payment. In this view, I do not find it necessary to express any opinion upon the other matters raised in argument and in the judgment of the Chief Justice.

The appeal should be dismissed.

Appeal dismissed with costs.

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MARSHALL v. CITY MUTUAL LIFE ASSURANCE SOCIETY LTD.

Solicitors for the appellant, *Lempriere, Abbott & Cornish.*

Solicitor for the respondent, *Irvine D. Wald.*

C. C. B.

[HIGH COURT OF AUSTRALIA.]

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

AND

THE STATE OF QUEENSLAND AND OTHERS DEFENDANTS.

[No. 2.]

Constitutional Law—State legislation—Infringement of Federal Constitution—Severability—Motor Spirit Vendors Act 1933 (*Q.*) (24 *Geo. V. No.* 11).

The High Court having held upon demurrer that the *Motor Spirit Vendors Act* 1933 (Q.) infringed sec. 92 of the Constitution and, to the extent to which it did so, was invalid (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland, ante,* p. 108):

Held, by *Gavan Duffy* C.J., *Rich, Dixon, Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), upon the trial of the action, which was referred to the Full Court, that, as framed, the Act was not severable and was therefore wholly invalid.

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MELBOURNE, *Oct.* 16, 17, 1934; *Mar.* 11, 1935.

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

ACTION referred to Full Court.

The Vacuum Oil Co. Pty. Ltd. brought an action against the State of Queensland, the Attorney-General, the Treasurer and the

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Secretary for Public Works for the State of Queensland claiming (1) a declaration that the *Motor Spirit Vendors Act* 1933 (Q.) was *ultra vires* the Parliament of Queensland and was invalid; (2) 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; (3) an injunction to restrain the defendants and their servants and agents from enforcing or putting into operation the said Act or such part thereof as was *ultra vires*.

The defendants demurred to the statement of claim, but the High Court overruled the demurrer upon the ground that the *Motor Spirit Vendors Act* 1933 (Q.) attempted to impair the freedom of inter-State trade by placing a burden upon importation (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (1), in the report of which, at pp. 109 *et seq.*, the statement of claim is set out). The action was subsequently brought to a hearing upon admissions of fact before *Evatt* J., who referred the matter to the Full Court.

The mutual admissions of fact relied on at the trial were in substance as follows:—

1. The plaintiff is one of several large companies which import into Australia motor spirit as defined in the *Motor Spirit Vendors Act* 1933 of the State of Queensland and distribute and sell such spirit throughout Australia and in particular throughout Queensland.

2. Some of the motor spirit which the plaintiff sells in Queensland is imported by the plaintiff into Queensland direct from overseas for sale in Queensland and some is brought by the plaintiff into Queensland from New South Wales for the same purpose.

3. The motor spirit brought by the plaintiff into Queensland from New South Wales for sale in Queensland is so brought in tins which are filled by the plaintiff in Sydney from the plaintiff's large tanks or containers there situated holding motor spirit imported by the plaintiff into New South Wales direct from overseas for sale in Australia.

4. (*a*) Motor spirit is also imported by companies other than the plaintiff in bulk from overseas into Queensland for sale and distribution therein. (*b*) Large quantities of motor spirit are refined by the

(1) *Ante*, p. 108.

Commonwealth Oil Refineries Ltd. in Victoria from petroleum and are shipped by that company from Victoria to Queensland ports and sold and distributed by the company in Queensland.

5. (*a*) The plaintiff in the course of its business has from time to time in Melbourne signed documents addressed to the Chief Inspector, Commonwealth Stores Supply and Tender Board, Melbourne, in respect of the supply of motor spirit and the Chief Inspector in Melbourne has subsequently signed and forwarded to the plaintiff in Melbourne documents relating thereto. (*b*) Thereafter from time to time orders were given in Queensland by various Commonwealth officers to the plaintiff in Queensland to supply motor spirit under and pursuant to the documents and the plaintiff in Queensland supplied and delivered to Commonwealth departments in Queensland from its stocks of motor spirit in Queensland the motor spirit so ordered at the price provided for in the documents.

