[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH AND ANOTHER . PLAINTIFFS;

AGAINST

THE STATE OF SOUTH AUSTRALIA AND ANOTHER . . . . . } DEFENDANTS.

THE COMMONWEALTH OIL REFINERIES LIMITED . . . . . } PLANTIFF;

AGAINST

THE STATE OF SOUTH AUSTRALIA AND ANOTHER . . . . . } DEFENDANTS.

H. C. OF A. 1926.

MELBOURNE, *Oct.* 27, 28.

SYDNEY, *Nov.* 25.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Constitutional Law—Validity of statute of State—Violation of Constitution of Commonwealth—Duties of customs and excise—Freedom of trade, commerce and intercourse—Tax on vendors of motor spirit—Income tax—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 90, 92, 106, 107, 109—*Taxation* (*Motor Spirit Vendors Act*) 1925 (*S.A.*) (*No.* 1681), *secs.* 2, 4, 5, 7, 8, 16*—*Taxation* (*Motor Spirit Vendors*) *Suspension Act* 1925 (*S.A.*) (*No.* 1712).

Held, by *Knox* C.J., *Isaacs*, *Higgins*, *Powers*, *Rich* and *Starke* JJ. (*Gavan Duffy* J. dissenting), that the *Taxation* (*Motor Spirit Vendors*) *Act* 1925 (S.A.) is invalid on the ground that it violates the provision in sec. 90 of the

* The *Taxation* (*Motor Spirit Vendors*) *Act* 1925 (S.A.), which is entitled "An Act to impose a tax upon the income of vendors of motor spirit, and for other purposes," by sec. 2 (1) defined "vendor" as meaning "every person who sells and delivers motor spirit within the State to persons within the State for the first time after the entry of such motor spirit into the State, or, as the case may be, after the production, refinement, manufacture, or compounding of such motor spirit within the State, but does not include any purchaser of such motor spirit who subsequently sells the same." By sec. 4 it is provided that "(2) every vendor shall . . . pay to the Commissioner of Taxes in addition to any other income tax payable by such vendor an income

Constitution that, on the imposition of uniform duties of customs, the power of the Parliament of the Commonwealth to impose duties of customs and of excise shall become exclusive; and also, by *Isaacs*, *Higgins*, *Powers*, *Rich* and *Starke* JJ. (*Gavan Duffy* J. dissenting), on the ground that it violates the provision in sec. 92 of the Constitution that, on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States shall be absolutely free.

CASES referred by *Knox* C.J.

An action was brought in the High Court by the Commonwealth and the Attorney-General for the Commonwealth against the State of South Australia and the Commissioner of Taxes of South Australia in which the plaintiffs, by their statement of claim indorsed on the writ alleged, in substance, as follows :—

1. The Parliament of the Commonwealth has enacted various Acts providing for bounties to be paid out of the Consolidated Revenue Fund of the Commonwealth in respect of the production of shale oil and power alcohol in Australia and also for the imposition and payment of duties of customs and duties of excise on (*inter alia*) spirits, petroleum and shale oils, namely, *Petroleum Prospecting Act* 1926; *Power Alcohol Bounty Act* 1926; *Shale Oil Bounties Act* 1910-1923; *Oil Agreement Act* 1920-1924; *Spirits Act* 1906-1923; *Customs Tariff* 1921 (items 3 (F), 229 (C), 230); *Excise Tariff* 1921 (item 2 (M)).

2. In the year 1925 the Legislature of the State of South Australia passed a statute called the *Taxation* (*Motor Spirit Vendors*) *Act* 1925 (No. 1681) which provided (*inter alia*) for the payment to the Commissioner of Taxes for South Australia by every vendor of motor spirit

tax calculated at the rate of three pence for every gallon of motor spirit sold" by him within the State, &c., and (3) authorizes every vendor who delivers motor spirit after the commencement of the Act in pursuance of a contract made before that time to add three pence per gallon to the price agreed to be paid. By sec. 5 it is provided that the vendor may obtain a refund from the Commissioner of Taxes in respect of spirit sold by him for which he has not been paid. By sec. 7 it is provided that every person who uses any motor spirit, which he has purchased or obtained outside the State, for the purpose of propelling any motor vehicle on any street or road within the State shall pay a tax calculated at the rate of three pence per gallon of motor spirit so purchased or obtained and so used by him. By sec. 8 provision is made for the payment by the Commissioner of Taxes to any person using motor spirit for any purpose other than the propelling of a motor vehicle on roads or streets within the State of three pence per gallon of the spirit so used. By sec. 16 it is provided that all money received by the Commissioner of Taxes in payment of tax due under the Act shall be paid into the Main Roads Fund established under the *Highways Act* 1925.

H. C. OF A. 1926.

THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

(as therein defined) of a tax of three pence per gallon on motor spirit sold in the said State, and further provided that every consumer of such spirit who consumed in the said State motor spirit in an amount exceeding ten gallons during a period therein specified, which had been purchased or obtained outside the boundaries of the said State, should pay to the said Commissioner of Taxes a tax of three pence per gallon on motor spirit so consumed.

3. It was further provided that the said Act No. 1681 should come into operation on a day to be fixed by proclamation.

4. Such proclamation was duly made, and 1st December 1925 was thereby fixed as the day on which the said Act No. 1681 should come into operation.

5. On 6th January 1926 the Legislature of the State of South Australia passed a statute called the *Taxation (Motor Spirit Vendors) Suspension Act* 1925 (No. 1712) whereby, if in the opinion of the Governor in Council of the said State satisfactory arrangements are made between the said State and the Commonwealth for the payment to the said State of any moneys raised by the Commonwealth by duties of customs or excise on "motor spirit" as defined by the said Act No. 1681, that Act might be satisfied or the tax reduced.

6. Payments of tax as provided in the said Act No. 1681 have been made both by vendors and consumers of motor spirit in the said State, and the said Commissioner of Taxes is demanding compliance with the said enactment from all such vendors and consumers.

7. The plaintiffs contend that sec. 7 of the said Act No. 1681 impairs the freedom of trade and commerce and intercourse between South Australia and other States.

8. The plaintiffs contend that the said Acts No. 1681 and No. 1712, or, alternatively, sub-sec. 2 of sec. 4 and sub-sec. 3 of sec. 7 of the said Act No. 1681, is invalid by reason of the provisions of secs. 86, 90, 92 and 109 of the Commonwealth Constitution or of some one or more of such sections.

The plaintiffs claimed—

(1) A declaration that the said Acts No. 1681 and No. 1712 or, alternatively, Act No. 1681 or sub-sec. 2 of sec. 4 and sub-sec. 3 of sec. 7 thereof are invalid;

(2) An injunction restraining the defendants and each of them from enforcing the said Act No. 1681;

(3) Such other or further order as to the Court may seem right.

The following facts were, for the purposes of the case, admitted by the defendants:—

1. That motor spirit (within the definition given thereto by Act No. 1681) is imported into the said State from the United States of America and other places beyond the seas in (*inter alia*) cases and tins.

2. That in some cases the first sale of such motor spirit subsequent to its importation into the said State of South Australia is made by the person importing the same in the cases and tins in which it was contained when imported.

3. That the Commonwealth Oil Refineries Ltd. carries on in Melbourne the business of refining crude petrol oil from places beyond the seas, and treats and refines the same in the State of Victoria, and then consigns the refined oil (being motor spirit within the meaning of the Act No. 1681) to its agents in South Australia as well as to other States, and such agents in some cases sell the same in the cases and tins in which it enters into South Australia to persons in that State.

The Commonwealth Oil Refineries Ltd. brought an action in the High Court against the State of South Australia and the Commissioner of Taxes for South Australia, by which the plaintiff, by its statement of claim indorsed on the writ, alleged, in substance, as follows:—

1. The plaintiff is a company incorporated under the *Companies Act* of the State of Victoria and carries on the business of supplying motor spirit (within the meaning given thereto by the Act No. 1681 hereinafter referred to) to retailers of such spirit and others throughout the Commonwealth of Australia.

