[HIGH COURT OF AUSTRALIA.]

PETERSWALD . . . . . APPELLANT;

AND

BARTLEY . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *August* 30, 31.

Griffith, C.J., Barton and O'Connor, JJ.

The Constitution, ss. 73, 86, 90—"*Duties of Excise*"—"*Police*" *powers of States*—*Liquor Act* (*N.S.W.*), (*No.* 18 *of* 1898)—*Brewer's licence fees*—*Appeals from State Courts*—*Justices Act* (*N.S.W.*), (*No.* 27 *of* 1902), *s.* 106—"*Final and conclusive.*"

Brewers' licence fees under sec. 71 of the New South Wales *Liquor Act*, (No. 18 of 1898), are not "duties of excise" within the meaning of secs. 86 and 90 of the Constitution.

The imposition of such licence fees is a *bonâ fide* exercise of the police power of the State, for the control and regulation of the trade.

Brewers and Maltsters' Association of Ontario v. *Attorney-General of Ontario*, (1897) A.C., 231; and *Bank of Toronto* v. *Lambe*, 12 App. Cas., 575, applied.

Notwithstanding sec. 106 of the New South Wales *Justices Act*, (No. 27 of 1902), which provides that on appeals by way of special case stated for the opinion of the Supreme Court, the judgment of the Court shall be "final and conclusive," the High Court has jurisdiction, under sec. 73 of the Constitution, to hear and determine appeals from such judgments.

Judgment of the Supreme Court, (1904), 4 S.R. (N.S.W.), 290, reversed.

APPEAL from a decision of the Supreme Court of New South Wales, on a special case stated under the *Justices Act* 1902.

The respondent E. C. Bartley was charged before a Police Magistrate, under sec. 75 of the *Liquor Act* 1898, by the appellant, Sergeant Peterswald, a District Licensing Inspector, that "on the 25th December, 1903, at Cootamundra, in the licensing district of Cootamundra," he "did carry on the trade or business of a brewer without holding a proper licence under the *Liquor Act* 1898 (No. 18)." He admitted that he did not hold a licence

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under the State *Liquor Act*, but contended that that Act, so far as it imposed licence fees upon brewers, was no longer in force, by virtue of sec. 90 of the Constitution, and that, as he held a licence under the Commonwealth *Beer Excise Act* (No. 7 of 1901), he was entitled to carry on the trade and business of a brewer in any part of the Commonwealth. The magistrate upheld the respondent's contention and dismissed the information, on the ground that the licence fee was a duty of excise within the meaning of sec. 90 of the Constitution, and was therefore *ultra vires* of the State legislature.

The appellant appealed to the Supreme Court, by way of Special Case stated for the opinion of the Court, under the *Justices Act*, and the Supreme Court, (consisting of *Darley*, C.J., *Owen*, J., and *Pring*, J.) by a majority, (*Pring*, J. dissenting), dismissed the appeal with costs; (1904) 4 S.R. (N.S.W.), 290.

Lamb (*Want*, K.C., and *Lyons* with him), for the respondent. The High Court has no jurisdiction to hear the appeal. The appeal to the Supreme Court is under sec. 106 of the *Justices Act* 1902 (No. 27), which makes the order of that Court on the special case "final and conclusive." That section is taken from 45 Vict. No. 4, sec. 5, which was copied from the Imperial Act (20 & 21 Vict., c. 43). Under the latter section it has been held that a decision made "final and conclusive" is not subject to appeal. The State, by its Act, has taken away the right of appeal to the High Court or any Court. This is within the power of the legislature of the State; *Cushing* v. *Dupuy*, 5 App. Cas., 409; *Johnston* v. *St. Andrews Church, Montreal*, 3 App. Cas., 159; *Théberge* v. *Laudry*, 2 App. Cas., 102. Sec. 73 of the Constitution merely gives this Court jurisdiction to hear appeals, but that applies only to cases where an appeal exists, whether of right or by special leave; it does not say that there shall be a right of appeal, where, by State law, there is none.

(Counsel for the appellant were not called upon.)

