CONSTITUTIONAL LAW

Section 92: Repairs and Interstate Trade

The extent of s.92 has been again considered by the Supreme Court in *Schwerdt* v. *Telford* [1960] S.A.S.R. 41.

The defendant was charged with having driven an unregistered vehicle on a road between Adelaide and Mount Gambier, South Australia. The defendant admitted that the vehicle was unregistered, but his defence was that at all material times it was being used exclusively in and for the purposes of interstate trade and commerce and was, therefore, within the protection of s.92 of the Constitution.

The defendant was engaged in the business of a carrier with his headquarters at Mount Gambier. His business was mainly, if not entirely, carrying interstate between South Australia and Victoria, and for that purpose he had three semi-trailers. The vehicle in question had been involved in a collision while taking a load of wool to Melbourne and after the accident it had been towed back to Mount Gambier. Normally the vehicle would have been repaired at Mount Gambier. However, the insurers of the vehicle took the matter out of the hands of the defendant and took the "prime-mover", the part of the semi-trailer requiring repair, to Adelaide for repair. The repairs having been effected about one month later, the defendant came to Adelaide and drove the prime-mover back to Mount Gambier. It was on this journey that the alleged offence occurred. Three days later the vehicle was engaged again in interstate trade.

The defendant admitted that he could have carried the "prime-mover" back to Mount Gambier on one of his other semi-trailers, but he explained that these were in use, and he wanted to get the "prime-mover" back on to the road as soon as possible.

The complaint was dismissed by the magistrate on the view that the case was within the principle of *Fry* v. *Russo* (1958) S.A.S.R. 2121 (see note 1 Adelaide L.R. 78). He found that up to the time of the accident the vehicle had been used exclusively in and for the purposes of interstate trade or commerce, and further that the defendant's intention throughout had been to repair the vehicle and return it to its former use. The defendant was, therefore, protected by s.92.

The complainant appealed, the question raised being whether the vehicle on the return trip to Mount Gambier was being used on a transaction within the ambit of s.92. Napier C.J. and Ross J. allowed the appeal, but Mayo J. dissented. Napier C.J. and Ross J. had also been the majority in *Fry* v. *Russo*. The Chief Justice was of the opinion that the magistrate had carried the principle of *Fry* v. *Russo* beyond anything decided in that case. He continued: "s.92 must be reasonably understood and applied, and it may be a question of fact and degree (a test he used in *Ridland* v. *Dyson* (unreported), noted in 1 Adelaide L.R. p. 80) whether the particular use of the vehicle is for the purposes of interstate trade". It is the *use* of the vehicle and not the *vehicle* as such that is protected. Since the vehicle while being repaired and driven back was not being used for the purposes of interstate trade or commerce, the occasion in question was, therefore, not protected by s.92.

The "prime-mover" could not be used for the purpose of interstate trade without the trailer. The operation was preparation for carrying and not commencement of carrying. It was ancillary to and not an incident of interstate trade.

The qualifications which his Honour suggests might be allowed are interesting:

> (1) If the interruption of use was "transitory" and not substantial it may be possible to regard the vehicle as being used exclusively for interstate trade. Had the interruption been for a few days instead of a month, the occasion may have been protected.
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> (2) Had the trailer been kept close to where the "prime-mover" was being repaired, it may have been possible to regard the driving to the place where the trailer could be picked up as an incident of interstate trade. But a long journey was not such an incident.

Both qualifications may be subjected to the same criticism, namely —"Where is the line to be drawn?" Is an interruption of 14 days transitory or substantial? Is a journey of 150 miles (Mount Gambier is about 300 miles from Adelaide) to pick up a trailer too long? The test of "fact and degree" provides no real answer. Either such a transaction as this is or is not one under the aegis of s.92.

