

G.D. 66 27, 1961

IN THE PRIVY COUNCIL

No. 3 of 1961

UNIVERSITY OF LONDON
W.C.1.
10 FEBRUARY
INSTITUTE OF ADVANCED
LEGAL STUDIES

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 COMMONWEALTH OF AUSTRALIA, THE
STATE OF NEW SOUTH WALES AND THE
ATTORNEY GENERAL OF THE STATE OF
NEW SOUTH WALES

Interveners

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CASE FOR THE STATE OF NEW SOUTH WALES
AND THE ATTORNEY GENERAL OF THE STATE
OF NEW SOUTH WALES AS INTERVENERS

RECORD.

1. This Appeal is brought by Special Leave granted by Her Majesty by Order in Council dated 3rd August 1960 from a judgment of the Full Court of the High Court of Australia delivered on 26th February 1960 allowing a demurrer by the Respondents (defendants) to a Statement of Claim of the Appellant (plaintiff). In his Statement of Claim

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p. 20.

pp. 4-6.

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the Appellant had alleged that he was the holder of a licensed victualler's licence under the Liquor Acts 1912 to 1958 of Queensland and that since the year 1956 the Licensing Commission, constituted under the said Acts, had charged levied and collected from the Appellant and that the Appellant had been required to pay by way of licence fees a certain sum calculated on a percentage basis upon liquor purchased or otherwise obtained for the Appellant's licensed premises 10 pursuant to the provisions of section 18(1) of the said Acts. The Appellant sought a declaration that the provisions of section 18(1) of the said Acts were invalid as being contrary to the provisions of section 90 of the Commonwealth of Australia Constitution Act 1900 and sought to recover the licence fees paid by the Appellant under the said section 18(1).

2. The basis of the Appellant's claim was that the fees payable under section 18(1) of the Liquor 20 Acts 1912 to 1958 (hereafter referred to as "The Queensland Act") constituted duties of excise within the meaning of section 90 of the Constitution; that the power to impose such duties was granted exclusively to the Parliament of the

Commonwealth of Australia by that section; and that, therefore, section 18(1) was invalid.

3. The Respondents demurred to the whole of the State- pp. 7-9.

ment of Claim on the ground that the said section 18(1) did not impose any duty of excise contrary to section 90 of the Constitution and was a valid law of the Parliament of the State of Queensland.

4. The said demurrer was heard and determined by the Full High Court immediately after the hearing by the said Court of a similar case, namely Dennis Hotels Pty. Limited v. The State of Victoria (1960)

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A.L.R. 129 (hereinafter referred to as "The Victorian Case"). The Judgment of the High Court in this case (hereafter called "the Queensland Case") was given upon the same day as the judgment in the Victorian Case. The High Court by a majority (Fullagar, Kitto, Taylor and Menzies JJ. Dixon C.J., McTiernan and Windeyer JJ.

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dissenting) allowed the Respondents' demurrer with costs. The Judges held (subject to some qualification by Dixon C.J.) that the legislation impugned in the Queensland Case was in pari materia with the legislation considered in the Victorian Case and followed and applied the reasoning upon which they based their judgments in that case.

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5. The Liquor Act 1912 as amended, of New South Wales (hereafter referred to as "The New South Wales Act") is, in material respects similar to the Queensland Act. In particular, the provisions of the New South Wales Act imposing fees upon the grant and renewal of liquor licences are comparable to the provisions of the Queensland Act imposing annual fees for liquor licences granted under that Act. Furthermore the New South Wales Act is in pari materia with the Victorian Act upon which the decision in the Victorian Case was given. The decision of the High Court and the reasons of the majority of the Judges who upheld the validity of s. 18(1) of the Queensland Act (as well as the decision and the reasons for judgment of the majority in the Victorian Case) would, it is submitted, support the validity of the corresponding provisions of the New South Wales Act and would uphold the Constitutional power of the State of New South Wales to enact such provisions.
- pp.21-22. 6. The Order in Council by which the appellant was granted leave to enter and prosecute this Appeal provides that the Respondents may raise as a preliminary point the plea that the Appeal is incompetent without a Certificate of the High

Court of Australia that the question raised in the Appeal is one which ought to be determined by Her Majesty in Council. These Interveners desire to support the objection of the Respondents to the competency of the Appeal and they submit that the question which the High Court decided, namely, whether s. 18(1) of the Queensland Act was within the legislative power of the State of Queensland is a question as to the limits inter se of the Constitutional powers of the Commonwealth and those of the States within the meaning of s. 74 of the Constitution and the Interveners adopt and rely upon the arguments set forth in the case for the Respondents in support of this submission.

