CASE NOTES

CHAPMAN v. SUTTIE[1]

Constitutional law—Freedom of interstate trade, commerce and intercourse—Dangerous things or implements—Firearms—Constitution section 92.

Section 24 (1) of the Firearms Act 1958 (Vic.) provides that a person shall not sell to any other person any firearm unless the purchaser produces to the seller a firearm certificate authorizing the purchaser to purchase such a firearm or unless the purchaser gives reasonable proof that he is by virtue of the Act entitled to purchase such a firearm without producing such a certificate.

Section 17 requires every holder of a gun dealer's licence to keep a register of transactions and to make therein entries of prescribed particulars. In addition, it provides by sub-section (1) (d) that in the case of the sale of a firearm within the meaning of Part III of the Act the holder of a gun dealer's licence shall at the time of the transaction require the purchaser to produce and deliver up to him the firearm certificate entitling the purchaser to purchase the firearm unless the purchaser gives reasonable proof that he is by virtue of the Act entitled to purchase the firearm without having such a certificate.

Section 22 (1) provides that subject to the Act ' no person shall purchase or have in his possession or carry a firearm unless he holds a firearm certificate authorizing him to do so '. Sub-section (2) provides that a licence shall be issued if the Chief Commissioner of Police or an authorized officer is satisfied that—

(a) the applicant has good reason for making the application;

(b) the applicant is not by law prohibited from possessing a firearm; and

(c) the applicant is not a person of intemperate habits or unsound mind or *otherwise unfit to be entrusted with such a firearm.*[2]

The appellants in *Chapman v. Suttie*[3] were licensed gun dealers within the meaning of the Act and they made, in Victoria, seven separate sales of firearms, to persons resident in other States, without observing the statutory requirements concerning the production of a firearm certificate. In these circumstances thirteen informations were exhibited alleging offences on the part of the appellants. Four informations alleged a breach of section 24 (1) and the remainder alleged breaches of section 17 (1) (d). There were convictions in each case and appeals were brought to the High Court pursuant to section 73 of the Constitution and section 39 of the Judiciary Act 1903-1959.

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[1] (1962-1963) 36 A.L.J.R. 342. High Court of Australia; Dixon C.J., Taylor, Menzies, Windeyer and Owen JJ.

[2] Italics added.

[3] (1962-1963) 36 A.L.J.R. 342.

The High Court upheld the appeals ruling that sections 17 (1) (d) and 24 (1) of the Firearms Act (Vic.) could not by reason of section 92 of the Constitution validly apply to the sales in question.[4]

In the course of their judgments Taylor, Menzies and Owen JJ. concluded that there might be transactions which would fall outside the protection of section 92 by virtue of the fact that they are not *bona fide* and for a lawful purpose, or, to put it another way, that the subject matter of the transactions are not legitimate articles of commerce. In their view, however, conventional firearms, bought for a legitimate purpose, did not fall within such a category.[5] Windeyer J., on the other hand, approached this problem in a completely different way, and said:[6]

> The transactions in question were bona fide transactions of interstate commerce . . . The question on which the case was made to turn was the effect of section 92. This does not, I think, depend on whether firearms are to be described as articles of commerce, or are to be regarded as in some special category of dangerous, or potentially dangerous, things to which section 92 does not apply. Poisons and drugs are as much subjects of commerce as are pickles and soft drinks, guns as much so as motor cars and sheep. Traffic in one, as much as in another, is within the assurance and protection that section 92 affords. The question is whether in fact commercial traffic in the goods in question is impeded in such a way that section 92 is infringed . . . . The character of the goods sold may be an element in determining the nature of the control that is exerciseable before freedom of trade in them is invaded. But the character of the goods is only a part of a totality of circumstance that must be considered.

The decision of the High Court can be contrasted with that of the Supreme Court of South Australia in *Coghlan v. Fleetwood*[7] in which similar South Australian legislation was held not to offend against the provisions of section 92 of the Constitution. The Chief Justice of the

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[4] By Taylor, Menzies and Owen JJ., Windeyer J. dissenting on this point, on the ground that the issue of a certificate under the Act was left, by the Act, to the discretion of an official of the State. By Windeyer J. on the ground that the Act and Regulations placed obstacles in the way of anyone resident outside Victoria obtaining a certificate under the Act. *Per* Dixon C.J. (dissenting) at p. 342 '. . . for now that judicial decisions appear to have succeeded in settling the chief general tests governing the application of s. 92 to laws and governmental action said to impair or adversely affect transactions of trade, commerce or intercourse among the States, it has seemed to me that the question whether a given transaction obtains the protection of s. 92 from the interference of a statutory provision or an exercise of governmental authority must be determined by the facts of the transaction rather than the general character of the law considered in the abstract'. The Chief Justice went on to hold that, notwithstanding any possible defects in the legislation, the appellant had not on the facts of the case shown an infringement of s. 92.