2. The crude spirit from which the motor spirit supplied as aforesaid is produced is imported into Australia by the plaintiff from places beyond the seas, and is treated and refined by it in the State of Victoria.

3. After the said crude spirit has been treated and refined as aforesaid the resultant motor spirit is sold and delivered by the

H. C. OF A. 1926.

THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

plaintiff to persons whose business it is to sell motor spirit to consumers of such spirit in the various States of the Commonwealth of Australia, including persons in the State of South Australia.

4. From 1st January 1926 to 31st March 1926 the plaintiff sold and delivered 133,857 gallons of such motor spirit to persons within the State of South Australia, and such selling and delivery was the first time that all or any of the said 133,857 gallons had been sold and delivered after the entry of the same into the said State.

(By pars. 5-8 the same facts were alleged as are set out in pars. 1-4 of the statement of claim in the first-mentioned case.)

9. Pursuant to the provisions of sec. 4 of the said Act No. 1681 the plaintiff caused a return to be filed showing the total number of gallons of motor spirit sold by it within the State of South Australia for the period commencing on 1st January 1926 and ending on 31st March 1926.

10. On or about 30th April 1926 the defendant the Commissioner of Taxes for the State of South Australia caused a document purporting to be an assessment notice under the *Taxation (Motor Spirit Vendors) Act* 1925 to be issued to the South Australian agents of the plaintiff, whereby he purported to assess the plaintiff for income tax pursuant to the provisions of the said Act in respect of 133,857 gallons of motor spirit (being the amount shown in the said return referred to in par. 9 hereof) at the rate of three pence per gallon, and thereby required the plaintiff or its said agent to pay the sum of £1,672 6s. 3d., being the alleged tax payable on such motor spirit on or before 14th May 1926.

11. The plaintiff has refused to pay the said sum or any part thereof and the defendant the said Commissioner of Taxes is demanding the payment thereof.

12. The plaintiff contends that sec. 7 of the said Act No. 1681 impairs the freedom of trade and commerce and intercourse between South Australia and other States and in particular the State of Victoria, from which State all the motor spirit sold and delivered in South Australia by the plaintiff is brought by it.

13. The plaintiff contends that the said Act No. 1681 or, alternatively, sub-sec. 2 of sec. 4 and sub-sec. 3 of sec. 7 thereof is or are

invalid by reason of the provisions of secs. 86, 90, 92 and 109 of the Commonwealth Constitution or of some one or more of such sections.

And the plaintiff claims —

(1) A declaration that the said Act No. 1681 or, alternatively, sub-sec. 2 of sec. 4 and sub-sec. 3 of sec. 7 thereof is or are invalid;

(2) A declaration that the said document purporting to be an assessment notice under the said Act No. 1681 is null and void;

(3) An injunction restraining the defendants and each of them from enforcing the said Act No. 1681;

(4) Such other or further order as to the Court may seem right.

The defendants, for the purposes of the case, admitted, in substance, the facts alleged in pars. 1-11 of the statement of claim, and also the following facts :—

11. That motor spirit (within the definition given thereto by Act No. 1681 of the State of South Australia) is imported into the said State from the United States of America and other places beyond the seas in (*inter alia*) cases and tins;

12. That in some cases the first sale of such motor spirit subsequent to its importation into the said State of South Australia is made by the person importing the same in the cases and tins in which it was contained when imported;

13. That motor spirit (within the said definition) the product of the plaintiff company from its operations in Victoria is imported into the said State of South Australia from Victoria in (*inter alia*) cases and tins;

14. That in some cases the first sale of such last-mentioned motor spirit subsequent to its importation into the said State of South Australia is made by the person importing the same in the cases and tins in which it was contained when imported.

Both cases were directed by *Knox* C.J. to be argued before the Full Court upon the pleadings and admissions; and they were argued together.

Sir Edward Mitchell K.C. (with him *Keating*), for the plaintiffs the Commonwealth and the Attorney-General for the Commonwealth. In a case such as is disclosed in the allegations contained in the statement of claim, the High Court will exercise jurisdiction to

H. C. OF A. 1926.

THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

grant a declaration and injunction or other appropriate relief, as is claimed by the present plaintiffs (*Commonwealth* v. *Queensland* (1), which followed and applied *Attorney-General for New South Wales* v. *Brewery Employees Union of New South Wales* (2)). Secs. 2-4 of the *Taxation (Motor Spirit Vendors) Act* 1925 (S.A.) (No. 1681) contravene sec. 90 of the Constitution of the Commonwealth. In so far as such sections purport to tax spirit on first sale after entry into the State, they provide, in effect, for the imposition of a customs duty. These sections of the State Act also contravene sec. 92 of the Constitution of the Commonwealth as their effect is to impair freedom of inter-State trade, commerce and intercourse. Sec. 7 of Act No. 1681 also contravenes secs. 90 and 92 of the Constitution of the Commonwealth. Sec. 7 purports to tax motor spirit on its first sale after production within the State, and is, in effect and substance, an attempt to impose a duty of excise. Sec. 8 of the that Act, by providing for repayments of tax to the consumer who uses the motor spirit for purposes other than propelling motor vehicles on roads or streets within the State, clearly indicates that the design of the Act is that the tax is to be indirect in its incidence and to be borne by the consumer, as is the case in connection with customs and excise duties generally. The State Act purports to tax the motor spirit before it has become part of the general mass of property of the State (*Brown* v. *Maryland* (3)). The admissions in the present case disclose that in some instances first sales of motor spirit in South Australia are made whilst such spirit is still contained in the original cases and tins in which it enters into the State. The State, at that stage, has no power to tax the goods (*Brown* v. *Maryland* (4); *Crew Levick Co.* v. *Pennsylvania* (5); *Croke* v. *Marshall County, Iowa* (6)). The United States Constitution expressly prohibits imposts being levied by the States on imports and exports; and the effect of that provision, coupled with the judicial doctrine regarding the silence of Congress on a subject of exclusive power of legislation such as inter-State commerce, has been given legislative expression in sec. 92 of the

(1) (1920) 29 C.L.R. 1.
(2) (1908) 6 C.L.R. 469.
(3) (1827) 12 Wheat. 419, at pp. 439-441.
(4) (1827) 12 Wheat., at pp. 441-442.
(5) (1917) 245 U.S. 292 (head-note, par. 2), and at pp. 294-295, 297.
(6) (1905) 196 U.S. 261, at p. 270.

Constitution of the Commonwealth. The tax here is at the first sale of motor spirit after its entry into or production in South Australia.

[KNOX C.J. In effect every dealer is made a collector of the tax : the provisions for refunds, rebates, &c., suggest that.]

The tax on first sale after production within the State is an excise tax or duty of three pence per gallon and is distinguishable from the uniform licence fee considered in *Peterswald* v. *Bartley* (1).

[HIGGINS J. referred to sec. 112 of the Constitution authorizing States to levy inspection charges.]

That section requires the net revenue from such charges to go to the Commonwealth. Here, the proceeds of the tax are to go to the Main Roads Fund of the State, as provided in sec. 16 of Act No. 1681. Motor spirit imported into the Commonwealth from abroad comes under sec. 68 of the *Customs Act* 1901-1923, and, if intended for "home consumption," is under the control of the Customs until compliance with all the relevant provisions of the *Customs Act*. [Counsel referred to *W. & A. McArthur Ltd.* v. *Queensland* (2); *Leisy* v. *Hardin* (3).] The provision contained in sec. 4 (3) of Act No. 1681 authorizing the addition of the amount of the tax to the prices provided for in current contracts for the sale and delivery of motor spirit, is similar in effect to sec. 152 of the *Customs Act* 1901-1923, and is a provision of a character long identified with Customs and Excise Acts (*G. G. Crespin & Son* v. *Colac Co-operative Farmers Ltd.* (4)). As contravening sec. 92 of the Commonwealth Constitution, secs. 2-4 and sec. 7 of Act No. 1681 are invalid (*Fox* v. *Robbins* (5)).

