(albeit an erroneous judgment) in determining its jurisdiction is a very fine one. It is difficult to see what is the precise distinction between the type of jurisdiction denied in *Connell's Case* and that upheld in the present case.[18] It is clear, however, that where there is doubt a privative clause such as s. 108 will operate to validate what *ab initio* is in excess of jurisdiction except in the case where the tribunal acts altogether outside its jurisdiction or in bad faith.[19]

R. D. LUMB

SECTION 92 OF THE CONSTITUTION AND "BORDER HOPPING"

Although *Harris v. Wagner*[1] is only another of the now long series of transport cases, it is something of a landmark in the law of Queensland. The case received a deal of publicity in the popular press and produced several ripples in the political life of the State. The drain on State revenue caused by the practice known as "border hopping" focused public attention on a case which would otherwise have been recognized by lawyers as a mere further refinement of the principle in *Hughes and Vale Proprietary Limited v. The State of New South Wales No.* 1.[2]

The appellant, a Queensland carrier, contracted to carry goods from one Queensland town to another via a town in New South Wales. This detour was unnecessary and was done solely to attract the application of Section 92 of the Constitution. The driver of the vehicle was intercepted in Queensland on the direct route between the point of departure and the point of destination and at a point prior to making the detour. The question arose whether the transaction was protected from certain provisions of State transport legislation.

Two relevant cases discussed by the High Court were *Golden v. Hotchkiss*[3] and *Beach v. Wagner*[4]. In the former case the carrier started from a station within the border of New South Wales, and then, by the only route which was possible for him, he crossed the

18. It could be said that the words "if the Industrial Authority is satisfied that the rates of remuneration in respect of which the alteration is sought are anomalous" imply a firmer and more objectively based opinion than the words "where it appears reasonably likely to the Court that an act . . . will occur and that the result of such an act . . . will be to contribute to a lock-out".
19. In *Connell's Case* there was also a privative clause. However, the High Court held such a clause could not deprive the High Court of the jurisdiction conferred upon it by s. 75 (v) of the Constitution to grant prohibition against an officer of the Commonwealth.

1. (1959) 33 A.L.J.R. 353.
2. (1954) 93 C.L.R. 1.
3. (1959) A.L.R. 573.
4. (1969) A.L.R. 707.

border into Queensland. He drove for some ten miles in Queensland before recrossing the border into New South Wales and from there drove to Sydney. It was held that Section 92 applied to protect the carrier from the relevant transport legislation of New South Wales. In the latter case the carrier carried on business at a point in Queensland and also at a storage depot which he had across the border in New South Wales. In the customary course of his business he loaded wool at the point in Queensland for transport to Brisbane and then carried the wool to his depot in New South Wales where he transferred the wool to a larger semi-trailer more suited for the longer haul to Brisbane. In a short joint judgment the High Court held that the carrier was protected from the Queensland transport legislation.

In *Harris v. Wagner* Dixon C.J. distinguished *Beach v. Wagner* thus:

> "Naturally in support of the appeal reliance is placed upon the decision of the Court in *Beach v. Wagner.* But the present case differs markedly from that. For here the undisguised fact is that the carriage of goods to Brisbane from Jandowae was the service to be performed and there was no purpose to be served in contracting to carry them into New South Wales and back except to secure, if it would suffice to do it, the protection of s. 92 from the application to the transaction of Pt. III of the *State Transport Facilities Acts* 1946 to 1955 (Q.). But for that the vehicle would have taken the shortest practicable route and no contract to do otherwise would have been made."[5]

Distinguishing *Golden v. Hotchkiss* Taylor J. said:

> "In the earlier case it appeared that the only route available for the transport of goods lay, first of all, along public roads in Queensland and then, after crossing the border into New South Wales, along the public roads in that State. In those circumstances, carriage from the point of origin to the point of discharge could not be accomplished without carriage from one State to another."[6]

It can be seen from the judgments delivered in *Harris v. Wagner* that the High Court has set its face against further extensions of the principles in *Golden v. Hotchkiss* and *Beach v. Wagner.* He who wishes to explore new devices in this field may do so at his peril.

J. M. Morris*

5. 33 A.L.J.R., at 353.
6. 33 A.L.J.R. at 359.

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CRIMINAL LAW

Murder by Negligence

There is no space here to do more than notice the astounding decision of the House of Lords in *D.P.P. v. Smith*[1], which, if it is taken at its face value, is the greatest disaster to befall the criminal law in modern times.

D was driving a car in the back of which he was carrying some sacks of stolen property. V, a policeman, noticed these sacks when the car stopped in obedience to the signal of another policeman on point duty. Desiring to investigate further, V told D to pull in to the kerb. D panicked, and instead of pulling in, accelerated. V clung on to the car but eventually was thrown off, or knocked off by collisions with other cars, and killed.

D was convicted of capital murder.[2] The Court of Criminal Appeal allowed an appeal[3] against conviction and substituted a verdict of manslaughter. The ground of the appeal was that the trial judge misdirected the jury by telling them that if in their opinion a reasonable man in D's position would have "contemplated that grievous bodily harm was likely to result" to V, then that was murder. This was held to be a misdirection because, so far as responsibility for murder was concerned, the question was what D in fact contemplated, and not what a reasonable man in his position would have contemplated.

One might have thought that this conclusion was almost trite at the present day. The whole history of the law of murder shows a progress from the indiscriminate application of arbitrary outer standards to the individual, to a general rule that a man is not to be convicted of murder, as opposed to manslaughter, unless he actually intended at least to inflict grievous bodily harm, or was reckless thereto. This is a progress from injustice and reflects our growing understanding of the workings of the human mind.

These considerations did not prevent Viscount Kilmuir L.C. and Lords Goddard, Tucker, Denning, and Parker, from unanimously reversing the decision of the Court of Criminal Appeal and laying down the barbaric rule that, insanity apart, the test of intention in murder "is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result" of the accused's actions. In other words, in their Lordships' opinions, murder ought to be a crime of negligence.

1. [1960] 3 W.L.R. 546.
2. Homicide Act, 1957 (Eng.), s. 5 (1) (d): "any murder of a police officer acting in the execution of his duty". A capital murder in England is one for which the death penalty is retained.
3. [1960] 3 W.L.R. 92.