GRIFFITH, C.J. There is, in our opinion, nothing in the point. Indeed, we are somewhat surprised that it should have been raised. Sec. 73 of the Constitution provides that "The High

Court shall have jurisdiction . . . . to hear and determine appeals from all judgments decrees and sentences . . . . ii. . . . . of the Supreme Court of any State or of any other Court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council." The decision appealed from in this case is a decision of the Supreme Court, and therefore under sec. 73 we have jurisdiction to entertain the appeal. It is said that the State Act provides that, in such cases as this, the decision of the Supreme Court shall be "final and conclusive." Whatever the effect of that provision may be, if it is in conflict with any provision in the Constitution, then by virtue of sec. 86 of the Constitution, it is inoperative. The construction that is sought to be put upon the section of the Justices Act in question is directly in conflict with sec. 73, and therefore either some other meaning must be given to it, or else it is inoperative.

It may be remarked that it has always been held that the prerogative right of the Sovereign to entertain appeals from colonial Courts could not be taken away except by express words. This absolute right of appeal to the High Court from all decisions of the State Supreme Courts, corresponds, under the Constitution, with the prerogative right of the Sovereign, and it cannot be taken away, even by an Imperial Act, without express words. But, under the Constitution, no State legislature can take it away even by express words, and it is quite certain that the legislature of New South Wales never intended to do any such thing when it passed the *Justices Act*, 1902.

Wise, K.C. (*Scholes* with him) for the appellant. There is no inconsistency between the State Act and the Constitution. The licence fee charged under the *Liquor Act*, sec. 71, is not a duty of excise, within the meaning of the Constitution. It is a fee payable to the State for the right to make beer for sale within the State; sec. 3. The Constitution itself must be looked at in order to see in what sense the term "duties of excise" is there used. It is used in secs. 55, 86, 87, and 90 by itself, without qualification, but in sec. 93 it is used in conjunction with the words "paid on goods produced or manufactured in a State,"

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showing that the term was understood by the framers of the Constitution in its natural sense, as a tax upon goods manufactured, varying according to quantity or value. That is the natural meaning of the term in English law; *Stephen's Commentaries*, 8th ed., Bk. IV., Pt. 1, chap. 7, sec. 3. The licence fee imposed by the State *Liquor Act* is not in any sense a tax upon goods, although it is paid by the manufacturer. It is fixed in amount, whether the brewer's output is great or small. It was held in *Brewers and Maltsters' Association of Ontario* v. *Attorney-General of Ontario*, (1897) A.C., 231, that a licence fee of this kind was a direct tax. Similar fees payable by commercial corporations were held to be direct taxes in *Bank of Toronto* v. *Lambe*, 12 App. Cas., 575. The licence fee cannot, therefore, be included under "duties of excise," which are indirect taxes, payable in the first instance by the producer or other person primarily liable, but in the expectation and intention that they will be passed on to the consumer by means of an advance in the price of the article taxed. It was argued in the Court below that the term "duties of excise" in the Constitution must be construed in the same sense as it has been construed in certain English Statutes. But the legislature there has deliberately adopted the term for convenience, to include almost all kinds of inland revenue taxation, direct as well as indirect, because they are under the control of the same authority, *e.g.*, in 24 Geo. III., c. 41, and others. But the cases already cited show that the distinction between indirect and direct taxation has not been altered, and that the modern English use of the term "duties of excise" is artificial, and peculiar to the English legislature, and is no guide to the sense in which the term is used in the Australian Constitution. The American use of the term throws no more light on the matter. The tendency there was to extend the meaning in order to bring under the head of indirect taxation as much as possible, and leave as little as possible under the head of direct taxation, because the States sought by every means open to them to impose indirect taxes under the guise of direct. This may be seen from the case *Patton* v. *Brady*, 184 U.S.R., 617. Direct taxes were practically limited to capitation taxes and taxes on land; *Pacific Co.* v. *Soule*, 7 Wall., 433. *Brown* v. *Maryland*, 12 Wheat., 436, relied on by the respondent

below, is not in point. The tax in that case, though nominally a tax on the importer personally, was held to be in substance a tax upon the goods imported. The prohibition in the American Constitution is against taxation of goods, imported or exported, and the question in that case was whether the tax in question, whatever it was called, was or was not such a tax. That does not touch the question here, which is whether the tax is a duty of excise. The States are not prohibited from taxing beer, but from doing it in a particular manner. Moreover it does not follow that a tax on the person is a tax upon the articles produced by him. It may or may not be, and the question always is whether it is so or not. *Brown* v. *Maryland* (*supra*) decided that in that particular case it was such a tax. *Judson on Taxation*, p. 458, defines an excise tax as one imposed upon some kind of personal property which is consumed by use.