Ham, for the plaintiff the Commonwealth Oil Refineries Ltd. The effect of sec. 90 of the Constitution of the Commonwealth is to place the whole fiscal regulation of commodities under Federal control. Act No. 1681 purports to impose what is tantamount to an excise duty on motor spirit in that State in the accepted sense of the word "excise." Although some authorities include local production as an element necessary in the conception of "excise,"

(1) (1904) 1 C.L.R. 497, at p. 508.
(2) (1920) 28 C.L.R. 530, at p. 546.
(3) (1890) 135 U.S. 100.
(4) (1916) 21 C.L.R. 205.
(5) (1909) 8 C.L.R. 115, at pp. 119, 120, 122-123, 126, 128, 131.

H. C. OF A. 1926. THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

others exclude or ignore that element (see *Imperial Dictionary*, vol. I., 695; *Blackstone's Commentaries*, I., 318, where it is defined as "an inland imposition . . . upon consumption . . . or . . . retail sale"; also *Encyclopædia of the Laws of England*, 1st ed., vol. v., pp. 106 *et seqq.*). [Counsel referred to *Patton* v. *Brady* (1); *Welton* v. *Missouri* (2).] Even if the word "excise" in sec. 90 of the Constitution of the Commonwealth were not given its original wider significance, sec. 7 of the Act No. 1681 must still be regarded as an attempt to impose a duty of excise (in its narrower sense) on motor spirit produced within the State, and sec. 7 would be invalid, and, if held to be invalid, the remainder of the Act would be invalid as imposing, in contravention of sec. 92 of the Constitution of the Commonwealth, a discriminating duty or tax on motor spirit not produced within the State (*Fox* v. *Robbins* (3)).

Cleland K.C. (with him *Hannan*), for the defendants in each case. No conflict between Act No. 1681 and Commonwealth legislation is shown. Act No. 1681 in form and substance is an income tax Act and does not contravene sec. 92 of the Commonwealth Constitution. It imposes an income tax—not a tax on goods, but a tax on the vendor the first time he sells the goods. The flat rate of three pence per gallon is merely a convenient method of assessment based on gross proceeds (*British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (4)). Customs and excise duties are taxes on goods. This is a tax, not imposed on petrol, but on the sale of petrol, and only upon the intra-State sale of petrol. The passing of the tax on to the consumer is incident to every tax levied upon a business properly regulated. In the American cases cited the tax was not merely on importation, but on the thing imported. The meaning of "excise" in sec. 90 of the Commonwealth Constitution is properly stated in *Peterswald* v. *Bartley* (5), as affirmed in *R.* v. *Barger* (6). Act No. 1681 does not contravene sec. 92 of the Commonwealth Constitution. It does not impose a tax upon anything that is

(1) (1902) 184 U.S. 608, at pp. 617-619.
(2) (1875) 91 U.S. 275.
(3) (1909) 8 C.L.R. 115.
(4) (1925) 35 C.L.R. 422, at pp. 431, 433-434.
(5) (1904) 1 C.L.R. 497.
(6) (1908) 6 C.L.R. 41.

part of inter-State commerce. Foreign or inter-State commerce in the goods has ceased before the tax operates (see *Barton* J. in *Fox* v. *Robbins* (1)). The " original package " doctrine, applied in some American cases, was a mere working rule not accurate in, nor adaptable to, modern practical business methods. A more appropriate test of the time when goods come under State legislative authority would be when " passing into another State for consumption " (see sec. 93 (I.) of the Commonwealth Constitution). In this case mere entry into the State of South Australia is not an element of liability to the tax. The element of liability is the first domestic transaction in respect of the goods after they have become part of the general property of the State. The tax affects, not the movement of the goods into the State, but a transaction respecting the goods when within the State (*Ex parte Walsh and Johnson*; *In re Yates* (2)). The tax is not, as is excise, a tax on goods, but is a tax on a sale or transaction.

Sir Edward Mitchell K.C., in reply. If either part of the State Act in question is invalid, the whole Act is invalid (*W. & A. McArthur Ltd.* v. *Queensland* (3)). If the State Act is valid, there would be no limit to the classes of goods to which a State might apply similar legislation. The State authority contended for does not exist except in the case of intoxicating liquors, for which sec. 113 of the Commonwealth Constitution makes special exceptional provision. The authority claimed for the State would cover sales by a collector of customs under the *Customs Act* 1901-1923. [Counsel also referred to secs. 33, 36, 39, 40, 68, 78, 86, 87, 88, 92, 94, 95, 101 and 103 of the *Customs Act* 1901-1923.]

Cur. adv. vult.

Nov. 25.

The following written judgments were delivered :—

KNOX C.J. In each case the plaintiffs seek a declaration that the South Australian Acts of Parliament Nos. 1681 and 1712 are invalid. Alternatively they claim that either Act No. 1681 as a whole or sub-sec. 2 of sec. 4 and sub-sec. 3 of sec. 7 are invalid.

(1) (1909) 8 C.L.R., at pp. 123-124.
(2) (1925) 37 C.L.R. 36, per *Isaacs* J., at pp. 89-90; per *Higgins* J., at p. 110.
(3) (1920) 28 C.L.R., at pp. 558-559.

H. C. of A. 1926.

THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

Knox C.J.

Act No. 1681 is intituled "An Act to impose a tax upon the income of vendors of motor spirit, and for other purposes." The relevant provisions of Act No. 1681 are as follows:—By sec. 2 (1) "vendor" is defined to mean "every person who sells and delivers motor spirit within the State to persons within the State for the first time after the entry of such motor spirit into the State, or, as the case may be, after the production, refinement, manufacture, or compounding of such motor spirit within the State, but does not include any purchaser of such motor spirit who subsequently sells the same." Sec. 4 provides that a tax, under the name of income tax, calculated at the rate of three pence on every gallon of motor spirit sold by any vendor within the State (excluding spirit sold for delivery in or transportation to any place outside the State), shall be payable by such vendor, and authorizes every vendor who delivers spirit after the commencement of the Act in pursuance of a contract made before that time to add three pence per gallon to the price agreed to be paid. By sec. 5 provision is made for a refund to the vendor in respect of spirit for which he has not been paid. Sec. 7 provides that every person who uses any motor spirit in excess of a certain quantity which he has purchased or obtained outside the State for the purpose of propelling a motor vehicle on any street or road within the State shall pay a tax calculated at the rate of three pence per gallon on the spirit so purchased or obtained and used by him. Sec. 8 provides for the payment by the Commissioner of Taxes to any person using motor spirit for any purpose other than the propelling of a motor vehicle on roads or streets within the State of three pence per gallon of the spirit so used. Sec. 16 provides that all money received by the Commissioner of Taxes in payment of tax due under the Act shall be paid into the Main Roads Fund established under the *Highways Act* 1925.

The Act No. 1712 provides for the suspension or reduction of the tax imposed by Act No. 1681 if, in the opinion of the Governor, satisfactory arrangements are made between the Government of the State and the Government of the Commonwealth for the payment to the State out of moneys raised by the Commonwealth from customs or excise duties imposed by the *Taxation (Motor Spirit*

Vendors) *Act* 1925 of any moneys which may be used by the State for the maintenance and construction of roads.

