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HIGH COURT OF AUSTRALIA — FULL COURT

STONEHAM v RYAN'S REMOVALS PTY LTD

Gibbs ACJ, Stephen, Mason, Jacobs, Murphy and Aickin JJ

19 December 1978 — [1978] HCA 59; (1978) 143 CLR 79; 53 ALJR 212; 23 ALR 1

CONSTITUTIONAL LAW (CTH) – FREEDOM OF INTERSTATE TRADE, COMMERCE AND INTERCOURSE – CARRIAGE OF GOODS FOR REWARD – GOODS CONSIGNED FROM ONE POINT IN STATE TO ANOTHER – OTHER GOODS IN SAME VEHICLE CONSIGNED INTERSTATE – WHOLE LOAD TAKEN TO ANOTHER STATE AND PART UNLOADED THERE – BALANCE OF GOODS BROUGHT BACK TO STATE OF ORIGIN – WHETHER INTERSTATE TRADE, COMMERCE OR INTERCOURSE: *MOTOR CAR ACT* 1958 (VIC.), S20; *COMMERCIAL GOODS VEHICLES ACT* 1958 (VIC.), S22(1); *THE CONSTITUTION* (63 & 64 VICT. C. 12), S92.

The respondent company was convicted in the Magistrates' Court of offences against s20 of the *Motor Car Act* and s22 of the *Commercial Goods Vehicles Act* 1958. On appeal to the Supreme Court of Victoria, by way of review, the convictions were set aside by McInerney J. Special leave was granted to appeal to the High Court.

HELD by Gibbs ACJ, Stephen, Mason, Jacobs and Aickin JJ, Murphy J dissenting, that the respondent's use of a vehicle in the carriage of goods to Woolworths in Warrnambool was in the course of the respondent's interstate trade and commerce and protected by Section 92 notwithstanding that the transaction with Woolworths was entirely of an intrastate character.

GIBBS ACJ: These appeals are brought from orders of the Supreme Court [in relation to convictions] of respondent of offences against s20 of the *Motor Car Act* 1958 (Vict.) and s22 of the *Commercial Goods Vehicles Act* 1958 (Vict.). The offences were said to have been committed on the morning of 21st October 1976, when a vehicle owned by the respondent company was used to carry goods for reward on a public road at Warrnambool in Victoria. It is not now disputed that it was proved that both offences were committed unless the carriage of the goods on the occasion in question was in the course of interstate trade, commerce or intercourse.

The evidence established that on 20th October 1976 the respondent's vehicle was driven from Melbourne to Warrnambool. The respondent was a carrier, and the vehicle, a semi-trailer, was carrying goods some of which were intended for delivery in Warrnambool and others for delivery in Mt Gambier (which is in South Australia); 95 per cent of the goods carried were intended for Warrnambool. The vehicle arrived at Warrnambool at about 8.30 o'clock at night and called at the respondent's depot there. It appears that the vehicle remained in Warrnambool for some hours, but no goods were unloaded. The vehicle then went on to Mt Gambier, where the respondent had another depot. The goods intended for Mt Gambier were unloaded at that depot, and the vehicle later returned to Warrnambool, carrying the rest of the load. At about 9am on 21st October the vehicle was driven through the streets of Warrnambool to the supermarket of Woolworths, the consignee of a considerable quantity of the goods, which were then unloaded and delivered. Notwithstanding some documentation contrived by the respondent, which showed that the goods had been consigned from Melbourne to Mt Gambier, and from Mt Gambier to Warrnambool, there can be no doubt that the respondent's contract was simply to carry the goods for Woolworths from Melbourne to Warrnambool. The respondent's managing director gave a number of reasons why the goods intended for Warrnambool were carried on to Mt Gambier. He said that the respondent conducted an overnight service and that the goods intended for Mt Gambier had to be there on the morning of 21st October. In fact, however, it appears that although the goods were urgently required they were not delivered until 22nd October. He also said: "The goods were carried to Mt Gambier to gain the protection of s92. We had to take the goods to Mt Gambier and back because we would not have got to Mt Gambier in time . . . Warrnambool is on the road to Mt Gambier and the best way to get there is via Warrnambool."

The magistrate found that the vehicle was "being operated for a dual purpose having a divided load". He held that the carriage of the goods for delivery in Mt Gambier was protected by s92

of the *Constitution* but that the carriage of the goods for delivery in Warrnambool was an intrastate transaction. He referred to the evidence of the managing director that he had sought to organize his business so as to procure the protection provided by s92, but he made no specific finding as to what was the purpose of the respondent in carrying to Mt Gambier the goods intended for Warrnambool. McInerney J found that the journey was "a genuine, *bona fide* interstate journey".

