~~C.D.1.G.6.~~ 26,1961

IN THE PRIVY COUNCIL No. 7 of 1961

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

DENNIS HOTELS PROPRIETARY LIMITED (Plaintiff) ... ... Appellant

- and -

THE STATE OF VICTORIA and HENRY EDWARD BOLTE (Defendants) Respondents

- and -

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA Intervener

CASE FOR THE RESPONDENTS

RECORD

INTRODUCTION

1. This is an Appeal brought by Special Leave granted by Her Majesty by Order in Council dated the 3rd August 1960 from a judgment of the Full Court of the High Court of Australia dated the 26th February 1960 which allowed a demurrer by the Respondents (Defendants) to the Statement of Claim of the Appellants (Plaintiffs) so far as it sought a declaration that Section 19(1)(a) of the Licensing Act 1928 (Victoria), as amended, was invalid as purporting to impose a duty of excise, and the recovery of £12,702.15. 0d. being the fee paid by the Plaintiffs for the victualler's licence held by them for the year 1958. p.95 p.94

2. In the High Court the basis of the Appellants' claim was that the fees payable for a victualler's licence under Section 19(1)(a) of the Licensing Act 1928 (hereafter referred to as "the State Act") and also the fees payable for a temporary victualler's licence under Section 19(1)(b) of p.5

the State Act were duties of excise; that the power to impose a duty of excise was granted exclusively to the Parliament of the Commonwealth by Section 90 of the Constitution; and that, accordingly, Sections 19(1)(a) and (b) were invalid.

p. 7 The Appellants claimed a declaration to this effect, an injunction restraining Respondents from imposing and collecting the said fees, and payment of £12,702.15.0d. and £68.6.6d. being the amounts which they had paid for the renewal of their victualler's licence and for the issue of temporary victualler's licences, respectively, in 1958.

3. Section 90 of the Constitution provides, so far as material -

> "On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.
> ....."

p.10 4. The Respondents demurred to the whole of the Statement of Claim on the ground that it disclosed no cause of action, each of the impugned sub-sections of the State Act being a valid law of the Parliament of the State and neither of them imposing or purporting to impose a duty of excise contrary to Section 90 of the Constitution.

5. The Full High Court by a majority (Fullagar, Kitto, Taylor and Menzies JJ.; Dixon C.J., McTiernan and Windeyer JJ. dissenting) allowed the Respondents' demurrer so far as it related to Section 19(1)(a) of the State Act, but by a majority (Dixon C.J., McTiernan, Menzies and Windeyer JJ.; Fullagar, Kitto and Taylor JJ. dissenting) overruled it so far as it related to Section 19(1)(b). The Respondents have not sought leave to appeal from the judgment of the High Court so far as it relates to Sec. 19(1)(b).

PRELIMINARY OBJECTION

p.96 6. The Order in Council by which the Appellants were granted leave to enter and prosecute this Appeal provided that at the hearing thereof the plea that the appeal does not lie without a Certificate of the High Court may be raised as a preliminary point. The Appellants have not sought

from the High Court a certificate that a question as to the validity of Section 19(1)(a) of the State Act is one which ought to be determined by Her Majesty in Council and the Respondents submit that under Section 74 of the Constitution Act 1900 (hereafter referred to as "the Constitution") this appeal does not lie in the absence of such a Certificate.

7. Section 74 is in the following terms:-

> "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.
>
> The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.
>
> Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave to appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure."

The Respondents submit that a question as to the limits inter se of the Constitutional powers of the Commonwealth and those of a State (hereafter called "an inter se question") must arise whenever it has to be determined, as in the present proceedings, whether a State law is beyond the limit of State legislative power because it is within the limit of Commonwealth legislative power made exclusive by Section 90 of the Constitution, or, alternatively stated, whether State legislative power to enact the

impugned law has been excluded by Commonwealth legislative power. Such a determination involves a question whether the legislative power of the State to pass the impugned law is excluded by the legislative power of the Commonwealth - the point of such exclusion must establish a dividing line or a mutual relation between the respective legislative powers and thus provide a limit inter se.

CONSTITUTIONAL PLACE AND PURPOSE OF SECTION 74

8. The significance and effect of Section 74 only appears from a consideration of the constitutional framework in which it is to be found. The Constitution distributes legislative powers between Commonwealth and States in the following manner:-

(i) Commonwealth legislative powers are specifically enumerated and granted by various provisions of the instrument but for the most part they are contained in Sections 51 and 52.

Section 51 provides that -

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to" the subject-matters specified in the following forty paragraphs. Some of these, such as those referred to in paragraphs (iv), (xxiv), (xxv), (xxx), (xxxi), (xxxvi) and (xxxviii) are powers, which from their nature or terms are not apt to be exercised by the States, but subject to that qualification the grant of power to the Commonwealth with respect to the matters enumerated in Section 51 does not ipso facto withdraw legislative power with regard thereto from the States.

(ii) Section 52 provides that -

"The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to -

(i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes;

(ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth;

(iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament."

The only "Other matters" within Section 52(iii) expressly declared by the Constitution to be within the exclusive power of the Commonwealth Parliament are those specified in Section 90. It is that Section therefor which defines the ambit of Section 52(iii). Before the happening of the event which brought Section 90 into operation, namely the imposition of uniform duties of customs, the power of the Commonwealth Parliament to impose duties of excise was derived from the taxation power contained in Section 51 (ii), but it is apparent that as and from the happening of that event Section 52 (iii) became the source of a grant of exclusive legislative power to the Commonwealth Parliament to impose duties of excise.

