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institutions which are not "public benevolent institutions" within the meaning of sec. 8 (5). Furthermore, there would not be a devise or bequest of "a distinct and definable part of the estate" to the four named charitable institutions, each of which, it may be conceded, answers the description of a "public benevolent institution."

Order that the question in the special case be answered: Yes. Costs of case stated costs in the appeal.

Solicitors for the appellant, *McDonell & Moffitt.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.

[HIGH COURT OF AUSTRALIA.]

THE VACUUM OIL COMPANY PROPRIETARY LIMITED . . . . . } PLAINTIFF;

AND

THE STATE OF QUEENSLAND AND OTHERS DEFENDANTS.

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MELBOURNE, *Feb.* 28; *March* 1.

SYDNEY, *April* 23.

Constitutional Law—Validity of statute of State—Violation of Constitution of Commonwealth—Duties of customs and excise—Grant of bounty—Freedom of trade, commerce and intercourse—Vendors of motor spirit required to purchase power alcohol—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 90, 92—*Motor Spirit Vendors Act* 1933 (*Q.*) (24 *Geo. V. No.* 11), *secs.* 2*, 3*, 6.*

The *Motor Spirit Vendors Act* 1933 (Q.), by sec. 3, provided that no person should in Queensland sell for delivery in Queensland any motor spirit which was at the time of sale situate in Queensland unless he was the holder of a

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

* The *Motor Spirit Vendors Act* 1933 (Q.), which is entitled "An Act to provide for the regulation of the sale of motor spirit and for other purposes," by sec. 2 defines "Motor spirit" as meaning "Any petroleum fuel used or adapted or intended to be used for the propulsion of any motor vehicle," and "To sell" as meaning "To sell by wholesale or retail, and includes barter or exchange, supply for profit, dealing in, agreeing to sell, or offering or receiving or exposing for sale, or having in possession for sale, or sending, forwarding, or delivering for sale or on sale, or causing, suffering, or allowing to be

Disc'd *Rocklea Spinning Mills Pty Ltd (ACN 000 070 824)* v *Anti-Dumping Authority* 56 FCR 406

Cons *Aust Tape Manufacturers Assoc Ltd* v *Commonwealth* (1993) 176 CLR 480

Dist *Wragg* v *State of New South Wales* (1953) 88 CLR 353

Dist *Williams* v *Metropolitan & Export Abattoirs Board* (1953) 89 CLR 66

Appl *Rocklea Spinning Mills Pty Ltd* v *Anti-Dumping Authority & Fraser* (1995) 129 ALR 401

Cons *Rocklea Spinning Mills Pty Ltd (ACN 000 070 824)* v *Anti-Dumping Auth* (1995) 37 ALD 405

licence under the Act, and, by sec. 6, required every holder of a licence to purchase and pay for at a prescribed rate a quantity of power alcohol manufactured in Australia bearing a prescribed proportion to the quantity of motor spirit sold by him; but, by provisos to secs. 3 and 6, persons purchasing motor spirit, immediately or mediately, from the holder of a licence were exempted from the obligations imposed by those sections. The Act defined "to sell" as including dealing in, agreeing to sell, offering or receiving for sale, having in possession for sale, and forwarding or delivering for sale.

Held, by the whole Court, that the Act did not impose a duty of customs or excise or grant a bounty, and therefore did not violate sec. 90 of the Constitution; but, by *Rich*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that it contravened sec. 92 of the Constitution and, to the extent to which it did so, it was invalid.

DEMURRER.

The Vacuum Oil Co. Pty. Ltd. brought an action in the High Court against the State of Queensland and the Attorney-General and the Treasurer and the Secretary for Public Works for the State of Queensland, claiming (*a*) a declaration that the *Motor Spirit Vendors Act* 1933 was *ultra vires* the Parliament of Queensland and was invalid; (*b*) a declaration that sec. 3 and/or sec. 6 of the Act were *ultra vires* the Parliament of Queensland and were invalid either wholly or in so far as they imposed a restriction upon inter-State trade and commerce; (*c*) an injunction to restrain the defendants and their servants and agents from enforcing or putting into operation the Act or such part thereof as was *ultra vires*.

The statement of claim alleged:—1. The plaintiff, the Vacuum Oil Co. Pty. Ltd., is a company incorporated in Victoria under the provisions of the Victorian *Companies Acts* and is registered in Queensland under the laws relating to the registration of British companies in Queensland. 2. The plaintiff carries on business as a vendor and distributor throughout the Commonwealth of Australia of (*inter alia*)

sold, offered, received, or exposed, or had in possession for sale, or attempting any such acts or things: and the deriviatives of 'sell' have a corresponding inclusive meaning." By sec. 3 it is provided:—"Subject to this Act, no person shall in Queensland, either as principal or as agent, sell to any other person for delivery in Queensland any motor spirit which at the time of such sale is situate in Queensland unless he is the holder of a motor spirit vendor's licence under this Act: Provided that any person who buys motor spirit for the purposes of sale from a person who holds a motor spirit vendor's licence under this Act shall be deemed to have complied with the provisions of this section upon proof that the person from whom he buys such motor spirit is so licensed, and any such person shall for the purposes of this Act be deemed to be a licensed person and the agent of the licensee accordingly." And by sec. 6 it is provided:—"The holder of every licence under this

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motor spirit as defined in the *Motor Spirit Vendors Act* 1933 of the State of Queensland, which Act came into force on 1st February 1934. 3. The plaintiff in the course of its said business sells in Queensland to other persons for delivery in Queensland large quantities of such motor spirit which at the time of such sale is situate in Queensland and forms part of the plaintiff's stock in Queensland and which has been either imported into Queensland for sale direct from overseas or brought into Queensland from New South Wales. 4. The said motor spirit sold as aforesaid by the plaintiff in Queensland is not purchased by the plaintiff in Queensland nor is it produced in Australia but is imported into Australia from overseas by the plaintiff and a customs duty imposed by the Commonwealth Parliament is paid thereon by the plaintiff when such motor spirit is entered for home consumption. The said motor spirit so imported from overseas is brought to Australia in oil tankers and is pumped into the plaintiff's large steel tanks or containers which then usually but not invariably contain other motor spirit imported in a like manner and held for sale. 5. (*a*) Petroleum from which motor spirit is made or refined has not yet been found in the State of Queensland in commercial quantities. (*b*) Motor spirit is not made or refined from petroleum within the State of Queensland. (*c*) Motor spirit is made or refined from petroleum in States of the Commonwealth of Australia other than Queensland by some vendors of motor spirit and, in particular, motor spirit is made or refined from petroleum by Commonwealth Oil Refineries Ltd. in the State of Victoria. 6. The plaintiff contends that it will by force of the said Act be required to purchase large quantities of power alcohol. 7. The plaintiff does not use or sell power alcohol in the course of its business except in negligible

Act shall during the currency thereof purchase and pay at the prescribed price for a quantity of power alcohol manufactured in Australia not less than a quantity equal to a prescribed number of gallons for every one hundred gallons of motor spirit sold by him during the period of such currency: Provided that, in calculating the number of gallons of motor spirit sold by him for the purposes of this section there shall be included only those sales in respect of which a licence is required to be held by him under section three of this Act: Provided further, that in the case of any sale as agent by any holder of a motor spirit vendor's licence the provisions of this section shall be deemed to have been complied with as regards such sale upon proof that the principal is the holder of a licence and has duly complied with the provisions of this section: Provided also, that in the case of any sale of motor spirit by a non-licensed person which has been purchased by him from a licensed person, such non-licensed person shall be deemed to be the agent of the licensed person in respect of such sale."