The main grounds of attack on the validity of the Act No. 1681 were (1) that the tax imposed was a duty of customs or excise and, therefore, beyond the competence of the State Parliament by force of sec. 90 of the Constitution, and (2) that the tax would, if valid, operate as a restraint on the freedom of trade, commerce and intercourse among the States in contravention of sec. 92 of the Constitution. In the view which I take on the first of these grounds, it is unnecessary for me to consider the second. It is clear that the Act imposes a tax of three pence per gallon payable by the first seller within the State of spirit produced, refined, manufactured or compounded in the State and sold and delivered in the State, excluding spirit sold for export. If the tax so imposed is a "duty of excise" within the meaning of the Constitution, the exclusive power of imposing it is in the Commonwealth Parliament, and the Act, so far as it imposes a tax in respect of such spirit, is invalid. It was not, and I think could not be, disputed that, if the provisions for the taxation of locally produced spirit were invalid, they could not be severed from the other provisions of the Act, which was clearly intended to embody a scheme of taxation embracing spirit imported into the State and sold there, spirit produced in the State and sold there and spirit purchased or obtained outside and used within the State. The provisions with respect to spirit produced or refined in the State are so interwoven into the scheme that they are not severable: they are essentially and inseparably connected in substance with the other provisions. It would follow, if this tax is a duty of excise, that the whole Act, and not merely the offending provisions, would be invalid. The first question for decision is, therefore, whether the tax imposed in respect of spirit produced, refined, manufactured or compounded within South Australia is a duty of excise within the meaning of sec. 90 of the Constitution.

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

H. C. OF A. 1926.

THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

KNOX C.J.

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 expression "duties of excise" had, before the enactment of the Constitution, been used in Acts passed by the Parliaments of some, if not all, of the States. For instance, by the *Customs and Excise Duties Act* 1890 of the State of Victoria "duties of excise" were charged on tobacco manufactured in Victoria. The duties so described were distinct from the annual licence fee payable for the right to manufacture tobacco. They were payable on all tobacco manufactured in Victoria on being entered for home consumption, no duty being chargeable in respect of tobacco exported. I can find no substantial distinction in character between the tax imposed by that Act and the tax imposed by the Act No. 1681 on motor spirit produced in South Australia. In each case it is assumed or intended that the burden of the tax is to be passed on by the person paying it to his vendee and ultimately to the consumer—that is to say, it is what is known as an indirect tax. In each case the tax is levied only in respect of goods to be consumed in the State. In the case of motor spirit the tax is, in practically every case, paid by the producer, who is authorized by the Act (sec. 4 (3)) to add the amount of the duty to the contract price of spirit delivered after the commencement of the Act in pursuance of a contract of sale made before that time. The tobacco tax is, in effect, paid by the manufacturer in all cases. In the case of tobacco entered by him for home consumption he pays the duty on delivering the entry. In the case of tobacco sold by him before entry for home consumption the price would be calculated on the footing that the purchaser would be liable to pay the duty and would therefore be less by the amount of duty than if the duty had been paid by the manufacturer.

The reasons given for the decision in *Peterswald* v. *Bartley* (1) do not assist the defendant in this case—they appear to me rather to support the view that the tax now in question is a duty of excise. Nor is it relevant to this discussion that the tax imposed is called

(1) (1904) 1 C.L.R. 497.

an income tax. 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.

For these reasons I am of opinion that the tax imposed by the Act No. 1681 in respect of motor spirit produced, refined, manufactured or compounded within the State of South Australia is a duty of excise within the meaning of sec. 90 of the Constitution and that the Parliament of South Australia had, therefore, no power to impose it. This portion of the Act being, in my opinion, inseparable from the other provisions of it, it follows that the plaintiffs are entitled to a declaration that the Act No. 1681 is invalid.

ISAACS J. The question is whether the South Australian Act called the *Taxation* (*Motor Spirit Vendors*) *Act* 1925 violates the Commonwealth Constitution. The Act is an experiment to test the limits of State power consistently with the mandates of the national Constitution, and it has been so clearly conceived and so well expressed as to raise the constitutional issue in the plainest manner. It would be quite possible to answer the question in a few words; but I think the parties, representing the whole people of Australia variously grouped, are entitled in a matter of this gravity to know explicitly the reasons leading me to my conclusions.

The State Constitution unaffected by the Commonwealth Constitution would, of course, justify every word in the statute. But secs. 106 and 107 of the Federal Constitution declare that every State Constitution is "subject to this Constitution," and that all State parliamentary powers are diminished by whatever powers are "exclusively vested in the Parliament of the Commonwealth or withdrawn fron the Parliament of the State." Sec. 90 of the Constitution, since the imposition of uniform duties of customs, has made the power of imposing duties of customs and of excise exclusive in the Federal Parliament. Sec. 92 withdraws from the State all power of diminishing the absolute freedom of inter-State trade, commerce and intercourse. Sec. 109 was relied on for the plaintiffs as important in determining this case. It was urged that the State Act is inconsistent with those portions of the Federal *Customs Act* which, until the law is complied with, declare that imported goods are subject to the control of the Customs. But

H. C. OF A. 1926. THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA. Isaacs J.

there is no inconsistency between the two laws. The control of the customs would not be interfered with by a sale, or by constructive delivery of the goods, leaving them wholly uninterfered with. Actual delivery, on the other hand, presupposes lawful personal control and either by authority or when the right to customs control has ended. I therefore place sec. 109 of the Constitution aside for present purposes and have regard to secs. 90 and 92.

It could not, of course, be denied that a direct customs or excise duty tax would be invalid, whatever the purposes of the imposition might be. Mr. *Cleland*, in his very clear argument, brought in the purpose of the Act as relevant in another way. His defence of the Act was, in effect, this: He said that sec. 4 imposed on vendors of motor spirit "an income tax"; that primarily such a tax was competent to the State; and that the mere fact that it was at a fixed flat rate measured by the quantity of motor spirit sold was in itself no reason for denying its character as an income tax. Then the contention was that, when the substance of the Acts read as a whole was regarded, there was nothing to attach to the tax the quality of a customs or excise duty; that excise duty was as defined in *Peterswald* v. *Bartley* (1); and that, read as a whole, the taxation was, in final broad substance and effect, a tax on the actual users of the roads by means of spirit-driven locomotives. This broad general effect was attained, it was said, by means of the scheme of taxation taken as an entirety. The original vendors in South Australia were, it was suggested, mere collectors of the tax from the ultimate users, and these were effectively compelled to pay the tax in the price they paid, and by subsequent adjustment got reimbursed by the State for anything overpaid. Purchasers of spirit outside the State are taxed direct upon the quantity of spirit used, but that, it was said, was only to complete the scheme and keep it effective.

That general statement is only approximate, because, where wholesale vendors sell to retail dealers, who in turn sell to consumers, the original vendors do not collect from the users, but from persons who subsequently collect from users, or rather, intended users, or even only possible users. Indeed, an original vendor selling to

(1) (1904) 1 C.L.R. 497.

a person never intending to use the spirit on roads, but wholly for manufacturing purposes, and so using it, would still have to pay the tax. The purchaser would, it is true, after some months get a refund, but it would not be true that he was a road user, or even an intended or probable road user—at most he was a possible road user by means of the motor spirit. The final words of sub-sec. 1 of sec. 7 do not occur actually or referentially in sec. 4.

But, apart from these obvious gaps in the scheme, it is an undeniable fact that whatever ultimate effect is sought to be attained, the Act in the course of its devious path does actually impose on vendors a tax with a personal liability to pay it, and does also impose on consumers who purchase outside the State a definite tax for the reason, which as to them and to the vendors in other States is the sole reason, that they have purchased outside the State of South Australia. I do not dispute the ingenuity of the scheme or the intrinsic equity of its economic adjustments. Addressed to a competent legislature those considerations are likely to receive a favourable hearing. But, as legal propositions advanced to a Court concerned, not with construction to an end, but with legislative power, and only incidentally with construction, they are not decisive. The prohibitions of secs. 90 and 92 of the Constitution may be transgressed not merely by a direct and avowed contravention. They are transgressed also by a statute—whatever its ultimate purpose may be, and however its provisions are disguised by verbiage or characterization, or by numerous and varied operations lengthening the connective chain, or by otherwise paying titular homage to the supreme law of the Constitution—if it operates in the end by its own force so as to do substantially the same thing as a direct contravention would do, either in attaining a forbidden result or in using forbidden means. The relevant constitutional prohibitions include both means and results. It is no justification for using forbidden means that permissible results are sought, nor for securing forbidden results that lawful means are employed. The Act now under consideration offends in both respects. In order to make my reasons clear I shall address myself to the various branches of this important case in logical order.

