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26, 1961

IN THE PRIVY COUNCIL No. 7 of 1961

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N:

DENNIS HOTELS PROPRIETARY LIMITED
(Plaintiff) .. .. Appellant

- and -

THE STATE OF VICTORIA and HENRY EDWARD BOLTE (Defendants) Respondents

- and -

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA Intervener

---

RECORD OF PROCEEDINGS

MESSRS. MARKBY STEWART & WADESONS,
5, Bishopsgate,
London, E.C.2.
Solicitors for the Appellant.

MESSRS. FRESHFIELDS,
Garrard House,
31/45, Gresham Street,
London, E.C.2.
Solicitors for the Respondents.

MESSRS. COWARD, CHANCE & CO.,
St. Swithins House,
Walbrook,
London, E.C.4.
Solicitors for the Intervener.

IN THE PRIVY COUNCIL No. 7 of 1961

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B E T W E E N:

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(Plaintiff) .. .. Appellant

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RECORD OF PROCEEDINGS

INDEX OF REFERENCE

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B E T W E E N:

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(Plaintiff) .. .. Appellant

- and -

THE STATE OF VICTORIA and HENRY EDWARD BOLTE (Defendants) Respondents

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RECORD OF PROCEEDINGS

No. 1

In the High Court of Australia

No. 1

Statement of Claim endorsed on Writ of Summons,

30th September 1958

STATEMENT OF CLAIM ENDORSED ON WRIT OF SUMMONS

1. The Plaintiff is a body corporate duly registered pursuant to the provisions of the Companies Acts of the State of Victoria.

2. The Defendant Henry Edward Bolte is the Treasurer of the State of Victoria and the responsible Minister of the Crown for the time being administering the "Licensing Fund" hereinafter referred to and is sued as such.

3. The Plaintiff is and was at all times material the holder of a Victualler's Licence in respect of premises known as The Tower Hotel, Auburn in the said State pursuant to the provisions of the Licensing Acts of the said State.

4. The Plaintiff has from time to time been the holder of Temporary Victuallers' Licences pursuant to the said Licensing Acts and has conducted booths and bars at sporting fixtures and agricultural shows pursuant to such Temporary Victuallers' licences.

In the High Court of Australia

No. 1

Statement of Claim endorsed on Writ of Summons,

30th September 1958 - continued.

5. The Plaintiff in the course of conducting its business as an hotelkeeper and in the course of conducting Temporary Victuallers' Licences as aforesaid -

(a) Purchases beer in containers holding 18 or 9 gallons for re-sale to the public in the course of such businesses;

(b) Provides all necessary equipment for the cooling and serving of such beer and cools and serves such beer to the public in glasses;

(c) Purchases wines and spirits in bottles for re-sale in such business and provides all necessary equipment for the chilling of such wines and the service of such wines and spirits to the public in glasses;

(d) Sells such liquor to the public at prices including (inter alia) - the percentage fee paid or payable under the provisions of Section 19(1)(a) and 19(1)(b) of the Licensing Acts hereinafter referred to.

6. Section 19(1)(a) of the Licensing Acts 1928 as amended by Act No. 5584 purports to provide (inter alia) that the fee payable for a Victualler's Licence shall be equal to the sum of six per centum of the gross amount (including any duties thereon) paid or payable for all liquor which during the twelve months ended on the last day of June preceding the date for the application of the renewal of the licence was purchased for the premises.

7. The Plaintiff has from time to time since 1954 at the least been required to pay and has paid into the Treasury of the State of Victoria fees for the renewal of the aforesaid Victualler's Licence calculated on a percentage basis in accordance with the provisions of Section 19(1)(a) of the said Acts.

8. Section 19(1)(b) of the Licensing Act 1928 as amended by Acts Nos. 5584 and 5908 purports to provide (inter alia) that the fee payable for a Temporary Victualler's Licence shall be One pound for each day during which the licence will be in force in respect of each booth bar or place from

which liquor will be sold and a further fee equal to the sum of Six per centum of the gross amount (including any duties thereon) paid or payable for all liquor purchased for sale under such licence.

9. The Plaintiff has from time to time since 1954 at the least been required to pay and has paid into the Treasury of the State of Victoria fees for Temporary Victualler's Licences calculated on a percentage basis in accordance with Section 19(1)(b) of the said Acts.

10. The said fees when paid into the Treasury of the State of Victoria as aforesaid were paid into a fund kept in the Treasury and known as the "Licensing Fund" pursuant to the provisions of Part XV of the said Act.

11. During the years ended the 30th June 1955, 1956, 1957 and 1958 the amounts paid into and out of the said "Licensing Fund" pursuant to the provisions of the Licensing Acts including the fees paid by the Plaintiff as alleged in Paragraphs 7 and 9 hereof were as follows:-

R E C E I P T S

Particulars	1954/55	1955/56	1956/57	1957/58
Balance brought forward - Bank	69,976	410,976	331,269	330,765
Investments in stock	341,000			
Interest on Government Stock	10,982	10,982	10,439	10,051
Licensing Court fees	5,215	7,108	10,587	11,375
Fines	8,805	9,558	10,716	10,385
Sale of Confiscated Liquor	273	539	253	576
Liquor Licence fees -				
Victuallers	1,719,962	1,863,981	2,027,162	2,272,741

In the High Court of Australia

No. 1

Statement of Claim endorsed on Writ of Summons,

30th September 1958 - continued.

Railway Refreshment Rooms	2,041	2,158	2,287	2,889
Spirit Merchants and Grocers	257,905	292,765	316,420	353,229
Australian Wines	16,291	15,428	14,642	15,213
Brewers	6,840	4,294	3,416	3,708
Vignerons	55	75	75	75
Clubs	64,416	79,257	93,572	111,578
Temporary Licences	18,909	19,746	23,138	21,995
Permits -				
Extra bars	2,150	5,060	5,760	6,860
Extensions of Meals Permits on licensed premises; permits for special occasions on unlicensed premises; permits public halls; permits late hours, non-intoxicating liquor and billiard tables	17,484	26,137	27,129	27,999
Billiard table licences	1,526	1,601	1,526	1,310
Fees - Extended Annual Sittings	27	205	NIL	189
	£2,543,857	£2,749,870	£2,878,391	£3,180,938

P A Y M E N T S

Particulars	1954/55	1955/56	1956/57	1957/58
Salaries and expenses of Court, Board Office	28,845	45,558	52,194	54,024
Allowances to Licensing Inspectors, Licensing Police, witnesses etc.	40,812	43,536	45,178	49,565

Annual payment to metropolitan and country municipalities (4th Schedule Act 3717)	58,736	58,616	58,244	58,116
Compensation payments for surrenders and deprivations	2,105	NIL	865	17,195
Annual payments to Police Superannuation Fund (Act 3717, Section 311)	23,000	23,000	23,000	23,000
Transfer to Consolidated Revenue (Act 3717 Section 312) amended by Acts 4571 and 4613	1,979,383	2,168,184	2,367,641	2,646,273
Expenses Liquor Referendum	NIL	79,707	504	15
Balance Licensing Fund	410,976	331,269	330,765	330,750
	£2,543,857	£2,749,870	£2,878,391	£3,180,938

12. The said provisions of the said Section 19 of the said Licensing Acts purport to impose a duty of excise contrary to the provisions of Section 90 of the Constitution of the Commonwealth and are and at all times have been invalid.

13. The Plaintiff was required to pay and did pay to the Treasurer of the State of Victoria for the renewal of the Victualler's Licence for the period from the 1st January 1958 to 31st December 1958 a fee calculated on a percentage basis in accordance with the said provisions of the said Section 19(1)(a) of the said Acts.

In the High Court of Australia

No. 1

Statement of Claim endorsed on Writ of Summons,

30th September 1958 - continued.

PARTICULARS

31.12.57	Paid	£ 6,196. 9. 6
31.12.57	Paid interest	309.16. 0
9. 6.58	Paid	6,196. 9. 6
		£12,702.15. 0

14. The Plaintiff has from time to time during 1958 been required to pay and has paid into the Treasury of the State of Victoria fees calculated on a percentage basis in accordance with Section 19(1)(b) of the said Licensing Acts in respect of Temporary Victuallers' Licences held by it.

PARTICULARS

Place	Date	Amount £. s. d	Date of Payment
Olympic Park	25. 1.58	1. 7. 9	18. 2.58
do.	18. 1.58	1. 7. 9	18. 2.58
do.	11. 1.58	1. 7. 9	18. 2.58
do.	27. 1.58	1. 7. 9	18. 2.58
do.	30. 1.58	1. 7. 9	18. 2.58
Lilydale Show	26.12.57	18. 9	27. 2.58
Olympic Park	8. 2.58	1. 7. 9	27. 2.58
do.	15. 2.58	1. 7. 9	27. 2.58
do.	22. 2.58	1. 7. 9	27. 2.58
North Croydon Reserve	18. 2.58	6. 0. 0	24. 3.58
Lilydale Athletics	1. 3.58	2. 1. 3	24. 3.58
Olympic Park	1. 3.58	1. 7. 9	24. 3.58
do.	8. 3.58	1. 7. 0	24. 3.58
do.	15. 3.58	18. 0	24. 3.58
do.	22. 3.58	1. 7. 0	21. 4.58
do.	29. 3.58	1. 7. 9	21. 4.58
do.	5. 4.58	2.15. 6	21. 4.58
do.	7. 4.58	3. 9. 0	21. 4.58
do.	12. 4.58	1. 7. 9	30. 4.58
do.	26. 4.58	2.15. 6	30. 4.58
do.	19. 4.58	1. 7. 9	30. 4.58
do.	22. 3.58	1. 1. 0	30. 4.58
Tennis Kooyong	5. 4.58	2.19. 3	19. 5.58
do.	7. 4.58	1.10. 0	19. 5.58
Rosedale Golf	3. 5.58	3. 0	17. 6.58
Olympic Park	3. 5.58	2. 2. 0	17. 6.58
do.	10. 5.58	2.15. 6	17. 6.58
do.	17. 5.58	1. 9. 3	17. 6.58
do.	24. 5.58	1. 9. 3	17. 6.58
do.	31. 5.58	4. 7. 0	17. 6.58

Olympic Park	7. 6.58	17. 3	2. 7.58
do.	14. 6.58	18. 0	2. 7.58
do.	16. 6.58	1.13. 9	2. 7.58
do.	21. 6.58	1.10. 9	2. 7.58
do.	28. 6.58	1. 7. 9	6. 8.58
do.	12. 7.58	1. 7. 9	6. 8.58
do.	19. 7.58	1. 1. 0	6. 8.58
do.	5. 7.58	3. 9. 0	6. 8.58
		£68. 6. 6	

In the High Court of Australia

No. 1

Statement of Claim endorsed on Writ of Summons,

30th September 1958 - continued.

15. None of the payments referred to in paragraph 13 or 14 hereof was made voluntarily and each such payment was made under protest.

16. The Plaintiff intends to continue to carry on the business of an hotelkeeper and to sell and dispose of liquor and to conduct booths and bars at sporting fixtures and agricultural shows and to sell and dispose of liquor thereat.

17. The Defendant intends to continue to require the Plaintiff to pay the aforesaid fees calculated on a percentage basis and to prevent the Plaintiff from carrying on the businesses referred to in Paragraph 16 hereof unless such fees are paid by the Plaintiff.

AND THE PLAINTIFF CLAIMS -

1. A Declaration that the said provisions of the said Section 19(1)(a) and 19(1)(b) of the said Acts are and have at all material times been invalid.

2. An injunction restraining the Defendants and each of them from imposing and collecting fees prescribed by Section 19(1)(a) and 19(1)(b) of the said Licensing Acts.

3. The sum of £12,771.1.6 as money had and received.

J.R. O'SHEA.

DELIVERED with the Writ.

TAKE NOTICE that the Plaintiff requires Pleadings and desires this endorsement to stand as its Statement of Claim.

In the High Court of Australia

No. 2

Request for further and better particulars of Statement of Claim,

3rd November 1958

No. 2

REQUEST FOR FURTHER AND BETTER PARTICULARS OF STATEMENT OF CLAIM

TAKE NOTICE that the abovenamed defendants require further and better particulars of the Statement of Claim delivered with the writ herein as follows:

Under paragraph 5(d) thereof.

Of the prices therein referred to stating precisely in respect of each kind of liquor sold, how the price is made up or arrived at and without limiting the generality of the foregoing stating -

(a) who determines the price at which each kind of liquor is sold;

(b) what are the components or ingredients of the price of each kind of liquor;

(c) what is comprised in the expression "inter alia" therein referred to in respect of each kind of liquor.

Under paragraph 15 thereof.

Of the protests therein referred to stating with respect to each payment alleged to have been made under protest

(a) When each such protest was made;

(b) To whom each such protest was made;

(c) By whom each such protest was made;

(d) Whether each such protest was verbal in writing or to be implied. In so far as each such protest was verbal setting out the substance of the conversation or conversations alleged to constitute such protest and stating when where and between what actual persons each such conversation took place. In so far as each such protest was in writing identifying the document or documents constituting such protest and indicating in whose possession such document or documents now is or are. In so far as each such protest is to be implied stating the acts facts matters and/or things from which such implication is alleged to arise.

AND TAKE FURTHER NOTICE that the abovenamed defendants require 21 days further time after the delivery of the particulars hereby requested for the delivery of their defence herein.

No. 3

In the High Court of Australia

No. 3

Further and better particulars of Statement of Claim,

3rd March 1959

FURTHER AND BETTER PARTICULARS OF STATEMENT OF CLAIM

The following are the Plaintiff's Further and Better Particulars pursuant to Request dated the Third day of November, 1958 -

Under Paragraph 5(d) thereof -

Save that the prices at which the said liquors are re-sold by the Plaintiff as alleged do in fact include the percentage fees paid or payable under Sections 19(1)(a) and 19(1)(b) of the said Licensing Acts the Defendants are not entitled to the further particulars sought.

Under Paragraph 15 thereof -

(a) On each date of payment set out in Paragraphs 13 and 15 thereof.

(b) In the case of the payments referred to in Paragraph 13 thereof the protests were made to the Receiver of Revenue for the State of Victoria.
In the case of the payments referred to in Paragraph 15 thereof the protests were made to the Registrar of the Victorian Licensing Court.

(c) By the Plaintiff.

(d) In the case of the payments referred to in Paragraph 13 the protests were in writing in letters from the Plaintiff to the Receiver of Revenue for the State of Victoria bearing dates on or about the dates of payments set out in the said Paragraph 13. The originals of such letters were forwarded to the said Receiver of Revenue for the State of Victoria and copies thereof may be inspected at the office of the Plaintiff's Solicitors.

(e) In the case of the payments referred to in Paragraph 15 the protests were in writing in letters from the Plaintiff to the Registrar of the Victorian Licensing Court bearing dates on or about the dates of payment set out in the said Paragraph 15. The originals of such letters were forwarded to the Registrar of the Victorian Licensing Court and copies thereof may be inspected at the office of the Plaintiff's Solicitors.

In the High Court of Australia

No. 4

Demurrer and Defence, 6th April 1959

No. 4

DEMURRER AND DEFENCE

DEMURRER

The abovenamed defendants demur to the whole of the Statement of Claim delivered with the writ herein on the ground that it does not show a cause of action to which effect can be given by the Court as against the defendants in that -

(1) each of the said provisions of the said section 19 of the Licensing Acts is a law validly made by the Parliament of the State of Victoria;

(2) neither of the said provisions of the said section 19 of the said Licensing Acts impose or purport to impose a duty of excise contrary to section 90 of the Constitution of the Commonwealth of Australia.

DEFENCE

AND the abovenamed defendants as to the said Statement of Claim further say:

1. They admit the allegations in paragraph 1 thereof.

2. They admit that the defendant Henry Edward Bolte is the Treasurer of the State of Victoria as alleged in paragraph 2 thereof but save as aforesaid they do not admit any of the allegations therein contained.

3. They admit the allegations in paragraphs 3 and 4 thereof.

4. They do not admit any of the allegations contained in paragraph 5 thereof.

5. Subject to reference to the precise terms of the Statute they admit the allegations in paragraph 6 thereof.

6. They admit that the plaintiff has paid into the Treasury of the State of Victoria fees for the

renewal of the said Victualler's Licence calculated in accordance with the provisions of section 19(1)(a) of the said Acts as alleged in paragraph 7 thereof but save as aforesaid they do not admit any of the allegations therein contained.

7. Subject to reference to the precise terms of the Statute they admit the allegations in paragraph 8 thereof.

8. They admit that the plaintiff has paid fees for Temporary Victuallers' Licences calculated in accordance with the provisions of section 19(1)(b) of the said Acts as alleged in paragraph 9 thereof but such fees were paid by the plaintiff to the office of the Victorian Licensing Court. Save as aforesaid they do not admit any of the allegations contained in the said paragraph 9.

9. They admit the allegations in paragraph 10 thereof.

10. They admit the allegations in paragraph 11 thereof.

11. They deny each and every allegation contained in paragraph 12 thereof.

12. They admit that the plaintiff paid to the Treasurer of the State of Victoria for the renewal of the Victualler's Licence for the period from the first of January 1958 to the 31st December 1958 the fees alleged in paragraph 13 thereof. Save as aforesaid they do not admit any of the allegations contained in the said paragraph 13.

13. They admit that the plaintiff paid (with one exception) the fees alleged in paragraph 14 thereof in respect of Temporary Victualler's Licences held by it but such fees were paid to the office of the Victorian Licensing Court. The Plaintiff did not pay a fee in respect of the North Croydon Reserve on 18th February 1958. Save as aforesaid they do not admit any of the allegations contained in the said paragraph 14.

14. They deny each and every allegation contained in paragraph 15 thereof.

15. They do not admit any of the allegations contained in paragraphs 16 and 17 thereof.

H.A. WINNEKE
JOHN MC I. YOUNG
ZELMAN COWEN.

In the High Court of Australia

No. 4

Demurrer and Defence, 6th April 1959 - continued.

In the Full Court of the High Court of Australia

No. 5

Reasons for Judgment

(a) His Honour The Chief Justice (Sir Owen Dixon),

26th February 1960

No. 5

REASONS FOR JUDGMENT OF THE FULL COURT OF THE HIGH COURT OF AUSTRALIA

(a) His Honour The Chief Justice (Sir Owen Dixon)

DIXON C.J. :

In Parton v. Milk Board (Victoria) (1949) 80 C.L.R. 229, at p.263 I had occasion to state why, in my opinion, the character of the levy dealt with in Hartley v. Walsh (1937) 57 C.L.R. 372 shewed that it could not be a duty of excise. I said, "Not only was the imposition upon the proprietor of the packing shed and one measured, at least as to the maximum, by the fruit handled, but the fruit was the fruit of the previous year. This appears to me to place the imposition more in the category of a licence fee in respect of a business calculated on past business done." Had I stopped there, I would have had nothing to repent. But I did not stop there; I went on with an illustration: "Something like the licence fee of a licensed victualler calculated on the amount expended by him in the previous year in purchasing liquor, which I should not regard as an excise." No doubt I had the system obtaining in Victoria in mind. But an examination of the system has convinced me that the illustration was entirely wrong.

A careful consideration of the Victorian licensing law, which is now embodied in the Licensing Act 1958, has made it clear to me that a connected series of provisions ensures that, subject to exceptions that are of no importance either because they are theoretical and not real or because they are too trivial to matter, all liquor sold in Victoria must bear a tax of six per cent of its wholesale price or value before it reaches the consumer. Some forms of licence authorise the selling of liquor by wholesale, such for instance as a brewer's licence or a spirit merchant's licence, although they cover retail sales. Other forms of licence of which the ordinary victualler's licence is the chief are concerned with retail selling. It will be necessary to shew the pattern more in detail but in a general way it may be said that for liquor sold under the first class of licence (unless it

be sold to persons authorized to resell which in effect means to persons who sell by retail) six per cent of the selling price must be paid to the State Treasury. For liquor passing through the hands of those holding any of the second forms of licence, those concerned with retail selling, the six per cent paid to the Treasury must be calculated on the price paid for the liquor; it could not be on the price for which the liquor is sold, for that is the retail price. In taking the price at which the retailer purchases and the wholesaler sells the provisions adopt the same thing for the calculation of the percentage.

