27, 1961

IN THE PRIVY COUNCIL No. 3 of 1961

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

CHARLES MACDONALD WHITEHOUSE ... Appellant

- and -

THE STATE OF QUEENSLAND,
THOMAS ALFRED HILEY
and
ALAN WHITESIDE MUNRO ... ... Respondents

- and -

THE ATTORNEY-GENERAL OF THE
COMMONWEALTH OF AUSTRALIA ... ... Intervener

CASE FOR THE APPELLANT

A. INTRODUCTION

RECORD

1. This is an appeal brought by special leave, granted by Her Majesty in Council on the 3rd August, 1960, from the order of the High Court of Australia given on the 26th February, 1960 allowing by a majority of four justices to three (Fullagar, Kitto, Taylor and Menzies, J.J., Dixon, C.J. and McTiernan and Windeyer, J.J. dissenting) the Respondents' demurrer to the whole of the Appellant's statement of claim. p.20

2. The demurrer related to an action brought by the Appellant in the High Court of Australia in which, by his statement of claim, he sought, among other relief, a declaration that the provisions of section 18 (1) of the Liquor Acts, 1912 - 1958 of the State of Queensland are invalid, on the ground that it imposes, or forms part of the imposition of, a duty of excise and consequently is placed outside the legislative power of the State by section 90 of the Constitution of the Commonwealth of Australia. pp.4-6

3. The Appellant (the plaintiff in the action) had and has an interest to claim this declaration as a holder of the victualler's licence under the aforementioned Acts. The Respondents, Thomas Alfred Hiley and Alan Whiteside Munro were sued as the Treasurer and Minister for Justice of Queensland respectively. The latter is the responsible Minister of the Crown for the time being administering the aforementioned Liquor Acts.

4. Section 90 of the Constitution, so far as is presently material, reads -

> '90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.'

Section 18 (1) of the Liquor Acts provides, inter alia, that the fees which shall be charged, levied, collected and paid annually for every licensed victualler's license, and every winesellers license shall be a sum equal to four per centum of the gross amount paid or payable for or in respect of all liquor which during the twelve months ended on the last day of June in the preceding year was purchased or otherwise obtained for the licensed premises. Similar percentage sums (besides lump sum payments) are also made payable "for every spirit merchant's license" and "by a registered brewer" on all liquor sold by a spirit merchant or a registered brewer to persons other than persons licensed to sell liquor (which latter persons would themselves in Queensland pay such percentage sums).

5. The Appellant's statement of claim, to which the Respondents demurred, contains the following statements of fact:

p.4,ll. 17-21 (a) The plaintiff, in the course of conducting his business as a Licensed Victualler, purchases liquor within the meaning of the said Acts for re-sale to the public in the course of such business, and sells such liquor to the public.

p.4,l.34-p.5,l.5 (b) All liquor purchased by the plaintiff as aforesaid is liquor coming within the terms of Section 18 (1) of the said Acts, being liquor purchased or otherwise obtained for the licensed premises of the plaintiff, and

the same is purchased only for re-sale and is in fact resold, other than an insignificant quantity of such liquor which is requisitioned by the cook at the Hotel and added to foods and supplied to customers in that form.

(c) Since 1956 The Licensing Commission, constituted under the said Acts, has charged, levied and collected, and the plaintiff has been required to pay and has paid or caused to be paid, by way of License fees in respect of the said Hotel the sum of £4117.12.10 calculated on a percentage basis on such liquor as aforesaid in accordance with the said provisions of Section 18 (1) of the said Acts. p.5,ll. 12-19

(d) The plaintiff intends to continue to carry on the business of a Licensed Victualler and to sell and dispose of liquor in the course of such business. p.5,ll. 25-27

(e) The defendants, by the said Licensing Commission, intend to continue to require the plaintiff to pay the aforesaid fees calculated on a percentage basis and to prevent the plaintiff from carrying on his business unless such fees are paid by him. p.5,ll. 28-33

6. Uniform duties of customs were imposed in the Commonwealth of Australia on the 4th October, 1902; and thereafter, by virtue of section 90 of the Constitution, duties of customs and of excise became exclusive to the Commonwealth and, therefore, were forbidden to the States.

7. Before the federation of the Australian Colonies, the Colonies had legislated for the licensing of hotels and they had also imposed excise duty on liquor in various ways.

8. It is contended that the present percentage fees are excise duties, and that to call them licence fees is not to alter their nature. It is further submitted that constitutional principles are no more to be flouted by indirect and circuitous means or by a resort to nomenclature than by direct and express means. The tax imposed by section 18 of the Liquor Acts is in substance an excise duty on the liquor bought and sold, and cannot be saved from invalidity by the form in which it is clothed by the Acts. As Isaacs, J. said, in Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia (1926), 38 C.L.R. 408 at P. 423: "The prohibitions of secs. 90 and 92 of the Constitution may be transgressed not merely by a direct and a vowed

contravention. They are transgressed also by a statute - whatever its ultimate purpose be, and however its provisions are disguised by verbiage or characterization, or by numerous and varied operations lengthening the connective chain, or by otherwise paying titular homage to the supreme law of the Constitution - if it operates in the end by its own force so as to do substantially the same thing as a direct contravention would do, either in attaining a forbidden result or in using forbidden means. The relevant constitutional prohibitions include both means and results. It is no justification for using forbidden means that permissible results are sought, nor for securing forbidden results that lawful means are employed. The Act now under consideration offends in both respects." Reference is also made to Matthews v. The Chicory Marketing Board (1938), 60 C.L.R. 263, per Dixon, J. at p. 304.

9. The substantial questions for decision in this appeal are -

(a) whether the exaction imposed by section 18 of the Liquor Acts is an indirect tax;

(b) whether it is a tax on or in respect of goods;

(c) whether it relates to commercial dealings in goods;

(d) whether its imposition in association with a system of licensing affects its nature;

(e) whether the application of the percentage impost generally to all goods bought in a past period, and not specifically as a particular duty on and at the time of each transaction, affects its nature; and

(f) whether it is an excise.

10. Upon the hearing of the Appellant's petition for special leave to appeal, the Respondents raised the objection that the appeal does not lie without a certificate of the High Court of Australia under section 74 of the Constitution, and special leave was granted to the appellant upon the footing that at the hearing of the

appeal that plea might be raised as a preliminary point. This point is hereinafter referred to as the "inter se question". The Commonwealth sought leave at the hearing to intervene on this question and was granted leave to intervene.

B. COMPETENCY OF APPEAL.

General Considerations.

11. It is contended and will be submitted that this appeal is competent and that the Privy Council has power to hear and determine it. Section 74 of the Constitution provides:

> "74. No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.
>
> The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.
>
> Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave to appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure."

12. The source of the Commonwealth's power to make laws for the imposition of duties of customs and of excise is section 51 (ii) of the Consitution, which empowers the Parliament, subject to the Constitution,

to make laws for the peace, order and good government of the Commonwealth with respect to (inter alia):

> '(ii) Taxation; but so as not to discriminate between States or parts of States.'

That source is not section 90 of the Constitution, which only became operative more than twenty one months after the creation of the Commonwealth. Section 90 created no further powers, but merely gave to part of a power already existing the quality of exclusiveness.

13. Queensland (as has each of the States) has within its territorial limits concurrent powers as to taxation with the Commonwealth, subject to the superiority of Commonwealth laws under section 109 of the Constitution and subject to the implied prohibition of section 90 in respect of part of the taxation power, i.e. that relating to duties of customs and of excise.

14. Section 74 of the Constitution denies jurisdiction to Her Majesty in Council in the absence of a certificate only in the case of a question (so far as present circumstances are concerned) "as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State". It is not enough that the question should concern the subject matter of Constitutional power, or even boundaries of Constitutional power. It must concern limits of a particular kind, "limits inter se", that is to say, reciprocal limits of relative constitutional powers. "It is implicit in an inter se question that between the powers of Commonwealth and State there should be a mutual relation and a reciprocal effect" (Attorney-General for Australia v. The Queen (1957), A.C. 288, 324).

