[HIGH COURT OF AUSTRALIA.]

FOX . . . . . APPELLANT;
COMPLAINANT,

AND

ROBBINS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF WESTERN AUSTRALIA.

H. C. OF A. 1908-9.

PERTH, 1908. *Nov.* 11, 12, 18.

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

MELBOURNE, 1909. *March* 16, 17, 23.

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

*Constitutional law—Inter-State freedom of trade—Validity of State legislation—Liquor licence—Discrimination against wine produced in another State—The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 92, 113—*Wines, Beer and Spirit Sale Act* 1880 (*W.A.*), (44 *Vict. No.* 9), *secs.* 5, 15, 39*—*Wines, Beer and Spirit Sale Act* 1880 *Amendment Act* 1893 (*W.A.*), (57 *Vict. No.* 25), *sec.* 22*—*Wines, Beer and Spirit Sale Act Amendment Act* 1902 (*W.A.*), (2 *Edw. VII. No.* 44), *sec.* 3*.

*Sec. 5 of the *Wines, Beer and Spirit Sale Act* 1880 provides that :—"A publican's general licence shall authorize the licensee to sell and dispose of any liquor in any quantity on the premises therein specified."

By sec. 15 of the *Wines, Beer and Spirit Sale Act* 1880 the fee for a publican's general licence is fixed at £50 in Perth and Fremantle, for a wine and beer licence at £5, and for a colonial wine licence at £2.

Sec. 22 of the *Wines, Beer and Spirit Sale Act* 1880 *Amendment Act* 1893 as amended by sec. 3 of the *Wines, Beer and Spirit Sale Act Amendment Act* 1902, provides that :—

"Section ten of the Principal Act is hereby repealed, and the following provisions shall be read in lieu thereof :—A colonial wine licence shall authorize the licensee to sell and dispose of, in the house or shop or on the premises certified in the licence, any wine, cider, or perry produced from fruit grown in the Colony, in any quantity, for consumption on the premises, or otherwise : Provided that if any such wine, cider, or perry shall contain more than thirty-five per centum of proof spirit, it shall be deemed to be for all purposes of the law 'spirituous liquors' : . . . . ."

Sec. 39 of the *Wines, Beer and Spirit Sale Act* 1880 provides (so far as material) that :—"If any person shall . . . . sell or dispose of within the Colony of Western Australia any liquor . . . . without having first obtained in manner and form hereinafter directed a licence authorizing such sale or disposal at the time and place and in the quantity and manner in which such licensee is by such licence authorized to sell and dispose of such liquor, every such person shall forfeit and pay for the first offence the sum of thirty pounds . . . ."

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A law of a State which, for a licence authorizing the sale of wine manufactured from fruit grown in any other State, requires a greater fee to be paid than for a licence authorizing the sale of wine manufactured from fruit grown in the first mentioned State, is contrary to the provisions of sec. 92 of the Constitution, and is, therefore, to the extent at least of the difference between the fees so required to be paid, invalid.

The defendant was charged that he, not being the holder of a licence authorizing the sale of wine not being the product of fruit grown in Western Australia, sold such wine, contrary to the provisions of sec. 39 of the *Wines, Beer and Spirit Sale Act* 1880. The fee payable under sec. 15 of that Act for the only licence which would authorize the sale of such wine was £50. The defendant was the holder of a licence which authorized the sale of wine the product of fruit grown in Western Australia, the fee for which was under sec. 15 £2, and he sold wine the product of fruit grown in Victoria. The Magistrate having dismissed the charge,

*Held*, that the charge was properly dismissed.

By *Isaacs* J.—The whole of the Act, so far as it requires a fee to be paid for a licence authorizing the sale of wines the product of fruit grown in any other State, is invalid.

By *Higgins* J.—The Act is invalid to the extent only of the discrimination. Sec. 113 of the Constitution gives a State power to legislate with respect to intoxicating liquids imported into the State as fully as with respect to intoxicating liquids produced in the State, but does not authorize a discrimination between imported intoxicating liquids and those produced in the State adverse to the former.

CASE stated by a Police Magistrate of Western Australia.