H. C. OF A. 1926.

THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

Isaacs J.

1. *Nature of the Taxation.*—The taxation imposed is in inherent nature twofold. On vendors (sec. 4) it is described as "an income tax"; on consumers (sec. 7) it is a tax on "users" of motor spirit for locomotion on roads. Mr. *Cleland* contended that the vendor's tax was properly designated "an income tax." Though so called, it is imposed at a fixed rate of three pence per gallon of motor spirit sold. The motor spirit may be of varying kinds, of varying cost and of varying prices. The tax is not on net income, or even on gross income. A bad debt *may* result in a refund. But the only factors of the tax are the number of gallons sold and three pence per gallon.

It was sought to support the application to such a tax of the term "income tax" by some observations of mine in the *British Imperial Oil Co.'s Case* (1). A careful purusal of that page will dispel any suggestion of analogy, and, particularly, I would refer to the words "the Commissioner is empowered to inquire into the facts and ascertain what percentage of the total receipts represents the true measure of *the net income* result of Australian trading." Here the facts and result of the trading are immaterial except for the number of gallons sold. Such a tax has no resemblance to an income tax. To call it so is only a device and ineffectual. The Court attaches no importance to a label: it examines the actual contents. The Supreme Court of the United States in 1917 dealt with a Pennsylvania State enactment somewhat similar, any difference being favourable to the Pennsylvania Act. It imposed a tax on vendors of "goods, wares and merchandise" measured by a percentage of the entire business transacted. It was part of what was called a mercantile licence tax, the other part being unchallenged. But as to this part—the percentage—it was held in *Crew Levick Co.* v. *Pennsylvania* (2) that "the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be, by its necessary effect, a tax upon such commerce, and therefore a regulation of it; and, for the same reason, to be in effect an impost or duty upon exports." The plaintiff's foreign trade was selling to customers abroad. And at pp. 297-298 this passage occurs: "That portion of the tax which is measured by the

(1) (1925) 35 C.L.R., at p. 434. (2) (1917) 245 U.S., at p. 295.

receipts from foreign commerce necessarily varies in proportion to the volume of that commerce, and hence is a direct burden upon it." Later in the same year the same Court had to consider the converse case, which arose under a Wisconsin income tax law. It was held in *United States Glue Co.* v. *Oak Creek* (1) that a general income tax on total gains and profits may lawfully include in the computation the net income derived from transactions in inter-State commerce, and the distinction between a tax measured by gross receipts and one measured by general net income is expounded at pp. 328 and 329. The distinction between the two classes of tax was reviewed and repeated in 1925 in *Ozark Pipe Line Corporation* v. *Monier* (2). Just as clearly is the tax imposed by sec. 7 on the " use " of motor spirit purchased inter-State a burden on inter-State commerce.

The first point made for the defence, therefore, is unsustainable. The second, namely, the substance of the taxation scheme must also fail. What I have already said, and apart from a distinct and very radical contention of Mr. *Cleland* as to what is included in inter-State trade and commerce, is really sufficient to demonstrate invalidity occasioned by the first limb of the definition of " vendor " in sub-sec. 1 of sec. 2, and incorporated into sec. 4. That limb relates to all motor spirit which enters into the State. That includes both foreign and inter-State motor spirit trade, just as did the Pennsylvania statute in the *Crew Levick Co.'s Case* (3).

2. *Excise Duties.*—The second limb of the definition relates to motor spirit produced in South Australia, at any stage, primary or later. The question as to this limb is whether the tax is an " excise duty " within the meaning of sec. 90 of the Constitution. The Court was asked by the plaintiffs to say that the view expressed as to the meaning of that phrase in *Peterswald* v. *Bartley* (4) was too narrow, and that the expression " excise duties " should be construed as widely as the law regards it in England. If that were acceded to, the term " excise duties " would embrace such things as a dog tax, a vehicle tax, a hawker's licence tax, a tax for publicans' licences or wine licences or pawnbrokers' licences.

(1) (1918) 247 U.S. 321.
(2) (1925) 266 U.S. 555, at pp. 569, 570.
(3) (1917) 245 U.S. 292.
(4) (1904) 1 C.L.R. 497.

H. C. OF A. 1926.

THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

Isaacs J.

All these come within the recognized range of excise duties as defined by English legislation, although some are licences merely. The concatenation of the three branches of finance, customs, excise and bounties (not mining), in the Australian Constitution, their evident interdependence and mutual action and reaction, would lead me to the clear conclusion, even if it were *res nova*, that the words "excise duties" are not used in the Constitution in the extended sense suggested. I arrive at that conclusion notwithstanding the expression was in Australia before Federation, as in Victoria, sometimes used in a sense large enough to include brewers' and wine licences. 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. Such taxing regulations are, in my opinion, not "withdrawn" from the States, however they might stand in presence of relevant Commonwealth legislation respecting foreign or inter-State trade. I agree with the reasoning in *Peterswald* v. *Bartley* (1). Therefore, if the taxation by the State Act under sec. 4 were simply on motor spirit as an existing substance in South Australia and not subject to any foreign or inter-State operation of trade or commerce, it would not be open to the challenge here made. That, however, is not the nature of the legislation.

3. *Sale as part of Inter-State Trade.*—There is a tax of three pence per gallon imposed on "vendors" of motor spirit in respect of certain sales and deliveries in South Australia. A sale and delivery which renders the vendor liable to pay the tax is described in a way which, to my mind, includes cases that come very plainly within the ambit, not only of foreign commerce, but also of that national species of trade and commerce called in the Constitution

(1) (1904) 1 C.L.R. 497.

"trade and commerce among the States." As shown in *McArthur's Case* (1)—a decision of special force as the deliberately reconsidered opinion of this Court, including one of the majority Justices in *Duncan* v. *Queensland* (2)—a sale of goods in a State may be a purely domestic transaction, or it may, by its associations with other circumstances, be of an inter-State character and outside the power of a State to embarrass or burden. This was challenged by Mr. *Cleland*, and made the subject of what I have termed a radical contention. It was really the crux of his second position, the first being the nature of the tax on vendors, with which I have already dealt. Learned counsel contended that, conceding that prior to the moment of sale the goods were within the inter-State sphere of business movement and free from State interference with their disposal, the very act of sale was itself a purely domestic operation and so within the province of State legislative power. An illustration put to him makes this clear. I supposed the case of Queensland cattle driven to New South Wales for attempted sale and, if not, then for return to Queensland. They are, by hypothesis, in fact sold in New South Wales. Is that sale outside the sphere of inter-State trade and commerce ? And the contention was in the affirmative. That would effectively nullify sec. 92, because, if the contention be correct that the sale itself is purely intra-State, the State could prohibit it, or tax it, or penalize it. It is, as I have pointed out, contrary to *McArthur's Case* and, in the absence of any direct challenge of the principle, one would suppose that would end the matter. But while there was no direct denial of the principle laid down in *McArthur's Case* the contention stated was made and supported in argument. It is, consequently, not out of place in a matter so important both to Commonwealth and States, and is, perhaps, in any event, satisfactory to the parties concerned, if I add some confirmation from recent judgments in the United States, which represent the considered opinion of the Supreme Court as to the essential frontiers of inter-State trade and commerce, not from any technical standpoint or as defined by

(1) (1920) 28 C.L.R., at p. 549. (2) (1916) 22 C.L.R. 556.