15. Furthermore, an inter se question must concern a Constitutional power of the Commonwealth, not merely part of a subject matter of Commonwealth power. If it were not so, it would be necessary to read the word "powers" in section 74 as having a dual sense.

16. The question of validity or invalidity of section 18 (1) of the Liquor Acts arises in the present appeal, not because of any questioned extension of Commonwealth powers into any concurrent powers of the State (which reason

arises in cases where the Commonwealth, questionably, exercises powers claimed to be under section 51 of the Constitution), but because of its infringement of the absolute constitutional rule of section 90, which establishes exclusiveness for part of a Commonwealth power, and prohibits the States from dealing with that part.

17. The Privy Council has ruled decisively that the question whether any action is within the exclusive field of the Commonwealth is not an inter se question. It is submitted that that question should not be reopened.

18. In any case, any reconsideration of the point should lead to the same conclusion, on account of

(a) the logical necessities of the Constitution; and

(b) the strong body of judicial opinion in favour of it.

The Logical Necessities of The Constitution.

19. As to paragraph 18 (a) above, important principles are already submitted under the heading of "General Considerations" in paragraphs 11 to 17 above. They are elaborated, as follows.

20. The wording of section 74 is precise. It is concerned with "limits inter se", not just "limits"; and with "powers", not just parts of a subject matter. It is aptly worded to describe the process of dividing a field of legislative power between Commonwealth and State. Section 90 concerns no reciprocal relation. It has a bearing on no interplay of any powers meeting on any field. It gives to part of Commonwealth power the quality of exclusiveness and establishes an absolute constitutional prohibition against States.

21. It follows that inter se questions arise when the extension of Commonwealth powers into a field of State residual and subordinate powers is being considered, or when the question how far one authority may control the functioning of the other is being considered, but not when the State is said to have infringed some absolute rule of the Constitution such as a prohibition or exclusion. Nor do inter se questions arise when the dispute concerns a mere question of subject matter, as in the section 109 cases.

22. Exclusiveness is a quality, and not a limit, of the Commonwealth power.

23. Thus, to decide in the present case that the tax levied is an excise would establish its nature, but not work any distribution of relative powers. The attempt by the State would be contrary to the absolute rule of the Constitution. One would be told nothing of any reciprocal limit affecting the State. One would be told nothing of any boundary of Commonwealth power, (which power already exists in any field of non-discriminatory taxation). The State simply would be excluded.

24. A similar result is to be achieved by considering parallel positions, such as that in regard to other exclusive powers of the Commonwealth, for example, coinage, and fisheries beyond territorial limits; that in regard to the inter-State commerce power of the Commonwealth, during the time when it was thought to have been made exclusive by the operation of sections 51 (i) and 92 of the Constitution; and that in regard to the application of section 109 of the Constitution, which makes exclusive to the Commonwealth any subject completely covered by its legislation. The consistent voice of the authorities in respect of these positions is that no inter se question arises.

25. It is to be observed of subjects made by the Constitution exclusive to the Commonwealth that some are the whole of the Commonwealth power, while others are only part of the Commonwealth power. Excise, the subject of the present appeal, is of the latter variety, being part of the Commonwealth taxation power. Thus, a fortiori, an enquiry whether a tax is an excise duty forbidden to the States involves no questions of the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States. Not only is the subject matter absolutely denied to the States by section 90, but outside that subject matter the Commonwealth is quite free to act over the whole field of taxation.

The Strong Body of Judicial Opinion.

26. As to paragraph 18 (b) above, the authorities will be mentioned in the following categories: first, the Privy Council cases; secondly, the cases of inter se questions; and, thirdly, the cases where it was held no inter se question arose.

The Privy Council Cases

27. The opinions of the Judicial Committee relative to section 74 are to be found in the following reports: Attorney-General (N.S.W.) v. Collector of Customs (1909), A.C. 345; Jones v. Commonwealth Court of Conciliation and Arbitration and Attorney-General (Commonwealth) Intervening (1917), A.C. 528; James v. Cowan (1932), A.C. 542, 47 C.L.R. 386; Commonwealth v. Bank of New South Wales (1950), A.C. 235, (1949), 79 C.L.R. 497; Nelungaloo Pty. Ltd. v. Commonwealth (1950), 81 C.L.R. 144, (1951), A.C. 34; Grace Bros. Pty. Ltd. v. Commonwealth (1951), A.C. 53, 82 C.L.R. 357; Perpetual Executor Trustee and Agency Co. (W.A.) Ltd. v. Maslen and Commonwealth (1952), A.C. 215, 88 C.L.R. 401; O'Sullivan v. Noarlunga Meat Ltd. (1957), A.C. 1, 95 C.L.R. 177; Attorney-General (Commonwealth) v. The Queen and the Boilermakers' Society (1957), A.C. 288, 95 C.L.R. 529.

28. Jones v. Commonwealth Court of Conciliation and Arbitration has become the authoritative statement of principles for subsequent cases. These principles were further expounded in Nelungaloo Pty. Ltd. v. Commonwealth (1951), A.C. 34, 81 C.L.R. 144. That case concerned the scope of a Commonwealth power under section 51 of the Constitution, namely that of acquisition upon just terms (placitum (xxxi)). Their Lordships contrasted prohibitions and exclusions under the Constitution with limits of Commonwealth power under section 51. Where the Constitution declared that neither the Commonwealth nor the States should have a certain power, no inter se question could arise. "Equally," they went on, "when a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits inter se of the powers of the Commonwealth and those of any State." But, they explained, section 51 did not expressly divest the States of any power, and it fell to the Courts to determine where the limits of the States' powers and the limits of the Commonwealth powers were fixed. These were inter se questions - ((1951), A.C. at p. 48). The question under the placitum in point, whether the constitutional limitation of the Commonwealth power had been exceeded by the Commonwealth, raised the question how far the constitutional power of the Commonwealth reached into the State and how far, if at all, the State's power had been affected by the Commonwealth power.

29. It having been considered by Dixon, C.J. in

Nelungaloo Pty. Ltd. v. Commonwealth (1951 - 2), 85 C.L.R. 545, 573 that this exposition might involve "new doctrine," such a suggestion was refuted in O'Sullivan v. Noarlunga Meat Ltd. (1957), A.C. 1. In that case their Lordships repeated the principles, and decided that a question of inconsistency under section 109 of the Constitution was not an inter se question.

30. In Attorney-General for Australia v. The Queen and The Boilermakers' Society (1957), A.C. 288 delivering the judgment of the Judicial Committee, Viscount Simonds, at p. 324, referred to the wide test, which had become the settled interpretation of section 74, and proceeded:

> "That test, so far as relevant, is whether the decision under appeal is a decision upon the extent of a paramount power of the Commonwealth over the concurrent powers of the States. If the power is one the exercise of which is denied to Commonwealth and States alike, for example, because section 92 invalidates it, no inter se question arises. If the power is one, of which the exercise is exclusively vested in the Commonwealth, no such question arises. It is only where the delimitation of the Commonwealth power necessarily implies a decision as to the extent of a subordinate State power that an inter se question truly arises. For in such a case the advance of the Commonwealth power must pro tanto reduce the State power."

31. The other Privy Council cases support these principles, and will be mentioned in the categories referred to hereinafter.

32. It is respectfully submitted that the Privy Council cases do not leave the matter in any doubt. A question of whether the tax imposed by section 18 (1) of the Liquor Acts is an excise duty, that is, whether it is a subject exclusively reserved to the Commonwealth and denied to the States, is a question of the application of the absolute rule of the

Constitution (s.90). There is no question of a mutual relation and a reciprocal effect.

Inter Se Cases

33. The cases where an inter se question was held to have arisen were concerned with the distribution of power over a common subject between Commonwealth and States, and may be said to fall within the principle that the advance of the Commonwealth power must pro tanto reduce the State power. They may be grouped into two sub-classes, first, the cases determining the extent of a Commonwealth "section 51" power; and, secondly, the cases of the respective powers of Commonwealth and State concerning some function or activity of either.