(iii) The power of the Parliaments of the States to make laws with respect to matters affecting the peace, order and good government of their respective States is derived from their own constitutions and preserved by Section 107 of the Commonwealth Constitution which provides that -

"Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

Under their powers the states may legislate with respect to any matters included in Section 51 so far as they are apt for the exercise of power by the Parliament of a State but may not legislate with respect to matters over which

exclusive power is granted to the Commonwealth nor may they legislate in respect of matters withdrawn by the Constitution from the States.

In the case of concurrent powers (those which may be exercised alike by Commonwealth and States) the supremacy of Commonwealth legislation is achieved by Section 109 which provides that -

"Where a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

(iv) The Constitution expressly prohibits the exercise of certain powers by the States (for example Section 115), by the Commonwealth (for example Section 116) and by the States and the Commonwealth alike (for example Section 92) The existence of such a provision as Section 92 means that although the Constitution distributes power between Commonwealth and States, it does not distribute the totality of Governmental powers between them.

9. The distribution of powers under the Constitution in the manner above described means that there are two distinct qualities of legislative power vested in the Commonwealth, namely, exclusive and concurrent power, the latter by virtue of Section 109 being potentially paramount. There are likewise two distinct qualities of legislative power remaining with the States, namely, concurrent power which by virtue of Section 109 is potentially subordinate, and absolute power. State absolute power relates to those matters over which the Commonwealth has no power, and is therefore in no way subject to Commonwealth supremacy.

10. Within this Constitutional framework of distribution of powers Section 74 has a special part to play. It is directly concerned with the resolution of conflicts between Federal and State power arising from that distribution. Its purpose was expressed in the following terms by Dixon J. in Australian National Airways Pty. Ltd., v. The Commonwealth (No.2) 71 C.L.R. 115 at page 123.

"The Court has always treated Section 74 as

placing upon it the general responsibility for resolving conflicts between Federal and State power and as meaning that unless there is something exceptional about a question as to the limits inter se which it has decided, the Court's interpretation of the Constitution shall be final."

In Nelungaloo Pty. Ltd. v. The Commonwealth 85 C.L.R. 545 at page 573 Dixon J. stated -

"The basal purpose of Section 74 and of the principles upon which this Court has proceeded has been to confine the final decision of the characteristically Federal questions described by Section 74 to a jurisdiction exercised within the Federal system by a Court to which the problems and special conceptions of federalism must become very familiar, not without the hope, perhaps, that thus a body of constitutional doctrine might be developed."

In the Commonwealth of Australia v. The Bank of New South Wales (1950) A.C. 235 at page 293 Their Lordships speaking of Section 74 said "In the establishment of the Federal Constitution of the Commonwealth of Australia it was a matter of high policy to reserve for the jurisdiction of her own High Court the solution of those inter se questions which were of such vital importance to Commonwealth and States alike".

THE SCOPE OF SECTION 74

11. Section 74 applies to any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States. Thus any question "about", or "concerning", or "relating to" such limits will fall within the ambit of the Section. Moreover, the Section in terms relates to powers generally and is not confined to any particular class or kind of power. It matters not, therefore, whether the relevant powers in question in any particular case are exclusive or concurrent, absolute or potentially subordinate, or whether they are legislative, executive or judicial powers. The Section applies to conflicts between any of such powers to whatever class they may belong. See Ex parte Nelson 42 C.L.R. 258 at pages 271 and 272 per Dixon J.

It is submitted that the only qualification on the operation of the Section is that the question must relate to the limits inter se, that is between or among themselves, of the respective constitutional powers. This means that a question relating to the constitutional limits simpliciter of the power of the Commonwealth, are of the States, or of both is not within the Section.

It is for this reason that it is now well established that a decision upon whether the Commonwealth or a State has legislated on a matter withdrawn from both by Section 92, is not a decision upon a question as to the limits inter se of the constitutional powers of Commonwealth and State. Such cases raise questions as to limits of power; but they do not raise questions as to limits inter se. See Commonwealth of Australia v. The Bank of New South Wales (1950) A.C.235 at page 292 and Nelungaloo Pty. Ltd. v. The Commonwealth (1951) A.C.34 at page 48.

In such cases there is no conflict between respective constitutional powers. Neither Commonwealth nor State has power, and if power is held to be inhibited it is simply because of the constitutional withdrawal of power by Section 92. Such cases are the antitheses of cases such as the present where, if the State power is inhibited, it is because of conflict with a relevant legislative power of the Commonwealth. In such cases the ultimate issue is whether the power of the State is excluded by the relevant power of the Commonwealth. The question for determination is the point at which the quality of exclusiveness conferred by Section 90 attaches to the Commonwealth power because at that point the power of the State is excluded altogether. See D'Emden v. Pedder 1 C.L.R. 91 at page 111. In other words, such a case as the present is directly concerned with the relationship between relevant Commonwealth and State legislative powers. It is a conflict of power case. In Section 92 cases no such relationship is involved and it is accordingly respectfully submitted that decisions in those cases are irrelevant to the determination of the present issue and provide a false analogy for its determination.

