

Oyrt
Hughes &
Vale Pty Ltd v
New South
Wales (No1)
(1954) 93
CLR 1

A. P. A.
Duncan &
Green Star
Trading Co v
Vizzard (1935)
53 CLR 493

[HIGH COURT OF AUSTRALIA.]

BESSELL APPELLANT ;
DEFENDANT,

AND

DAYMAN RESPONDENT.
PLAINTIFF,

ON APPEAL FROM A COURT OF SUMMARY JURISDICTION OF
SOUTH AUSTRALIA.

*Constitutional Law—Freedom of trade, commerce, and intercourse among the States—
Regulation of facilities for transport—Licensing of public motor vehicles—Motor
car engaged on inter-State journey—Validity of State Act—The Constitution (63
& 64 Vict. c. 12), sec. 92—Road and Railway Transport Acts 1930-1931 (S.A.)*
(No. 1967—No. 2020).

The *Road and Railway Transport Acts 1930-1931 (S.A.)* are not an infringement
of sec. 92 of the Constitution as interfering with the freedom of trade,
commerce and intercourse among the States.

So held by Gavan Duffy C.J., Rich, Evatt and McTiernan JJ. (Starke and
Dixon JJ. dissenting).

R. v. Vizzard ; Ex parte Hill, (1933) 50 C.L.R. 30, and *O. Gilpin Ltd. v.
Commissioner for Road Transport and Tramways (N.S.W.)*, ante, p. 189, applied.

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1934-1935.
MELBOURNE,
Oct. 12,
1934.
Mar. 11,
1935.
Gavan Duffy
C.J., Rich,
Starke, Dixon,
Evatt and
McTiernan JJ.

APPEAL from a Court of Summary Jurisdiction of South Australia.

Irvine Dayman of Adelaide, police prosecutor, laid a complaint in the Court of Summary Jurisdiction, Port Adelaide, against Robert George Bessell of Semaphore, South Australia, alleging that on 8th April 1934, between Adelaide and Gawler in such State, the defendant, not being the holder of a licence under the *Road and Railway Transport Acts 1930-1931* or a person employed by the holder of such licence, unlawfully drove a vehicle, to wit, a motor lorry for the

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purpose of carrying goods for hire on the road between Gepps Cross and Tarlee, *via* Gawler, Roseworthy and Linwood, which road was on 8th April 1934 a controlled route within the meaning of those Acts, having been on 12th December 1931 declared by order of the Transport Control Board constituted by such Acts to be a controlled route for the purposes of such Acts, and in relation to which controlled route the Board did on 13th December 1931 by order fix 19th December 1931 as the "appointed day" within the meaning of sec. 14 of the Act of 1930.

Sec. 14 of the *Road and Railway Transport Act* 1930 (S.A.) provides :—" (1) The Board may by order, in relation to any controlled route or routes, fix a day after which it shall not be lawful for any unlicensed person to operate any vehicle on that route or those routes for the carriage of passengers or goods or both for hire. The term 'appointed day' in this section means the day fixed under this sub-section as regards the particular controlled route on which any vehicle is driven at the material time." The section then prohibits any person driving any vehicle for the purpose of carrying passengers or goods for hire after the appointed day unless he is licensed or employed by the holder of a licence.

Evidence was called for the complainant which was in substance that on the day in question a constable stopped a lorry driven by the defendant along the road from Gawler in South Australia, that the defendant said that he was the driver and owner of the lorry and came from New South Wales, that he was not the owner of the goods he was carrying, that the goods belonged to persons in New South Wales and that he was going to take them to Goldsbrough Mort, Port Adelaide, and get about £3 a ton for carting ; that the lorry was registered in New South Wales and South Australia, that the defendant said he did not have a permit under the *Road and Railway Transport Acts* and had no permit for carrying in South Australia, and that the road on which the defendant was carrying the goods was portion of the road between Gepps Cross and Tarlee *via* Gawler, Roseworthy and Linwood.