This finding of the learned judge was criticized in argument before us but I see no justification for disturbing it. Whether or not the goods for Mt Gambier had to be delivered urgently, the respondent had a genuine commercial reason for taking its semi-trailer to Mt Gambier, and for carrying there the goods intended for Warrnambool. It may safely be inferred that by the time the vehicle arrived in Warrnambool from Melbourne it was too late to deliver the goods to the consignee. It is true that it is possible to suggest a number of courses that might then have been open to the respondent. If the evidence that the goods intended for Mt Gambier had to be there by the next morning be rejected (and the magistrate did not say that he rejected it), the respondent could have kept the vehicle at Warrnambool for the night and on the following morning could have delivered the goods intended for Warrnambool, before going on to Mt Gambier.

Another possible course was to unload the goods that night (assuming that the forklift necessary to enable that to be done was available, a question which the evidence leaves doubtful), and to leave at the depot those goods intended for delivery in Warrnambool. If that had been done it would have been necessary to re-load the goods in the morning on to another vehicle, or on to the semi-trailer when it returned from Mt Gambier, to enable delivery to be effected. Since the semi-trailer had in any case to proceed to Mt Gambier and return through Warrnambool, it would seem to have been obviously more convenient to leave the goods on the vehicle as was in fact done. It would therefore not be correct to say (and the magistrate did not find) that the sole purpose of carrying the goods to and from Mt Gambier was to gain the protection of s92.

The offence created by s20 of the *Motor Car Act* is only committed if the vehicle is used "otherwise than for interstate trade commerce or intercourse"; the section so provides in express terms. Section 22 of the *Commercial Goods Vehicles Act* does not contain a similar express provision, but it is established by authorities too numerous to mention that the provisions of such a section could not validly be applied to the use of a vehicle in the course of interstate trade or commerce; it must be read down accordingly – s3 of the *Acts Interpretation Act* 1958 (Vict.). The sole question for our decision in the present case is whether in the circumstances mentioned it was right to conclude, as McInerney J concluded, that the vehicle was being used in the course of interstate trade or commerce at the time when it was being driven on the streets of Warrnambool on the morning of 21st October.

There is no doubt that a journey from Warrnambool to Mt Gambier, or from Mt Gambier to Warrnambool, is an interstate journey. The respondent was free to send its vehicle on such a journey. However the statutory provisions in question do not attempt to penalize an owner simply for taking a vehicle on a journey; the offence lies respectively in the use of the vehicle and in the carriage of goods in the vehicle for reward. It is clear that neither the use of the vehicle to carry from Melbourne the goods which were delivered in Mt Gambier, nor the carriage of those goods, constituted an offence under the relevant statutes, because such carriage was part of the respondent's interstate trade or commerce, and the use of the vehicle for that purpose was in the course of that interstate trade or commerce. It is equally clear that the carriage of the goods between two places within the one State and the use of the vehicle for that purpose – in themselves intrastate activities – would not take on the character of interstate trade or commerce simply because the vehicle was engaged on an interstate journey, and was carrying other goods between one State and another.

A vehicle, although making an interstate journey, may be put to two distinct uses, and may at the one time be carrying some goods in the course of interstate trade and other goods in the course of intrastate trade. So much is established by *Pioneer Express Pty Ltd v Hotchkiss* [1958] HCA 45; (1958) 101 CLR 536; [1958] ALR 921; 32 ALJR 256; the decision in that case applies equally to freight as to passengers: see *Golden v Hotchkiss* [1959] HCA 9; (1959) 101 CLR 568, at p579; [1959] ALR 573; 32 ALJR 420 and *Harris v Wagner* [1959] HCA 60; (1959) 103 CLR 452, at pp464-465; [1960] ALR 440; 33 ALJR 353. The use of the vehicle to carry the goods destined for Warrnambool, and the carriage of the goods from Melbourne to Warrnambool, did not necessarily

acquire an interstate character from the fact that the vehicle was at the same time used to carry other goods to Mt Gambier.

