HIGH COURT OF AUSTRALIA

Nilson

Vs.

The State Of South Australia

(Dixon C.J.(1), McTiernan(1), Webb(1), Williams(2), Fullagar(3), Kitto(4) and Taylor(5) JJ.)

9 June 1955

CATCHWORDS

Constitutional Law (Cth.) - Freedom of inter-State trade commerce and intercourse - State Statute - Prohibition on driving of unregistered motor vehicles on State roads - Payment of heavy fee based on weight and horse-power of vehicle at time of application for registration - Registration for six months or twelve months - Application to vehicles used exclusively for purposes of inter-State trade - Exemption by regulation of vehicles owned by residents of and registered in other mainland States - Amending regulation removing exemption in case of vehicles weighing two and one-half tons or more unladen - Validity - The Constitution (63 & 64 Vict. c. 12), s. 92 - Road Traffic Act 1934-1954 (No. 2183 of 1934 - No. 48 of 1954) (S.A.), ss. 7 (1) (2) (3), 8 (1) (2), 9 (4) - Acts Interpretation Act 1915-1949 (No. 1215 of 1915 - No. 58 of 1949) (S.A.), s. 22a - Road Traffic Act Regulations 1951 (S.A.), reg. 42 as amended by Variation of Road Traffic Act Regulations 1951 made on 23rd December 1954, reg. 2.

HEARING

Melbourne, 1955, May 10, 11, 12; June 9. 9:6:1955 CASE STATED.

DECISION

June 9.The following written judgments were delivered: -

DIXON C.J., McTIERNAN (See addendum, (1955) 93 CLR, at p 183) AND WEBB JJ. suit in which it is stated was instituted in this Court against the State of South Australia, the Attorney-General, the Minister of Roads and the Registrar of Motor Vehicles of that State. The plaintiff sues on behalf of himself and a number of persons firms and companies whom he names all of whom carry on business as carriers of goods by road. The object of the suit is to obtain declarations of right relieving the plaintiff and the parties whom he represents of the application of certain provisions of the Road Traffic Act 1934-1954 (S.A.). The plaintiff says that the provisions cannot apply to them consistently with s. 92 of the Constitution. They own "commercial motor vehicles", as the Act calls motor lorries and the like, and these vehicles are registered under the motor car legislation of other States. The plaintiff and each of the parties whom he represents carries on business as a carrier of goods by road by means of the commercial motor vehicles he owns. They carry goods between Adelaide and Melbourne, Sydney or Brisbane. None of the vehicles is used for the carriage of goods upon an intra-State journey. The Road Traffic Act provides that no person

shall drive any motor vehicle on any road unless that vehicle has been registered under Pt. II of the Act: s. 7. An application to register a motor vehicle must be made to the defendant registrar by or on behalf of the owner and at the time of application a fee calculated as provided in the Act must be paid: s. 8 (1). The period of registration is, at the option of the applicant, either six or twelve months and if six months is chosen the fee is fifty-two and a one-half per cent of the fee for twelve months: ss. 8 (2), 9 (6b) and 16 (2). The registration fees are calculated by a formula based on the weight of the vehicle and the horse-power of the engine determined in a manner prescribed by the statute: s. 9 (1). As this "power-weight" increases the rate payable advances according to a graduated table. There is a separate graduated table for commercial motor vehicles: s. 9 (4). The result is to impose a very substantial tax which for large transport vehicles may amount to a heavy annual charge. The Act confers power on the Governor in Council to make regulations providing for the exemption of registration of motor vehicles owned by persons resident outside the State of South Australia and temporarily in the State: s. 61 (1) (xii). Under this power the Road Traffic Act Regulations 1951, as in force up to 31st January 1955, had provided that a motor vehicle owned by a resident of any of the five mainland States or of the Capital Territory, if insured and registered under the laws of the State or Territory, might be driven in South Australia without registration so long as certain conditions were observed: reg. 42. The conditions to be observed are not material nor is the distinction between the mainland States and Tasmania. A separate provision was made as to Tasmania and the other Territories: reg. 41. Had the first-mentioned provision remained in force the plaintiff and those whom he represents would not have been obliged to register their vehicles in South Australia and pay the charges thereon. But by a regulation made on 23rd December 1954 taking effect on 31st January 1955 it was provided that the exemptive provision should not apply to a motor vehicle the unladen weight of which is two and a half tons or more. This, however, brought the commercial motor vehicles in question within the operation of ss. 7, 8 and 9, requiring registration and payment of the fee or charge. The plaintiff's case is that this amounts to a tax upon inter-State transportation which is inconsistent with the freedom of trade commerce and intercourse among the States guaranteed by s. 92. (at p303)