Mr. Justice Mayo asked whether the delivery of a new vehicle acquired solely for use in interstate transactions was protected by s.92. The implied answer was, No. Similarly every vehicle in constant use requires repair, which is a concomitant of interstate trade, where the vehicle was entirely devoted to that kind of trading, and therefore within s.92. Again, all vehicles are subject to the risk of collision and consequential repair which will also be a part of interstate trade if the vehicle is being exclusively used in such trade. "But the steps taken must be convenient, economical and reasonable".

To distinguish transactions necessary for interstate trade and those merely antecedent, regard will be had to the *degree* of association of these matters. This is the same test as the "fact and degree" test of Napier C.J. noted above. The greater expense involved in the journey to Adelaide must be weighed against the possibility of better work being done in Adelaide. The magistrate found that the bringing of the repair job to Adelaide "was the most economical thing to do". Mayo J. agreed and, therefore, would have dismissed the appeal.

While Ross J. accepted the facts as found by the magistrate without qualification, he drew his own inferences from the facts and concluded that the vehicle on its trip to Mount Gambier was not being used exclusively *in* interstate trade, nor for the purposes of such trade.

The warning of the High Court in *Grannall* v. *Marrickville Margarine Pty. Ltd.* (1955), 93 C.L.R. at 79 was repeated by Ross J., who also held that the present case was very different from *Fry* v. *Russo,* where only a short journey had been undertaken.

The question of how far back the protection of s92 extends, though formulated several times, has never been settled. (These tests sug-

gested are outlined in 1 Adelaide Law Review at p. 78 and the articles there referred to.) Though the test in *Grannall's Case* is often cited, its application is often elusive. Napier C.J. has applied a test of fact and degree (See *Ridland* v. *Dyson* (supra); *Fry* v. *Russo* (supra) and the present case).

Both the test and conclusion are often arbitrary and a different answer could easily be made, as in most s.92 cases, if there were some differences of fact and circumstance to be considered. This is, of course, a most unsatisfactory position.

THE M'NAUGHTEN RULES

Medical Evidence and Insanity

The practical and conceptual difficulties of applying the M'Naughten Rules in the contemporary criminal trial appear to have been accentuated by the judgment of the Privy Council in *Attorney-General for South Australia* v. *Brown*.[1] The extent of the law's dilemma is more fully revealed when it is recognised that the views of the High Court on this matter, which the Privy Council modified considerably in setting aside the judgment of the High Court[2] and restoring the verdict and judgment of the trial court, were themselves open to strong theoretical and practical objections, some of them outlined in the previous issue of this journal.[3] The High Court had developed the view, first expressed in *Sodeman* v. *R.*,[4] that "domination by uncontrollable impulse . . . may afford strong ground for the inference that a prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong".[5] Such a view is closely related to the High Court's doctrine[6] that if a man is incapable of reasoning with a moderate degree of sense and composure as to the rightness or wrongness of an act, he cannot be said to "know that what he is doing is wrong"—and it is well known that this interpretation of the M'Naughten Rules is by no means the same as that advanced by the English Court of Criminal Appeal in, for example, *R.* v. *Windle*.[7] The Privy Council, however, took no advantage of their opportunity to give some unified direction to the Common Law (if, indeed, there is a Common Law to England, Australia, and the various Australian States), but preferred to dissent from the High Court's view of "irresistible impulse" on only the narrowest of grounds. In brief, their Lordships demanded medical evidence, in every case in which the prisoner's self-control is in doubt, as to the effect of any (medically demonstrable) irresistible impulse on that prisoner's ability to know the nature and quality of his act or that his act is wrong. The law, they said, will not presume any effect without such evidence.

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1. [1960] I W.L.R. 558.
2. *Brown* v. *R.* [1959] Argus L.R. 808; 33 A.L.J.R. 89.
3. I Adel. L.R. 69-74, a full comment which may be thought to anticipate to a great degree (albeit fortuitously) the views of the Privy Council.
4. (1936) 55 C.L.R. 192.
5. *Brown* v. *R.* [1959] Argus L.R. at 814; 33 A.L.J.R. at 93.
6. *Stapleton* v. *R.* (1952) 86 C.L.R. 358.
7. [1952] 2 Q.B. 826.