[HIGH COURT OF AUSTRALIA.]

BROWNS TRANSPORT PROPRIETARY LIMITED . . . . . } PLAINTIFF;

AND

KROPP . . . . . DEFENDANT.

DOWNS TRANSPORT PROPRIETARY LIMITED . . . . . } PLAINTIFF;

AND

KROPP . . . . . DEFENDANT.

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MELBOURNE, *Oct.* 7, 8;

SYDNEY, *Nov.* 14.

Dixon C.J., McTiernan, Fullagar, Kitto, Taylor and Windeyer JJ.

Constitutional Law (Cth.)—Duty of excise—Meaning—State statute prohibiting use of vehicle on roads for carriage of passengers or goods—Exemption in favour of vehicles licensed under statute—Provision for payment of licensing fee—Which, inter alia, might be fixed at amount per cent of gross revenue derived from licensed service—Whether licensing fee so fixed a duty of excise—The Constitution (63 & 64 *Vict. c.* 12) *s.* 90—*The State Transport Facilities Acts* 1946 *to* 1955 (*Q.*), *s.* 35 (2) (*ii*).

Section 23 of *The State Transport Facilities Acts* 1946 *to* 1955 (Q.) prohibits generally the use of any vehicle at any time on any road for the carriage of passengers or goods unless they are being carried under and in accordance with a provision of Pt. III of the Act. Section 24 (25) makes lawful the use of a vehicle licensed under the Act. Section 35 (1) provides that a licensing fee of the amount or at the rate determined by the Commissioner of Transport shall be payable by every licensee and s. 35 (2) provides that the licensing fee " shall, in the discretion of the Commissioner, be (i) an amount fixed by the Commissioner or (ii) an amount per centum as fixed by the Commissioner of the gross revenue derived from the licensed service, or (iii) . . . ".

Held, that, while a fee fixed under s. 35 (2) (ii) was a tax, it was not a tax " upon " or " in respect of " or " in relation to " goods so as to be a duty of excise within s. 90 of the Constitution.

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BROWNS TRANSPORT PTY. LTD. v. KROPP.

CASE STATED.

On 13th January 1958 Browns Transport Pty. Ltd. and Downs Transport Pty. Ltd. each commenced an action in the Supreme Court of Queensland against Norman Eggert Kropp, the Deputy Commissioner of Transport under *The State Transport Facilities Acts* 1946 *to* 1955 (Q.). In each case the plaintiff alleged that a condition of a licence issued to it under the said Acts and cancelled by the defendant was void as imposing a duty of excise. The condition in each case was that the plaintiff pay a licensing fee of twenty per cent of its gross revenue derived from carrying on the service authorised by the licence. The defendant having in each case demurred to the plaintiff's allegation, the High Court, on 21st April 1958, made an order in each case removing so much of the cause into the High Court as involved the question whether the condition was void as imposing a duty of excise.

On 31st July 1958 the parties in both actions pursuant to O. 35 of the *High Court Rules* concurred in stating a special case for the opinion of the Full Court of the High Court substantially as follows—

1. The above-named plaintiff Browns Transport Pty. Ltd. is a company incorporated in the State of Queensland and having its registered office at 13 Railway Street Toowoomba in the said State.

2. The above-named plaintiff Downs Transport Pty. Ltd. is a company incorporated in the State of Queensland and having its registered office at Primary Building Creek Street Brisbane in the said State.

3. The above-named defendant is the Deputy Commissioner for Transport appointed under and pursuant to *The State Transport Facilities Acts* 1946 *to* 1955 (Q.).

4. Each plaintiff is a carrier of goods by road for reward.

5. License no. 1087 issued under the provisions of *The State Transport Facilities Acts* 1946 to 1955 of which the plaintiff Browns Transport Pty. Ltd. became the holder on 18th December 1956 authorised the said plaintiff to operate a service for the carriage of goods between Brisbane and Biddeston and Toowoomba and Warwick (all of which places are within the State of Queensland) by certain approved routes.

6. License no. 1206 issued under the provisions of *The State Transport Facilities Acts* 1946 *to* 1955 of which the plaintiff Downs Transport Pty. Ltd. became the holder on 1st October 1948 authorised the said plaintiff to operate a service for the carriage of goods between the local authority area of Brisbane and Toowoomba; Toowoomba and Warwick; the local authority area of Brisbane and Gatton; the local authority area of Brisbane and Warwick via

Cunningham's Gap (all of which places are within the State of Queensland) by certain approved routes.