[5] Dixon C.J. expressly referred to the fact that the conflict between complete freedom of trade in dangerous goods and the measures of control which could be imposed in the interests of safety had not received much consideration in the courts.

[6] (1962-1963) 36 A.L.J.R. 342, 351.

[7] [1951] S.A.S.R. 76; Ligertwood and Abbott JJ. concurring with the judgment of Napier C.J. In the High Court Menzies J. was the only one to refer to this decision and expressly reject it.

Supreme Court of South Australia did not consider, nor had addressed to him, any argument related to discretionary licensing, and upheld the legislation on the ground that section 92 of the Constitution leaves to each State the power to regulate traffic in pistols which are a menace to the public safety if they come into the hands of the wrong people and, consequently, if there was a prohibition on trade with other States it was indirect, resulting from an exercise of the power of regulation which the State must necessarily have to ensure order.

Notwithstanding that the majority of the High Court decided the question on the basis that the licensing of interstate trade in firearms was discretionary there remains a conflict of opinion as to the operation of section 92 of the Constitution in relation to dangerous goods; on the one hand, Taylor, Menzies and Owen JJ. taking the view that there may be a category of goods to which section 92 has no application; on the other hand, Windeyer J.[8] saying that section 92 applies to trade in all goods and that what the court must do is determine whether the prohibition of trade amounts to a regulation of that trade within the meaning of the *Bank Nationalization Case.*[9] In examining this conflict and its possible outcome it is necessary to look to the decided cases.

In *R. v. Smithers*; *Ex parte Benson*[10] Barton J., referring to the police powers of the States, said that the position might be that, notwithstanding Federation and section 92, the States retained the right to exclude persons dangerous to domestic order, health or morals, but that such a right would be limited by the existence of some necessity for the defensive precautions.

In *Ex parte Nelson* (No. 1)[11] Knox C.J., Gavan Duffy and Starke JJ., applying dicta in *McArthur's Case*[12], upheld New South Wales legislation prohibiting the introduction into the State of diseased stock from Queensland. Isaacs, Higgins and Powers JJ. took the view that the legislation was directed to trade and commerce and that it infringed the freedom of interstate trade as guaranteed by section 92; however, they did say that laws of general operation, not in terms referable to trade and commerce, could validly operate to control matters of the kind mentioned in *McArthur's Case.*[13]

Ex parte Nelson (No. 1)[14] was referred to and distinguished in *Tasmania v. Victoria*[15] where a proclamation under section 4 of the Vegetation and Vine Diseases Act 1928 (Vic.) prohibiting the introduction into Victoria of Tasmanian potatoes, on the ground that it was believed

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[8] *Cf.* the reasoning in *Coghlan v. Fleetwood* [1951] S.A.S.R. 76.

[9] *Commonwealth v. Bank of New South Wales* (1949) 79 C.L.R. 497.

[10] (1912) 16 C.L.R. 99, 110.

[11] (1928) 42 C.L.R. 209.

[12] *W. & A. McArthur v. Queensland* (1920) 28 C.L.R. 530, 550, 551 where it was said that s. 92 affords no protection for a person dealing in goods that are dangerous, such as ' gun powder or wild cattle or a mad dog ', or are stolen or offensive and that he must submit to any relevant State law.

[13] *Ibid.*

[14] (1928) 42 C.L.R. 209.

[15] (1934-1935) 52 C.L.R. 157.

that they were diseased, was held to infringe section 92. The absolute prohibition on the importation of Tasmanian potatoes, without regard to whether or not the potatoes were in fact diseased, went too far and did not come within the ambit of the dicta of the Privy Council in *James v. Cowan*[16] where it was said that if the primary purpose of the legislation was not directed to trade and commerce, but to such matters as defence against the enemy, prevention of famine, disease and the like, then it would not be open to attack if incidentally interstate trade was affected. Dixon J.,[17] adopting the approach of Isaacs and Higgins JJ. in *Ex parte Nelson* (No. 1),[18] refused to characterize the proclamation as a law with respect to disease and held it to be prohibition on trade in Tasmanian potatoes that contravened section 92.