12. Apart from decisions relating to Section 92, it has been held with respect to Section 74 -

(a) that a decision as to the extent of a

Commonwealth concurrent legislative power under Section 51 involves an inter se question. This is established by a line of authority commencing with Jones v. The Commonwealth Court of Conciliation and Arbitration (1917) A.C.528 and concluding with Nelungaloo Proprietary Limited v. The Commonwealth (1951) A.C.34 and Grace Bros. Pty. Ltd., v. The Commonwealth (1951) A.C.53;

(b) that a decision as to inconsistency of State and Commonwealth law under Section 109 does not involve an inter se question as that Section relates to conflicts not between powers but between laws made under powers. See O'Sullivan v. Noarlunga Meat Ltd. (1957) A.C. page 1;

(c) that a decision as to the validity under one power of a Commonwealth law that could be validly made under some other Commonwealth power does not involve an inter se question. See Attorney-General for Australia v. The Queen and The Boilermakers Society of Australia (1957) A.C.288;

(d) that a decision whether the executive power of a State to import goods is restricted by the Commonwealth exclusive legislative power over customs does involve an inter se question. See Attorney-General for New South Wales v. Collector of Customs for New South Wales (1909) A.C.345.

13. By reason of the distribution by the Constitution of constitutional power between Commonwealth and States, and by reason of the principles enunciated in the decisions referred to above, it is submitted that an inter se question within the meaning of Section 74 arises -

(a) whenever the Constitution itself creates or defines and grants to the Commonwealth a particular class or kind of legislative power, and a question arises whether an exercise of State legislative power has infringed or invaded the boundary of the Commonwealth power so created or defined; or

(b) whenever a question arises whether the relationship between Commonwealth and State legislative power is such that a determination of the extent or supremacy of one of them involves a complementary ascertainment of the existence, content, or efficacy of the other. When State power is in question it is immaterial whether its existence is dependent upon either the extent or quality of the relevant Commonwealth power.

EXCISE POWER CONSTRUED AS INDEPENDANT HEAD OF POWER

14. By Section 52(iii) read in conjunction with Section 90 the Constitution has created or defined and granted to the Commonwealth a particular class or kind og legislative power, namely an exclusive power to make laws with respect to, inter alia, duties of excise. The appellants contend that the impugned law of the State imposes a duty of excise, and that the exercise of the legislative power of the State to enact the same transgresses the boundary of power so conferred upon or granted to the Commonwealth and is, therefore, excluded. This contention must involve in its determination some definition of the expression "duty of excise", and the decision of the question must distinctively mark a boundary between State legislative power and Commonwealth exclusive legislative power over excise. The reason for this was, it is submitted, clearly stated by Evatt J. in Hopper v. The Egg and Egg Pulp Marketing Board 61 C.L.R. 665 at page 681 and 682 as follows:-

"The question whether a law passed by a State legislature imposes a duty of excise, however the question is answered, is a question as to the limits inter se of the constitutional powers of State and Commonwealth. For the question can be answered adversely to the State only by asserting that, however far the area of power of State powers is co-extensive with Commonwealth powers in relation to taxation, the boundary of the State area of power falls far short of the power sought to be exercised; and that at the crucial point the Commonwealth has excluded the State from such exercise.

The decision of the Court in the particular case may not mark out the precise limits of State power in relation to taxation; so that it will not completely define the boundary between State and Commonwealth power. But the decision of the

Court must -

(1) impliedly at least, lay down some definition of a "duty of excise", and in that sense assist in the fixation of a boundary at which both State power ends and Commonwealth exclusive power begins; and

(2) assert the absence (or presence) of power in the State to pass the particular legislation.

In (2) it will be held that the power claimed by the State to pass the particular enactment crosses or does not cross the boundary separating State powers from Commonwealth exclusive powers. In respect of both (1) and (2) the decision will of necessity be a decision "as to" the limits inter se of the Commonwealth and State powers.

Where the power of the State is affirmed the Court holds that it has not transgressed the limits where Commonwealth exclusive power begins. But, in order so to hold, it is necessary to determine a question "as to" such limits. Equally, if the State power is denied"

In Nelungaloo Pty. Ltd., v. The Commonwealth 85 C.L.R. 545 at page 562 Dixon J. said -

"The expression 'question ..... as to the limits inter se of the Constitutional powers of the Commonwealth and of any State or States' clearly includes within its denotation cases where the definition of a Federal power involves as a necessary consequence a proposition forming part of the definition of State power. When the question relates to powers which are both legislative, this is best seen where the Constitution is bestowing a power on the Commonwealth Parliament withdraws it completely and absolutely from the Parliaments of the States. In such case, to affirm that, within a defined area of subject-matter, a legislative power belongs to the Commonwealth is necessarily to deny that within that area any legislative power exists in the States."

In the present case in the High Court Dixon CJ. observed (1960 A.L.R. 129 at p.135 and 136) -

"Section 90 is quite unconcerned with the p.22 l.36

position of the individual It is concerned wholly with the demarcation of authority between Commonwealth and State to tax commodities."

The Respondents respectfully adopt these statements of principle and submit that they precisely cover the present issue. In particular and in the first place, the Constitution by Sections 52(iii) and 90 in bestowing a power over excise on the Commonwealth Parliament has withdrawn it completely and absolutely from the Parliaments of the States, and in the second place, it is precisely because the question here is wholly one of demarcation between the Commonwealth and State legislative authority, the decision of which must fix the boundary between Commonwealth exclusive legislative power over excise and State legislative power, that it is submitted that it raises an inter se question.

INTER SE PRINCIPLE DERIVED FROM DECISIONS ON CONCURRENT POWERS.

15. In describing the application of Section 74 in relation to questions dealing with the extent of Commonwealth concurrent legislative powers Dixon J. pointed out in a much quoted passage in Ex parte Nelson (No.2) 42 C.L.R. 258 at page 272 -

"The essential feature in all these instances is a mutuality in the relation of the constitutional powers; a reciprocal effect in the determination or ascertainment of the extent or the constitutional supremacy of either of them." And at page 275 His Honor said that a Section 74 question would only arise if "the relevant powers are so distributed that they have limits inter se, a common boundary or some other mutual relation which causes the determination of the extent or supremacy of one of them to involve a complementary ascertainment of the existence, content, or efficacy of the other."

