[HIGH COURT OF AUSTRALIA.]

RUSSELL . . . . . COMPLAINANT;

AND

WALTERS AND ANOTHER . . . . DEFENDANTS.

H. C. OF A. 1957.

MELBOURNE, *Feb.* 14, 15;

SYDNEY, *April* 8.

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

Constitutional Law (Cth.)—Freedom of inter-State trade commerce and intercourse—State Statutes—Validity—Public vehicle licensing system—Licences limited to areas—Necessity for permit to travel outside area—Fruit purchased in Victoria by Launceston merchant—Shipment by seller to Burnie—Burnie outside area in respect of which purchaser's vehicle licensed—Application of Acts to purchaser transporting fruit from Burnie to Launceston in his own vehicle without permit—The Constitution (63 & 64 *Vict. c.* 12), *s.* 92—*Traffic Act* 1925-1954 (*No.* 38 *of* 1925—*No.* 5 *of* 1954) (*Tas.*), *s.* 24 (1) II—*Transport Act* 1938-1953 (*No.* 70 *of* 1938—*No.* 73 *of* 1953) (*Tas.*).

A wholesale fruit merchant, W., who resided at Launceston, Tasmania, maintained a depôt there, from which fruit was distributed to retailers there and in other towns in Northern Tasmania. For two years before February 1956 he had been obtaining about ninety per cent of the fruit which he sold from Victoria, purchasing it from a merchant D. On 12th February 1956, W. in Launceston ordered by telephone from D. in Melbourne a consignment of fruit having an invoice value of about £390. No express terms of sale were stated but it was understood that the course of dealing which had been established would be followed. In accordance with that course D. caused the fruit to be conveyed by his truck to Port Melbourne and placed on board S.S. *Taroona* consigned to W. at Burnie, Tasmania. He obtained a bill of lading for the fruit. Freight was not prepaid nor was insurance effected for the voyage. The price of the fruit was payable to D. within seven days of delivery. The S.S. *Taroona* arrived at Burnie on 14th February 1956. After arrival the fruit was cleared and freight, wharfage, stacking and inspection charges paid by a firm of shipping agents, which rendered its account in due course to W. The fruit was then loaded on W.'s vehicle by his servant R. who had been sent from Launceston for the purpose. R. then drove the vehicle, which carried no other goods, on the normal route from Burnie to Launceston, delivering a small portion of the load at respectively Deloraine and Westbury on the way to fulfil orders previously received. Under the provisions of the *Transport Act* 1938-1953 (Tas.) and the *Traffic Act* 1925-1954

H. C. OF A. 1957.

RUSSELL v. WALTERS.

(Tas.) and regulations made thereunder it was necessary for W. to obtain a permit from the Transport Commission in order to carry his fruit from Burnie to Launceston, his licence being only in respect of traffic area 3 in which Launceston is situated. On a prosecution against W. under s. 24 (1) II of the *Traffic Act* for having caused the vehicle to be driven outside traffic area 3 and against R. for having so driven the vehicle.

Held, that the vehicle while being driven from Burnie to Launceston on the occasion in question was being used in the course of and for the purposes of inter-State trade and s. 24 (1) II of the *Traffic Act*, could not, consistently with s. 92 of the Constitution, be applied to it.

CAUSE REMOVED INTO THE HIGH COURT UNDER JUDICIARY ACT 1903-1955.

By a complaint made on 19th April 1956 Horace Randall Russell, Sergeant of Police, charged Geoffrey Henry Walters with that he, on 14th February 1956, on the Bass Highway, a public street at Devonport, Tasmania, used or caused or permitted to be driven or used as a public vehicle, a vehicle licensed as a public vehicle, to wit Ancillary No. 23941 licensed for Traffic Area No. 3, in or upon a traffic area in respect of which the said licence did not authorise it to be so driven or used, namely in Traffic Area No. 5 and thereby did act in contravention of s. 24 (1) II, *Traffic Act* 1925, and further charged Brien Michael Richardson with that he did, at the time and place aforesaid, drive the said vehicle.

The complaint came on for hearing before Desmond Tasman Oldham Esq., a police magistrate, in the Court of Petty Sessions at Launceston, Tasmania, on 20th June 1956, when evidence was called by both the complainant and defendant and the hearing adjourned.

On 20th November 1956, on the application of the complainant *Webb* J. ordered pursuant to s. 40 of the *Judiciary Act* that the cause be removed into the High Court.