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7. The Interveners also support the Respondents' case for the validity of s. 18(1) of the Queensland Act. The similarity of the New South Wales Act to the Queensland Act appears from the following comparison:

20 The Queensland Act.

The Queensland Act prohibits the sale of any liquor in any place whatsoever, in any less quantity than two gallons of one and the same description of liquor at any one time, without the authority of a licence granted under the Act (s.129)

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The Act sets up a Licensing Commission (s. 6) which is charged with the authority of granting and refusing licences under the Act (s. 7). It provides that licences of various descriptions, including a licensed victualler's licence, may be granted under the Act and such licences, once granted, are continuous and remain in force unless surrendered cancelled or forfeited (s. 16(1),(3)). Under s. 18(1) of the Act an annual fee is levied for, inter alia, every licenced victualler's 10 licence, the fee being a sum equal to a percentage of the gross amount paid or payable for 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. The holder of the licence is required to furnish not later than the 31st day of August in each and every year a return of liquor purchased or otherwise obtained for his licensed premises for the purpose of enabling the Commission to assess the annual fees 20 payable under s. 18(1) (s. 18(4)). The Commission is required to assess the amount of the fee (s.18(5)) and to give notice of the assessment to the person liable to pay the same. (s. 18(6)). The Notice of assessment must state the time within which the fee

must be paid and if the same is not paid within the time specified the amount thereof is recoverable as a debt (s. 18(7)). In addition the Commission may at any time forfeit any licence in respect of which any fee imposed under and in accordance with s. 18 has not been duly paid (s. 18(7)). The Act generally regulates the premises hours and conditions under which a licensee may lawfully sell liquor.

10 The provisions of s. 18(1) challenged by the Appellant are, so far as material, in the following terms :-

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

- (1) For every licensed victualler's licence and every wine seller's licence - 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
- 20 obtained for the licenced premises.

The New South Wales Act.

The New South Wales Act regulates and controls the sale of liquor principally by means of a licensing

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system. The Act prohibits the sale of liquor by any person unless he is authorised under the Act to sell the same and prohibits him from selling liquor otherwise than in accordance with the terms of the authority conferred on him under the Act (s. 43). The Act provides that a Licensing Court may grant and renew various descriptions of licenses for the sale of liquor including publican's licenses and booth or stand licenses (ss. 4, 5, 10 14 (1)). Licenses, other than booth or stand licences, are in force from the date of grant until the 30th June next following (s. 14 (2)); and are renewable annually upon application to the Licensing Court (s. 35). Booth or stand licenses are in force only for particular days specified in the licence (s. 20). Under Part X of the Act Certificates of Registration authorising the Secretary of a club to sell liquor on club premises may be granted (s. 132A) and these Certificates are in force from the date of issue until the 30th June next following and may be renewed annually (s.144). A fee is payable upon the grant or renewal of a licence or Certificate of Registration (ss. 21, 150A) and the amount of any fee payable on a percentage basis on the renewal of a licence or

Certificate of Registration is fixed finally and conclusively by the Licences Reduction Board constituted under the Liquor (Amendment) Act 1919 (s. 23(1) s. 150A (2)). Upon the first renewal of a licence or Certificate of Registration after the grant of a new licence or Certificate of Registration or where no information or insufficient information is furnished to enable the Board to fix the fee upon a percentage basis the Board is empowered to fix the fee at such amount as it thinks fair and reasonable (s. 23 (2) s. 150A(3)). The Board is required to inform the Clerk of the Licensing Court of the District where the premises are situated of the amount of the fee (s. 23(3) s. 150A(4)) and payment of a fee is a condition precedent to the issue of the licence or Certificate of Registration (s. 32 s. 139(3)). The holder of a publican's licence or of a club Certificate of Registration is required to submit, before renewal of a licence or Certificate of Registration, returns of liquor purchases for the purpose of assessing the fees (s. 22(1), s. 151A). As in the case of the Queensland Act the New South Wales Act regulates the premises hours and conditions under which a licensee may be permitted to sell liquor (ss. 25, 26, 40A, 40B