The reasoning on which was based the conclusion that a question as to the extent of Commonwealth concurrent legislative power raised an inter se point was also explained by Dixon J. in Australian National Airways Pty. Ltd., v. The Commonwealth (No.2) 71 C.L.R.115 at pages 122 and 123 as follows:-

"The settled interpretation of the crucial words of s.74, which are, of course, transcribed in ss.38A and 40A of the Judiciary Act is that they

cover any decision upon the extent of a paramount power of the Commonwealth, paramount over the concurrent powers of the States. The reason is that the advance, by interpretation, of a paramount power of the Commonwealth, would mean that the area of State legislative power which is absolute, would recede, absolute in the sense that its exercise is not liable to be defeated or rendered inoperative by an inconsistent exercise of Commonwealth legislative power. Correspondingly, any reduction of a paramount power of the Commonwealth would mean an increase of the area of State power, the exercise of which is free from possible invalidation by the exercise of Commonwealth power. There is, therefore, a boundary between the paramount legislative power of the Commonwealth and the absolute power of the States, limits inter se ..... not to adopt this interpretation would have been to confine the operation of Section 74 to a very small and insignificant subject-matter. For the only logical alternative would be to treat it as covering the demarcation of the boundary between the exclusive powers of the Commonwealth and the States and perhaps the relations between the constitutional powers of one organ of the Federal system and the immunities of another organ and the exercise of its powers."

This passage was cited with approval by the Privy Council in Nelungaloo v. The Commonwealth (1951) A.C.34 at page 50. It is important to note, as arising from it, two points which have a direct bearing on the present case. First, the inter se relationship or boundary in such cases as between qualities of power. The expressed ground upon which an inter se question is stated to arise is that a boundary is marked out between paramount concurrent Commonwealth power and absolute State power; absolute as contrasted with potentially subordinate State power. That the inter se question in such cases arises in respect of a quality of power was again stated by Dixon J. in Nelungaloo v. The Commonwealth 85 C.L.R. 545 at pages 563 and 564 when he said in explaining why such cases raise inter se questions -

"In the case of Federal legislative powers made paramount in this way by Section 109, to advance or restrict the apparent boundary of the powers by judicial decision is not to diminish

or to enlarge the area of legislative power possessed by the State. It is but to affect the quality, the absolute quality, of State power. For the legislative power retained by the States may be considered as falling into two parts possessing different qualities. The State legislative power, which is concurrent with Federal legislative power, may be described as being by virtue of Section 109 subordinate or conditional. But where there is no paramount concurrent legislative power in the Commonwealth State power is exclusive and absolute. To advance or retract Federal legislative power by interpretation, where by virtue of Section 109 it is a paramount concurrent power is therefore to diminish or enlarge the area of State absolute or exclusive legislative power. There is a common boundary between Federal legislative power and State absolute power and this has been considered to provide a sufficient mutual relationship between the legislative power of the States and that of the Commonwealth to involve the limits inter se of such powers."

Second, it is to be noted that in the case of concurrent Commonwealth legislative powers which raise inter se questions the decision, except in the most limited sense, tells nothing whatever about the ultimate scope or extent of State power. For example: if the question is whether the Commonwealth under Section 51 (xxxi) can compulsorily acquire a particular property on just terms, the decision will say nothing whatever as to the extent of State powers of acquisition, other than the power to acquire the particular property. What makes the question inter se is simply that it marks a boundary between Commonwealth paramount concurrent power and State power having a particular quality, namely absolute power. Moreover it is well established that whether the decision involves the annihilation or impairment of State power is irrelevant and not the test for Section 74 purposes. See Jones v. The Commonwealth Court of Conciliation and Arbitration (1917) A.C.528 at page 532, Nelungaloo Pty. Ltd. v. The Commonwealth (1951) A.C.34 at pages 50 and 51, and Nelungaloo Pty. Ltd. v. The Commonwealth 85 C.L.R. 545 at pages 576 and 598.

16. The foregoing analysis of inter se questions arising in the context of Commonwealth concurrent legislative powers has been developed at some length because it is submitted that it bears

directly on the specific problem in this case. Just as decisions as to the extent of such concurrent powers mark out a boundary or limit of powers inter se expressed in terms of quality, so it is submitted does a decision as to the extent of a Commonwealth exclusive power mark out a similar boundary or limit. To affirm that the State law now impugned imposes a duty of excise, means that the boundary or limit of the area in which Commonwealth power is absolute is extended, and that the boundary or limit of the area of State power, whether absolute or subordinate, is correspondingly retracted. To deny that the State law imposes a duty of excise, means that the boundary or limit of the area in which Commonwealth power is absolute is retracted, and that the boundary or limit of the area of State power, whether absolute or concurrent, is extended. In either event, just as Dixon J., in passages approved by their Lordships, has demonstrated that an inter se question arises in the case of concurrent powers because a boundary expressed in terms of quality is marked out between Commonwealth power and State absolute or exclusive power, so too in this case an inter se question arises because the decision must fix a boundary between State power, whether absolute or subordinate, and Commonwealth exclusive or absolute power. Repeating the words of Dixon J. in Nelungaloo Pty. Ltd. v. The Commonwealth 85 C.L.R. 545 at at page 563 in the context of concurrent powers: "It is but to affect the quality, the absolute quality, of State power" (italics supplied), so by parity of reasoning a decision in this case will define a duty of excise and thus will necessarily affect the quality, the exclusive quality, of Commonwealth power. That the decision may not otherwise annihilate or impair Commonwealth power to tax is no more relevant or the test for Section 74 purposes than was the case with the corresponding State powers in the concurrent power Cases above referred to.