Further, the fact that the goods crossed the re-crossed the border in the course of their journey from one place within Victoria to their final destination within the same State did not in itself mean that the use of the vehicle to carry them on the road in Warrnambool, or the carrying of them there, was in the course of interstate trade or commerce. It is well established that a transaction of carriage between two places within the one State does not acquire an interstate character because the carrier makes an artificial diversion over the border: see *Harris v Wagner (supra)*; *Western Interstate Pty Ltd v Madsen* [1961] HCA 63; (1961) 107 CLR 102; [1962] ALR 528 and *Winton Transport Pty Ltd v Horne* [1966] HCA 51; (1966) 115 CLR 322.

On the other hand, if the diversion across the border has a business purpose, apart from the wish to secure the protection of s92, the carriage will be held to have been made in the course of interstate trade: *Beach v Wagner* [1959] HCA 24; (1959) 101 CLR 604; [1959] ALR 707; *Roadair Pty Ltd v Williams* [1968] HCA 18; (1968) 118 CLR 644; 42 ALJR 7; *Ward (J & J) Pty Ltd v Williams* [1969] HCA 65; (1969) 119 CLR 318; [1970] ALR 289; 44 ALJR 19. It is needless to discuss the facts of these well-known decisions, but it appears to me that the true ground of distinction between the two lines of cases is that in the former, where the protection of s92 was denied, the only purpose of crossing the border was to attempt to obtain immunity under the section, so that the crossing of the border was "nothing but an interruption of an essentially intra-State transaction" – "a superficial excrescence on the journey": see *Harris v Wagner* (1959) 103 CLR, at pp458-459, 461, 467, 470-472. In the latter cases, on the other hand, the carrier was engaged upon an interstate journey "for the perfectly legitimate purposes of his business"; he was acting in conformity with a practice adopted "for the general purposes of his business": see *Beach v Wagner* [1959] HCA 24; (1959) 101 CLR 604 at p610 and *Roadair Pty Ltd v Williams* [1968] HCA 18; (1968) 118 CLR, at p647.

The most recent discussion of this question occurred in *Ward (J & J) Pty Ltd v Williams* [1969] HCA 65; (1969) 119 CLR 318; [1970] ALR 289; 44 ALJR 19. In that case the Court rejected an argument that in deciding whether an operation was of an interstate or an intrastate character it was erroneous to consider matters relating to the carrier's convenience, business organization and ordinary practices (1969) 119 CLR, at pp319, 332. The main judgment was given by Walsh J, with whom Barwick CJ, Kitto, Menzies, Windeyer and Owen JJ concurred. Although Walsh J expressed the view that it was relevant to consider whether the carrier had some commercial purpose – a real and not a pretended commercial purpose – for crossing the border, in his opinion this is not the sole criterion or test. He said (1969) 119 CLR, at p333:

> "When the question to be decided has been whether or not the use for the carriage of goods of a road in one State, before an intended detour across the border into another State has begun, or after such a detour has been completed, was an activity to which the character of inter-State trade or commerce should be assigned, the purpose for which the goods were going to be carried or had been carried across the border into the other State has been treated as an important consideration. . . . But to say this is not the same as to say that a single and decisive test has been established by which the character of inter-State trade or commerce has been ascribed to all journeys in which there has been or there is about to be a crossing of the border which had a 'real commercial purpose' and denied to all journeys in which the border crossing, already made or to be made, had no such purpose."

Although it is no doubt correct to say, as Walsh J said, that the question whether the border has been crossed for a real commercial purpose does not provide a single and decisive test, I find it impossible to imagine any case in which it could be said that a vehicle carrying goods between two points within one State was used in the course of interstate trade or commerce by reason only of the fact that it had crossed the border in the course of its journey, unless there had not been some real purpose in crossing the border, other than the purpose of attempting to bring the transaction within s92. In some cases the purpose might simply be to travel by the most convenient route, which might be across the border and back again. In other cases the manner in which the carrier's business was organized might provide the purpose for crossing the border. As Kitto J pointed out in the additional reasons which he gave in *Ward (J & J) Pty Ltd v Williams* [1969] HCA 65; (1969) 119 CLR 318, at p325; [1970] ALR 289; 44 ALJR 19, no gloss is to be placed upon the language of s92 which limits its application to cases where "a genuine commercial purpose", or "the ordinary course of business", has characterized the movement across the border.

The actual movement across the border is always protected. But when the question is whether the carriage of goods on a journey that began and ended within one State, or the use of a vehicle for the purposes of that carriage, was in the course of interstate trade or commerce, the fact that the border has been crossed can not give that carriage or use an interstate character, unless there was a real purpose for crossing the border.