quantities and for special purposes and does not wish to purchase or acquire power alcohol in quantities proportionate to its sales of motor spirit in Queensland as prescribed under the said Act. 8. The plaintiff contends that it will by force of the said Act incur in respect of motor spirit in Queensland sold in Queensland (within the meaning of the word " sold " in the said Act) a monetary obligation to pay a licence fee and also a monetary obligation imposed under the said Act to purchase a quantity of power alcohol determined under the said Act prior to or at the time of the first sale of such motor spirit in Queensland 9. Power alcohol is manufactured in the State of Queensland from molasses, a by-product of sugar grown or produced in the State of Queensland, and is not presently manufactured elsewhere within the Commonwealth of Australia but may be manufactured throughout Australia from the same substance or from numerous other substances. 10. The plaintiff contends that by the said Act a duty of customs and/or excise is imposed and/or a bounty on the production of power alcohol is granted within the meaning of sec. 90 of the Commonwealth Constitution and that accordingly the said Act of the State of Queensland is *ultra vires* the Parliament of that State. 11. Prior to and for the purpose of being sold as mentioned in par. 3 hereof a considerable quantity of the said motor spirit is brought by the plaintiff into Queensland from stocks of such motor spirit held by the plaintiff in New South Wales which stocks are previously imported into New South Wales and in Queensland is added to its stocks. The motor spirit is brought into Queensland in tins which are filled in Sydney from the plaintiff's containers in Sydney. 12. The plaintiff in the course of its business offers in Melbourne and agrees to supply to a customer at a stated price such motor spirit up to a stated aggregate quantity as shall be ordered by such customer at various places and centres throughout Australia from time to time during a stated period and to deliver the same at the place or centre at which such order is given and the said customer in Melbourne accepts such offer. Thereafter orders are from time to time given in Queensland to the plaintiff in Queensland for the supply of motor spirit under and pursuant to the said tender and agreement and the plaintiff in Queensland supplies and delivers to such customer from its stocks

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of motor spirit in Queensland at the price stated in the said tender and agreement the motor spirit so ordered. 13. The plaintiff contends that by force of the said Act that part of its trade and commerce referred to in par. 11 hereof or, alternatively, that part referred to in par. 12 hereof will be burdened and impeded and that the said Act is in contravention of sec. 92 of the Commonwealth Constitution and that accordingly the said Act of the State of Queensland is *ultra vires* the Parliament of that State.

The defendants demurred to the statement of claim and said that the same was bad in law on the following grounds:— (*a*) That the *Motor Spirit Vendors Act* 1933 upon its true construction does not nor does any part thereof offend against the provisions of sec. 90 or sec. 92 or any other provision of the Commonwealth Constitution and that the said Act was lawfully enacted by the Parliament of the State of Queensland and is a law for the peace, welfare and good government of the said State. (*b*) That the plaintiff has not in the statement of claim alleged any fact or facts which indicate that it has been injured. (*c*) That the sales or transactions in the statement of claim alleged are intra-State sales or transactions or, alternatively, if such sales or transactions are inter-State sales or transactions the same are not struck or affected by the *Motor Spirit Vendors Act* 1933. (*d*) That the allegations of fact in the statement of claim do not establish that the freedom prescribed by sec. 92 of the Commonwealth Constitution has in any manner been interfered with by the *Motor Spirit Vendors Act* 1933. (*e*) That if the *Motor Spirit Vendors Act* 1933 in any way interferes with such freedom the facts alleged in the statement of claim do not constitute an interference with the plaintiff. (*f*) That the said Act does not impose a duty of customs or excise or grant a bounty on the production or export of goods.

The demurrer was referred by *Starke* J. to the Full High Court.

Wilbur Ham K.C. (with him *Tait*), for the plaintiff. Secs. 3 and 6 are the only material provisions. They are the operative sections of the Act. The Act infringes both sec. 90 and sec. 92 of the Constitution. The pith and substance of the Act is by governmental intervention to require importers to pay a contribution in money to

the manufacturers of power alcohol in Queensland. That is a customs and excise duty because it is levied on the first sale of the goods in Queensland. It is not material that the money does not go through the Government, but goes direct to the persons whom it is desired to benefit. Alternatively, it amounts to a bounty. Moreover, under sec. 92, the Act is an impediment to the freedom of inter-State trade, the plaintiff's trade being of two kinds, one consisting of the importation of petrol from America, and the other consisting of the exporting of petrol in tins from New South Wales to Queensland. A considerable part of the plaintiff's business consists of the latter class of business. Sec. 92 protects the goods until they have been released from the hands of the importer and have become commingled with the goods of the State. The fact that the goods cannot be sold until a tax has been paid is an interference with inter-State trade (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1)). *W. & A. McArthur Ltd.* v. *Queensland* (2), as interpreted and applied by later decisions, covers this case. The inter-State trade is not stopped as soon as the petrol is placed in containers in Queensland. Under the Act " sale " includes " holding the goods for sale." As soon as the petrol is poured into the containers in Queensland, there is a taxable sale. The imposition of any duty on the first sale is equivalent to a customs duty (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (3)). A tax on the first actual sale of a commodity is in truth and in fact a hindering of trade in that commodity. The character of inter-State trade in relation to an imported commodity is ended when the importer is at liberty to sell and not before. In this case the inter-State character of the trade does not cease merely because the petrol has been lodged in a receptacle in Queensland already containing small quantities of similar motor spirit. It is not at that stage to be deemed to be mixed with the general property in the State. The mere fact that the consolidated revenue was short-circuited by paying money direct to the persons whom they wished to benefit does not prevent the imposition being an excise duty. The payment of this money to the manufacturers of power alcohol

(1) (1926) 38 C.L.R. 408.
(2) (1920) 28 C.L.R. 530.
(3) (1926) 38 C.L.R., at pp. 423, 427, 432, 438, 439, 440.

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is in substance a bounty to them. The fact that the person paying obtained something for the payment does not prevent it being a bounty (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1); *Swift & Co.* v. *United States* (2); and see the definition of " duty " and " bounty " in the *Shorter Oxford Dictionary*) The present Act is entirely connected with the entry of goods into Queensland, and the validity of the Act must be tested by the construction of the Act itself and not by other means. A tax on the first sale of a commodity constitutes a customs duty. It is not only free entry but also free marketing of goods that is protected by sec. 92 (*R.* v. *Barger* (3); *Peterswald* v. *Bartley* (4)). There is a distinction between the imposition of a licensing fee imposed once and for all, and such a payment as is required in the present case where the payments depend on the amount of petrol sold from time to time. The distinction is between direct and indirect taxation (*Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.* (5)). *Roughley* v. *New South Wales*; *Ex parte Beavis* (6) is distinguishable, as there the licence fee was fixed and was not dependent on the amount of business done. Any governmental action that controls inter-State trade or makes it a condition subject to which it must be carried on is a contravention of sec. 92. As regards the transactions that are partly performed in New South Wales and completed in Queensland, they definitely are of an inter-State character.

Hart, for the defendants. The *Constitution Act* 1867 (Q.), sec. 2, enables the Queensland Parliament to make laws for the peace, welfare and good government of the State, and whilst it may be that the *Queensland Constitution Act* must be read subject to the Federal Constitution, there is nothing to prevent the Queensland Parliament passing the Act in question. This Act differs from the *Taxation (Motor Spirit Vendors) Act* 1925 (S.A.), secs. 4 and 7. Sec. 3 of the present Act applies only to intra-State business. The

(1) (1926) 38 C.L.R., at pp. 429, 430, 438, 439.
(2) (1905) 196 U.S. 375; 49 Law. Ed. 518.
(3) (1908) 6 C.L.R. 41, at p. 65.
(4) (1904) 1 C.L.R. 497, at pp. 511, 512.
(5) (1927) A.C. 934.
(6) (1928) 42 C.L.R. 162.

act of sale has to be in Queensland, the person selling has to be in Queensland, the petrol has to be in Queensland, and if by chance it may hit some inter-State transaction it should be construed so as to carry out the purpose of the Act. If anything had escaped the draftsman in sec. 3, sec. 6 makes the position plain. The Act in no way conflicts with sec. 92 and does not apply to inter-State commerce. The exception in sec. 6 is wide enough to exclude inter-State contracts if they would otherwise have come within the Act. Before the Act operates the petrol must be in Queensland. In no section of the Act is there anything to enlarge the scope of sec. 3. The Act on its true construction does not cover any inter-State transactions (*W. & A. McArthur Ltd.* v. *Queensland* (1)). In *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (2) there was evidence that the petrol was imported in tins into South Australia but there was no definite statement in that case that the goods had come to rest. In the present case there was a stock of petrol in Queensland. In *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* the inter-State movement was still continuing, but in the present case the inter-State transit had ended before the Act operated (*Minnesota* v. *Blasius* (3) ; *General Oil Co.* v. *Crain* (4)). The Act does not impose a customs duty. There is nothing in sec. 6 to compel the holder of a licence to purchase power alcohol. Unless the money flows into the coffers of the Crown a payment made by any citizen cannot be a customs duty. The obligation is to buy power alcohol but only after the owner of the petrol has sold a certain number of gallons of his own petrol. This is not a customs duty as that term was understood at the time of the passing of the Constitution. It could only be a customs duty if imposed on goods before they had lost their character of imports. Here the goods had become commingled with the general goods of the State. This is not an excise duty. The nature of an excise duty was considered in *Peterswald* v. *Bartley* (5). An excise duty must be a duty imposed in connection with the production or

(1) (1920) 28 C.L.R., at p. 541.
(2) (1926) 38 C.L.R. 408.
(3) (1933) 290 U.S. 1 ; 78 Law. Ed. 19.
(4) (1908) 209 U.S. 211 ; 52 Law. Ed. 754.
(5) (1904) 1 C.L.R. 497.