2. It is difficult to see what other character it can bear. The roads cannot be used unless the vehicle is registered and the vehicle cannot be registered unless the imposition is paid. Before a commercial motor vehicle carrying goods from another State can enter South Australia the owner must register it and pay the large fee or tax. The registration will enable him to use South Australian roads for six months if he pays fifty-two and one-half per cent of the yearly fee. But he may not need to use them again or he may intend to use them only intermittently. The decision of the question is covered by the reasons given in Hughes & Vale Pty. Ltd. v. State of New South Wales (No. 2) (1955) 93 CLR 127 which should be read as part of this judgment. (at p303)

3. There is no attempt made here to impose a charge for the use of the roads measured according to mileage or ton-mileage or in any other way reflecting the service or advantage which the owner of the motor vehicle actually obtained from South Australian roads or the burden he placed upon them or his contribution to their deterioration. Like the Motor Vehicles (Taxation) Act 1951 (N.S.W.) it simply imposes a tax burdening transportation. It is said for the State that it is inconsistent with the decision of the Court in Willard v. Rawson [1933] HCA 12; (1933) 48 CLR 316 to hold that, by reason of s. 92, the tax cannot apply to commercial motor vehicles entering South Australia from other States. That decision was elaborately examined during the argument not without reference to the views which Dixon C.J. expressed about it in the period that intervened before R. v. Vizzard; Ex parte Hill [1933] HCA 62; (1933) 50 CLR 30 and the subsequent Transport Cases were overruled in Hughes & Vale Pty. Ltd. v. State of New South Wales (No. 1) (1955) AC 241; (1954) 93 CLR 1 (see R. v. Vizzard; Ex parte Hill [1933] HCA 62[1933] HCA 62; ; (1933) 50 CLR 30, at p 70 ; O. Gilpin

Ltd. v. Commissioner for Road Transport & Tramways (N.S.W.) [1935] HCA 8; (1935) 52 CLR 189, at p 210 ; Hughes & Vale Pty. Ltd. v. State of New South Wales (No. 1) [1953] HCA 14; (1953) 87 CLR 49, at p 69). All that Dixon C.J. finds it necessary to say now is that the decision of the majority of the Court, in so far as it is not to be accounted for by an adherence to a conception of the operation of s. 92 which is no longer open, appears to depend simply upon a characterization of the legislative provision there in question, a characterization in which he found himself at the time unable to agree: see O. Gilpin Ltd. v. Commissioner for Road Transport & Tramways (N.S.W.) [1935] HCA 8; (1935) 52 CLR 189, at p 210 and Hughes & Vale Pty. Ltd. v. State of New South Wales (No. 1) [1953] HCA 14; (1953) 87 CLR 49, at p 69 . We certainly are not prepared to give the same characterization to the provision now in question. (at p304)

4. Section 22a of the Acts Interpretation Act 1915-1949 (S.A.) contains a "severability provision" which prevents the foregoing conclusion from operating to invalidate ss. 7 (1), 8 and 9 (4). It means only that motor vehicles which are exclusively engaged in inter-State transportation need not pay the fee and register under ss. 8 and 9 (4). There is no need to consider whether the system of registration stripped of the necessity of paying the fee could operate upon such motor vehicles; for upon the terms of ss. 8 (1) and (2) and 9 (6b) registration cannot be disentangled from payment of the fee. They are provisions which in combination are altogether inapplicable to the vehicles in question of the plaintiff and those he represents. Had this particular severance been legitimate, the considerations governing the decision of the case of Armstrong v. State of Victoria [1955] HCA 26; (1955) 93 CLR 264 might be found to be relevant. Indeed the view which may be more properly taken of this case is that s. 92 simply operates to invalidate the regulation made on 23rd December 1954 so far as it purports to amend reg. 42. Until that regulation came into purported operation the law of South Australia relating to registration and payments of the fee did not so far as appears invade s. 92 in relation to commercial motor vehicles entering South Australia from another State. It was therefore the making of this amending regulation which was ultra vires. (at p304)