A statement of facts agreed upon by the parties also formed part of the case. It was, in substance, as follows :—

1. The company obtains its supplies of motor spirit in bulk from overseas, such motor spirit being transported by tank steamers to Sydney and other main ports of Australia.

2. On arrival at Sydney, the bulk motor spirit is pumped from the tank steamer, through pipe-lines, to the company's shore storage tanks, in which the motor spirit remains under bond until withdrawn for the company's New South Wales' trading requirements.

3. The company pays customs duty on all motor spirit withdrawn from such bonded tanks for such trading requirements.

4. From its storage tanks at Sydney, the company delivers supplies for its New South Wales trade, and also to (*a*) its depots and agents in Northern Queensland ; (*b*) its customers, depots and agents in Pacific Islands, such as New Guinea, Port Moresby and Samarai (Papua), New Caledonia, Solomon Islands, Thursday Island, &c. ; (*c*) its depot and agent in the Northern Territory.

5. The supplies delivered from Sydney to the company's depots and agents in Northern Queensland are shipped in cased tins to the ports of Rockhampton, Mackay, Bowen, Townsville and Cairns, where the motor spirit is, in the cases, or occasionally in the tins without cases, sold and delivered at such ports to the company's

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customers, or is sent to the company's inland depots, from which it is sold and delivered.

6. At Sydney, the company packs motor spirit into tins and cases in large quantities. The company has contracts with tin-makers in Sydney for the twelve months' supply of tins at that port, and also has contracts for the supply of cases.

7. The process of tinning and casing motor spirit at Sydney is continuous, and stocks of cased motor spirit are always maintained in quantities commensurate with the company's cased motor spirit trading requirements, which involve deliveries as aforesaid (*a*) internally in New South Wales; (*b*) to the northern Queensland ports of Rockhampton, Mackay, Bowen, Townsville and Cairns; (*c*) to the Northern Territory; (*d*) to Pacific Islands.

8. The process of filling tins and cases at Sydney is as follows:— Bulk motor spirit is withdrawn from the company's storage tanks, filled into tins, which are then cased at the company's tin and casing plant in Sydney. The case supplies are then transferred to the company's case warehouse at Sydney, and remain there until required for trading requirements, either in New South Wales or elsewhere. The tins and cases are manufactured in Sydney and purchased there by the company.

9. [This paragraph contained a statement showing the volume of the plaintiff's imports of motor spirit into Queensland, from which it appeared that the percentage imported from New South Wales in 1933 was 9.5 per cent, and in 1934 was 5.73 per cent.]

The question which arose for decision was whether, in consequence of the invalid attempt to include motor spirit introduced by the vendor from another State, the statute was wholly bad, or whether it was severable and could be given an operation upon petrol imported direct from overseas.

Wilbur Ham K.C. and *Tait*, for the plaintiff. In view of the decision of the High Court in *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (1), the only question to be decided is the question of the severability of the *Motor Spirit Vendors Act* 1933. The petrol which is refined in Victoria and sent to Queensland for sale is subject to the Act

(1) *Ante*, p. 108.