The true view to take of the charging of licence fees by the State is that it is an exercise of the police power, for the purpose of controlling and preventing abuses in the trade, and not a means of obtaining revenue; *Judson on Taxation*, p. 526; *Cooley on Constitutional Limitations*, 6th ed., p. 716. The State has absolute power to prohibit brewing within its boundaries; *à fortiori* it has power to restrict and regulate the trade. The Commonwealth has only power to collect revenue upon such goods as are allowed by the State legislatures to be manufactured; sec. 113 of the Constitution. The *Beer Excise Act* does not interfere with the State control. [He referred to *Kidd* v. *Pearson*, 128 U.S.R., 1; *Licence Tax Cases*, 5 Wall., 462; *Mugler* v. *Kansas*, 123 U.S.R., 623; *Commonwealth of Mass.* v. *Holbrook*, 10 Allen (Mass.), 202.]

Lamb, for the respondent. The licence fee is *ultra vires* of the State legislature. It must have been imposed for one of two purposes, either as a source of revenue, or as incidental to the exercise of State control. If the former, it is no longer in the power of the State. The power of the States to raise revenue by taxation is limited to such methods as are not prohibited by the Constitution. Duties of customs and of excise are now exclusively reserved to the Commonwealth. This, if regarded as a means of raising revenue, is a duty of excise. It is in the same position as

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the tax considered in *Brown* v. *Maryland*, 12 Wheat., 436. That was nominally a tax upon importers, a fixed charge of 50 dollars, but was held to be in substance a tax upon the goods imported. The licence fee here is a tax upon the manufacturer, and is, therefore, by the same reasoning, a tax upon the article manufactured. The smallness of the fee is immaterial, because, if the State has power to impose a small one, it has power to impose a large one.

[GRIFFITH, C.J.—Surely, even if the tax were so high as to be prohibitive, that would be no objection to it. The State has power to prohibit the carrying on of the business altogether.]

It may prohibit it, but not by means of taxation.

[O'CONNOR, J.—The State is not prohibited from taxing manufacturers in other ways than by the imposition of excise duties.]

Taxing the makers is taxing the article, and that is imposing an excise duty. The licence is a licence to *make* beer for purposes of sale, not to sell. If the State can do this, it can in effect tax every article produced in the country, and not only that, it can tax imports and exports as well.

[GRIFFITH, C.J.—There is a distinction between the case of *Brown* v. *Maryland* and the present case. There the right to import was given by the Commonwealth laws, and the State had therefore no power to interfere with importers. But here the right to make beer is given by the laws of the State. The licence is a sort of conditional permission to carry on the trade. The Judges in *Brown* v. *Maryland* held that that particular tax on the person was a tax on the thing, not that all taxes on persons were taxes on things.]

It was held in *Welton* v. *Missouri*, 91 U.S.R., 275, that a tax on the business of sale was a tax on the articles sold.

[GRIFFITH, C.J.—The Statute in that case discriminated between the selling of goods made locally and goods made abroad.]

The prohibition in the Constitution is against taxing goods at all, whether made locally or abroad.

[BARTON, J.—There would be no such thing as a direct tax possible, if your argument were followed out to its logical consequences.]

A tax on all sellers alike would be constitutional, but a tax on a maker who sells puts him in a worse position than the seller

of foreign goods. In this case there is discrimination against the brewer. A spirit merchant, who may sell beer and spirits, wherever made, pays a licence fee of £30, but a brewer who wishes to sell foreign beer and spirits as well as his own must pay licence fees amounting to £85, or, excluding the federal licence fee, £60. *Brown* v. *Maryland* was followed in *Almy* v. *California*, 24 (Howard) U.S.R., 52.

[GRIFFITH, C.J.—That case has been criticised by the Judges in later cases.]

"Excise" has been given the wider meaning in England, America, and in our own federal legislation. In England instances of this use are seen in 43 & 44 Vict. c. 20, sec. 3, and 23 & 24 Vict. c. 27, secs. 1, 2, 9.

[BARTON, J.—You must show that the Imperial Parliament used the word "excise" in the Constitution with the intention of including all that the term included in other Acts passed for purely administrative purposes.]