Dr. *E. G. Coppel* Q.C. (with him *R. K. Fullagar*), for the complainant. It is conceded that the provisions of the *Traffic Act* 1925-1954 regarding out of area permits could not validly apply to vehicles driven across the Tasmanian border to or from other States, if such was possible. The primary question is what does the legislation do in restriction of inter-State commerce. [He referred to *Wilcox Mofflin Ltd.* v. *State of New South Wales* (1); *Grannall* v. *Marrickville Margarine Pty. Ltd.* (2).] A carrier of goods from one part of Tasmania to another is not engaged in inter-State trade

(1) (1952) 85 C.L.R. 488, at p. 516. (2) (1955) 93 C.L.R. 55, at p. 80.

even if the goods carried have come from the mainland. [He referred to *Hughes* v. *State of Tasmania* (1).] The legislation does not impose restrictions by reference to, or in consequence of, anything that forms an essential attribute of inter-State trade. [He referred to *Hospital Provident Fund Pty. Ltd.* v. *State of Victoria* (2); *Wragg* v. *State of New South Wales* (3).] The fruit was not, when it arrived at Burnie, as a matter of law, destined for anywhere in particular in Tasmania. The fair inference from the facts is that the defendant would sell it wherever he could find a customer, that he had customers in Westbury and Deloraine and only what was left would reach Launceston. The defendant could have had the fruit shipped to Beauty Point in which case he would not have required an out of area permit, his vehicle being licensed for that particular area. If he procured a carrier to convey the fruit from Burnie to Launceston this Court has decided that the carrier would not be engaged in inter-State trade.

D. M. Chambers Q.C. (Solicitor-General for Tasmania) (with him *J. H. Dobson*), for the State of Tasmania. [As *amicus curiae* he explained the scheme of the *Traffic Act* 1925-1954 (Tas.) and the *Transport Act* 1938-1953 (Tas.) and referred to specific relevant provisions of the Acts.]

G. H. Crawford, for the defendants. On the facts it is submitted that the defendant was engaged in inter-State trade in the fruit at least until it was brought to his store at Launceston. His right to engage in inter-State trade is a personal one and not simply one attaching to the vehicle used or the goods. [He referred to *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 2] (4).] In *Hughes* v. *State of Tasmania* (5) the Court assumed that the merchants were engaged in inter-State trade. The facts in the present case are the same as in that case except that here the inter-State trader is himself carrying his goods. There is no case in which it has been held that inter-State trade in goods ends before the first sale. [He referred to *Grannall* v. *C. Geo. Kellaway & Sons Pty. Ltd.* (6); *Fergusson* v. *Stevenson* (7); *McNee* v. *Barrow Bros. Commission Agency Pty. Ltd.* (8); *Ex parte Nelson* [*No.* 1] (9).] The fact that certain fruit was unloaded at Westbury and Deloraine

(1) (1955) 93 C.L.R. 113, at pp. 124, 125.
(2) (1953) 87 C.L.R. 1, at pp. 17, 36.
(3) (1953) 88 C.L.R. 353, at p. 387.
(4) (1955) 93 C.L.R. 127, at p. 186.
(5) (1955) 93 C.L.R. 113.
(6) (1955) 93 C.L.R. 36, at p. 51.
(7) (1951) 84 C.L.R. 421.
(8) (1954) V.L.R. 1.
(9) (1928) 42 C.L.R. 209, at pp. 243, 244.

H. C. OF A. 1957. RUSSELL v. WALTERS.

only means that inter-State trade in that fruit ended at the point of unloading. If the fruit was in the course of inter-State trade after it had reached Burnie then the legislation imposed a real burden on the trade. [He referred to *W. & A. McArthur Ltd.* v. *State of Queensland* (1); *R.* v. *Vizzard*; *Ex parte Hill* (2).]

R. Else-Mitchell Q.C. (with him *K. A. Aickin*), for the States of Victoria, New South Wales and Queensland, did not address the Court.

Dr. *E. G. Coppel* Q.C., in reply.

Cur. adv. vult.

April 8.