It is, I believe, an undeniable proposition that, subject to the unimportant exceptions I have mentioned, because of the provisions of the Licensing Act no liquor can be bought by retail in Victoria unless in respect of it someone has paid, has become liable to pay or will be placed in a situation which will 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 means to me that the provisions impose an excise duty within the meaning of s.90. It is a tax. It is a tax "upon" the goods. It is the kind of tax which tends to be recovered by the person paying it in the price he charges for the goods which bear the imposition. Only in two respects does the case appear to me to involve any question as to the connotation of the word "excise" in s.90, a connotation that has been discussed in past cases very fully in this Court. The first of the two matters to which I refer is the fact that the proposition, as I have framed it, embraces liquors independently of their place of origin. The tax is an inland tax and not an import tax but, as I have described it, it falls without distinction upon liquors whether they originated in Victoria, in Australia but outside Victoria or outside Australia altogether. The tax is undoubtedly an inland tax but it does not distinguish between the goods upon which it falls in respect of their origin; it is indifferent to the possibility of their being domestically produced or imported. Certain licences such as an Australian Wine licence and to some extent perhaps a brewer's licence, are restricted to Australian production but we need not enter upon that

In the Full Court of the High Court of Australia

No. 5

Reasons for Judgment

(a) His Honour The Chief Justice (Sir Owen Dixon),

26th February 1960 - continued.

distinction between licences; it is a side issue. For so far as I am concerned, I think 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 may be that it is an excise because it includes goods of home manufacture and as to imported goods is not. That seems to be the way it was regarded in Commonwealth and Commonwealth Oil Refineries Ltd. v. State of South Australia (1926) 38 C.L.R. 408. But it would be ridiculous to say that a State inland tax upon goods of a description manufactured here as well as imported here was not met by s.90, excluding as that section does both duties of customs and duties of excise, because the duty was not confined to goods imported and so was not a duty of customs and was not confined to goods manufactured at home and so was not a duty of excise. The brief statement in Matthews' Case (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 in a tax directly affecting commodities" may need elaborating, but it expresses my view of the substance of the provision. The second matter which perhaps arises as to the connotation of "excise" is closely connected with the first. It is whether the tax in order to be an excise must be imposed on the production of the goods or may be imposed upon the goods in the hands of any of the various persons through whom they pass in the course of distribution. Upon this I have expressed my view in Matthews' Case, supra, at pp.291-303, and in Parton's Case, supra, at pp. 260-1, where there is a qualification with respect to consumption.

I have begun by framing the foregoing proposition because it appears to me to represent the effect of the provisions of the Licensing Act 1958. I must, of course, establish or justify the proposition by a detailed discussion of the provisions. But for two reasons it has seemed better to formulate it at once before proceeding to justify it. The first is because it is the operation of the provisions of the Act considered together which appears to me inevitably to shew that an excise is imposed. They operate together to burden liquor as a commodity with six per cent upon the wholesale price. As was said by Lord

Thankerton speaking for the Privy Council in Attorney-General for British Columbia v. Kingcome Navigation Co., (1934) A.C. 45, at p.59: "Customs and excise duties are, in their essence, trading taxes and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted." If you proceed by looking at each particular licensing provision of the Act connecting it only with the man licensed you are very likely to fail to perceive that, whatever the purpose of licensing the man, that is to say the description of trader in or producer of liquor, the purpose of levying six per cent upon the wholesale price of the liquor permeates the whole and is put into effective operation. The second reason for stating first the combined effect of the provisions as the imposition upon the commodity of a tax of six per cent of the wholesale price and treating that as decisive is that it enables one better to see the bearing of certain objections that are made to placing the exaction of six per cent of the purchase price within the category of a duty of excise. Some of these objections, as it would appear to me, give a characterization to the licence and to the payment to the Treasury by a licensee of the tax, a characterization which may be just enough but which does not detract from the truth that nevertheless the result of the whole is an excise upon the commodity. Other objections seem rather to treat as important the fact that in return for the tax a licence is given to the licensee possessing a quasi-monopoly value. This again I would not regard as material, once it is seen that the result is to tax liquor on its way to the consumer by whatever human channel it may flow.

Now the occasion when the percentage upon sales or purchases as the case may be is to be paid is on the renewal of the particular description of licence. It is convenient to neglect for the moment the grant of a new licence. The Licensing Court has annual sittings usually appointed for the close of the year: see Part VI. Renewals are granted for the ensuing year. The Licensing Court fixes the amount of the "fee" and inserts it in the certificate of renewal: see s.20. The "fee" comprises the percentage, that is six per cent of the sales or purchases as the case may be, but, speaking generally, it is the sales or

In the Full Court of the High Court of Australia

No. 5

Reasons for Judgment

(a) His Honour The Chief Justice (Sir Owen Dixon),

26th February 1960 - continued.

purchases over the period of twelve months ending on 30th June last. Now it does not matter who applies for the renewal of the licence. It may be the holder, a transferee, or some successor in title or some one applying as owner or mortgagee of the premises or nominee of the owner or mortgagee when for example a tenant or mortgagor who is a licensee has failed to seek a renewal of the licence of the premises: see s.89(2). In whatever character he applies he must pay the licence fee fixed by the court, that is to say the tax calculated on the liquor purchased during the twelve months ending on the previous 30th June.

There is one possible contingency in which the amount may not be paid and may not become payable. That contingency is that neither the licensee nor any occupier nor the owner nor the mortgagee nor any person with any right title or interest seeks a renewal of the licence and the licence lapses or is surrendered. It is not necessary to pursue what is involved in this contingency. It is enough to concede its possibility and to add a reference to s.37 and part XIII for cases where perhaps there is a surrender and where compensation is sought. It seems plain enough that the provisions are all framed on the footing that a licence will be renewable and will continue indefinitely whether the licensee be the same or there be a transfer or some new licensee coming in for the owner or mortgagee or as the case may be or there be a removal of the licence to another site (cf. s.120). In a general scheme of the kind which the provisions disclose, it appears to me that no significance on the question whether the tax is an excise can be found in the fact that no attempt is made to cover the contingency that a business carried on under a licence may be abandoned at the end of a year and that no renewal may be obtained which would form the occasion for payment of the tax. It is not now perhaps considered remarkable that a licensed site in a growing city should be turned to a more profitable use than the liquor trade provides; but one may be sure that it would be a mistake to attach any particular significance to the omission from the provisions with which we are concerned, taking their root as they do in 1916 and earlier, of any measure to catch the "licence fee" or tax on the liquor purchased in the prior year ending 30th June in a case where there was no renewal of

the licence. Plainly it was the general conception that when the renewal of the licence was obtained, six per cent on the liquor bought during a convenient year of account for sale on premises should be paid to the Treasury and that this should go on de anno in annum. It is for this reason that in framing the proposition with which I opened this judgment I ventured to place this qualification under the description of exceptions that are of no importance either because they are theoretical and not real or too trivial to matter. There may be found one or two other points, for example in the case of a vigneron's licence, at which it may seem possible theoretically that occasionally a little liquor may go untaxed but if it be so they form very trivial exceptions and they are not worth separate discussion.

But it is desirable now to turn to the task of justifying the proposition. It is justified by going through the possible channels or courses under the licensing system by which liquor may be distributed and by shewing how they each mean that six per cent of the wholesale purchase price shall be drawn off to the Treasury, so that the whole field of distribution is covered and there is a tax of six per cent on the wholesale purchase price of all liquor reaching the consumer. I shall begin with clubs, a category outside the general system. I do so simply because they supply an initial example of the fact that the provisions of the Act cover the whole lawful distribution of liquor and secure (subject to the unimportant exceptions to which I have referred) a return of six per cent to the Treasury on the wholesale price of all liquor reaching the consumer in Victoria.

Clubs are not licensed. They are registered under Part XII of the Licensing Act 1958. But the grant or renewal of the registration of a club involves the payment of six per cent paid or payable for all liquor purchased by or for such club during the twelve months ended on the last day of June preceding the date of the application for registration s.248(2).

Take next a packet licence, that is a licence to sell liquor aboard a vessel: s.14. Six per cent of the amount paid for liquor purchased for the vessel during the twelve months ending on the

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previous 30th June must be paid on the renewal of that licence: s.19(1)(a). So with an Australian wine licence: ss.10 and 19 (1)(e). A brewer's licence is granted under Part VII of the Act. It authorises the holder to sell and dispose of beer, ale, porter or wine made in Victoria but in quantities of not less than two gallons. The licence is for a calendar year and is of course renewable. The fee includes six per cent on the liquor sold, not purchased, but it is on the liquor sold or disposed of under the licence to persons other than persons licensed to sell liquor: see ss.19(i)(g), 17, 124. This means that there is no percentage payment payable by the brewer in respect of liquor sold to retailers or other wholesalers but only to persons who because they possess no licence must be considered consumers. Sales to them, however, must be in quantities of not less than two gallons. The point for the purpose in hand is that if the beer, ale, porter or wine sold by a licensed brewer is sold to a licensed person who must include it in the purchases upon which he, his transferee or other successor in title or in business will pay six per cent to the Treasury when he comes at the close of the year to obtain a renewal of that licence, then the brewer pays nothing in respect of it; for it will in due course bear the tax. But if he sells it to a person having no such licence, he must pay six per cent on the selling price which being in quantities of not less than two gallons will, it is supposed by the provision, be a wholesale price. In the same way a licensed spirit merchant must pay six per cent of the amount paid or payable by him for all liquor which during the twelve months ended on 30th June preceding was sold or disposed of under the licence to persons other than persons licensed to sell liquor: see ss. 11, 19 (1)(c). But a licensed spirit merchant may be a licensed grocer. A holder of a grocer's licence who is a licensed spirit merchant may sell and dispose of liquor in bottles. Such a person must pay six per cent of the amount paid or payable by him for all liquor which during the twelve months ending on the previous 30th June was purchased by the licensee and disposed of under such licence to any person other than a person licensed to sell liquor. If he sells as a wholesaler he does not pay the six per cent because the retailer does pay; otherwise the grocer-spirit-merchant does

pay it: see ss. 11, 12, 19(1)(c), (d). A vigneron's licence stands in a special position. Doubtless it is assumed that the vigneron will export or sell for export or sell to a wholesaler here all the wine he produces from his vineyard. He will thus never be in a position of one who should pay the six per cent on liquor to be consumed in Victoria. He obtains a vigneron's licence which authorises him to sell at his vineyard, in quantities of not less than one pint and not to be drunk on the premises, wine made from grapes of his own growing or from grapes purchased by him: ss. 13, 19 (1)(f). He does not pay six per cent on any sales. For whether it is the wholesaler who buys from him or any retailer who buys from him direct, so far as the wine goes into consumption in Victoria, the six per cent is imposed on it by the other provisions. It is perhaps superfluous to trouble over a railway refreshment room licence; but there the six per cent must be paid calculated on the amount paid or payable by the licensee for all liquor which during the twelve months ending on 30th June preceding was purchased for the premises. Before coming to the licensed victualler there are two other forms of licence to mention. They are the temporary victualler's licence and the temporary packet licence. The first of these may be obtained by a licensed victualler or licensee of a railway refreshment room. It enables the licensee to sell liquor at an agricultural show, at races, at a regatta and at any of a number of other specified temporary amusements or games. The second, the temporary packet licence, authorises the master of a ship conveying passengers from a place in Victoria to another place in Victoria or outside Victoria to sell or dispose of liquor to passengers during the passage. These licences are of course of no intrinsic importance but they provide this point, namely, that six per cent of the amount paid or payable for liquor purchased for sale or disposal under the licence must be paid to the Treasury within seven days of demand and, to enable it to be fixed, the licensee must declare the amount paid by him for liquor purchased by him for sale or disposal under the licence.

The licensed victualler is of course chiefly important; but there is nothing about his case which, having regard to the explanation already given, does more than complete the system which

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ensures payment of six per cent to the Treasury of the wholesale price of liquor. The six per cent is calculated on the liquor purchased within the twelve months ending with the last preceding 30th June. Whoever obtains the renewal of the licence for the ensuing year for those premises must pay it: see ss.9, 19(1)(a).

There is one matter of importance which might affect the view taken of the six per cent as a tax of a description tending to be passed on to the consumer, commonly regarded as a characteristic of an excise duty. It is the provision which enables or was intended to enable a licensed victualler who is a tenant to place upon his landlord the burden of the three-eighths the amount of the tax: see s.19(3) (amended since Meredith v. Fitzgerald (1948) 77 C.L.R. 161.) It might be suggested that this provision 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 customer. Perhaps that may be an inference. But, in my opinion, it does not operate to make a tax which is calculated directly on the price of the goods sold any less an excise. It remains something essentially associated with the quantity and value of the goods. I say this in full consciousness of the fact that the payment exacted is calculated on the price of the goods purchased during a period which ended six months before the exaction is fixed, purchased during that period for sale but of course not necessarily for sale during that period. That, to my mind, does not matter. For it is a continuing business and when the licensee purchased those goods he knew they must bear an impost of six per cent. 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.

The licences which have been dealt with in the foregoing account of the provisions cover what may be called the distribution of liquor for consumption in Victoria. No person may sell liquor except under the authority of one or other of the licences: see s.154. The registration of a club covers what ground might remain and the result is that all liquor on its way to the consumer, except to the immaterial extent stated, is subject in the manner described to the payment of a tax of six per cent of the wholesale price.

The provisions deal with the distribution of liquor in Victoria as a continuous operation and impose the tax accordingly. That is one reason why it appears to me to be quite immaterial that the payment of the tax made in, say, January of a given year is calculated on the liquor purchased during the twelve months ending on the last day of the previous June for sale on the premises or as the case may be. It is also a reason why it has seemed unnecessary to go into the question of the obtaining of a new licence and the assessment of tax for the commencing year. The Licensing Court in such a case estimates the probable extent of the annual purchases of liquor for sale or disposal under the licence: see s.21. It might be possible to regard the ensuing annual payments upon renewals as continuances from this payment working out the correction. But that is not the aspect which the provisions give them.

It is not a matter to which I attach importance

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in the view I take but it should be noticed that in the case of certain licences there is a fixed fee as well as the six per cent on wholesale prices paid or charged. They are the temporary victualler's or packet licence, the spirit merchant's licence and the brewer's licence. 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.

It will be seen that under the system which operates as a result of the provisions that have been examined the tax of six per cent on wholesale prices covers the whole supply of liquor to the consumers in Victoria. The disappearance of this or that old licence or the grant of this or that new licence has no effect on the liability to tax of the total amount of liquor obtained by the consumers.

Nothing has been said so far as to the relative proportions of the liquor passing under the system which respectively is imported and is produced in Australia or more particularly in Victoria. But it is common knowledge that the proportion imported is very small and the great proportion, particularly of beer, is produced in Victoria.

The fact that the licensing of a licensed victualler and for that matter the registration of a club forms part of the method of controlling the sale of liquor, the conduct of hotels and so on appears to me quite immaterial, as does the question whether the licence in the hands of the licensee is a valuable privilege for which the payment of the tax may be regarded as part of the consideration. Section 90 is quite unconcerned with the position of the individual. It is concerned wholly with the demarcation of authority between Commonwealth and State to tax commodities. Duties of excise and of customs are denied to the States simply because of their effect on commodities. Whether a tax is a duty of excise must be considered by reference to its relation to the commodity as an article of commerce. The six per cent upon the wholesale selling price of liquor appears to me simply to be a tax upon liquor, a tax imposed on liquor on its way to the consumer by whatever channel it may proceed; it is, in other words, an

addition to the excises the Commonwealth Parliament has chosen to impose on liquor. It is a tax which goes into the Licensing Fund kept in the Treasury under Part XV. From that certain annual subventions are payable to municipalities and to the Police Superannuation Fund and the costs are paid for administering the Act: see s.290. But the balance forming the great bulk of the fund goes to the Consolidated Revenue of Victoria.

The tax is, in my opinion, an excise on liquor.

For those reasons, I think, the demurrer should be overruled.

Perhaps it should be added that the Licensing Act 1958 has been referred to in the foregoing for convenience although it was not in force at the material time. All the provisions are gathered together in that Act and no purpose would be served by going behind it.

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McTIERNAN, J. :

In my opinion the demurrer should be decided in the plaintiff's favour.

The plaintiff claims a declaration invalidating the provisions of the Licensing Acts cited in the statement of claim and reproduced by s.19(1)(a) of the Licensing Act 1958, also by s.19(1)(b). The interest of the plaintiff to claim this declaration is as holder of a victualler's licence and temporary victualler's licence. The plaintiff paid annually the fees provided by paragraph (a) for the victualler's licence, and the fees provided by paragraph (b) for the temporary victualler's licence. These provisions make it compulsory to pay the fees for the licences to which they apply.

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The fees go to revenue in order to be appreciated for public purposes.

The fee provided by paragraph (a) is, in the case of a victualler's licence, a sum equal to six per cent of the purchases of liquor, including the duty thereon. These are purchases made during the period of twelve months ended the 30th June prior to the application for the grant or renewal of the licence and intended to be sold on the licensed premises. Paragraph (b) provides for a daily fee of £1 for a temporary victualler's licence and in addition a further fee equal to six per cent of the purchases of liquor made for sale under the licence, including duty thereon.

The plaintiff claims the declaration invalidating these provisions on the ground that the percentage fees are, in substance, duties of excise and therefore, by reason of s.90 of the Constitution, beyond the powers of the Parliament of a State. The fees payable under the provisions in question have clearly the indicia of taxation, being exactions made for the purposes of Government. They are not merely payments for services performed by the Government for licensees. It was argued for the defendants that the fees could be regarded rather as consideration for valuable rights than as taxation. This argument seems to me to involve the implication that the grant of a licence is a transaction with the licensee, and to give the fee the colour of the price of the grant. I think that the argument takes away too much of the character of the grant, which is rather a decision than a transaction, and deprives the fee of its character as an exaction.

But the substantial issue between the parties is whether the percentage fees in question are duties of excise within the meaning of s.90. Excise, like customs, is one of the divisions of indirect taxation. The association of the term "excise" with "customs" in s.90 defines the field of taxation over which the Parliament of the Commonwealth is given exclusive power and shows that the meaning of duties of excise does not extend beyond indirect taxation, although in contexts other than the Constitution of the Commonwealth the term "excise" is often used to refer to taxes, irrespective of whether they are direct or indirect in their incidence.

A tax is a duty of excise within the meaning of s.90 which is payable on or in respect of goods and is intended or expected to be passed on and finally borne by the consumer or user of the goods as part of the price which he pays for them. The decision of the Court in Parton v. Milk Board (Victoria) (1949) 80 C.L.R. 229, (1950) A.L.R. 55, establishes, in my opinion, that duties of excise within the contemplation of s.90 includes duties imposed subsequently to production or manufacture. I feel that it would be contrary to the decision of the majority in that case for me to adhere to the opinion which I expressed in that case as to the extent of the exclusive power to impose duties of excise.

In my view, the effect of the provisions in s.19(1)(a) is that the fee payable for a victualler's licence is a tax payable on, or directly in respect of, the liquor "purchased for the premises" which those provisions require to be taken into account, because it is a sum equal to six per cent of the amount of such purchases, with duty thereon added. Such liquor is purchased for sale on the licensed premises. I apprehend that the consequence reasonably expected to follow from levying tax on goods purchased for sale is that the tax will be borne finally by the ultimate purchasers as part of the price which they pay for the goods. In my opinion, the provisions of s.19(3) do not operate to change the essential character of the fees from indirect to direct taxation.

It is argued for the defendants that, if the fees in question are taxes, they are levied on the licences respectively for which they are prescribed and are direct taxes. I think that this argument is right in the case of the fees, other than the percentage fees. The latter fees only are computed by reference to purchases of liquor.

In my judgment the percentage fees fixed by s.19(1)(a) or (b) are, in the case of liquor produced in Australia, clearly duties of excise. It is unnecessary to decide whether duties of excise on goods imported into Australia are intended by s.90 to be within the exclusive power of taxation which the section reserves to the Parliament of the Commonwealth. Even if that is the case the provisions which impose percentage fees are invalid in regard to liquor purchased in Australia because they are not capable of a distributive application to imported liquor on the one hand and home-produced liquor on the other. The provisions under attack must therefore be wholly invalid, except as regards the daily fee payable under s.19(1)(b).

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FULLAGAR, J. :

I do not think that the argument for the plaintiff in this case is fully met by saying that the Victorian legislation which requires licences for the sale of liquor to be held, and requires fees to be paid for licences, is no more than an exercise of the general power to control trading in liquor which belongs to the States under the Constitution. It is true that, under the Constitution, the States have, and the Commonwealth has not, that general power, and that the State power is specifically safeguarded by s.113. It is true also that the elaborate State licensing systems are designed to effectuate a strict general control of the trade and not as mere machinery for the collection of revenue. In this respect they differ from the licensing systems which exist under the excise legislation of the Commonwealth and which are designed for, and justifiable only as incidental to, the effective collection of revenue; see Griffin v. Constantine (1954) 91 C.L.R. 136; (1955) A.L.R. 28. But these considerations are not decisive. A licence 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.

