PILKINGTON v. FRANK HAMMOND PTY LTD[1]

Constitutional law — Freedom of interstate trade — Constitution s. 92 — Intrastate segments of interstate transportation — Effect of overseas destination on s. 92 immunity — Traffic Act 1925 (Tas.) s. 24(1)(c).

A Tasmanian lamb producer (Donaldson) engaged a Tasmanian company (J.C. Huttons Pty Ltd) to process his lamb and arrange for its export to London. Huttons contracted with A.C.T.A. Pty Ltd (a company incorporated in the Australian Capital Territory and the wholly-owned subsidiary of an overseas shipping company called A.C.T.A. (European Service)) to transport the frozen lamb from Huttons' premises to London. A.C.T.A. Pty Ltd (A.C.T.A.) arranged for the respondent to deliver an empty container to Huttons' premises at St Leonards in Tasmania and after it had been filled and refrigerated to transport it to Bell Bay on the Tasmanian coast. It was then arranged for the container to be shipped by the Australian National Line (A.N.L.) from Bell Bay to the overseas terminal at Melbourne where it would be exported to London. *En route* from St Leonards to Bell Bay the trailer carrying the container of frozen lamb was intercepted by a Tasmanian transport inspector and the respondent was charged with an offence against section 24(1)(c) of the Traffic Act 1925 (Tas.) which prohibited the use of an unlicensed trailer. The magistrate dismissed the charge holding that although all the elements of the statutory offence had been established, the respondent was entitled to the immunity of section 92 since it was acting on behalf of or in a contractual relationship with principals who were concerned with transporting the container from St Leonards to Melbourne and therefore at the relevant time the respondent's trailer was being used in the course of interstate trade.

On appeal to the High Court it emerged that the evidence was unsatisfactory in several respects and this situation produced disagreement among the Court on at least two evidentiary issues. First, Barwick C.J.[2] and Jacobs J.[3] held that the respondent was contractually responsible to deliver the container to Melbourne while Mason,[4] Gibbs[5] and Menzies JJ.[6] were of the view that the respondent's contractual obligations were terminated upon delivery of the container at Bell Bay. Secondly, Menzies J. decided that A.C.T.A. had contracted as agent for its overseas parent company to transport the container to London[7] and Gibbs J. agreed that A.C.T.A. had entered into one contractual obligation covering the whole journey.[8] Stephen J. held that whether A.C.T.A.

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[1] (1974) 2 A.L.R. 563; (1974) 48 A.L.J.R. 61. High Court of Australia; Barwick C.J., McTiernan, Menzies, Gibbs, Stephen, Mason and Jacobs JJ.

[2] (1974) 2 A.L.R. 563, 569.

[3] *Id.* 621.

[4] *Id.* 619.

[5] *Id.* 598.

[6] *Id.* 594. McTiernan J. did not discuss the issue, while Stephen J. held that it was unnecessary for him to decide either way: *id.* 610.

[7] *Id.* 590.

[8] *Id.* 598.

contracted to deliver the goods to Melbourne as principal or agent was immaterial,[9] while Barwick C.J.[10] and Mason J.[11] proceeded on the basis that it had contracted as principal to deliver the container to Melbourne and as agent for its parent to deliver it to London. Whether these differences had any significant effect on the ultimate decisions of the various judges will be discussed later.

It was held by Barwick C.J., Gibbs, Stephen, Mason and Jacobs JJ., McTiernan and Menzies JJ. dissenting, that the respondent's carriage of goods was protected by section 92.