The Federal Parliament must have understood the word in the wider sense, for it has included the provision for licences in the *Beer Excise Act* 1901, No. 7, sec. 11. A prosecution for carrying on the trade without a licence under that Act is an excise prosecution.

In America the term is used in the widest sense; see definitions in *Patton* v. *Brady*, 184 U.S.R., 617; *Baker's Annotated Constitution*, p. 16; *Bell's Law of Excise*, p. 1.

The imposition of the licence is not an exercise of the police power. It is not incidental to the control of the traffic by the State. The object of the regulating provisions of the *Liquor Act* was to protect the revenue by preventing unlawful distillation. It was passed when the State had power to levy excise duty on the liquor manufactured locally. The State cannot now be defrauded in that way, for the whole concern in excise duties has passed to the Commonwealth, and with it the necessity for control by inspection and otherwise. The licence fee now operates merely as a source of revenue. The traffic could be controlled, for other purposes, by registration and inspection. The State has no right to tax goods for the purpose of carrying out its inspection laws; *Cooley on Constitutional Limitations*, p. 594; *Pervear* v. *Com-*

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monwealth (Mass.), 5 Wall., 475; *Walling* v. *Michigan*, 116 U.S.R., 446.

[O'CONNOR, J., referred to *Woodruff* v. *Parham*, 8 Wall. U.S., 123.]

The licence under the State Act has been brought to an end by virtue of sec. 9 of the *Beer Excise Act*.

Brewers' and Maltsters' Association of Ontario v. *Attorney-General of Ontario* (*supra*) is not in point, because the question there was whether the licence was a direct or indirect tax, not whether it was a duty of excise. In construing similar terms, this Court will be guided by the interpretation of the American Constitution by the American Courts, not by the Privy Council interpretations of the Canadian Act, which differs entirely from our own.

As to the costs, if the Court allows the appeal, it is not a case in which costs should be given against the respondent. The result is of much greater importance to the State than to the respondent; *Commissioners of Taxation* v. *Trustees of St. Mark's, Glebe*, 1902 A.C., 416.

Wise, K.C., in reply. It is not a valid objection to the licence fee as a police regulation, that it partakes also of the character of excise. It is within the power of the State, unless utterly extravagant and unreasonable. *Gundling* v. *Chicago*, 177 U.S.R., 183; *Cooley on Taxation*, p. 151; *Woodruff* v. *Parham*, 8 Wall., U.S., 123.

The respondent should pay the costs, if the appeal is allowed.

GRIFFITH, C.J. This appeal raises a question which is important from many points of view, viz., whether the power of a State legislature to impose licence fees upon persons carrying on within the State the business of manufacturing particular articles is restricted by the provision in the Constitution that, after the imposition of uniform duties of customs throughout the Commonwealth, the power of the Commonwealth Parliament to impose duties of excise shall become exclusive. Before the establishment of the Commonwealth an Act had been passed by the legislature of New South Wales, called the *Liquor Act* 1898, which provided, amongst other

things, for licence fees being paid to the State by persons carrying on the business of manufacturing beer for sale. This was done by sec. 71, which is a re-enactment of a section in an earlier Act, and provides that "every person who desires to carry on the business of a brewer, or of a spirit merchant, shall apply for a brewer's or spirit merchant's licence to some quarterly licensing Court," &c. The Act then goes on to provide for the carrying on of the business in licensed premises. Sec. 72 provides that "a brewer's licence under this Part shall be deemed to authorize the holder to carry on the trade of a brewer as defined in this Act, and to sell any liquor which he is by law authorized to make (but no other liquor), in quantities of not less than two reputed gallons, at any one time, of the same kind of liquor," &c. The business of a brewer is defined by the Act as that of "making, for purposes of sale, beer, ale, porter, or stout," &c. The licence is transferable, and is granted to a particular person in respect of particular premises, being transferable by application to the licensing Court. Sec. 75 provides that any person who carries on the trade or business of a brewer without holding a proper licence under the Act shall be liable to a penalty. That Act was passed in 1898. The respondent was charged with having carried on the trade or business of a brewer without holding a proper licence under the *Liquor Act* (No. 18 of 1898). The proceedings were taken under sec. 75. The defence was that the licence fee was in effect a duty of excise, which it was not in the power of the State to impose, but was a matter within the exclusive power of the Commonwealth Parliament. Respondent also said that he had a licence under the Commonwealth *Beer Excise Act*. The real question is whether such a licence fee is a duty of excise within the meaning of sec. 90 of the Constitution. The term "duties of excise," is used in several sections of the Constitution. Section 86 provides that, on the establishment of the Commonwealth, the collection and control of duties of customs and of excise shall pass to the Executive Government of the Commonwealth. Sec. 90 provides that on the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise shall become exclusive, and that thereupon all laws of the several States imposing duties of customs or of excise shall cease to have effect.