34. Cases concerning Commonwealth "section 51" powers are: Attorney-General (N.S.W.) v. Collector of Customs (1909), A.C. 345 (Supra); Jones v. Commonwealth Court of Conciliation and Arbitration (1917), A.C. 528 (Supra); Attorney-General (Commonwealth) v. Balding (1920), 27 C.L.R. 395; George Hudson Ltd. v. Australian Timber Workers' Union (1923), 32 C.L.R. 413; Ffrost v. Stevenson (1937), 58 C.L.R. 528, 617 (question explained at pp. 535, 576 to 578); Joyce v. A.U.S.N. Co. (1939), 62 C.L.R. 160, per Latham, C.J. at p. 165; The King v. The University of Sydney (1943), 67 C.L.R. 95 at pp. 106 to 107; Australian National Airways Pty. Ltd. v. The Commonwealth (1945), 71 C.L.R. 115, per Latham, C.J. at p. 118, per Dixon, J. at pp.122 and 123; Commonwealth v. Bank of New South Wales and others (1950), A.C. 235, 292 and 79 C.L.R. 497, 623; Nelungaloo Pty. Ltd. v. The Commonwealth (1950), 81 C.L.R. 144, (1951), A.C. 34 (Supra); Grace Bros. Pty. Ltd. v. The Commonwealth (1951), A.C. 53, 61, 82 C.L.R. 357; Nelungaloo Pty. Ltd. v. The Commonwealth (1951-2), 85 C.L.R. 545, per Dixon, J. at pp. 561 et seq. and 573 et seq., per McTiernan, J. at p. 583, per Williams, J. at pp. 586 to 587, per Webb, J. at p. 589, per Fullager, J. at p. 592, per Kitto, J. at pp. 597 and 599; Nelungaloo Pty. Ltd. v. The Commonwealth /No. 4/ (1953-4), 88 C.L.R. 529, 538 - 540; Poulton v. The Commonwealth (1956), 96 C.L.R. 35.

35. To this list may be added cases which, though not 'section 51' cases themselves, recognise the principle of those cases; for example, Ex parte Nelson No. 2 (1929), 42 C.L.R. 258; O'Sullivan v. Noarlunga Meat Ltd. (1956), 94 C.L.R. 367, 372 and

373, O'Sullivan v. Noarlunga Meat Ltd. (1957), A.C. 1, 95 C.L.R. 177, and Attorney-General v. The Queen and The Boilermakers' Society (1957), A.C. 288, 95 C.L.R. 529.

36. In the sub-class of cases relating to functions or activities of Commonwealth or States, and heard since Jones' Case, may be put: Pirrie v. McFarlane (1925), 36 C.L.R. 170; Commonwealth v. Kreglinger and Fernau Ltd. (1925), 37 C.L.R. 393, and New South Wales v. Commonwealth (1932), 46 C.L.R. 235. These cases would seem to involve a question of how far Commonwealth power extends into a State, and to illustrate the general principles.

Cases where question held not inter se.

37. The third category is that of cases where the Court held no inter se question arose. It may be divided into the subclasses; first, that of Commonwealth exclusive powers; secondly, that of the section 92 cases that proceeded on the assumption that section 92 did not bind the Commonwealth; and, thirdly, that of the section 109 cases.

38. That entrenchment on an exclusive subject of Commonwealth power entails no inter se question received early recognition in the work on the Australian Constitution by Dr. John Quick, LL.D. and Sir Robert Garran, published in 1901. At p. 757, the learned authors expressed the opinion that a question as to the extent of the federal power to legislate with respect to trade and commerce was a question as to the limits inter se of the powers of the Commonwealth and the States, because any increase of the power of the Commonwealth in that respect involved a diminution, either actual or potential, of the power of the States, whereas on the other hand, a question as to the extent of the federal power to legislate in respect of fisheries beyond territorial limits was not such a question, because the States had no power in that respect and the extent of the federal power did not affect the powers of the States.

39. Such a view is borne out by the statement of the Privy Council relating to another exclusive power of the Commonwealth, namely coinage (Constitution, sections 51 (xii) and

115). This statement was made in James v. Cowan (1932), A.C. 542, at p. 560. Delivering the judgment of the Judicial Committee, Lord Atkin said that the Commonwealth had a right of coining money, but if a State were alleged to be violating section 115 of the Constitution there would be only a simple question of whether the prohibition had been ignored or not; and no question of the limits of State and Commonwealth powers inter se would arise.

40. That the question of entrenchment on an exclusive subject of Commonwealth power is not an inter se question is now conclusively shown by the Privy Council cases to which reference has been made.

41. The second sub-class of cases in which it was held that no inter se question arose is an illustration of the first. These cases were heard at the time when the current judicial opinion, that of the High Court, was to the effect that section 92 did not bind the Commonwealth but was an inhibition, of a wide and absolute nature, addressed only to the States. The result was to make exclusive the Commonwealth power under section 51 (1) relating to inter State trade and commerce.

42. This sub-class of cases comprises Ex parte Nelson No. 2 (1929), 42 C.L.R. 258 and James v. Cowan (1932), A.C. 542. The result was also recognised by Dixon, J. in the Nelungaloo Case (1951-2), 85 C.L.R. 545, at pp. 573 and 574. These authorities, based as they are on the assumption or hypothesis of Commonwealth exclusive power or prohibition of the States, support the view that a question of infringement of a rule of exclusion or prohibition is not an inter se question.

43. In Ex parte Nelson No. 2 (1929), 42 C.L.R. 258, four Justices expressed opinions on the inter se point. Rich, J. and Dixon, J., whose opinions were approved by the Privy Council in James v. Cowan, ruled that a question whether a State Act had violated the freedom of trade established by section 92 was not an inter se question. In their important judgment their Honours stressed the absolute application of section 92. They regarded the fundamental question as whether there was any mutuality in the extent or operation of the Commonwealth and State powers respectively. Speaking generally, Dixon, J. remarked that the necessary relation had been

found in several forms of antinomy. The essential feature of all these instances was a mutuality in the relation of the constitutional powers, a reciprocal effect in the determination or ascertainment of the extent or the constitutional supremacy of either of them. That feature was quite absent if section 92 bound both Governments. It was not easy to see why any different consequence followed upon a view that section 92 operated to impose a restraint upon the State power alone. "Why" he asked, "should it follow from this interpretation of sec. 92 that any relation exists between the State power which it restricts and a Commonwealth power? And what mutuality can there be?"

44. In James v. Cowan (1932), A.C. 542, 47 C.L.R. 386 the Privy Council was faced with a similar question, and decided that no inter se point was involved. The only question, assuming section 92 was addressed to the States alone, was whether the State had violated the prohibition or not.

45. In these section 92 cases the position was held to be governed by the prohibition implied by that section, and it was contemplated that the Commonwealth power was made exclusive on that account (see remarks of Dixon, J. in the Nelungaloo Case (1951-52), 85 C.L.R. 545 at p. 574, second paragraph). It is submitted that the reasoning of these cases applies to the present appeal. Section 90 of the Constitution confers the quality of exclusiveness on subjects of Commonwealth power including duties of excise. It is implied that the States are prohibited from dealing with the subject. No question of a mutual or reciprocal boundary between relative powers arises. The States are excluded from the subject matter or prohibited from dealing with it by the absolute rule of the Constitution.