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manufacture of goods (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1)). This is not a bounty. At the time of Federation bounties were given only to producers. It is not stipulated that power alcohol is to be purchased from the producer. It may be purchased from another vendor. " Bounty " is also used in sec. 51 (3) and is there used in connection with the word " production." This is not a bounty at all and is not a bounty on the production or export of goods. The Act should be read *ut magis valeat quam pereat*. The whole Act is attacked here, but if part is *ultra vires*, the remainder should be held to be good (*Attorney-General for Ontario* v. *Reciprocal Insurers* (2) ; *Macleod* v. *Attorney-General for New South Wales* (3)).

Ham K.C., in reply. It does not matter what the terms of the contract are, a tax on the first sale of a commodity imported from one State to another is an interference with inter-State trade unless it is shown that the goods have become intermingled with the general goods of the State. In order to obtain the protection of sec. 92 it is not necessary to show that the goods are introduced into one State from another in pursuance of a contract. The goods need not be introduced into the State by virtue of a contract. It is sufficient if the goods are sent from one State to another in the ordinary course of trade ; then, if there is any interference with the dealing with the goods before they have become commingled with the ordinary goods of the State, such an interference is contrary to sec. 92 (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (4) ; *Roughley* v. *New South Wales* ; *Ex parte Beavis* (5) ; *R.* v. *Vizzard* ; *Ex parte Hill* (6)). This Act is similar in effect to the *Taxation (Motor Spirit Vendors) Act* 1925 (S.A.). The imposition placed on the first sale is important as showing that the inter-State character of the transaction had not come to an end.

Cur. adv. vult.

(1) (1926) 38 C.L.R., at pp. 426, 434-435.
(2) (1924) A.C. 328.
(3) (1891) A.C. 455.
(4) (1926) 38 C.L.R., at pp. 412, 427, 429, 430-433, 435, 437, 438, 440.
(5) (1928) 42 C.L.R., at p. 179.
(6) (1933) 50 C.L.R. 30.

The following written judgments were delivered :—

GAVAN DUFFY C.J. The plaintiff in this case makes various claims founded on the allegation that the *Motor Spirit Vendors Act* 1933 of the Queensland Parliament, or certain sections of it, offend against secs. 90 and 92 of the Constitution.

With respect to sec. 90, it is enough to say that nothing in the Act constitutes an imposition of duties of customs or of excise or grants any bounty on the production or export of goods within the meaning of that section.

With respect to sec. 92, I think that the plaintiff has not distinctly alleged in its statement of claim that it is in fact engaged in any inter-State trade or commerce, which is, or would be, affected by the Act. The allegations of the statement of claim are consistent with the view that it carries on two businesses, or two distinct operations within one business, one, that of conducting domestic or intra-State sales within Queensland, and another that of supplying the materials for such sales by inter-State transport in connection with which no sale is made, the inter-State nature of the transaction terminating before any sale takes place or is negotiated.

The plaintiff has therefore failed to establish any cause of action and the demurrer should be allowed.

RICH J. The facts to which this demurrer is pleaded are set out in the statement of claim and need not be restated. The *Motor Spirit Vendors Act* of 1933 of Queensland contains a well-considered scheme for burdening petrol with a charge in favour of power alcohol. A study of the Act, particularly of secs. 3 and 6, satisfies me that the requirement of a licence to sell petrol is directed at the first person who in Queensland has possession of or receives petrol for sale or who there sells it. This consequence is brought about by requiring that no one shall sell petrol without a licence unless he has bought the petrol from a licensed person and providing that any person who buys from a licensed person shall be deemed a licensed person. The result is that all sales of petrol acquired from or under a licensed person, however many intervening sales have occurred, are permissible. All sales in Queensland, and by virtue of the definition of sale, receipt or possession of petrol in Queensland are

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forbidden before the petrol passes through or into the hands of a licensed person. The situation produced and intended to be produced is that it is unlawful for the first person who handles petrol in Queensland to sell it without a licence, but for no other person unless he has acquired the petrol from an offender. Licensed persons must buy a ratable quantity of power alcohol calculated by reference to their sales of petrol. As no petrol can be received for sale in Queensland, or held there for sale, or sold by the person so receiving it, without incurring in this manner the obligation to buy power alcohol, every importer of petrol is saddled with that burden. As the burden is not imposed on anyone else unless he buys petrol from an offender, the importer is saddled with the liability in his character as importer. Importers fall into two classes—those who import direct from overseas and those who import from other States. The fact that the legislation does not distinguish between these classes does not, I think, affect the truth of the proposition that the burden is imposed upon an importer from another State because of his participation in the inter-State transaction. Any burden placed upon a man because he has taken part in an inter-State transaction involves an invasion of sec. 92 of the Constitution if it immediately and directly relates to the inter-State character of the transaction (*R.* v. *Vizzard*; *Ex parte Hill* (1)). When the person chosen for the imposition of the liability is selected because he is the importer, it inevitably follows that a direct burden is imposed on inter-State trade. In my opinion the Queensland Act involves a violation of sec. 92 and to that extent, at least, it is invalid. Much of the trade done by the plaintiff consists in the importation of petrol from other States, and in respect of that trade he is entitled to seek relief. Accordingly, I think the demurrer should be overruled.

I am not able to agree with the arguments employed on behalf of the plaintiff to bring the case within sec. 90 of the Constitution. I recognize the force of the view presented by Mr. *Ham* that the scheme of the Act brought about the same result as might be achieved by levying an excise on petrol and expending the proceeds of the tax upon a bounty on the production of power alcohol; but I find it

(1) (1933) 50 C.L.R. 30.

difficult to see that in the course of this scheme a tax has been levied or a bounty paid.

The demurrer should be overruled with costs.

STARKE J. In this action, the plaintiff, by its statement of claim, seeks a declaration that the *Motor Spirit Vendors Act* 1933 (24 Geo. V. No. 11), of the State of Queensland, or sec. 3, or sec. 6, thereof, is invalid, and consequential relief. It is alleged that the Act, and the sections mentioned, contravene the provisions of secs. 90 and 92 of the Constitution. The defendants have demurred to the statement of claim, and this demurrer now falls for decision.

Shortly, the Act prescribes that no person shall in Queensland, either as principal or as agent, sell to any other person for delivery in Queensland, any motor spirit which at the time of such sale is situate in Queensland, unless he is the holder of a motor spirit vendor's licence under the Act. The expression "sell" or "to sell" is, by the interpretation section (sec. 2) given a very comprehensive meaning, but the sale, within this comprehensive definition, must still be in Queensland, for delivery in Queensland, and in respect of motor spirit situate in Queensland. The method of obtaining the licence is prescribed in sec. 4, and the application for it must be accompanied by a fidelity bond, conditioned in a sum not exceeding £1,000, for compliance with the Act. And sec. 6 prescribes that "the holder of every licence under this Act shall during the currency thereof purchase and pay at the prescribed price for a quantity of power alcohol manufactured in Australia not less than a quantity equal to a prescribed number of gallons for every one hundred gallons of motor spirit sold by him during the period of such currency." The price for and quantity of power alcohol manufactured in Australia to be purchased and paid for during the currency of the licence may be found in the regulations made under the Act, but it is unnecessary to state them in detail.

Some reference must be made, however, to the proviso to sec. 3 and the proviso to sec. 6. The meaning of these provisos is far from clear. But the effect is, I think, that a person who buys motor spirit, immediately or mediately, from the holder of a licence, is not himself required to obtain a licence for the purposes of a resale.

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Starke J.

Penalties are prescribed for breaches of the Act, and various other provisions made that do not require notice for present purposes. The Constitution must now be considered.

By sec. 90, it is enacted that the power of the Federal Parliament to impose duties of customs and of excise and to grant bounties on the production or export of goods is exclusive. The obligation imposed upon the holder of a licence under sec. 6 of the Queensland Act is not a duty of customs or of excise, nor a bounty, within the meaning of the Constitution. It is not a duty on importation or exportation, and so not a customs duty. It is not a duty on goods manufactured or produced in Australia, and so not an excise. It is not a grant or allowance from any government or State, and so not a bounty. (See *Peterswald* v. *Bartley* (1); *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (2).) It is a price or sum which persons licensed to sell motor spirit are compelled to pay for power alcohol.