THE COURT delivered the following written judgment:—

The defendants, Geoffrey Henry Walters and Brien Michael Richardson, were charged in the Court of Petty Sessions at Launceston with offences against s. 24 (1) II of the *Traffic Act* 1925-1954 (Tas.). The charges arose out of the journey of a motor vehicle from Burnie to Launceston on 14th February 1956. The vehicle was owned by Walters, and was being driven on Walters's business by Richardson, who was an employee of Walters. The defence to each charge was that the vehicle was at the material time being used in the course of, and for the purposes of, inter-State trade, and that s. 24 (1) II of the *Traffic Act* could not, consistently with s. 92 of the Constitution, be applied to it. A constitutional question being thus raised, the cases were removed into this Court by order made under s. 40 of the *Judiciary Act* 1903-1955 of the Commonwealth.

The *Traffic Act* 1925 contains provisions for the licensing of "public vehicles", which differ in detail but not in substance from those provisions of the *State Transport Co-ordination Act* 1931-1951 (N.S.W.) which have been held, so far as they purport to apply to vehicles engaged in inter-State trade, to infringe s. 92: see *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* [*No.* 1] (3). The general effect of the Tasmanian system is explained in *Hughes* v. *State of Tasmania* (4). Section 24 (1) of the Tasmanian Act, so far as material, provides that "no person shall drive or use or cause or permit to be driven or used as a public vehicle any vehicle . . . in or upon any traffic area . . . in or upon which the licence in respect thereof does not authorise it to be so driven or used." Walters

(1) (1920) 28 C.L.R. 530, at p. 549.
(2) (1933) 50 C.L.R. 30, at p. 59.
(3) (1955) A.C. 241; (1954) 93 C.L.R. 1.
(4) (1955) 93 C.L.R. 113, at pp. 122, 123.

was charged with using the vehicle or causing or permitting it to be driven or used, and Richardson was charged with driving it. The vehicle was licensed under the Act for use as a public vehicle in one of the " traffic areas " into which the State of Tasmania is divided by the Act, but on the occasion in question it travelled, during the latter part of its journey, outside that area. Since it was being used exclusively for the carriage of Walters's own goods, it was not being used as a public vehicle within the meaning of the definition of that term in s. 3 of the *Traffic Act*, but s. 16 of the *Transport Act* 1938 provides (subject to certain exceptions) that, for the purposes of the *Traffic Act*, a vehicle shall be deemed to be used as a public vehicle if goods are transported in it for the purposes of sale or in the course of any trade or business. This provision brings Walters's vehicle within the terms of s. 24 (1) II of the *Traffic Act*, and it seems clear that the only question in each case is whether s. 92 of the Constitution affords an answer to the charge.

It is clear that the relevant provisions of the *Traffic Act* are provisions which impose a burden or restriction on trade and commerce, and that they are invalid in so far as they purport to apply to inter-State trade and commerce. The question is whether the defendants, in relation to the journey from Burnie to Launceston, were engaged in inter-State trade or commerce. The first step must be to examine the facts.

The defendant Walters is a wholesale fruit merchant, who resides and carries on business at Launceston. He maintains a depôt or store at Launceston, from which fruit is distributed in that city and its suburbs and in other towns in northern Tasmania. He sells exclusively to retail traders. For some two years before February 1956 he had been obtaining about ninety per cent of the fruit which he sold from Victoria, purchasing it from a merchant named Deacon, who carries on business at the Victoria Market in Melbourne. A consignment of fruit, having an invoice value of about £390, which had been purchased from Deacon, was being carried in Walters's vehicle on the day on which the offences were alleged to have been committed. There were no other goods on the vehicle.

The fruit had been ordered by Walters in Launceston from Deacon in Melbourne by telephone two days before 14th February 1956. No express terms of sale were stated, but it was understood that the course of dealing, which had been established over the preceding two years or so, would be followed. In accordance with that course of dealing Deacon caused the fruit to be conveyed by his own truck from Victoria Market to Port Melbourne, and placed on board S.S. *Taroona* consigned to Walters at Burnie. He obtained a

H. C. OF A. 1957.

RUSSELL v. WALTERS.