upon its first sale and consequently the Queensland Act imposes a burden on the sale which is inconsistent with sec. 92. The plaintiff company carries on a trade which is either inter-State or overseas. There is no local trade at all. The Act has been held to be invalid so far as it affects inter-State trade, and, consequently, the companies which have only an inter-State trade are not hit by the Act, but those which have an overseas trade are hit by it. The Act cannot have been intended to have this dual operation and, consequently, the whole Act is invalid. The judgment of this Court delivered in the case on demurrer concludes the matter on the point of law there decided. The very moment the petrol is brought into Queensland the obligation to buy power alcohol attaches and this constitutes an interference with inter-State free trade. The petrol is brought into Queensland to supply orders not yet given, and also to supply standing orders for petrol. There is an inter-State trade quite independent of the movement of goods, the trade being constituted by inter-State contracts (*W. & A. McArthur Ltd.* v. *Queensland* (1)). This amounts to a tax upon the first sale and is an infringement of sec. 92 (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (2)). As to severability of the Act, secs. 3 and 6 are the material provisions. Sec. 3 covers both petrol brought into Queensland from overseas and that which is brought in inter-State. Secs. 3 and 6 contain phrases which impose a burden on inter-State and other trade. If by striking out the offending provision, something ungrammatical is left, or if something entirely different is left, the whole Act must fall. The test of severability was propounded in the United States and was adopted in this Court in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees Association* (3); *Attorney-General for New South Wales* v. *Brewery Employees Union of New South Wales* (*Union Label Case*) (4); *R.* v. *Commonwealth Court of Conciliation and Arbitration* (*Bootmakers' Case*) (5)). If secs. 3 and 6 of the Act

(1) (1920) 28 C.L.R. 530, at pp. 540, 546, 547.
(2) (1926) 38 C.L.R. 408, at p. 439.
(3) (1906) 4 C.L.R. 488, at p. 546.
(4) (1908) 6 C.L.R. 469, at p. 518.
(5) (1910) 11 C.L.R. 1, at pp. 26, 27 and 54.

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go, the whole Act must go as the rest of the Act is merely machinery to enforce secs. 3 and 6. Although in the present case there may be only one sentence and one phrase in each section which offends, if you cut that out there is nothing left.

[STARKE J. referred to *Roughley* v. *New South Wales*; *Ex parte Beavis* (1).]

The burden is upon those who assert the validity of a Commonwealth Act of showing that it was within the competence of the Commonwealth Parliament. If they prove that only part of it is within the power they would not discharge the onus. If the phrases in secs. 3 and 6 cannot stand the whole Act is invalid (*Attorney-General for Manitoba* v. *Attorney-General for Canada* (2); *Owners of S.S. Kalibia* v. *Wilson* (3)). The effect of holding that the legislation is valid would be to differentiate between classes of trade which the Legislature intended to deal with as a whole. The trade in this case may be severable, though the Act is not severable (*Attorney-General for Manitoba* v. *Attorney-General for Canada* (4)). The following authorities deal with the severability of by-laws: *Blackpool Local Board of Health* v. *Bennett* (5); *R.* v. *Company of Fishermen of Faversham* (6); *Maxwell* on *The Interpretation of Statutes*, 7th ed. (1929), p. 256. In this Act you cannot reject the bad and leave anything grammatical at all. If this Act be considered as severable, the result would be to read certain exceptions into the general provisions, and the Courts have uniformly refused to do this as it would amount to legislation and not interpretation. Secs. 3 and 6 are not severable and the rest of the Act is mere machinery to carry out these provisions.

Herring (with him *Robert Menzies*, A.-G. for the Commonwealth), for the defendant. The matter is covered by *Roughley* v. *New South Wales*; *Ex parte Beavis* (7) and *Ex parte Nelson* [*No.* 1] (8). This

(1) (1928) 42 C.L.R. 162, at pp. 206, 207.
(2) (1925) A.C. 561, at p. 568.
(3) (1910) 11 C.L.R. 689, at pp. 698, 699, 709, 713-715.
(4) (1925) A.C., at p. 568.
(5) (1859) 4 H. & N. 127, at p. 138; 157 E.R. 784, at p. 789.
(6) (1799) 8 T.R. 352, at p. 356; 101 E.R. 1429, at p. 1431.
(7) (1928) 42 C.L.R. 162.
(8) (1928) 42 C.L.R. 209.

Act is one in which one provision deals with different kinds of transactions. The test in such a case differs from that where there are different provisions dealing with different matters (*Owners of S.S. Kalibia* v. *Wilson* (1)). The proper way of construing secs. 3 and 6 is to read them down so that there will be no infringement of sec. 92.

[McTiernan J. referred to *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (2).]