By sec. 92 of the Constitution, it is enacted that trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free. Movement across State boundaries is necessarily involved in trade, commerce and intercourse among the States. Transportation is an essential element of inter-State trade, but it is impossible to limit trade, commerce and intercourse to the mere act of transportation. "It comprehends all commercial intercourse between different States, and all component parts of that intercourse"—buying, selling, exchanging, and the transportation incidental thereto. There is no distinction between buying for transportation, or transportation for sale to another State, or selling for transportation to another State. The question whether commerce is inter-State or intra-State must be determined by the essential character of the commerce and not by the mere forms of contract. It is a practical conception, and when inter-State commerce begins or ends or is interrupted must depend upon the facts of the particular case. In one case the evidence may establish a continuity of the inter-State character of the commerce, in another a change from inter-State to intra-State commerce, and sometimes even to a re-engagement in inter-State

(1) (1904) 1 C.L.R. 497. (2) (1926) 38 C.L.R. 408.

commerce (*W. & A. McArthur Ltd.* v. *Queensland* (1); *Roughley* v. *New South Wales*; *Ex parte Beavis* (2); *Dahnke-Walker Milling Co.* v. *Bondurant* (3); *Atlantic Coast Line Railroad Co.* v. *Standard Oil Co.* (4); *Sonneborn Bros.* v. *Cureton* (5)). In my opinion, the nature of the commerce alleged in the statement of claim in the present case is not inter-State, but is (or at least is consistent with the view that it is) intra-State or domestic.

The plaintiff, according to the allegations in the statement of claim, imports motor spirit from overseas in oil tankers. This oil is pumped into large steel tanks or containers, in Queensland, and New South Wales, and in other States, as I gather from par. 12 of the statement of claim. The plaintiff also from its stocks of motor spirit in New South Wales sends into Queensland a considerable quantity of motor spirit in tins, filled in Sydney, New South Wales, from its containers there. In the course of its business, the plaintiff sells in Queensland to other persons for delivery in Queensland large quantities of motor spirit, which at the time of such sale is situate in Queensland and forms part of the plaintiff's stock in Queensland. Further, the plaintiff in the course of its business offers in Melbourne, and agrees to supply to a customer at a stated price, such motor spirit, up to a stated aggregate quantity, as shall be ordered by such customer, at various places and centres throughout Australia from time to time during a stated period, and to deliver the same at the place or centre at which such order is given, and the customer in Melbourne accepts the offer. Thereafter, orders are from time to time given in Queensland to the plaintiff in Queensland for the supply of motor spirit pursuant to the tender and agreement, and the plaintiff in Queensland supplies and delivers to such customer from its stocks of motor spirit in Queensland at the price stated in the tender and agreement the motor spirit so ordered.

It is clear, from these allegations, that the plaintiff keeps storage tanks and stocks of motor spirit in Queensland. The title to the spirit in the storage tanks, and the stocks, remains in the plaintiff and it is free to distribute the oil according to the demands of its

(1) (1920) 28 C.L.R. 530.
(2) (1928) 42 C.L.R. 162.
(3) (1921) 257 U.S. 282, at pp. 290-293; 66 Law. Ed. 239, at pp. 243-245.
(4) (1927) 275 U.S. 257; 72 Law. Ed. 270.
(5) (1922) 262 U.S. 506; 67 Law. Ed. 1095.

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business. It is put in storage tanks or stocks, for convenient distribution in Queensland. It is not appropriated to any particular purchaser or contract. The ultimate destination of the spirit is entirely within the discretion of the plaintiff. It may be that the transport of spirit from New South Wales into Queensland, until stored or stocked, constituted inter-State commerce, " but that is not inconsistent with the closing or ending of the continuity of movement in inter-State " commerce, " and the beginning of intra-State " distribution for the purposes and business of the plaintiff. The delivery into storage tanks or stocks is a natural stage for a change from inter-State commerce to that which is intra-State or domestic. The allegations in the statement of claim make it clear, or at all events are consistent with the view, that the plaintiff's inter-State commerce in its motor spirit ended upon its delivery into storage tanks or being placed in stock. At this point, it came to rest, and movement in inter-State commerce ended, though it might no doubt be restored to inter-State commerce, e.g., if it were sold for delivery across the borders of Queensland.

The case of *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1) was much relied upon in support of the proposition that taxing or hindering the first sale of a commodity subsequent to its introduction from one State into another was necessarily an interference with inter-State trade, and so in contravention of sec. 92 of the Constitution. But the case is no authority for that proposition. No doubt, as *Isaacs* J. said, " 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 operation of trade and commerce." " 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 " (2). The facts and the Acts upon which the decision in that case was founded are stated at pages 409-411 of the report, and the circumstances of the present case are not parallel.

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

(2) (1926) 38 C.L.R., at pp. 429, 430.

The result is that the statement of claim here does not allege, or does not sufficiently allege, that the plaintiff is engaged in inter-State commerce : the plaintiff is wanting in interest. State legislation cannot be declared in contravention of sec. 92 at the suit of a plaintiff who does not allege the infringement of any right or interest in him secured or protected by the Constitution.

I go further, however. In my opinion, the *Motor Spirit Vendors Act* itself, properly construed, is confined to intra-State or domestic commerce, and does not extend to inter-State commerce. It should be construed so as to support rather than to defeat it. It must not be assumed that the State has acted in contravention of the Constitution. And here we find that the State restricts the operation of the Act to sales in Queensland, of a commodity in Queensland, and for delivery in Queensland. It is true that a commodity may enter Queensland in inter-State commerce, but in my opinion the Act strikes, and strikes only, when the continuity of that movement is ended and closed, and the motor spirit is absorbed in the domestic or local stocks of the plaintiff, and for intra-State distribution in Queensland. In any case, for reasons assigned by me in *Roughley* v. *New South Wales* (1), the Court should not declare the Act wholly invalid, but only so far as it hinders or interferes with inter-State commerce.

The demurrer should be allowed.

DIXON J. Power alcohol is produced in Queensland and it appears to be an object of the State Legislature to promote its manufacture. There is, of course, no production of petrol motor fuel in Queensland. It is all imported. It comes in bulk direct from overseas to some Queensland ports, three in number we were told, where there are oil tanks. To other parts of Queensland, it comes in tins or drums, many of which are sent from one or other of the southern States, where the petrol is put up in those containers.

The State cannot encourage the production of power alcohol by means of a bounty, because sec. 90 of the Commonwealth Constitution makes the power of the Federal Parliament to grant bounties on the production or export of goods exclusive. It cannot impose a tax or

(1) (1928) 42 C.L.R., at pp. 206-208.

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duty upon petrol as an import from abroad, because the Federal power to impose duties of customs is also exclusive. To impose an internal tax upon the ownership, sale, or disposal of petrol, would provoke a contention that it was, or included, an excise, which again is within the exclusive power of the Commonwealth. (See *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1).) It could not burden by a duty or otherwise the introduction of petrol from other States, because to do so would infringe upon the freedom of inter-State trade preserved by sec. 92. These considerations, doubtless, led to the adoption of the plan to which the *Motor Spirit Vendors Act* 1933 seeks to give legislative force. That plan, briefly, is to require that, for every hundred gallons of petrol supplied in Queensland, a specified quantity of power alcohol at a specified price should be purchased by the supplier. It is left to the Executive Government to fix both the quantity and the price. The power alcohol must be of Australian manufacture, but no provision is made to ensure a sufficient supply. Apparently there is no fear that enough power alcohol will not be forthcoming to satisfy the requirements created by the enactment. The suppliers of petrol, who are compelled to buy power alcohol, are left free to do what they like with it when they have got it. Unless the fate of the power alcohol, after the manufacturer receives the fixed price, was a matter of indifference, the view must have been taken that, once they bought it and paid for it, vendors of petrol would turn it to account in the provision of motor fuel. Notwithstanding the argument to the contrary, I think that this plan involved no infringement upon the exclusive powers of the Commonwealth to impose duties of customs and of excise and to grant bounties. The contention may be correct that to require the seller of a commodity to pay an amount calculated by reference to the volume of his sales to those who manufacture or supply a given quantity of another commodity is only to achieve in one step the result which would be effected by the two steps of levying upon the first commodity the same sum in the guise of an excise or customs duty payable to the Treasury and paying it again out of the Treasury as a bounty upon the second commodity. It may also be true that the character of the operation is not altered in substance by

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

the circumstance that the seller of the first commodity incidentally obtains the given quantity of the second commodity, since he does not want it and it may be of little or no value to him. But, in my opinion, there is imposed neither customs nor excise, for the reason that the compulsory payment required of the suppliers of petrol does not answer the description of taxation. It is not a liability to the State, or to any public authority, or to any definite body or person authorized by law to demand or receive it. The liability to make the payment is not imposed by the enactment itself, but arises only when the suppliers of petrol proceed to fulfil the requirements of the enactment and purchase power alcohol; and then liability arises exclusively out of the contract of sale. The power of the Commonwealth Parliament to impose duties of customs and of excise, which sec. 90 makes exclusive, is conferred by sec. 51 (II.) as part of the power to make laws with respect to taxation. I cannot think that, in the exercise of that power, the Commonwealth Parliament could pass such an enactment as that contained in the Queensland *Motor Spirit Vendors Act* 1933. The payment received by the seller of power alcohol is not a bounty on the production of goods. It is not paid for or on behalf of the State, or any authority under the State. It is not a premium, but the price on a sale.

