CASE NOTES

ASSOCIATED STEAMSHIPS PTY. LTD. v. THE STATE OF WESTERN AUSTRALIA[1]

Constitutional law—Freedom of interstate trade—What amounts to interference with freedom

The High Court in this case was concerned to determine whether certain provisions of the Stamp Act 1921-1967 of the State of Western Australia were invalid (in so far as they applied to the plaintiff), as contrary to section 92 of the Constitution.

The question arose on a demurrer by the defendant to the plaintiff's statement of claim which stated that it was not obliged by the Act to issue receipts for money paid to it in Western Australia as freight for the carriage of goods interstate, or to pay stamp duty on such receipts. If it was so required the plaintiff claimed that the Act was invalid as contravening section 92. It was also claimed that the plaintiff was not obliged, under an alternative provision, to submit a statement to the Commissioner of Stamps, appointed under the Act, concerning money which would have been liable to duty under the Act and to pay the duty in that alternative manner. If the Act did so oblige the plaintiff this provision was also invalid as contravening section 92. (Section 2A(1) of the Act provided that the Act should be read and construed subject to the limits of the legislative powers of the State of Western Australia, and any provision which would, but for that section, be construed as being in excess of those powers, should be a valid enactment to the extent to which it did not exceed those powers.)

Thus the issue before the Court was whether the requirement of payment of duty on the receipt of money as payment for freight for the carriage of goods interstate constituted an interference with the freedom of interstate trade, commerce and intercourse and thus was invalid under section 92. The legislation here was very different from the complete prohibition embodied in the bank nationalisation legislation considered by the Privy Council in *Commonwealth v. Bank of N.S.W.*[2] Nevertheless it seems that perhaps statutes of a quite different character must be assessed according to the guidelines laid down by the Privy Council in that case concerning the interpretation of section 92.

The interpretation of section 92 has been the subject of conflicting views in the High Court for many years. For a long period during which he dissented from the judgments of the majority of the Court,[3] Dixon J. reiterated an interpretation of this section propounded by him in the case of *O. Gilpin Ltd. v. Commissioner for Road Transport and Tramways (N.S.W.)*.[4] According to this interpretation the protection of section 92 extends only to activities by reason of which trade, commerce or intercourse exists or takes an interstate character. In the words of Dixon J.:

[1] (1969) 43 A.L.J.R. 379. High Court of Australia; Barwick C.J., McTiernan, Kitto, Menzies, Windeyer and Owen JJ.
[2] (1949) 79 C.L.R. 497.
[3] As in *Willard v. Rawson* (1933) 48 C.L.R. 316, 329; *R. v. Vizzard; Ex parte Hill* (1933) 50 C.L.R. 30, 56; *Bessell v. Dayman* (1935) 52 C.L.R. 215, 220.
[4] (1935) 52 C.L.R. 189.

> The expression 'trade, commerce and intercourse among the States' describes a section of social activity by reference to special characteristics. The freedom it gives plainly relates to those characteristics. It is only where they are present that the activity is to be absolutely free . . . [5]

Legislation will only be struck down as contrary to section 92 if, *inter alia,* it fastens on such a characteristic as the selected item(s) upon which it operates. At length the High Court accepted this formula as a logical solution to the problem of interpreting section 92[6] as had the Privy Council in the case of *Hughes and Vale Pty. Ltd. v. N.S.W.* (No. 1).[7] (This case however was the culmination of the so-called 'transport' cases and was confined thus to that area following the setting aside in a separate category of these cases by the *Banking* case.[8])

In 1949 the *Banking* case[9] arose in the Privy Council. However the *Gilpin*[10] formula was neither expressly accepted nor rejected because its application was unnecessary where a law concerning banking was in question, since banking was understood to be part of interstate trade and commerce in accordance with carefully detailed elaboration, especially by Dixon J. in the High Court judgment, and no criterion was thought necessary to rest this fact. The Privy Council put forward a proposition containing two separate links, the key words of which remained undefined. (If it had been possible such definition would have greatly elucidated the whole area of the meaning of section 92.) It was declared[11]

> (1) that regulation of trade commerce and intercourse among the States is compatible with its absolute freedom, and (2) that section 92 is violated only when a legislative or executive act operates to restrict such trade commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote.

There is no definitive statement in the decision handed down as to the extent of permissible regulation, or as to what constitutes a direct, as opposed to a consequential, burden on interstate trade and commerce. Thus the statement has been left open for interpretation according to differing theories as to the extent to which the states and the Commonwealth may intervene in this area.

Recently in *Re Reader's Digest Association Pty. Ltd.*[12] the conflict between the views of the members of the present High Court concerning the interpretation of the propositions of the Privy Council emerged. The legislation challenged was contained in the Trading Stamps Act 1924-1935 (S.A.) and prohibited the issue of 'trading stamps' (as defined by the Act) entitling the acceptor of the stamps to receive goods free of cost or at an allegedly reduced price. The Chief Justice, Sir Garfield Barwick, found that the legislation in question was invalid as contravening the freedom given by section 92. He was prepared to extend the freedom of the individual trader and consequently to limit the amount of valid regulation of trading by the states to a greater extent than the other members of the Bench[13] who considered the legislation

[5] *Ibid.* 205.
[6] As in *Hospital Provident Fund Pty. Ltd. v. Victoria* (1953) 87 C.L.R. 1.
[7] (1954) 93 C.L.R. 1 (P.C.).
[8] (1949) 79 C.L.R. 497.
[9] *Ibid.*
[10] (1935) 52 C.L.R. 189.
[11] (1949) 79 C.L.R. 497, 639.
[12] (1969) 43 A.L.J.R. 116.
[13] McTiernan, Kitto, Taylor and Menzies JJ.

to be valid regulation by South Australia. In determining whether the legislation was within the protection of section 92 as forming part of interstate trade, commerce or intercourse, he refused to be bound by formulae such as that put forward in the *Gilpin* case.[14] He interpreted the *Banking* case[15] as abolishing the 'legislative subject matter' test which determines validity by asking whether the law challenged was a law with respect to interstate trade. The legislation could not escape the effect of section 92 under the guise of permissible regulation, in his view, since the 'regulation' contemplated was limited to prevention of interference in trade by one free man with the like freedom of another equally 'free man'.