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Then there is sec. 93 which provides, amongst other things, that during the first 5 years after the imposition of uniform duties of customs by the Commonwealth "the duties of customs chargeable on goods imported into a State, and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State, and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State." Sec. 55 also makes use of the term, providing that "laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but 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." It will be noticed that whenever in the Constitution the expression "duties of excise" is used, it is used in close juxtaposition with the expression "duties of customs," as being a term relating to things of the same nature, and governed by the same rules. They are indeed in every respect analogous. The first thing that occurs to one on reading the words "duties of excise" in sec. 93, is that they are qualified by the addition of the words "paid on goods produced or manufactured in a State." There the term is evidently limited to duties of excise in the sense stated, and is not used in the larger sense contended for by the respondent. The majority of the learned Judges of the Supreme Court appears to have been of the opinion that the term should be construed in the larger sense, so as to include almost all kinds of inland revenue imposts, as it is used in a number of the more recent English Statutes. I will take as an example the last of the Statutes referred to, 43 & 44 Vict. c. 20, which uses the expression to include duties, drawbacks, and licences, payable in respect of the business of brewing for sale. The same Act also enacts that the licence, which is to be in a prescribed form, shall be granted only when the duties of excise on the licence have been paid. No doubt, in England in modern times there is a tendency to use the word as including all kinds of inland revenue taxation which come under the control of the Commissioners for Inland Revenue. But it also appears that by a Statute 23 & 24 Vict. c. 27 it was expressly declared that the licence fees specified in the Act, which included,

amongst others, publicans' licences, should be deemed to be duties of excise for the purposes of that Act, and from that time onward we find the term has been used in England to include all these different classes of imposts. That argument seems to have prevailed in the Supreme Court, which held that, as the licence fee clearly came within the meaning of the term "excise duty," as used in England, it must, therefore, be taken that it was a duty of excise within the meaning of section 90, which conferred on the Commonwealth Parliament exclusive power to impose duties of customs and excise. Of course, the consequences of such a decision are very serious, for, if it is correct, the power to impose licence fees on publicans, for instance, has passed to the Commonwealth, as well as a large number of other fees, which, up to this time, have been thought to be within the power of the State to impose.

In construing a Constitution like this it is necessary to have regard to its general provisions as well as to particular sections, and to ascertain from its whole purview whether the power to deal with such matters was intended to be withdrawn from the States, and conferred upon the Commonwealth. The Constitution contains no provisions for enabling the Commonwealth Parliament to interfere with the private or internal affairs of the States, or to restrict the power of the State to regulate the carrying on of any businesses or trades within their boundaries, or even, if they think fit, to prohibit them altogether. That is a very important matter to be borne in mind in considering whether this particular provision ought to be construed so as to interfere with the States' powers in that respect. If the majority of the Supreme Court were right, the Constitution will have given to the Commonwealth, and withdrawn from the States, the power to regulate their internal affairs in connection with nearly all trades and businesses carried on in the States. Such a construction is altogether contrary to the spirit of the Constitution, and will not be accepted by this Court unless the plain words of its provisions compel us to do so.

Now the term "duties of excise" does not appear to have been used in the larger sense in any of the legislative instruments cited before us except in certain English Statutes. The word "excise"