7. Each of the plaintiffs in operating its said service on many occasions carries goods from the premises of the consignor to the premises of the consignee.

8. (a) The said license of Downs Transport Pty. Ltd. so far as the same is material is in the words following that is to say :—"This license is issued by the Commissioner for Transport to the licensee hereinafter described and is in all respects subject to the provisions of ' The State Transport Facilities Act of 1946 ' and all regulations from time to time made thereunder and to the terms and condition hereinafter contained . . . Condition 17. FEE : The licensing fee payable in respect of this license shall be an amount calculated at the rate of twenty per centum (20%) of the gross revenue derived by the licensee from carrying on the service authorised by this license and such licensing fee shall be due and payable at the office of the Commissioner for Transport, Brisbane in respect of each and every calander month not later than the Twenty-eighth day of the calendar month then next immediately following Condition 20. FREIGHTS : The licensee shall charge for the carriage of goods carried by him in carrying on the said service—(i) Where the goods are carried from a place in or adjacent to which there is a railway station to a place in or adjacent to which there is a railway station a freight not less than the freight then payable under the Railway by-laws for the carriage of goods of the same class between such railway stations. (ii) Where the goods are carried from one place to another place and there is not a railway station in or adjacent to both or either of such places—(a) If the service authorised by this license is the service for the carriage of goods between two places which are connected by the railways of the Queensland Government Railways a freight not less than that proportion of the freight then payable under the Railway by-laws for the carriage of goods of the same class between the terminal points of the said service as the road distance the goods are carried bears to the road distance between such terminal points. (b) If the service authorised by this license is the service for the carriage of goods between two places which are not connected by the railways of the Queensland Government Railways a freight not less than the freight for the carriage of goods of that class as set out on the sheet attached hereto marked ' APPROVED SCALE OF FREIGHTS '. For the purpose of this clause the area of any city or town shall be deemed to be a place and the principal railway station in or adjacent to such area at which goods are normally loaded for carriage on the railway between the

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terminal points of the said service shall be deemed to be the railway station in or adjacent to such place to which this clause applies and the term 'terminal points' means the places between which the service for the carriage of goods is authorised by this license. For the purpose of this clause in ascertaining the freight then payable under the Railway by-laws any deductions in freight made in pursuance of s. 108 of *The Railways Acts* 1914 *to* 1946 or any special reduction made under cl. 59 of Railway by-law no. 474 (or under any clause hereafter made in addition to or in substitution therefor) shall not be taken into account."

(b) The said license of Browns Transport Pty. Ltd. so far as the same is material is in the same terms save and except that condition 17 reads as follows:—"Condition 17. FEE: The licensing fee payable in respect to this license shall be the amount of twenty per centum (20%) of the gross revenue derived by the licensee from carrying on the service authorised by this license and such licensing fee shall be due and payable at the office of the Commissioner for Transport, Brisbane, in respect of each and every calendar month not later than the Twenty-first day of the calendar month then next immediately following."

9. Each plaintiff since it became the holder of its said license has carried on the said respective service and pursuant to condition no. 17 of its said license has paid in respect of each month to the Commissioner of Transport twenty per cent of its gross revenue derived in that month from carrying on the said service.

10. The said gross revenue of each plaintiff consists and has at all material times consisted exclusively of freight charged by each plaintiff to members of the public for the carriage of goods carried by such plaintiff in carrying on its said service. The defendant does not admit the relevance of any particular method of charge that the plaintiffs may adopt but submits that the relevant matter is the construction of the words of each license.

11. and 12. [Here were set out the total amounts paid by each plaintiff under the said condition 17 in respect of each of the months January to December 1957.]

14. It has been for some time and is the present intention of each plaintiff if permitted by law so to do in most cases to carry goods at freights lower than those chargeable under the said by-laws.

15. [Here was set out a classification of goods carried by the respective plaintiffs between Brisbane and Toowoomba under their said licenses in the month of December 1957 which was stated to be a typical period.]