In Downs Transport Pty. Ltd. v. Kropp; Browns Transport Pty. Ltd. v. Kropp (1959) A.L.R. 1, at p.3, the court observed that the definition of a duty of excise propounded by Griffith C.J. in Peterswald v. Bartley (1904) 1 C.L.R. 497, at p.509; 10 A.L.R. C.N.65, had been found to be somewhat too narrow. In saying this we had - or at any rate I had - mainly in mind the case of Parton v. Milk Board (Victoria) (1949) 80 C.L.R. 229; (1950) A.L.R. 55. The Kropp cases seemed to me to be very clear cases. To have decided them in the appellants' favour would have meant, in substance, attributing to the term "duties of excise" in the Constitution that loose and wide meaning which they had for administrative reasons acquired in England and the rejection of which in Peterswald v. Bartley, supra, has never been questioned. No critical examination of the later decisions was required. The present case,

however, does call for a consideration of some of those decisions and for a brief critical inquiry into the whole subject.

In delivering the judgment of the court in Peterswald v. Bartley, supra, at pp. 508 et seq., Griffith, C.J., quoted the statement of Quick and Garran that "the fundamental conception of the term (duties of excise) is that of a tax on articles produced or manufactured in a country." His Honour then observed that in some of the States before federation "there were in existence for many years 'duties of excise' properly so called, imposed upon beer, spirits and tobacco." He then said, "There were other charges which were never spoken of as excise duties, such as fees for publicans' licences and for various other businesses, such as slaughtermen's, auctioneers' and so forth, but these were not commonly understood in Australia as included under the head of excise duties." Then came what we referred to as a "definition." The learned Chief Justice, speaking of the word "excise", said: "..... the conclusion is almost inevitable that, whenever it is used, it is intended to mean a duty analogous to a customs duty, imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax."

Peterswald v. Bartley, supra, has always been regarded as the leading case on duties of excise, and the exclusion from the category of the wide range of charges to which the term has been applied in England and in America has, as I have said, never been questioned. The words "analogous to a customs duty" though I would myself attach considerable importance to them, are descriptive rather than definitive, and in any case the famous exposition of Griffith, C.J., cannot be treated as having the force of a statutory definition. The words, however, are carefully chosen and precise, and they do purport to state the essential elements which, for the purposes of s.90, distinguish a duty of excise from other duties and taxes. They have always, I think, either expressly or tacitly, provided the starting point for any discussion of the subject. But two of the essential elements stated in the definition have not received universal acceptance. It has not been universally accepted either that, in order to be an excise duty, a charge must be "imposed in

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relation to quantity or value of goods," or that it must be imposed upon goods "when produced or manufactured" - which I take to mean "on or in respect of their production or manufacture." I proceed to consider the essential elements of a duty of excise within the meaning of s.90.

When it is necessary to characterise an exaction for the purposes of s.90, it is usual to begin by asking: "Is it a tax?" It might have been thought more correct to ask: "Is it a duty?" Section 90 speaks of "duties of excise," not "taxes of excise," and the word "tax" is of wider import than the word "duty": see Encyclopaedia Britannica, 11th ed. s.v. "duty." We speak of "customs duty," "excise duty" and "estate duty" but of "income tax," "land tax" and "sales tax." It is probably correct to say that every duty is a tax but not every tax is a duty. But however this may be, we do advance one step on the road if we can say that a particular exaction is a tax and then proceed to inquire whether it is that particular kind of tax which is called a duty of excise. This seems better than asking (1) "Is it a duty?" and (2) "Is it an excise?"

I am prepared to concede that the fees imposed by s.19 of the Licensing Act 1958 (Victoria) are, for the purpose in hand, "taxes." It is true that in each case the fee is exacted as the price of a licence to do something which is otherwise prohibited, and it falls only upon those who choose to apply for a licence or the renewal of a licence. But it is a compulsory exaction by a public authority and is rightly regarded, I think, as a tax payable by a class of persons. It is not necessary in this connection to consider the line of cases decided in recent years under certain "marketing" legislation of certain states. In these cases producers of particular commodities were required in one way or another, by direct levy or by "pool deduction," to contribute to the cost of a marketing scheme intended for their benefit. As to these cases, I have difficulty in reconciling Crothers v. Sheil (1933) 49 C.L.R. 399; Hartley v. Walsh (1937), 57 C.L.R. 372, (1937) A.L.R. 480, and Hopper v. Egg and Egg Pulp Marketing Board (1939), 61 C.L.R. 665, (1939) A.L.R. 249, on the one hand, with Matthews v. Chicory Marketing Board (Victoria) (1938), 60 C.L.R. 263, (1938) A.L.R. 370 and Parton v. Milk Board, supra, on the other hand. But the

Licensing Act of Victoria has nothing to do with any marketing scheme; it is concerned, inter alia, with the raising of revenue for certain purposes, and the exactions which it makes for those purposes are, I think, properly regarded as "taxes".

When it has been decided that the particular exaction in question is a tax, the question is then sometimes asked whether it is a "direct" tax or an "indirect" tax. As to this, I would say, with the greatest respect, that I think it a pity that this distinction was ever raised or mentioned in relation to s.90. I do not think it is capable of throwing any light on s.90. Attention to it may be thought to have been invited by the concluding words of the "definition" of Griffith, C.J. in Peterswald v. Bartley, supra, at p.509. His Honour's words were: "and not in the sense of a direct tax or personal tax." But I understand His Honour to have intended by those words not to add anything by way of definition to what he had already said, but merely to give an example, by way of contradistinction, of something which would not be a duty of excise. I gather from a recent article by Professor Arndt, (1952), 25 A.L.J. 667, at p.674, that the distinction between "direct" and "indirect" taxes is now discredited among economists. But, in any case, I do think that the whole subject of s.90 and duties of excise has been clouded by reference to a number of decisions of the Privy Council which have interpreted and clarified s.92(II) of the Canadian Constitution but have no real bearing on s.90 of our own. Section 92(II) of the British North America Act 1867 gives to the Legislatures of the Provinces exclusive power to make laws in relation to "direct taxation within the Province." This provision was adopted with conscious and deliberate reference to John Stuart Mill's distinction between "direct" and "indirect" taxation, and Mill himself probably had some influence in the matter. In Atlantic Smoke Shops Ltd. v. Conlon (1943) A.C. 550, at p.563, (1943) 2 All E.R. 393, Viscount Simon, L.C. said: "It has been long and firmly established that, in interpreting the phrase 'direct taxation' in head 2 of s.92 of the Act of 1867, the guide to be followed is that provided by the distinction between direct and indirect taxes which is to be found in the treatise of John Stuart Mill. The question, of course,

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as Lord Herschell said in Brewers' and Maltsters' Association of Ontario v. Attorney-General for Ontario (1897) A.C. 231, at p.236, is not what is the distinction drawn by writers on political economy, but in what sense the words were employed in the British North America Act. Mill's Political Economy was first published in 1848 and appeared in a popular edition in 1865. Its author became a member of Parliament in this latter year and commanded much attention in the British House of Commons. Having regard to his eminence as a political economist in the epoch when the Quebec Resolutions were being discussed and the Act of 1867 was being framed, the use of Mill's analysis and classification of taxes for the purpose of construing the expression now under review is fully justified." There can be no such justification for "the use of Mill's analysis," or for the use of Canadian precedents, when we come to interpret our own s.90, which was adopted in a quite different setting and employs much more specific terminology.

When we have found that an exaction which is in question is a tax, and when we have put aside the Canadian Constitution and the decisions on it as irrelevant, we come to the critical questions. These may be stated as being three in number - (1) Must it be a tax "upon goods?" - (2) Must it be imposed upon the production or manufacture of goods? - (3) Must it be imposed by reference to quantity or value of the goods? The questions so stated raise for consideration, though not in the same order, the three elements regarded by the court in Peterswald v. Bartley, supra, as essential.

Probably no one would dissent from the broad proposition that it is an essential element in the character of a duty of excise that it should be a tax "upon goods." But the whole weight of that expression is carried by, and ambiguity lurks in, the humble preposition, for which is sometimes substituted a prepositional phrase such as "in respect of" or "in relation to." Taxes may be charged upon property, real or personal, in the sense that there is a direct remedy against the property for recovery of the tax. But nothing of that kind is meant when we speak, in the present universe of discourse, of a tax "upon goods." Goods as such cannot pay taxes; there must be a

person to pay them. And what is meant by saying that a tax is a tax upon goods is that the person by whom the tax is payable is charged by reason of, and by reference to, some specific relation subsisting between him and particular goods. A tax will be rightly regarded as a tax upon goods if the person upon whom it is imposed is charged by reason of, and by reference to, the fact that he is the owner, importer, exporter, manufacturer, producer, processor, seller, purchaser, hirer or consumer of particular goods. This list may not be exhaustive.

Duties of customs and duties of excise are particular classes of taxes "upon goods." The relation of taxpayer to goods which characterises a duty of customs is found in the importation or exportation of goods. The taxpayer is taxed by reason of, and by reference to, his importation or exportation of goods. The relation is implicit in the term itself, which has acquired an established meaning so that difficulty is seldom felt as to whether a particular exaction is or is not a duty of customs. It has often been observed that the meaning of the term "duty of excise" is not so well established and the crucial question in the present case, as I see it, is: What is the relation of a taxpayer to goods which characterises a "duty of excise" as that term is used in the Constitution and particularly in s.90?

The answer to this question given by the court in Peterswald v. Bartley, supra, was that the necessary relation is to be found in the manufacture or production of goods - that which 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 relation is treated as implicit in the term itself. As to the scope of the terms "manufacture" and "production", see Parton v. Milk Board, supra, at pp. 245-6, per Latham, C.J. After full consideration, and necessarily with the greatest respect for the contrary view, I am of opinion that the answer given in Peterswald v. Bartley, supra, was right and should be applied in the present case.

The reasons which support this conclusion are stated in Peterswald v. Bartley, supra, itself and in later cases. They appear to me to be convincing. I will state them briefly as they appear

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to me. In the first place, there is the reference in s.93 to "duties of excise" paid on goods produced or manufactured in a State." The words "produced or manufactured" seem clearly to refer to the occasion of the imposition of the duty, and to be intended to cover all duties of excise and not merely a particular class of duties of excise. Then there is the repeated collocation in the Constitution of the term "duties of customs" with the term "duties of excise." The collocation occurs in ss.55, 86, 87, 90 and 93. This seems amply to warrant the view of Griffith, C.J. that the duty intended by the term "duty of excise" is a duty "analogous to a customs duty," and this view fits in with what one would suppose to be the policy behind the relevant provisions of the Constitution. I would myself respectfully agree with the observations of McTiernan, J., in Parton v. Milk Board, supra, at pp.264-5. His Honour said: "Duties of customs on imported goods have a relationship to the price paid by the user or consumer of the goods similar to that which duties of excise imposed upon goods produced or manufactured in the country have to the price paid by the user or consumer of those goods. There is an important relationship between duties of customs and duties of excise levied upon production or manufacture ..... It may be inferred from the event mentioned in s.90 and the inclusion of customs, excise and bounties in the section, that the duties of excise to which it refers have this relationship to duties of customs and that the object of the section is a uniform fiscal policy for the Commonwealth."

Again, importance attaches, I think, to the nature of the duties of excise under that name in force in most of the States before the enactment of the Constitution Act. That nature is illustrated by the Customs and Excise Act 1890 of the Colony of Victoria. The duties of customs and duties of excise contemplated by the Constitution are, I think, alike duties which are imposed as a condition of the entry of particular goods into general circulation in the community - of their introduction into the mass of vendible commodities in a State. When once they have passed into that general mass, they cease, I think, to be subject matter for either duties of customs or duties of excise.

On the view which I take of the proper answer to the second of the questions I have propounded, it is not necessary, for the purposes of this case, to answer the third. I will only say that I am not satisfied that it is an essential element of a duty of excise that it should be measured by quantity or value of goods. The fact that a tax is so measured tends, of course, to support the view that it is a tax "upon goods", but in Matthews v. Chicory Marketing Board, supra, a levy was held, Latham C.J. and McTiernan, J., dissenting, to be a duty of excise although it was not measured by quantity or value of goods. It was imposed on a producer as such and might well be regarded, if a tax at all, as a tax on production, but it was measured by acreage planted and not quantity or value of commodity produced. If a State were to impose a tax of £100 per month on all distillers of spirits, I should feel difficulty in saying that the tax was not a duty of excise. It would be payable by reason of, and by reference to, the production or manufacture of goods. I should feel the same difficulty, if the same tax was imposed on importers of spirits, in saying that it was not a duty of customs. So, in the present case, I have difficulty in saying that a tax imposed upon retailers of liquor as such is a duty of excise if it is measured by quantity of liquor purchased, but is not a duty of excise if it is measured by annual value of licensed premises.

I do not think that there is any actual decision of the Court which is inconsistent with the view which I have expressed on the second of the three questions which I have raised, although I am aware, and am, of course, very much pressed by the fact, that it is inconsistent with the view expressed by Dixon, C.J., in Matthews' Case, supra, and in Parton's Case, supra. The cases are reviewed very fully in the judgment of Menzies J., which I have had the advantage of reading. The case of John Fairfax & Sons Ltd. v. State of New South Wales (1927) 39 C.L.R. 139; 33 A.L.R. 84, was a very clear case of a tax imposed on a producer or manufacturer by reference to what he produced or manufactured. The two difficult cases are Commonwealth of Australia and Commonwealth Oil Refineries Ltd. v. State of South Australia (1926), 38 C.L.R. 408; 33 A.L.R. 40 (the Petrol Case) and Parton's Case, supra. In the former case there

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were several complicating factors, and the reasons given by the six justices who formed the majority were not altogether in accord. But I think it clear that Knox C.J., Isaacs J., Powers J., and Starke J., accepted the exposition in Peterswald v. Bartley, supra, and regarded the exaction as a tax on producers within the meaning of that exposition; see specially the judgments of Knox C.J., at pp. 419-20, of Isaacs J., at pp.426,430, and of Starke J., at p.439.

In Parton's Case, supra, the levy in question was imposed upon "dairymen". Dairymen were not producers or manufacturers of milk, but it was held by a majority of five justices that the levy was a duty of excise. Latham C.J., and McTiernan J., dissented. Latham C.J., 80 C.L.R. at pp.245-6, said: "In my opinion an examination of the cases upon which the plaintiff relies shows that in each of them a tax payable upon the occasion of the sale of a commodity was held to be a duty of excise because the tax was a tax payable by the producer of the commodity and therefore was truly a tax upon the production of goods. If a tax is imposed upon the producer of goods when he sells the goods, the tax is a tax upon production. If, however, the tax is imposed at a later stage after the producer has disposed of the goods, it is a tax merely upon sale and not upon production." The majority consisted of Dixon J. (as he then was), Rich J. and Williams J. The view of Dixon J. was, as I have observed, directly opposed to that which I have expressed; His Honour repeated, with a very slight modification, what he had said in Matthews' Case, supra. But Rich J. and Williams J. who delivered a joint judgment, were of opinion (80 C.L.R. at p.252) that a duty of excise "must be imposed so as to be a method of taxing the production or manufacture of goods." This is my view and I cannot therefore regard their judgment as inconsistent with that view. Their Honours proceeded: "..... but the production or manufacture of an article will be taxed whenever a tax is imposed in respect of some dealing with the article by way of sale or distribution at any stage of its existence, provided that it is expected and intended that the taxpayer will not bear the ultimate incidence of the tax himself but will indemnify himself by passing it on to the purchaser or consumer." With this I am, with respect, unable to agree. The

"tax" payable by the diaryman was not imposed on production or manufacture; it did not affect production or manufacture in any way; what was done was a taxing of the dairyman, or of what the dairyman did with milk, not a method of taxing production or manufacture.

It remains only to apply the general propositions which I have formulated to the facts of the present case and this can be very briefly done. The two classes of licence in question are the victualler's licence and the temporary licence. In each case the licence fee is payable by the licensee, and it is quantitied by reference to past purchases of liquor by him. It does not fall upon any producer or manufacturer, and it does not in any way affect production or manufacture. The quantification is arrived at by taking into account all purchases of liquor made in the relevant period, whether produced or manufactured in Victoria or imported from abroad or from another State by the vendor or by the licensee himself. The exaction is not, in my opinion, a duty of excise within the meaning of s.90 and I think that the demurrer should be allowed.

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KITTO, J. :

This is a demurrer to a statement of claim which seeks a declaration that the provisions of paras. (a) and (b) of subs. (1) of the Licensing Act 1928 (Vict.) were, prior to their repeal, invalid, and for the recovery of fees paid by the plaintiff thereunder. The impugned provisions purported to make fees payable for certain kinds of licences under the Act, namely victuallers' licences and temporary victuallers' licences, and according to the statement of claim the plaintiff, having held licences of these kinds at certain times, has been required to pay and has paid fees

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in respect of them in accordance with the section. The case made for the relief which is sought is that the fees were duties of excise, within the meaning of s.90 of the Constitution of the Commonwealth, and that therefore their purported imposition by the Parliament of Victoria was void because s.90 makes the power of the Parliament of the Commonwealth to impose duties of excise exclusive.

By a line of decisions beginning with Peterswald v. Bartley (1904) 1 C.L.R. 497, it is established that although in the United Kingdom the word "excise" has come to be used as a convenient label for a mass of heterogeneous taxes collected by the excise administration, in the Australian Constitution the expression has a more precise meaning. The Court had occasion to consider this line of decisions in the recent case of Downs Transport Pty. Ltd. v. Kropp (1959) A.L.R. 1, in which, after saying that the essential distinguishing feature of a duty of excise (in the relevant sense) is that it is a tax imposed "upon", or "in respect of" or "in relation to goods", a reference was given to a passage in the judgment of Dixon J. (as he then was) in Matthews v. Chicory Marketing Board (Vict.) (1938) 60 C.L.R. 263, at p.304. His Honour there stated more fully what such expressions as the foregoing attempt to convey. He said that to be an excise, "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 the subjects of manufacture or production or as articles of commerce". The reference to consumption must be considered as omitted now, in view of what His Honour said later in Parton v. Milk Board (Vict.) and Another (1949) 80 C.L.R. 229, at p.261; but with that qualification the correctness of the proposition seems to me to be demonstrated by His Honour's examination of the subject. The Court went on, in the Downs Transport Case, to reject a contention that the licence fee there in question was a duty of excise, holding that the exaction did not possess the distinguishing feature referred to, and remarking, by way of contrast, that it was "in truth ..... a fee payable as a condition of a right to carry on a business". Similarly, in an earlier case, Hughes and Vale Pty. Limited v. The State of New South Wales and Others (1953) 87 C.L.R. 49, at p.75, Dixon C.J. held that a tonnage rate levied

on a carrier was not a duty of excise, being not "a tax directly affecting commodities", but a tax "on the carrier because he carries goods by motor vehicle".

The contrast which these citations bring out is not simply between a tax which is and a tax which is not imposed by reference to commodities, or even by reference to a specified mass of commodities. 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 consumer. Indeed, the fact which in general justifies the description of an excise duty as an indirect tax, in the sense of John Stuart Mill's dichotomy, is that when, in the ordinary case, excise duty becomes payable, it amounts to a statutory addition to the cost of a particular act or operation in the process of producing or distributing goods, so that in the costing of the goods in relation to which the act or operation is done, for the purpose of arriving at a selling price to be charged to the next recipient in the chain that leads to the ultimate consumer, the duty paid in respect of those goods may enter - and therefore, according to the natural course of business affairs, will enter - as a charge relating to those goods specifically. This, I apprehend, is what is meant by saying that an indirect tax "enters at once (the italics are mine) into the price of the taxed commodity," as the Privy Council said of a customs duty in Bank of Toronto v. Lambe (1887) 12 App. Cas. 575, at p.583; 38 C.L.R. at p.435, and by saying that such a tax is "intended" or "desired" or "expected" to be passed on (Mill's own words, adopted by the Privy Council in Bank of Toronto v. Lambe (1887) 12 App. Cas. at p.582) or has "a general tendency" to be passed on (per Lord Warrington of Clyffe in R. v. Caledonian Collieries (1928) A.C. 358, at p.362). As Matthews v. Chicory Marketing Board (Vict.) shows, it is not essential that in every case that may arise the act or process which attracts the tax shall succeed in its purpose: through some mischance it may happen that no goods issue from the activity to be passed down the line to the consumer, and therefore there may be

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no opportunity to pass the tax on. But the impost is nevertheless a duty of excise if it operates as a tax upon the taking of a step in a process of producing or distributing goods.

To say so much is to exclude a tax which has no closer connexion with production or distribution than that it is exacted for the privilege of engaging in the process at all. The cases decided in this Court have been marked by much diversity of opinion on some points, but I think it may be taken as settled that a tax is not a duty of excise unless the criterion of liability is such as I have mentioned.

The statutory provisions which must be considered in order to apply these considerations are provisions of the Act of 1928. They are no longer in force, for the whole of that Act as amended up to 1958 was repealed, and its provisions replaced by the Licensing Act 1958 (Vict.). The latter received the Royal assent on the day on which the writ in this action was issued, but it did not come into force until 1st April 1959. It repeats without substantial alteration the material provisions of the repealed Act, and the section in it which replaces the former s.19 has the same number. The question before us has been discussed in argument, and for convenience may be discussed here, by reference to the provisions which are now in operation.