46. Dixon, C.J. has put forward what, it is submitted, is a narrower view concerning exclusive powers in the Nelungaloo Case (1951-2), 85 C.L.R. 545. He there drew a distinction between the position when the subject matter exclusive to the Commonwealth was the whole of a Commonwealth power and when it was but part of that power. He remarked concerning the judgment of the Privy Council in the Nelungaloo Case ((1951), A.C. 34) that it stated new doctrine, if it meant that no question inter se could exist where the legislative power of the Commonwealth over a subject matter was exclusive

up to the exact limits of the power, so that the very boundary line of Federal exclusive legislative power was necessarily the boundary line of State legislative power. He thought the judgment of the Privy Council might very well refer to another type of exclusive power, that where exclusiveness only applied to part of the power. Then, he said,

> "The boundary of Federal legislative power extends beyond the boundary of so much as is exclusive. The boundary of the exclusive power tells you nothing about the extent of Federal power. It tells you only that within the boundary there is no State power. This is the case with customs and excise (s. 90), which form the exclusive part of the power to make laws with respect to taxation". (85 C.L.R. at pp. 573 and 574).

47. The competency of the appeal is supported by this statement of principle, and, although the Appellant respectfully submits that it narrows the principle of Jones' Case, he relies upon it. Indeed, in the present appeal it is as far as he need go.

48. It is conceived, however, that, where a Commonwealth power has altogether been made exclusive, the States are forbidden to trespass thereon, and no question of boundaries arises with the States, and there is, particularly, no question of mutual or reciprocal boundaries. There is no working out of such boundaries as was thought to be the fit subject for the special supervision of the High Court of Australia.

49. The third sub-class of cases, where it was held no question of limits inter se arose, and which it is contended further illustrate and support the wider principles discussed above, is that of the section 109 cases. These comprise - O'Keefe v. The Country Roads Board (1930), 45 C.L.R. 31; O'Sullivan v. Noarlunga Meat Ltd. No. 2 (1956), 94 C.L.R. 367, 374, O'Sullivan v. Noarlunga Meat Ltd. (1957), A.C. 1, 25, 95 C.L.R. 177, 183; while the position is also recognised in Baxter v. Commissioner of Taxation (N.S.W.) The Commonwealth intervening (1907), 4 C.L.R. 1087, 1119, Jones' Case (1917), A.C. 528, 532, and Joyce v. Australasian United Steam Navigation Co. Ltd. (1939), 62 C.L.R. 160, per Latham, C.J. at p. 165.

50. These are cases on inconsistency between a law of a State and a law of the Commonwealth. By dealing with a subject the Commonwealth has made it exclusive, and the State is precluded from dealing with it. The point is that this is a question of subject matter, and not mutual boundaries of Commonwealth and State Constitutional powers. It is as if section 109 had said to the States: 'You cannot trespass on a subject matter made exclusive by Commonwealth legislation'. Similarly, section 90 says: 'You cannot trespass on this subject made exclusive by the Constitution.' In both instances the enquiry whether the State has trespassed is a question of subject matter and the application of an absolute constitutional rule, and not of establishing mutual boundaries of relative powers.

51. The point may be illustrated further by supposing that the subject of customs and excise in all its possible aspects had been dealt with completely and exhaustively by Commonwealth legislation. If a State's action amounted to a dealing with this subject matter, it would be invalid on account of section 109. This, it is contended, is an exact parallel in principle with the case of a State attempting to deal with the subject which is already made exclusive to the Commonwealth by the Constitution. Any infringement again is a matter of subject matter and an application of the absolute Constitutional rule.

Conclusions concerning competency of appeal.

52. It is contended that the questions for decision in the present case, which may be summed up in the one question, whether the impost levied by section 18 (1) of the Liquor Acts of the State of Queensland on victuallers amounts to an excise, raise no point as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, and that this appeal is competent. This contention is shown to be sound by the decisions of the Privy Council, which enunciate the material principles. These authorities should not be reopened; but, if they are, a similar conclusion should be reached on account of the logical necessities of the Constitution and the weight of strong judicial opinion.

53. The Appellant therefore respectfully submits that the appeal should be held to be competent, for the following (among other)

REASONS

1. Because the question whether the tax imposed by section 18 (1) of The Liquor Acts of Queensland is a duty of excise is not a question as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, but is a question whether such a tax falls within the exclusive province of the Commonwealth, altogether prohibited to the States;

2. Because the question is one merely of subject matter, and involves no determination of mutual and reciprocal boundaries between relative powers of Commonwealth and State;

3. Because the question does not raise any question how far the constitutional power of the Commonwealth reaches into the State and how far, if at all, the State's power has been affected by the Commonwealth power;

4. Because the words "inter se" in section 74 should receive their full weight;

5. Because the trespassing by the States on the subject of excise is forbidden by the prohibition implied by section 90;

6. Because the question is to be determined by the application of the absolute constitutional rule established by section 90;

7. Because the exclusive power at present in question, that relating to the subject of excise, is only part of the Commonwealth power, and an answer to the question of this appeal can tell nothing of any limit of Commonwealth power;

8. Because the Privy Council has ruled that questions of infringement of exclusive powers of the Commonwealth are not inter se questions;

9. Because this ruling should not be reopened, but, if it be opened, then the same decision should be reached

(a) on account of the principles and reasoning adopted relating to section 74 in other cases concerning Commonwealth exclusive powers;

(b) on account of the decisions and reasoning relating to section 74 in the cases on section 92 during the time when it was held or assumed that the Commonwealth was not bound by section 92 and thus gained exclusive powers over the freedom of inter State trade;

(c) on account of the analogy provided by the section 109 cases, which show that questions of encroachment upon a subject matter raise no inter se question.

C. THE MERITS OF APPEAL

General Considerations

54. Further to matters in the introduction, it is observed that, although the present appeal concerns liquor, a similar question could arise in respect of any commodity, such as petrol, or bread, or milk, if the State established a system of licensing and imposed similar taxes calculated as a percentage of past purchases of the commodity. It is contended that any such tax would be a duty of excise.

55. In respect of the present appeal, the scheme of the Liquor Acts of Queensland is shown by a reference to section 4 (Interpretation), 6 (constituting the Licensing Commission), 7 (Functions of the Licensing Commission), 11 (Register of Licenses), Part III, Licenses (Sections 15 to 49), especially sections 15 (persons who may be granted licenses in the case of corporations and firms), 16 (various kinds of licenses), 18 (license fees), 18 A (Apportionment of

license fees), 23 (Booth licenses), 29 (Transfer of licenses), 31, 32 and 33 (Provisions for continuity of business in certain circumstances), 36 (Powers of cancellation), 47B (Procedure upon forfeiture of a license) and, in subsequent parts, to sections 55 (Liquors to be sold by measure), 129 and 130 (Prohibiting certain sales of liquor by unlicensed persons) and 157 (Fees, etc. to be paid to Treasurer for the Consolidated Revenue Fund).

56. For the purpose of presenting this Case, the following provisions of the Liquor Acts are set out in full:

'18. (1) The fees which shall be charged, levied, collected, and paid annually for the following licenses under this Act shall be respectively:-

(i) For every licensed victualler's license and every wine-seller's license - a sum equal to four per centum of the gross amount (including all duties thereon) paid or payable for or in respect of all liquor which during the twelve months ended on the last day of June in the preceding year was purchased or otherwise obtained for the licensed premises;

(ii) For every packet license - ten pounds for every two hundred tons or part of two hundred tons of the registered tonnage of the vessel but not exceeding forty pounds;

(iii) For every spirit merchant's license - one hundred and twenty-five pounds, and in addition, a further sum equal to four per centum of the gross amount (including all duties thereon) paid or payable to the licensee for all liquor which during the twelve months ended on the last day of June in the preceding year was sold or otherwise disposed of under such spirit merchant's license to persons other than persons licensed, at the time of the sale or disposal

otherwise, under this Act or any Act or law of any other State or of any Territory of the Commonwealth to sell liquor;

(iv) For a club license - a sum equal to four per centum of the gross amount (including all duties thereon) paid or payable for or in respect of all liquor which during the twelve months ended on the last day of June in the preceding year was purchased or otherwise obtained for the licensed premises;

(v) For every bottler's license - seven pounds ten shillings;

(vi) For a billiard license or a bagatelle license - ten pounds for each and every billiard or bagatelle table.

