[HIGH COURT OF AUSTRALIA.]

NARACOORTE TRANSPORT COMPANY PROPRIETARY LIMITED . . . DEFENDANT, } APPELLANT;

AND

BUTLER . . . . . INFORMANT, RESPONDENT.

ON APPEAL FROM THE COURT OF PETTY SESSIONS AT GEELONG, VICTORIA.

H. C. OF A. 1956.

MELBOURNE, *Oct.* 10, 29.

Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

Constitutional Law (Cth.)—Freedom of inter-State trade commerce and intercourse—Wool grown in Victoria—Transported to South Australia by one carrier—Subsequent transport by another carrier from South Australia to Victoria—Whether an inter-State transaction—Transport Regulation Acts 1933-1954 (*No.* 4198—*No.* 5848) (*Vict.*), *s.* 45—*The Constitution* (63 & 64 *Vict. c.* 12), *s.* 92.

Wool grown in Victoria was transported therefrom by a firm of road hauliers operating from a Victorian town, to Naracoorte (S.A.) where it was handed over to the defendant a road haulage company operating from Naracoorte. The only connexion shown between the two firms was that a partner in the former was a director of the latter. The defendant transported the wool from Naracoorte to Geelong (Vict.). The two firms were paid separately for their respective services. The defendant was convicted of being the owner of a vehicle operating in carrying the wool on a public highway in Victoria without a licence or authority so to operate under the *Transport Regulation Acts* (Vict.). On appeal,

Held, that whatever reasons or motives the consignors of the wool may have had in using the defendant's service from Naracoorte rather than some more direct service to Geelong, the operation of the defendant's vehicle in so carrying the wool was an operation in the course of and for the purpose of inter-State trade and as such within the freedom guaranteed by s. 92 of the Constitution.

Decision of the Court of Petty Sessions at Geelong, Victoria, reversed.

APPEAL from the Court of Petty Sessions at Geelong, Victoria.

On 16th April 1956 Edward John Butler as informant laid an information against Naracoorte Transport Company Pty. Ltd. alleging that on 6th October 1955 at Geelong in the State of Victoria

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it was the owner of a commercial goods vehicle which operated on a public highway without being licensed or authorised by permit to so operate under Pt. II of the *Transport Regulation Act* 1933, contrary to s. 45 of the Act.

The information was heard before the court of petty sessions at Geelong, constituted by E. J. M. Steedman Esq., Stipendiary Magistrate, who on 8th May 1956 ordered that the defendant be convicted and fined £10.

From this decision the defendant appealed to the High Court.

Further facts, and the manner in which the magistrate stated his decision appear in the judgment of the Court hereunder.

C. I. Menhennitt (with him *P. H. N. Opas*), for the appellant. The magistrate did not deal with the only material question before him, which was whether the defendant, whose trade was transportation, was, on the occasion in question, engaged in inter-State trade. The fact that the grazier whose wool was carried was engaged in an intra-State transaction was irrelevant as also was the fact that a carrier other than the defendant had conveyed the wool from Victoria to Naracoorte. There is no evidence that the defendant contracted to carry the wool from Miga Lake. The motives of the carrier or of those resorting to him are irrelevant. [He referred to *Hughes and Vale Pty. Ltd.* v. *State of New South Wales* (1); *Hughes and Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (2); *Armstrong* v. *State of Victoria* (3).] Section 6 of the *Transport* (*Amendment*) *Act* 1953 (Vict.) (No. 5761) which provides that where goods in the course of carriage are transferred from one vehicle to another each vehicle shall be deemed to have completed the whole journey (1) could have no operation to a transfer outside Victoria and (2) is invalid in so far as it would deprive inter-State transportation of its true inter-State character and of the protection of s. 92. Even if it were held that the journey in question here is to be deemed to be one from Miga Lake to Geelong, via Naracoorte, that would still be inter-State transportation and protected by s. 92. [He referred to *Hanley* v. *Kansas City Southern Railway Co.* (4); *Western Union Telegraph Co.* v. *Speight* (5); *Missouri Pacific Railroad Co.* v. *Stroud* (6); *Cornell Steamboat Co.*