Before stating the grounds of the appeal and analysing the High Court's response to the appellant's submissions, it is pertinent to acquire a background of the Court's decisions on this aspect of section 92. It had been decided in *Hughes* v. *Tasmania*[12] that a Tasmanian carrier, who in the normal course of his business, carried fruit to Hobart for Tasmanian merchants who had purchased the fruit on the mainland and arranged its delivery to various Tasmanian ports, was not entitled to the protection of section 92 with respect to a Tasmanian Act which required all carriers to obtain special permits at a prescribed fee in order to travel in certain areas of the State. It was held that the carrier was not himself engaged in interstate trade and the fact that he was serving the interests of interstate traders did not give to his own intrastate activities an interstate character. It is important to note that the court adopted this approach despite the admission that it was part of the regular course of trade to bring the fruit from the various Tasmanian ports to Hobart. It was held that:

> any inter-State character that may be possessed by the plaintiff's activities as a carrier are [*sic*] not obtained from the nature of his functions but from the course of his clients' trade . . . The foundation of the plaintiff's complaint is that the charges constitute a burden upon an inter-State transaction which the plaintiff carries out . . . Regarded in this way his claim for the protection of s. 92 is seen to be untenable.[13]

This restrictive approach to the question whether an intrastate journey in the context of an interstate operation was protected by section 92 was not to prevail. In *Russell* v. *Walters*[14] the facts were very similar to those which had existed in *Hughes* v. *Tasmania* with the significant difference that it was the interstate merchant who transported the goods from the Tasmanian port to Hobart in his own vehicle. The court held that the merchant was himself engaged in interstate trade and commerce[15] since it was established that it was within his ordinary course of trade to deliver the goods to Hobart, and having regard to the practical realities

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[9] *Id.* 610.
[10] *Id.* 567.
[11] *Id.* 619.
[12] (1955) 93 C.L.R. 113.
[13] *Id.* 124 *per* Dixon C.J., McTiernan, Williams, Webb and Taylor JJ.
[14] (1957) 96 C.L.R. 177.
[15] *Hughes* v. *Tasmania* (1955) 93 C.L.R. 113 was distinguished on this point: (1957) 96 C.L.R. 177, 182-183.

of the situation it was held that his interstate trade in the goods did not end until they were delivered from the Tasmanian port to Hobart. The court said:

> 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.[16]

This view was accepted and applied in *Simms* v. *West*[17] where a Queensland company bought timber in North Queensland on behalf of a Sydney principal and carried it to Cairns for shipment to Sydney. It was held that the intrastate carriage of the timber was protected by section 92 since any direct interference with that carriage imposed a burden on the interstate trade of the Sydney purchaser. The decision in *Hughes* v. *Tasmania* was distinguished on a ground different from that taken in *Russell* v. *Walters* for it was claimed that the burden or interference in *Hughes* v. *Tasmania* was merely a financial exaction from the carrier which did not amount to a direct burden on the interstate trade of the Tasmanian fruit merchants.[18]

In *Bell Bros Pty Ltd* v. *Rathbone*[19] a West Australian merchant consigned timber from its mill at Nannup in West Australia to its yard in Melbourne. The timber was conveyed to Fremantle by a carrier for shipment to Melbourne. This carriage was held to be protected by section 92 on two grounds. First it was found that the carrier was a party to a contract to procure the carriage of the timber to Melbourne and was therefore itself engaged in interstate trade. Secondly, it was held that notwithstanding any contractual undertaking by the carrier to transport the timber interstate, the carrier was entitled to the immunity of section 92 in respect of its intrastate journey from Nannup to Fremantle since any direct interference with that carriage constituted a direct burden on the interstate trade of the West Australian timber merchant. Menzies J., with whom Kitto and Taylor JJ. agreed, remarked with respect to *Hughes* v. *Tasmania*:

> In the view I take of the facts that decision is distinguishable but if it is implicit in that case that in the circumstances here the appellant, if not itself engaged in an operation of inter-State trade, cannot rely upon the burden imposed upon it by the Act as involving an unconstitutional interference with the inter-State trade of others, then, as the citations I have made show, a different decision has already been given in the later case of *Simms* v. *West*.[20]

Although *Hughes* v. *Tasmania* had not been expressly overruled, its authority was somewhat doubtful after this series of cases[21] and it was

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[16] (1957) 96 C.L.R. 177, 184.
[17] (1961) 107 C.L.R. 157.
[18] (1961) 107 C.L.R. 157, 162 *per* Dixon C.J., 165 *per* Taylor J.
[19] (1962-1963) 109 C.L.R. 225.
[20] *Id.* 238.
[21] Howard, *Australian Federal Constitutional Law* (2nd ed. 1972) 354.

not unexpected that the question of its authority would soon arise for the deliberations of the High Court.