(2) There shall be charged, levied, and collected from and paid by a registered brewer an annual fee not exceeding four per centum of the gross amount (including any duties thereon) paid or payable to such registered brewer for all liquor which during the period of twelve months ended on the last day of June in the preceding year was sold or disposed of by him to persons other than persons licensed under this Act or any Act or law of any other State or of any Territory of the Commonwealth, at the time of the sale or disposal otherwise, to sell liquor.

(3) /Repealed by the Liquor Acts Amendment Act, 1958, s.7./

(4) For the purpose of enabling the Commission to assess the annual fees payable under this section, every registered brewer, licensed victualler, wine-seller, licensed spirit merchant, and licensed club shall, not later than the thirty-first day of August in each and every year, make, and if so prescribed, as prescribed, to the Commission in the prescribed form, or a form to the like effect, containing the prescribed information, a return in respect of all

liquor purchased or otherwise obtained for his licensed premises, or, according as the return requires from the class of licensees to which a licensee belongs, and in the case of every registered brewer, sold or otherwise disposed of to persons other than persons licensed under this Act or any Act or law of any other State or of any Territory of the Commonwealth, at the time of the sale or disposal otherwise, to sell liquor.

Every such return shall contain such information as may be prescribed, and the Commission may from time to time require such further information to be supplied as it deems necessary. Different returns may be prescribed for different classes of licensees.

A person to whom this subsection applies, who fails, within the time and otherwise as prescribed, to make a return complying with the provisions of this Act in that behalf in every respect, shall be liable to a penalty of not less than ten pounds nor more than one hundred pounds.

Such return as aforesaid shall be verified by statutory declaration, and, moreover, the Commission may require the holder of such license or any other person to present himself before the Commission for examination on oath concerning any particulars or concerning such other matters as it shall deem relevant.

Every return as aforesaid shall, unless the Commission otherwise orders, contain or be accompanied by a certificate in the prescribed form by a person who has audited the books, accounts and records of the business to which the return relates certifying that the information contained in the return is correct according to such audit.

In the case of a licensed club failing to make any return required by this subsection within the prescribed time, each and every member of the committee of management or other governing body thereof, by whatever name called, shall be liable to the penalty prescribed by this section.

(5) (i) The Commission shall assess the amount of any fee where such fee is to be assessed or fixed under this Act.

(ii) The Commission shall assess such sum as it thinks reasonable in any case -

(a) Where no information is produced to the Commission, or the information produced is incomplete or insufficient to enable the Commission to determine the gross amount paid or payable for liquor purchased or sold or disposed of, as the case may be; or

(b) Where there is no previous period of twelve months or information covering a period of twelve months cannot be produced; or

(c) Where a cancelled or surrendered license has been removed to another place or locality.

(iii) Where any license, in respect of which a fixed annual fee is payable is issued for a less period than one year a proportionate amount only of the particular fee chargeable on the particular kind of license, shall be payable by the licensee.

(6) As soon as conveniently may be after an assessment has been made by the Commission, the Commission shall in the manner prescribed cause notice in writing of the assessment to be given to every person liable to pay the amount of the assessment.

(7) Payment of such assessment shall be demanded within such time as the Commission considers reasonable, and such notice as aforesaid shall state the time within which the assessment must be paid.

Any payment in respect of an assessment so demanded as aforesaid may be made to the Commission at Brisbane or to the clerk of petty sessions at a place appointed for holding courts of petty sessions in the district in which the premises concerned are situated, and if payment is not made within the time specified in the notice the Commission or such clerk of petty sessions may recover the amount of the assessment as a debt before the magistrates court for the district and notwithstanding that the amount of such assessment exceeds six hundred

pounds.

Provided that, in the case of every license in respect of which a fixed annual fee is payable, the annual fee shall be paid by the licensee to the Commission at Brisbane or to the clerk of petty sessions aforesaid not later than the thirty-first day of October in each year, and in default of payment the Commission or such clerk of petty sessions may recover same as a debt before the magistrates court for the district.

Notwithstanding anything herein contained, the Commission may at any time forfeit any license in respect of which any fee imposed under and in accordance with this section has not been duly paid and for the purposes of such forfeiture section 47B of this Act, with all necessary adaptations thereof, shall extend accordingly.

(8) (a) The first levy of fees under this section shall be for the year commencing on the first day of July, one thousand nine hundred and thirty six, and each subsequent levy shall be for each succeeding year.

(b) The first annual period for which returns on which assessments are to be based are to be furnished shall be the period of twelve months ending on the thirtieth day of June, one thousand nine hundred and thirty-six, and each subsequent annual period shall be for the period of twelve months ending on the thirtieth day of June of each succeeding year.'

(Note: The word "duties" in this Section refers to duties imposed by the Commonwealth of Australia.)

'18A. (1) Notwithstanding any agreement to the contrary whether made before or after the passing of "The Liquor Acts Amendment Act of 1945" -

(i) Any licensed victualler or wine-seller who is not the owner of the licensed premises and who, in respect of the year commencing on the first day of July, one thousand nine hundred and fifty-five, or any year thereafter, pays the annual fee for such license fixed on a percentage basis, may without suffering any penalty imposed

by any such agreement deduct from any rent payable by him for the premises for any year in respect of which such fee is paid a sum equal to one-fourth of the amount of such fee or may recover the said sum by action as for a debt in any court of competent jurisdiction from the owner of the premises; .....'

'157. All fees, penalties and other moneys received or recovered under this Act shall be paid to the Treasurer and placed to the credit of the Consolidated Revenue Fund.....'

Other provisions deal with the control of the liquor trade.

57. In Queensland a victualler's license issued under the Liquor Acts is not renewable annually, but is of indefinite duration. This serves to emphasise the true nature of the tax, which is payable annually.

GENERAL CONTENTIONS

58. An examination of the Liquor Acts and the judgments given in the High Court of Australia makes it clear that the license fees levied are taxes, compulsory exactions by the State of Queensland for revenue purposes.

59. It is further contended -

(a) That the license fees are an inland tax relating to the sale or purchase of liquor;

(b) That the license fees are a tax "on goods", that is, in respect of goods. They are calculated by reference to the gross amount paid or payable for or in respect of all liquor purchased in a given period;

(c) That the fees are a percentage or proportionate tax that must be paid (in the normal course) in respect of all liquor manufactured and passed into trade;

(d) That they are a tax the tendency of which is to be passed on;

(e) That, though imposed as a license fee, the tax in its substantial nature is an indirect tax;

(f) That these and other characteristics show that the tax is a duty of excise.

The Decision of The High Court of Australia

60. This case is in pari materia with that of Dennis Hotels Pty. Ltd. v. The State of Victoria and another and the same Justices constituted the High Court in each case. Each of the Justices in the Victorian case gave his own reasons for judgment, which reasons were incorporated into their judgment in this case, Dixon, C.J. adding further remarks.

61. The Justices who formed the majority (Fullagar, Kitto, Taylor and Menzies, JJ.) gave various reasons for their judgments, and it it submitted that the consistent opinions of the dissenting Justices (Dixon, C.J., McTiernan and Windeyer, JJ.) are to be preferred to those of the majority and correctly explain and apply the law. Indeed, the judgment of Fullagar, J. is based upon the view that excise duty is a duty applicable only to manufacture, a view which, it is submitted, is untenable and long discarded. It is submitted that, apart from such view, the learned Judge expressed opinions substantially in favour of the license fees being an excise duty.

Reasons of The Majority

62. In the Victorian case, Fullagar, J. stated that he did not think that the argument for the Appellant was fully met by saying that the Victorian legislation, which required licenses for the sale of liquor to be held, and required fees to be paid for licenses, was no more than an exercise of the general power to control trading in liquor, which belonged to the States. It was true also that the elaborate State licensing systems were designed to effectuate a strict general control of the trade, and not as mere machinery for the collection of revenue.