Before a Police Magistrate sitting at Perth as a Court of Petty Sessions a complaint was heard whereby Samuel Alfred Fox, the appellant, charged that William Magill Robbins, the respondent, not being the holder of a licence under the *Wines, Beer and Spirit Sale Act* 1880 and amendments thereof authorizing the sale of wines not the product of fruit grown in the State of Western Australia, did sell liquor, to wit one glass of wine, not being the product of fruit grown in the State of Western Australia. The complaint having been dismissed, the complainant, pursuant to sec. 197 of the *Justices Act* 1902, applied to the Police Magistrate to state a case for the opinion of the Supreme Court, and he did so accordingly.

The case stated that it was admitted that the defendant had sold wine the produce of grapes grown in the State of Victoria,

and that he was the holder of a colonial wine licence under sec. 22 of the *Wines, Beer and Spirit Sale Act* 1880 *Amendment Act* 1893 (57 Vict. No. 25), as amended by the *Wines, Beer and Spirit Sale Act Amendment Act* 1902 (2 Edw. VII. No. 44) and of no other licence by which the sale of the wines was authorized. The case also stated that the Police Magistrate dismissed the charge as he was of opinion that the colonial wine licence authorized the sale in question. The question for the Supreme Court was whether the Police Magistrate, in deciding that the colonial wine licence authorized the sale, came to a correct decision in point of law, and, if not, what should have been done in the circumstances.

The Supreme Court directed the cause to be removed into the High Court, considering that it fell within sec. 5 of the *Judiciary Act* 1907, as they had done in the case of *Lee Fay* v. *Vincent* (1).

The Court, as in *Lee Fay* v. *Vincent*, treated the matter as a question reserved by the Supreme Court for the consideration of the High Court under sec. 18 of the *Judiciary Act*.

*Draper*, for appellant.

Perth, Nov. 11, 12, 1908.

*Haynes* K.C. and *Canning*, for respondent.

The Court directed the case to be re-argued before a Full Bench at Melbourne.

Nov. 18.

The case now came on for argument accordingly.

*Schutt*, for the appellant. If the effect of sec. 92 of the Constitution is to render invalid any portions of the *Wines, Beer and Spirit Sale Act* 1880 and amendments thereof which create a discrimination between wines made from fruit grown in Western Australia and wines made from fruit grown in other States, then the only sections which create such a discrimination are those dealing with colonial wine licences, viz., sec. 15 of the Act of 1880 so far as it fixes the fee for a colonial wine licence at £2 and of a wine and beer licence at £5, and sec. 22 of the Act of 1893 as amended by the Act of 1902.

Melbourne, March 16, 1909.

(1) 7 C.L.R., 389.

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An alternative view is that sec. 15 of the Act of 1880 is rendered invalid so far as it requires a larger fee, viz., £50, to be paid for a licence which authorizes the sale of wine made from fruit grown in other States than for a licence authorizing the sale of wine made from fruit grown in Western Australia. In either view the only licence which would authorize the sale made by the respondent is a publican's general licence, which in one view the respondent might be entitled to get on payment of £2, and as the respondent had not that licence he should have been convicted. Sec. 92, however, had not that effect in the case of intoxicating liquors, for they are put upon a special footing by sec. 113 of the Constitution. That section enables the legislature of a State to legislate as it pleases with regard to imported liquor once it is within the State, and to discriminate if it thinks fit, notwithstanding sec. 92. [He referred to *Cooley* v. *Board of Wardens of Port of Philadelphia* (1); *Leisy* v. *Hardin* (2).]

[ISAACS J. referred to *Vance* v. *W. A. Vandercook Co.* (*No.* 1) (3). HIGGINS J. referred to *Welton* v. *State of Missouri* (*No.* 1) (4). GRIFFITH C.J. referred to *Tiernan* v. *Rinker* (5)].

*McArthur*, for the respondent. Sec. 39 of the Act of 1880 is invalid so far as it makes it an offence to sell wine made from fruit grown in other States without having a licence for which the fee is £50. The discrimination, which is impliedly prohibited by sec. 92 of the Constitution, is effected not by the sections as to colonial wine licences, but by the sections which impose a greater burden on the sale of wine made from fruit grown in other States than on the sale of wine made from fruit grown in Western Australia. The respondent was entitled to sell Victorian wine under the licence which he held. Sec. 113 of the Constitution does not interfere with the operation of sec. 92. It merely enables the legislature of a State to deal with imported liquor in the same way as with liquor manufactured in the State, but does not give any power to discriminate. *Tiernan* v. *Rinker* (6); *Welton* v. *State of Missouri* (7); *Scott* v. *Donald* (8).