It was argued by the appellant in *Pilkington* v. *Frank Hammond Pty Ltd* that the magistrate had incorrectly ruled that the respondent was protected by section 92 since the container of frozen lamb was not engaged on an interstate journey at the time of its interception but was engaged on an international journey. Further, it was submitted that the trailer was involved in an intrastate movement of the container from St Leonards to Bell Bay and that the journey was merely preparatory to the interstate movement of the container to Melbourne. *Hughes* v. *Tasmania* was argued to be an authoritative decision which supported the appellant's contention that the respondent was not engaged in interstate trade and commerce. It was argued that section 92 would only apply to protect goods if those goods were themselves the subject of interstate trade and commerce in the hands of their owner. In any event, the appellant submitted, the operation of the Tasmanian Act upon the respondent's trade was merely indirect or consequential and insufficient to entitle the respondent to rely on section 92.

The Majority Judgments

Since Barwick C.J. found that the respondent had a contractual obligation to transport the container to Melbourne (and not merely to Bell Bay), he might have dismissed the appeal on that simple ground relying on *Bell Bros Pty Ltd* v. *Rathbone*. However he elected to go a step further and consider whether the respondent was entitled to the immunity of section 92 even if it had not been contractually obliged to transport the goods interstate. The appellant's argument that section 92 applied only to the carriage of goods which were themselves the subject of interstate trade and commerce was rejected by Barwick C.J., who asserted that transport for reward is itself trade and commerce regardless of the nature or subject of the goods carried. Transport of goods for reward which involved the crossing of State borders was interstate trade and commerce and accordingly would be protected as such. Barwick C.J. declared that this protection may extend in certain situations to the carriage of goods for reward which does not cross State lines. He regarded it as an established principle that where the segments of the carriage of goods for reward from a place in one State to another State in truth form part of an entire interstate transport operation the operator in each segment was entitled to the constitutional immunity. He said:

> The principle which, in my opinion, has been accepted can adequately be expressed by saying that a carrier co-operating in the course of his business with other carriers in an entire transport operation across State boundaries is entitled to the protection of s 92 in respect of the performance of his part of that transport, though his activity is confined within the State, provided that his vehicle is used exclusively, or perhaps predominantly, for the performance of the particular interstate transportation.[22]

[22] (1974) 2 A.L.R. 563, 573.

This immunity was independent of any interstate contractual undertakings by the carrier or any burden which was imposed on someone else's interstate trade as a result of the operation of the legislation on the intrastate carriage of the goods. Barwick C.J. suggested that the immunity was derived from the interstateness of the entire operation in which the intrastate carrier was participating and the primary question as he saw it was "whether the transportation of the goods is an entire operation crossing State lines".[23]

How was this fact to be established? Barwick C.J. said that in many cases the existence of a through bill of lading or other contract of carriage will be sufficient *per se* to give rise to the conclusion that an entire transport operation intersecting State borders was contemplated. On his interpretation of the documentary evidence here Barwick C.J. had concluded that the respondent's contractual obligations extended to the delivery of the container in Melbourne and this finding might have constituted evidence of an entire interstate operation.[24] However even in the absence of such evidence the existence of an entire interstate operation might be established by the fact that as a matter of practical reality such an operation was intended,[25] as was the situation in *Russell* v. *Walters*. The interstateness of the entire operation was derived simply from the fact that State lines were crossed.[26] It would appear therefore that little significance ought to be attached to Barwick C.J.'s earlier finding that A.C.T.A. had contracted as principal to procure the transportation of the container to Melbourne rather than as agent for its overseas parent.