The other members of the High Court found the legislation to be permissible regulation of trade. Kitto J. took the opportunity to reiterate the *Gilpin* formula and found the legislation to be outside the area of section 92 because it did not take as the subject matter upon which it operated an activity forming an essential part of interstate trade.

In the present case the issue raised the question of the interpretation of the word 'direct' as it occurred in the second limb of the statement of the Privy Council.

The Chief Justice once again refused to be bound by any formulae concerning the legal operation of the legislation. According to the opposing view mere economic or social consequences of legislation were not a 'direct' restraint. This view he definitely rejected. He held the Stamps Act provisions in question were repugnant to section 92 since the receipt duty may be characterised as a tax and thus a burden placed upon the commercial activity of transferring goods from one state to another. He regarded the charging or receiving of freight for such transportation as an essential part of the activity and the tax here is levied upon the charging of such freight. Thus although the legislation may strictly speaking be said legally to operate only upon the receipt of money, its economic effect in reducing the value of freight was on the whole transaction, and such effects, in his view, could not be ignored. His Honour held that such a view was not inconsistent with that of the Privy Council in the *Banking* case and interpreted a 'direct' restraint as including such economic effects.[16] Even if under section 99(2) of the Act a receipt was compulsorily created in order that it should be stamped with the appropriate amount of duty being paid, the Chief Justice found that a tax on an activity rather than on the creation of an instrument had been imposed, since the receipt had no commercial value and nevertheless was demanded by the Act. Thus the same principles applied as if the provisions of section 99B were complied with and a tax was paid without the issuing of receipts.

Owen J.[17] agreed with the reasoning of the Chief Justice.

Kitto J.[18] however adhered to the well established *Gilpin* formula as affirmed, in his view, by the Privy Council in the *Banking* case. He thus refused to use the words 'direct restraint' in any other sense than as referring to the strict legal operation of the legislation excluding any protection under section 92 against economic or social effects of legislation. He regarded the legal operation of the Stamps Act of Western Australia to be on the creation

[14] (1935) 52 C.L.R. 189.
[15] (1949) 79 C.L.R. 497.
[16] 43 A.L.J.R. 379, 382.
[17] *Ibid.* 385.
[18] *Ibid.* 383.

of a receipt and thus not upon any activity forming an integral part of interstate trade, commerce or intercourse, and not invalid as offending against the provisions of section 92.[19]

Menzies J.[20] agreed with Kitto J.

Windeyer J.[21] found that the legislation could offend section 92 but did not do so because it constituted permissible regulation. He thus constituted the third member of the majority in this case but appears, on the other hand, to align himself with the reasoning of the Chief Justice so far as the meaning of 'direct restraint' is concerned.

Thus the course to be adopted by the High Court in future decisions concerning the amount of interference permitted to the states in the area of interstate trade and commerce seems once again to be facing uncertainty reminiscent of the past. No indication is given as to whether the *Gilpin*[22] formula will remain as a logical method with which to draw the line between what is permissible and what is not permissible interference, excluding consideration of economic and social factors. It may be that such considerations present difficulties in the exercise of judicial power though constitutional law has often faced and resolved such matters. It is to be remembered that in the *Banking* case the Privy Council itself said:

> The problem to be solved will often be not so much legal as political, social or economic. Yet it must be solved by a court of law . . . It is vain to invoke the voice of Parliament.[23]

KATHARINE GORMAN

RE HEMBURROW, DECEASED[1]

Administration and probate—Omission of phrase from will—Jurisdiction to grant probate of will textually different from that signed by testatrix

In March 1966, Alice Hemburrow instructed her son to make certain changes in her will. In retyping the will on a printed will form, there was a mistake in copying the residuary clause. Instead of repeating the words 'I give, devise and bequeath the whole of my real estate and the residue of my personal estate unto my trustee', the phrase 'the residue of my personal estate' was omitted. The will was duly executed in ignorance of the error.

The executor, who was the testatrix's son, sought to have probate granted of the will with the word 'real' omitted from the residuary clause. Gillard J. dismissed the motion and probate was granted of the will as it stood at the death of the testatrix. On the evidence, His Honour was satisfied that the presumption, as to knowledge and approval by the testatrix of the contents of the will, was not rebutted.[2] In any case, the omission sought was unwarranted as the testatrix had meant the word 'real' to be included. Such an omission would be remaking the testatrix's will and altering the sense of her testamentary document.[3]

[19] See also on this point *Grannall v. Marrickville Margarine Pty. Ltd.* (1955) 93 C.L.R. 55, where manufacture was held by the High Court to be outside the meaning of interstate trade and commerce, and thus not under the protection of section 92.
[20] *Ibid.* 385.
[21] *Ibid.*
[22] (1935) 52 C.L.R. 189.
[23] (1949) 79 C.L.R. 497, 639.
[1] [1969] V.R. 764. Supreme Court of Victoria; Gillard J.
[2] *Ibid.* 765.
[3] *Ibid.* 766.