(1) 12 How., 299.
(2) 135 U.S., 100.
(3) 170 U.S., 438, at p. 449.
(4) 91 U.S., 275.
(5) 102 U.S., 123.
(6) 102 U.S., 123, at p. 127.
(7) 91 U.S., 275, at p. 282.
(8) 165 U.S., 58, at p. 97.

*Schutt*, in reply. If the legislation is invalid so far as it imposes a fee of £50 for a licence authorizing the sale of wine made from fruit grown in other States, the result is that that wine may be sold without a licence at all, the result being a consequent discrimination against Western Australian wine. The preferable view is that the legislation is invalid so far only as it requires payment of £50 instead of £2 for a publican's general licence.

*Cur. adv. vult.*

March 23.

The following judgments were read :—

GRIFFITH C.J. The respondent was charged before a magistrate with a breach of sec. 39 of the *Wines, Beer and Spirit Sale Act* 1880 (W.A.), in that, not being the holder of a licence authorizing the sale of wines not the product of fruit grown in the State of Western Australia, he sold liquor, namely, wine not being such a product. The wine sold was the product of fruit grown in the State of Victoria. The Act of 1880 authorizes the issue of several different licences for the sale of liquor, for which different fees are required to be paid. At the date of the prosecution the fee prescribed for a licence authorizing the sale of wine the product of fruit grown in Western Australia was £2, while the fee for the only licence under which wine made from fruit grown in any other part of Australia could be sold was £50.

Sec. 39 prohibits under a penalty the sale of any liquor without a licence authorizing the sale of that liquor.

The respondent objected that, although discrimination between the conditions upon which wine the product of Western Australian fruit and wine the product of fruit grown in other States may be sold was permissible before the establishment of the Commonwealth, any such discrimination after that period was unlawful; and he relied on the provisions of sec. 92 of the Constitution, which provides that "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

This provision would be quite illusory if a State could impose disabilities upon the sale of the products of other States which

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are not imposed upon the sale of home products. It follows, in my opinion, that a law which had that effect before the imposition of uniform duties could not remain in force after that imposition. The Supreme Court of the United States long ago laid down a similar rule under the American Constitution. That Constitution does not contain any express provision to the effect of sec. 92, but the Court rested their decision upon an implied prohibition which they found in the consideration that if such a law were held valid the object for which the power to control trade and commerce between the States was vested in Congress would be defeated.

In *Welton* v. *State of Missouri* (1) it was held that this prohibition continued until the property which was the subject of trade had become a part of the general property of the country, subject to similar protection and to no greater burdens. "In the other view," the Court said (2):—"Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favourable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States." This decision has been frequently followed.

In my opinion a similar implied prohibition results from the express language of sec. 92, so that the Act of Western Australia now in question, in so far as it makes a discrimination against wine the product of fruit grown in other States of the Commonwealth in favour of wine the product of fruit grown in Western Australia, is contrary to the Constitution, which is the paramount law of the Commonwealth.

The consequence is that no greater burden or restriction can now be laid upon the sale of other Australian wines in Western Australia than that laid upon the sale of Western Australian wine. This burden is measured by the licence fee of £2. Applying this principle, the operation of the Act must be qualified so far (but only so far) as is necessary to give effect to the implied prohibition. It follows that, so far as the Act imposed

(1) 91 U.S., 275.

(2) 91 U.S., 275, at p. 281.

a larger fee than £2 for permission to sell other Australian wines, and made it unlawful to sell them without a licence charged with such larger fee, it ceased to have operation after the imposition of uniform duties of Customs and Excise. Two views may be taken of the consequence of this qualification, one, that as no special provision is made in the Act for granting a licence to sell other Australian wines, no licence is necessary to authorize such sale, so that sale without licence is no longer an offence; the other, that a licence to sell Western Australian wine should be construed as extending to authorize the sale of other Australian wines. As the respondent was the holder of such a licence it is not necessary to decide which is the correct view, since in either case the magistrate was right in dismissing the charge. A good deal may be said in support of either contention, but I do not express any opinion on the point.