In the process of his examination of the decided cases which he claimed enunciated the "entire interstate operation" principle, Barwick C.J. concluded that *Hughes* v. *Tasmania* had been erroneously decided and ought to be overruled.[27] He rejected the distinction which had been made in *Russell* v. *Walters* that *Hughes* v. *Tasmania* was based on the fact that the carrier there was not himself engaged in interstate trade, since both carriers in those cases were in fact performing the identical task of transporting the goods intrastate apart from any contractual obligation.[28] The distinction drawn in *Simms* v. *West* that the interference in *Hughes* v. *Tasmania* was merely a financial exaction from the intrastate carrier which did not impose a burden on the fruit merchant's interstate trade was also rejected by Barwick C.J. as it overlooked the fact that the carrier was complaining of the burden imposed upon him by a system involving the discretionary granting of a compulsory permit.[29]

Having found on the evidence that as a matter of practical reality

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[23] *Ibid.*
[24] *Id.* 574.
[25] *Id.* 578.
[26] *Id.* 585.
[27] *Id.* 584.
[28] *Id.* 583.
[29] *Ibid.* Mason J. rejected the distinctions on similar grounds: *id.* 617.

this case was one which fell within the "entire interstate operation" principle, it remained only for Barwick C.J. to consider the effect on the respondent's immunity of the fact that the container here was destined for overseas. The immunity to which an intrastate carrier is entitled was derived from his co-operation in an entire operation which crossed State lines and in that context his activities assumed an interstate character. Barwick C.J. asserted that the immunity was in no way dependent upon the trade in which the owner of the goods was engaged but was derived simply from the fact that State lines were crossed. The primary issue as he saw it was to characterize the nature of the carrier's trade rather than to characterize the total movement of the goods. Therefore, the fact that it was intended that the container be forwarded from Melbourne to London did not, in Barwick C.J.'s opinion, detract from the respondent's immunity which flowed from the fact that he himself was engaged in interstate trade since he was participating in the movement of the container from St Leonards to Melbourne. The principle expressed in *Fergusson* v. *Stevenson*[30] that "Inter-State trade and commerce protected by s. 92 must include the transport of goods from one State to the ports of export of another for the purpose of shipment abroad"[31] was held to be directly in point.[32]

Generally the reasoning of Gibbs J. was very similar to that of the Chief Justice. Gibbs J. also regarded it as an established principle that:

> if, when all the facts and circumstances have been considered, it is seen that the carriage of goods between two places within one State formed part of what was in truth one larger operation of an interstate character, that carriage must itself be regarded as having been done in the course of interstate trade and commerce and as being within the protection of s 92, notwithstanding that the carrier himself had no responsibility to carry the goods, or to arrange for them to be carried, across the border of the State.[33]

The fact that there was in existence a larger interstate operation could be established by evidence that as a matter of business and practical reality the container was despatched on a single journey from St Leonards to Melbourne.

Gibbs J. agreed that *Hughes* v. *Tasmania* ought to be overruled because of its inconsistency with the "larger interstate operation" principle which had been established in subsequent cases.[34] He also agreed with Barwick C.J. that it was irrelevant to characterize the total movement of the goods. To do so would be to deny that the journey from Bell Bay to Melbourne by A.N.L. was made in the course of interstate trade. The respondent's immunity here was derived from its participation in a larger operation which involved the crossing of State borders and Gibbs J. held that this immunity would not be defeated simply because

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[30] (1951) 84 C.L.R. 421.
[31] *Id.* 433.
[32] (1974) 2 A.L.R. 563, 586.
[33] *Id.* 604.
[34] *Ibid.*

the movement of the container was involved in an overseas operation as well. Since the respondent was himself engaged in interstate trade and commerce he was entitled to rely on the principle expounded in *Fergusson* v. *Stevenson.*

While Mason J. agreed that the appeal should be dismissed for reasons similar to those adopted by Barwick C.J. and Gibbs J., his judgment is unique in several respects. Proceeding on the basis that section 92 protected the entire concept of interstate trade and commerce, Mason J. concluded that the intrastate movement of goods for reward was protected since that intrastate carriage acquired the character of interstate trade and consequently the intrastate carrier co-operating in such an operation was himself engaged in interstate trade and commerce.