Section 19 is in Part II of the 1958 Act, headed "Licences and Fees Payable Thereon". The Part begins with s.7, containing a list of no fewer than eleven descriptions of licences which may be granted under the Act, and it proceeds in ss.8 to 18 to provide what is to be the effect of each kind of licence. Nine licences, including victuallers' licences, are to be in force to the end of the year for which they are granted. Two, including temporary victuallers' licences, may be granted for any specified period, not exceeding a stated maximum which in the case of temporary victuallers' licences is seven days: ss.7, 9, 16. Each licence authorizes the licensee to sell liquor, subject to restrictions. In some cases the hours of sale are limited, in some cases the kinds of liquor that may be sold, and in all cases the places where it may be sold. Each licence except a temporary victualler's licence authorizes only the selling of liquor at particular premises or on board a particular vessel.

A temporary victualler's licence authorizes only sales at functions of specified kinds, and the licensee must be either the holder of a victualler's licence or the lessee of a railway refreshment room for which a licence is in force: s. 9.

Since the selling of liquor without a licence authorizing the sale is made by s.154 an offence punishable by fine or imprisonment, the possession of a licence confers on the licensee the privilege of carrying on for a limited period a business which otherwise would be unlawful, and of carrying it on free of competition except such as may be offered by other licensees selling liquor at the places to which their licences apply and within the limits of the authority thereby granted.

Subsection (1) of s.19 provides that fees shall be paid "for such licences respectively", and it proceeds to specify in eight lettered paragraphs what shall be the fees for the various classes of licences provided for in s.7. A victualler's licence, a packet licence and a railway refreshment room licence are covered by a general provision made by para. (a): the fee is to be six per centum of the gross amount paid or payable for all liquor which during the twelve months ended on the last day of June preceding the date of the application for the grant or renewal of the licence was purchased for the premises in respect of which the grant or renewal is sought. For a temporary victualler's licence or a temporary packet licence, para. (b) prescribes a fee of £1 for each day during which the licence is in force, (in the case of a temporary victualler's licence this applies in respect of each place for which liquor will be sold), and a further fee equal to six per centum of the gross amount paid or payable for all liquor purchased for sale or disposal under the licence.

The demurrer before us is directly concerned with those two paragraphs only; but as the problem with respect to them is to characterize the fees which they impose, it is proper to consider them in association with the remaining six. Briefly, these prescribe the following fees: for a spirit merchant's licence, £40 per annum and (where the spirit merchant is not the holder of a grocer's licence) six per centum of the gross

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amount paid or payable by the licensee for all liquor sold or disposed of under the licence to unlicensed persons during the twelve months ended on 30th June preceding the application for the grant or renewal of the licence: para. (c); for a grocer's licence, six per centum of the gross amount paid or payable by the licensee for all liquor purchased by him (and not disposed of under the licence to another licensed person) during a similar period: para. (d); for an Australian wine licence, six per centum of the gross amount paid or payable by the licensee for all liquor purchased by him during a similar period: para. (e); for a brewer's licence, £10 per annum and six per centum of the gross amount paid or payable to the licensee for all liquor sold or disposed of under the licence to unlicensed persons during a similar period: para. (g); for a vigneron's licence, £7.10.0 per annum: para. (f); and for a billiard table licence, £5 per table per annum with a maximum of £40 per annum: para. (h).

It will be noticed that the vigneron's licence fee is of fixed amount. Clearly that is a fee payable as a condition of a right to carry on a business; it is not imposed upon goods in the sense that has been explained, and it seems clearly enough not to be a duty of excise. The billiard-table licence fee is of an amount which varies, not by reference to anything done in producing or distributing goods, but by reference to the size of the business which the licence authorizes, as measured by means of a broad and easily applied test. That, too, is clearly a fee payable as a condition of a right to carry on a business and is not a duty of excise. Each of the other fees provided for by s.19, however, is of an amount which varies by reference to certain described purchases or sales of liquor, and to that extent has some relation to particular goods. There is also an obvious connexion in thought between the fee and other particular goods, namely the liquor which in the event is sold under the authority of the licence for which the fee is charged. Each of these forms of connexion must be considered in order to see whether it means (as the plaintiff contends) that the fee is charged "upon goods" in the relevant sense of that expression - whether the liquor pays the duty, to use the convenient and sufficiently accurate language of the judges in Jones v. Whittaker (1870) L.R. 5

Q.B. 541 at p.544 - or whether it means, as the defendants contend, that, like the vigneron's licence fee and the billiard-table licence fee, it is charged only as a condition of carrying on a business.

The matter cannot be disposed of in favour of the defendants simply by saying, though it is true, that in s.19 the fees are described expressly as fees "for" the licences, and that in substance they constitute the payment which the licensee must make to the State in return for the authority which the licence gives him and the degree of freedom from competition which the operation of the Act in respect of other persons creates in his favour. No doubt even an exaction in the nature of a quid pro quo for a statutory licence to carry on a business might take the form of an excise duty; if, for example, s.19 had imposed, as the payment to be made to the State for a victualler's licence, what in truth was a sales tax, so that a liability for the tax arose every time a sale of liquor was made under the licence, it would be an excise duty clearly enough. The fact which makes a licence fee not a duty of excise is not that the exaction is for the licence; it is that the exaction is only in respect of the business generally, and not in respect of any particular act done in the course of the business. But the relation of the licence fees now in question to the goods to be sold under the licence, consisting, as it does, merely in the fact that without the licence the sales would not be made, does not connect any part of the fee with any particular sale: on the contrary, it is simply the relation between a fee for a licence to carry on a business and the business itself. The fee is payable in full when the licence is taken out; and no right to a refund arises if the privilege which the licence gives is not fully availed of, as, for instance, if sales cease during the year in consequence of a forfeiture of the licence or some catastrophe to the premises. I put aside, therefore, the relation between the licence fee and the sales made under the licence. The more difficult problem is that which arises from the relation between the fee and the purchases or sales on which the amount of the fee is calculated. Let me go over the paragraphs of s.19(1) and identify the purchases or sales upon which the amount in each case is made to depend.

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The goods which the general provision in para. (a) selects consist of the whole of the liquor purchased in the year ended on the preceding 30th June for the premises or vessel to which the licence applies. Paragraph (c) selects the liquor purchased by the licensee at any time and sold or disposed of in the earlier year above-mentioned "under such licence" - which means, presumably, under a similar licence for the same premises. Paragraph (d) selects the liquor purchased by the licensee in the earlier year above-mentioned, again "under such licence." Paragraph (e) selects the liquor purchased by the licensee in that earlier year, without expressly mentioning the premises but with a clear enough implication that the purchases referred to are those of the licensee as licensee of the premises. And para. (g) selects the liquor sold by the licensee in that earlier year "under such licence". Paragraph (b) is exceptional (as it has to be, having regard to the temporary character of the licences to which it applies), for it, alone of the paragraphs which fix fees by reference to liquor purchased or sold, does not base the fee upon the purchases or sales of a period which expired before the relevant grant or renewal of the licence. It selects the liquor purchased for sale or disposal under the licence; but the point to notice is that it takes no account of the time when the purchases were made: they may be made before the licence is granted.

In no case except the last mentioned do individual purchases or sales attract a liability. Take first the victualler's licence fee. No part of such a fee becomes payable at the time of a purchase of liquor for the victualler's premises, and no purchase of liquor for the premises necessarily results in any liability under the section on the part of the person making the purchase. If a particular licensed victualler buys liquor for his premises he does not, by doing so, make himself liable to pay one penny to the Crown. If he renews his licence after the ensuing 30th June, his doing so will involve him in a liability under the section, and past purchases, (which in the case supposed happen to have been his purchases) will be taken into account in working out the amount of his liability according to the statutory formula. But if he does not renew it, he will pay nothing under the section in respect of the

purchases; and neither will anyone else who does not take a grant or renewal of a licence for the premises. If someone else does renew the licence, or gets a new licence for the premises, that person will pay the fee, and the fact that he had nothing to do with the purchases on which it is based will not matter.

In these circumstances it seems to me very difficult indeed to say that the fee is, in the relevant sense, a tax on each purchase of a quantity of liquor, and therefore a tax on the liquor. Even taking one circumstance alone, the difficulty is, to my mind, insuperable; I mean the circumstance - and under paras. (c), (d), (e) and (g) it is the only relevant circumstance - that the person making each individual purchase does not by doing so become liable for the fee or any part of it.

It is urged that when a licensed victualler buys liquor for his premises, he knows that if he is the applicant for the next renewal after the ensuing 30th June he will have to pay whatever fee is then exacted, and that unless the law is amended in the meantime the fee will be six per centum. In the most usual type of case, it is said, he will have, at the time of buying the liquor, the intention of renewing the licence when it expires, and will probably be in a position to do so. Consequently he will want to cover his contingent but probable liability, by including the six per centum in his selling price. (Whether in the practical working of the liquor trade that will be possible is another matter). Of course, if he does this it may turn out that he is simply putting an extra profit in his pocket, for it may be someone else who renews the licence and therefore has to pay the fee, someone who has received no benefit from the addition to the price. Still, the argument proceeds, it is permissible for the purpose of characterizing the fee to generalise from the case which will most often occur, and to say that the fee is of a kind which lends itself to being passed on, (and is therefore to be classed at least as an indirect tax) because there is no relevant difference between including in a selling price a sum by way of provision for a contingent tax liability and including the amount of an actual tax liability incurred in the course of dealing with the goods. And to conclude from

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this that it is a duty of excise is a step which, according to the plaintiff, receives some support from the very fact that while the fee is proportioned to the purchase price of goods, the liability to pay it may not fall upon the person who makes the purchases; for such duties may be said in a sense "to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted." Attorney-General for British Columbia v. Kingcome Navigation Company (1934) A.C.45 at p.59.

This I think, puts the argument about as high as it can be put for the plaintiff, but it does not commend itself to me at any point. In particular, the fact that the person who becomes liable to pay the fees may have had nothing to do with the purchases by reference to which it is calculated, does not mean that the fee is concerned with the liquor purchased rather than with the person who has to pay. It means rather that the fee is concerned with the taking out or renewing of the licence, and therefore with the person who takes it out or renews it rather than with the person who made the purchases. The reason why the amount of the purchases in the last complete year is taken as the determinant of the quantum of the fee is not far to seek, and it is a reason which places the emphasis on the individual who is to pay the fee rather than on him whose purchases are taken as the variable factor in the ascertainment of it. Just as the billiard-tables licence fee is based upon a readily ascertainable fact which gives some indication of the size of the particular business, so, for each of the other licences except the vigneron's licence there are readily available figures which give some idea of the comparative volumes of the individual businesses. (in the case of the vigneron's licence it may well be that no attempt to follow a similar course would be satisfactory or worthwhile). This is borne out by s.21(1) which provides that every applicant for the grant of a new licence shall at the time of the application furnish all particulars available to enable the Licensing Court to estimate the probable extent of the annual purchases of liquor for sale or disposal under licence. The figures for past transactions may, of course, not provide in every case, or perhaps in any case,

an accurate indication of future business. But if you are going to lay down a formula for general application the figures of the most recently closed financial year are probably as convenient a guide as you can get. And the important point is that in so far as they are a guide to the probable volume of business in the near future they are a guide to the relative values, as between different businesses in the same class, of the advantages which licences will confer. True to the characterization which this suggests, the fees are not only described as fees "for" the licences; they are made payable by the persons who take out the licences and in respect of their doing so. The purchases have been made at earlier dates and when made were free of tax. They never are taxed. The fact that they were made is made relevant to the quantum of the fee which some person probably (though not certainly) will have to pay; but to have a bearing upon quantum is a very different thing from being taxed. Even if the purchases had not been made - for example if the licences were the first licences granted for the premises - the liability for the fee would still arise on the grant of the licences (see ss. 97 and 98), and the quantum would presumably have to be assessed as contemplated by ss. 20(1) and 21(1). To call in aid the passage quoted above from the Privy Council's judgment in Attorney-General for British Columbia v. Kingcome Navigation Company (1934) A.C. 45, at p.59, is, I think, to miss the contrast which that judgment as a whole brings out. Their Lordships, if I follow them correctly, would not have held the fees in question in the present case to be indirect taxation. They would have said, I think, adapting language which they used at p.57, that the fees are imposed in respect of the privileges and advantages which the particular licensee enjoys by the operation of the Act, and that it is intended and desired that he should pay them, though it is possible for him, by making his own arrangements to that end, to pass the burden on in the sense of the political economists. In other words, the fees are taxes imposed not "in respect of commercial dealings" (1934) A.C. at p.59, but in respect of the acquisition of a right to engage in commercial dealings. They are imposed, not on goods, but on licences. Accordingly I would hold that the victualler's licence fees are not duties of excise.

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As supporting this conclusion I may refer to the case of R. v. Lancashire (1857) 7 E. & B. 839; 119 E.R. 1458, which was followed in Jones v. Whittaker (1870) L.R. 5 Q.B. 541 already referred to. It was an appeal against a conviction under s.18 of the Act 9 Geo.4, c.61, of selling "exciseable liquor" without being licensed so to do. The expression "exciseable liquor" was interpreted by s.37 of the same Act to mean inter alia wine "charged with duty either by customs or excise." The appellant had sold wine made in the United Kingdom and the question was whether such wine was at the date of the sale "exciseable." Two duties with respect to liquor made in the United Kingdom were in force at the passing of the Act. One, imposed by s.2 of the Act 6 Geo.4 c.37, was called a duty of excise, and on any test it was such a duty, being made payable upon every 100 gallons of liquor made in any part of the United Kingdom, for sale, from certain ingredients. The other duty was imposed by s.2 of the Act 6 G. 4, c.81 under the description "The several Duties of Excise, or Rates or Sums of Money hereinafter following". It took the form of an annual sum "For and upon every Excise Licence to be taken out by any Maker, Manufacturer, Trader, Dealer or Person hereinafter mentioned". The section set out a list of classes of persons described by reference to their trades, and specified a fee for each. The appellant came under the description "Every retailer of made wines", and as such was liable to a fixed duty of £1.1.0.; but there were some classes of persons who were charged differently. Brewers of beer were charged on a sliding scale according to the number of barrels of beer brewed within the year ending 18th October previous to taking out the licence; maltsters on a sliding scale according to the number of quarters of malt made within the year ending 5th July in each year; distillers on a sliding scale according to the rent or annual value at which their premises were rated; and manufacturers of tobacco and snuff on a sliding scale according to the rate of tobacco and snuff-work weighed within the year ending 5th July previous to taking out the licence. (It will be noticed how the fees payable by these four classes of persons were proportioned, not directly to the value of their licences, but to readily verifiable figures indicating the size of the business

for which each licence was taken out). The duties under both Acts, c.37 and c.81 of 6 G.4, were continued in force concurrently for some years; but, before the date of the offence charged, the first-mentioned duty was repealed by the Act 4 & 5 W. IV, c.37. In this state of the law, the question arose whether made wines were still "exciseable liquors": and the Queen's Bench (Lord Campbell C.J., Coleridge J. and Crompton J., Erle J. dissenting) held that they were not. The following passage from the judgment of Crompton J. rests the decision on the distinction which seems to me decisive in the present case:- "Throughout the Acts there are two different duties imposed, one on certain liquors, and another on the licences to sell them. In the first Act (6 G.4, c.37) a duty of excise was imposed on the liquors, which thereby became exciseable liquors. In the same year, by stat.6 G.4, c.81, another duty was imposed on another thing, though relating to the same liquors, which duty was a duty upon the licences to sell the liquors, which licences were to be granted by the excise. By stat.9 G.4, c.61, another licence was to be taken out, namely, a licence to be granted by justices to any person keeping or about to keep inns &c., to sell exciseable liquors by retail to be drunk or consumed on the premises. By stat. 4 & 5 W.4, c.77, the duty on the liquors in question is repealed, but the necessity of taking out the excise licence mentioned in 6 G.4, c.81, is preserved, and so is the duty on such licence. The licence to be granted by justices is not mentioned: and I should suppose designedly so; because such licence is no longer necessary or applicable, the liquors in question being no longer exciseable liquors".

I turn to the temporary victualler's licence fee - or rather, since the fixed fee of £1 is obviously not a duty of excise, to the "further fee" of six per centum on the gross amount of liquor purchased for sale or disposal under the licence. The reasons above given in reference to the victualler's licence fee appear to me to apply in substance here also. Had the purchasing of the liquor been made the criterion of the liability, the right conclusion might no doubt have been that this fee was different in character from each of the others. But para. (b) does not tax the purchasing of liquor. It

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measures the fee by reference to purchases some or all of which may already have been made when the licence is granted. What attracts the liability is the acceptance of the licence. The tax is not on the liquor; it is on the licence - on the obtaining of authority to sell and dispose of liquor generally at the relevant function. In my opinion it is not a duty of excise.

For these reasons, I would uphold the demurrer. 10

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This demurrer raises for our consideration the question of the true character of fees paid by the plaintiff for a victualler's licence and for a number of so-called temporary victualler's licences issued pursuant to the provisions of the Licensing Act 1928 (Victoria) as amended. For the purposes of convenience we were referred by the parties to the consolidation of the previous legislation now to be found in the Licensing Act 1958. In this Act s.19(1)(a), (b) is in the same terms as the provisions referred to in the statement of claim as s.19(1)(a), (b) of the previous legislation. For the plaintiff it is contended that the fees for which those subsections provide are, in truth, duties of excise and that since the imposition of duties of customs and excise is, by virtue of s.90 of the Constitution, within the exclusive legislative jurisdiction of the Commonwealth Parliament, those provisions are invalid.

The Licensing Act contains a great many provisions with respect to the regulation of the liquor trade and it is an offence for any person to sell liquor, as defined, unless he is the holder of an appropriate licence under the Act: s.154. This section is, as Fullagar J. described it in Bergin v. Stack (1953) 88 C.L.R. 248, at p.260; (1953) A.L.R. 805 "the keystone of the whole licensing system." Perhaps it may be said, it is the "keystone" invariably employed in the regulation of a trade which, traditionally, has been thought to require regulation and supervision in the public interest. It is unnecessary to refer in detail to the provisions of the Act but particular mention should be made of ss. 8, 9, 19(1)(a), 19(2)(b) and 19(3). By s.8 it is provided that a victualler's licence shall authorise the licensee to sell and dispose of liquor in any quantity on the premises therein specified between the hours of nine in the morning and six in the evening. A temporary victualler's licence is, by virtue of s.9, issued for any specified period not exceeding seven days and

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it authorises the licensee, being also the holder of a victualler's licence, to sell and dispose of liquor between the hours of ten in the morning and six in the evening at any fair, agricultural or horticultural show, military encampment, races, regatta, rowing, cricket, football, golf, tennis or polo match or circus or other public sports, games or amusements subject to such restrictions and conditions as the Licensing Court granting the application may impose. The fees to be paid for such licences are prescribed by s.19(1). By subsection (1)(a) the fees payable for a victualler's licence "shall be equal to the sum of six per cent of the gross amount (including any duties thereon) paid or payable for all liquor which during the twelve months ended on the last day of June preceding the date of the application for the grant or renewal of the licence was purchased for the premises." By the succeeding subsection the fees payable for a temporary victualler's licence are specified as "One pound for each day during which the licence will be in force in respect of each booth, stall, bar or place from which liquor will be sold" together with "a further fee equal to the sum of six per cent of the gross amount (including any duties thereon) paid or payable for all liquor purchased for sale or disposal under such licence." Provision is made by s.19(3) to enable a licensed victualler who holds a victualler's licence for any premises of which he is not the owner and who pays the annual licence fee to recover from the owner of the premises by way of deduction from the rent payable or otherwise a sum equal to three-eighths of the amount of the fee paid by him. Licences, with the exception of temporary licences, remain in force to the end of the year for which they are granted and applications for renewal are made annually: s.7. Fees payable under the Act on a percentage basis are fixed by the Licensing Court and the Court is empowered to fix such sums as it thinks reasonable in any case where no information is produced to the Court or where the information produced is incomplete or insufficient to enable the Court to determine the gross amount paid or payable for liquor purchased or where information covering a period of twelve months cannot be produced: s.20. All fees for licences, certificates, permits or authorities under the Act and all fees, fines, penalties, forfeitures and moneys incurred or accruing thereunder are to be paid to the credit of the Licensing Fund and subject to certain

prescribed payments to the municipalities specified in the Second Schedule to the Act and to the Police Superannuation Fund, that fund is to be applied towards carrying out the provisions of the Act including the payment of all compensation payable to owners and occupiers of licensed premises deprived of licence under the Act; ss.288-290.