Dicta of the Privy Council in *James v. Commonwealth*[19] and the *Bank Nationalization Case*[20] refer to this problem but do not attempt to provide a solution. In the *Bank Nationalization Case*,[21] having rejected the ' freedom at the frontier ' test for the operation of section 92 and replaced it with the current test of ' regulation ', the Privy Council went on to say that prohibition with a view to State monopoly could, in certain circumstances, be the only practical and reasonable manner of regulating interstate trade and commerce in a given field. Furthermore, ' regulation of trade may clearly take the form of denying certain activities to persons by age or circumstances unfit to perform them or of excluding from passage across the frontier of a State creatures or things calculated to injure its citizens '.[22]

The above dicta of the Privy Council was applied by the Supreme Court of New South Wales in *Ex parte Topco Pty Limited; Re Eldershaw*[23] where the Court held that regulations under the Noxious Trades Act 1902-1944 (N.S.W.) requiring rag-dealers to clean and maintain in a clean condition, rags brought onto their premises, did not infringe section 92 in their application to rag-dealers engaged in interstate trade. The Court rejected the proposition that section 92 required a State legislature to submit to a ' constitutional ' claim of traders in noxious goods enabling them to ignore or disobey health and sanitary measures designed to prevent the spread of disease latent in the raw materials of manufacture by means of the thorough cleansing of such materials for benefit of users both within and outside the State.

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[16] (1932) 47 C.L.R. 386, 396, 397. This dicta of the Privy Council gave rise to a school of thought seeking to characterize laws so as to take them outside the operation of s. 92; *e.g. Hartley v. Walsh* (1937) 57 C.L.R. 372.

[17] (1934-1935) 52 C.L.R. 157, 180, 183.

[18] (1928) 42 C.L.R. 209.

[19] (1936) 55 C.L.R. 1, 53 where it was said: ' It is certainly difficult to read into the express words of s. 92 an implied limitation based on public policy . . . . But the question whether in proper cases the maxim " *salus populi est suprema lex* " could be taken to override s. 92 is one of great complexity.'

[20] *Commonwealth v. Bank of New South Wales* (1949) 79 C.L.R. 497.

[21] *Ibid.*

[22] *Ibid.* 641.

[23] [1960] S.R. (N.S.W.) 532. In Banco: Evatt C.J., Herron and Sugerman JJ.

Kangaroo skins sent from Queensland to New South Wales were the subject of the prohibition considered in *Fergusson v. Stevenson*[24] and the High Court held the Fauna Protection Act 1948 (N.S.W.)[25] inapplicable to the skins in question. Dixon, Williams, Webb, Fullagar and Kitto JJ., in a joint judgment, referred to the fact that the prohibition was *not* based upon any ground of harm to the health, morals or minds of the *people of New South Wales*, and that the making of skins available as articles of commerce did not expose the public to any dangers, as, for example, might be the case of weapons or poisons or other dangerous things.[26]

At first glance the above judicial pronouncements would seem to be in a state of some confusion; but when regard is had to the history of section 92 it is possible to categorize and explain what has been said. Following *McArthur's Case*[27] section 92 protected the individual from any form of State governmental interference; then followed the *James v. Commonwealth*[28] test of freedom at the frontier. Applying both of these tests as to the application of section 92, it was clear that if noxious or dangerous goods or activities were to be 'controlled' the courts would have to find that there was a class of goods or activities to which section 92 did not apply. However, under the current test of 'regulation' as expounded in the *Bank Nationalization Case*[29] such characterization is no longer of relevance.

It is submitted that the 'prohibition-regulation' test of the High Court in the *Bank Nationalization Case*[30] makes the approach of Windeyer J. in the instant case a desirable one.

In determining whether a particular law constitutes a 'regulation' of trade, the nature of the subject-matter to be controlled and its possible effects on the community must be considered.

On the other hand, the difficulty of looking to see whether a particular article is a 'legitimate' article of commerce is that there are few,

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[24] (1951) 84 C.L.R. 421.