DICTA RELATING TO APPLICATION OF SECTION 74 TO EXCLUSIVE POWERS.

17. It is respectfully acknowledged that these submissions are at variance with certain obiter dicta expressed by their Lordships firstly, in Nelungaloo Pty. Ltd. v. The Commonwealth (1951) A.C.34 at page 48, and repeated in Attorney-General for Australia v. The Queen and The Boilermakers Society of Australia (1957) A.C.288

at page 324. In the first mentioned Case their Lordships, after stating that constitutional prohibitions binding Commonwealth and States alike do not raise inter se questions, said - "Equally when a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits inter se of the powers of the Commonwealth or those of any State, and on this point the reasoning of Dixon J. in Ex parte Nelson (No.2) appears to their Lordships to be conclusive."

Those dicta were accordingly directly attributable to the reasoning of Dixon J. in Ex Parte Nelson (No.2) 42 C.L.R. 258 at page 272, but it is respectfully submitted that what the learned Judge said in that Case does not disclose any expression of opinion on whether an exclusive power gives rise to an inter se question.

Ex parte Nelson was a case arising under Section 92, a case therefore concerned simply with a constitutional prohibition of power, whether that prohibition applied to Commonwealth and States alike or to the States alone. The element which effectively distinguishes it from such a case as the present is that what excludes State power here, if it is excluded, is a relevant power of the Commonwealth, and not, as in Ex parte Nelson a simple constitutional prohibition which did not in itself involve a grant of power to the Commonwealth, nor in the view of Dixon J. call for any decision affecting any such grant of power. This case, therefore, involves, which Ex parte Nelson did not, a relationship between Commonwealth and State power. Such a relationship gives rise to a conflict of powers which cannot appear in cases arising under Section 92. It is accordingly respectfully submitted that Ex parte Nelson affords a false analogy for the determination of Section 74 questions arising in connection with Section 90.

Indeed, in Ex parte Nelson at page 275 Dixon J. himself said:-

"The absence of a mutual, or, indeed, any relation between such a restriction as that contained in Section 92 and the de-limitation of Commonwealth power is characteristic of most constitutional checks and restraints, because they are not designed to accomplish that distribution of powers among the respective governments of the Federal system which gives rise to the questions described by Section 74."

18. It is also submitted that from the earliest days of the Australian Constitution it has been assumed that questions as to the extent or limits of Commonwealth exclusive powers are inter se questions within the meaning of Section 74. In 1909, the Privy Council in Attorney-General for New South Wales v. Collector of Customs for New South Wales (1909) A.C.345 held that an issue as to the limits of Commonwealth exclusive power with respect to duties of customs did raise an inter se question. It has been, and remains, the general view of the writers, that cases of exclusive power raise inter se questions. See, for example, Bailey 1 Res Judicatae 81; Sawer in Essays on the Australian Constitution at pages 88 et seq; Wynes Legislative, Executive and Judicial Powers in Australia (Second Edition) at pages 669 et seq.

19. In Nelungaloo Pty. Ltd. v. The Commonwealth 85 C.L.R. 545, on an application for a certificate, under Section 74, the High Court had occasion to consider what was said by their Lordships about exclusive powers in Nelungaloo Pty. Ltd. v. The Commonwealth (1951) A.C.34. Dixon J. in the High Court said (at pages 573 and 574) -

"Under this head the first matter perhaps to mention is the statement of their Lordships that when a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits inter se of the powers of the Commonwealth and those of any State. It does not appear to be of any relevancy to the present application, whether this states new doctrine or not. It certainly states new doctrine if it means that no question inter se can exist where the legislative power of the Commonwealth over a subject-matter is exclusive up to the exact limits of the power, so that the very boundary line of Federal exclusive legislative power is necessarily the boundary line of State legislative power. Of this a ready example is the Federal power with respect to bounties: s.51(iii) and s.90. Assuming that bounties could not be granted under a power found in ss.81-83 (cf. Attorney-General for Victoria; ex Rel. Dale v. The Commonwealth 71 C.L.R. 237), the definition of a bounty on the production or export of goods marks at once the boundary of State power and Federal power, and in such a case a question where the boundary ran was, it

was considered, the most conspicuous example of a question of the limits inter se of the constitutional powers of State and Commonwealth."

The respondents respectfully adopt the statement of Dixon J. that an exclusive power question may afford the most conspicuous example of an inter se question. To affirm that a particular class of benefit granted to manufacturers of an article is a bounty upon the production of goods and so falls within exclusive Federal legislative power, is necessarily to deny that the States possess any power to give that particular class of benefit to manufacturers. Likewise, to affirm that a duty imposed by a law is a duty of excise and therefore falls within exclusive Federal legislative power, is necessarily to deny that the States possess any power to impose such a duty. In both instances there is thus a mutual relation between the two powers consisting of a common boundary.