This does not mean that the Court is concerned to inquire whether it was profitable, sensible or in the public interest for a person seeking the protection of s92 to engage in interstate trade; it means that in deciding whether he has engaged in interstate trade, it is in some cases not merely relevant, but of fundamental importance, to ask whether he had any real reason for crossing the border.

There are weighty *dicta* in favour of the view that where a carrier has diverged from his intrastate journey to cross the border, for no other reason than to gain the protection of s92, the journey from the point of the deviation to the border, and the return to the point where the deviation began, or even to the ultimate destination, have an interstate character: see *Harris v Wagner* [1959] HCA 60; (1959) 103 CLR, at p458, *Western Interstate Pty Ltd v Madsen* (1961) 107 CLR, at p110, and *Ward (J & J) Pty Ltd v Williams* [1969] HCA 65; (1969) 119 CLR 318 at p324; [1970] ALR 289; 44 ALJR 19. I do not find it necessary to consider in the present case whether those *dicta* are consistent with principle, or with the authorities that have decided how a particular act of carriage is to be characterized.

In the present case, having regard to the findings of McInerney J, it should be accepted that the respondent had a genuine business purpose in crossing the border. The case is indistinguishable from *Beach v Wagner* [1959] HCA 24; (1959) 101 CLR 604, *Roadair Pty Ltd v Williams* [1968] HCA 18; (1968) 118 CLR 644, and *Ward (J & J) Pty Ltd v Williams* [1969] HCA 65; (1969) 119 CLR 318 and the carriage from Mt Gambier to Warrnambool, and the use of the vehicle for the purpose of that carriage, were of an interstate character, notwithstanding that the transaction between the respondent and Woolworths was entirely of an intrastate character. It is true that one motive of the respondent in going to Mt Gambier was to secure the protection of s92, but once it is held that it was engaged in interstate trade, its motive for doing so does not matter. As Windeyer J. said in *Western Interstate Pty Ltd v. Madsen* [1961] HCA 63; (1961) 107 CLR 102 at p117: "People may, of course, choose to engage in inter-State trade because they will in it have the protection of s92: but they do not get the protection of s92 by pretending to be engaged in inter-State trade."

For these reasons, which depend very much upon the particular facts of the case, I would dismiss the appeals.

MASON J: In order that the journey, in particular the Mt Gambier-Warrnambool section of it, should attract the operation of s92 it is necessary that it forms part of interstate trade and commerce or intercourse. The character of interstate trade, commerce or intercourse attaches to the return journey (whether it involves the carriage of goods for reward or not) undertaken after the outward interstate carriage of goods for reward has been completed. As the return journey from Mt Gambier to Warrnambool was on the direct route home to Melbourne from the interstate destination at Mt Gambier the driving of the vehicle from Mt Gambier back to Warrnambool, certainly to the extent to which it coincided with the return route to Melbourne, formed part of interstate trade or commerce. And it has even been pointed out that the protection afforded by s92 attaches to so much of the return part of a diversionary journey across a State border undertaken to give an intrastate carriage of goods an interstate flavour as lies between the point reached outside the State and the point of deviation within the State on the route between the place where the goods were picked up and the place of destination. See *Harris v Wagner* [1959] HCA 60; (1959) 103 CLR 452, at p458; *Western Interstate Pty Ltd v Madsen* [1961] HCA 63; (1961) 107 CLR 102, at p110.

None the less the appellant submits that the actual carriage of the goods between Mt Gambier and Woolworths' store at Warrnambool formed no part of interstate trade or commerce, the respondent not having contracted for reward to carry the goods between those two points. No doubt it is proper to draw a distinction between the movement interstate of a vehicle and the intrastate carriage of goods or passengers by that vehicle on part of its interstate journey (*Pioneer Express Pty Ltd v Hotchkiss* [1958] HCA 45; (1958) 101 CLR 536; [1958] ALR 921; 32 ALJR 256).

There it was decided that the carriage of passengers intrastate on a vehicle making an interstate journey on which it was carrying other passengers interstate did not constitute part of interstate trade and commerce. This is not such a case for here the goods were carried interstate across the State border notwithstanding that the contract of carriage did not require such a carriage. ...