In *Roughley* v. *New South Wales* ; *Ex parte Beavis* (3) *Isaacs* C.J. tried to make the tests of severability all fit in with one another. *Macleod* v. *Attorney-General for New South Wales* (4) was not dealing with severability but with construing an Act so as to make it valid rather than invalid.

[Evatt J. referred to *Peanut Board* v. *Rockhampton Harbour Board* (5).]

The Court should uphold the effect of the statute in so far as it affects the foreign trade. In this case the whole Act is good but only applies to goods in a particular sphere. There is no evidence that the inter-State trade has come to an end or that any inter-State trade has been carried on by these companies at all (*Attorney-General for Ontario* v. *Reciprocal Insurers* (6)). The same position obtains here as in that case. The State law remains operative save in so far as it is controlled by sec. 92. Here is an Act which is perfectly good so far as it applies to some of the persons to whom it is intended to apply. Either *Macleod* v. *Attorney-General for New South Wales* (4) applies, or the Act is valid so far as it applies to importers from overseas.

Wilbur Ham K.C., in reply. The Act cannot be read down. That is concluded by this case on the hearing of the demurrer and *Macleod* v. *Attorney- General for New South Wales* (4).

Cur. adv. vult.

(1) (1910) 11 C.L.R., at p. 697.
(2) (1926) 38 C.L.R. 408, at p. 430.
(3) (1928) 42 C.L.R., at pp. 185-191.
(4) (1891) A.C. 455.
(5) (1933) 48 C.L.R. 266, at p. 268 .
(6) (1924) A.C. 328, at pp. 344, 345.

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Mar. 11.

The following written judgments were delivered :—

GAVAN DUFFY C.J., EVATT AND MCTIERNAN JJ. This is the trial of the action the main legal question in which has already been determined by this Court upon demurrer (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (1)). Upon the demurrer it was held by the majority of the Court that the *Motor Spirit Vendors Act* 1933 of the State of Queensland offended against sec. 92 of the Commonwealth Constitution inasmuch as it required the importer and first vendor of motor spirit introduced into Queensland from the State of New South Wales for the purpose of marketing in the latter State, not only to take out a licence under sec. 3 of the Act but also, under sec. 6 thereof, to purchase and pay at the prescribed price for a quantity of power alcohol measured by a percentage of the total motor spirit sold by the licensee during the currency of his licence. The Queensland Act proceeded upon the assumption, held by this Court to be erroneous, that so long as, at the time of sale, motor spirit was situate in Queensland, the latter State could impose taxes upon or restrict the Queensland sales of the spirit without infringing sec. 92 of the Constitution. The Court's view was that, in the circumstances set out in the statement of claim and demurred to, the first sale of such of the plaintiff's motor spirit as had been introduced into that State from New South Wales, was covered by the protection of sec. 92 and the latter section was infringed when the Queensland Parliament compelled the first seller to purchase power alcohol as a condition of his right to sell the motor spirit within Queensland.

The action now stands for trial. The inter-State trade originally described in par. 11 of the statement of claim is now admitted to have existed (see mutual admissions of fact, pars. 2 and 3, statement of facts, pars. 4 and 5). It would appear from par. 9 of the statement of facts that in the year 1933, 9.5 per cent of the plaintiff's imports of motor spirit into Queensland were from the State of New South Wales and in 1934 the percentage was 5.73.

The plaintiff also contended that the course of business described in par. 12 of the statement of claim and also referred to in par. 5 of the mutual admissions of fact, was itself protected by sec. 92 of the Constitution. The essence of this part of the plaintiff's business

(1) *Ante*, p. 108.

is that the plaintiff company makes an offer in Melbourne to supply its customers with motor spirit in accordance with orders subsequently given by the customers at various centres throughout Australia. Later, the orders are given in Queensland by the customers to the plaintiff and the plaintiff in Queensland supplies and delivers to the customer from its stocks in Queensland and at the price stated in the tender and agreement, the quantity of motor spirit ordered.