I do not think that sec. 113 of the Constitution, which provides that "All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage shall be subject to the laws of the State as if such liquids had been produced in the State," has any bearing on the question. But for that provision it might have been argued (I do not say successfully) that a State law which interfered with freedom of internal trade in respect of liquor imported into a State would be in contravention of sec. 92 of the Constitution. The effect of sec. 113 is to give the State full power of legislation with respect to intoxicating liquors as fully as if the liquors had not been imported. But it does not touch the objection founded on the ground of discrimination.

The appeal must therefore be dismissed.

Barton J. The enactments made by the legislature of Western Australia material to this case, and the facts in evidence, have already been stated. The charge laid against the respondent under the 39th section of the Act 44 Vict. No. 9 was that he, not being the holder of a licence under that Act and the amendments thereof authorizing the sale of wines not the product of fruit grown in Western Australia, had sold liquor not being such product. The subject of sale was a glass of Victorian

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wine. The respondent was the holder of a colonial wine licence, which in form authorized him to sell only wine produced in Western Australia. For that the statutory charge was £2. The only other licence which would on its face have authorized him to retail wine not produced in Western Australia, was a publican's general licence. That would have cost him £50, as his place was in Perth: see sec. 15 of the Principal Act. A publican's general licence authorizes the licensee to sell and dispose of any liquor in any quantity on the licensed premises. The respondent's defence was that the imposition of the higher fee to authorize the sale of wine produced in another State was illegal, and he relied on secs. 92 and 113 of the Australian Constitution, and contended that the licence he held authorized him by the force of these provisions to sell Victorian wines. The Police Magistrate dismissed the charge, and we are to say whether he did so rightly. I may say here that in the argument before us the appellant also relied on sec. 113 of the Constitution.

Sec. 22 of the State Act 57 Vict. No. 25 must, like the whole of that Act, be read with the Principal Act and its other amendments as one Act (57 Vict. No. 25, sec. 25). Apart from that section we should have read the enactments now in question together.

I have no doubt whatever that the State enactments now in question, valid as they were when passed, have become, if not ever since the imposition of uniform duties of Customs of the Federal Parliament in 1901, then certainly since the expiration of the special tariff of Western Australia in 1906, inoperative so far as they derogate from the freedom of inter-state trade ordained by sec. 92 of the Constitution. That they so derogate is abundantly clear.

The Constitution of the United States contains no such provision as our sec. 92. The framers of that instrument gave Congress the right to regulate trade and commerce with other countries and among the States. In terms, that right is not exclusive. The Supreme Court however has repeatedly held it to be exclusive of any State legislative power, "so far . . . that no State has power to make any law or regulation which will affect the free and unrestrained intercourse and trade be-

tween the States, as Congress has left it, or which will impose any discriminating burden or tax upon the citizens or products of other States, coming or brought within its jurisdiction:" *Brown* v. *Houston* (1). The Australian Constitution, for more abundant caution, has enacted in sec. 92 that:—"On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." In this respect the Australian Constitution is stronger than the American.

Now it is impossible to reconcile the effect of the State legislation called in question with the maintenance in unhampered operation of this constitutional provision. To impose one charge on the sale of the wines of other States, while allowing the sale of Western Australian wines at another and a lower fee, is discrimination of a kind which if lawful in this case is lawful in a thousand others—for this is a question of power. By burdens of this kind and that, whether under the name of licence fees or under any other name, the operation of inter-state free trade could be so hampered and restricted as to reduce the Constitution in that regard to mere futility. If sec. 99 had never been in the Constitution, the Federal Parliament could not any more than the Parliament of a State have lawfully enforced any such discrimination. There is no difference in substance or effect in its bearing on inter-state commerce between a burden such as this and a duty collected at the borders or the ports of one State on the products of another. In either case that commerce is restricted which the Constitution says shall be free; and in either case the disability may be made so great as to render the product unsaleable, and therefore virtually to prohibit its introduction. In a word, however the enactment may be phrased, it is inter-state protection, not inter-state free trade. And we may be allowed to recollect as a matter of history that one of the chief objects of the struggle for federation was to secure that which sec. 92 ordains, free trade among the States, although to one of them a temporary concession, long since expired, was made (see sec. 95).

I must not for a moment be taken to cast any doubt on the

(1) 114 U.S., 622, at p. 630.