16. In most instances of primary produce being consigned from Toowoomba to Brisbane freight is payable by the consignor who is usually the producer but who is occasionally a purchaser from the producer. In most instances of primary produce being consigned from Brisbane to Toowoomba freight is paid by the consignee who may also be the consignor. Usually in the case of primary produce the producer does not pass on the freight though to carry on his business economically his returns must in a general sense cover his expenses including freight paid by him.

17. In the case of most other goods freight is usually paid by the consignee who may also be the consignor and who is usually either the consumer or user of the goods or a retailer or other distributor who sells or supplies goods to consumers or users. In many cases the burden of the said freight may be borne by the ultimate consumers or users in the same sense and manner as any other increase in or addition to costs is frequently passed on to purchasers or consumers of goods or users of a service.

In some cases the matter of the passing on of such freight is affected by the whole system of marketing under which prices are frequently influenced by competition and under which on occasions goods are sold at a loss and under which some goods are sold at standard prices throughout the State of Queensland or other area. On occasions perishable goods on which freight has been paid do not reach the market or the consumer.

18. The said levy payable under condition no. 17 is payable as a condition of the license and not in respect of any service or benefit directly provided for the licensee or consumer of the goods.

19. The said levy is paid into the consolidated revenue fund of the State of Queensland and is not reserved for or devoted to any special purpose whether associated with the carriage of goods by road or of any other nature. Disbursements from that fund do provide benefits in the nature of road construction and repairs.

20. During the currency of the respective licenses each licensee in fact enjoyed the benefits provided by the operation of *The State Transport Facilities Acts* 1946 *to* 1955 in that the only lawful competition which each licensee experienced from road transport carriers was from such carriers as had been issued with licenses or permits under the provisions of the said Acts and such carriers as enjoyed the protection afforded to them by the Commonwealth Constitution.

21. Apart from payments of the said levy each of the plaintiffs is liable to pay :—(a) Registration fees under *The Main Roads Acts* 1920 *to* 1952 (Q.) in respect of each vehicle used in carrying on their

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said respective services which said fees in the case of the plaintiff Browns Transport Pty. Ltd. vary between £47 0s. 0d. per annum and £129 16s. 6d. per annum per vehicle and in the case of the plaintiff Downs Transport Pty. Ltd. average approximately £40 0s. 0d. per annum per vehicle; (b) Fees for inspection of vehicles under *The Inspection of Machinery Acts* 1951 *to* 1954 (Q.). Such fees are 10s. 0d. per vehicle for each inspection. Inspections are normally made each half-year; (c) The cost of number plates issued to it by the Department of Transport under *The State Transport Facilities Acts* 1946 *to* 1955 (Q.). The cost of number plates is 10s. 0d. each; (d) Contributions under *The Roads (Contribution to Maintenance) Act of* 1957 (Q.). Contributions made under *The Roads (Contribution to Maintenance) Act of* 1957 have up to the present been allowed as a set-off against the fees payable by licensees under *The State Transport Facilities Acts* 1946 *to* 1955. Payments made in respect of (a) and (d) of this paragraph are completely devoted to the construction and maintenance of roads whilst the payments in respect of (b) and (c) do not exceed the costs of the services provided in relation thereto.

22. Certain holders of licenses under *The State Transport Facilities Acts* 1946 *to* 1955 being airline operators (but not in fact the plaintiffs) without objection from the Commissioner for Transport show in their dockets or invoices for fares or freight as a separate charge the levy under the conditions of their licenses some of which contain a provision that the amount of State license fees may be surcharged.

23. It is agreed by the parties that the word "levy" as used herein is a neutral word.

24. The parties agree that the facts stated in pars. 5, 6, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 20, 21 and 22 are admitted for the purposes of this special case and not otherwise.

25. The parties do not admit the relevance of any fact set out herein. In particular the plaintiffs do not admit the relevance of the facts set out in pars. 7 and 20 herein and the defendant does not admit the relevance of the facts set out in pars. 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 21 and 22 herein.

26. The question for the opinion of the Full Court of the High Court is as follows:—

Whether a levy made by or under condition no. 17 aforesaid amounts to an attempt to impose a duty of excise contrary to the provisions of the Commonwealth Constitution.