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is, however, often used in America with that signification. What then does the term "duties of excise" mean in the Constitution in the collocation in which we find it? On this point there is an interesting passage in the *Annotated Constitution of the Australian Commonwealth*, by Messrs. Quick and Garran. It is interesting as giving an historical account of the origin and use of the term. The passage, which is at p. 837, is as follows:—"Excise duties were first introduced into England in the year 1643, as part of a scheme of revenue and taxation devised by Pym and approved by the Long Parliament. These duties consisted of charges on beer, ale, cider, cherry wine and tobacco, to which list were afterwards added paper, soap, candles, malt, hops, and sweets. The only excise duties now surviving in England similar to those of the original list, are duties on beer, spirits, chicory, imitations and substitutes of chicory and coffee, and chicory mixture. The basic principle of excise duties was that they were taxes on the production and manufacture of articles which could not be taxed through the Customs House, and revenue derived from that source is called excise revenue proper. In the course of time licences were required from the makers of and the dealers in excisable commodities, and these licence fees acquired the name of 'duties of excise.' The next step was to require persons to take out licences, who neither produced nor manufactured nor disposed of excisable commodities, and these licence fees became known as 'duties of excise.' Thus the list . . . . . was expanded by English usage until it embraced auctioneers, owners of armorial bearings, owners of dogs, owners of game, gun dealers, persons entitled to carry guns, hawkers, house agents, patent medicine sellers, owners of carriages, pawnbrokers, plate dealers, refiners of gold and silver, refreshment house keepers, and carriers. Such was the primary meaning of 'excise,' and such the secondary and enlarged use of the term. The fundamental conception of the term is that of a tax on articles produced or manufactured in a country. In the taxation of such articles of luxury as spirits, beer, tobacco, and cigars, it has been the practice to place a certain duty on the importation of these articles and a corresponding or reduced duty on similar articles manufactured in the country; and this is the sense in which excise duties have been under-

stood in the Australian colonies, and," the learned authors go on to add, "in which the expression was intended to be used in the Constitution of the Commonwealth." That is, as far as we know, a correct historical statement of the use and growth of the term in England. With respect to the Australian use of the term, we are entitled to take notice of the sense in which it has been understood and used in the legislation of the various States. We know that in some of them there were in existence for many years "duties of excise," properly so called, imposed upon beer, spirits and tobacco. 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. Bearing 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. Reading the Constitution alone, that seems to be the proper construction to be put upon the term. That being so, the judgment of the Supreme Court, if it is to be supported at all, must be supported on some other ground than this.

Mr. Lamb contended that, even if the grounds of the decision of the Supreme Court were incorrect, nevertheless this particular duty operates in effect as a tax upon articles manufactured in the country, *i.e.*, on beer manufactured in New South Wales. Very likely a tax may be imposed in the form of a licence fee, which would be, in effect, a tax upon goods produced by the holder of the licence. As to that the observation of Lord *Herschell* in the *Brewers' and Maltsters' Association of Ontario* v. *The Attorney-General for Ontario*, (1897) A.C., 231, seems to be applicable. I shall refer to it again presently. But in considering whether a duty, which is not

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primâ facie within the prohibition contained in the Constitution, comes within it in substance, it is important to consider, first of all, what is the substance. Mr. Lamb relied mainly on the case of *Brown* v. *Maryland*, 12 Wheat., 262, a well known decision of the Supreme Court of the United States, in which it was decided that a tax upon importers was in substance a tax upon the goods imported, and therefore was a violation of the provision in the United States Constitution which prohibited the States from imposing any duties upon imports or exports. He contended that, as it was held by the Supreme Court in that case that the tax in question, which was in form a tax on the importer, was a tax upon imports, so in this case the licence fee, being a tax upon the manufacturer, is a tax upon the manufacture and the articles manufactured. But there appears to be really a very great difference between the two cases. In the American case the State had no power or authority to prohibit the carrying on of the business of an importer by virtue of what is known in America as the police power. Freedom of trade and commerce could not be interfered with by any State. No State could impose any restriction upon importing, and therefore it could not do what was practically to prohibit it. The only effect of the tax that was considered in that case was to impose a tax upon importation. But, if a particular industry is one which exists only by the permission of the State, the forbidding of the carrying on of that industry in that State is within the power of its legislature, and they may impose upon it any condition or restriction they think fit. Therefore, such a tax is not, *primâ facie*, a tax upon particular goods, but a condition imposed by Statute upon persons who are engaged in producing them. That, I think, is enough to distinguish the cases of *Brown* v. *Maryland* and *Welton* v. *Missouri* from the present case. Upon this point I will read a passage from the report of *Brewers' and Maltsters' Association of Ontario* v. *Attorney-General of Ontario*, in the judgment delivered by Lord *Herschell*. He says, at p. 237—"It was argued that the provincial legislature might, if the judgment of the Court below were upheld, impose a tax of such an amount and so graduated that it must necessarily fall upon the consumer or customer, and that they might then seek to raise a revenue by indirect taxation