H. C. OF A. 1926. THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA. Isaacs J.

law, but as a fact of life. I may at once say that I agree with what Mr. *Cleland* said as to the "original package" doctrine. It is in many cases a convenient working rule, but it is not by any means a legal test. In some cases it is either impossible of application from the nature of the commodity, or is attended with added circumstances which render it of little or no value. I put it aside for present purposes. The one relevant question always is: Are the given transactions in the circumstances part of trade and commerce among the States? The most valuable assistance as to this from the American Supreme Court is that found in such a case as *Swift & Co.* v. *United States* (1), followed in *Stafford* v. *Wallace* (2), *Champlain Realty Co.* v. *Brattleboro* (3) and *Chicago Board of Trade* v. *Olsen* (4); and *Missouri* v. *Kansas Natural Gas Co.* (5).

From these cases I gratefully draw very valuable, because practical, aid, not only for the present case, but for many others involving the interpretation of the Constitution. In the forefront, as it contains a great principle, I place *Chicago Board of Trade* v. *Olsen*. There *Taft* C.J. (4) referred to *Swift's Case* (6). He said it was a milestone in the interpretation of the commerce clause of the Constitution. He said that, as his succeeding words show, because the Court which decided the case brought to it, as one of the great organs of the national Government, a consciousness of the movements and current circumstances of national life, and, because it was possible from the point of view of legal construction, applied the words of the Constitution as it would apply the principles of the common law to meet new conditions. The learned Chief Justice (4) said of *Swift's Case*:—"It recognized the great changes and development in the business of this vast country and drew again the dividing line between inter-State and intra-State commerce where the Constitution intended it to be. It refused to permit local incidents of great inter-State movement, which taken alone were intra-State, to characterize the movement as such. *The Swift Case merely fitted the commerce clause to the real and practical*

(1) (1905) 196 U.S. 375, at pp. 398, 399.
(2) (1922) 258 U.S. 495, at p. 518.
(3) (1922) 260 U.S. 366, at p. 376.
(4) (1923) 262 U.S. 1, at p. 35.
(5) (1924) 265 U.S. 298, at p. 308.
(6) (1905) 196 U.S. 375.

essence of modern business growth." I venture to lay special emphasis on the last quoted passage. Constitutions are made, not for the moment of their enactment but for the future; and it is the great and enlightened principle of interpretation enunciated by the present Chief Justice of America, applied wherever consistent with the words of the document, that can alone maintain our own or any Constitution as a living instrument capable of fulfilling its high purpose of accompanying and aiding the national growth and progress of the people for whom it has been made. Now, the central point of the actual decision in *Swift's Case* (1), and the enduring consideration in relation to the commerce clause is thus stated (2): "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." The application of that consideration was to the sale of cattle, and was adverse to the present defendants' radical contention referred to. It will be found at the pages cited.

In *Stafford* v. *Wallace*, *Taft* C.J., speaking for the Court, reaffirmed *Swift's Case* (1) and referred to it as "a fixed rule of this Court in the construction and application of the commerce clause" (3). That is, its construction and application are, as stated, not governed by any "nice and technical inquiry into the non-inter-State character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part." But, on the other hand, it is quite plain that the inter-State character of the trade or commerce, once begun, does not last for ever. The point at which it ceases and trade in the goods assumes true intra-State character must depend entirely on the circumstances. Whether a sale which taken by itself would be a purely domestic operation is to be so regarded notwithstanding previous inter-State movements of the goods or transactions relating to them, is a business question, and is determined by its connection or want of connection with the other circumstances as then understood, from a business standpoint. The principle was considered and applied in the cases cited of

(1) (1905) 196 U.S. 375. (2) (1905) 196 U.S., at p. 398.
(3) (1922) 258 U.S., at p. 519.

H. C. OF A. 1926.

THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

Isaacs J.

Champlain Realty Co. v. *Brattleboro* (1) and *Missouri* v. *Kansas Natural Gas Co.* (2).

4. *Generality of Sec.* 4.—But it is clear—and this is a decisive consideration in the present case, if the position be well established, as I hope it is, that a sale within a State of goods brought from another State may, not as an exception but as a very common case arising in business, be part of an inter-State operation of trade and commerce — that the broad general words of sec. 4 of the South Australian Act include sales and deliveries forming part of inter-State commerce.

I emphasize the word " entry " in the first limb of the definition and the words " production," &c., in the second. The " motor spirit " may have its " entry " either from some foreign country or from some other State. The " sale and delivery " may be so closely connected from a business standpoint with the " entry " as to make the tax substantially a tax on imports—in other words, a customs tax. It may, on the other hand, be entirely separate as a business transaction from the importation, so that the " entry " is a mere means of identifying the goods taxed. Again, the sale and delivery may, in conformity with what I have said as to the trade and commerce clause, be in itself an intra-State integer, or a portion of an inter-State movement protected by sec. 92. As the validity of the section must be determined by the scope of its own provisions properly construed, and not by the circumstances of any particular case, it is clear that sec. 4, incorporating the first limb of the definition is in violation of both secs. 90 and 92 of the Constitution. The second limb of the definition 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. Production of motor spirit is with a view to sale; and the tax, having direct reference to a sale so described as to be intimately related to production, is a matter which affects the producer as such, because it burdens the

(1) (1922) 260 U.S. 366. (2) (1924) 265 U.S., at p. 308.

trade for which his production is the essential preparation. A tax laid expressly on the production alone of goods would affect everyone who produced them, even for personal use or consumption. But it is all one in reality whether the tax is expressed to be on production followed by sale or, as here, on the sale immediately following production. In the result, secs. 4 and 7 of the State Act offend, the first against both secs. 90 and 92 and the latter against sec. 92 of the Commonwealth Constitution, and are invalid. Sec. 4, if invalid as to the second limb of the definition in sec. 2 (1), would as to the other limb discriminate so as to attract sec. 92 of the Constitution (see *McArthur's Case* (1)). Further, taking each limb separately, invalidity in part necessarily involves invalidity altogether, because inherently indivisible. I would add that the elision of either limb of the definition would also raise—but from a standpoint unconnected with the Commonwealth Constitution — a serious difficulty in maintaining the rest of sec. 4 as a separable enactment. It is unnecessary to discuss it, even in the case where it might properly be considered, namely, the *Commonwealth Oil Refineries' Case*.

In my opinion the plaintiffs in both actions are entitled to the declarations of invalidity sought.

HIGGINS J. The South Australian Legislature has passed an Act, the *Taxation* (*Motor Spirit Vendors*) *Act* 1925; and a company which refines motor spirit impugns the Act as infringing the Commonwealth Constitution. The Commonwealth and its Attorney-General attack it also, in a distinct action.

By sec. 4 a tax, called an "income tax," is imposed, of three pence for every gallon of motor spirit sold and delivered in South Australia to persons within that State for the first time after (a) entry into the State, or (b) production or refining in the State (sec. 2). The vendor—the first time vendor—has to pay the tax, "in addition to" his "other income" tax; but it is evident from the nature of the tax (as well as from the words of sec. 4 (3)), that the tax is one which normally would be passed on by the vendor to the buyer.

As will be noticed, this tax under sec. 4 is in respect to motor

(1) (1920) 28 C.L.R., at p. 551, last six lines.

H. C. OF A. 1926.

THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

Higgins J.

spirit " sold and delivered " *in the State* (for the first time after entry). But there is another section—sec. 7—imposing on every consumer who uses motor spirit purchased or obtained *outside the State*, the same amount of duty per gallon, if the spirit be used for the purpose of propelling any motor vehicle within the State.

All the money received under the Act has to be paid into a Main Roads Fund, which has been established under another State Act.