20. In Australian National Airways Pty. Ltd. v. The Commonwealth 71 C.L.R.115 at pages 122 and 123 Dixon J. in the passage already cited, pointed out that unless inter se questions could arise in the case of concurrent powers, they would be restricted to the comparatively narrow field of exclusive powers. This passage was approved by the Privy Council in Nelungaloo Pty. Ltd. v. The Commonwealth (1951) A.C.34, and in the same Case in the High Court Dixon J. again asserted very clearly that an inter se question could conspicuously arise in the case of exclusive powers. In O'Sullivan v. Noarlunga Meat Ltd. (1957) A.C.1 at page 25, their Lordships when referring to Dixon J's statement in the Nelungaloo Case in the High Court that the conception of inter se questions which had prevailed in the High Court would not require any "radical" revision in the light of the Privy Council's judgments said -

"With this statement their Lordships are in full agreement except that the word 'radical' suggests an unnecessary qualification: they do not think that any revision is demanded."

Subsequently in The Boilermakers' Case (1957) A.C.288 at page 324 their Lordships once again stated that a question of exclusive powers does not give rise to an inter se question. But it is respectfully submitted, for the reasons stated above, that the case of an exclusive power is the

most conspicuous example, in Dixon J's own words, of a question of the limits inter se of the constitutional powers of State and Commonwealth.

21. The respondents respectfully submit that Dixon J. fell into error in Nelungaloo Pty. Ltd. v. The Commonwealth 85 C.L.R. 545 at page 574, when, following the passage above cited from his judgment, he said -

"But the judgment of the Privy Council may very well refer to another type of exclusive power. If a Federal legislative power is conferred over a subject-matter and the power over part only of the subject matter is made exclusive, then the definition of the exclusive power does not give a common boundary between State power and Federal power. The boundary of Federal legislative power extends beyond the boundary of so much as is exclusive. The boundary of the exclusive power tells you nothing about the extent of the Federal power. It tells you only that within the boundary there is no State power. This is the case with customs and excise (Section 90) which form the exclusive part of the power to make laws with respect to Taxation."

This says, in effect, that whereas a decision as to the limits of the exclusive Commonwealth power with respect to bounties marks out the limits of Commonwealth and of State power for the reasons already stated, a decision as to the definition of a duty of excise, although it draws a line which limits the State's legislative powers with respect to taxation, has no effect on Commonwealth legislative power because the Commonwealth's right to impose taxation is derived from Section 51(ii) of the Constitution and is wider than and includes the excise taxing power.

22. It is respectfully submitted that the attempted distinction is false and should not be followed. In the first place, a study of their Lordships' Judgment in Nelungaloo Pty. Ltd. v. The Commonwealth 1951 A.C.34 gives no support to it. In the second place, there is no demonstrated justification for characterising any specifically granted Commonwealth power as "part of" another power. There is no rule of logic and no definition in the Constitution which

compels adoption of the characterization of "excise taxation" as part of a general taxation power rather than as an independent head of power. Indeed, for the reasons already stated, the constitutional scheme, having regard to Sections 90 and 52(iii), provides for specific exclusive Commonwealth powers with respect to excise taxation, customs taxation, and bounties.

In view of the express provisions of the Constitution, it is submitted that it is proper to regard the power to legislate with respect to duties of excise as standing independently on its own feet, as a separate exclusive Commonwealth power, and if this is so, the reasoning which leads to the conclusion that the definition of a bounty gives rise to an inter se question, applies equally to a case involving the definition of a duty of excise.

23. An additional practical consideration also operates in favour of this result. A national fiscal policy underlies the grant of exclusive power to the Commonwealth with respect to duties of customs and excise and the grant of bounties. This is that the trading policy of the Nation should be exclusively within Commonwealth control and not subject to State interference. Any State action with respect to such matters would impede the execution of this policy, and it would be anomalous to hold that a question as to the definition of one, namely bounties, gives rise to an inter se question, while a question as to the definition of the other two, namely, duties of customs and excise, does not. Having regard to this National fiscal policy, and its bearing on the operation of the Australian Federal system, and having regard to the considerations which give rise to Section 74 that questions characteristic of federation should be decided in the High Court and that that Court should exercise control over appeals from it on such questions, it is submitted that questions as to the definition of duties of customs, excise and of bounties should alike be regarded as inter se questions in so far as they all de-limit boundaries between State power and Commonwealth power in its exclusive aspect or quality.

24. Even if it should be held that, as Dixon CJ. said, an interpretation of an exclusive power of the Commonwealth, which is itself part of a power otherwise concurrent (in this Case, the taxation power, Section 51(ii) decides nothing as to the

boundary of Federal and State powers considered in their entirety yet, as is pointed out by Wynes: Legislative Executive and Judicial Powers in Australia (Second Edition) at page 681 -

"It seems equally true to say that it does say something as to the field within which the State power cannot be exercised and it seems nothing to the point to say that this is irrelevant simply because that field happens to be part of a wider or larger field which but for the exception is common to both. It appears to be straining logic somewhat to say that a determination that a particular State enactment is invalid because it is forbidden to the States expressly as being a matter solely within the power of the Commonwealth, does not affect the constitutional power of the State in relation to the constitutional position of the Commonwealth. Once again the considerations which gave rise to Section 74 should lead to the conclusion that the interpretation of such a power should give rise to an inter se question."

25. In the Respondent's submission, and for the foregoing reasons, this appeal raises an inter se question. In the absence of a certificate from the High Court, the Privy Council has no jurisdiction to entertain the appeal.

SPECIAL MEANING OF EXCISE UNDER COMMONWEALTH CONSTITUTION

26. But if that submission be not accepted the Respondents will submit that the majority of the Justices of the High Court were right in holding that the fee paid by the Appellants for the victuallers' licence granted to them for the year 1958 was not a duty of excise.