[25] The Act was intended for the protection and preservation of fauna in New South Wales. The defendant was charged under s. 19 (1) which provides: 'Any person who knowingly buys, sells, offers or consigns for sale, or has in his possession, house, or control, any protected fauna at any time shall be liable to a penalty not exceeding five pounds for each of such fauna in respect of which such offence has been committed. The provisions of this subsection shall apply whether such fauna was killed, taken, or bought in or received from any State or territory of the Commonwealth, or the Dominion of New Zealand, or elsewhere: Provided that the Minister may by license, under conditions therein specified, permit the importation of any such fauna: Provided also that the Governor may by proclamation exempt under conditions specified in such proclamation any fauna from such provisions.'

[26] The High Court did not say, however, that the absence of such bases for the prohibition was relevant, it said: 'To negative their existence is not to imply that their presence in the case would be decisive or even important or relevant, but it serves at once to clear the ground and to define the scope of our actual decision.' (1951) 84 C.L.R. 421, 434.

[27] *W. & A. McArthur v. Queensland* (1920) 28 C.L.R. 530.

[28] (1936) 55 C.L.R. 1.

[29] (1949) 79 C.L.R. 497.

[30] *Ibid.*

if any, goods that cannot be used *both* for legitimate and illegitimate purposes. What is pornography in the hands of a schoolboy might well be an object of worthwhile study to a sociologist or an anthropologist. The court, in dealing with the problems of section 92, cannot avoid the task of balancing the freedom of interstate trade with other local policies, such as the health and safety of the community. It is for this reason that what may be permissible ' regulation ' in respect of one item of commerce may be ' prohibition ' when applied to another subject-matter.

The legislation in *Chapman v. Suttie*[31] clearly involved leaving a wide discretion to the Commissioner of Police. The standards provided for the receipt of a licence were not, in the opinion of the court, sufficiently defined to bring the legislation within the category of ' regulation '. It is suggested, however, that even if the criteria laid down in the Act were more narrowly limited the relevant provisions would still have been invalid insofar as interstate sale of firearms out of Victoria was concerned.

The control of sales of firearms *outside* the State cannot have as its primary purpose the protection of people *within* the State. It could be argued that it is not the function of Victoria to apply its policies in relation to firearms to the people of, say, New South Wales, at the expense of the freedom of interstate trade, even in circumstances where it would be within the power of New South Wales to control the possession of the firearms within that State. This was clearly brought out in *Fergusson v. Stevenson*[32] where it was said that the prohibition in question was *not* based upon any ground of harm to *the people of New South Wales.* Thus in the case of a prohibition or restriction on the interstate sale of firearms it could *not* be said that the prohibition or restriction was based on any ground of harm to *the people of the legislating State.* It may be, therefore, that the South Australian decision of *Coghlan v. Fleetwood*,[33] leaving aside the discretionary licensing aspects brought out in *Chapman v. Suttie*,[34] was wrongly decided.

With the passing of the need to characterize goods as falling outside the operation of section 92, the approach taken by Windeyer J. in *Chapman v. Suttie*[35] is clearly preferable. The extent of regulation permissible will vary according to the goods or activities which are the subject of consideration and the High Court did say that a State law requiring a vendor to keep a record of his purchases or sales, whether the sales were intrastate or interstate, would not infringe section 92. On the basis of such records the State could, by close co-operation, maintain a check on the interstate sale of firearms, the States could then enforce their own internal licensing laws with respect to firearms. Such internal licensing laws could well escape attack under section 92 because, generally

[31] (1962-1963) 36 A.L.J.R. 342.
[32] (1951) 84 C.L.R. 421.
[33] [1951] S.A.S.R. 76.
[34] (1962-1963) 36 A.L.J.R. 342
[35] *Ibid.*

speaking, they are general laws which do not take for their operation events, circumstances or conduct which of their own nature fall within, constitute or necessarily include any essential element or attribute of trade commerce and intercourse among the States.[36] Moreover, Dixon C.J. in *Chapman v. Suttie*,[37] said that in considering whether compliance with the Act would mean an interference with freedom of interstate trade one could not disregard the fact that the Court was not concerned with the ordinary course of trade and commerce in commodities where delay and the like may form real impediments.

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[36] Dixon C.J., Webb and Fullagar JJ. in *Mansell v. Beck* (1956) 95 C.L.R. 550.
[37] (1962-1963) 36 A.L.J.R. 342, 345.