5. In Hughes & Vale Pty. Ltd. v. State of Queensland [1955] HCA 29; (1955) 93 CLR 247 and in Armstrong v. State of Victoria [1955] HCA 26; (1955) 93 CLR 264 questions were raised as to the relevance of certain facts and circumstances. Analogous questions are raised by the special case in the present proceeding. As in those cases the facts relied upon are largely matters of public general knowledge or opinion and in any case incapable of giving to the provisions impugned here a valid operation they would or could not otherwise possess. (at p305)

6. In answer to the questions in the special case it is enough to declare that so long as the commercial motor vehicles mentioned in the special case are used exclusively in or for the purposes of inter-State trade commerce or intercourse among the States the plaintiff and the persons firms and companies on whose behalf he sues or any of them and the drivers of such vehicles are not within the operation of ss. 7 (1), (2) and (3), 8 (1) and (2) and 9 (4) of the Road Traffic Act 1934-1954 (S.A.) and that cl. 2 of the regulations under that Act made on 23rd December 1954 is void except in so far as it relates to Territories. (at p305)

WILLIAMS J. The decision of this Court in Hughes & Vale Pty. Ltd. v. State of New South Wales (No. 2) [1955] HCA 28; (1955) 93 CLR 127 and in particular the reasons given for holding that the provisions of the Motor Vehicles Taxation Management Act 1949-1951 (N.S.W.) and the Motor Vehicles (Taxation) Act 1951 (N.S.W.), which correspond to the provisions of the Road Traffic Act 1934-1954 (S.A.) under attack, offend against s. 92, and are inapplicable to motor vehicles engaged exclusively in inter-State trade, commerce and intercourse, must lead inevitably to the conclusion that the proposed order in the present case is right. I agree with this proposed order. In the course of

the argument Mr. Chamberlain for the State of South Australia referred, amongst other favourable references to Willard v. Rawson [1933] HCA 12; (1933) 48 CLR 316 , to the one I made in McCarter v. Brodie [1950] HCA 18; (1950) 80 CLR 432, at p 476 where I said I thought it was clear that that case was rightly decided. But that remark was made whilst I still believed that I was entitled to think that the fact that a State provided a facility for inter-State trade, commerce and intercourse such as a road gave the State an interest in the road of a proprietary nature and authorized it to exercise very wide powers of control over the use of the road without impaling itself on s. 92. But now I am no longer entitled so to think, judicially at any rate, whatever my personal opinion may continue to be; and with that disentitlement, my previous approval of Willard v. Rawson [1933] HCA 12; (1933) 48 CLR 316 must, I fear, melt into thin air "and like the baseless fabrick of this vision . . . dissolve; and . . . leave not a rack behind". (at p305)

FULLAGAR J. I agree with the order proposed. I think the case is covered by the reasons which I gave in Hughes & Vale Pty. Ltd. v. State of New South Wales (No. 2) [1955] HCA 28; (1955) 93 CLR 127 in relation to the Motor Vehicles Taxation Management Act 1949-1951 (N.S.W.) and the Motor Vehicles (Taxation) Act 1951 (N.S.W.). (at p306)

KITTO J. I adhere to the opinion I have expressed as to charges in the case of Hughes & Vale Pty. Ltd. v. State of New South Wales (No. 2) [1955] HCA 28; (1955) 93 CLR 127, but otherwise I agree with the judgment which the Chief Justice has delivered. (at p306)

TAYLOR J. In this matter questions similar to those raised in Pioneer Tourist Coaches Pty. Ltd. v. State of South Australia [1955] HCA 32; (1955) 93 CLR 307 were raised by special case in relation to the use of South Australian roads by vehicles engaged in the carriage of goods exclusively in the course of inter-State journeys. (at p306)

2. For the reasons given in that case I agree that the questions raised by the special case in this matter should be answered as proposed. (at p306)

ORDER

In answer to the questions submitted by the special case declare that so long as the commercial motor vehicles mentioned in the special case are used exclusively in or for the purposes of inter-State trade commerce or intercourse among the States the plaintiff and the persons firms and companies on whose behalf he sues or any of them and the drivers of such vehicles are not within the operation of ss. 7 (1), (2) and (3), 8 (1) and (2) and 9 (4) of the Road Traffic Act 1934-1954 (S.A.) and that cl. 2 of the regulations under that Act made on 23rd December 1954 is invalid except in so far as it relates to Territories.

The costs of the special case to be paid by the defendants.

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