While Barwick C.J. and Gibbs J. regarded it as an established principle that section 92 protected the intrastate carriage of goods which formed an integral part of a larger interstate operation, Mason J. took the view that the effect of the decided cases was that such carriage was entitled to the immunity if it appeared that an interference with that carriage constituted an interference with the interstate trade of another, such as that of the consignor, consignee or other person for whom the intrastate carriage was undertaken.[35] Mason J.'s analysis of the decided cases (which, the author respectfully submits, is the more correct) is consistent with the views taken by Stephen and Menzies JJ., but, by a circuitous route Mason J. ultimately agreed with Barwick C.J. and Gibbs J. that the "entire interstate operation" principle was the exclusive test in this aspect of section 92 and that that principle was consistent with the decided cases.[36] He said:

> Nevertheless, in my opinion, it should now be recognized that s 92 accords protection to the carriage because, and solely because, it is an integral part of the interstate movement of goods for reward, whether or not the evidence establishes it to be an infringement of the interstate trade of a person for whom, or on whose behalf, the carriage is undertaken.[37]

Consequently, as did Barwick C.J., Mason J. preferred expressly to rest his decision on the "entire interstate operation" principle rather than on the basis that the effect of the operation of the Traffic Act 1925 (Tas.) on the respondent's trade was to impose a burden on the interstate trade of A.C.T.A. who had contracted as principal to arrange the transportation of the container from St Leonards to Melbourne.[38] Mason J. also agreed that *Hughes* v. *Tasmania* ought to be overruled[39] and that the decision in *Fergusson* v. *Stevenson* ought to be applied in this situation where the respondent was himself engaged in interstate

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[35] *Id.* 612.
[36] *Ibid.*
[37] *Id.* 617.
[38] *Id.* 619.
[39] *Id.* 617.

trade in a derivative sense. Echoing the views of Barwick C.J. and Gibbs J. he pointed out that:

> There is no antithesis or opposition between interstate trade (in so far as it is an element in overseas trade) and trade and commerce with other countries which would make the protection afforded by s 92 inapplicable to commercial transportation across State borders merely because it forms part of an entire and continuous transportation between a point of departure in Australia and an overseas destination.[40]

The notion advanced by Mason J. that section 92 protects the entire concept of interstate trade and commerce including the various acts and transactions by which it is constituted, was expanded considerably by Jacobs J. The issue as he saw it was not whether the respondent was engaged in interstate trade, but whether the container was free to move in the course of trade, commerce and intercourse among the States.[41] This flowed from Jacobs J.'s view that the purpose and effect of section 92 was to create a common area of trade, commerce and intercourse among the States. Accordingly, emphasis should be given to the public as distinct from the private nature of section 92, and in this sense Jacobs J. described section 92 as being primarily a public declaration and injunction rather than the source of an individual's new juristic rights. Therefore the effect of the operation of the Traffic Act on someone else's interstate trade was an issue with which Jacobs J. did not need to concern himself.[42] Nor did he have to face the problem whether the respondent's carriage formed an integral part of a larger interstate operation. Rather, the question which he regarded as critical was simply whether the container of frozen lamb was involved in trade, commerce and intercourse among the States at the time of its interception. This question was easily answered in the affirmative here for it was the owner's intention that the container be transported to Melbourne which necessarily involved the movement of the container across State lines. Since the effect of the Traffic Act was to threaten the owner's freedom to transport his goods interstate Jacobs J. held that the respondent was entitled to rely on the protection of section 92.

This freedom could in no way be reduced or affected by the fact that the owner's goods were destined for overseas since the character of the relevant trade and commerce was to be determined by having regard to activities within Australia. The interstate trade in this container was established to Jacobs J.'s satisfaction by the fact that the owner wanted to transport his container of frozen lamb to Melbourne for export to London and consequently the case was governed by *Fergusson* v. *Stevenson*. Likewise he agreed with Barwick C.J., Gibbs and Mason JJ. that the decision in *Hughes* v. *Tasmania* ought to be overruled.[43]

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[40] *Id.* 620.

[41] *Id.* 623.

[42] Jacobs J. did say that the individual should be able to establish an impact or interference with his trade as a prerequisite to his obtaining the protection of s. 92: *id.* 622.

[43] *Id.* 624.