Now, except for the original agreement in pursuance of which the later orders are given, the whole of such transactions take place within the State of Queensland. No part of the business so conducted necessarily requires the transport of a single gallon of motor spirit from one State of the Commonwealth into another. That being so, *McArthur's Case* (1) requires the conclusion that sec. 92 does not operate to protect the trade in question. In the latter case the then plaintiff company's trade in relation to Queensland comprised four types of transactions set out in pars. 8 to 11 respectively of the statement of claim (2). The plaintiff succeeded only as to the fourth method of business and failed as to the first three (3). The first three methods comprised the making of contracts for the sale of goods " which neither by the expressed terms of the contract nor by its implications are necessarily deliverable from any State but Queensland " (4). The only method of sale held protected was that which required inter-State transport of the very goods sold (4).

Therefore so far as the business described in par. 12 of the statement of claim is concerned we are of opinion that the plaintiff makes out no case of any infringement of sec. 92 of the Constitution.

A further question which was raised during the argument of the demurrer was whether the trade between New South Wales and Queensland in motor spirit might not be regarded as portion of the trade between Queensland and overseas countries from which the spirit was derived. This part of the case has not been separately argued or considered. In our opinion (as stated by *Evatt* J. in *Vacuum Oil Co.'s Case* (5)), it should be regarded as covered by *McArthur's Case* (1). Most of the goods referred to in that case

(1) (1920) 28 C.L.R. 530.
(2) (1920) 28 C.L.R., at pp. 532-533.
(3) (1920) 28 C.L.R., at pp. 560, 570.
(4) (1920) 28 C.L.R., at p. 560.
(5) *Ante*, p. 139.

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had been imported from overseas so that the warehouse of the then plaintiff in Sydney must have been regarded as the commencing point of an inter-State trade. It does not follow that the plaintiff company will be able to avoid the operation of such an Act as the *Motor Spirit Vendors Act* merely by diverting its oil tankers to Sydney so as to secure constitutional immunity under sec. 92. All the circumstances would require examination in order to determine whether what was being done was a real or pretended trade and commerce among the States.

That leaves us with the main question to determine. The plaintiff argued that, as the Queensland Act is inconsistent with sec. 92 of the Constitution in that a definite portion of the trade of the plaintiffs and other like importers is unlawfully hindered, the whole Act is rendered invalid. The contention of the defendants is that it is possible to separate the invalid part of the statute from that which is valid and the latter should be deemed good and effective.

The principle applicable to the case is not in any doubt, whatever difficulty there may be in its application. As *Isaacs* J. said in *Roughley's Case* (1) :—

> "The test stated as above obviously means that if on a proper construction of the State Act the Legislature has restricted the two classes of trade acts, inter-State and intra-State, independently and separately, so that it intended the one to stand whether the other stood or not, the intra-State restrictions can operate. But if dependent or conditional as the restrictions must be if bound up in the one word or expression, that is, by necessary implication, so that the restrictions cannot be separated in the expression of the legislative will, the whole enactment must fall."

Later his Honor said, after referring to certain decisions :

> "If, therefore, having reached that point, I found lawful and unlawful subjects wrapped up in the same undistinguishable expression, I should conform to the principle laid down, not only by other British Courts of great eminence, but also by the supreme tribunal—for us—of the Empire" (2).

The question is one of construction and it is necessary to determine whether, having regard to the legislative scheme, the Queensland Parliament can be assumed to have intended to make the Act applicable only to those persons and sales which are not entitled to the special protection of sec. 92 of the Constitution. There is nothing in the Act referring to the Commonwealth Constitution or sec. 92

(1) (1928) 42 C.L.R., at p. 187. (2) (1928) 42 C.L.R., at p. 190.