27. This submission is based on two grounds which may be summarized as follows:-

(a) A duty of excise within the meaning of the Australian Constitution is limited to a tax imposed on the manufacture or production of goods or imposed as a means of taxing manufacture or production, and the licence fee in issue is not so imposed;

(b) Alternatively, a duty of excise within the meaning of the Constitution is a tax imposed "upon" or "in respect of" or "in relation to" goods in the sense that it is imposed in respect of commercial dealings in the goods, and the licence fee in issue is not so imposed.

28. In characterizing the fee it is necessary in the Respondent's submission to have regard only to the legal operation and effect of the Act, and to disregard the practical, or supposedly practical, economic effects if the Act itself does not operate to tax manufacture or production or actual commercial dealings in the goods. In this regard the Respondents adopt the statement of Latham CJ. in Attorney-General for New South Wales v. Homebush Flour Mills Ltd. 56 C.L.R. 390, at page 398 where he said -

"The validity of what is done is determined not by its actual practical result, but by its legal character. In this Case the validity of the State Act must be determined by what the legislation does as viewed by a lawyer and not by its results, effects or consequences as viewed by a miller. The commercial and fiscal results and consequences of the Act are the same as would follow from an excise duty on flour but the State Parliament is not prohibited by the Federal Constitution from producing certain consequences- it is prohibited only (so far as this Case is concerned) from imposing duties of excise ..... I entirely agree that the decision of this question (whether the State legislation imposes a duty of excise) should depend upon the legal effect or character of the legislation in question and not upon the results which it may happen to produce ..... I do not accept any argument which, ignoring the form of the statute now under consideration, contends that it is invalid because "in substance" it imposes an excise duty for the reason that the practical effect of the legislation is the same as that which would follow from a statute avowedly imposing an excise duty."

LEGAL OPERATION OF VICTORIAN LICENSING ACT

29. The great purpose of the State Act is the regulation and control in the public interest of the liquor trade in the State of Victoria. This will be seen from the provisions of the Licensing Act 1958 which re-enacts with no material

alterations the provisions of the Licensing Act 1928. Section 7 of the Act provides that licences of various descriptions may be granted to sell and dispose of liquor. A licence is defined in Section 3 as either the authority under the Act to sell or dispose of liquor or the document evidencing such authority. Section 80 provides for sittings of the Licensing Court at which applications may be made for the grant or renewal of licences. Section 96 directs the Licensing Court, if it grants an application for the grant or renewal of a licence, to issue a certificate and to cause a duplicate of the certificate to be transmitted to the appropriate public officer. Section 97 provides that the fee payable for the licence shall be paid to that public officer and that on payment the licence shall issue. The various fees payable for licences are prescribed by Section 19, and Section 21 requires applicants for the grant or renewal of licences to furnish particulars to the Licensing Court to enable it to determine the fees payable. The scheme is made complete by the "key" section 154 (as it was described by Menzies J. in Dennis Hotels Pty. Ltd. v. State of Victoria (1960) Argus L.R. 129 at page 157) which prohibits the sale of any liquor otherwise than by, or on behalf of, a licensed person in accordance with the provisions of a licence. See also Fullagar J. in Bergin v. Stack 88 C.L.R. 248 at page 260. p.61

From the foregoing it will be seen that the Licensing Act is a statute concerned with the regulation, control and prohibition of the sale of liquor in the State. It is based upon a discretionary system of licensing to exempt from the general prohibition upon trading in liquor, and the actual and only event that attracts the tax is the issue of the licence. The tax is payable irrespective of any commercial dealings in liquor pursuant to the licence and remains payable even if no such dealings eventuate. It is not properly described as a fiscal statute, and its revenue side is merely an appendage to the discretionary licensing system. The respondents respectfully adopt the words of Taylor J. in Dennis Hotels Pty. Ltd. v. State of Victoria (1960) A.L.R. 129 at 155 when he says that -

"Though a system of licensing may frequently be adopted as a convenient aid to p.57,l.16

the administration of excise laws and the collection of excise duties, this is not the part played by the system of licensing erected by the Licensing Act, for the issue of licences under that Act, is, as already appears, a traditionally-accepted method of regulating a trade which the public interest demands shall be subject to strict supervision. In other words the requirement that liquor shall not be sold or disposed of without a licence appears to be a substantive provision and not merely as an adjunct to a revenue statute."

The fee for the licence is properly described as a fee for "the privilege of carrying on for a limited period a business which would otherwise be unlawful, and of carrying it on free of competition except such as may be offered by other licensees selling liquor at the place to which their licences apply and within the limits of the authority thereby granted" (per Kitto J. at page 145.)

p.39,l.10

The grant of a licence thus confers a valuable, quasi-monopolistic right for which the State may charge a fee. See Peterswald v. Bartley 1 C.L.R. 497 at pages 507 and 510. It is submitted that fees so charged are, in the words of Section 19(1) of the Act, "fees for such licences"; they are fees paid for the acquisition of the right to engage in commercial dealings as distinct from fees imposed upon or in respect of commercial dealings effected under the licence. In short they are fees imposed not on goods but on licences to use the words employed by Kitto J. at page 149.

p.45,l.48

EXCISE AS A TAX ON MANUFACTURE OR PRODUCTION

30. The expression "duties of excise" in Section 90 of the Constitution connotes a tax on the production or manufacture of goods and it is not to be read as covering the wide miscellaneous collection of taxes sometimes known in England as excise duties. The reasons why the expression as used in the Constitution is so limited are threefold. First, Section 93 of the Constitution speaks of "duties of excise paid on goods produced or manufactured in a State", which, it is submitted, is intended to cover all duties of excise and not merely a particular class of duties of excise. Secondly, the expression "duties of excise" is repeatedly used in the Constitution in conjunction with the term "duties of customs" - see Sections 55, 86, 87, 90 and 93. Thus, as

Griffith C.J. said in Peterswald v. Bartley (1904) 1 C.L.R. 497 at page 509, the expression is intended to mean a duty analogous to a customs duty. Thirdly, prior to the establishment of the Commonwealth, the nature of the duties of excise under that name in force in most of the States was a tax upon the production or manufacture of goods.