Now, under sec. 90 of the Constitution, on the imposition of uniform duties of customs (4th October 1901), the power of the (Federal) Parliament to impose duties of customs or of excise became exclusive. The plaintiffs rely on this sec. 90 (*inter alia*).

Counsel for the State contend, however, that the tax, under either sec. 4 or sec. 7, is not a duty of customs or of excise within sec. 90 of the Constitution; that under secs. 106 and 107 of the Constitution the powers of the States remain—subject to the Constitution; and that the power of the State to tax any property begins as soon as the commodity has actually entered the State. This argument treats customs taxation as ending when the commodity has actually passed within the State boundary. I do not think that this is the true discrimen. A tax imposed after entry into the State would be as effectual in the way of hampering commerce between State and State, or between foreign countries and the State, as a tax imposed on entry. The discrimen is certainly wrong if the reasoning of the Supreme Court of the United States in *Brown* v. *Maryland* (1) is right. There, under a Constitution which is analogous to ours, but not so explicit in this respect, it was held that the constitutional prohibition did not cease the moment the goods enter the State (2). In that case, one hundred years ago, *Marshall* C.J. pointed out that the object of the inter-State commerce clause in the United States Constitution would be as completely defeated by a power to tax the commodity in the hands of an importer within the State the instant it arrives within the State, as by a power to tax when entering the boundary. According to *Marshall* C.J., the power of the State to tax begins when the commodity has become incorporated and mixed up with the mass of property in the State which it enters; and a tax on a commodity not so

(1) (1827) 12 Wheat. 419.

(2) (1827) 12 Wheat., at p 442.

incorporated is plainly a tax on imports (1). The importer has the right not only to bring the article into the State without State taxation, but also to mix it with the mass of property in the State; and a tax on the sale of an article is a tax on the article itself (2). Until incorporation with the mass of other property the inter-State movement has not completely determined (*Rosenberger* v. *Pacific Express Co.* (3)). A trader in Melbourne may send a truck-load as far as Adelaide, intending to sell the goods in Perth (W.A.), or in Broken Hill (N.S.W.); but while the goods are in truck in Adelaide, an Adelaide merchant may desire to buy them; and this South Australian tax, if valid, obstructs such a dealing. Ever since *Brown* v. *Maryland* (4) the same principle has been recognized (*Welton* v. *Missouri* (5)). In *Leisy* v. *Hardin* (6) it was laid down that the point of time at which "the power of the State to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country"; and "the right to sell any article imported was an inseparable incident to the right to import it."

To determine the point where the Commonwealth power ends and the State's power begins is often difficult; and in this Court there has been considerable discussion as to sec. 92 in particular, and freedom of commerce between the States. The case of *W. & A. McArthur Ltd.* v. *Queensland* (7) has been referred to by counsel in this argument. There was a previous case (*Duncan* v. *Queensland* (8)) which established that the power of the State to legislate for the State remains undisturbed subject to the precise restrictions imposed by the Constitution; and in the present case this tax on sales after actual entry is said to be within the power of the State. It is true that in the *McArthur Case* certain members of this Court expressed a desire to overrule the decision in *Duncan's Case*. Yet in *McArthur's Case* counsel did not even urge that *Duncan's Case* was wrong—they purported to distinguish it; and

(1) (1827) 12 Wheat., at p. 439-442.
(2) (1827) 12 Wheat., at p. 444.
(3) (1916) 241 U.S. 48.
(4) (1827) 12 Wheat. 419.
(5) (1875) 91 U.S. 275.
(6) (1890) 135 U.S., at pp. 110-111.
(7) (1920) 28 C.L.R. 530.
(8) (1916) 22 C.L.R 556.

H. C. OF A. 1926.

THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

Higgins J.

speaking for myself, concurring as I did with the decisions in both cases, I had no idea that any of my colleagues wished to overrule *Duncan's Case* (1) until their judgments were published. I do not feel justified in treating the decision of a Bench of seven in which five Judges concurred, as overruled by a Bench of six in which four Judges (at the most) concurred. In *Duncan's Case* the State's right to make laws as to property, to say whether certain property was to be vendible or not, in Queensland, to anyone, anywhere—without reference to State boundaries in any way—was treated as not affected by sec. 92 of the Constitution, which merely prevents obstruction to commerce because of State boundaries. But whatever the difference of opinion in these cases, it does not affect, to my mind, the question as to the dividing line between the Commonwealth powers and the State powers under sec. 90.

Apart altogether from the principles so clearly established in the United States, there is a clue to the meaning of "duties of customs and excise," as used in sec. 90, in the subsequent part of sec. 90 itself. It is there provided that on the imposition of uniform duties of customs "all laws of the several States imposing duties of customs or of excise shall cease to have effect." This provision drives us to examine the State laws of customs and of excise as they existed at the commencement of the Constitution: what was the meaning of the terms "customs" and "excise" in the States? I take the Victorian use as a good test; and the industry of counsel has not succeeded in pointing out any divergences in meaning in the other States. "Customs duties" are defined as duties "upon goods imported into and exported from any part of Victoria whether by land or by sea" (*Customs and Excise Duties Act* 1890, sec. 3). Excise duties appear in Part II. of the same Act, "Excise Duties.—Division I.—Distillation." By sec. 85 in this Part II. there is a grant to Her Majesty of 8s. upon every gallon of spirits *distilled* in Victoria from malt, grapes, &c. As for tobacco, the 17th Schedule provides that "the following duties of excise shall be chargeable upon tobacco manufactured . . . in any tobacco factory on being entered for home consumption—6d. per lb."

It appears to me that these express provisions of the Constitution

(1) (1916) 22 C.L.R. 556.

itself, this express reference to the existing States' customs and excise duties, lift the question of the meaning of sec. 90 out of the quagmire of dictionary meanings. According to the *Oxford Dictionary*, "excise" has as its first meaning "any toll or tax"; but the denotation of the term (and, incidentally, the connotation of the term, so far as definite) has greatly fluctuated. The very spelling of the word is due to a mistake as to the derivation. According to the *Encyclopædia Britannica* (1878), 9th ed., "excise" is a duty charged on home goods, either in the process of their manufacture or before their sale to the home consumers. The analogous tax in the Roman law, the *vectigal rerum venalium*, was a tax levied on all commodities *sold* by auction or in public market. I take it that, whatever may be the differences in English and in American usage, "customs and excise" are correlative words for indirect taxes, such taxes as enter at once into the price of the taxed commodity (see *Bank of Toronto* v. *Lambe* (1)); and that 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, &c., 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. The case of *Patton* v. *Brady* (2) established, for the United States, that a tax on manufactured tobacco, imposed at a period intermediate between the commencement of manufacture and the final consumption of the article, is an excise tax. In my opinion, therefore, the duties which sec. 4 (with sec. 2) and sec. 7 impose, are duties of customs and excise, and must be treated as invalid under sec. 90 of the Constitution. This opinion is quite consistent with the decision of this Court in *Peterswald* v. *Bartley* (3), which established that a licence tax on brewers in New South Wales is not a duty of excise within sec. 90.

From my point of view, it may be unnecessary to consider the effect on this Act of sec. 92 of the Constitution; but if my reasoning is right, it follows that this South Australian Act is invalid also as infringing the provision that "trade, commerce, and intercourse

(1) (1887) 12 App. Cas. 575, at pp. 582-583. (2) (1902) 184 U.S. 608.
(3) (1904) 1 C.L.R. 497.

H. C. OF A. 1926.

THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

Gavan Duffy J.

among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

I think that in each action a declaration should be made as prayed.

GAVAN DUFFY J. In the *Taxation (Motor Spirit Vendors) Act* 1925 the Parliament of South Australia devised a method of making persons who used the South Australian roads for motor traffic contribute to the Main Roads Fund of that State. It was objected that in doing so it had violated the provisions of the Constitution of the Commonwealth. I have had the advantage of hearing the argument of counsel in support of that view, and of reading the judgments of the other members of the Court in which the objections to the validity of the statute are elaborately discussed, but I remain of opinion that it is a valid exercise of the legislative power of the Parliament of South Australia.