thereof from which the inference can be drawn that the Parliament intended the Act to have a residual application if it were held that certain transactions could not be dealt with owing to the operation of sec. 92. We are therefore driven to examine the scheme of the Act. Its feature is contained in sec. 6, whereby the holder of a licence is required to purchase and pay for a quantity of power alcohol and that quantity is ascertained by reference to a percentage of " every one hundred gallons of motor spirit sold by him " during the currency of the licence. Sec. 6 further provides that, in calculating the number of gallons of motor spirit sold by the licensee, there shall be included only those sales in respect of which a licence is required to be held by him under sec. 3. But this does not mean that inter-State sales are or may be excluded. On the contrary, the reference back to sec. 3 shows that those sales must be included because although constituting part of the business of inter-State marketing, the spirit disposed of is " for delivery in Queensland " and is " at the time of such sale . . . situate in Queensland " (sec. 3). Further, although sec. 3 requires a licence to be taken out by the vendor of motor spirit, it also provides that the person purchasing the motor spirit from the licensee is deemed to have complied with the Act upon proof that his vendor is licensed under its provisions.

It is clear from these closely interwoven provisions that the Act is aimed at the importer (and the first seller) of motor spirit introduced into Queensland for sale and is not aimed at persons purchasing from such importer. Upon the importer and upon him alone is thrown the statutory obligation to purchase power alcohol, and that obligation is measured, not by the use of any phrase which will enable inter-State sales to be removed from the calculation, but by reference to a totality of sales which necessarily includes sales in the course of trade and commerce among the States.

It is quite correct to say that the Legislature of Queensland could have (and has subsequently) used phraseology which would enable the Act to operate in respect of those transactions which are not protected by sec. 92 of the Constitution. But, in the statute as framed, sales which may lawfully be regulated, as well as sales which are not, are so wrapped up together in the statutory scheme that

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they " cannot be separated in the expression of the legislative will " and the result of attempting to apply the Act only to intra-State transactions would be to destroy what *McTiernan* J. described as " the balance which sec. 6 intended to establish between the amount of power alcohol and motor spirit marketed in Queensland " (1).

It is always possible for a State Parliament, by using appropriate language, to ensure that although a portion of the operation of its legislation may be defeated by sec. 92, that shall not prejudice the operation of the residue of the Act. But in the present case such language has not been used, so that the whole enactment must fall.

In our opinion there should be a declaration that until the passing of the recent amendment the whole Act was invalid.

RICH J. This matter first came before the Court on demurrer, when it was decided that the burden imposed by the Act fell upon inter-State commerce and was in contravention of sec. 92 of the Constitution. This decision was given upon the argument of a demurrer and on that occasion the question did not arise whether the Queensland statute was wholly bad or whether it was severable. Subsequently the action was heard upon admissions of fact and was referred by *Evatt* J. to the Full Court. These facts proved the allegations contained in par. 2 of the statement of claim that some of the motor spirit which the plaintiff sells in Queensland is imported by the plaintiff into Queensland direct from overseas for sale in Queensland and some is brought by the plaintiff into Queensland from New South Wales for the same purpose. The facts also prove that the motor spirit was not imported into Queensland through New South Wales " by a continuous and unbroken course of transportation from overseas." The question of severability thus falls to be decided.

The statute does not merely provide machinery for regulating sales in Queensland but imposes on all motor spirit the burden of purchasing a quantity of power alcohol directly proportionate to the amount of motor spirit sold, and in order to carry this scheme out a system of licensing is prescribed. There is nothing in the statute to suggest that the Legislature contemplated the

(1) *Ante*, p. 140.

exclusion from this burden of motor spirit imported from other States. It contains nothing to distinguish or separate those matters which are within the power of the Legislature from those which are outside its competence. It is impossible, in my opinion, to unravel the provisions of the statute, which are interwoven in such a way as to embody a scheme which is uniform, general and comprehensive in its application (*In re The Initiative and Referendum Act* (1)). If its operation were limited to petrol not introduced from other States it would produce different commercial and economic results and have a different effect. The woof of invalid provisions is so woven with the warp of valid provisions that it is impossible to unravel the threads. The statute cannot, I think, be construed so as to operate only upon petrol imported directed from overseas and should be declared to be invalid.