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capacity of a State to tax, together with its own products, goods produced in other States, when brought into it for sale or consumption. When the inter-state transit is over and they have become part of the mass of property within the State, any goods may be taxed, no matter whence they have come. But they must be taxed alike with all other such goods in the State. The tax must be general, and laid equally on all goods of the kind to be taxed, whether their State of origin be the taxing State or another. And what I say of taxes applies to other imposts and burdens.

I am of opinion, for the reasons given, that these enactments taken together are now, in respect of their application to wines the product of grapes grown in States other than Western Australia, a violation of sec. 92 of the Constitution. Further reasons are, in my judgment, unnecessary.

Now as to sec. 113 of the Constitution. First I will say something of its origin. In 1889 the Supreme Court of the United States decided, in *Leisy* v. *Hardin* (1), that a Statute of Iowa, prohibiting the sale of intoxicating liquors except for certain strictly limited purposes, and under licence, was, as applied to a sale by the importer and in the original unbroken packages, of such liquors made in and brought from another State, repugnant to the commerce clause of the Constitution, so that the decision limited the operation of the law to property strictly within the jurisdiction of the State. In the following year Congress passed the *Wilson Act*, 26 Stat. 313, c. 728. That enactment made "all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein," subject "upon arrival in such State or Territory to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory," and declared that such liquors should "not be exempt therefrom by reason of being introduced therein in original packages or otherwise." The validity of this Statute was called in question in the case of *In re Rahrer* (2). The Act was held valid, and

(1) 135 U.S., 100.

(2) 140 U.S., 545.

*Fuller* C.J., in delivering the judgment of the Supreme Court described the action of Congress as simply removing an impediment to the enforcement of State laws in respect of imported articles in their original condition. In other words, it provided that inter-state transit of liquors should end one stage earlier in order that the police laws of the State might begin to operate on the liquors at that earlier stage.

Now on comparing the *Wilson Act* with sec. 113 of the Australian Constitution it will be seen that they are identical in substance and nearly indentical in terms. It was simply thought safer by those who framed our Constitution, especially in view of the inflexible character of sec. 92, that such a provision should be embodied in the charter than that it should be left for future enactment by the Federal Parliament under the commerce power. The Australian provision is shorter than the American. It lacks the prohibition with which the *Wilson Act* winds up, against the exemption of liquors from the operation of State laws by reason of being introduced therein in original packages "or otherwise." The draftsmen of the Australian Constitution seem to have thought the general terms of the section so direct and so comprehensive that the exemption could not possibly be inferred from them. That reason would lead them to consider a prohibition of such an exemption superfluous.

Like the *Wilson Act*, then, sec. 113 has the effect of enabling State laws, otherwise valid, to take effect on the liquors introduced from other States, at least as soon as they have reached the consignee, whether the original packages have been broken or opened or not. It has no greater effect, and there is no word in it which says, or which gives room for the implication, that it is meant to justify a violation of sec. 92 by way of discrimination. Any law of the State laying any burden on the liquor brought in, whether by tax or impost, or by restriction of sale, must apply equally to the like article of the State's own production, or sec. 113 will not save that law.

It is unnecessary for the respondent to call sec. 113 to his aid, and it cannot help the appellant.

I do not enter into any of the other questions that have been

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raised in argument, as on arriving at the conclusion expressed, I am bound to hold that this appeal ought to be dismissed.

O'CONNOR J. The Western Australian legislation which is challenged in these proceedings may be described in a few words. A person who in Western Australia wishes to retail wine the product of that State may do so on obtaining a licence at a charge of £2 a year. But if he wishes to retail there wines the product of any other State he must obtain a general licence at a cost of £50 a year. The wines of other States coming into Western Australia are subject therefore to a charge twenty-four times greater than that imposed on Western Australian wines as a condition of their being allowed to go into retail consumption. Compliance with that provision is enforced by forbidding under pain of penalties any sales of wine except by persons duly licensed. It is clear that the Constitution does not permit a State by such discriminating charges to place at a disadvantage the goods of other States passing into it for sale. It has long been a firmly established principle of the American Constitution that such discriminations are an obstruction to the right of free and unimpeded trade throughout the States, which it was one of the great objects of the American as it has been of the Australian Constitution to secure. In America the principle is held to rest on the exclusive powers of Congress over inter-state trade, and it is laid down that as Congress has refrained from enacting any law restricting inter-state trade, that must be taken as "equivalent to a declaration that inter-state commerce shall be free and untrammelled": *Welton* v. *State of Missouri* (1). In the Australian Constitution, passed we must assume with a knowledge of the American decisions, the principle is not left to assumption or deduction. It is plainly set forth in sec. 92: "On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." There could hardly be a clearer instance of an infringement of the rights thus conferred on the people of each State of the Commonwealth in their dealings with each other than is to be found in the enact-