Victualler's licences are issued for annual periods ending on the 30th June in each year and it will be seen from the above provisions that the fee payable in respect of each renewal is determined by the application of the specified percentage to the gross expenditure for liquor which was purchased for the premises during the immediately preceding annual period. But, quite clearly, the fee is not payable in respect of the purchase of such liquor nor in respect of the period during which such purchases were made; it is paid for the licence in respect of the annual period for which the renewal is granted: Meredith v. Fitzgerald (1948) 77 C.L.R. 161; (1948) A.L.R.279. Accordingly, if the licence is not renewed the fee is not payable, whilst if the licence should be transferred prior to the application for renewal the fee payable by the applicant for renewal will be based upon purchases of liquor made either wholly or in part by the previous holder of the licence and not by the applicant.

Much has been said concerning the meaning of the expression "duties of ..... excise" in s.90 of the Constitution since it was decided in Peterswald v. Bartley (1904), 1 C.L.R. 497, 10 A.L.R. (C.N.) 65, that the fees payable by brewers for licences under the Liquor Act 1898 (New South Wales) were not duties of excise. In Commonwealth v. State of South Australia (1926) 38 C.L.R. 408; 33 A.L.R. 40, it was held by a majority of the court that a tax imposed by an Act of the South Australian Legislature of threepence per gallon on any first sale of motor spirit in that State, so far as it related to motor spirit produced, refined or manufactured locally, was a duty of excise and that, so far as it related to motor spirit brought into the State from other places, it was a duty of customs. The conclusion that the Act operated to impose a "duty of excise" was consistent with the view expressed concerning that expression in the following passage in Peterswald v. Bartley, supra, at p.509: "Bearing

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in mind that the Constitution was framed in Australia by Australians and for the use of the Australian people and that the word 'excise' had a distinct meaning in the popular mind and that there were in the States many laws in force dealing with the subject and that when used in the Constitution it is used in connection with the words 'on goods produced or manufactured in the States,' the conclusion is almost inevitable that, whenever it is used, it is intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct tax or personal tax." Indeed, in the later case, Isaacs, Higgins and Starke J.J. expressly accepted the definition of "excise" contained in this passage and the conclusions of Knox C.J. and Powers J. necessarily involved acceptance of the view that "excise" denotes a tax imposed upon goods produced or manufactured locally. This view was again affirmed by Starke J. in Attorney-General for New South Wales v. Homebush Flour Mills Limited (1937) 56 C.L.R.390 at p.408; (1937) A.L.R. 161. But in Downs Transport Proprietary Limited v. Kropp (1959) A.L.R. 1, this Court felt constrained to say that the definition in Peterswald v. Bartley, supra "has been found in several later cases to be somewhat too narrow" and, no doubt, this circumstance has given rise to the present litigation in which it is sought to establish in the face of the decision in Peterswald v. Bartley, supra, to the effect that brewers' licence fees payable under the Liquor Act 1898 (New South Wales) could not be regarded as duties of excise, that victuallers' licence fees ought now to be so regarded. I should mention, for what it is worth, that the fees payable under the legislation in question in the last mentioned case were of fixed amounts. But the fact that in later years it has become common practice to fix them by reference to a percentage of purchases in an earlier year did not deter Starke J., in Matthews v. Chicory Marketing Board (Victoria) (1938) 60 C.L.R. 263, at p.285; (1938) A.L.R. 370, from observing "that personal taxes, such as fees for brewers' licences etc. are not excise duties." Nor did that circumstance appear significant to Dixon J., (as he then was) when he said: "Before leaving Hartley v. Walsh (1937) 57 C.L.R. 372; (1937) A.L.R. 480, it is perhaps desirable to refer again to the character of the levy in that case. Not only was the imposition

upon the proprietor of the packing shed and one measured, at least as to the maximum, by the fruit handled, but the fruit was the fruit of the previous year. This appears to me to place the imposition more in the category of a licence fee in respect of a business calculated on past business done; something like the licence fee of a licensed victualler calculated on the amount expended by him in the previous year in purchasing liquor, which I should not regard as an excise." See Parton v. Milk Board (Victoria) (1949) 80 C.L.R. 229, at p.263; (1950) A.L.R. 55.

In the cases which were decided between Commonwealth v. State of South Australia, supra, and Parton's case, supra, there has been considerable discussion concerning the question whether the expression "duties of excise", as used in the Constitution, was intended to denote taxes of a particular character levied upon goods of local manufacture or production or whether it embraces taxes levied in respect of goods generally and irrespectively of their place of origin. A further question debated from time to time was whether "excise" is limited to taxes directly levied upon production or manufacture or whether it extends also to taxes imposed upon the sale and distribution of goods or merchandise at any time before reaching the consumer and irrespectively of any other considerations which might colour or give a particular character to the tax imposed. But it must now, I think, be taken to be decided by a majority of the Court in Parton's case, supra, that a tax upon the sale of goods at any stage before they reach the consumer must, in some circumstances at least, be regarded as a duty of excise. This conclusion is stated in the following passage from the joint reasons of Rich and Williams J.J. in Parton's Case, supra, where, after expressing the view that the court had never decided "that a levy is only a duty of excise within the meaning of s.90 of the Constitution if it is imposed in respect of the production or manufacture of goods or in respect of the first sale of such goods by the producer or manufacturer," they said; "In Peterswald v. Bartley, supra, Griffith C.J., for the Court said that excise in s.90 is intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured and not in the sense of a direct tax or personal tax. At p.512 he said that

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the term 'duties of excise' as used in the Constitution is limited to taxes on goods in process of manufacture. If the latter statement is accepted literally, a levy on the first sale of goods produced or manufactured in Australia is not an excise duty. But it has been decided that such a levy is an excise: Commonwealth & Commonwealth Oil Refineries Ltd. v. South Australia, supra: John Fairfax & Sons Ltd. v. New South Wales (1927) 39 C.L.R.139; 33 A.L.R. 84. It is submitted this is because the first sale of the goods is usually a sale by the producer or manufacturer, so that such a tax is in effect a tax on their production or manufacture. But we can see no reason why a levy should not be a duty of excise within the meaning of s. 90 of the Constitution although it is imposed at some subsequent stage. It must be imposed so as to be a method of taxing the production or manufacture of goods but the production or manufacture of an article will be taxed whenever a tax is imposed in respect of some dealing with the article by way of sale or distribution at any stage of its existence, provided that it is expected and intended that the taxpayer will not bear the ultimate incidence of the tax himself but will indemnify himself by passing it on to the purchaser or consumer." See 80 C.L.R. at p.252. Thereafter their Honours accepted the definition proposed by Dixon J. in Matthews v. Chicory Marketing Board (Victoria), supra, at p.304; "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 the subjects of manufacture or production or as articles of commerce." In the last mentioned case, Dixon J. fully discussed the meanings which had from time to time been assigned to the expression "excise" in England and, for himself, expressed the view at p.299, that its history "does not disclose any very solid ground for saying that according to any established English meaning an essential part of its connotation is, or at any time was, that the duty called by that name should be confined to goods of domestic manufacture or production." But Parton's Case, supra, was concerned with a local product and I do not read the observations of Rich and Williams JJ. as conclusive of the proposition that "duties of excise" are concerned with all goods whatever their origin.

However, it is unnecessary in this case to pursue the point for if the fee payable in respect of a victualler's licence can, in some way, be regarded as the aggregate of direct levies upon individual sales then, as in Commonwealth v. State of South Australia, supra, the legislation applies with equal force to both locally produced and imported goods. But the difficulties in the way of so regarding the licence fee are, it seems to me, insuperable.

The actual decision in Parton's Case, supra, in my view, carries the concept of "excise" a little further than the earlier cases. The tax under consideration in Commonwealth v. State of South Australia, supra, was, so far as any locally produced or manufactured goods were concerned, bound to fall in the first instance upon the manufacturer or producer. Likewise, in John Fairfax and Sons Ltd. v. State of New South Wales, supra, the impost fell directly upon the proprietor or publisher of the newspaper upon which the tax was imposed. Again in Attorney-General for New South Wales v. Homebush Flour Mill Limited, supra, the impost fell initially upon the flour manufacturer whilst in Matthews v. Chicory Marketing Board (Victoria), supra, it fell directly upon the grower. But in Parton's Case, supra, we have the pronouncement of Rich and Williams JJ. that although in order to constitute a duty of excise the tax must be imposed "so as to be a method of taxing the production or manufacture of goods, ... the production or manufacture of an article will be taxed whenever a tax is imposed in respect of some dealing with the article by way of sale or distribution at any stage of its existence, provided that it is expected and intended that the taxpayer will not bear the ultimate incidence of the tax himself but will indemnify himself by passing it on to the purchaser or consumer;" see 80 C.L.R. at p.252. Whether this proposition affords a safe and exhaustive guide in determining whether a tax upon the sale of a commodity constitutes a method of taxing the production or manufacture of that commodity is, I think, open to question but for reasons which will appear it is unnecessary in this case to pursue the problem.

When we pass to a consideration of the character of the fees payable for a victualler's licence it is seen that they are quite dissimilar in many respects

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to imposts which this Court has held to be "duties of excise." In the first place, they are not, as was suggested by the plaintiff, either in form or substance a tax upon the production or manufacture of liquor. Nor do they constitute a tax upon the liquor sold during the currency of the licence. In truth, they constitute fees payable by the licensed victualler for the right which his licence confers upon him. That is, the right to sell and dispose of liquor, in the course of his business, upon the premises specified in the licence. And the amount payable for this privilege will be the same whether he sells more or less liquor than he or his predecessors purchased during the previous year, or indeed, even if he sells none at all. In these circumstances, it will be seen that the charge lacks the characteristic of a tax upon a commodity or upon the sale of a commodity such as may be "passed on" to the consumer or other purchaser. No doubt the fact that a licence fee must be paid by a licensed victualler may have some economic effect on the price at which he disposes of his stock but this is far from saying that the fee represents a tax upon a commodity which it is expected will be "passed on" to the consumer. Indeed, unlike the imposts considered in the earlier cases, it is impossible for a licensed victualler to "pass on" the amount of the licence fee to the purchasers from him during the annual currency of his licence for, although that amount may be known in advance, the extent of his sales cannot be ascertained until the end of the trading period. To attempt, in those circumstances, to estimate the amount by which his sales prices ought to be increased to cover the expenditure on the licence fee for any particular period could not, on any view, be regarded as a method of "passing on" to the purchasers from his taxes which had been imposed upon the relevant sales. The substance of the matter is that the fee payable for his licence represents but one item of expenditure in the conduct of a licensed victualler's business and although it may, as such a factor, affect the prices at which he sells his stock - and, no doubt, the prices charged for other services provided by him in the course of his business - it is not a tax either upon his sales or upon the subject matter of his sales.

Nor, as was suggested during the course of the argument in the Queensland case which was heard

immediately after this case, can the licence fee be said to constitute a purchase tax upon the purchases made, or upon the stock purchased, during the year prior to the renewal, or issue of the licence. It is not the purchase of stock from time to time which creates the relevant liability, for the fee is not payable unless and until an application for the renewal of the licence is made. And, indeed, there must be many cases in which the licence fee is payable by an applicant for renewal who made none, or some only, of the purchases during the preceding year.

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Examination of the character and incidence of the legislation leads me to conclude that the fee payable for a victualler's licence is not a duty of excise. Though a system of licensing may frequently be adopted as a convenient aid to the administration of excise laws and the collection of excise duties, this is not the part played by the system of licensing erected by the Licensing Act, for the issue of licences under that Act is, as already appears, a traditionally accepted method of regulating a trade which the public interest demands shall be subject to strict supervision. In other words the requirement that liquor shall not be sold or disposed of without a licence appears as a substantive provision and not merely as an adjunct to a revenue statute. But this very requirement necessarily means that partial monopolies will be enjoyed by licensees and that licensed premises will, as such, achieve an enhanced value. So much is recognized by the provision of s.19(3) to which reference has already been made. Where the licensee is a lessee of the licensed premises he may recover from his landlord a sum equal to three-eighths of the licence fee for each year. Such a provision is not only inconsistent with the suggestion that the licence fee is an impost intended to be passed on directly to purchasers from licensed victuallers but recognises the advantage which accrues to the owner of premises by the issue and continued subsistence of the licence. One may, of course, readily assume that any increase in value which so accrues to the owner will be reflected in the rent obtainable for his premises and that this, in turn, may affect the prices generally charged for liquor on licensed premises. But, again, this does not mean that the licence fee is "passed on", or is intended to be "passed on" to customers who purchase liquor on licensed premises.

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It is as I have already said, but an item of cost which may, and probably does, constitute a factor in determining retail prices for liquor.

In substance, the fee payable for a victualler's licence bears some resemblance in character to the payments required by English legislation as a condition of the grant of justice's licences. These payments are required in order to secure to the public any monopoly value that is represented by the difference in value which the relevant premises bear when licensed and the value of the premises unlicensed. Some difference may be found in the fact that under the local legislation licences fall due for renewal and the appropriate fees are payable annually but both here and in England "the effect of the licensing laws is to grant to a licensee what for practical purposes and in respect of a particular area is in truth a monopoly" and that what the legislation requires the licensee to do "is, so to speak, to purchase the monopoly rights for a sum equal to their value" or, if I may add, for a sum to be determined according to a formula specified by the Legislature; see per Lord Greene, M.R. in Henriksen v. Grafton Hotel Ltd. (1942) 2 K.B. 184, at p.189, (1942) 1 All E.R. 18, 678. A payment partaking of this character in no way resembles the imposts in the cases to which reference has been made and, in my view, it is in no sense a "duty of excise" within the meaning of the Constitution. It is, I think, fair to say that the argument to the contrary is substantially based on the fact that the fee payable in respect of the renewal of the licence for any particular licensed premises is calculated by applying the prescribed percentage to the amount expended for purchases by the licensee of those premises during the preceding year. Indeed, it was common ground that if, instead of a fee so calculated, a fee of a fixed amount or a fee varying with the assessed annual value of the premises were payable as a condition of renewal it could not be characterized as a duty of excise. A review of the history of the legislation shows that, in Victoria, until 1916 licensed victuallers were required to pay fees determined by reference to the assessed annual value of their premises though from 1906 to 1916 they were required in addition to pay a "compensation fee" calculated by reference to a percentage of past purchases. Then, in 1916, provisions not dissimilar to those

now in force came into operation. In these circumstances, it is said that there was a change from an impost which was not a duty of excise to one which is, the ground for the assertion being that the fee has changed from a fixed fee to one that is calculated by the application of a percentage to past purchases. With respect to those who entertain the contrary view, I am unable to see that this change had the effect of transforming the character of the fee and of making it a duty of excise. Even if one is prepared to accept fully - which, as at present advised, I am not - that a tax payable by a trader and measured by the amount of the commodities which he buys or sells in the course of his business is prima facie a duty of excise, there is, I think, ample in the considerations to which I have already adverted to displace any prima facie impression which the formula for the calculation of the fees payable by licensed victuallers may tend to produce. There can be little doubt that the annual purchases made by a licensed victualler are, in practice a reliable and well-established guide to the annual value of his licensed premises and to me there is no significant difference between a fee which is calculated by reference to that value and one which is calculated directly by reference to past purchases. In these circumstances to say that one is a duty of excise and the other is not is, I think, to attach far too much significance to the manner in which the fee is calculated and to pass by what I regard as the decisive considerations.

The same considerations also determine the question which has been raised with respect to the fees payable for temporary victuallers' licences and, accordingly, the demurrer should be allowed.

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MENZIES J.

This case, which was argued upon demurrer by the defendants to the whole of the plaintiff's statement of claim, calls for the determination of the validity of two provisions of the Licensing Acts of the State of Victoria. The first is that which requires the payment of a licensing fee for a victualler's licence for specific premises of an amount equal to 6% of the gross amount paid or payable for all liquor which, during the twelve months ended on the 1st June preceding the date of the application for the licence, was purchased for the premises. The second requires the payment for a temporary licence to sell liquor of £1 for each day of the currency of the licence together with a further fee equal to 6% of the gross amount paid or payable for all liquor purchased for sale or disposal under such licence. The plaintiff was during the year 1958 the licensee of the Tower Hotel, Auburn, in the State of Victoria and the holder of a number of temporary licences. It is alleged that it paid £12,702.15.0 for the renewal of its victualler's licence for the year 1st January to 31st December 1958 and a sum of £68.6.6 for temporary licences over the period 21st January 1958 to 5th July 1958. These sums, totalling £12,771.1.6 it alleges were demanded from it under invalid provisions of the Licensing Acts, were paid by it involuntarily and are recoverable as money had and received.

Although this action is concerned with payments made prior to the 1st April 1959 when the Licensing Act 1958 came into operation, it is convenient to follow the course taken at the hearing and to refer to that consolidating and amending Act rather than to the preceding legislation. Nothing turns upon any of the amendments made by the 1958 Act. In the 1958 Act, the relevant provision relating to victuallers' licences is s.19(1)(a), and that relating to temporary licences s.19(1)(b). It is the validity of these provisions that the plaintiff denies and that the defendants by their demurrer assert. What is claimed by the plaintiff is that

the fees exacted are duties of excise and accordingly, by reason of s.90 of the Constitution, their imposition by s.19 of the Licensing Act is something outside the power of the Parliament of the State of Victoria.

The fees in question and other like fees covered by s.19, are imposed as part of the State's detailed control of the liquor trade which is effected by the Act. The key provision is s.154, which penalises the selling of any liquor otherwise than by, or on behalf of, a licensed person in accordance with the provisions of a licence. The scheme of the Act is to provide for the granting of various types of licences to sell liquor from the point of production (e.g., brewers) through wholesale dealings (e.g., spirit merchants) down to the point of retail sale (e.g., licensed victuallers). It is part of the statutory scheme that there should be a licensing fund to be applied (subject to particular deductions) towards the carrying out of the provisions of the Act, including the payment of compensation to owners and occupiers of licensed premises deprived of licences under the Act: ss.290-292. It is into this fund that all licence fees must be paid: s.289. It was argued, with a good deal of persuasive force, that in a general way the Act is concerned to raise as revenue for the fund 6% of the value of all liquor sold by licensed persons to non-licensed persons; it is, however, necessary to examine the matter in some detail. Starting at the production end, a vigneron seeking a licence is required to pay an annual fee of £7.10.0 and no more; under such a licence, the licensee may, in accordance with s.13, sell from his vineyard wine of his own making. For a brewer's licence a person is required to pay £10.0.0. per annum and a further fee of 6% of sales to unlicensed persons during the preceding year. For a spirit merchant's licence a person is required to pay £40.0.0 per annum and a further fee equal to 6% of sales to unlicensed persons during the preceding year; for a grocer's licence, a fee equal to 6% of liquor purchased and not disposed of to a licensed person during the preceding year; for an Australian wine licence, a fee equal to 6% of purchases during the preceding year; and for a victualler's licence or a packet licence, a fee equal to 6% of purchases for the licensed premises or ship. When a club licence is granted, a fee is

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payable equal to 6% of purchases during the preceding year. A person seeking a temporary licence is required to pay a fee of £1.0.0 for each day the licence is in force and a further fee equal to 6% of purchases for sale under the licence. In the foregoing enumeration the phrase "the preceding year" is used in the sense of the twelve months ended on the last day of June preceding the date of the application for the grant or renewal of licences or for the club registration. It is the duty of the Licensing Court to fix finally and conclusively in every case the amount of any fee payable on a percentage basis under the Act. Where an application is made for a new licence or a new club registration, the percentage fee is seemingly charged upon the Licensing Court's estimate of the amount of liquor which is likely to be purchased for sale under the licence during the period of the licence.

From the foregoing statement, it can be seen that there are gaps which make the general proposition that the Act is concerned to raise as revenue 6% of the value of liquor sold by licensed persons to non-licensed persons not wholly accurate. One gap relates to sales by vignerons; another (and one more important for present purposes) is that with the possible exception of the case where there is a purchase for sale under a temporary licence, neither the purchase nor the sale of liquor is the occasion for any impost - the fee based upon past purchases or sales is payable only if and when there is an application for a licence to sell liquor in the future and at the point of purchase or sale it can never be said that a liability to pay is incurred. It is only if there is a successful application for a renewal of licence that a fee based upon past purchases or sales becomes payable. This, as will appear later, seems to me to be a matter of great significance by itself even if it be that the number of licences not renewed is comparatively small. At the same time I see no reason to dismiss from consideration the fact, commonly known, that some licences are not renewed or to disregard as insignificant the quantity of liquor sold under licences not renewed.