But the plan embodied in the State enactment, although it contains no invasion of the Federal powers made exclusive by sec. 90, in my opinion, cannot operate in its entirety without an impairment of the freedom of trade, commerce and intercourse among the States, which sec. 92 preserves. The reason is that it is essential to the operation of the plan that the burden of buying power alcohol shall be placed, not on every seller of petrol, but primarily upon that person who introduces petrol into Queensland. The enactment does not make the obligation to buy power alcohol an incident of the sale of petrol, considered simply as a commodity, and independently of prior dealings with it. It is not the design of the statute to saddle a sale of, or other dealing with, petrol with the burden because it is a dealing with petrol. What is the purpose of the enactment is to ensure that for every hundred gallons of petrol, which goes into distribution, a specified quantity of power alcohol shall also go into distribution, or, at any rate, be sold by the manufacturer, at

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an adequate price. It is evident that to achieve this purpose some circumstance or event occurring in the course of distributing petrol must be fixed upon as the occasion of the liability to effect the purchase of the correlative power alcohol. The incidence of this burden must inevitably be prescribed. In fact the statute throws it upon the person who in Queensland is the first to receive or have possession of the petrol for sale or to sell it. It thus imposes upon the person, who introduces petrol into the State for sale, a burden to which he would not otherwise be subject. This result is produced by secs. 3 and 6 of the Act, considered with the definition of " sell " contained in sec. 2. Some analysis of the provisions is needed to make clear their real effect as a burden upon the person introducing petrol into the State.

Sec. 3 begins by prohibiting any sale in Queensland of motor spirit situate in Queensland at the time of sale for delivery in Queensland unless the seller is licensed under the Act as a motor spirit vendor. It is to be noticed that, by the express restriction of its operation to motor spirit situated in the State, the provision avoids applying its prohibition to sales of petrol which, although made in Queensland, are to be fulfilled by delivery from another State, and that, by the restriction to delivery in Queensland, it avoids applying its prohibition to sales for delivery from Queensland into another State. Thus it is not open to objection as a direct interference with the making of inter-State contracts. It is not in this respect that it violates sec. 92. Further, prima facie, it is a general fetter on sales of motor spirit which is uniform and does not particularly affect the importer. This prima facie uniformity of operation is, however, controlled by the provisos to sec. 3 and sec. 6, the effect of which is strengthened by the definition of " sell." The very wide definition of the verb " to sell " and its derivatives includes supplying for profit, dealing in, receiving for sale, having in possession for sale, and forwarding or delivering for sale. By sec. 6, the holder of a motor spirit vendor's licence shall during its currency, which is twelve months, purchase and pay for the quantity of power alcohol, which bears the required proportion to the quantity of petrol he sells. The proviso to sec. 3, which prohibits sale without licence, is as follows : " Provided that any person who buys motor spirit for the

purposes of sale from a person who holds a motor spirit vendor's licence under this Act shall be deemed to have complied with the provisions of this section upon proof that the person from whom he buys such motor spirit is so licensed, and any such person shall for the purposes of this Act be deemed to be a licensed person and the agent of the licensee accordingly." The effect of this provision is to relieve from the necessity of obtaining a licence all persons who sell petrol which has been already sold by a licensed vendor. No doubt, in the ordinary course the importer supplies the petrol directly to the retailers who, through petrol pumps or otherwise, supply the consumer. But, however many intermediate transactions there might be, it is, I think, the purpose and effect of the proviso to sec. 3 to exclude from the requirement of a licence all but the first. This result is produced by the last part of the proviso, which, for the purposes of the Act, deems the buyer from a licensed person to be a licensed person and to be the agent for the licensee. As the buyer is deemed to be a licensed person for the purposes of the Act, when he sells, his buyer will be in the same position as if he bought from a licensed person, and, indeed, as the seller is deemed the agent of the licensee, he is to be regarded as buying from the licensed person. Each successive sale will thus be within the proviso. Sec. 6, which requires the licensed motor spirit vendor to purchase the power alcohol, ends with a corresponding proviso, which, although depending entirely on statutory agency for the licensed person, produces the same result in relieving subsequent purchasers who might, as persons deemed to be licensed, come within the requirement of sec. 6.

It is not surprising, in view of the decision of this Court in *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1), that secs. 3 and 6 are not framed in such a way as explicitly to deal with sales by the importer as such. But, apart from this consideration, the sections may well have been drawn with a view to ensure that in the course of the distribution of petrol all dealings should be penalized until it reached the hands of a licensed person. Although this may sufficiently account for the generality of the prohibition of sales by unlicensed persons

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

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expressed in sec. 3, it does not alter the real effect of the enactment, which is to throw upon the first person who, after petrol reaches the State, receives or holds it for sale, or sells it, the burden of buying a proportionate quantity of power alcohol. This appears to me directly to burden the person who introduces petrol into Queensland for sale, in a way in which others are not burdened. It is true that, upon the face of the statute, it affects all first sales of petrol alike, and does not differentiate petrol imported from another State from petrol imported from abroad, or from petrol produced in Queensland. The last may be neglected because petrol is not produced in Queensland, and this fact is one which determines the actual operation of the statute, as, no doubt, it determined its policy. But when a special burden is placed upon persons importing a commodity, the fact that foreign and inter-State trade are affected uniformly does not mean that the freedom of inter-State trade is preserved, but rather that the freedom of foreign and inter-State trade alike is impaired. Upon examination it becomes reasonably clear that the incidence of the obligation is upon the person importing petrol for sale, and that the burden is placed upon him by reason of a consequence inseparable from his character of importer, namely, that he is necessarily the first person who in Queensland has the commodity in his hands for sale. Inasmuch as he is selected because of this circumstance, he is, in substance burdened in his character of importer, that is, because it is he who introduces the goods into Queensland for sale. The legislation does not impose upon the commodity, when it is imported, a burden of which the same commodity is free if produced in the State. The case is one in which the same commodity cannot be produced in the State. But, for the advantage of another commodity which is produced within the State, a commodity contributing to the same purpose, it burdens an imported commodity in the hands of the importer. It does not deal with the imported commodity independently of its importation, because, in allocating the burden, it adopts a criterion which of its very nature distinguishes the person who introduces it for sale from all others.

The very essence of commercial intercourse between States is importation into or exportation from a State for purposes of sale.

In making one of these acts the substantive ground for imposing the burden of supporting home production, the State strikes at inter-State trade. It appears from the statement of claim that the plaintiff has a trade in petrol which it imports from New South Wales into Queensland for sale. This trade cannot be affected by the *Motor Spirit Vendors Act* 1933. Accordingly, the demurrer should be overruled.

The question does not appear to me to arise upon this demurrer whether the statute is in consequence wholly bad, or whether it is severable and can be given an operation upon petrol imported direct from overseas. Nor, upon the facts, does the further question arise whether, if petrol is imported into Queensland through another State by a continuous and unbroken course of transportation from overseas, it can be considered to involve inter-State trade.

EVATT J. The *Motor Spirit Vendors Act* of 1933 of the State of Queensland provides in sec. 3 that

> "no person shall in Queensland, either as principal or as agent, sell to any other person for delivery in Queensland any motor spirit which at the time of such sale is situate in Queensland unless he is the holder of a motor spirit vendor's licence under this Act."