(1) 91 U.S., 275, at p. 282, per *Field* J.

ments under consideration. The respondent has relied on sec. 113 of the Constitution. To what extent that is to be read as cutting down the effect of sec. 92 in the case of "fermented, distilled, or other intoxicating liquids," is a question which need not be discussed at present. However it may modify sec. 92, it is clear on its face that it does not authorize the making of laws discriminating to the disadvantage of the people of other States. The legislation challenged, therefore, is inconsistent with the Constitution, which by virtue of sec. V. of the covering clauses is made binding on the people of every State "notwithstanding anything in the laws of any State." To the extent of the inconsistency the State law becomes void and of no effect. The questions, what is the extent of the inconsistency, and what portions of the enactment must now be declared invalid, were discussed at some length during the argument. But in my view the Court in this proceeding is only called upon to determine whether the provisions under which the respondent was prosecuted are any longer in force. It is plain that they are not. The law imposing the discriminating charge being unconstitutional, any provision for enforcing compliance with such a law must also be unconstitutional and therefore invalid.

On that ground I am of opinion that the prosecution rightly failed. It is not necessary in this case to discuss the magistrate's grounds for his decision. Agreeing as I do with his conclusions, I guard myself against expressing approval of his reasons. I therefore agree that the appeal must be dismissed.

Isaacs J. The Western Australian Act was valid when passed, and continued to be in all respects a binding enactment up to the date of the imposition of Commonwealth Customs duties. The provisions of sec. 92 of the Constitution now require from that date that trade, commerce, and intercourse among the States shall be absolutely free. That is an organic law—superior to any Act of any Parliament either Commonwealth or State. Sec. V., one of the covering sections of the Statute which enacts the Constitution, provides:—"This Act . . . shall be binding on the Courts, Judges, and people of every State, and of every part

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of the Commonwealth, notwithstanding anything in the laws of any State."

Consequently so far as the provisions of the Western Australian *Wines, Beer, and Spirit Sale Act* would in their operation offend against the Constitutional declaration of absolute freedom of inter-state trade, they are ineffective and void, and no longer to be regarded as law.

It was suggested that sec. 113 of the Constitution empowered the State notwithstanding sec. 92 to legislate as it pleased in relation to all intoxicating liquors, because it provided that liquors passing into the State from elsewhere are to be subject to the laws of the State as if they had been produced in the State. But that is impossible to maintain. Sec. 113 was inserted *diverso intuitu*. It certainly enables the State so far to legislate regarding intoxicating liquors, the objects of inter-state commerce, as to make them subject to the same laws as apply to its own liquors, but it does not confer power on the State to discriminate adversely to the liquors of other States. Sec. 92 was made an organic law operating of its own force,—and not capable of being modified or weakened in any degree by any Parliament, whether Commonwealth or State. In this respect our Constitution differs from that of the United States because there the Constitution does not provide that inter-state commerce shall be inalterably free, but by the grant to the Federation of the exclusive power to regulate it, it was left free except as Congress might impose restraint: *In re Rahrer* (1).

By the *Wilson Act* Congress did impose certain restraint by enabling the States to legislate on the subject of intoxicating liquors passing into them from other States.

The Federal Parliament could not have so legislated in face of the unqualified declaration of sec. 92, and therefore similar provisions had to be inserted in the Constitution itself. These find expression in sec. 113. The language of that section is sufficiently similar to the *Wilson Act*, to make the cases in America illustrative of the principle to be applied.

The decisions in the United States since the passing of the *Wilson Act* demonstrate clearly that no adverse discrimination is

(1) 140 U.S., 545, at p. 555.

there permissible. In *Welton* v. *State of Missouri* (1), decided in 1875 before the passage of the Wilson Act, the Court said that the inaction of Congress with respect to foreign and inter-state commerce was equivalent to "a declaration that inter-state commerce shall be free and untrammelled." That declaration, as I have said, is expressly made in the Australian Constitution. The Court then adds that as the main object of that commerce is the sale and exchange of commodities, State legislation discriminating against the products of other States would defeat the policy thus established. Accordingly the Court held invalid the licence tax which was required only for selling merchandise not the growth or product of the State of Missouri. That exemplifies the nature of a contravention of sec. 92.

