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OF AUSTRALIA.

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[HIGH COURT OF AUSTRALIA.]

JOHN FAIRFAX & SONS LIMITED AND }
OTHERS } PLAINTIFFS ;

AGAINST

THE STATE OF NEW SOUTH WALES }
AND ANOTHER } DEFENDANTS.

SMITH'S NEWSPAPERS LIMITED AND }
ANOTHER } PLAINTIFFS ;

AGAINST

THE STATE OF NEW SOUTH WALES }
AND ANOTHER } DEFENDANTS.

Constitutional Law—Taxation—Validity of State legislation—Duties of excise—Tax on newspapers published and sold in State—The Constitution (63 & 64 Vict. c. 12), sec. 90—Finance (Taxation Management) Act 1926 (N.S.W.) (No. 23 of 1926), secs. 2, 3, 5, 6, 7—Finance (Newspapers Taxation) Act 1926 (N.S.W.) (No. 24 of 1926), secs. 2, 3.

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MELBOURNE,
Feb. 21;
Mar. 3.

The *Finance (Newspapers Taxation) Act 1926* (N.S.W.) imposed a tax of one halfpenny upon each copy of a newspaper issued for sale and actually sold unless issued or sold for transmission to a place outside New South Wales.

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

Held, (1) that the tax so imposed was a duty of excise within the meaning of sec. 90 of the Constitution of the Commonwealth and therefore that the Act was beyond the power of the Parliament of New South Wales and was invalid ; (2) that secs. 2, 3, 5, 6 and 7 of the *Finance (Taxation Management) Act 1926* (N.S.W.), which provided machinery for enforcing the provisions of the *Finance (Newspapers Taxation) Act 1926*, were also invalid.

Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia, (1926) 38 C.L.R. 408, followed.

H. C. OF A. MOTIONS for judgment.

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An action was brought in the High Court by John Fairfax & Sons Ltd., the Sydney Daily Telegraph Ltd., the Sun Newspapers Ltd. and S. Bennett Ltd. against the State of New South Wales and the Colonial Treasurer for that State in which the plaintiffs by their writ claimed, in substance, declarations that the *Finance (Newspapers Taxation) Act* 1926 (N.S.W.) and secs. 2 to 7 of the *Finance (Taxation Management) Act* 1926 (N.S.W.) were invalid as being inconsistent with the provisions of the Constitution of the Commonwealth, and injunctions restraining the defendants from enforcing the provisions of the former Act and those of secs. 2 to 7 of the latter Act.

An action was also brought in the High Court by Smith's Newspapers Ltd. and Robert Clyde Packer against the State of New South Wales and John Thomas Lang in which the plaintiffs by their writ, claimed substantially the same relief as that in the first mentioned action.

On motions by the plaintiffs in those actions for injunctions pending the hearing of the actions, *Knox* C.J. ordered, by consent, that the motions be turned into motions for judgment, and directed that the motions for judgment be argued before the Full Court.

The motions now came on for argument.

Brissenden K.C. (with him *Bonney* and *Dudley Williams*), for the plaintiffs in the first mentioned action. The tax imposed by the *Finance (Newspapers Taxation) Act* 1926 is a tax upon goods produced in the Commonwealth and is therefore a duty of excise within the meaning of sec. 90 of the Constitution of the Commonwealth. The tax is therefore beyond the competence of the Parliament of New South Wales. This case is governed by the decision of this Court in *Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia* (1).

Owen Dixon K.C. (with him *Evatt* and *Tait*), for the plaintiffs in the second action. The tax is levied immediately upon the production of newspapers, and is levied upon their first sale with

the intention that the purchasers should pay the tax as part of the price of the papers. In the narrowest view that tax is a duty of excise.

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Sir Edward Mitchell K.C. (with him *Keating*), for the Commonwealth, intervening. This case is covered by the reasons for the decision in *Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia* (1). Sec. 5 of the *Finance (Taxation Management) Act 1926* clearly shows that the tax is intended to be passed on to the purchaser. That is an indication that the tax is a duty of excise (*Peterswald v. Bartley* (2)).

McTiernan, A.-G. for N.S.W. (with him *Flannery* K.C., *E. M. Mitchell* K.C. and *Robert Menzies*), for the defendants. The words "duties of excise" in sec. 90* of the Constitution are used in the same sense as in sec. 93, that is, as meaning duties on goods manufactured or produced. A tax on newspapers is not a tax on goods manufactured or produced, but is a tax on communications, that is, upon the distribution of the information which is contained in newspapers. *Mill*, in his *Political Economy* (1923 ed.), Book V., ch. v., p. 860, deals with taxes on communications, such as taxes on newspapers, as being distinct from taxes on commodities. The history of English legislation bears out that distinction; for it treats taxes on newspapers as being taxes, not on the paper on which information is printed, but on the communication of the information (see 10 Anne c. 19; 12 & 13 Vict. c. 1; 16 & 17 Vict. c. 3; 18 & 19 Vict. c. 27; 23 & 24 Vict. c. 7).

Cur. adv. vult.