"But," he said, "these considerations are not decisive. A license required in the first place alio intuitu may be made obtainable only on payment of what is found to be a duty of excise within the meaning of s. 90 of the Constitution". Fullagar, J. conceded that the fees imposed by the provisions of the Victorian legislation, corresponding to those of the Queensland Acts, were, for the purpose in hand, taxes. He did not think the test whether they were a "direct" tax or an "indirect" tax capable of throwing light on section 90. He decided that the principle to be applied was - "that what characterises a duty of excise is that the taxpayer is taxed by reason of, and by reference to, his production or manufacture of goods". The learned Judge said that the exaction in question "does not fall upon any producer or manufacturer and it does not in any way affect production or manufacture". It followed that the exaction was not, in his opinion, a duty of excise within the meaning of section 90 of the Constitution.

63. The Appellant contends that, in regarding the question of directness or indirectness of the tax as irrelevant, and in regarding as excise only a tax imposed by reference to production or manufacture of goods, Fullagar, J. was in error. He was alone among the learned Judges of the High Court in taking that view. Apart from that view, Fullagar, J.'s judgment substantially supported the view of the minority in the present case.

64. Kitto, J., in his judgment in the Victorian case, described a duty of excise thus: "What is insisted upon may, I think, be expressed by saying that a tax is not a duty of excise unless the criterion of liability is the taking of a step in a process of bringing goods into existence or to a consumable state, or passing them down the line which reaches from the earliest stage in production to the point of receipt by the customer". The learned Judge also said that the matter could not be disposed of in favour of the States simply by saying that the fees constituted payment for the license. A quid pro quo for a statutory license might take the form of an excise duty. If, for instance, the payment for a victualler's license had been a sales tax, liability for tax arising every time a sale of liquor was made under the license, it would clearly have been an excise duty. This license fee, however, was an exaction

only in respect of the business generally, not in respect of any particular act done in the course of the business. It was a tax, in Kitto, J.'s view, imposed not in respect of commercial dealings, but in respect of the acquisition of a right to engage in commercial dealings, so it was not a duty of excise. To fees for temporary victuallers' licenses he said the same reasons applied. Had the purchasing of the liquor been made the criterion of the liability, it would have been different. "What attracts the liability", he said, "is the acceptance of the license. The tax is not on the liquor; it is on the license."

65. It is submitted that the last remark brings out the point of Kitto, J.'s judgment. He appears to regard an excise duty as a tax or penalty on the act of purchase or other commercial dealing. Such a view ignores the reality of the matter, and his own remarks that a quid pro quo for a statutory license might take the form of an excise duty. Authorities, to which reference will be made, show that a tax is not any the less an indirect tax, or any the less an excise, because levied ex post facto generally on dealings over a period.

66. In the Victorian case Taylor, J., who also was one of the majority, said it had been decided in Parton v. Milk Board (Victoria) (1949), 80 C.L.R. 229 that a tax upon the sale of goods at any stage before they reached the consumer must, in some circumstances at least, be regarded as a duty of excise. The fees in question were not duties of excise. They were not either in form or substance a tax upon the production or manufacture of liquor. Nor did they constitute a tax upon the liquor sold during the currency of the license. They constituted fees payable by the licensed victualler for the right which his license conferred upon him. "That is," Taylor, J. said, "the right to sell and dispose of liquor." The charge lacked the characteristic of a tax such as might be passed on. The fee was like a payment for a monopoly. Too much significance was not to be attached to the manner in which the fee was calculated.

67. While Kitto, J. appeared to base his decision on a consideration of the occasion by which the exaction is attracted, Taylor, J. is concerned with the consideration of a quid pro quo. It is a payment for the right to sell liquor or for a monopoly. With respect, this loses sight of the nature of the tax itself. A State could create monopolies in any

trading business by a system of licenses. Then, in one sense, license fees would be "for the monopoly"; but that would not determine the nature of the tax involved. That involves an examination of its relationship to goods the subject of trade. A State has a power to impose license fees and taxes of various kinds but not if they are excise duties. To make excise duties payable as a license fee does not alter their nature.

68. The other member of the majority in the Victorian case, Menzies, J., reviewed the Australian authorities. He said that his survey showed that a tax might be an excise, and upon the production or manufacture of goods, though imposed at any point before sale for consumption. He accepted the view that a duty of excise would generally be an indirect tax. The learned Judge went on to say that he regarded the victualler's license fee as an indirect tax, but not as a sales or purchase tax, because it was not a dealing with the goods which exposed the licensed victualler to liability for tax. It was, he said, a tax upon persons, namely, a tax upon a licensed victualler as the price for his franchise to carry on a business, and was not a duty of excise.

69. The learned Judge went on to decide that fees for temporary licenses were taxes attracted by every purchase of liquor, and so were duties of excise. It is submitted that there is no material distinction between the annual fees, and these fees, which merely serves to illustrate the true nature of the exactions.

70. It is contended that in the various opinions of the majority Justices are to be found principles which support the decision of the minority Judges in all aspects. It is recognised by some of them that the license fees are an indirect tax, and that excise duty is not confined to the mere point of production or manufacture. It is also conceded by some that the fact that it is a fee "for the license" still leaves it capable of being a duty of excise.

71. It is further contended that it is commercial dealings in goods, namely the purchase of liquor, which exposea licensed victualler in a normal and continuing business to liability for the tax. It is measured quantitatively by references to his purchases of liquor. The

majority have been influenced unduly by the name of the tax and by coexisting factors.

The Minority Opinions

72. The Justices forming the minority decided that fundamentally the license fees were taxes imposed on liquor on its way to the consumer. With immaterial exceptions, all liquor sold had to bear a tax of four per cent of the wholesale price or value before reaching the consumer. It was a tax on the goods intended, or expected, to be passed on.

73. In the Victorian case, Dixon, C.J. stated his conclusion that the licensing fees were a duty of excise on the footing of certain major premises which he stated, and proceeded to justify in detail. He said he believed it to be an undeniable proposition that, subject to unimportant exceptions, because of the provisions of the Licensing Act no liquor could be bought by retail in Victoria unless in respect of it someone had paid, had become liable to pay or would be placed in a situation which would from the necessity of the case involve him in paying to the Victorian Treasury an amount equal to six per cent of the wholesale selling price of the liquor. That proposition meant to him that the provisions imposed an excise duty within the meaning of section 90. It was a tax. It was a tax "upon" the goods. It was the kind of tax which tended to be recovered by the person paying it in the price he charged for the goods. He analysed in the light of previous decisions the questions whether an excise duty was restricted, first, to goods of home manufacture and, secondly, to the actual production of the goods. As to the first question, he said, "An inland tax upon goods of a class manufactured in Australia and abroad, imposed without regard to their place of origin, is an excise;" it would be ridiculous to say that a State inland tax upon goods of a description manufactured in Australia as well as imported there was not met by section 90, excluding, as that section did, both duties of customs and duties of excise. The brief statement in Matthews v. Chicory Marketing Board (1938), 60 C.L.R. 263, at p. 303, that "the basal conception of an excise in the primary sense which the framers of the Constitution are regarded as having adopted is a tax directly affecting commodities", might need elaborating, he added, but it expressed his view of the substance of the provision. The second matter was closely connected with the first, and he had expressed his

views in Matthews' Case (at pp. 291 - 293) and in Parton v. Milk Board ((1949), 80 C.L.R. 229, at pp. 260-1). (These cases are authorities for the proposition that excise duties need not be restricted to production, but could apply at any stage of the commercial chain of buying and selling short of the ultimate consumer. This proposition was stated by Dixon, C.J.).

74. Dixon, C.J. went on to stress that it was the operation of the provisions of the Act considered together which appeared to him inevitably to show that an excise was imposed. If one proceeded by looking at each particular licensing provision of the Act, connecting it only with the man licensed, one was very likely to fail to perceive that, whatever the purpose of licensing the man, the purpose of levying six per cent upon the wholesale price of the liquor permeated the whole. Stating the combined effect of the provisions, too, enabled one better to see the bearing of certain objections made to placing the exaction within the category of a duty of excise. Some of these objections gave a characterization to the license and to the payment which might be just enough, but did not detract from the truth that nevertheless the result of the whole was an excise upon the commodity. The other objection, that in return for the tax a license was given to the licensee possessing a quasi - monopoly value, the Chief Justice did not regard as material, once it was seen that the result was to tax liquor on its way to the consumer by whatever human channel it might flow. The only possible contingency upon which that amount would not become payable was that nobody sought a renewal of the license. This exception was insignificant. The provisions were all framed on the footing that a license would be renewable and would continue indefinitely.