In 1890 the Wilson Act was passed, and an authority that defines the limits of State powers under that Act, and by parity of reasoning under sec. 113 of our own Constitution, is *Scott* v. *Donald* (2), in 1897, where the Court said that the State could forbid entirely the manufacture and sale of intoxicating liquors, or provide equal regulations for the inspection and sale of all domestic and imported liquors, but could not validly discriminate between inter-state and domestic commerce in commodities to make and use which are admitted to be lawful. That rule was affirmed in 1897 in *Vance* v. *W. A. Vandercook Co. (No. 1)* (3), and is settled law in America.

If the Western Australian Act is found on examination to be in effect an enactment impairing the absolute freedom of inter-state commerce, it is *pro tanto* void. And if any of the provisions discriminate adversely to other States, it does impair that freedom, because it deters the residents of the State from selling or consuming, and therefore from purchasing and importing, the products of the other States. Under the Statute in question a licence to sell Western Australian wine may be obtained for £2, and a licence to sell Western Australian wine or beer for £5, but no licence to sell the wine of any other State can be procured at all except in the form of a general licence to sell all liquors and at the cost of £50, and under certain burdensome conditions. The

(1) 91 U.S., 275, at p. 282. (2) 165 U.S., 58.
(3) 170 U.S., 438, at p. 449.

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objectionable discrimination adverse to other States therefore exists, and was intended to exist. But under the Constitution the residents of Western Australia who desire to sell wine from other States have a right to insist that they are not bound to submit to that discrimination or to be penalized for refusing to recognize it. Strictly speaking, it is not necessary to say whether the consequence is that the licence held by the respondent itself includes wines of other States, or that no licence is required for wines of other States—that is wines only. But the question has been argued and I state my view. The licence to sell only Western Australian wine costing £2, and the licence to sell Western Australian wine or beer costing £5 cannot, as I think, by any stretch of language be construed as extending to authorize the sale of any Victorian wine, or satisfy the requirements of sec. 39 which penalizes the sale of such wine unless under the £50 licence. The reason given by the learned Police Magistrate is not, in my opinion, sustainable.

Nor can I imagine that the Constitution simply deletes sub-sec. (3) of sec. 15 of the Principal Act, and sec. 22 of the Amending Act, leaving the seller of Western Australian wine open to the penalties of sec. 39 of the Principal Act unless he takes out a general licence and pays £50.

Sec. 92 of the Constitution does not reframe State Acts by making new affirmative legislation not contemplated by the State Parliament. It prevents adverse discrimination from being lawful; so far as the Act can be effectively worked in conformity with the constitutional requirement it still stands; so far as it cannot it simply ceases to operate.

The Court cannot, in my opinion, do what it was invited to do, namely, remodel the Statute by preferring one of the sections in question to another. Each of the provisions, the £50 licence and the £2 and £5 licences, were equally the will of the Western Australian Parliament but for different circumstances, and this tribunal has no authority to select preferentially any of these provisions and say it alone shall be the law for Western Australia for all sets of circumstances. A discrimination is caused by the joint presence of all, and while the Constitution condemns the

fault it cannot cure it by altering the enactment in the way suggested; that is a matter for the legislature of the State.

There is in the result no valid provision under which a person, desiring to sell only wine the produce of other States, could demand from a Western Australian official under the Western Australian Act and get a licence on terms as advantageous as a licence for Western Australian wine. Consequently there is no lawful provision in the Act, relative to licences for the sale of wine the produce of other States apart from other liquors, applicable to sec. 39, and the result is that no penalty exists in respect of the mere sale of wine the produce of other States. The decision appealed from is consequently right though in my opinion upon a ground different from that upon which it was rested.

