be necessary, e.g. on grounds of public safety, to limit the number of vehicles of certain types in certain localities or over certain routes, with the result that some applicants might be unable to obtain licences. Such a system might well be justified as regulatory.

It may be that this passage was intended to convey the notion that whether a law is "regulatory" involves a "value judgment", but the High Court has shown itself surprisingly loth to make such judgments and, of course, the procedure it adopts to determine matters is most inadequate for that purpose. It is significant, however, that the State Governments have already seized on the passage cited in framing amending legislation designed to bring interstate transport under administrative control.[24]

Almost as disappointing is the ambiguous treatment accorded to the mileage charges which were imposed by licences issued under the State Transport (Co-ordination) Act, 1931-1951. Having regard to the disclaimer by the Privy Council of the need to determine the validity of these charges, it is surprising that its reasons should select passages from the judgments of Dixon, C.J., and Fullagar, J., in which the validity of these charges is expressly or impliedly denied. If, as is probably the case, the members of the Judicial Committee did not intend to express a view on the validity of these charges, they should surely have avoided the quotation *in extenso* of the passages in question. In quoting them they have made certain the further litigation of this matter.[25]

Per Dixon, C.J., 87 C.L.R. at 67-8; see also Fullagar, J., in *McCarter* v. *Brodie*, 80 C.L.R. at 497.

[20] *Milk Board (N.S.W.)* v. *Metropolitan Cream Pty. Ltd.* (1939) 62 C.L.R. 116 at p. 127.

[21] *Australian National Airways Pty. Ltd.* v. *The Commonwealth* (1945), 71 C.L.R. 29 at p. 61.

[22] (1950) A.C. at 310-311, 79 C.L.R. at 640.

[23] (1954) 28 A.L.J. at 389, (1954) 3 W.L.R. at 654.

[24] State Transport Co-ordination (Amendment) Act, 1954.

[25] Proceedings on this issue have, indeed, already commenced, challenging amending legislation in New South Wales and Queensland.

Professor Sawer's observations on the effect of the Privy Council's over-diffident treatment of doubtful Australian precedents in this field are thus repeatedly underlined by the instant case. See *Federalism. A Jubilee Study* (1951) 234.