STARKE J. This Court has already determined that the *Motor Spirit Vendors Act* 1933 of Queensland is invalid in so far as it hinders or interferes with inter-State trade (*Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (2)). It is now contended that the Act is wholly invalid because the provisions of the Act are so connected together that it is impossible to give effect to them in part, or, in other words, so far as they affect the domestic or home trade of Queensland. I am unable to agree with the contention, for the reasons stated in *W. & A. McArthur Ltd.* v. *Queensland* (3), and particularly for those stated by me in *Roughley* v. *New South Wales* ; *Ex parte Beavis* (4). The invalidity of the Act, in so far as it affects the domestic trade of Queensland, depends upon the intent of the Queensland Parliament as gathered from the language of its own Act, and in no wise depends upon any provision of the Constitution, such as sec. 92 or sec. 109. There is nothing in the Act which leads me so to construe it as making its efficacy, as to the home trade of Queensland, depend upon its efficacy as to the inter-State trade. The *Motor Spirit Vendors Act Amendment Act* of 1934 (No. 35) is confirmatory of the opinion I have expressed on both aspects of the present case.

(1) (1919) A.C. 935, at p. 944.
(2) *Ante*, p. 108.
(3) (1920) 28 C.L.R., at p. 559.
(4) (1928) 42 C.L.R., at pp. 206-208.

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DIXON J. After the decision of this Court overruling the State of Queensland's demurrer to the plaintiff's statement of claim upon the ground that the *Motor Spirit Vendors Act* 1933 attempted to impair the freedom of inter-State trade by placing a burden upon importation (1), the action was brought to a hearing before *Evatt* J. upon admissions of fact. He has referred it to the Full Court. It appears that, although much the greater proportion of motor spirit consumed in Queensland is directly imported from overseas, yet a substantial trade is done in sending petrol from other States in tins and cases there manufactured and the plaintiff has an important share in this trade. The plaintiff thus has made out the allegations in its pleading from which it appeared that the plaintiff conducted a trade in petrol imported from New South Wales into Queensland for sale, a trade which we held could not be affected by the *Motor Spirit Vendors Act* 1933. Further, the plaintiff has negatived the possibility that the petrol so imported came through New South Wales into Queensland by a continuous and unbroken course of transportation from overseas, a course which might not, perhaps, be considered to involve inter-State trade. The plaintiff seeks relief against the application of the Queensland statute to any part of its trade, oversea as well as inter-State. Upon the present occasion, therefore, the question does arise whether, in consequence of the invalid attempt to include motor spirit introduced by the vendor from another State, the statute is wholly bad, or whether it is severable and can be given an operation upon petrol imported direct from overseas.

The enactment embodies a plan evidently closely considered and carefully worked out. The trade in motor spirit is treated uniformly and all motor spirit is required to bear the burden of the purchase of a proportionate amount of power alcohol. In order that all motor spirit may do so, every vendor of that commodity must obtain a licence, and, during its currency, purchase power alcohol to an amount bearing the prescribed proportion to the motor spirit he sells unless he acquires the motor spirit from or under a vendor who is himself licensed. This means that the first person to sell motor spirit after it reaches Queensland must be licensed. Unless he has

(1) *Ante*, p. 108.