Although agreeing that the appeal should be dismissed, Stephen J.'s reasoning is conspicuously different from the other majority judgments. Stephen J. accepted the general principle that a carrier may be protected by section 92 even though he himself was not engaged in acts of interstate trade. To the extent to which *Hughes* v. *Tasmania* was inconsistent with that principle Stephen J. agreed that it ought to be overruled.[44] The extension of the section 92 immunity was seen by Stephen J. to have occurred in two situations. First, where the burden imposed on an act of intrastate trade relevantly interfered with another's interstate trade and secondly where intrastate carriage formed an integral part of an interstate operation. Both aspects were considered by Stephen J. to be related since an interstate journey that was effectively separated from an earlier intrastate journey would not normally be burdened in the constitutionally relevant sense by restrictions placed on the latter. The extension of the section 92 immunity in the second situation was based upon the premise that intrastate carriage forming part of an interstate operation acquired that interstate character itself. Where, therefore, the total movement was to an overseas destination as was the case here, Stephen J. considered that the intrastate carriage did not acquire the character of interstate trade and commerce and consequently the respondent could not rely on that argument to secure the protection of section 92. Accordingly, in Stephen J.'s opinion, *Fergusson* v. *Stevenson* bore no relevance to this case since the respondent's carriage did not acquire the character of interstate trade and the respondent was not himself engaged in interstate trade.[45]

On the other hand Stephen J. regarded characterization of the total operation as relevant to the other aspect of the extension of section 92 protection. The basis for the amplification of the immunity of section 92 in the situation where the interference with intrastate trade directly burdened interstate trade was simply to protect that interstate trade. Therefore it would make no difference that the goods were destined for overseas if the burden test were to be applied. Stephen J. remarked that this test involved the identification of some act of interstate trade and the determination whether the subject legislation relevantly burdened that trade when it operated on some act of intrastate trade. It was also necessary to show that the act of intrastate trade was not merely preparatory to the act of interstate trade for otherwise the case would be governed by the decision in *Deacon* v. *Mitchell*.[46] In that case the act of intrastate trade did not form part of the entire interstate operation and consequently the burden imposed on the latter was held to be merely indirect.

Although Stephen J. found A.N.L. to be engaged in interstate trade between Bell Bay and Melbourne he held that the operation of the Traffic Act 1925 (Tas.) on the respondent's carriage from St Leonards

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[44] *Id.* 607.

[45] *Id.* 608.

[46] (1965) 112 C.L.R. 353 and see also *Webb* v. *Stagg* (1965) 112 C.L.R. 374 and *Tamar Timber Trading Co. Pty Ltd* v. *Pilkington* (1968) 117 C.L.R. 353.

to Bell Bay in no way directly burdened A.N.L.'s trade. He declared:

> Only if the consequence of that legislation was shown to be the total abandonment of Donaldson's act of overseas trade, his exporting of lamb to London, could the burden placed upon the respondent's intrastate trade in any way affect Australian National Line's interstate trade and then only quite indirectly and remotely in consequence of its direct effect upon Donaldson's overseas trade.[47]

Stephen J. also found that either A.C.T.A. or the respondent had undertaken in one entire contractual obligation to procure the carriage of the container from St Leonards to Melbourne and therefore was engaged in interstate trade. He held that:

> The conduct of that trade of its nature involved the movement of goods interstate, the performance of the contractual obligations around which that trade revolved required such movement, and it follows that that trade was itself interstate in character—*Bank of New South Wales* v. *Commonwealth* (1948) 76 C.L.R. 1 at 289, 380; *Hospital Provident Fund Pty Ltd* v. *State of Victoria* (1953) 87 C.L.R. 1 at 14-15, 24, 38 and 44.[48]

There was little doubt that the effect of the Traffic Act 1925 (Tas.) was to directly burden the interstate trade of either A.C.T.A. or the respondent since it prevented the respondent from delivering the container to Bell Bay, thereby preventing either A.C.T.A. or the respondent from performing their contractual undertaking to procure the delivery of the container to Melbourne. Consequently Stephen J. was prepared to extend the immunity of section 92 to protect the respondent's intrastate carriage of the container in order to avoid the burden which would have been imposed on the interstate trade of the party who had contracted to procure the transportation of the goods from St Leonards to Melbourne.