There is a proviso to sec. 3 to the effect that a person purchasing motor spirit for the purpose of sale from a licensed motor spirit vendor is deemed (1) to have complied with the provisions of sec. 3 and (2) to be a licensed person and the agent of the licensee.

Sec. 6 of the Act imposes upon the holder of every licence the duty of purchasing and paying for, at the price prescribed, a quantity of power alcohol manufactured in Australia, such quantity being not less than the prescribed proportion of the motor spirit sold by the licensee.

The provisos to sec. 6 enact that if a non-licensed person purchases from a licensed person, the former is to be deemed the agent of the latter in respect of the sale so that no further compliance by the agent with the Act is required.

By regulations passed under the Act the percentage of motor spirit sold by the holder of a licence which such holder is required to purchase is fixed at two and one-tenth ; and the price per gallon free on rail at the place of manufacture at which the licensed

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motor spirit vendor is to purchase power alcohol is fixed upon the basis of the wholesale price per gallon of the highest price motor spirit sold by the licensed holder.

The rest of the Act and regulations carry out the general scheme indicated by secs. 3 and 6 of the Act and the regulations already referred to.

It is clear that the main purpose and effect of the Act is to compel the first person who sells motor spirit in Queensland for delivery in that State to buy and pay for a proportionate quantity of power alcohol so long as the motor spirit sold is at the time of the sale "situate" in Queensland. The principal question which has been debated in these proceedings upon demurrer is whether sec. 92 of the Commonwealth Constitution allows the State Legislature to pass such an Act of Parliament.

The facts stated in the demurrer are descriptive of the trade carried on by the plaintiff company so far as it concerns Queensland. Some of the plaintiff's motor spirit is imported into Queensland for sale direct from overseas and some of it is also brought into Queensland from New South Wales. The motor spirit which comes from New South Wales is not produced in that State, or in any other part of the Commonwealth, but is itself imported from overseas in oil-tankers from which it is pumped into large tanks or containers. From par. 11 of the statement of claim it appears that in the State of New South Wales, at Sydney, motor spirit is taken from the tanks and put into tins, which are then sent into the State of Queensland for sale. After arrival in the State of Queensland, these tins are "added to its stocks."

The plaintiff has business relationships with Queensland customers, in the course of which it undertakes its readiness to supply and deliver motor spirit to the customer, during a stated period, at the place or centre where the order is given. The actual orders from the customers in Queensland are given to the plaintiff in Queensland, and then the plaintiff in Queensland supplies and delivers to its customers from its Queensland stocks of motor spirit.

In the Act of Parliament, secs. 3 and 6 adopt a definite criterion for their own application, and this criterion is relied upon by the defendants as securing to the State an immunity from the operation

of sec. 92 of the Constitution, which provides that " trade, commerce, and intercourse among the States, . . . shall be absolutely free." The theory behind the criterion is that, so long as, at the time of sale, the motor spirit is situated in Queensland, that State may freely impose taxes upon or restrict the Queensland sales of such motor spirit without any infringement of sec. 92 of the Constitution. It is argued that the decision in *W. & A. McArthur Ltd.* v. *Queensland* (1) is to the effect that sec. 92 of the Constitution protects from hostile State action only sales of goods where the goods are brought from one State into another in pursuance of a prior contract made between the parties.

In my opinion, this is a misapprehension of the position. In *McArthur's Case* (1), the State of Queensland passed a Profiteering Prevention Act fixing the sale price of certain commodities, and this Court held that sec. 92 of the Constitution prevented the State law from operating only upon those contracts of sale which expressly or by necessary implication stipulated for the inter-State transport of the goods sold. But it is quite clear that it was not intended to lay down a full and complete definition of what was comprised in the principle that trade and commerce among the States of the Commonwealth shall remain absolutely free.

This is evidenced by the judgment of *Isaacs* J. in *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (2), where he said :—

> " 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* (1) and, in the absence of any direct challenge of the principle, one would suppose that would end the matter."

In the present case very little guide is afforded by the dictum that trade and commerce, including trade and commerce among the States, consists rather of " acts " than of " things." This dictum is of value because it emphasizes that sec. 92 is not mainly concerned with proprietary rights in those commodities which are the subject of inter-State trade. Hence the conclusion has been reached that

(1) (1920) 28 C.L.R. 530. (2) (1926) 38 C.L.R. 408, at p. 427.

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expropriation laws of the State do not necessarily offend against sec. 92 (*New South Wales* v. *The Commonwealth* (1)), though, of course, under certain circumstances, they may so offend (*James* v. *Cowan* (2)).

But it is misleading to suppose that sec. 92 is designed to protect, or to protect solely, every one of that infinite aggregation of acts which are performed by various persons from time to time as commodities in one State are carried into another State, and that the protection of sec. 92 ceases so soon as the inter-State "movement" has ceased. In my opinion,

> "the predominant object of sec. 92 was to secure free trade and free intercourse among what had formerly been self-governing colonies and what were now to become States which should still possess very large powers of internal self-government. To assert freedom of trade between such organized communities was to lay down in formal expression a well-known economic doctrine and ideal, which was one of the chief motive forces of Federation. . . . The section if read as a whole, postulates the free flow of goods inter-State, so that goods produced in any State may be freely marketed in every other State, and so that nothing can lawfully be done to obstruct or prevent such marketing. The section may be infringed by hostile action within the State of origin of the goods, as was attempted to be done in the Dried Fruits legislation of South Australia, or at the border by means of prohibitions upon exit or entry, or by laws preventing or prohibiting sale or exchange within that State to the markets of which the commodities are destined" (*R.* v. *Vizzard*; *Ex parte Hill* (3)).

So far as present purposes are concerned, sec. 92 protects trade and commerce between New South Wales and Queensland in motor spirit. The practical question is: What is involved in the overriding postulate that such trade and commerce must be left absolutely free?

Apart from authority, it would seem to be reasonably clear that all the plaintiff's sales and supplies in Queensland of their motor spirit, introduced solely for the purpose of such sale and supply, should be regarded as part either of a Queensland trade with New South Wales or of a Queensland trade with those countries overseas, whence the motor spirit was imported to Queensland direct.

Dealing with the former aspect of the matter, it would also seem clear that (1) preparing the spirit in New South Wales for the purpose of sale in Queensland by placing it in tins, (2) the consignment of the tins of petrol to Queensland for the purpose of sale in that State to meet what is no doubt a certain demand, (3) the

(1) (1915) 20 C.L.R. 54. (2) (1932) A.C. 542; (1932) 47 C.L.R. 386.
(3) (1933) 50 C.L.R., at pp. 86, 87.

replenishing of the plaintiff's " stock " in Queensland as a further step in this system of trading, and (4) the allocation of part of such Queensland " stock " for the purpose of delivering it to Queensland purchasers, all comprise a systematic course of inter-State business, engaged in not only by the plaintiff, but by all others likewise engaged in trade and commerce in motor spirit between the other States of the Commonwealth and the State of Queensland. And, in truth, the predominant end of this elaborate system of inter-State trade is the marketing or selling of the goods in the State of destination, whether or not the goods at the time of such sale are " situate " within the State of Queensland. For " *buying and selling* are the essential elements of international commerce. Carriage, insurance and finance are, after all, only ancillary to the main purpose of the interchange of goods " (Dr. *H. C. Guthridge* K.C. in *Y.B. International Law* (1933), at p. 77. Italics are mine).

It cannot be laid down *a priori* that, in every case, inter-State trade in a commodity necessarily continues up to, and includes, the first sale of the commodity within the borders of the State of destination. As *Isaacs* J. said in the *South Australian Petrol Case* (1),

> " 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."

In determining whether the first sale of commodities after their arrival in one State of the Commonwealth from another, whence they have been sent for the purposes of sale, is to be regarded as part of inter-State trade entitled to protection under sec. 92, one must have regard to a number of factors, including the condition and character of the commodity, e.g., its perishability, such as the farm products dealt with in *Roughley* v. *New South Wales*; *Ex parte Beavis* (2), or its comparative non-perishability, like the dried fruits dealt with in *James* v. *Cowan* (3), and the motor spirit in the *South Australian Petrol Case* (4). One must also have regard to the existence of general places of marketing. But if, by reason of the course of trade, there are no recognized marketing-places, and the vendor introducing goods from one State into another for the

(1) (1926) 38 C.L.R., at p. 429.
(2) (1928) 42 C.L.R. 162.
(3) (1932) A.C. 542; (1932) 47 C.L.R. 386.
(4) (1926) 38 C.L.R. 408.