The following written judgments were delivered:—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. In each of these cases the only question is whether the New South Wales Act No. 24 of 1926 is within the powers of the Parliament of that State.

Mar. 3.

By sec. 3 of the Act a tax of one halfpenny is imposed on each copy of a newspaper published in the State of New South Wales

(1) (1926) 33 C.L.R. 408.

(2) (1904) 1 C.L.R. 497.

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which is issued for sale and actually sold, unless issued or sold for transmission to a place outside that State. The plaintiffs contend that this tax is a duty of excise within the meaning of sec. 90 of the Constitution and that therefore the State Parliament has no power to impose it, and in support of this contention they rely on the reasons given by a majority of this Court for the decision in *Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia* (1). In our opinion the reasons so given establish that the tax now in question is a duty of excise.

Knox C.J.  
 Gavan Duffy J.  
 Starke J.

The subject of the tax now under discussion is a concrete article produced for the purpose of sale. The tax imposed by the Act is a tax upon goods produced in New South Wales and does not differ in principle from the tax under consideration in the case to which we have referred.

ISAACS J. With the exception of one question, this case is covered by the decision in the South Australian *Petrol Case* (1). If a "newspaper," as that term is used in the New South Wales Acts now challenged (Nos. 23 and 24 of 1926), comes within the expression "goods" as used in the Federal Constitution, the South Australian case is decisive in favour of the plaintiffs. The accuracy of that case is not impeached by the defendant, but its contention is that a "newspaper" is not comprehended in the constitutional term "goods," and therefore not a subject for "excise," and consequently the State power of taxation as exerted in the Acts referred to still exists, notwithstanding sec. 90 of the Federal Constitution.

The learned Attorney-General of New South Wales, in the course of a very clear and earnest argument, contended that the essence of a newspaper consisted not in the paper on which it is printed, but in the information it conveyed, and consequently it should be regarded, not as "goods," but as "communication." This view was supported by the Imperial statute of Anne of 1712 (10 Anne c. 19), by which a stamp tax was imposed and the stamp being required to be affixed on the unprinted paper intended to be afterwards used for printing the news. This, the argument implied, indicated a separation between the material vehicle and the essential

(1) (1926) 38 C.L.R. 408.



feature of information conveyed. It is, of course, true that the true importance of a newspaper rests in the information it conveys to the sense of sight, and that the material on which the information is imprinted is of secondary consideration. But that is beside the question we have to consider. That question is to be answered, not by metaphysical, but by plain commercial considerations. What is the common understanding of a "newspaper" as that word is used by the Legislature of New South Wales? That Legislature speaks of a newspaper just as it is commonly understood, that is, as an article, not only visible, but tangible—the material piece of paper with printed matter upon it. The statutes do not separate, any more than the public mind separates, the printed matter from the material substance of the paper; they treat the "newspaper" as something which is corporeally "issued" and "sold," having pages and copies, and capable of "transmission" to other places.

As used in the New South Wales legislation, therefore, the subject of taxation is unquestionably "goods." The suggested distinction between this case and the *Petrol Case* (1) disappearing, the attempted tax is an "excise duty" within the meaning of sec. 90 of the Constitution, and beyond State competency. The motion should therefore be granted on the ground that Act No. 24, and also so much of Act No. 23 as applies to newspapers, are invalid.

HIGGINS J. In my opinion, the Constitution compels us to treat this Act of New South Wales, No. 24 of 1926, for taxation of certain newspapers published in that State, as invalid.

Under sec. 90 of the Constitution, the power of the Federal Parliament to impose duties of customs and of excise is "exclusive"—that is to say, the State Legislature has no power to impose such duties; and the only question here is, is the duty which the State Act purports to impose an excise duty. It is quite possible that the provisions of sec. 90 exclude from the power of the States more than was reasonably necessary; but we must obey the section as it stands.

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The Attorney-General for New South Wales says that he does not impugn the correctness of our recent decision in the motor spirit case (*Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia* (1)); but he says that a tax on newspapers is not an excise tax. The Act purports to impose a tax of one halfpenny upon each copy of a newspaper issued by the publisher of the newspaper for sale and actually sold; and it is not contended that any of the exceptions to the operations of the tax, as stated in sec. 3, are applicable to these newspapers. It does not matter for the present purpose whether the newspapers are sold by the publishers to the subscribers, or sold by the publishers to the newsboys; they are "actually sold." Sheets of paper are sold with certain marks thereon in printer's ink; just as a cotton print is sold with certain marks thereon in colour. What is sold is not the news or the information, but the sheets of paper with the news on it. If a duty on the cotton print is an excise duty, why is not a duty on the paper print also an excise duty?