(1) (1954) 93 C.L.R. 1, at pp. 16, 21, 22, 23, 28.
(2) (1955) 93 C.L.R. 127, at pp. 153, 159, 162, 166, 186, 187, 199, 200, 215, 217, 228.
(3) (1955) 93 C.L.R. 264.
(4) (1903) 187 U.S. 617 [47 Law. Ed. 333].
(5) (1920) 254 U.S. 17, at p. 19, [65 Law. Ed. 104, at pp. 105, 106].
(6) (1925) 267 U.S. 404, at pp. 406, 408 [69 Law. Ed. 683, at pp. 684, 685].

v. *United States* (1); *Central Greyhound Lines Inc.* v. *Mealey* (2); *Eichholz* v. *Public Service Commissioner of the State of Missouri* (3).]

Gregory Gowans Q.C. (with him *K. Anderson*), for the respondent. Section 92 of the Constitution does not protect an activity which while being "trade commerce or intercourse" is only colourably and not in reality "trade commerce or intercourse among the States", and the true character of which is trade commerce or intercourse intra-State. [He referred to *Hughes and Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (4); *Reg.* v. *Wilkinson*; *Ex parte Brazell, Garlick and Coy* (5); *Carter* v. *Potato Marketing Board* (6).] In considering whether an intra-State transaction is being disguised as an inter-State transaction the question of motive is relevant. [He referred to *Kirmeyer* v. *State of Kansas* (7); *Cook* v. *Marshall County* (8); *Western Union Telegraph Co.* v. *Speight* (9).] An activity of an individual which, if it stood alone, would constitute trade commerce or intercourse among the States may have its true character revealed as trade commerce or intercourse not "among the States" by the place it occupies in a larger transaction which is a single transaction of trade commerce or intercourse. If carrier A in Victoria, who is under a contractual obligation to transport wool from Miga Lake to Geelong, takes the wool to South Australia and arranges with carrier B, carrying on a legitimate business in South Australia, to complete the obligation and B knows the nature of the activity and that it is designed to invoke the protection of s. 92, then B is not engaging in real inter-State trade or commerce any more than is A. The magistrate was entitled to find and did find that the larger transaction was designed to give an inter-State flavour to an intra-State transaction and that the defendant's vehicle operated in Victoria in the course of such a transaction. The onus of proving that the transportation in question was part of inter-State trade or commerce was on the defendant. [He referred to *Ex parte Beath*; *Re Phillipson* (10).]

C. I. Menhennitt, in reply.

Cur. adv. vult.

(1) (1944) 321 U.S. 634, at pp. 638, 639 [88 Law. Ed. 978, at pp. 981, 982].
(2) (1948) 334 U.S. 653, at pp. 655, 656 [92 Law. Ed. 1633, at pp. 1637, 1638].
(3) (1939) 306 U.S. 268, at p. 274 [83 Law. Ed. 641, at p. 646].
(4) (1955) 93 C.L.R. 127, at pp. 160, 163.
(5) (1952) 85 C.L.R. 467, at p. 483.
(6) (1951) 84 C.L.R. 460, at p. 479.
(7) (1915) 236 U.S. 568 [59 Law. Ed. 721].
(8) (1905) 196 U.S. 261, at pp. 268-272 [49 Law. Ed. 471, at pp. 473-475].
(9) (1920) 254 U.S. 17 [65 Law. Ed. 104].
(10) (1932) 49 W.N. (N.S.W.) 76, at p. 77.