H. T. Gibbs Q.C. (with him *H. Matthews*), for the plaintiff Browns Transport Pty. Ltd. The levy of a percentage of the gross revenue

derived from the licensed service which is made as a condition of the licence is a duty of excise. Such a duty, under s. 90 of the Constitution, includes a duty which is imposed in respect of goods and which is an indirect tax. [He referred to *Peterswald* v. *Bartley* (1); *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (2); *John Fairfax & Sons Ltd. and Smith's Newspapers Ltd.* v. *State of New South Wales* (3); *Crothers* v. *Sheil* (4); *Hartley* v. *Walsh* (5); *Hopper* v. *Egg and Egg Pulp Marketing Board (Vict.)* (6); *Vacuum Oil Co. Pty. Ltd.* v. *State of Queensland* (7); *Attorney-General for N.S.W.* v. *Homebush Flour Mills Ltd.* (8); *Matthews* v. *Chicory Marketing Board (Vict.)* (9); *Parton* v. *Milk Board (Vict.)* (10); *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (11); *Hughes & Vale Pty. Ltd.* v. *State of New South Wales* (12).] The distinction between a direct and an indirect tax has been considered in *R.* v. *Caledonian Collieries* (13); *Attorney-General for British Columbia* v. *Kingcome Navigation Co. Ltd.* (14); *Atlantic Smoke Shops Ltd.* v. *Conlon* (15). These cases illustrate that if the general tendency is to pass the tax on it is an indirect tax, whether or not in all cases it will be passed on. Moreover in the first-named case their Lordships considered that the general tendency of a tax on gross revenue was that the tax would be passed on. That the exaction is a duty of excise is further borne out by the condition of the licence that where goods are carried in competition with the railways the freight shall not be less than the railway freight would be. Many railway freights are not based on the nature of the produce but on some consideration of policy. Thus under Queensland Railway by-law no. 668, jam not the produce of Australia is carried at £10 2s. 9d. per ton, jam which is the produce of Australia is carried at £5 17s. 0d. per ton and jam manufactured in Queensland and being carried to ports is carried at £4 12s. 9d. per ton.

Sir *Garfield Barwick* Q.C. (with him *H. Matthews*) for the plaintiff Downs Transport Pty. Ltd. The word " excise ", is of uncertain

(1) (1904) 1 C.L.R. 497, at pp. 506-511.
(2) (1926) 38 C.L.R. 408, at pp. 419, 420, 430, 435, 437-439.
(3) (1927) 39 C.L.R. 139, at pp. 144-146.
(4) (1933) 49 C.L.R. 399, at p. 408.
(5) (1937) 57 C.L.R. 372.
(6) (1939) 61 C.L.R. 665.
(7) (1934) 51 C.L.R. 108, at pp. 120, 123-125.
(8) (1937) 56 C.L.R. 390, at pp. 401, 403, 409 et seq.
(9) (1938) 60 C.L.R. 263, at pp. 281, 284, 286, 289, 290, 292-295, 297-299, 302, 304.
(10) (1949) 80 C.L.R. 229, at pp. 251, 252, 258, 259, 260, 261.
(11) (1935) 52 C.L.R. 189, at pp. 201, 202, 214.
(12) (1953) 87 C.L.R. 49, at p. 75.
(13) (1928) A.C. 358, at pp. 361, 362.
(14) (1934) A.C. 45, at pp. 55-59.
(15) (1943) A.C. 550, at pp. 563, 564.

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meaning. The meaning of an inland tax, as in England, has never been accepted in Australia. An inland tax on local manufacture in England is said in some of the writings to have been designed as a means of compensating the revenue for the loss of customs which local manufacture represented. In s. 90 there was no idea of compensating the Commonwealth for loss of customs revenue because goods were locally manufactured and not imported. There would have been no need to make the power exclusive if all it had been sought to do was to compensate the Commonwealth for loss of customs, because under a general power of taxation it would have been able to gather tax on local manufacture and make up what it was losing by the non-import of locally manufactured goods. Moreover a limitation on the meaning of excise to colonial experience has never been accepted. If one puts those various possible meanings on one side, the way is open to give effect to the emphasis which is in the Constitution. There are three elements in that emphasis. One is the correlative nature of customs and excise in relation to fiscal policy, not in relation to the gathering of money, but in relation to the use of taxation as an instrument of policy. The second is that there is bracketed with customs and excise, bounties, which also relate to fiscal policy. The third is the exclusiveness of the power over all three given to the Commonwealth. These considerations yield the notion that behind the word "excise" is the policy of having one single fiscal policy in relation to dealings in commodities, from the point of time of importation or manufacture down to consumption. The course of this Court's decisions has been to depart from the initial narrow denotation of excise in *Peterswald* v. *Bartley* (1). It has been increasingly to emphasise the correlative nature of customs and excise and the broad policy behind the grant of the exclusive power. The majority of judges have rejected the notion that the tax, to be an excise, must be related to home manufacture or production. Lastly, the course of decision has been to conclude that an excise includes an indirect tax in relation to commodities. There may be a federal policy, raising a customs barrier to a certain point, with a view to stimulating home manufacture of some item. If a State can raise the price of an article to the consumer over a certain point, it can really reverse that policy on another product. It is the price to the consumer that will be the factor that will alter or impinge upon the federal policy if home manufacture is not the focal point of excise, the notions of production and manufacture are irrelevant and one must look towards consumption, the emphasis being on whether the tax has