The defendant, Robert George Bessell, gave evidence that apart from carrying goods from one State to the other he did not carry in South Australia. Cross-examined, he said that he had never applied

for a licence or a permit to carry on this route. The defendant also called the secretary of the Transport Control Board, who said there were no licences operating on the route between Gepps Cross and Tarlee; that the licences did not go beyond Gawler; a man could not carry goods on that route from Adelaide to Burra without a special permit from the Board; that there were no licences for any route beyond Burra; it was the Board's policy not to issue licences in respect of any route from Adelaide, beyond Gawler in a northerly direction; the Board might issue permits because they were an occasional matter; a permit was a special matter for a special job.

The defence was in substance that the *Road and Railway Transport Acts* interfered with the freedom of inter-State trade and contravened sec. 92 of the Constitution. The Court overruled this objection and fined the defendant £5.

From this decision the defendant now appealed to the High Court.

Ward (with him *Mollison*), for the appellant. So far as the *Road and Railway Transport Act* purports to interfere with the freedom of inter-State trade it is *ultra vires*. The Act does not hit the appellant, because it is aimed at intra-State carriage only. The Act is not aimed at inter-State traffic at all. This Act differs from the *State Transport (Co-ordination) Act* 1931 of New South Wales. Although under the New South Wales Act this Court held in *R. v. Vizzard*; *Ex parte Hill* (1) that there was no interference with inter-State trade, the South Australian Act controls the whole trade by giving the Board unlimited power with regard to the issue of licences. *W. & A. McArthur Ltd. v. Queensland* (2) is a binding authority. This Act placed a restriction upon inter-State trade (*R. v. Vizzard*; *Ex parte Hill* (3); *Willard v. Rawson* (4)). Sec. 92 of the Constitution is directed against interference with trade, commerce and intercourse between the States. Trade, commerce and intercourse consists of acts as well as things (*W. & A. McArthur Ltd. v. Queensland* (2)). It follows that a State can lawfully legislate as to property and if it does so and such legislation affects inter-State trade such interference, if incidental and indirect,

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(1) (1933) 50 C.L.R. 30.

(2) (1920) 28 C.L.R. 530.

(3) (1933) 50 C.L.R., at pp. 77, 94.

(4) (1933) 48 C.L.R. 316, at pp. 321, 324, 337.

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leaves the legislation valid (*W. & A. McArthur Ltd. v. Queensland* (1); *New South Wales v. The Commonwealth (Wheat Case)* (2); *Ex parte Nelson* [No. 1] (3); *James v. Cowan* (4)). If the State, while legislating as to property or acts, does so for the purpose or with the intention of affecting trade, commerce or intercourse, that legislation is invalid (*James v. Cowan* (4)). If a State legislates as to trade, commerce or intercourse that legislation is invalid whether the interference with inter-State trade is contemplated or incidental, if its necessary effect is to interfere with inter-State trade. If executive action is substituted for legislative action the result is the same. Transport between States is one of the acts which must be left free (*W. & A. McArthur Ltd. v. Queensland* (5)).

Hannan (with him *Healy*), for the respondent. *R. v. Vizzard*; *Ex parte Hill* (6) governs the construction of the Act under consideration. The appellant might have obtained a licence or a permit to carry the goods on his lorry between Burra and Gawler. A permit is only another form of licence (sec. 24). The appellant was rightly convicted.

Cur. adv. vult.

March. 11,
1935.

The following written judgments were delivered:—

GAVAN DUFFY C.J., EVATT AND McTIERNAN JJ. In our opinion this appeal should be dismissed.

Upon an examination of the *Road and Railway Transport Act* 1930 of South Australia we can see no reason for distinguishing this case from *Willard v. Rawson* (7) and *R. v. Vizzard*; *Ex parte Hill* (6).

RICH J. The appellant appeals from a conviction under the *Road and Railway Transport Acts* 1930-1931 of South Australia. He was convicted of driving a motor lorry for the purpose of carrying goods for hire on the road between Gepps Cross and Tarlee, being a controlled route within the meaning of these Acts. He was not

(1) (1920) 28 C.L.R. 530.

(2) (1915) 20 C.L.R. 54.

(3) (1928) 42 C.L.R. 209.

(4) (1932) A.C. 542; 47 C.L.R. 386.