HIGGINS J. I entertain no doubt that the *Wines, Beer and Spirits Act* 1880 (as amended by 57 Vict. No. 25), offends against the Constitution, in so far as it allows a man to sell wine, the produce of fruit grown in Western Australia, under a licence costing only £2, leaving those who desire to sell wine produced from other fruit to take out a general publican's licence costing £50. This involves a discrimination in favour of Western Australian products, and an infringement of the provisions of sec. 92 of the Constitution in favour of absolute freedom of trade among the States (and see sec. 51 (1), 112, 117). The Constitution of the United States is not nearly so explicit as ours on this subject; and yet the Courts have clearly laid down that such a discrimination is invalid: *Welton* v. *State of Missouri* (1); *Tiernan* v. *Rinker* (2); *Scott* v. *Donald* (3).

The question then arises, how is a person who wants to sell wine the produce of grapes grown in any of the other States to take advantage of the constitutional provisions made for his protection. This is not an action for payment of the licence fee of £50, as in *Tiernan* v. *Rinker* (2). It is a complaint under sec. 39 of the Act for selling wine, not the produce of fruit grown in Western Australia, without a general publican's licence. The respondent holds a licence to sell wine of Western Australia.

(1) 91 U.S., 275. (2) 102 U.S., 123. (3) 165 U.S., 58.

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Sec. 39 provides that if any person sells liquors "without having first obtained in manner and form hereinbefore directed a licence authorizing such sale," he is to be subject to a penalty of £30. Secs. 4-15 state what the various kinds of licences authorize. Sec. 5 says that a publican's general licence shall authorize the licensee to sell any liquor in any quantity on the premises specified. Sec. 10 (as amended by sec. 22 of 57 Vict. No. 25), says that a colonial wine licence shall authorize the licensee to sell any wine produced from fruit grown in Western Australia, in certain quantities. Sec. 15 prescribes for a publican's general licence a fee of £50; and for a colonial wine licence, £2. I have had considerable doubt as to the propriety of treating a licence to sell Western Australian wines as (in effect) allowing the holder to sell wine from some other State. It seemed as if by such a course the Court would be really making a new law for Western Australia. The words of sec. 39 are general, imposing a fine for selling without a licence obtained "in manner and form hereinbefore directed"; and if the manner and form prescribed for a Western Australian wine licence are constitutionally invalid, it might be urged that this flaw affects the exception only, leaving the words imposing a fine unaffected. The duty of the Court, however, is not to strike words out of a Statute, but to treat the Statute as invalid so far as it offends against the Constitution by discrimination between goods of one State and goods of another. In such a case as the present, I think it would be correct to read sec. 39 as if it were prefaced by such words as "Subject to the provisions of sec. 92, &c., of the Constitution"; and, in that case, as soon as we come to apply sec. 39, it would have to be read as providing that the person who sells the wines of other States is to be in no worse position than the person who sells wine of Western Australia. The Act is invalid to the extent only of the discrimination. Therefore, when the complainant says, "You are selling Victorian wine without a publican's licence," the defendant answers, "Yes—but I have fulfilled all the conditions that the Act lays down for selling wine of Western Australia; and, under the Constitution, I am to be in no worse position when selling the wine in Victoria." The Police Magistrate decided that "the colonial wine

licence authorized the said sale." This statement is not technically accurate, but it gives the true result in substance. If a person has a licence to sell wine of Western Australia he cannot be punished for selling wine of Victoria. This does not, to my mind, involve any corollary that a man who sells Australian wine without any licence at all is not liable to the penalty : still less the corollary that he is not liable if he sells spirits.

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*Appeal dismissed with costs.*

Solicitors, for appellant, *Lawson & Jardine*, for *Northmore, Lukin & Hale*, Perth.

Solicitors, for respondent, *Hamilton, Wynne & Riddell*, for *R. S. Haynes & Co.*, Perth.

B. L.

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[HIGH COURT OF AUSTRALIA.]

CLEMENT AND OTHERS . . . . APPELLANTS; PLAINTIFFS,

AND

JONES AND OTHERS . . . . . RESPONDENTS. DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1909. MELBOURNE, *March* 29, 30, 31. Griffith C.J., O'Connor and Isaacs JJ.

*Real property—Title by adverse possession—Land of two owners within one fence—Presumption of possession—Equivocal acts of possession—Intention—Real Property Act* 1890 (*Vict.*) (*No.* 1136), *Part II.—Transfer of Land Act* 1904 (*Vict.*) (*No.* 1931), *secs.* 10, 11.

Where two pieces of land belonging to two different owners are enclosed in one ring fence, the presumption is that the possession of each of the pieces remains in the respective owners, and this presumption is not rebutted