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

a bearing on the price to the consumer. The word "indirect" imports the notion of a tax which, in its nature, is susceptible of being passed on. The words "in relation to commodities" are satisfied by acts which affect commodities. The tax will be in relation to the commodity if it is in respect of an act or dealing with a commodity, which act or dealing tends to affect the ultimate price to the consumer in a specific way. The delivery of goods by a seller to a buyer is an act with respect to the commodities the cost of which affects the ultimate price to the consumer. A tax levied upon the seller and quantified by reference to the volume or value of goods delivered by him would clearly be a tax in relation to the commodity and an excise. If it was quantified by reference to the cost of delivery of the goods to the buyer the position would be no different. The indirect tax on the carrier here is in a like position to a tax on the seller quantified on his freight. Suppose that some of the goods carried are not in the course of commerce at all, or that some are being carried for buyer consumers. That fact does not, it is submitted, detract from my previous submissions as to the nature of the tax. The tax can be tested as if the plaintiffs were being taxed in respect of freight received from sellers or people sending goods to market. The exaction is a tax and not merely a fee for services performed or value given. It goes into consolidated revenue. There is nothing promised or given in return for it other than that it is made a condition of the person's ability to carry on a service. That is not a *quid pro quo* in the sense that it would cease to be a tax. It is indirect in that it is susceptible of being passed on as an element or an item.

A. L. Bennett Q.C. (with him *M. B. Hoare*) for the defendant in each case. Even if the licence fees are regarded as taxes the tax relates to services and is not a tax on goods. The expression "on goods" has a definite significance meaning direct, in respect of goods, not related to goods in some remote way. An excise must be directly referrable to some commercial transaction in goods. It must, it is submitted, be on one or other of the following: the manufacture or production of goods; or the disposal or sale of those goods. It is a tax particularly referrable to the ownership of goods falling on an owner although he may pass it on to a subsequent owner. Alternatively an excise duty must bear on manufacture whether immediately or at some subsequent stage in dealings with the goods. The licence fees relating to the services of carriage are quite unrelated to manufacture. The charges here are in the nature of personal licence fees. The legislation and the scheme

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embodied in it shows that stress is laid on the identity and the personality of the licensee in each particular case ; and the fees are bound up with the whole scheme of regulating the conditions of this trade and with the legislative scheme of conferring upon licensees certain exclusive rights to use Crown roads . An excise must be an indirect tax. But not all indirect taxes are excise duties. The authorities, do not use the expression " it is intended and expected that the charge be passed on ". That, it is submitted, is an intention and expectation to be inferred from the legislation, not from the economic condition which, of course, tends to result in costs of all kinds being passed on to the ultimate consumer. Nor does it apply to the hope of the vendor to recoup those charges from his purchaser. [He was stopped.]

DIXON C.J. :—We will answer the question in the special case in the negative. We will deliver our reasons for judgment at a later date.

NOV. 14.