(5) (1920) 28 C.L.R., at p. 547.

(6) (1933) 50 C.L.R. 30.

(7) (1933) 48 C.L.R. 316.

then the holder of a licence under the Acts or employed by the holder of a licence. The Transport Control Board constituted by the Acts had not issued any licences to operate vehicles on that route for the carriage of goods for hire. It appears that upon the occasion of the alleged offence the appellant was engaged in carrying goods from Broken Hill (New South Wales) to Adelaide (South Australia) in the course of his carrier's business which he conducted between those places. The ground of the appeal is that the State law could not forbid or control this act of inter-State transportation. The *Road and Railway Transport Acts* 1930-1931 are of the same order as the *State Transport (Co-ordination) Act* 1931 of New South Wales, the validity of which was upheld by this Court in *R. v. Vizzard ; Ex parte Hill* (1). Its precise plan of controlling transportation differs in a number of particulars. We listened to a valiant argument, commendable for its ingenuity, in which an effort was made to distinguish this case from that on the ground of these differences. In my opinion it is quite impossible to find any distinction which would warrant a different decision in the two cases. The decision in *Vizzard's Case* (1) is, I think, applicable and as there is no other substantial point in the case the appeal should be dismissed with costs.

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STARKE J. The *Road and Railway Transport Acts* 1930 and 1931 of South Australia, though not identical in terms with the *State Transport (Co-ordination) Act* 1931 of New South Wales, are substantially the same in effect. The Acts of both States prohibit the carriage of passengers or goods for hire, unless the carrier be licensed. The licence is required whether the transport be in respect of inter-State, foreign, or domestic trade. Under the South Australian Acts the grant or refusal of a licence is in the discretion of the Transport Control Board (sec. 17), which has authority to prescribe the terms and conditions of the licence and the fees payable in respect thereof (secs. 16 and 18). In *R. v. Vizzard ; Ex parte Hill* (1), the majority of this Court were of opinion that the New South Wales Act did not contravene the provisions of sec. 92 of the Constitution. They declined, however, to overrule the propositions of law established by the Court in *McArthur's Case* (2), and considered the New South

(1) (1933) 50 C.L.R. 30.

(2) (1920) 28 C.L.R. 530.

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 1934-1935. expressed the law." But if those propositions be accepted, and
 BESSELL bind this Court, then it appears to me, for reasons which I have
 v. sufficiently expressed in *R. v. Vizzard*; *Ex parte Hill* (1), that the
 DAYMAN. *Road and Railway Transport Acts* of South Australia do contravene
 Starke J. the provisions of sec. 92 of the Constitution.

The appellant was engaged in the carriage of goods between New South Wales and South Australia—engaged in inter-State trade. And he was convicted of driving a vehicle on a controlled route in South Australia whilst so engaged, without a licence. In my opinion this conviction should be quashed, either because the constitutional provision in sec. 92 renders the South Australian Acts inoperative in so far as they extend to inter-State trade, or because sec. 3 of the amending Act of 1931 (No. 2020) excludes from the operation of the *Road and Railway Transport Acts* any interference with or control of trade or commerce obnoxious to the constitutional provision (see *R. v. Vizzard*; *Ex parte Hill* (2)).

DIXON J. For reasons which I have stated at length in *R. v. Vizzard*; *Ex parte Hill* (1) and in *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (N.S.W.)* (3), decided to-day, I take a view of sec. 92 of the Constitution inconsistent with the valid operation of such legislation as the *Road and Railway Transport Act* 1930-1931 upon inter-State carriage of goods or persons. In the present case, moreover, I think that much may be said for the view that a discrimination has been practised against road traffic between Broken Hill and Adelaide.

I think the appeal should be allowed.

Appeal dismissed with costs.

Solicitors for the appellant, *Edmunds, Jessop, Ward & Ohlstrom*.
 Solicitor for the respondent, *A. J. Hannan*, Crown Solicitor for South Australia.

H. D. W.

(1) (1933) 50 C.L.R. 30.

(2) (1933) 50 C.L.R., at p. 56.

(3) *Ante*, p. 189.