It is important to recall that in this appeal it is the trade of the carrier, not that of the consignor, that is in question. The relevant freedom guaranteed by s92 is that of the carrier to move goods across a State border. That freedom does not depend on the contract with the consignor having an interstate character. The movement of the goods across the border is protected whether the contract of carriage is an interstate or intrastate transaction. And s92 will invalidate any attempt to prohibit or burden that movement. But in many cases the difficult question which arises for determination is how much of the carriage of goods in the course of which they are transported across a State border falls within the protection of s92. It is in connexion with this question that the interstate or intrastate character of the contract of carriage becomes relevant. Though it is a relevant consideration, for the reasons which I have given it is not a decisive factor in this appeal.

JACOBS J: Where goods are consigned from one place in a State to another place in the same State and if those goods are carried out of the State into another State and then back again into the first State the carriage of those goods may be, but is not necessarily, trade commerce and intercourse among the States. An important circumstance is that the carriage into the other State and out of it to the place of ultimate consignment is in the ordinary course of the business of the carrier: *Beach v Wagner* [1959] HCA 24; (1959) 101 CLR 604; *Roadair Pty Ltd v Williams* [1968] HCA 18; (1968) 118 CLR 644; for the "perfectly legitimate purposes of his business" as it was described in *Beach v Wagner* [1959] HCA 24; (1959) 101 CLR at p610. This result is not affected by the fact that it would have been physically possible to deliver the goods in the course of the journey before crossing the State boundary: *Roadair* [1968] HCA 18; (1968) 118 CLR at p647. In *Ward (J & J) Pty Ltd v Williams* [1969] HCA 65; (1969) 119 CLR 318 the "commercial purpose test", as it was there described, was adopted by Walsh J (with whose reasons Barwick CJ, Windeyer and Owen JJ agreed) as an important, but not sole, consideration in determining the question whether the carriage of the goods interstate and then back again was trade commerce and intercourse among the States. He said (1969) 119 CLR, at p333:

> "When the question to be decided has been whether or not the use for the carriage of goods of a road in one State, before an intended detour across the border into another State has begun, or after such a detour has been completed, was an activity to which the character of interstate trade or commerce should be assigned, the purpose for which the goods were going to be carried or had been carried across the border into the other State has been treated as an important consideration. This is illustrated by such cases as *Harris v Wagner* [1959] HCA 60; (1959) 103 CLR 452; [1960] ALR 440; 33 ALJR 353 and *Western Interstate Pty Ltd v Madsen* [1961] HCA 63; (1961) 107 CLR 102. But to say this is not the same as to say that a single and decisive test has been established by which the character of interstate trade or commerce has been ascribed to all journeys in which there has been or there is about to be a crossing of the border which had a 'real commercial purpose' and denied to all journeys in which the border crossing, already made or to be made, had no such purpose."

Kitto J expressed agreement with the reasons of Walsh J but in his added reasons pointed out that the tests of "ordinary course of business" or "commercial purpose" are not tests of the applicability of s92 but of the indivisibility of the journey interstate and back again. In the present case it seems to me that the application of the tests of "ordinary course of business" or "genuine commercial purpose", though perhaps not the only tests to be applied, were of very great importance. Unfortunately no finding upon them was made by the magistrate at first instance. On the order to review McInerney J found that there was "a genuine act of interstate trade or commerce, namely, the carrying of goods from Melbourne to Mt Gambier via Warrnambool" and that "the same interstate trade and commerce required the return of the vehicle from Mt Gambier to Warrnambool" and, further, that there was "a *bona fide* commercial purpose in the defendant's journey to Mt Gambier". I am not quite clear whether McInerney J was here directing his attention to the purpose of carrying the Warrnambool goods out of Victoria and back into it again, or whether his statements were not based simply on the facts that there were goods to be carried to and delivered at Mt Gambier and that the Victorian-based vehicle then had to return to Victoria. Nevertheless, the finding was open that there was "a bona fide commercial purpose" in carrying the Warrnambool goods out of the State and back into it again and that the goods

were so carried as "a genuine act of interstate trade and commerce" even though a finding to the contrary would have been quite open, especially in view of the admitted evidence of a motive to obtain the protection of s92.

I am not satisfied that the decision of McInerney J was wrong on the facts and I would therefore dismiss the appeal. I would however spell out what is implicit in what I have stated, namely, that in a case where goods for delivery in the same State are carried out of the State and back again, the fact that they are carried out of the State in the same load as goods genuinely destined for delivery in the second State and that the vehicle is entitled to return to its home State does not of itself provide an answer to the question whether the carriage of the goods ultimately destined for delivery in the State of consignment is an act of trade commerce and intercourse among the States.