It is convenient at this point to refer to s. 19(3), which provides that where a licensed victualler is not the owner of the licensed premises he may pass on three-eighths of the percentage fee to the

owner of the premises. The significance of this provision for present purposes is that it shows that it was not in the contemplation of the legislature that the whole of the percentage licence fee should be passed on to consumers or borne by the licensed victualler. It is, however, proper, I think, to deal with this case on the basis that some part of the fee would be passed on to consumers so that licence fees would not fall outside the economists' category of indirect taxes. In the course of the hearing, Mr. Gowans, for the plaintiff, traced for us the history of the provisions of the Licensing Acts imposing licensing fees which showed that up to 1906 the fee payable by a licensed victualler was based upon the value of the premises licensed but, in that year, provision was made for the payment of fees amounting to three per cent of the value of liquor purchased during a past year. These fees were to be paid into a separate fund to be used to compensate licensees deprived of their licences. This 1906 Act was passed subsequently to the decision of this Court in Peterswald v. Bartley (1904) 1 C.L.R. 497. In 1916 the separate compensation fund was abolished and a general licensing fund, such as that presently constituted under ss.288-292, was established. By that Act, the percentage fee was increased from three per cent to four per cent and, for the first time, it was required that a percentage fee should be paid for a brewer's licence and for a temporary licence.

Having now stated the problems and the setting in which they arose, I turn to the Constitution and in particular to s.90, which makes the power of the Commonwealth to impose duties of customs and excise exclusive. Leaving the cases aside for the moment, I propose to consider what can be derived from the words of the Constitution itself about the character of "duties of excise". The Constitution makes it quite clear that duties of customs and duties of excise are distinct and separate one from the other, because s.55 provides that "laws imposing duties of customs shall deal with duties of customs only and laws imposing duties of excise shall deal with duties of excise only." The essential distinction between duties of customs and duties of excise is indicated by ss. 92 and 93. The customs duty is chargeable on the importation of goods into the Commonwealth; the excise duty is payable on goods produced or manufactured within the Commonwealth.

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It is true that the words in s.93 "duties of excise paid on goods produced or manufactured in a State" do not necessarily restrict the conception of an excise duty to one paid on the production or manufacture of goods, but these words do give the only indication that the Constitution itself provides as to what is a duty of excise - except that it is something altogether distinct from a duty of customs - and there seems no reason why the provisions of s.93 should apply to only one category of duties of excise, viz., those paid on goods produced or manufactured in a State, if there are other categories such as a duty paid on a dealing with goods after their import into a State. Section 95 contains a further indication that a customs duty is a duty upon the passage of goods into a territory in that it authorises Western Australia, if an original State, to impose duties of customs "on goods passing into that State and not originally imported from beyond the limits of the Commonwealth." It is true that the insistence of the Constitution that a duty of customs is chargeable "on the importation" of goods or on goods "passing into" a territory does not necessarily show that there may not be duties of excise upon imported goods. These provisions do not define either duties of customs or duties of excise, and although I have spoken of duties of customs as being duties upon importation, it could well be that a duty upon exportation is also a customs duty. Moreover, if "duties of customs" is a description reserved for a duty at the point of import or export, it could be that a tax upon a dealing with goods at a point after their importation might fall within the description of a duty of excise. Theoretically, therefore, a tax upon the sale or purchase of goods after their importation could be treated as a customs duty, an excise duty, or neither one nor the other. The guidance of the Constitution itself is, however, that a duty of customs is a duty charged at the point of importation and a duty of excise is one paid on the production or manufacture of goods and that a tax upon some dealing with goods which is neither upon importation into Australia nor upon the production or manufacture of goods in Australia is neither a duty of customs nor a duty of excise. I cannot find in the Constitution any indication that duties of customs and of excise were grouped together as a comprehensive description of any taxation in respect of goods so as to exclude the States altogether from that

field. The import, export and production of goods seem to me to constitute such a cohesive subject matter that considerations of policy as well as of revenue might well be thought to warrant a grant of exclusive taxing power to the Commonwealth with regard thereto without going further to extend that grant to cover taxation in respect of all dealings in goods. If this were the correct view, it would not, of course, follow that a State could directly or indirectly tax goods brought into the State from another State. Section 92 would in general prevent this and at this point it is perhaps pertinent to refer to s.113, which is a special provision relating to intoxicating liquids, which assumes that in its absence States would have greater power over locally produced intoxicating liquids than over such liquids "passing into any State .....for use, consumption, sale or storage," and it requires liquids falling in the second category to be regarded as liquids falling within the first category for the purpose of the application of State laws. The only relevant application of s.113 to the case under consideration is that notwithstanding s.92, all the provisions of the Licensing Act apply as validly to intoxicating liquids brought into Victoria from other States as they do to such liquids produced in Victoria for sale and consumption in Victoria.

There is one other matter to be noticed. I find nothing in the language of the Constitution which would exclude from the categories of duties of customs or duties of excise duties to be borne as well as paid by the importer or manufacturer. In other words, unless it be by the use of the words "customs" and "excise" themselves, the Constitution does not adopt the distinction between direct and indirect taxes so that, unless the usage of the words otherwise requires, an import duty on goods imported for use or consumption by the importer would be a customs duty and a duty upon the production of goods for the producers' own use or consumption would be an excise duty and both would be beyond the power of the Parliament of a State.

I turn now to the decided cases. Peterswald v. Bartley (supra) decided that a brewer's licence fees which corresponded with the lump sum portion of the licence fees covered by s.19(1)(g) are not duties of excise on the grounds that a duty of

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excise is a tax imposed upon goods in the process of manufacture and is an indirect tax, i.e., one demanded from a manufacturer in the expectation and intention that it should be passed on. Griffith C.J., delivering the judgment of the Court, said at p.509 that the word excise "is intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured" and is not used "in the sense of a direct or personal tax." Later, at p.512, it is said - "Rejecting then the larger view as to the meaning of the term 'duties of excise' which found favour with the majority of the Supreme Court, and regarding the term as it is used in the Constitution, where it is limited to taxes imposed upon goods in process of manufacture, we find nothing in the State Act to show that this licence fee was other than a direct tax upon the manufacturer."

Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia (1926) 38 C.L.R. 408 (the Petrol case) decided inter alia that the Taxation (Motor Spirit Vendors) Act 1925 of South Australia did impose a duty of excise. This Act defined "vendor" to mean "every person who sells motor spirit within the State to persons within the State for the first time ..... after the production ..... of such motor spirit within the State". It was on the basis of this definition that a tax upon vendors at the rate of 3d. a gallon on motor spirit sold was held to be an excise duty. Knox C.J. at pp.419-420 said:- "The tax imposed is payable by the person who within the State for the first time sells and delivers to persons within the State motor spirit produced in the State according to the quantity of spirit sold. In the ordinary course of events the first seller within the State of such spirit is the producer. In effect, the tax is payable by every producer in the State of motor spirit on all spirit produced by him within the State, except so much thereof as is not sold or is sold for export from the State. In my opinion, such a tax is a duty of excise within the meaning of the Constitution." The Chief Justice then examined the Victorian duty of excise on tobacco manufactured in Victoria and found no distinction between the petrol duty in question and that duty which he treated as an obvious duty of excise. With this judgment Powers J. agreed. Isaacs J. rejected the argument that the expression "excise duties" in the Constitution

should be construed as widely as the law regards it in England and agreed with the reasoning in Peterswald v. Bartley (supra). He said at p.426:- "Licences to sell liquor or other articles may well come within an excise duty law if they are so connected with the production of the article sold or are otherwise so imposed as in effect to be a method of taxing the production of the article. But if in fact unconnected with production and imposed merely with respect to the sale of the goods as existing articles of trade and commerce, independently of the fact of their local production, a licence or tax on the sale appears to me to fall into a classification of governmental power outside the true content of the words 'excise duties' as used in the Constitution." Later, at p.430, he said the second limb of the definition of vendor (i.e. that quoted earlier) "is also a contravention of sec.90 of the Constitution, even on the more limited field of excise duties that I adopt. The first sale of motor spirit, after its production either by primary or later processes, is naturally and in the ordinary course of business a sale by the producer and a sale by him is certainly included. A tax on that sale, so described, is essentially a burden and a tax on the production of the goods." He also said at p. 431:- "A tax laid expressly on the production alone of goods would affect everyone who produced them, even for personal use or consumption." Higgins J. said at p.435:- "For the purpose of sec.90 and our Constitution as a whole, customs duty is a duty on the importation or exportation whether by land or by sea; whereas excise duty means a duty on the manufacture, production etc. in the country itself; and it matters not whether the duty is imposed at the moment of actual sale or not, or sale and delivery, or consumption." Rich J. adopted an entirely different stand from that taken by the other members of the Court. He said (at p.437) that the tax was void because "it is simply an inland tax directly imposed upon the sale of a commodity and this always was and still is denominated a duty of excise." He rejected the notion that a tax is not a duty of excise because "it is not confined to goods of home manufacture" and said:- "In my opinion, the Constitution gives exclusive power to the Commonwealth over all indirect taxation imposed immediately upon or in respect of goods and does so by compressing every variety thereof under the term 'customs and excise.'

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If the expression 'duties of excise' be restricted to duties upon or in respect of goods locally produced the fiscal policy of the Commonwealth may be hampered." Starke J. at p. 438 said:- "Duties of customs under the Constitution are duties levied upon the importation or exportation of commodities into and out of the Commonwealth. Duties of excise under the Constitution have received a definite interpretation from this Court in Peterswald v. Bartley (1904) 1 C.L.R. 497. They are duties charged upon goods produced or manufactured within Australia itself. Both are what John Stuart Mill calls indirect taxes; but that classification appears to be one of convenience rather than of strict logical division."

In John Fairfax & Sons Ltd. v. New South Wales (1927) 39 C.L.R. 139 (the Newspaper case) it was decided that a tax of ½d. upon each copy of a newspaper sold otherwise than for transmission to a place outside New South Wales was a duty of excise. The Court treated the case as covered by the Petrol case. At pp.146-147 Rich J. said:- "In the recent case, Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia (1926) 38 C.L.R. 408, I was of the opinion that the expression 'duties of excise' found its way into the Constitution, secs. 86, 90 and 93, without any precise connotation. And I considered that the expression was not restricted in its denotation to duties upon or in respect of goods of local production but comprised inland duties upon or in respect of goods wherever produced ..... I gather, however, from the opinions of the majority of the Court in the South Australian case, that they hold that the expression 'duties of excise' is used in the Constitution with the restricted meaning. Even so, I think it is clear that the proposed tax is an excise duty because the newspapers in question are material things or commodities produced or manufactured for sale in New South Wales."

Attorney-General for New South Wales v. Homebush Flour Mills Ltd. (1937) 56 C.L.R. 390 (the Flour case) decided that the Flour Acquisition Act 1931-1933 of New South Wales imposed a duty of excise. The decision is important here only because of the statements as to what makes a tax a duty of excise. At pp. 400-401 Latham C.J. said:- "In so far as it is paid in respect of flour produced or

manufactured in New South Wales it is plainly an excise duty within the narrowest definition of that term (Peterswald v. Bartley (1904) 1 C.L.R., at p. 509). The flour in question in this case was gristed in New South Wales from wheat grown in New South Wales. But though the flour is acquired from production (sec. 3(2)) the difference between the two prices becomes payable by the miller only upon resale of the flour to him by the Government (secs. 6(3) and 6(5)). But a tax payable on the occasion of the sale of goods is also an internal revenue duty by way of indirect taxation amounting to an excise duty." Rich J. at p. 403 said:- "In The Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia (1926) 38 C.L.R. at p.437, I expressed the opinion that sec.90 gives exclusive power to the Commonwealth over all indirect taxation imposed immediately upon or in respect of goods and does so by compressing every variety thereof under the term 'customs and excise'. I said that I was not aware of any authority which explicitly denied the application of the word excise to duties upon goods collected in respect of use, consumption or sale because the duty is not confined to goods of home manufacture. These views I repeated in John Fairfax & Sons Ltd. and Smith's Newspapers Ltd. v. New South Wales (1927) 39 C.L.R. at p. 146. But I said that I gathered from the opinions of the majority of the court in the South Australian Case (1926) 38 C.L.R. 408 that they held that the expression 'duties of excise' was used in the Constitution with the restricted meaning, that is, restricted to duties upon or in respect of local production. I remain of the opinion which I expressed in those cases but the limitation to goods of local production is of no importance in the present case." Starke J. at p. 408 said:- "Excise duties have often been described as inland imposts levied upon articles of manufacture or sale and also upon licences to pursue certain trades or deal in certain commodities. But this Court, in Peterswald v. Bartley (1904) 1 C.L.R. 497, denied that the words were used in this extended sense in the Constitution: the Constitution limited the words to duties charged upon goods produced or manufactured in Australia itself or upon a sale of such commodities."

McTiernan J. at p.421 said:- "The occasion for levying the liability created by the Act on a miller or any person exercising the power to sell any flour

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is the sale of such flour. In my opinion the liability is therefore an excise tax on flour."

In Matthews v. Chicory Marketing Board (Vict.) (1938) 60 C.L.R. 263, the Court by a majority held that a levy on producers of £1 for every half acre of land planted with chicory was a duty of excise. The real division between the members of the Court was whether a tax that has no relation to a quantity or value of goods can yet be a duty of excise. The minority (Latham C.J. and McTiernan J.) held the view that it could not; the majority decided that it could and, as was said by Starke J. at p. 286:- "It remains a tax in respect of the commodity produced for sale" and later:- "It still remains a tax or levy upon production for sale. Such a tax or levy is usually and normally susceptible of being passed on which assists the conclusion that it is an excise duty." The most important judgment for present purposes is, however, that of Dixon J. as he then was, who, after a comprehensive examination of the use of the expression "duties of excise" in statutes, decisions, dictionaries and writings of economists at pp. 302-303 said:- "The chief purpose of the foregoing discussion of the considerations governing the connotation of the word 'excise' is to show that, although, as it is used in the Commonwealth Constitution, it describes a tax on or connected with commodities there is no ground for restricting the application of the word to duties calculated directly on the quantity or value of the goods. A definition which makes quantity and value the only basis of taxation which would satisfy the notion of 'excise' has no foundation either in history, economic or fiscal principle, nor in any accepted specialization. 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." His Honour at p.299 also said:- "The history of the word 'excise' does not disclose any very solid ground for saying that, according to any established English meaning, an essential part of its connotation is, or at any time was, that the duty called by that name should be confined to goods of domestic manufacture or production. The application of the word by economists and others to duties so confined is scarcely logical proof that the word is inapplicable to inland duties levied on commodities independently of the place of manufacture. But, of

course, it is a factor to be weighed and context and other considerations may show that the word is so restricted. Whether the limitation of the word 'excise' in the Constitution to duties upon commodities produced or manufactured within Australia is justified is a question which I think should be regarded as open for future decision." At the end of his judgment, his Honour, at p. 304, described a duty of excise as follows:- "To be an excise the tax must be levied 'upon goods,' but those apparently simple words would 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 the subjects of manufacture or production or as articles of commerce. But if the substantial effect is to impose a levy in respect of the commodity the fact that the basis of assessment is not strictly that of quantity or value will not prevent the tax falling within the description, duties of excise."

The next case is Parton v. Milk Board (Vict.) (1949) 80 C.L.R. 229, where it was held that s.30. (1)(a) of the Milk Board Acts 1933-1939, which provided for dairymen paying an amount not exceeding ¼d. per gallon of milk sold or distributed in the metropolis, authorised a duty of excise, and that the amount of ⅛d. per gallon fixed by regulations and determinations as the amount of contribution was a duty of excise. The decision was that of a majority (Rich, Dixon and Williams JJ.; Latham C.J. and McTiernan, J. dissenting). The difference of opinion was upon the question whether a tax, not imposed upon a producer of milk but imposed upon a sale made after the producer has disposed of milk to a dairyman, is a duty of excise. Rich and Williams JJ. said that a levy imposed at some stage subsequent to manufacture might be a duty of excise and at p. 252 stated:- "It must be imposed so as to be a method of taxing the production or manufacture of goods, but the production or manufacture of an article will be taxed whenever a tax is imposed in respect of some dealing with the article by way of sale or distribution at any stage of its existence, provided that it is expected and intended that the taxpayer will not bear the ultimate incidence of the tax himself but will indemnify himself by passing it on to the purchaser or consumer." Dixon J. described the levy as a

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sales tax and said, at p. 259:- "As I understand it that is generally regarded as an excise." He added:- "Finally it falls within the definition of 'excise' given by the Encyclopedia Britannica, 11th ed., vol. 10, and adopted by the Oxford English Dictionary s.v. viz: 'a term now well known in public finance, signifying a duty charged on home goods either in the process of their manufacture or before their sale to the home consumers.' Only if the conception of what is an excise is limited by the condition that the tax must be levied on the manufacturer, that is to say upon the goods while they are still in his hands, can I see any escape from the conclusion that the levy of the contribution is an excise. I cannot adopt the view that this is an essential feature of the conception. What probably is essential is that it should be a tax upon goods before they reach the consumer." Then at p.261, in deference to Atlantic Smoke Shops Ltd. v. Conlon 1943 A.C. 550, his Honour modified his statement on the meaning of the word "excise" already quoted from the Matthews case (supra) by excluding from the conception of excise a tax on commodities levied at the point of consumption.

The last case is Downs Transport Pty. Ltd. v. Kropp (1959) A.L.R.1, which decided - as Dixon C.J., Williams and Webb JJ. had previously decided in Hughes and Vale Pty. Ltd. v. New South Wales (No.1) (1953) 87 C.L.R. 49 - that a levy of road charges upon a transport operator did not amount to a duty of excise because it is not a tax upon commodities; rather it is a tax on the carrier because he carries goods by motor vehicle.

This survey of the Australian cases shows that the position has now been reached that although an excise duty is a tax on the production or manufacture of goods, a tax upon the sale or purchase of goods manufactured in Australia at any point before sale or consumption is to be regarded as a tax on production or manufacture; and furthermore, that a tax may be an excise notwithstanding that quantity or value of goods is not the basis of the duty. This position I feel bound to accept notwithstanding the reservations I would otherwise have about the glosses upon the main proposition. Although the point has not yet been finally determined, I regard the repeated statements of Rich J. that a duty imposed upon a dealing with goods which are not of

home production is a duty of excise, as inconsistent with the view which still prevails and which is accepted by Rich J. himself in Parton's Case (1949) 80 C.L.R. 229, at p. 252, that an excise is a tax on production or manufacture as well as being contrary to the explicit pronouncements in Peterswald v. Bartley (supra) and Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia (supra); furthermore, the statement of Rich J. that "the Constitution gives exclusive power to the Commonwealth over all indirect taxation imposed immediately upon or in respect of goods, and does so by compressing every variety thereof under the term 'customs and excise'" is, as that learned judge himself recognised, contrary to authority; moreover, his own statement indicates that what his Honour says is based upon his conception of fiscal policy rather than upon anything in the Constitution itself. It is also to be observed that in the cases, there are many statements to the effect that an excise duty is an indirect tax but there is a good deal to be said for the view expressed by Starke J. on more than one occasion that this particular classification is one of convenience rather than logic and the fact that a duty is "indirect" is no more than one factor in favour of the conclusion that it is an excise. This is the view taken by the Court in Downs Transport Pty. Ltd. v. Kropp (supra) but at p.4 it is said:- "It would perhaps be going too far to say that it is an essential element of a duty of excise that it should be an 'indirect' tax. But a duty of excise will generally be an indirect tax and, if a tax appears on its face to possess that character, it will generally be because it is a tax upon goods rather than a tax upon persons." This discounting of the importance of indirectness as a mark of a duty of excise (and of duties of customs too) is another reason for treating the foregoing statement of Rich J. as something other than a precise statement of constitutional law.

Coming back now to the victualler's licence fee, I am disposed to regard it as an indirect tax in that not only are consumers likely to pay more for liquor than would be the case if licence fees were not charged but, further, notwithstanding s.19(3) licensed victuallers probably endeavour to pass on to consumers the full amount of what they pay as licence fees; it is not, however, a sales

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or a purchase tax because, as I have already stated, a dealing with the goods does not expose the licensed victualler to liability for tax; the tax is upon the person seeking a licence to sell liquor upon particular premises in the future, not upon the liquor already purchased for sale at those premises although it is calculated upon such purchases; it is a tax upon persons, like that considered in Downs Transport Pty. Ltd. v. Kropp (supra) namely, a tax upon a licensed victualler as the price for his franchise to carry on a business, the most important element of which is to sell liquor from the licensed premises independently of whether the liquor is produced in Australia or abroad, or partly in Australia and partly abroad. It is not in truth a tax on the production or manufacture of liquor, and none of the decided cases require that it should be treated as such a tax. For these reasons, I have come to the conclusion that the licensed victualler's fee is not a duty of excise. In reaching this conclusion, I am fortified by the views expressed in Parton v. Milk Board (Vict.)(1949) 80 C.L.R. 229, by Latham C.J. at p. 248 and Dixon J. at p. 263. This was also the view of Isaacs J. as appears from his statement in Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia (1926) 38 C.L.R. 408 at p. 426.