failed to comply with that requirement, the buyer from him need not be licensed, and, unless both have failed to obtain licences, the next buyer of that motor spirit need not be licensed, and so on with successive buyers. It is apparent that this scheme assumes both that petrol coming to Queensland must go through the course it prescribes and that, under the machinery of the statute and the regulations made under it, all petrol will be traceable through successive sales. Motor spirit from vendors who import it from other States cannot be excluded from the operation of the statute without producing very important effects upon the practical application of the scheme. In the first place, such petrol will escape the burden intended to be imposed on all that is distributed in Queensland, and traders in petrol will be treated differentially and not uniformly. In the second place, if the attempt to require the first vendor of petrol from another State to obtain a licence is void, it seems a necessary consequence that sub-purchasers should also be free, because in respect of successive purchasers of a particular consignment of petrol the legislative requirement is not independent and severable. In the third place, the presence in the market of petrol outside the course of dealing prescribed by the statute and regulations would be productive of much difficulty in administering the provisions under which the distribution of petrol is checked. These considerations are material in determining whether the enactment is severable. The principles upon which that question must be decided appear to me to be well settled. Sec. 92 of the Constitution is a restraint upon the power of the States. One of its operations is to prevent the continuance under sec. 107 of the power of the Parliament of a Colony to restrict the freedom of inter-State trade, a power which by sec. 92 is, within the meaning of sec. 107, withdrawn from the Parliament of the State. State legislation which attempts to restrict the freedom of trade, commerce and intercourse among the States is simply *ultra vires*. When provisions of a statute extend beyond the powers of the legislature, the question whether it is wholly void or operates upon so much of the subject matter with which it deals as lies within those powers, depends altogether upon the interpretation of the statute itself. It must be examined to see if an intention appears of providing for

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the matters found to be outside the legislature's powers independently of the matters found to be within its powers. The statute will not operate upon the matters within the powers of the legislature unless it is capable of applying to them in the same way and with the same consequences to the persons and things affected. It is necessary that the legislation should be intended to operate distributively. Further, neither in the purpose disclosed by the enactment, the means adopted for carrying out the purpose, nor the manner in which the statute is expressed, must there appear reason for supposing that the legislature meant to deal with the matter as an indivisible whole. If these conditions are fulfilled, so much of the statute as does not exceed the powers of the legislature should receive the force of law. The requirement cannot be satisfied where conditions, qualifications and compensations exist in or extend into the invalid portion, but, nevertheless, relate to provisions in the remainder of the enactment, or where, under a single description, a uniform general rule is prescribed governing persons or transactions partly within and partly without the legislative power so that limitations and exceptions must be notionally inserted to reduce it to a lawful operation. " Such a result could only be accomplished by introducing qualifying phrases, indeed, by rewriting the clause and transforming it into one to which the legislature has not given its assent " (per *Duff* J., in delivering the judgment of the Privy Council in *Attorney-General for Ontario* v. *Reciprocal Insurers* (1), cited by *Isaacs* J. in *Roughley* v. *New South Wales* ; *Ex parte Beavis* (2), where, at pp. 185-190, the authorities are collected and the principles are discussed).

The present case appears to me to be one in which the enactment should not be considered severable. As in the case of the *Owners of S.S. Kalibia* v. *Wilson* (3), it expresses under a single description a uniform rule for a class which extends beyond its powers. There is no reason to suppose that uniformity of treatment of the whole class did not enter into the determination of the legislative will. The scheme would have a different operation if the Act were separated and received a divisible application. Further, the working

(1) (1924) A.C. 328, at p. 346. (2) (1928) 42 C.L.R. 162.
(3) (1910) 11 C.L.R. 689.

of the plan adopted for carrying out its purpose would be dislocated and rendered both different and more difficult, if not altogether ineffective.

For these reasons I think the plaintiff was at the time of the institution of the proceedings entitled to relief against the operation of the whole Act. Apart from the *Motor Spirit Vendors Amendment Act* of 1934, which was assented to on 12th December 1934, after the argument, there should, in my opinion, be a declaration that the *Motor Spirit Vendors Act* 1933 is invalid and inoperative. The parties have not directed our attention to the Act of 1934 and presumably desire us to deliver judgment independently of it. But I think we should qualify the declaration by referring to it. An appropriate declaration is that, up to the passing of the *Motor Spirit Vendors Amendment Act* of 1934, the *Motor Spirit Vendors Act* of 1933 was invalid and altogether inoperative.

Judgment for plaintiff with costs. Declare that, up to the passing of the Motor Spirit Vendors Amendment Act of 1934, *the Motor Spirit Vendors Act of* 1933 *passed by the Parliament of Queensland was invalid and altogether inoperative.*

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

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

H. D. W.