

HIGH COURT OF AUSTRALIA

Bessell

Vs.

Dayman

(Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.)

11 March 1935

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*[\[1\]](#) and *R. v. Vizzard; Ex parte Hill*[\[2\]](#).

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 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*[\[3\]](#). 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*[\[4\]](#) is, I think, applicable and as there is no other substantial point in the case the appeal should be dismissed with costs.

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*[\[5\]](#), 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*[6], and considered the New South Wales Act "on the hypothesis that those propositions correctly expressed the law." But if those propositions be accepted, and bind this Court, then it appears to me, for reasons which I have sufficiently expressed in *R. v. Vizzard; Ex parte Hill*[7], that the *Road and Railway Transport Acts of South Australia* do contravene 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*[8]).

Dixon J.

For reasons which I have stated at length in *R. v. Vizzard; Ex parte Hill*[9] and in *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (N.S.W.)*[10], 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.

[1] [\[1933\] HCA 12; \(1933\) 48 C.L.R. 316.](#)

[2] [\[1933\] HCA 62; \(1933\) 50 C.L.R. 30.](#)

[3] [\[1933\] HCA 62; \(1933\) 50 C.L.R. 30.](#)

[4] [\[1933\] HCA 62; \(1933\) 50 C.L.R. 30.](#)

[5] [\[1933\] HCA 62; \(1933\) 50 C.L.R. 30.](#)

[6] [\[1920\] HCA 77; \(1920\) 28 C.L.R. 530.](#)

[7] [\[1933\] HCA 62; \(1933\) 50 C.L.R. 30.](#)

[8] (1933) 50 C.L.R., at p. 56.

[9] [\[1933\] HCA 62; \(1933\) 50 C.L.R. 30.](#)

[10] Ante, p. 189.

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