I find greater difficulty about the character of the fee for a temporary licence. It seems to me that once a temporary licence is granted, every purchase of liquor for sale under that licence, whether it be of local or overseas production, does attract tax at the rate of 6% of the purchase price. In these circumstances I feel constrained by Parton v. Milk Board (Vict.) (supra) to treat such fees to the extent that they are upon purchases of liquor produced in Australia, as duties of excise. As s.19(1)(b) is not susceptible to the application of what is now s.5 of the Acts Interpretation Act 1958, I think the provision therein for a percentage fee is wholly invalid.

I would allow the demurrer to so much of the statement of claim as relates to licensed victuallers' fees, and overrule it so far as it relates to temporary licence fees.

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In my opinion the licence fees in question are duties of excise; and their imposition by the State of Victoria was therefore invalid. The question arises in connection with the sum of £12,702.15.0. being six per centum of the gross amount paid or payable for all liquor which during the year ended 30th June 1957 the appellant bought for its licensed premises. This sum the appellant was required by the Licensing Act to pay to the Treasurer on renewal of its victualler's licence for the year 1958. The case thus arises out of occurrences before the Licensing Act 1958 came into operation. But as the question is of far reaching and continuing importance and it is agreed that the material provisions of that Act do not differ from those theretofore in force, I shall throughout refer to the sections of that Act. If the above-mentioned amount which was required to be paid as a licence fee by s.19(1) had not been paid in accordance with the Act the licence would have become void (ss.22,97). Fees paid by the appellant for temporary licences are also in question; but if the levy in respect of the victualler's licence be invalid, the others are too. So I shall deal primarily with it. It was conceded by the Solicitor-General that the impost is a tax. That was indisputable. Is it then a duty of excise within the meaning of S.90 of the Constitution?

A tax payable by a trader and measured by the amount of a commodity that in the course of his business he buys or sells is, in my view, prima facie a duty of excise. If it be measured by the quantity of the goods so bought or sold it is a specific duty. If it be measured by the price or value of the trader's purchases or sales of the particular goods it is an ad valorem duty. In either event it is prima facie an excise because it is a tax laid on the commodity. Of course the taxpayer, not the commodity, pays the tax. But we need not be hypercritical about the phrase duties

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"on commodities," for it goes back a long way. The Act 12 Car.II c.23 (1660) was "A grant of certain impositions upon beer, ale and other liquors." And in 1786 in a statute reciting the terms of the commercial treaty with France it was said that "other merchandises shall pay the duties payable by the most favoured nation" (26 Geo. III c. 13 s. 21). By Dr. Johnson's time the essential quality of an excise was so well known that his famous definition of excise began "a hateful tax levied upon commodities." And, omitting the opprobrium, this Court has recently expressed the essential feature of an excise in the same words. In Downs Transport Pty. Ltd. v. Kropp, 1959 A.L.R. at 4, the matter was summed up as follows:-

> "If an exaction is to be classed as a duty of excise, it must, of course, be a tax. Its essential distinguishing feature is that it is a tax imposed 'upon' or 'in respect of' or 'in relation to' goods; Matthews v. Chicory Marketing Board (1938), 60 C.L.R. 263, at p.304. It would perhaps be going too far to say that it is an essential element of a duty of excise that it should be an 'indirect' tax. But a duty of excise will generally be an indirect tax, and, if a tax appears on its face to possess that character, it will generally be because it is a tax upon goods rather than a tax upon persons. 'A direct tax is one that is demanded from the very person who it is desired and intended should pay it. An indirect tax is one which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another'; Attorney-General for Manitoba v. Attorney-General for Canada, (1925) A.C. 561 at 566."

Today the distinction between direct and indirect taxes is not accepted as exact or satisfactory for purposes of economic analysis. The difficulties of the ideas of successive passings on and of shifting the incidence of a tax have been recognised by many economists (see e.g. Mrs. Ursula Hicks's article on the Terminology of Tax Analysis in the Economic Journal of March 1946, the essence of which is repeated in her Public Finance 2nd edn. 1955, 131 ff, and in her article on "Taxation" in the last edition of Chambers's Encyclopedia). But

there is no difficulty in the simple notion of a tax which it is intended should be borne by the consumers of a particular commodity - by smokers of tobacco or drinkers of beer for example - but which by means of a customs or excise duty is collected by the revenue authorities from an importer, manufacturer or trader through whose hands the commodity reaches the consumer, the smoker or the drinker. To quote Lord Stamp's article on Taxation in the Encyclopedia Britannica 14th edition; "The distinction between direct and indirect taxation is mainly an administrative one. It is a classification for convenience sake, adopted upon a rough observation of conspicuous, or apparently conspicuous differences in the mode of levying taxes, and nothing more. The division nevertheless cannot be passed over without mention, as it is not only a common one in economic writing, but it figures largely in budget statements, financial accounts and finance ministers' speeches - especially in the United Kingdom and France ..... Direct taxes are those finally borne by the actual payer, but where the legislation does not intend the tax to fall upon the payer, and expects him to pass it on, in price, or otherwise by altering the terms of a bargain, it is indirect".

For us the importance of this distinction is that, because it has a place in the constitutional law of Canada, it has had to be defined and applied by the Privy Council. The Privy Council has recognised that the distinction is derived from John Stuart Mill (Bank of Toronto v. Lambe, 12 App. Cas. 575 at 582; Brewers & Maltsters' Association v. Attorney-General for Ontario, (1897) A.C. 231). As their Lordships pointed out in Atlantic Smoke-Shops Limited v. Conlon, (1943) A.C. 550 at 563, Mill's fame as an economist was established at the time the British North America Act was passed; so that for the purpose of construing the expression direct and indirect taxation in that instrument the use of his exposition is fully justified. But our Constitution does not make this distinction and in Matthews v. Chicory Marketing Board, supra, at 285 Starke J. went so far as to say: "The cases under the Canadian Constitution are descriptive rather than definitive of a customs and excise duty and they are no authority for the proposition that a tax cannot be an excise duty unless it has the characteristics of an indirect tax." Nevertheless

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from Peterswald v. Bartley, 1 C.L.R. 497, to Downs Transport Pty. Ltd. v. Kropp, supra, this Court has considered the economic concept of indirect taxation of assistance in determining whether or not a particular impost is an excise within s.90. But we ought not to take too much from Lord Hobhouse's reference to a duty which "enters at once into the price of the taxed commodity"; for whether a duty does enter at once into the price of the taxed commodity and in what sense, to what extent and for how long it does so, must depend upon how far various factors and circumstances remain unchanged and on the relative elasticity of demand and supply. The matter may be put in its simplest form by quoting further from the abovementioned article by Lord Stamp; "The distinction (i.e. between direct and indirect taxation) has little actual economic basis, because the effect of the tax in retarding production or consumption may be such as to throw the burden elsewhere, and the customer may, in consequence of the higher price, drink less beer, and the brewer, through selling less, make lower profits." Searching for the incidence and ultimate effect of a particular commodity tax may not be a fruitful economic inquiry. But that a tax on commodities levied on anyone before the ultimate consumer does ordinarly affect the price the ultimate consumer pays seems indisputable. If one assumes a state of perfect competition, inelastic demand and supply and other factors constant - an economist's dream world - then, as I understand the matter, the tax might be said in a simple sense to enter at once into the price. Those conditions do not, of course, prevail in the present case. But, in so far as the quality of an indirect tax is a characteristic of an excise duty, I can see no reason for thinking that the fee for a victualler's licence does not have it. It was argued that, because the levy is payable when a licence is renewed and is calculated in respect of purchases for a previous period, it does not enter into the price of the actual commodities sold during the period for which the licence was renewed. A hypothetical illustration in the judgment of Dixon J., as he then was, in Parton v. The Milk Board, 80 C.L.R. at 263, supports this view. But, as his Honour does not now regard it as correct, it may be put aside and the question approached afresh. The real nature of the tax has to be ascertained (see per Starke J. in Matthews v. Chicory Marketing Board, supra, at 285). This depends upon its operation

and effect upon the commodity as an article of commerce. The mechanics of calculating and collecting it should, in my view, be considered so far only as they substantially affect its operation and commercial effect. That a tax is computed in respect of a trader's purchases in a particular period and is payable when he renews his annual trading licence for a different period cannot, I think, be decisive in itself. If it is, then, as my brother Menzies has pointed out, the logical consequence is that whereas the fee paid for a victualler's licence is not a duty of excise, that paid for a temporary licence is. But the two imposts are similar in their general economic consequences. To distinguish them in the way that the logical application of the proposed criterion demands appears to me to involve considerations so nice as to be artificial. Moreover, with great respect to those who think otherwise, it seems to me that this ground for denying the character of an excise to the victualler's licence fee overlooks the way in which a publican's business is conducted. A victualler's licence authorises the holder to sell liquor upon the licensed premises. The term "victualler" in this connection has for long been restricted to publicans, that is to "persons authorised by law to keep houses of entertainment for the public" (per Tindal C.J. in Tyson v. Smith, 9 Ad. & E. at 423). The Licensing Act requires a licensed victualler to provide meals and accommodation on the premises - in effect to keep an inn. But his licence merely authorises him to sell and dispose of liquor in any quantity on the premises therein specified between the hours of nine in the morning and six in the evening (s.8). The right (more strictly the immunity or privilege) which the licence thus creates arises because it is an offence to sell liquor without a licence (s.154). The licence is granted for a year. It is renewable from year to year. Renewals are obtainable under s. 88 of the Act at the annual sitting of the Licensing Court which is held during such periods in every year as are appointed by notice in the Gazette (s.80(1)). Applications for renewal have to be made before the first day of the annual sittings; but apparently they may be made at any time before that day (s.88). Technically, a renewal is not a continuance of the old licence, but a re-granting of a new licence. A licensee is, however, entitled, subject to objection, to obtain

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a renewal provided the licence was not liable to be forfeited or revoked (s.88). (See per Jordan C.J. in Ex parte James re Furlong, 40 S.R. (N.S.W.) at 349). It is important to note that the Victorian Act here differs materially from the law under consideration in Sharpe v. Wakefield, (1891) A.C. 173. (See also R. v. Flintshire County Council Committee ex parte Barrett, (1957) 1 Q.B. 350 at 368-9). A publican who carries on his business in a proper fashion can therefore expect to have his licence renewed from year to year. This is what the Act contemplates (see per Lord Branwell in Sharpe v. Wakefield, supra, at 184). A publican's business is thus normally conducted on the basis that it will continue. Liquor stocks are replenished as the need arises and sold as demanded. The course of trading is not broken into annual periods. How much, if any, of the liquor bought in the period in respect of which the tax is computed is in stock when the tax has to be paid depends upon the course of trading. A victualler's licence relates to particular premises. It can in certain circumstances be removed to new premises (s. 120). The Act itself indicates what common knowledge makes plain, namely that a licence annexed to premises is a valuable thing. There are careful provisions to safeguard the interest of the owner or mortgagee of the premises if the licensee should fail to apply for a renewal of his licence or should cause it to be forfeited (ss. 89, 115). The owner or mortgagee can then obtain a renewal. If he does so he must pay the tax computed on the purchases made by the outgoing licensee. The tax is payable when any person applies for and gets either the grant or renewal of a victualler's licence. It is not computed on the value of the applicant's purchases - it could not be in cases when he had not previously been the licensee of the premises, and was thus applying for a grant as distinct from a renewal. It is computed on the amount paid or payable for liquor which had been purchased for the premises. The result is that, assuming the law is not altered, and assuming the premises remain licensed, a tax of six per cent. must be paid upon the amount of all liquor from time to time bought for the premises, no matter when, or by whom, or indeed where, it be sold. From a business point of view that must mean that the surcharge which the law has imposed on the cost of the liquor will, to a greater or less amount, be reflected in the price at which it is sold to the consumer.

I say in greater or less degree because this qualification must, as I have said, always be made when the circumstances are not those of perfect competition and inelastic demand and supply. In the case of the liquor trade, the need for the qualification is very obvious. The circumstances are complex. The tax is by law apportionable between the holder of the licence and the owner of the licensed premises (s. 19(3)). That would not prevent it being, in part at all events, passed on. Moreover this tax has been long in operation, and there is an adage that an old tax is no tax. There is usually some measure of uniformity in the retail prices of some forms of liquor. The trade as a whole is carried on in conditions of partial monopoly. And, as was pointed out, it cannot be supposed that the retail prices of all types, qualities and quantities of liquor will reflect the burden rateably. But a commodity tax certainly does not cease to be an indirect tax, so far as that is an element in the concept of excise, because the precise extent to which the burden is "passed on" is not predictable and is not uniformly discernible in each item of the commodity sold.

But it was said the licence might not be renewed, and the premises might thus cease to be licensed; and that in that event nothing would be payable in respect of liquor bought during the preceding period. This it seems is so. But the classification of the impost for legal purposes cannot, I think, depend upon the exceptional case. Voluntary relinquishment of a licence - as distinct from its transfer or removal - so that it goes out of existence must be exceptional. In my opinion we should ignore unlikely single instances and take a broad view of the economic consequences of the tax. So regarded, it appears simply as a tax on all liquor bought for resale in Victoria. The fees provided by the Act (s. 19(1)) for licences other than a victualler's licence shew very plainly the general fiscal plan. All liquor (except such as a licensed vigneron sells at his vineyard) is to bear the six per cent. tax. No liquor is to bear it more than once. The person who is to pay the tax is the person who sells it for consumption not for resale. The spirit merchant, the grocer, the brewer thus pay only on liquor which they sell to persons who are not themselves licensed to sell it. This is very close to Blackstone's description of

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an excise as "an inland imposition paid ..... frequently upon the retail sale which is the last stage before consumption."

Turning now to another aspect: I was inclined during the argument to think that to be an excise duty within the meaning of s.90 the tax must be levied upon the producer of a commodity, or at all events that the goods taxed must have been produced in the country imposing the tax. On consideration I have, however, come firmly to the conclusion that the first of these restrictions, of the broad idea of an excise as a tax upon commodities cannot be sustained; and that, notwithstanding what was said in Peterswald v. Bartley, supra, the second is questionable. I am not convinced, however, that we necessarily have to decide the question for the purpose of deciding this demurrer; for we can surely assume that some of the liquor the purchase of which attracted the tax in question was brewed, distilled or fermented in Victoria. And, in the calculation of the tax that a licensed victualler must pay, the Act makes no distinction between his purchases of locally produced and of imported goods. An impost which is invalid cannot be made valid by coupling it with an impost which is valid (cf. Commonwealth Oil Refineries Ltd. v. South Australia, 38 C.L.R. 408). But to look at the question more broadly, and assuming that it has to be decided in this case, the majority opinion in Parton v. The Milk Board, 80 C.L.R. 229, was that a duty of excise is not necessarily a tax levied upon the manufacturer. It may be a tax on manufactured goods which have become articles of commerce. But the tax there was on a commodity which was locally produced. And, apart from the implications of the Petrol Case (Commonwealth Oil Refineries v. South Australia, supra), there is no case in which the question directly arose whether or not a tax upon the purchase or sale in one State of the Commonwealth of goods produced either outside that State or outside the Commonwealth is a duty of excise. There is an abundance and variety of dicta more or less in point, but no decision. In the Chicory Case, Dixon J., as he then was, surveyed the history of excise duties. He concluded, and I very respectfully agree with his conclusion, that: "The history of the word 'excise' does not disclose any very solid ground for saying that, according to any established English meaning, an essential part of its connotation is, or at any

time was, that the duty called by that name should be confined to goods of domestic manufacture or production. The application of the word by economists and others to duties so confined is scarcely logical proof that the word is inapplicable to inland duties levied on commodities independently of the place of manufacture. But, of course, it is a factor to be weighed, and context and other considerations may show that the word is so restricted. Whether the limitation of the word 'excise' in the Constitution to duties upon commodities produced or manufactured in Australia is justified is a question which I think should be regarded as open for future decision".

There is no doubt that until the nineteenth century an excise duty in England meant an inland tax levied upon goods which were either produced in or had come into the Kingdom, whereas a customs duty was levied at the quay, that is upon importation. But the distinction was mainly administrative - was the tax under the management of the customs officials or of the Commissioners of Excise? Without repeating the history which the Chief Justice gave in the Chicory Case, I would merely add that there are in the English statute book numerous illustrations of duties on imported goods called duties of excise. One, to which he referred, is the provision made by the Restoration Parliament settling a revenue on the Crown in lieu of the revenues from the military tenures which were abolished by the same Act (12 Car.II c.24). This hereditary revenue included the proceeds of taxes on beer, ale, cider or perry and "strong water perfectly made", which were imported from beyond the seas, as well as duties on certain articles made in the Kingdom. These duties were all regularly described as "the hereditary duties of excise" in later enactments (see e.g. 10 Geo. II c. 10 s.8; 27 Geo. III c.13, s. 51; 1 & 2 Vic. c.2 s.6; 1 Ed. VII c. 4 s.9(3)). Other examples are that when Pitt was able to accomplish what Walpole, because of public clamour, had had to relinquish, the duties on imported wines were transferred from the Customs to the Excise by being made an inland tax levied upon wholesalers (26 Geo. III c. 59 (1786)). Excise duties were levied on imports by a system of supervised bonded warehousing, the duty being paid when the goods were taken out for home consumption. In the next year Pitt's great consolidation of the customs and excise duties

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described many duties on imported goods, including brandy and wine, as excises and put them under the Excise Commissioners (27 Geo. III c. 13 s.36 and Schedule F). Blackstone said that the excise duties on coffee and tea and cocoa - all imported commodities - were paid by the retailer. The complicated history of these particular duties in Blackstone's time and afterwards can be traced in the statute book (e.g. 10 Geo. II c.10; 21 Geo. III c.55; 25 Geo. III c.74). The interest of the Excise in goods coming from abroad during the eighteenth century is very apparent from the part which excisemen and excise cutters played in opposition to smuggling.

In the nineteenth century, after the adoption of a policy of free trade, customs and excise duties became associated as instruments of policy as well as sources of revenue. And this tended to greater definition of their respective fields - imports and exports for customs, and home manufacture for excise. When duties on foreign trade were considered to be justified only as means of revenue, and not for the protection of home industries, then, if goods dutiable on importation might also be made at home, they must be subjected to an excise equivalent to the customs duty. If not the local manufacturer would be protected contrary to the free-trade faith. Conversely, if the revenue from excises was to be safeguarded, countervailing customs duties on exciseable commodities were required. Customs and excise duties thus used as counter weights in fiscal or tariff policy were, as has been often pointed out, known in the Australian Colonies, in Victoria especially, before Federation. The word excise had by that time come to mean not so much any inland duty, its original meaning, as a duty on locally made goods, the common form of inland commodity tax once the Customs had taken over the system of bonded imports. Such a duty was commonly called in statutes a duty of excise, in distinction from the duties of customs on imported goods. For examples in Victoria see The Duties of Customs Act 1884 and 1886; The Distillation Act 1862 as amended by The Distillation Amending Act 1884; The Tobacco Act 1880; The Customs Act 1890; The Customs and Excise Duties Act 1890; The Beer Duty Act 1892. Customs duties have always been duties on imported goods. And the expression "on the imposition of uniform duties of customs in ss. 92, 93, 94 and 95 of the Constitution refers to duties on imports into

Australia. And it may well be that the word "excise" in the expression "duties of customs or of excise" in s.90 refers only to duties upon goods locally produced. But, however this may be, it is the scope of the comprehensive expression "duties of customs or of excise" which is the critical matter. I have found nothing that leads me to the conclusion that in that expression the phrase "duties of customs" means only duties on imported goods levied at the point of importation (or release from bond) and collected from the importer, or that the phrase "duties of excise" is restricted to duties upon goods of local production imposed at the point of production and collected from the producer. And, if dictionaries be resorted to, the Encyclopedia of Social Sciences (Macmillan Company, New York 1930) describes an excise as "a tax on commodities of domestic manufacture, levied either at some stage of production or before the sale to home consumers". More important, however, than dictionaries is the decision of this Court in Parton v. The Milk Board, supra. We should, I consider, take the judgments of the majority in that case as binding us. Accepting that, it would be a strange result if s.90 had the effect of prohibiting the State of Victoria from imposing a purchase or sales tax on whisky or beer made in Victoria, yet leaving it free to do so on whisky made in Scotland or beer made in South Australia. But in my view it is not so. The place where a particular commodity is produced may determine whether a tax on it is best called a customs or an excise duty; but that is really unimportant since either is equally beyond the power of the State. See the various judgments in the Petrol Case, supra. Moreover this view of the operation of s.90 accords with what has been said to be the purpose of it and its associated provisions, namely to ensure the basic unity of the Australian economy in relation to trade and commerce.