75. Dixon, C.J. proceeded to remark that it might be suggested that the provision which enabled or was intended to enable a licensed victualler who was a tenant to place upon his landlord the burden of a proportion of the tax shewed an intention, or at least a hope, on the part of the Legislature that the tax of six per cent would not be incorporated in the price of the liquor sold to the consumer. That might be an inference. But, in his opinion, it did not operate to make a tax which was calculated directly on the price of the goods sold any less

an excise. It remained something essentially associated with the quantity and value of the goods. He said this in full consciousness of the fact that the payment exacted was calculated on the price of the goods purchased during a period which ended six months before the exaction was fixed. However, it was a continuing business, and when the licensee purchased those goods he knew they must bear an impost of six per cent. He proceeded,

> "Both the points are met by the language of Lord Warrington of Clyffe in disposing on behalf of the Privy Council of a contention that a tax on the gross revenue of a coal mine was not an indirect tax. "What then is the general tendency of the tax now in question? First it is necessary to ascertain the real nature of the tax. It is not disputed that, though the tax is called a tax on 'gross revenue', such gross revenue is in reality the aggregate of sums received from sales of coal, and is indistinguishable from a tax upon every sum received from the sale of coal. The respondents are producers of coal, a commodity the subject of commercial transactions. Their Lordships can have no doubt that the general tendency of a tax upon the sums received from the sale of the commodity which they produce and in which they deal is that they would seek to recover it in the price charged to a purchaser. Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains. It is said on behalf of the Appellant that at the time a sale is made the tax has not become payable, and therefore cannot be passed on. Their Lordships cannot accept this contention; the tax will have to be paid, and there would be no more difficulty in adding to the selling price the amount of the tax in anticipation than there would be

if it had been actually paid": R. v. Caledonian Collieries (1928), A.C. 358, at p. 362."

76. McTiernan, J. also dissented in the Victorian case. He said a tax was a duty of excise within the meaning of s. 90 of the Constitution if it was payable on, or in respect of, goods and was intended or expected to be passed on and finally borne by the consumer as part of the price which he paid for the goods. Parton v. Milk Board had established that a duty imposed subsequently to production or manufacture might be an excise. The fee for a victualler's license was a tax payable directly in respect of liquor purchased for sale on the licensed premises, and the consequence reasonably expected was that the tax would be borne finally by the ultimate purchaser of the goods as part of the price. The percentage fees were thus clearly duties of excise.

77. Windeyer, J., the third member of the minority in the Victorian case, said that a tax payable by a trader and measured by the amount of a commodity which in the course of his business he bought or sold was prima facie a duty of excise. An excise was essentially a tax imposed upon, or in respect of, or in relation to, goods. The real nature of the tax depended upon its effect on the commodity as an article of commerce. The fact that a tax was calculated upon a trader's purchases in one period and payable when he renewed his annual trading licence for a different period could not be decisive. A publican's business was normally conducted on the basis that it would continue; and the result of the legislation was that, if the law was not altered and the premises remained licensed, a tax of 6% had to be paid on all liquor bought for the premises. This must mean that the surcharge imposed by law would, to a greater or less amount, be reflected in the price at which the liquor was sold to the consumer. It was true that, if the licence was not renewed, nothing would be payable on liquor bought during the preceding period; but that would be an exceptional case. On a broad view of its economic consequences, the tax appeared simply as a tax on all liquor bought for resale in Victoria. Payment of the licence fee was the condition of the right to participate in a trade otherwise forbidden, but this was no ground for saying

that the fee was not a duty of excise. A fee payable for an authority to trade in a commodity was not as such an excise duty; but if calculated by reference to the value or quantity of the goods handled it was an excise duty, and no less so because it was a licence fee.

78. In his judgment in the present case, Dixon, C.J. said that the Queensland legislation differed in not unimportant respects from that of Victoria, but he considered that the so called "fees" constituted a tax which was a duty of excise. He summarised the material provisions of the legislation. The reason why, in his opinion, those provisions amounted to an attempt to impose an excise was that their effect was to impose on liquor at a point in the course of distribution to the consumer a tax of 4% of its wholesale price. Even if the tax was paid 'for' a licence in the sense of a quid pro quo, it was still a tax calculated by reference to the wholesale purchases or sales of liquor. A plan plainly appeared whereby the liquor as it was purchased had to bear the imposition of 4%. There were possibilities of certain liquor escaping the imposition, but these were so trifling that they could be ignored in making a generalisation of the fiscal operation of the Acts. It was true that the man who bought the liquor might not be the man who paid the tax, and the man who paid the tax might have no handling of the liquor upon which it was calculated, but it was apparent from the legislation that it was the goods that were taxed. If an imposition was so made in respect of goods that it naturally formed part of their cost, it was unimportant how the machinery for ensuring it was paid was constructed. The percentage naturally formed part of the cost of the liquor and had all the characteristics of an excise, including susceptibility of passing on. The claim that it represented the State's recompense for conferring a monopoly was neither relevant nor correct. The tax was not levied on production as such, but it was impossible that s. 90 of the Constitution should exclude only duties placed on goods as and when produced, or in virtue of their production, within the state. That would mean frustration of the manifest intention to give to the Federal Parliament the power to deal with taxation of commodities entering, or produced within, Australia. The learned Chief Justice finally said that the judgment should be read

pp.10-16
p.10,11. 21-25
p.11,l.20-p.12,l.7
p.12,l.30-p.13,l.41
p.13,l.42-p.14,l.47
p.14,l.48-p.15,l.16
p.15,11. 17-26
p.15,11. 27-42
p.16,11. 1-6

together with his judgment in the Victorian case. For the reasons appearing in both judgments, he thought the demurrer should be overruled.

pp.16,19 79. In the present case McTiernan and Windeyer, JJ. agreed with Dixon, C.J. They both said that their reasoning in the Victorian case was applicable to this case.

80. The opinions of the three minority Justices have been referred to at some length because it is desired to adopt them as the contentions of the Appellant. It is submitted that they are a consistent body of judical opinion correctly based upon the Constitution and the authorities concerning section 90.

Further Contentions

81. In Queensland the licence under the Liquor Acts is not renewable annually, though the fee is payable annually. In no sense is the fee payable "for the license", though the license may be revoked for non-payment of the fee, and may be said to be in one of its aspects a means of enforcing payment of this tax. This emphasises the double nature of the licence regarded historically.

82. Prior to federation, similarly to other Colonies, Queensland had a Licensing Act which provided for various kinds of licenses and for various lump sum fees. Further legislation relating to distilleries and breweries provided for licences or registration and fees of a particular amount. On the other hand, various Acts imposed duties of excise or customs of a graduated nature. The present Liquor Acts of Queensland have drawn historically from both sources, and there are some fixed fees as well as the percentage fees. The words of Dixon, C.J. in the Victorian case are applicable where he said, "This fixed fee represents as a matter of history the fee for the licence payable by the licensee to which the tax of six per cent on purchases has been added" (four per cent in Queensland).