POWERS J. I agree, for the reasons set out in the judgment of the Chief Justice, that the tax imposed by sec. 4 of the *Taxation (Motor Spirit Vendors) Act* 1925 (S.A.), read with sub-sec. 1 of sec. 2 is an excise tax and that the section is invalid because it is contrary to sec. 90 of the Constitution.

I also agree with my brother Judges who hold that the imposition of the tax under sec. 4, read with sub-sec. 1 of sec. 2, is an infringement of the exclusive right of the Federal Parliament to impose customs taxes, and that the State Act referred to infringes the provision in the Constitution (sec. 92) that "trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." It is therefore invalid. It is so if we adopt the reasoning of the United States Court in *Brown* v. *Maryland* (1) and in subsequent cases in that Court, or if we follow previous decisions of this Court.

I cannot usefully add anything to what has already been said so fully in the judgments of my brother Judges on the questions to be decided in these cases.

I agree that the declaration asked for should be made.

(1) (1827) 12 Wheat. 419.

Rich J. In my opinion both sec. 7 and sec. 4 of the *Taxation (Motor Spirit Vendors) Act* 1925 are void—the former, because it is in collision with sec. 92 of the Constitution and sec. 8 of the Act does not avoid its annihilation, and the latter, 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. The notion that the commodity taxed must be produced within the territory of the taxing Government is based upon the contrast of economists between duties upon home and foreign manufactures, and has no warrant in the meaning of the term excise or its application in England (see *Blackstone's Commentaries*, book I., pp. 318-321; *Encyclopædia of the Laws of England*, "Excise"). Economists called the duties upon home manufactures duties of excise because such they were. But there is no authority, so far as I am aware, which explicitly denies the correctness of the application of that term to duties upon goods collected in respect of use, consumption or sale because the duty is not confined to goods of home manufacture.

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." 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. One authority should exercise the complementary powers of customs, excise and bounties without hindrance, limitation, conflict or danger of overlapping from the exercise of a concurrent power by another authority vested in the States. The question of severability remains to be considered. In my opinion "the offending provisions are . . . so interwoven into the scheme that they are not severable" (*In re Initiative and Referendum Act* (1)), and consequently the Act in question is invalid.

The plaintiffs are, therefore, entitled to the declaration claimed.

Starke J. Since the imposition of uniform duties of customs in 1901 the power of the Parliament of the Commonwealth to impose duties of customs and of excise became exclusive by force of sec. 90

(1) (1919) A.C. 935, at p. 944.

H. C. OF A. 1926.

THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

Starke J.

of the Constitution. 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* (1). 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 (*Encyclopædia Britannica*, 11th ed., "Taxation," by Sir Robert Griffin, vol. XXVI., p. 459).

Again, it is undoubted that "taxes on the sale of consumable commodities are simply taxes on those commodities" (*Mill's Political Economy*, 4th ed., vol. II., p. 434); and that fact may have a very material bearing on the question whether any given duty is or is not a duty of customs or of excise. It is the application of these tests that must determine the validity or invalidity of the *Taxation (Motor Spirit Vendors) Act* 1925 of South Australia. What, then, is the "true nature and character" of the Act under discussion? What is the Act in substance? Its title—"An Act to impose a tax upon the income of vendors of motor spirit, and for other purposes"—is immaterial if its true nature, character and substance is to impose duties of customs or of excise. Again, the motive of the Act, or the application of the proceeds of the duty, or provisions for refunds, repayments or abatement of the duty are all equally irrelevant if a duty is in substance imposed upon commodities imported into or produced in Australia, but all these matters may be used as aids in the interpretation of the statute.

Now, sec. 4 coupled with sec. 2 applies to the entry of motor spirit into South Australia both from abroad and from other States. A duty is imposed upon vendors who sell and deliver motor spirit within the State to persons within the State for the first time after entry into the State at the rate of three pence for every gallon sold. Entry here is, of course, actual entry into the State and not entry for the purposes of customs under the *Customs Act* 1901, sec. 68. A State cannot do indirectly what it may not do directly. The State of South Australia could not, for instance, provide that

(1) (1904) 1 C.L.R. 497.

importers of commodities into South Australia should pay a duty in respect of the first sale of those commodities in South Australia, for that, as already observed, would constitute a burden upon the commodity imported, and, in substance, upon its importation. Under the present Act a vendor may be an importer. The entry of the commodity—motor spirit—into South Australia may constitute the actual importation of the commodity into Australia. Yet upon the first sale of the commodity in South Australia, the importer, if the vendor, must pay a duty. The duty is, in this case, also a burden upon the commodity, and equally in substance a burden upon the importation of the commodity. Instances might be multiplied, but it is clear, I think, that the tax upon the sale and delivery of motor spirit within the State for the first time after entry into the State must operate, in many cases, so as to constitute a burden or tax on the commodity in the hands of the importer and on its importation. It therefore operates as a customs duty and is obnoxious to the provisions of the Constitution. On the other hand sec. 7 is a tax upon user of motor spirit in the State for propelling motor vehicles, and not upon importation. It is not, in my opinion, a customs duty.

There still remains for consideration the tax imposed by secs. 2 and 4 upon vendors who sell and deliver motor spirit within the State to persons within the State for the first time after production, &c., of such motor spirit within the State. If a tax, however, upon the sale of a commodity be in substance a tax upon the commodity, here we have a tax which operates in many cases as a tax upon the producer, and in respect of the production of the commodity by him. That, in my opinion, is an excise duty.

Another attack upon secs. 2, 4 and 7 of the South Australian Act was based upon sec. 92 of the Constitution: "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." The prohibition by a State of inter-State sale of commodities, either absolutely or subject to conditions imposed by State law, is a contravention of sec. 92 (*W. & A. McArthur Ltd.* v. *Queensland* (1)). Likewise, in my opinion, the burdening of

(1) (1920) 28 C.L.R., at p. 555.

H. C. OF A. 1926.

THE COMMONWEALTH AND COMMONWEALTH OIL REFINERIES LTD. v. SOUTH AUSTRALIA.

Starke J.

inter-State sales or transactions by means of taxes or duties is equally obnoxious to the provisions of sec. 92. The question whether the South Australian Act contravenes sec. 92 necessarily depends upon the construction and operation of that Act. Its provisions undoubtedly extend to motor spirit brought into South Australia from other States. It may be brought into the State for the purpose of sale, or purchased or obtained outside the State for delivery within the State. In either case the transactions may constitute acts in inter-State trade (see *W. & A. McArthur Ltd.* v. *Queensland* (1)). At some time, no doubt, a commodity must pass beyond the range of inter-State trade and commerce which sec. 92 protects, and come completely under the power and control of the States, but it is not necessary to define that point in this case, because the South Australian Act covers both inter-State and intra-State acts and transactions in language that is indivisible. Consequently, in my opinion, secs. 2, 4 and 7 contravene the provisions of sec. 92 of the Constitution. The result of all these contraventions of the Constitution is that the *Taxation (Motor Spirit Vendors) Act* 1925 of South Australia must be declared invalid.

In each case declare that the Taxation (Motor Spirit Vendors) Act 1925 *(S.A.) is invalid. In the case in which the Commonwealth Oil Refineries Ltd. is plaintiff, defendants to pay plaintiff's costs.*

Solicitors for the plaintiffs, *Gordon H. Castle,* Crown Solicitor for the Commonwealth ; *Whiting & Byrne.*

Solicitor for the defendants, *A. J. Hannan,* Acting Crown Solicitor for South Australia.

B. L.

(1) (1920) 28 C.L.R., at pp. 540, 559 *et seq.*