Dixon C.J. McTiernan J. Webb J. Fullagar J. Kitto J. Taylor J.

bill of lading for the goods, which was presumably forwarded to Walters. No insurance was effected for the voyage to Burnie. Freight was not prepaid. The price of the fruit was payable to Deacon within seven days of delivery. It would appear that, having had the fruit placed on board ship and obtained the bill of lading, Deacon had fully performed his part of the contract. The property would pass at latest on the goods being placed on board: possibly it passed at an earlier stage. The *Taroona* left Port Melbourne on the afternoon of 13th February, and arrived at Burnie on the morning of the 14th. After arrival the goods were cleared, and freight and wharfage and stacking and inspection charges paid, by a firm of shipping and transport agents, which rendered its account in due course to Walters. Immediately after the fruit was cleared it was picked up and loaded on Walters's vehicle by Richardson, who had been sent from Launceston by Walters for the purpose. Richardson then proceeded to drive the loaded vehicle from Burnie to Launceston along the Bass Highway, which is a main road and the route normally used for that journey. The distance from Burnie to Launceston is about ninety miles. Richardson was stopped in the vicinity of Devonport, which is about thirty miles from Burnie, by a constable of police, and the charges were later laid against Walters and Richardson. It must be mentioned that Richardson stopped at Deloraine and at Westbury, two towns which lie between Devonport and Launceston, and at each place delivered a part of his cargo of fruit. It would appear that in each case the fruit had been previously ordered by the person or persons to whom it was delivered. It does not appear what proportion of the load was delivered at Deloraine or Westbury, but both towns are small towns, the load was a large one, and the proportion so delivered was probably small.

In *Hughes* v. *State of Tasmania* (1) the plaintiff was a shipping agent and carrier. In the course of his business he carried for reward from northern Tasmanian ports to Hobart fruit which had been purchased by merchants in Hobart from merchants in South Australia, Victoria, New South Wales and Queensland, and shipped from those States to the northern Tasmanian ports. It was held that he was not protected by s. 92. It is important, however, to note the reason for the decision. The reason was that he was not himself engaged in inter-State trade. *Fullagar* J. said:—"The immunity given by s. 92, however, applies only to activities which themselves possess the character of inter-State trade or commerce. The activities for which the plaintiff claims immunity do not possess

(1) (1955) 93 C.L.R. 113.

that character. They consist simply in the carriage of goods from one place in Tasmania to another place in Tasmania. It may be true that that carriage represents a service rendered in the course of the carrying out of an inter-State transaction which consists in the sale and delivery of fruit. But to that transaction the plaintiff is a complete stranger. He can claim protection only for what he himself does, and what he himself does begins and ends in Tasmania, and lies outside the scope of s. 92 " (1).

In the present case the defendant Walters (like the defendant company in *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (2)) was carrying his own goods in his own vehicle. He was carrying them from a port, to which they had been shipped from another State, to his own place of business in Launceston. The goods had been bought by Walters from Deacon in Melbourne, and consigned by Deacon to Walters at the Tasmanian port. The transaction between Walters and Deacon was unquestionably an inter-State transaction, and the journey of the goods from Victoria to Tasmania, which followed, was unquestionably an inter-State journey. That inter-State journey was unquestionably entitled to the protection of s. 92. The only question seems to be whether that inter-State journey ought to be regarded as having terminated when the goods were unloaded on the wharf at Burnie, or as having continued until the goods reached Walters's store in Launceston. The plaintiff in *Hughes* v. *State of Tasmania* (3) was undoubtedly engaged in intra-State trade. The defendant Walters was undoubtedly engaged in inter-State trade up to the point when his goods were landed at Burnie. The question is whether he had ceased to be so engaged before his vehicle entered an area for which it was not licensed. If he had so ceased, he must, one would think, have so ceased when the goods were landed at Burnie.

It is to be noted that the problem is not occasioned by the mere fact that Tasmania is an island State. Exactly the same problem could arise in any of the so-called mainland States. A manufacturer at Wangaratta might purchase wool from a grazier at Wagga, the wool might be carried by road or rail from Wagga to Wodonga, picked up by the purchaser at Wodonga, and carried by him in his own vehicle from Wodonga to his factory at Wangaratta. There would be undoubtedly an inter-State journey. But did that journey end at Wodonga or at Wangaratta ?

It is to be noted also that the question cannot be made to depend on the place of delivery under the contract of sale. In the present

(1) (1955) 93 C.L.R., at p. 125.
(2) (1935) 52 C.L.R. 189.
(3) (1955) 93 C.L.R. 113.

H. C. OF A. 1957.

RUSSELL v. WALTERS.