83. The Constitution makes indirect taxation in respect of goods the exclusive right of the Commonwealth. In so referring customs and excise to the Commonwealth power the Imperial Parliament must have intended to do so effectively, and not to confine them within

narrow and artificial limits, as, for instance, by restricting them to the occasion of production or manufacture. The argument sometimes put, that section 93 of the Constitution indicates such a restriction, does not bear analysis. That section dealt merely with a particular situation applicable to the early years of the Commonwealth. It made provision for crediting duties chargeable in one State to another State, when the goods afterwards passed into the latter State for consumption. The goods with which the section concerned itself fell into two classes, those imported into the first State and those produced there. It was only dealing with duties imposed by the Commonwealth, for the section relates to the period after the imposition of uniform duties. As a practical consideration, it contemplated that Commonwealth duties on goods imported would be duties of customs, and that Commonwealth duties on goods "produced or manufactured" would be excise duties. However, the words "produced or manufactured" are merely descriptive of the second class of goods being dealt with, and they do not in any way limit the stage at which duties, amounting to excise duties, may be charged in respect of these, or, for that matter, any other, goods. Nor does section 93 contemplate possible circumstances in which a State might attempt to impose excise duties denied to States by section 90. Necessarily it had only in mind duties likely to be imposed by the Commonwealth.

84. Various Australian authorities show the nature of an excise duty, and reference is made to the following: Peterswald v. Bartley (1904), 1 C.L.R. 497 (which now must be read as qualified by the remarks in Browns Transport Pty. Ltd. v. Kropp (1958-9), 100 C.L.R. 117, 128); Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia (1926), 38 C.L.R. 408; John Fairfax & Sons Ltd. v. New South Wales (1926), 39 C.L.R. 139, 146; Crothers v. Shiel (1933), 49 C.L.R. 399; Attorney-General (N.S.W.) v. Homebush Flour Mills Ltd. (1936-7), 56 C.L.R. 390; Matthews v. Chicory Marketing Board (V.) (1938), 60 C.L.R. 263; Parton v. Milk Board (1949), 80 C.L.R. 229 and Browns Transport Pty. Ltd. v. Kropp (1958), 100 C.L.R. 117, 129. Further light is thrown on the question by Privy Council decisions on the Canadian Constitution, such as Attorney-General (Quebec) v. Reed (1884), 10 App. Cas. 141; Bank of Toronto v. Lambe (1887), 12 App. Cas. 575; Brewers and Maltsters' Association v.

Attorney-General (Ontario) (1897), A.C. 231; Attorney General (Manitoba) v. Attorney General (Canada) (1925), A.C. 561; Attorney General (B.C.) v. Canadian Pacific Railway Co. (1927), A.C. 934; R. v. Caledonian Collieries Ltd. (1928), A.C. 358; Attorney General (B.C.) v. McDonald Murphy Lumber Co. Ltd. (1930), A.C. 357; Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy Ltd. (1933), A.C. 168; Attorney General (B.C.) v. Kingcome Navigation Co. Ltd. (1934) A.C., 45; and Atlantic Smoke Shops Ltd. v. Conlon (1943), A.C. 550.

85. In Matthews v. Chicory Marketing Board (V.) (1938), 60 C.L.R. 263 the Board, by a proclamation of the 15th July, 1937, had made a levy to be paid by all producers of chicory "at the rate of £1 for every ½ acre, or part thereof, of the area planted by such producer with chicory during the year ending 30th June, 1937." The High Court of Australia (Rich, Starke and Dixon, JJ., Latham, C.J. and McTiernan, J. dissenting) held the levy to be an excise duty, and the levy and the provisions of the Act authorizing it to be consequently invalid. Dixon, J., at p. 304, said: "If the word "excise" received a meaning which confined its application to taxes the relation of which to the commodity concerned was of some narrow and strictly defined nature, for instance, by an arithmetical relation to quantity, it would not only miss the principle contained in the use of the word "excise," but it would expose the constitutional provision made by sec. 90 to evasion by easy subterfuges and the adoption of unreal distinctions. To be an excise the tax must be levied "upon goods," but those apparently simple words permit of much flexibility in application. The tax must bear a close relation to the production or manufacture, the sale or the consumption of goods and must be of such a nature as to affect them as subjects of manufacture or production or as articles of commerce." Dixon, J. did not question the significance of the consideration that a tax might be a graduated tax in relation to the price or value of goods.

Conclusions

86. It is contended that these cases establish that the nature of a tax must be determined not on the form but on the substance of the legislation involved. Not even the declaration

of the legislature that the tax imposed "shall be a direct tax upon the person" alters its true nature. Nor can a State impose excise duties by indirect means. Lord Herschell, delivering the judgment of the Privy Council in Brewers and Maltsters' Association v. Attorney General (1897), A.C. 231, at p. 237 said: "But if the Legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case."

87. The cases show that the essential feature of an excise duty is that it is a tax imposed in respect of commercial dealings in commodities. It need not be limited to the occasion of a particular step or act of commerce but may be imposed as a graduated tax proportionate to the whole volume of commercial dealings in a past period. An excise will generally be an indirect tax, and the fact that an inland tax is indirect and in relation to goods is an important criterion that it is an excise. What makes a tax indirect is its tendency to be passed to others, whether in anticipation of, or after, its payment, even though there may be reasons why it is not in fact passed on. The cases further show that the association of the exaction with a license or other features (such as monopoly) does not alter the nature of a tax. Finally, excise duty is not a tax restricted to production or manufacture.

88. The fees payable by the Appellant under the Liquor Acts are exactions imposed in respect of commercial dealings. They bear an exact mathematical relation to his purchases of goods bought by him for trading purposes, and are indirect taxes. It is immaterial that they relate to a system of licenses and are calculated by relation to all his purchases in a past period. In substance and in truth they are duties of excise.

89. The Appellant therefore respectfully submits that the decision of the High Court of Australia was wrong and ought to be reversed and this appeal ought to be allowed with costs, for the following (among other)

REASONS

1. Because the Constitution requires a

broad and not a narrow application, so that its intendment may not be defeated by verbal differences, nomenclature, particular forms of Governmental action, indirect means or associated factors;

2. Because a tax is not prevented from being an excise by association with irrelevant concomitant circumstances;

3. Because a tax, in substance an excise, is not the less so, because it is "for a license", or is associated with the granting of a monopoly;

4. Because an excise duty is an inland tax in respect of commercial dealings in commodities; it is an exaction "upon", "in respect of", or "in relation to" goods;

5. Because important criteria that a tax is an excise are that it is an indirect tax, relating to goods, and that it bears a proportionate relation to the cost or value of such goods;

6. Because excise duties are not confined

   (a) to imposts on actual production or manufacture or on the producer or manufacturer;

   (b) to the occasion of an actual commercial step or dealing;

   (c) to taxes levied ostensibly as excise duties;

7. Because a tax may be an excise and "in respect of" goods though levied ex post facto on the sum total of commercial dealings in a period;

8. Because if it were otherwise a State could readily, by subterfuge, impose taxes to all intents and purposes the equivalent of excise and customs duties;

9. Because, historically, the percentage fees under the Liquor Acts represent the proportionate excise or customs duties that were levied by the State

prior to federation;

10. Because the license fees paid or payable by the Appellant as a licensed victualler are an imposition which is clearly a tax;

11. Because such tax is of an indirect nature;

12. Because it is a graduated tax relating to the price of the liquor purchased;

13. Because it is a tax "upon goods", that is, in respect of or in relation to the liquor purchased;

14. Because the Liquor Acts contemplate, and the probabilities are for, continuity in hotel businesses the subject of a victualler's license, and the license fees under section 18 (1) are payable in respect of the purchase of goods for resale in that business;

15. Because in Queensland the license fees payable by a victualler under section 18 (1) are not "for the license", even if that were a test;

16. Because in substance, according to all the tests and criteria set out above, the tax on the Appellant under section 18 (1) is a duty of excise forbidden to the State by section 90 of the Constitution;

17. Because of the other reasons given by Dixon, C.J. and McTiernan and Windeyer, JJ.

A.L. BENNETT

J.G. LE QUESNE

IN THE PRIVY COUNCIL No. 3 of 1961

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

CHARLES MACDONALD WHITEHOUSE
Appellant

- and -

THE STATE OF QUEENSLAND,
THOMAS ALFRED HILEY
and
ALAN WHITESIDE MUNRO
Respondents

- and -

THE ATTORNEY-GENERAL OF THE
COMMONWEALTH OF AUSTRALIA
Intervener

CASE FOR THE APPELLANT

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