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44-46, 49, 53, 57, 65). The provisions of s. 21 of the New South Wales Act (the section corresponding to s. 18 of the Queensland Act) and of s. 150A of the New South Wales Act are, so far as material, as follows :-

S. 21 (1) The following fees shall be paid in respect of licences under this part namely:-

(a) For a new publican's licence such sum (not exceeding five hundred pounds) as may be fixed by the Licensing Court granting the licence. 10

(b) For the renewal of a publican's licence, a sum equal to five pounds per centum of the gross amount (including any duties thereon) paid or payable for all liquor (other than liquor sold by the licensee to other licensed persons) which, during the twelve months ended on the thirty first day of December next preceding the date of the application for the renewal of the licence was delivered upon or purchased for the premises in respect of which each such renewal is sought or any neighbouring premises in which the licensee temporarily carried on business pursuant to an authority given under section forty of this Act, and including all liquor delivered by him or on his behalf upon, 20

or purchased by him for any booth or stand in respect of which a licence was, during the said period of twelve months granted to him or to any other person.

.....

(j) For a booth or stand licence two pounds per day.

S.150A. (1) The following fees shall be paid in respect of Certificates of Registration granted or renewed under this part, namely:

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(a) For a new Certificate of Registration of a club such sum (not exceeding five hundred pounds as may be fixed by the Licensing Court granting the Certificate; in no case shall the fee payable under this paragraph exceed a sum calculated at the rate of one pound for each bona fide member of the club at the date of the application as shown on the statement required to be furnished under sub-section two of section one hundred and thirty-six of this Act;

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(b) For the renewal of a Certificate of Registration of a club a sum equal to five pounds per centum of the gross amount

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(including any duties thereon) paid or payable for all liquor which, during the twelve months ended on thirty-first day of December next preceding the date of application for the renewal was delivered upon the club premises or purchased for or on behalf of the club.

8. These Interveners submit that the fees imposed by s. 18(1) of the Queensland Act are not duties of excise. The liability to pay them is not tied to or dependent upon the manufacture or production of the liquor 10 or the taking of any step or the making of any transaction between the manufacture or production of the liquor and its distribution to the consumer. It is not a tax "on the goods" but upon the right to continue to engage in a particular kind of business. The liability to pay the annual fees imposed by the Act is a condition which the holder of the licence must fulfil once a year in order to avoid the cancellation of his licence to trade. The quantum of the fee is a measure of the size of 20 the licensee's business varying with the value of the privilege which the licence affords. The principal features of the Victorian Act which persuaded the Judges of the High Court who formed the majority in the Queensland Case to hold that

the fees imposed by s. 19(1)(a) of the Victorian Act were not duties of excise are also to be found, it is submitted, in the Queensland Act. They are also to be found in the New South Wales Act. They lead to the conclusion, it is respectfully submitted, that the fees imposed by s. 18(1) of the Queensland Act are properly to be characterised as fees imposed by the State upon a licence or privilege of a quasi-monopolistic kind to carry on a business and as such are within the power of a State to impose. The Interveners adopt and rely upon the arguments set forth in the case for the Respondents in support of this submission.

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9. If, contrary to the Interveners' submissions, it be held that this Appeal is competent, the Interveners' submit that the Appeal should be dismissed for the Reasons set forth in the case for the Respondents.

R. R. DOWNING

K. J. HOLLAND

MERVYN HEALD

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THE STATE OF NEW SOUTH WALES
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CASE FOR THE STATE OF NEW SOUTH
WALES AND THE ATTORNEY GENERAL
OF THE STATE OF NEW SOUTH WALES
AS INTERVENERS

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