Dixon C.J. McTiernan J. Webb J. Fullagar J. Kitto J. Taylor J.

case it is clear on any view that the process of inter-State transit commenced before, and continued after, Deacon had effected delivery under the contract by placing the goods on board the *Taroona*. The question of when and where inter-State transit begins and ends is a question to be decided not upon the terms of a contract but as a matter of practical reality depending on the facts of each particular case. In *Public Utilities Commission* v. *Landon* (1) the Court said : " Interstate commerce is a practical conception and what falls within it must be determined upon consideration of established facts and known commercial methods " (2). In *W. & A. McArthur Ltd.* v. *State of Queensland* (3), *Isaacs* J., after quoting this passage, said :—" It is therefore impossible to limit the ' trade and commerce ' either ' among the States ' or ' with other countries ' to the mere act of transportation over the territorial frontier " (4). In *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *State of South Australia* (5) the same learned judge, after observing that the " original package " doctrine, which at one time held a prominent place in the United States, could not be accepted as applying a legal test, said :—" But, on the other hand, it is quite plain that the inter-State character of the trade or commerce, once begun, does not last for ever. The point at which it ceases . . . must depend entirely on the circumstances " (6). By " circumstances " his Honour meant circumstances " understood from a business standpoint ".

So approaching the present case, we are of opinion that the character of inter-State commerce attached to the journey of the fruit in question from the time of its departure from Deacon's premises at the Victoria Market in Melbourne to the time of its arrival at Walters's premises in Launceston. The end and object in view from the inception of the transaction was the arrival of the fruit at Walters's premises in Launceston. It was essentially a Melbourne-Launceston transaction. The intended destination of the fruit, when it left the Victoria Market, was Launceston. Deacon was responsible for part of the journey which the fruit had to make, and Walters was responsible for the rest of that journey, but it was a single journey that was in contemplation. Three instruments of transport were involved—Deacon's truck, the ship *Taroona*, and Walters's vehicle—but all were contributing to a single end. The reality of the situation was not different from what it would have been if one truck, loaded with the fruit, had been

(1) (1919) 249 U.S. 236 [63 Law. Ed. 577].
(2) (1919) 249 U.S., at p. 245 [63 Law. Ed., at p. 586].
(3) (1920) 28 C.L.R. 530.
(4) (1920) 28 C.L.R., at p. 549.
(5) (1926) 38 C.L.R. 408.
(6) (1926) 38 C.L.R., at p. 429.

driven from the Victoria Market to Port Melbourne, loaded on the ship there, unloaded at Burnie, and then driven from Burnie to Launceston. Such a case might at first sight have seemed clearer than the present case, but the facts of the present case cannot be held to produce a different result. It is to be noted indeed that, if the informant is right in this case, the position would not (apart from the accidental fact that Walters's vehicle happened to be licensed for the area in which Burnie lies) have been different if Walters's depôt had happened to be not in Launceston but in Burnie. Walters could not have taken the fruit from the wharf to his depôt in Burnie except by a vehicle licensed under the *Traffic Act*.

The informant sought to attach some significance to the deliveries of fruit to purchasers at Deloraine and Westbury. We cannot see how these can be said to affect the character of the journey in any way. The fact remains that the destination of the bulk of the fruit was Launceston. Both Deloraine and Westbury lie on the normal direct route from Burnie to Launceston. If it was found convenient to fulfil orders at those towns on the way, it follows, of course, that the inter-State journey of some of the fruit terminated at Deloraine, and some more of the fruit at Westbury. But it does not follow that the inter-State journey of the truck terminated at any point short of Launceston. If fruit had been *picked up* at Deloraine or Westbury or any other point on the journey, the whole position might, of course, have been different.

Both informations should be dismissed.

Informations dismissed. Order that the complainant pay the costs of the complaint in this Court, including the costs of removal, and the costs in the court of petty sessions.

Solicitors for the complainant, *Moule, Hamilton & Derham*, by *John H. Dobson*, Hobart.

Solicitors for the defendants, *Douglas & Collins*, Launceston.

Solicitor for the State of Tasmania, *J. R. M. Driscoll*, Crown Solicitor for the State of Tasmania.

Solicitors for the States of Victoria, New South Wales and Queensland, *Thomas F. Mornane*, Crown Solicitor for the State of Victoria, *F. P. McRae*, Crown Solicitor for the State of New South Wales and *H. T. O'Driscoll*, Crown Solicitor for the State of Queensland both by *Thomas F. Mornane*, Crown Solicitor for the State of Victoria.

R. D. B.