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purposes of sale has of necessity to keep them at some convenient place so as to enable himself to sell and deliver them in orderly and business-like fashion, such sales do not cease to be part of inter-State trade. For this reason, the use of the word " stock " in the statement of claim's description of the plaintiff's trade cannot be regarded as negativing the continuance of inter-State trade.

Other features which may be of importance in determining the duration of inter-State trade, are the velocity of turnover of the commodities imported, a factor dependent upon the certainty or uncertainty of its immediate sale, and the absence of any local treatment or alteration in order to put the goods in a deliverable state. The test suggested, whether the goods are " at rest " within the State, is of little value, because the state of " rest " may be merely a temporary interruption to inter-State trade. The test whether the goods are " commingled " with the ordinary goods of the State is often useful, and it may suggest that, in the case of special forms of trading, even a first sale may be too remote from the inter-State trade to enjoy any constitutional immunity.

But, in the case of most commodities which are produced for sale, or prepared for sale, or transformed for sale in one State, and which are thence carried into another State for the purposes of such sale, their first sale within the second State constitutes so typical and necessary an element that, in its absence, there could never exist any inter-State trade in the commodity. The main element in the inter-State trade is the marketing of the goods in the second State. Very frequently there are recognized places for marketing in each State or district thereof. A typical example of trade and commerce conducted under such circumstances was provided in *Roughley's Case* (1). There, most of the members of this Court seem to have either said or assumed that the selling at the Sydney market of primary produce grown in States other than New South Wales was part of trade and commerce among the States in such commodity. And this was so although, at the time of sale in New South Wales, the commodities were there situated and were sold for delivery within that State.

Many other examples may be given. A very important trade takes place between Queensland and New South Wales in Queensland cattle (*Duncan* v. *Queensland* (2), per *Barton* J.). This trade is

(1) (1928) 42 C.L.R. 162.

(2) (1916) 22 C.L.R. 556, at p. 586.

usually conducted by the Queensland owners consigning their cattle to the Sydney markets, where, in due course, they are sold by auction. In the *South Australian Petrol Case* (1), the trade in motor spirit between South Australia and Victoria, described in the statement of claim, was not limited to, if it consisted at all of, special contracts of sale requiring the transport of petrol from Victoria to purchasers in South Australia. It appeared that enormous quantities of the motor spirit were sold and delivered for the first time within South Australia after it had entered such State.

A further illustration is provided by *James* v. *Cowan* (2). That case was concerned with inter-State trade in dried fruits, the produce of South Australia. A South Australian law violated sec. 92 by forbidding the " marketing " in the other States of the Commonwealth of any dried fruits beyond a fixed quota. It should be observed that the South Australian law was directed not against any particular method of conducting the trade in dried fruits, but against the first sale or marketing of the fruits in the other States of the Commonwealth. No distinction was attempted in that case between " marketing " in the shape of contracts stipulating for inter-State shipment to a purchaser, and marketing consequential upon the consignment in ordinary course of the goods to the other States for sale therein.

In my opinion, this case calls for the application of the general principle laid down in *James* v. *Cowan* (2). There a State placed a definite restriction upon the marketing of one of its commodities in the other States of the Commonwealth. In the present legislation, the State of Queensland prevents the marketing within its own borders of motor spirit which has come from New South Wales for the purpose of sale, except upon compliance by the importer with a stringent condition requiring the payment of a sum of money proportionate to the actual quantity of motor spirit marketed by him in Queensland.

The face of the present Act evidences no discrimination against inter-State trade in motor spirit, but two points should be noted; first, no motor spirit is produced in Queensland for the purposes of sale within that State, second, power alcohol, which the importer of motor spirit is required to purchase, is produced only within Queensland. It is quite true that the Act of Parliament refers to power

(1) (1926) 38 C.L.R. 408. (2) (1932) A.C. 542; (1932) 47 C.L.R. 386.

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alcohol produced *in Australia*, but, as the price which the seller of motor spirit must pay for it is a price fixed f.o.r. at the place of manufacture, it is hardly likely that the Act will stimulate the production of power alcohol in any other State of the Commonwealth.

In applying sec. 92, the Court is not required to limit its attention to the superficial appearance of any challenged legislation or regulation. As was pointed out elsewhere,

> "if a State law discriminates against inter-State trade and intercourse so as to prohibit it, it will be invalidated by sec. 92 (*Fox* v. *Robbins* (1)). And such discriminatory legislation may exist although in form the law is of general application. Thus a State may attempt to enact a general law fixing the price of commodities which, in fact, are produced in only one other State, the price operating so as to destroy all trade in such commodities between the States. Such discriminatory effect is, of course, provable by evidence" (*R.* v. *Vizzard*; *Ex parte Hill* (2)).

In one sense discrimination against inter-State trade is actually displayed on the face of the Queensland Act, for, as we have seen, the Act applies not to all sales of motor spirit within the State of Queensland, but only to the first sales within that State. In other words, the Act applies only to the first marketing of the spirit within Queensland. This is clear evidence that in the proved circumstances of the trade inter-State trade is not only being regulated and restricted, but discriminated against. It is, of course, correct to say that the Queensland Legislature does not aim at the prevention, or even the discouragement, of inter-State trade in motor spirit in the sense that its motive or policy is to cause any diminution of the Queensland sales of motor spirit. But the general character of the Queensland Act is one thing, and the motive of those who designed it is another. Whatever may have been the motive, a very striking restriction is imposed upon the inter-State trade, and the point selected for the placing of the restriction is the crucial point of marketing for the first time in the State of destination.

I agree that even although the plaintiff's first sale of motor spirit in Queensland should be regarded as being covered by the protection of sec. 92, it does not follow that the State of Queensland is wholly prevented from regulating such trade. For instance, in *Roughley's Case* (3), the majority of the Court held that although in a general sense "marketing" in Sydney was part of the inter-State trade in the farm products, the particular licensing system set up by the New South Wales Act could not be regarded as a restriction of

(1) (1909) 8 C.L.R. 115. (2) (1933) 50 C.L.R., at p. 93.
(3) (1928) 42 C.L.R. 162.

inter-State trade inconsistent with sec. 92 of the Constitution. And elsewhere I have endeavoured to show that, although

> "sec. 92 also confers rights upon individuals in the sense that any person may invoke its aid in an appropriate case . . . it gives no constitutional right either to individuals engaged solely in the inter-State trade, or to individuals whilst they are so engaged, to determine for themselves the manner in which and the means by which, they will conduct their business or commerce in each State" (*R.* v. *Vizzard*; *Ex parte Hill* (1)).

Indeed, I have expressed the opinion, to which I adhere, that

> "on the contrary, I think that a State does not infringe sec. 92 if, having no concern, interest or object in restricting or prohibiting trade between States, or commerce between States, or intercourse between States, it chooses to organize, regulate and co-ordinate those facilities and services which are provided and conducted within the State as the essential instruments of all trade, commerce and intercourse, including inter-State trade, commerce and intercourse. Any given organization, regulation, or co-ordination may infringe sec. 92 if it is proved that the State is really directing its authority against commerce or intercourse between itself and any other State, or between any two other States. But it is not enough to show that individual traders or travellers are incommoded or 'burdened' in the course of their inter-State transactions or journeys by having to obey general State regulations which, in their particular application to individuals, may control and determine *the manner and method* of their trading or travelling" (*R.* v. *Vizzard*; *Ex parte Hill* (2)).

Knox C.J., who held that a State system for licensing marketing agents was valid, said (italics are mine):—

> "It may well be that the Parliament of New South Wales is prevented by sec. 92 of the Constitution from either prohibiting the owner of goods produced in another State or the servant of such an owner bringing such goods into New South Wales or selling them there, *and from imposing conditions on the exercise of his right to do so*" (3).

For myself, I cannot agree without some qualification to the very broad proposition laid down in the words I have italicized. For the licensing requirements deemed valid in *Roughley's Case* (4) certainly involved the owner of the goods having to submit to a prohibition of his right to market them, unless he obeyed the State law, and sold through an agent licensed by the State. In determining upon the validity of a State Act which regulates trade, including inter-State trade, much depends upon the nature and character of the State legislation. General regulations as to the method, time and place of sale of commodities can seldom be held to interfere with absolute freedom of trade and commerce among the States.

Whatever difficulties are involved in solving other questions, the present form of State interference seems to me to strike a definite

(1) (1933) 50 C.L.R., at p. 93.
(2) (1933) 50 C.L.R., at p. 82.
(3) (1928) 42 C.L.R., at p. 179.
(4) (1928) 42 C.L.R. 162.