THE COURT delivered the following written judgment :—

Two actions were commenced in the Supreme Court of Queensland on 13th January 1958. The plaintiff in the one case is Browns Transport Pty. Ltd., a company incorporated in Queensland, and in the other is Downs Transport Pty. Ltd., which is also a company incorporated in Queensland. The defendant in each case is the Commissioner for Transport appointed under *The State Transport Facilities Acts* 1946 *to* 1955 (Q.). In each case the plaintiff claimed relief in respect of the cancellation by the defendant of a licence, which had been issued to it under the Queensland statute, to carry goods by road for reward. The statement of claim in each case contained an allegation (the relevance of which is not obvious) that one of the conditions of the licence had the effect of imposing a duty or excise and was therefore void by reason of s. 90 of the Constitution. To this allegation the defendant demurrred. Subsequently the Attorney-General of the State of Queensland applied to this Court for an order under s. 40 of the *Judiciary Act* 1903-1955 (Cth.), and on 21st April 1958 this Court made an order in each case " that so much of the cause be removed into the High Court of Australia as involves the question whether the levy made by or under condition 17 of the license issued under the provisions of *The State Transport Facilities Acts* 1946 *to* 1955 to the plaintiff amounts to an attempt to impose a duty of excise contrary to s. 90 of the Constitution ". Later the parties agreed on a special case to be stated in both cases for the opinion of the Full

Court of this Court. It is this case stated that is now before this Court. The question asked by the case is " whether a levy made by or under condition 17 amounts to an attempt to impose a duty of excise contrary to the provisions of the Commonwealth Constitution ".

The Queensland statute is a statute *in pari materia* with the *State Transport (Co-ordination) Act* (N.S.W.) and the *Transport Regulation Act* (Vict.), but it is framed on a slightly different scheme. Section 23, which is in Pt. III of the Act, prohibits generally the use of any vehicle at any time on any road for the carriage of passengers or goods unless those passengers or goods are being carried under and in accordance with a provision of Pt. III of the Act. Section 24 then sets out in numbered paragraphs a long list of vehicles which may be lawfully used in certain ways and for certain purposes. The only material paragraph is par. (25) which reads :—" Any vehicle approved for use in carrying on a licensed service at any time when such vehicle is carrying passengers, or goods, or both passengers and goods under and in accordance with the terms and conditions of the license for such service" .—

Part IV of the Act deals with the licensing of vehicles for the carriage of goods or passengers or both. The Commissioner of Transport is given an absolute discretion as to the grant or refusal of licences, and (subject to regulations to be made under the Act) he may impose such conditions as he determines on the grant of a licence. Section 35 (1) provides that " a licensing fee of the amount or at the rate determined by the Commissioner shall be payable by every licensee ". Section 35 (2) deals with the amount of the licensing fee. It is not necessary to set it out in full. It provides that the licensing fee " shall, in the discretion of the Commissioner, be (i) an amount fixed by the Commissioner, or (ii) an amount per centum as fixed by the Commissioner of the gross revenue derived from the licensed service, or (iii) the sum of the amounts fixed by the Commissioner for each and every vehicle used for the purpose of carrying on the licensed service," or an amount or amounts calculated on a passenger-mile or ton-mile basis. The commissioner may fix the total licensing fee payable by a licensee partly on one of the specified bases and partly on another.

Each of the plaintiffs is a company incorporated in Queensland, and carries on business in that State as a carrier of goods by road for reward. Each is (or was until the cancellation abovementioned) the holder of a licence under the Act authorising it to carry goods for reward to and from specified places in Queesland. The plaintiff Browns Transport Pty. Ltd. has (or had) held such a licence since

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18th December 1956. The plaintiff Downs Transport Pty. Ltd. has (or had) held such a licence since 1st October 1948., Each licence is subject to a number of conditions, one of which provides for the licensing fee which is to be payable under s. 35 of the Act. The fee is fixed on the basis authorised by s. 35 (2) (ii). The relevant condition in the case of Browns Transport reads :—" The licensing fee payable in respect to this license shall be the amount of twenty per centum (20%) of the gross revenue derived by the licensee from carrying on the service authorised by this license, and such licensing fee shall be due and payable at the office of the Commissioner for Transport, Brisbane, in respect of each and every calender month not later than the 21st day of the calender month then next immediately following." The relevant condition in the case of Downs Transport is not in quite identical terms, but the percentage rate is the same and there is no material difference between the two conditions. It should be mentioned that the licences also contain conditions the general object of which is to prevent the licensee, where his service might compete with a railway, from charging lower freight rates than those charged by the railway.

The gross revenue of each plaintiff consists exclusively of freight charged by it to members of the public for the carriage of goods. Large sums have been paid by each plaintiff under the condition which imposes the licensing fee, the amount paid by each in the year 1957 being in the vicinity of £30,000. All fees paid by licensees are paid into the consolidated revenue of the State of Queensland and are not reserved or earmarked by law for any special purpose.