in spite of the restriction of their powers to the imposition of direct taxation. Such a case is conceivable. But if the legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise." In considering the validity of laws of this kind we must look at the substance and not the form. If the Statute is good in substance, the Court will regard the substance, and hold the law to be valid, whatever the form may be. The case of *Brown* v. *Maryland*, therefore, does not affect this case. In this instance the subject matter is one which the legislature of New South Wales has power to regulate,—that is to say the carrying on of any business—in the exercise of the police power of the State. It is not disputed that it can regulate the manufacture of an article, though it has no power to impose a tax upon the thing itself. From that point of view we look at the Statute in question to see whether it was passed for the purpose of regulating or controlling the manufacture of this particular article, beer. The Act provides in substance that a person who proposes to carry on the business of manufacturing beer must give the name and place where he intends to carry it on, and pay a licence fee. Whether there is also a federal excise duty upon the manufactured beer is quite immaterial. Further, the licence not only empowers the licensee to manufacture beer, but entails the liability to have the premises entered by an inspector for the purpose of taking samples of the beer made there, in order to ascertain whether there is any adulteration or not. The provision, therefore, is one of several conditions imposed upon the manufacturer for regulating the trade, which is one of the primary functions of a State legislature. It was contended for the respondent that the tax is in substance an indirect tax, and therefore obnoxious to the restrictive provision in the Constitution. But, as was pointed out by Mr. Wise, the amount of the tax in no way depends upon the quantity of beer manufactured. Nobody disputes that an excise duty imposed upon goods during the process of manufacture, by quantity or value, is an indirect tax, *i.e.* that the person primarily liable, having paid it, adds it to the selling price and so passes it on to be ultimately paid by

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the consumer. The Privy Council, in the case I have just quoted, adopted the definition of J. S. Mill, which had been also adopted in the previous case *Bank of Toronto* v. *Lambe*, 12 App. Cas., 575, at p. 582:— "Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs."

"The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price."

Mill was evidently using the word in the ordinary sense, and their Lordships of the Privy Council expressed the opinion that the tax in question was a direct tax, to be paid by the person made primarily liable. There was neither an expectation nor an intention that the person who paid it should indemnify himself by passing it on. In short, it was intended to be a direct tax. That case is an authority for saying that, *primâ facie*, a licence fee of this sort is not a tax on the goods themselves. Their Lordships then go on to discuss the possibility of its being so in effect. In such a case the Court has power to inquire into the matter in order to see whether it really is so.

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.

It is right to advert to one argument used by Mr. Lamb, viz., that the effect of the tax might be to discriminate between locally manufactured goods and those produced in other States, to the prejudice of the former. He said that a spirit merchant, on taking out a single licence, is entitled to sell beer, wherever produced, whereas a licensed brewer cannot sell any beer not of his own

manufacture, nor any spirits, without taking out another licence, so that he requires two licences. That, however, is an incident to all regulation of trade. The person subject to restrictions is at a disadvantage as compared with others who are not subject to those restrictions. That is incidental to freedom of trade and commerce within the Commonwealth, but it is not in any way an objection to the validity of a law regulating the manufacture.

For all these reasons we are of opinion that this licence fee is not a duty of excise within the meaning of sec. 90 of the Constitution, and that the Statute is not affected by the imposition of uniform duties of Customs throughout the Commonwealth, and that the respondent was guilty of the offence with which he was charged, and should have been convicted.

Appeal allowed. Order of the Supreme Court discharged. Case remitted to the Police Magistrate with a direction to convict. Respondent to pay the costs in the Supreme Court and of the appeal.

Solicitor, for the appellant, *The Crown Solicitor of New South Wales.*

Solicitor, for the respondent, *R. H. Matthews,* by *E. R. M. Newton.*

[HIGH COURT OF AUSTRALIA.]

MACDONALD . . . . . APPELLANT;

AND

BEARE . . . . . RESPONDENT.

Foll *R v Nicholas* (2000) 1 VR 356

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Games, Wagers and Betting Houses Act, No. 18 of 1902, *sec.* 4—*Special warrant—Form of—Address to police force at large—Motion to rescind special leave—Matter of public importance.*

A special warrant under sec. 4 of the *Games, Wagers and Betting Houses Act,* 1902, may be addressed to members of the police force of New South Wales generally, and need not mention any constable by name.