It is interesting to note that Stephen J. claimed that it was immaterial to his conclusion whether A.C.T.A. or the respondent engaged in interstate trade as principal or agent for another company.[49] Even if A.C.T.A. had contracted as agent for its overseas parent it would still have been engaged in interstate trade.

The Dissenting Judgments

McTiernan J. upheld the appeal on the ground that the total movement was an overseas operation rather than an interstate operation. He agreed with Stephen J.'s view than an intrastate activity might be protected by section 92 where, as in the particular instance, such activity had acquired an interstate nature by reason of its association with a larger interstate integer.[50] However, he saw no room for the application of that principle here since the larger integer was overseas and not

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[47] (1974) 2 A.L.R. 563, 610.
[48] *Ibid.*
[49] *Ibid.*
[50] *Id.* 588. *Cf. W. & A. McArthur Ltd* v. *Queensland* (1920) 28 C.L.R. 530.

interstate trade. McTiernan J. did not discuss the issue whether characterization of the operation as overseas trade similarly prevented the extension of section 92 where it could be shown that the effect of the operation of the legislation was to directly burden some act of interstate trade.

Fergusson v. *Stevenson* was regarded as irrelevant by McTiernan J. since the port of export here was Bell Bay rather than Melbourne and therefore the container was not transported to Melbourne for the purpose of shipment abroad. It would appear that the significance which McTiernan J. attached to that aspect of the decision in *Fergusson* v. *Stevenson* was unjustified since the Court in that decision declared that the protection of section 92 applied there irrespective of the commercial dealing with the skins at the "port of export". Therefore the fact that the continuity of the overseas shipment from Bell Bay to London was not broken by the trans-shipment to the overseas terminal at Melbourne should not have detracted from the protection of section 92 in this case.

Menzies J.'s judgment is in many respects similar to that of Stephen J. Menzies J. conceded that the effect of the decided cases was to extend the immunity of section 92 to intrastate carriers in two situations. First, where it is established that the carrier was a party to a contractual obligation to carry or arrange to carry the goods interstate as was the situation in *Bell Bros Pty Ltd* v. *Rathbone* where the carrier was himself engaged in interstate trade. Menzies J.'s analysis of the documentary evidence resulted in the respondent not coming within the first situation, since he held that the respondent's contractual obligations were discharged upon delivery of the container at Bell Bay. Secondly, where it was established that the operation of the relevant legislation on his trade had the effect of directly burdening some act of interstate trade and commerce as was also the situation in *Bell Bros Pty Ltd* v. *Rathbone*. So far as the second situation was concerned, Menzies J. arrived at a different conclusion from that reached by Stephen J. While Stephen J. had held that the entering into and the carrying out of an undertaking to procure the carriage of goods interstate was an act of interstate trade, Menzies J. declared that neither A.C.T.A. nor the respondent was engaged in interstate trade. It is difficult to assess the significance which ought to be attached to his earlier finding that A.C.T.A. was at all times contracting as agent of its overseas parent in explaining his conclusion that A.C.T.A. was not engaged in interstate trade.[51] The issue, however, may be merely academic considering his opinion that to enter into a contract with a carrier for the carriage of goods of a third person interstate was not to engage in interstate trade.[52] Although Menzies J. did not discuss the issue whether A.C.T.A.'s contractual undertaking with Huttons constituted interstate trade, one can only presume that he regarded this situation as no different from A.C.T.A.'s other contractual obligations. His view appears consistent with the opinions expressed by Stephen and Mason JJ. that the act of undertaking

[51] (1974) 2 A.L.R. 563, 590.
[52] *Id.* 596.

and performing the obligation to procure the passage of goods interstate is itself an act of interstate trade.