The case stated refers to a number of other matters, but these have not seemed to us to be relevant to the question at issue. That question is, as has been said, whether the imposition of licensing fees under s. 35 (2) (ii) in relation to a licence for the carriage of goods amounts to the imposition of a duty of excise within the meaning of s. 90 of the Constitution, which denies to the States the power to impose such duties. It seems obvious that, in the case of a licence to carry passengers, the imposition of a licence fee calculated in accordance with s. 35 (2) (ii) could not possibly be said to be the imposition of a duty of excise, but it is contended that a fee so calculated in the case of a licence to carry goods does amount to such a duty. This contention cannot, in our opinion, be supported.

The definition of a duty of excise propounded by *Griffith* C.J. in *Peterswald* v. *Bartley* (1), has been found in several later cases to be somewhat too narrow. But the decision in that case has never been doubted, and it has never been doubted that the term " duties of

(1) (1904) 1 C.L.R. at p. 509.

excise " in s. 90 of the Constitution does not include many classes of impost which in England have been commonly described by that name: see, e.g., *Matthews* v. *Chicory Marketing Board* (*Vict.*) (1), (per *Latham* C.J.), and see also the general discussion of the history and scope of the term by *Dixon* J. (2) in the same case. If an exaction is to be classed as a duty of excise, it must, of course, be a tax. Its essential distinguishing feature is that it is a tax imposed " upon " or " in respect of " or " in relation to " goods: *Matthews* v. *Chicory Marketing Board* (*Vict.*) (3). It would perhaps be going too far to say that it is an essential element of a duty of excise that it should be an " indirect " tax. But a duty of excise will generally be an indirect tax, and, if a tax appears on its face to possess that character it will generally be because it is a tax upon goods rather than a tax upon persons. " . . . a direct tax is one that is demanded from the very person who it is desired and intended should pay it. An indirect tax is one which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another ": *Attorney-General for Manitoba* v. *Attorney-General for Canada* (4), per Lord *Haldane* (5).

In the present case it is clear enough that the impost is a tax. " It is a compulsory exaction of money by a public authority for public purposes, enforceable at law, and is not a payment for services rendered ": *Matthews* v. *Chicory Marketing Board* (6) As to whether it is a direct tax or an indirect tax, it is to be observed that no reason appears on the face of the Act or in the case stated for supposing that there was any expectation or intention that the licensee should indemnify himself at the expense of his customers. While the licensing fee would no doubt normally enter, like any other outgoing, into the calculation of fares and freights to be charged, this does not mean that it is expected to be " passed on " as such. But it is unnecessary to consider this matter, because whether it is expected to be " passed on " or not, it is very clear, in our opinion, that the tax is not a tax " upon " goods, or " in respect of " goods, or " in relation to " goods.

Here the exaction is imposed without mention of, and without regard to, any commodity or class of commodities. The person taxed is not taxed by reference to, or by reason of, any relation between himself and any commodity as producer, manufacturer processor, seller or purchaser. The taxes which s. 35 (2) authorises, calculated on one or more of a variety of bases, are payable whether

(1) (1938) 60 C.L.R., at pp. 276, 277.
(2) (1938) 60 C.L.R., at pp. 292-299.
(3) (1938) 60 C.L.R. at p. 304.
(4) (1925) A.C. 561.
(5) (1925) A.C., at p. 566.
(6) (1938) 60 C.L.R., at p. 276.

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the person taxed carries goods or passengers, and, if he carries goods, whatever may be the nature of the goods carried. The exaction is in truth, as it purports to be, simply a fee payable as a condition of a right to carry on a business. "A tax imposed upon a person filling a particular description or engaged in a given pursuit does not amount to an excise": *Matthews* v. *Chicory Marketing Board* (1): cf. *Parton* v. *Milk Board (Vict.)* (2).

The question asked by the case stated should be answered:—No.

Question in the special case answered No. The plaintiffs to pay the cost of the special case.

Solicitors for each of the plaintiffs, *Hobbs Bernays & McDonald*, Brisbane.

Solicitor for the defendant in each case, *L. E. Skinner*, Crown Solicitor for the State of Queensland.

R. D. B.

(1) (1938) 60 C.L.R., at p. 300.

(2) (1949) 80 C.L.R., at p. 259.