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THE COURT delivered the following written judgment:—

The appellant, a company incorporated in South Australia, was charged before the court of petty sessions at Geelong on an information alleging an offence against s. 45 of the *Transport Regulation Acts* 1933-1954 (Vict.). That section makes a person guilty of an offence if he is the owner of a commercial goods vehicle which (a) operates on any public highway, and (b) is not licensed as such or authorised by permit so to operate under Pt. II of the Acts. For such an offence s. 48 provides a penalty. The expression "commercial goods vehicle" and the word "operate" are defined in s. 5.

The prosecution proved that on the day charged in the information, 6th October 1955, the appellant was the owner of an International semi-trailer which was a commercial goods vehicle within the defined meaning of that expression, and which operated, in the defined sense of the term, on a public highway in Victoria without being licensed under the Acts or authorised by permit so to operate. The appellant did not dispute that all the ingredients of an offence under s. 45 were proved. Its defence was that the operating of the vehicle which was charged as the offence was in the course and for the purposes of inter-State trade, and that accordingly it was protected from the application of s. 45 by s. 92 of the Constitution: *Armstrong* v. *State of Victoria* (1). The magistrate who constituted the court, however, convicted the appellant and imposed a penalty. From his decision an appeal is now brought to this Court under s. 39 (2) of the *Judiciary Act* 1903-1955.

The evidence established that the appellant conducted a carrying business from a depot in Naracoorte, a town in South Australia a few miles from the Victorian border, and that on the occasion to which the information referred the appellant's semi-trailer was being used by its servant in the conveyance of eighty-nine bales of wool, in the course of its business, from its depot at Naracoorte to wool stores at Geelong. The wool had been brought to Naracoorte by a carrying firm, Brown & Mitchell Road Transport Service, which operated from the Victorian town of Harrow, and whose only connexion with the appellant, so far as appears, was that one of its members was on the appellant's board of directors. Brown & Mitchell, as the firm may be called, had collected all eighty-nine bales from places on the Victorian side of the border for conveyance to Naracoorte, and thence, through the appellant, to Geelong; and the wool, having been brought by their vehicle to Naracoorte, was there transferred to the appellant's semi-trailer. The two

(1) (1955) 93 C.L.R. 264.

carrying concerns were paid separately for their respective services, Brown & Mitchell being paid 7s. 6d. per bale for the journey from Harrow to Naracoorte, and the appellant 17s. 6d. per bale for the journey from Naracoorte to Geelong. As to the circumstances in which seventy-nine of the bales came to be despatched through Naracoorte the evidence was silent. There was some evidence concerning the remaining ten, but it established no more than that they came from a place called Miga Lake, which is in Victoria and some forty-five miles from the border, and that they belonged to a man named McDonald, who had had his sheep shorn at his brother's shearing shed at Miga Lake and had left to his brother the making of all arrangements with Brown & Mitchell for the carriage of his wool to Geelong.

The magistrate gave as his reason for rejecting the defence based upon s. 92 that "the transaction", meaning apparently the arrangements made by the respective consignors for the conveyance of their wool by a route which took it first across the border to Naracoorte and then back into Victoria, was designed to give an inter-State flavour to an intra-State transaction. Taking this view, he was led away from the only question which it was material for him to consider, namely whether the operation of the appellant's vehicle in carrying its load of wool in the proved circumstances was an operation in the course and for the purposes of the appellant's inter-State trade. Clearly it was, whatever reasons or motives any of the consignors may have had for sending their wool by the appellant's service from Naracoorte rather than by some other service following a more direct route to Geelong.

The appellant's conduct which the magistrate held to constitute an offence was part of a transportation of goods from a point of departure in one State to a destination in another State. As such, it was within the freedom provided by s. 92, and the conviction therefore cannot stand.

The appeal should be allowed. The conviction and penalty should be set aside and the information dismissed.

Appeal allowed with costs. Order of Court of Petty Sessions at Geelong discharged. In lieu thereof order that the information be dismissed with 20 *guineas costs.*

Solicitors for the appellant, *Alexander Grant, Dickson & King.*

Solicitor for the respondent, *Thomas F. Mornane,* Crown Solicitor for the State of Victoria.

R. D. B.