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blow at the constitutional guarantee of sec. 92. For what the State is doing is not a mere regulation of the method or the time or place of sale of motor spirit imported into Queensland for purposes of sale. The licensing system set up by the Act is only ancillary to the general scheme, which is that all persons selling motor spirit for the first time shall be forced to purchase a quantity of power alcohol directly proportionate to the volume of such first sales. If such a law is valid, the State of New South Wales can compel the first seller in New South Wales of Queensland sugar to buy a proportionate quantity of New South Wales flour ; the Victorian Parliament can compel the first seller in that State of cane sugar to buy a proportionate quantity of beet sugar produced in Victoria, and Tasmania can make a similar law in order to compel the importer of Queensland sugar to purchase Tasmanian fruit. Instead of inter-State trade in Queensland sugar being absolutely free, it would be subjected to a series of embargoes in the several States.

In my opinion, therefore, the present Queensland Act substitutes for the free sale in Queensland of a New South Wales commodity a completely inconsistent economic doctrine which directly restricts each and every such sale by requiring the purchase of a proportionate quantity of a Queensland product. The Act does not leave trade and commerce between Queensland and New South Wales in motor spirit absolutely free, and the Act is, in respect of the inter-State trade described in par. 11 of the statement of claim, inconsistent with sec. 92, and of no force and effect. The defendant's demurrer should be overruled.

The question in this case which appeared to me most difficult of all is whether there ever comes into existence any real trade between New South Wales and Queensland in motor spirit. All the motor spirit is produced overseas, and, in a sense, New South Wales is merely a conduit pipe for transacting trade between countries overseas and that particular State of the Commonwealth where the motor spirit is first sold.

As against this, however, there must be balanced the fact that in New South Wales the goods are taken from oil-tankers and pumped into the large steel tanks or containers of the importer, and the motor spirit is subsequently placed in tins or drums which are filled in Sydney from the containers. As regards sec. 92 we are only concerned with the trade in the motor spirit which is contained in these tins or drums. On the whole, it would seem that New South Wales

has also to be regarded as the commencing point of an Australian trade in motor spirit, part of which is between the States of New South Wales and Queensland. This part of the case seems to be covered by *McArthur's Case* (1), where the warehouse of the then plaintiffs in Sydney must have been regarded as the point of commencement of an inter-State trade in many commodities which had reached their final form outside the Commonwealth of Australia.

A separate question has been raised which requires a decision as to the limits *inter se* of the constitutional powers of the Commonwealth and Queensland. For it is also alleged that the Queensland Act offends against the exclusive power granted by sec. 90 of the Constitution to the Commonwealth Parliament to impose duties of customs and of excise and to grant bounties on the production and export of goods.

In my opinion, the Act does not offend against any of the provisions of sec. 90. Certainly the State of Queensland has regulated the trade of the importers of motor spirit by compelling them to purchase a quantity of power alcohol proportionate to their importations. But this is not a law imposing any duty of customs, although it undoubtedly lays a direct and immediate burden upon trade and commerce between Australia and other countries, and between Queensland and the State of New South Wales. Nor does the Act impose any duty of excise.

The Act does not grant a bounty on the production of power alcohol. Whether it even encourages its production depends upon the cost of production in Queensland, as to which the Court is not informed. In my opinion, the legislation, as framed, cannot be brought within the prohibition of sec. 90.

But, for the reasons previously stated, the demurrer should be overruled.

McTiernan J. The *Motor Spirit Vendors Act* of 1933 of Queensland is, in my opinion, in conflict with sec. 92 of the Constitution of the Commonwealth. It is expressed to be "An Act to provide for the regulation of the sale of motor spirit and for other purposes." The Act seeks to force the domestic trade carried on in Queensland in this commodity to bear with it into the market a fixed quantity of power alcohol for every hundred gallons of motor spirit sold there.

(1) (1920) 28 C.L.R. 530.

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Sec. 3 provides that " subject to this Act, no person shall in Queensland, either as principal or as agent, sell to any other person for delivery in Queensland any motor spirit which at the time of such sale is situate in Queensland unless he is the holder of a motor spirit vendor's licence under this Act." Sec. 4 says that an applicant for a licence must lodge security for the due compliance by him with the requirements of the Act. The principal requirement is contained in sec. 6, which says that " the holder of every licence under this Act shall during the currency thereof purchase and pay at the prescribed price for a quantity of power alcohol manufactured in Australia not less than a quantity equal to a prescribed number of gallons for every one hundred gallons of motor spirit sold by him during the period of such currency : Provided that, in calculating the number of gallons of motor spirit sold by him for the purposes of this section there shall be included only those sales in respect of which a licence is required to be held by him under section three of this Act."

These sections confine the operation of the Act to intra-State sales. But the validity of the Act under sec. 92 does not depend entirely on that consideration (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1)). If vendors of motor spirit were compelled to purchase a quantity of power alcohol whenever a sale of motor spirit was made, the balance which sec. 6 intended to establish between the amount of power alcohol and motor spirit marketed in Queensland would be destroyed, and the market would perhaps be glutted with power alcohol. Hence provisos are enacted to secs. 3 and 6 containing a limitation of the obligations imposed by these sections to one person in respect of the sale by him of any given quantity of motor spirit. The proviso to sec. 6 is in these terms : " Provided further, that in the case of any sale as agent by any holder of a motor spirit vendor's licence the provisions of this section shall be deemed to have been complied with as regards such sale upon proof that the principal is the holder of a licence and has duly complied with the provisions of this section : Provided also, that in the case of any sale of motor spirit by a non-licensed person which has been purchased by him from a licensed person, such non-licensed person shall be deemed to be the agent of the licensed person in respect of such sale." (See also the proviso to sec. 3.) The Act gives a wide meaning to

(1) (1926) 38 C.L.R. 408, at p. 427.

the words " to sell," and this meaning is also imparted to the derivatives of " sell " (sec. 2). " To sell " is defined to mean, amongst other things, " receiving . . . for sale," " having in possession for sale," " received or exposed or had in possession for sale " (sec. 2).

An examination of all these provisions of the Act shows that the first " sale " which is made in the course of intra-State trade in Queensland was selected to bear the burden of expanding the trade in power alcohol proportionately to the amount of motor spirit thereby sold, and that subsequent sales of motor spirit comprised within that sale are relieved from the burden. Motor spirit which enters into the intra-State trade in Queensland consists of motor spirit imported directly from overseas and quantities of the fuel brought to Queensland from other States after importation. In the case of a sale of motor spirit brought from another State the liability to make a compulsory purchase of a quantity of power alcohol in respect thereof is intended by the Act to be imposed on the person who is identified by the fact that he makes the first sale of such motor spirit, under the conditions laid down in sec. 3, after the entry of such motor spirit into Queensland. Furthermore, " to sell " includes to receive or have in possession for sale.

The Act imposes a burden on the plaintiff in respect of the first " sale " made by it in Queensland of motor spirit which it brings there from some other State in carrying on its business in the manner alleged in the statement of claim. In *R.* v. *Vizzard*; *Ex parte Hill* (1), *Evatt* J., speaking of sec. 92, said :—" The section, if read as a whole, postulates the free flow of goods inter-State, so that goods produced in any State may be freely marketed in every other State, and so that nothing can lawfully be done to obstruct or prevent such marketing. The section may be infringed by hostile action within the State of origin of the goods, as was attempted to be done in the dried fruits legislation of South Australia, or at the border by means of prohibitions upon exit or entry, or by laws preventing or prohibiting sale or exchange within that State to the markets of which the commodities are destined." In my opinion it is impossible to reconcile the provisions of the Act

(1) (1933 50 C.L.R., at p 87.

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now in question with the constitutional command that trade and commerce among the States shall be absolutely free.

The exactions made by the Act upon sellers of motor spirit in certain cases are not discharged by payment to the Crown or any public authority. They have not, in my opinion, the character either of a duty of customs or excise. The payments required to be made by licensees to those who may sell power alcohol to them are not made directly or indirectly out of the revenues of the State. None of these payments is, in my opinion, a bounty within the meaning of sec. 90 of the Constitution.

It follows that, as the Act is obnoxious to sec. 92 and therefore invalid, the demurrer should be overruled.

Demurrer overruled.

Solicitors for the plaintiff, *Arthur Robinson & Co.*

Solicitor for the defendant, *H. J. Henchman*, Crown Solicitor for Queensland.

H. D. W.