Any difficulty that arises is due to the fact that the word "excise" has not, in British legislation, any fixed, invariable meaning apart from the legislation itself. The British Parliament, being free from constitutional limitations such as ours, can call any impost an excise duty; and for purposes of administrative machinery, it has seen fit to limit the term in a manner which it thinks suitable to the particular Act. But our Constitution treats the term as if it had a definite, fixed, invariable meaning. What we have to do is to find the meaning in the Constitution. "Excise" is not a technical term in the law; and the popular meaning is not rigid. Looking at the *Standard Dictionary*, "excise" is defined as "a charge levied upon commodities of domestic production; an internal-revenue tax." This definition is based on *Mill's Political Economy* (Bk. V. ch. 3, p. 562): "Taxes on commodities are either on production within the country, or on importation into it, or on conveyance or sale within it, and are classed respectively as excise, customs, or tolls and transit duties." It is not necessary for us to decide the outside boundary of the denotation of the term; but it is, to my mind, clear that in our Constitution, whatever else the term may

include, it certainly includes a duty paid on goods “produced or manufactured in a State” (see sec. 93 (1.), sec. 95, &c.). These newspapers are goods produced or manufactured in New South Wales. That they were printed in New South Wales is expressly stated in the affidavit filed on behalf of Smith’s Newspapers Ltd. It is not so alleged in the affidavit filed on behalf of the other plaintiffs, but it has been admitted before us at the Bar. From the very nature of the case the tax falls ultimately on the purchaser of the newspaper; and sec. 5 of the Act No. 23 shows that the tax is meant to be passed on to him. I need not state again in this case the confirmation of our view which I have already stated in the South Australian case—such as the words of the *Encyclopædia Britannica*, of the *Oxford Dictionary*, and of the *Bank of Toronto v. Lambe* (1)

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POWERS J. The tax in question in these cases is a tax on the production of newspapers produced and issued in the Commonwealth (one halfpenny on every newspaper). Sec. 3 of the New South Wales Act No. 24 of 1926 is as follows: “Subject to this section there shall be charged, levied, collected and paid to the use of His Majesty a tax of one halfpenny upon each copy of a newspaper issued.”

The plaintiffs contend that the tax in question is an excise tax. It was pointed out by counsel for the State of New South Wales, that in England, from the time of Queen Anne up to 1855, the tax on newspapers was usually called a stamp tax or a stamp duty—not an excise tax—although other taxes in different Acts passed by the British Parliament were called excise taxes. That cannot make any difference, as the only question is whether the tax in question is, or is not, an “excise tax.”

Excise taxes can only (under the Constitution) be imposed by the Commonwealth Parliament. Sec. 90 of the Constitution is as follows:—“On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive. On the imposition of uniform

(1) (1887) 12 App. Cas. 575, at p. 582.

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duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise." I hold that newspapers, playing cards and books are all "goods on which duties of excise can be imposed" within the meaning of the words in sec. 90 of the Constitution.

The tax in question is a tax on the producer—on and in respect of goods produced and sold in the Commonwealth. In this case provision is made by the State Act for passing the tax on to the public. In the *Petrol Case* (1) this Court, by a majority, decided that such a tax by a State was contrary to sec. 90 of the Constitution and was therefore invalid.

I agree that the reasons for the judgment of this Court in the *Petrol Case* (1) cover these cases and that the State of New South Wales could not legally impose the tax in question.

RICH J. The power to impose excise duties is exclusively vested in the Commonwealth (sec. 90 of the Constitution). And the question in this case is whether the tax which the Act No. 24 of 1926 (N.S.W.) attempts to impose is an excise duty. In the recent case, *Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia* (1), I was of the opinion that the expression "duties of excise" found its way into the Constitution, secs. 86, 90 and 93, without any precise connotation. And I considered that the expression was not restricted in its denotation to duties upon or in respect of goods of local production but comprised inland duties upon or in respect of goods wherever produced. Excise duties are "an inland imposition, and are imposed sometimes on the manufacturer or dealer, sometimes on the commodity itself, or the retail sale" (*Chitty's Burn's Justice of the Peace*, 29th ed., vol. II., p. 478). Dr. Johnson's well-known definition, "a hateful tax levied upon commodities, and adjudged, not by the common judges of property, but wretches hired by those to whom excise is paid,"

(1) (1926) 38 C.L.R. 408.

does not suggest that the origin of the goods is an essential part of the tax. I thought that confusion would arise in the future if the States were allowed to impose a tax immediately upon commodities imported from abroad. I gather, however, from the opinions of the majority of the Court in the South Australian case, that they hold that the expression "duties of excise" is used in the Constitution with the restricted meaning. Even so, I think it is clear that the proposed tax is an excise duty because the newspapers in question are material things or commodities produced or manufactured for sale in New South Wales.

I agree that the *Finance (Newspapers Taxation) Act* 1926 and secs. 3 to 7 of the *Finance (Taxation Management) Act* 1926 are beyond the powers of the Legislature of the State of New South Wales.

The parties having agreed that these motions shall be treated as motions for judgment in the actions, declare that the Act of the Parliament of New South Wales No. 24 of 1926 and secs. 2, 3, 5, 6, 7 of the Act No. 23 of 1926 are beyond the powers of that Parliament. Costs of the actions including costs of these motions to be paid by the defendant State.

Solicitors for the plaintiffs, *Stephen, Jaques & Stephen ; Norton, Smith & Co.*

Solicitor for the defendants, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the intervener, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

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