It is equally difficult to understand Menzies J.'s view that notwithstanding the true nature of A.C.T.A.'s trade, the effect of the Traffic Act 1925 (Tas.) on the operation of the respondent's trade did not impose any burden on A.C.T.A.'s trade. Mason and Stephen JJ. agreed that A.C.T.A.'s trade was burdened in that situation simply because the Act operated to prevent the respondent delivering the container to Bell Bay and thereby preventing A.C.T.A. from performing its obligation to procure the carriage of the container to Melbourne by whatever means it desired. It is submitted that their Honours' view on this issue is consistent with the decided cases.[53]

Fergusson v. *Stevenson* was regarded as distinguishable by Menzies J. since the legislation there operated on acts indispensably connected with interstate trade whereas the Act here operated simply on the respondent's intrastate trade. If the respondent had himself been engaged in interstate trade and commerce then Menzies J. conceded that the principle in *Fergusson* v. *Stevenson* might have been relevant. However, Menzies J. declared finally that even if the respondent had been able to bring itself within either of the two areas where the Court has extended the immunity of section 92 this protection would be withdrawn if the total movement of the goods was characterized as overseas rather than interstate trade. Like McTiernan J., Menzies J. held that this fact alone was sufficient to defeat the respondent's claim to the immunity of section 92.[54]

Conclusion

It is not easy to formulate a *ratio decidendi* of the decision. One thing however is certain: *Hughes* v. *Tasmania* was erroneously decided and is no longer authoritative.

Three judges supported the proposition that the intrastate carriage of goods for reward will be protected by section 92 if that carriage formed an integral part of a larger operation of interstate trade.[55] The simplicity of the "larger interstate operation" principle provides its greatest advantage over the alternative principle propounded by Stephen and Menzies JJ. The principle that intrastate carriage will be protected by section 92 if it is established that the effect of the operation of the legislation on that trade is to directly burden some act of interstate trade and commerce poses several difficulties. Its application can produce diametrically opposed results depending on the view which the judge takes of the documentary evidence as is illustrated by the judgments of Menzies and Stephen JJ. On the other hand, the problem of unsatisfactory documentary evidence is largely avoided by the "larger interstate operation" principle since the Court interprets the evidence as a matter of practical

[53] *Cf. Bell Bros Pty Ltd* v. *Rathbone* (1962-1963) 109 C.L.R. 225 and *Simms* v. *West* (1961) 107 C.L.R. 157.

[54] (1974) 2 A.L.R. 563, 597.

[55] Barwick C.J., Gibbs and Mason JJ.

reality from a business standpoint. That a larger interstate operation existed may be established simply by evidence of a course of dealing notwithstanding that there is no evidence of a contractual undertaking to deliver or arrange to deliver the goods interstate. The burden test also raises the problem of what actually constitutes a "direct burden", an aspect of section 92 which has been the subject of much litigation in its own right. Another complex area raised by the burden test is the problem of determining who is engaged in interstate trade and commerce. Again, the judgments of Menzies and Stephen JJ. demonstrate the unfortunate uncertainty and confusion which surrounds this issue. The problem is largely avoided in the "larger interstate operation" principle since the interstate element is established simply by evidence that State lines were crossed.

It is submitted that the "larger interstate operation" principle does apply even though the total movement of the goods may be characterized as overseas rather than interstate trade. The fact that the goods are destined for overseas in no way detracts from the immunity which section 92 guarantees since the premise upon which the "larger interstate operation" principle is based is that an intrastate carrier participating in a larger interstate operation acquires the character of interstateness in his activity in order that the entire concept of interstate trade may be protected. In this sense the approach of Jacobs J. is not dissimilar to this principle, although his approach would appear to go further in expanding the scope of section 92.

The decision in *Pilkington* v. *Frank Hammond Pty Ltd* leaves many questions open. These include the problem of border-hopping; the problem of the extent to which the intrastate carrier must use his vehicle for the purpose of the larger interstate operation; and the problem of when intrastate carriage is merely preparatory rather than integral to the interstate movement of the goods.[56] However it is submitted that if the "larger interstate operation" principle is applied in future decisions, whether involving an overseas element or not, then the decision in *Pilkington* v. *Frank Hammond Pty Ltd* will have made a significant contribution to clarifying at least one aspect of section 92.

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[56] *Cf.* Coper, "The Impact of Section 92 of the Commonwealth Constitution upon Intrastate Segments of Interstate Transportation" (1974) 48 A.L.J. 563.

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