The peculiar phrase "duty-paid spirituous liquor" which appears in the definition of "spirit merchant" in the Licensing Act 1958 and also in s.11(1) does not, I think, curtail the effect of anything I have said above. It has been carried forward from earlier Acts and apparently came into Victorian Licensing legislation through the Spirit Merchants' Licences Act 1912 from the Licensing Act 1890 and the Customs and Excise Act 1890. When it

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first appeared the Colony of Victoria in fact levied customs and excise duties. If the expression has any meaning now, I take it it must be a reference to the Commonwealth customs, excise and distillation legislation.

I have left to the last the argument which the Solicitor-General put in the forefront, because it seemed best to deal with the other matters first. What was said is briefly that the licence fee is paid for permission to carry on the trade of a publican and that the purpose of the licence is the regulation of that trade. Payment, it was said by the Solicitor-General, is "the condition of the right granted by the State to participate in a trade that is otherwise forbidden". This, of course, is true. But it seems to me no ground at all for saying that the payment is not a duty of excise. In Browns Transport Pty. Ltd. v. Kropp, supra, the Court said of the carrier's licence fee there in question: "The exaction is in truth, as it purports to be, simply a fee payable as a condition of a right to carry on a business. A tax imposed upon a person filling a particular description or engaged in a given pursuit does not amount to an excise". If the context of these statements be disregarded, then they do in terms support the proposition that a licence fee is not an excise. But it is, of course, necessary to read them in relation to the circumstances out of which they arose. All that they really establish is that a fee payable for an authority to make or trade in a commodity is not, as such, an excise duty. But, if a licence fee be calculated in reference to the quantity or value of the goods made or traded in, then it seems to me to be an excise duty, and not the less so because it is a licence fee. Lord Herschell's observations in the Ontario Brewers and Maltsters' Case, supra, quoted by Dixon J. in the Chicory Case, supra, at 302 are significant. And as Starke J. said in that case (at 285), the real nature of a tax does not depend upon the name given to it in the taxing Act, but upon its operation and effect, as gathered from the language of the Act. And Knox C.J. said in the Petrol Case, supra (at 421): "If it is in truth a duty of excise, the State Parliament has no power to impose it by whatever name it may be called". Here the tax is called a licence fee and, as payment of it is the price of a licence, that name is apt. But, if its operation is that of an

excise - and the Act, I think, shews that it is - then the name excise is apt too.

As Mr. Gowans shewed, in tracing the history of the statutory provisions for licence fees, what has happened is that the legislature has substituted for a licence fee which was not a duty of excise a licence fee which is. The course of events, as outlined by Mr. Gowans, may be summarised. Immediately before Federation the Colony of Victoria levied duties on beer brewed and spirits distilled within the Colony, and also duties on imported liquor (Customs Act 1890 and Customs and Excise Duties Act 1890; Beer Duty Act 1892; Duties of Customs Act 1892). And it had then, and had always had, licensing laws regulating the sale of liquor. (See Licensing Act 1890 s.17). The fees that were then payable annually for liquor licences were fixed sums, except that in the case of victuallers' licences the fee ranged from £15 to £50 depending on the assessed annual value of the premises. Fees paid for licences under the Licensing Act went to the credit of a "trust fund" in the Treasury. From this fund came the moneys necessary to pay compensation when the number of licensed premises was reduced in accordance with the law then prevailing. In so far as the licence fees did not yield enough for this purpose the fund was to be replenished from the duties on liquor (Licensing Act 1890 s.200). After the Commonwealth came into existence and uniform duties of customs had been imposed on 8th October 1901, the Victorian duties of customs and excise ceased to have effect. The Licensing Act continued, but at the expiration of five years the State of Victoria was not in receipt of any customs or excise duties from which the trust fund could be supplemented. However in 1906 a new Licensing Act was passed. It transferred the moneys then in the trust fund to a new fund to be called the Licensing Fund, and set up another fund called the Compensation Fund. To create this victuallers had when renewing their licences each year to pay a "compensation fee" in addition to the ordinary licence fee under the 1890 Act. This additional fee was three per cent. of the gross amount paid or payable for all liquor purchased for the licensed premises for the twelve months ended on the thirtieth September preceding the date of application for renewal of the licence. By a provision like s.19 (3) of the present Act a licensee

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who was a tenant could throw two thirds of the burden of this new percentage impost on his landlord. (Licensing Act 1906, ss.108-111).

The result at this stage, so far as the holder of a licensed victualler's licence was concerned, was that he had each year when he renewed his licence to pay the ordinary fee of £15 to £50, depending on the annual value of his premises, and also the compensation fee calculated on his purchases in a preceding period. It is unnecessary to consider what would have been the fate of this compensation fee if its validity had been challenged on the ground that it was a duty of excise. It had most of the characteristics of the present tax; but it was only payable by the holders of victuallers' licences, and it went to replenish the compensation fund and not to the general revenue of the State. In 1916 a considerable change was made. In place of the old fixed fee and further compensation fee, one fee only was to be paid for a victuallers' licence. It was a six per cent. tax, calculated in exactly the same way as the one now in question. And fees similar to those now in operation were made payable in respect of other forms of licences also, including brewers' licences. At the same time the Compensation Fund was abolished, and the entire proceeds of the licence fees went into a fund, the Licensing Fund, from which certain moneys were paid annually to municipalities and to the Police Superannuation Fund, and the balance applied to carrying out the provisions of the Licensing Act including the payment of compensation (Licensing Act 1916, ss. 19, 44). In fact the proceeds of the new licence fees soon exceeded the sum necessary to meet these charges on the Licensing Fund; and in 1922 provision was made for transferring the surplus from time to time to the consolidated revenue of the State (Licensing Act 1922 s.39; and see s. 291 of the present Act). In the result the tax with which this case is concerned yields a large annual revenue to the State of Victoria. The Statement of Claim alleges that in each of the three years before the action was commenced more than two million pounds was transferred to consolidated revenue. But it was contended for the State of Victoria that, as I understood the argument, whatever the manner of computing the fee for a liquor licence, it could never be an excise duty. This view hardly seemed to accord with the State's attitude which appeared

to be based on concern lest the State lose a source of revenue rather than on any fear it would be frustrated in the control of the liquor trade. However the way in which the argument that the fee for the licence was merely incidental to the system of liquor trade licensing was urged makes it necessary to go even further into the background of the present legislation than Mr. Gowans took us. For it becomes necessary to see whether there is any special quality in a liquor licence that so colours payments for it that, however computed, they cannot be duties of excise in the constitutional sense.

The Australian system of taxing and licensing the liquor trade is derived from England. In its essentials, as it still operates in England, it is described in Halsbury's Laws of England 3rd edn. vol. 22 p. 514 as follows: "The sale of intoxicating liquors although perfectly lawful at common law is subject to certain statutory restrictions. These restrictions are primarily of two kinds; those designed for the orderly conduct of the retail trade and those designed to obtain revenue from the trade whether wholesale or retail. The machinery for achieving these ends consists of two systems of licensing, one controlled by licensing justices, the other controlled by the Commissioners of Customs and Excise". Taking first the fiscal provisions: Historically these consisted of two levies. One a true excise duty levied upon brewers and distillers according to their production. The second a fee for brewer's and distiller's licences. Such licences, commonly called "excise licences", have for long been common concomitants of excise duties on commodities. They are required to facilitate the collection of the duties and to prevent evasion of them. They are part of the machinery for the collection of the excise revenue, not part of the social regulation of the liquor trade. They had their beginning in 1784 (24 Geo. III c.41) when makers of and dealers in various exciseable commodities were required to be licensed. For these licences, fees were charged, so that excise licences became themselves a source of revenue as well as an administrative convenience. Such licences to make exciseable goods are still an ordinary part of the machinery for the collection of excise duties. Examples of those required today may be found in the (Commonwealth) Beer Excise Act 1901-1957 and the (Commonwealth) Distillation Act 1901-1956. Since

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the fees payable for these licences do not themselves bear any direct relation to the quantity or value of the exciseable liquor which the brewer or distiller makes they are not themselves duties of excise in the constitutional sense. The brewer's fee in question in Peterswald v. Bartley, 1 C.L.R. 497, is a good illustration. Even further removed from duties of excise in the constitution sense are the miscellaneous taxes payable in England for licences required for a variety of purposes. Many of these have no relation at all to duties on commodities. They are called excises in England simply because the issue of such licences had, as a matter of convenience, been made the responsibility of the Excise Commissioners.

Turning now to the other system of licensing mentioned in the above quotation from Halsbury, that concerned with the orderly conduct of the retail trade in intoxicating liquor: it has a quite separate early history going back to 1552, when the Act 5 & 6 Edw. VI c.25 was passed: "Forasmuch as intolerable hurts and troubles to the Commonwealth of this Realm doth daily grow and increase through such abuses and disorders as are had and used in common alehouses and other houses called tippling houses", Parliament required keepers of such houses to be licensed by the justices and to enter into recognisances for the proper conduct of them. The only other enactment in the long series of Licensing Acts which then began to which I need refer is 9 Geo. IV c.61. It is the Act that my brother Kitto mentions as under consideration in R. v. Lancashire, 7 E. & B. 839; but I, with respect, apply that decision in this case somewhat differently from his Honour. When 9 Geo.IV c.61 was passed in 1828 duties of excise on beer and spirits were in force, and the Act related justices' licences to them. It provided for a special session of justices, the General Annual Licensing meeting, for granting licences to persons keeping or being about to keep inns, alehouses and victualling houses. The fee for a licence was fixed - the petty constable got a shilling; the justices' clerk five shillings, and one shilling and sixpence was payable for the preparation of precepts etc. - seven and sixpence in all. To carry on his business the publican had still to obtain from the Commissioners of Excise a licence to sell exciseable liquor - meaning liquor "charged with duty either by Customs or Excise".

For this excise licence the publican had to pay the usual excise licence fee. The Excise Commissioners were, however, prohibited from granting him their licence except on production of his justices' licence. The form of the justices' licence was to authorise and empower the licensee to sell by retail on the specified premises all such exciseable liquors as he should be licensed to sell under his excise licence. It was an offence to sell exciseable liquor without a licence. But it was no offence to sell without a justices' licence liquor which at the relevant time was not exciseable; for a justices' licence was not necessary for the sale of liquor - only for the sale of exciseable liquor (R. v. Lancashire, 7 E. & B. 839; sub nom. Lancashire v. Staffordshire Justices, 26 L.J.M.C. 171; Jones v. Whittaker, L.R. 5 Q.B. 541). There have, of course, been many changes in licensing law in England since the Act of 1828; but the system continues generally the same. For the sale of intoxicating liquor by retail, excise licences and justices' licences are still required; and intoxicating liquor as defined by the Licensing Act 1953 is liquor which cannot for the time being be sold without an excise licence (s. 165(1)). The fee for an excise licence is either a fixed sum or a percentage of the annual value of the licensed premises (Customs & Excise Act 1952 s. 149(2), Schedule 4). Such a fee is, according to English practice, described in the Act as a "duty of excise". But it is not a duty of excise within the meaning of that phrase in the Constitution. Justices' licences are granted or renewed at the annual licensing meeting of the licensing justices. The fee for a justices' licence is eight shillings and sixpence (Licensing Act 1953 s.51).

Passing from England to Australia, the system of liquor licensing has from its first institution had a pattern similar to, but different from, that of England. The first statutory licensing of public houses in New South Wales was effected by an Act of the Legislative Council in 1825. (6 Geo.IV No.4). Duties on spirits locally manufactured were levied by the Governor at about the same time, under the authority of the Imperial Act 59 Geo. III c. 114 s.3. The duties on commodities imported and locally manufactured existing in 1828 are set out in an Act of the Legislative Council II Geo. IV No. 9 (1830). Distillers' licences were provided

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for in 1838 (2 Vic. No. 24). For a distiller's licence an annual fee of £50 had to be paid. Brewers' licences came much later. In the Colony publicans' licences were not as directly related to customs and excise duties as in England. They were licences to sell, not exciseable liquor, but fermented and spirituous liquor. They were authorised by justices but issued and signed by the Colonial Treasurer and Commissary of Civil Accounts. From the first, one of the professed objects was to raise revenue. The preamble to the Act of Council of 1825 ran: "Whereas it is necessary to the orderly conduct of public houses where strong liquors are sold by retail, that the characters of the occupiers thereof should be subject to strict examination; and whereas it is expedient, in consideration of the licences to be granted to such public houses, to raise certain sums of money in aid of the funds expended in the Colony". For beer licences a fee of twenty dollars was payable to the Colonial Treasurer, for beer and spirit licences a hundred dollars - the Spanish dollar was then the currency of the Colony. The licences were renewable annually.

Of the local enactments which followed, the earliest which is clearly shewn to have been applied in the Port Phillip District is 3 Wm. IV No. 8 (1833). Its application there is referred to in 8 Wm. IV No. 8 s.3. It may therefore be said to be the beginning of licensing law in Victoria. Various new forms of licences were from time to time authorised in addition to the publican's licence - for example, packet licences in 1833 (3 Wm. IV No.8 s.8) and temporary extensions of a publican's licence to fairs held in the neighbourhood of his premises in 1838 (2 Vic. No.18 s.8); there was originally no fee for these temporary licences. A confectioner's licence was required for the sale of ginger beer, and for it the annual fee was £1. The Act in force in the Port Phillip District when Victoria became a separate Colony was a consolidation, 13 Vic. No. 29 (1849). By that time the provisions for the control of licensed premises had become much more elaborate than they had been. But licence fees were still imposed as a source of revenue. The annual fee for a publican's general licence was £30, for a packet licence £2. These fees were payable to the Colonial Treasurer, and the licence was issued by him on payment of the fee and

production of a certificate by two justices after the annual licensing meeting. From the beginning of Victoria as a separate Colony in 1851 until 1885, the amount of the annual fee for a victualler's licence continued to be a fixed sum. By the Licensing Act of 1885 this was changed, and the graduated scale depending on the annual value of the premises was adopted. This, of course, was still not a duty of excise. But, as has been shown earlier, a vital alteration occurred when the annual fee was computed as a percentage of the publican's purchases for the licensed premises.

I find nothing in the provisions of the present Licensing Act of Victoria or in the historical background of licensing law in England or Australia that prevents a fee for a liquor licence being a duty of excise. In Australia one victualler's licence is used to effect the dual purpose which in England was, and is, effected by the separate justices' and excise licences which a publican must have. In England however the fee for the excise licence is not a duty of excise in the sense in which that phrase is used in the Commonwealth Constitution, for it is not computed by reference to the quantity of liquor bought or sold. And neither, of course, is the eight shillings and six pence there paid for the justices' licence. But in Victoria the licence fees in question have what I consider to be the essential characteristics of duties of excise in the constitutional sense. I think therefore that the demurrer should be overruled.

In the Full Court of the High Court of Australia

No. 5

Reasons for Judgment.

(g) His Honour Mr. Justice Windeyer.

26th February 1960 - continued.

In the Full Court of the High Court of Australia

No. 6

Order of the Full Court of the High Court of Australia allowing demurrer.

26th February 1960.

No. 6

ORDER OF THE FULL COURT OF THE HIGH COURT OF AUSTRALIA ALLOWING DEMURRER

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR OWEN DIXON, MR. JUSTICE McTIERNAN, MR. JUSTICE FULLAGAR, MR. JUSTICE KITTO, MR. JUSTICE TAYLOR, MR. JUSTICE MENZIES and MR. JUSTICE WINDEYER.

FRIDAY THE 26th DAY OF FEBRUARY, 1960

THE DEMURRER of the Defendants to the Statement of Claim in this action which was commenced by Writ of Summons issued out of the Principal Registry on the 30th day of September 1958 coming on for argument before this Court at Melbourne on the 19th, 20th and 21st days of May 1959 UPON READING the pleadings filed herein AND UPON HEARING Mr. Gowans of Queen's Counsel and Mr. O'Shea of Counsel for the Plaintiff and Her Majesty's Solicitor-General in and for the State of Victoria and Mr. Young and Professor Zelman Cowen of Counsel for the Defendants THIS COURT DID ORDER on the said 21st day of May 1959 that this matter stand for judgment and the same standing for judgment this day accordingly at Melbourne THIS COURT DOTH ORDER that the said Demurrer be and the same is hereby allowed except as to paragraphs 8, 9 and 14 of the Statement of Claim which relate to temporary victuallers' licences in pursuance of Section 19(1)(b) of the Licensing Acts of the State of Victoria and except as to the allegations contained in the remaining paragraphs of the Statement of Claim so far as they relate to such temporary victuallers' licences and to the said Section 19(1)(b) and that the Demurrer be and the same is hereby overruled as to the paragraphs and allegations so excepted and insofar as excepted AND THIS COURT DOTH FURTHER ORDER that the costs of the Defendants of and occasioned by the Demurrer be taxed by the proper officer of this Court and when so taxed and allowed paid by the Plaintiff to the Defendants.

By the Court

(sgd) M. Doherty

PRINCIPAL REGISTRAR

No. 7

In the Privy Council

No. 7

Order granting Special Leave to Appeal.

3rd August 1960.

ORDER GRANTING SPECIAL LEAVE TO APPEAL

AT THE COURT AT BUCKINGHAM PALACE

The 3rd day of August, 1960

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

Earl of Perth
Mr. Secretary Macleod (acting as Lord President)
Mr. Secretary Ward
Sir Michael Adeane

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 19th day of July 1960 in the words following, viz.

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Dennis Hotels Proprietary Limited in the matter of an Appeal from the High Court of Australia between the Petitioners and the State of Victoria and Henry Edward Bolte Respondents setting forth (amongst other matters): that by an Action commenced in the High Court of Australia the Petitioners as Plaintiffs sought a Declaration that paragraph (a) of Sub-section 1 of Section 19 of the Licensing Act 1928 (as amended) which imposed a fee for an annual victualler's licence was invalid as purporting to impose a duty of excise and the recovery of £12,702.15s.0d. being the fee paid by them for the victualler's licence held by them for the year 1958: that in the said Action the Petitioners also sought a Declaration that paragraph (b) of Sub-section 1 of Section 19 of the Licensing Act 1928 (as amended) which imposed a fee for a temporary victualler's licence was likewise invalid and the recovery of £68.6s.6d. being the amount of the fees paid by them for temporary victualler's licences held by them during the year 1958:

In the Privy Council

No. 7

Order granting Special Leave to Appeal.

3rd August 1960 - continued.

that in the said Action the Defendants were the aforesaid State of Victoria and Henry Edward Bolte who was sued as the Treasurer of the State of Victoria and they demurred to the whole of the Statement of Claim on the ground that the said provisions were valid and did not impose a duty of excise: that such Demurrer was heard by the Full Court of the said High Court which on the 26th February 1960 delivered Judgment allowing the Demurrer with costs in so far as it related to the claim in respect of paragraph (a) of Sub-section 1 of Section 19 of the said Act and overruling the Demurrer in so far as it related to the claim in respect of paragraph (b) of Sub-section 1 of Section 19 of the said Act: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal from the Judgment of the High Court of Australia dated the 26th February 1960 in so far as the said Judgment allowed the Respondents' Demurrer to the Petitioners' Statement of Claim and ordered them to pay the costs of the Respondents of and occasioned by the said Demurrer and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the High Court of Australia dated the 26th day of February 1960 in so far as the said Judgment allowed the Respondents' Demurrer to the Petitioners' Statement of Claim upon the footing that at the hearing of the Appeal the plea that the Appeal does not lie without a certificate of the High Court of Australia may be raised as a preliminary point and upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the

Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same."

In the Privy Council

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

No. 7

Order granting Special Leave to Appeal.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

3rd August 1960 - continued.

W.G. Agnew.

No. 8

No. 8

ORDER GRANTING LEAVE TO ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA TO INTERVENE

Order granting Leave to Attorney-General of the Commonwealth of Australia to intervene.

AT THE COURT OF BUCKINGHAM PALACE

The 3rd day of August, 1960

3rd August 1960.

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

EARL OF PERTH
MR. SECRETARY MACLEOD (acting as Lord President)
MR. SECRETARY WARD
SIR MICHAEL ADEANE

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 19th day of July 1960 in the words following, viz:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the

In the Privy Council

No. 8

Order granting Leave to Attorney-General of the Commonwealth of Australia to intervene.

3rd August 1960 - continued.

Attorney-General of the Commonwealth of Australia in the matter of an Appeal from the High Court of Australia between Dennis Hotels Proprietary Limited Appellants and the State of Victoria and Henry Edward Bolte Respondents setting forth: that the Petitioner desires leave to intervene upon the hearing of the said Appeal which is pending before Your Majesty in Council as the question arises as to the construction of Section 90 of the Commonwealth of Australia Constitution Act and also as to whether the Appellants have a right to appeal to Your Majesty in Council without having first obtained a certificate from the High Court of Australia under the provisions of Section 74 of the said Constitution Act: And humbly praying Your Majesty in Council to grant the Petitioner leave to intervene upon the hearing of the appeal:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to intervene in the Appeal to lodge a Printed Case and to be heard by Counsel."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W.G. Agnew.