31. The meaning of the expression "duty of excise" within Section 90 of the Constitution has been considered in a series of cases in the High Court. The first of these was Peterswald v. Bartley 1 C.L.R. 497 in which Griffith C.J. said that there was a broader usage of the word excise in England, but that in Australia the definition of an excise was controlled by the constitutional context. Griffith C.J. at page 509 defined a duty of excise in a famous passage which has been quoted many times -

"It is intended to mean a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured, and not in the sense of a direct or personal tax."

It has been said that this definition has been found to be somewhat too narrow (see Browns Transport Pty. Ltd. v. Kropp 100 C.L.R. 117 at page 128) but it has never since been doubted that the essential feature of a duty of excise is that it is a tax imposed upon, or in respect of, or in relation to goods. The tax, of course, is imposed on a person, but it is upon a person by reference to, or by reason of some relation existing between him and the particular goods (see Browns Transport Pty. Ltd. v. Kropp 100 C.L.R. 117 at page 129; and see per Fullagar J. in Dennis Hotels Pty. Ltd. v. State of Victoria (1960 A.L.R. 129 at page 140. p.31,l.1

It has been stated on many occasions in the High Court that this is the essential characteristic of a duty of excise. For example, in Crothers v. Sheil 49 C.L.R. 399 at page 408 Rich J. said that the deductions could not be a duty of excise because "they do not impose any liability in respect of the ownership, transfer, sale or production of goods." In Hopper v. Egg and Egg Pulp Marketing Board 61 C.L.R. 665 at page 676, Starke J. repeated and applied the words of Rich J. to the facts of that case.

32. Unless, therefore, the tax possesses this characteristic it cannot be a duty of excise. But there is a further question as to the ambit of the proposition that to be a duty of excise, the tax must be imposed upon or in respect of, or in relation to, goods. In Peterswald v. Bartley (supra) Griffith C.J. expressly required that the tax, to constitute a duty of excise, should be on the manufacture or production of goods. In the present case, in the High Court, Fullagar J. adopted this view and said ((1960) A.L.R. 129 at page 141):

p.31,l.40 "After full consideration, and necessarily with the greatest respect for the contrary view, I am of opinion that the answer given in Peterswald v. Bartley supra was right and should be applied in the present case."

The reasons for reaching this conclusion were stated by Fullagar J. at page 141 and it is respectfully submitted that they are correct and should be followed in this case.

33. In Matthews v. Chicory Marketing Board (Victoria) 60 C.L.R. 263, however, Dixon J. propounded a wider view of the scope of a duty of excise. He said at page 304 -

"To be an excise the tax must be levied 'upon goods' but those apparently simple words permit of much flexibility in application. The tax must bear a close relation to the production or manufacture, the sale or the consumption of goods, and must be of such a nature as to affect them as the subjects of manufacture or production or as articles of commerce."

In Parton v. Milk Board (Victoria) 80 C.L.R. 229 at page 261, Dixon J. restated this definition, but excluded from it the possibility that a tax upon consumption might constitute a duty of excise. The other members of the majority in Parton's case, Rich and Williams JJ, said, at page 252, that a duty of excise "must be imposed so as to be a method of taxing the production or manufacture of goods,"but they went on to say"... but the production or manufacture of an article will be taxed whenever a tax is imposed in respect of some dealing with the article by way of sale or distribution at any stage of its existence, provided that it is expected and intended that the taxpayer will not bear the ultimate incidence of

the tax himself but will indemnify himself by passing it on to the purchaser or consumer."

The Respondents submit that this extended view of the nature of a duty of excise, propounded by Dixon J. in Matthews case and by the majority in Parton's case is wrong. It does not accord with the view of the whole Court in Peterswald v. Bartley, supra; nor with the views of Knox CJ., Isaacs, Higgins, Starke and Powers JJ. in Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia (1926) 38 C.L.R. 408; nor with the views of the dissenting minority in Parton's case (Latham C.J. and McTiernan J.). It was rejected by Fullagar J. in the present case (1960 A.L.R. at pages 141 and 143). It was accepted by Taylor J. (at page 153) and by Menzies J. (at page 164) in the present case, because it represented the majority view in Parton's case, but Taylor J.'s acceptance was qualified and Menzies J. said that he would otherwise have had reservations about what he described as "the glosses upon the main proposition."

p.31

p.34

p.53

p.72

The Respondents adopt the reasoning of Fullagar J. (at page 141) and submit that, unless a tax is imposed upon the production or manufacture of goods, or as a means of taxing their production or manufacture, it cannot amount to a duty of excise. In the present case, none of the Justices of the High Court held that the tax was a tax upon production or manufacture or was a means of taxing production or manufacture. Dixon C.J., McTiernan and Windeyer JJ., who dissented, all held that it was a tax upon purchases of liquor. The majority expressly found that it was not a tax upon production or manufacture of liquor (see per Fullagar J. at page 143, per Kitto J. at page 149, per Taylor J. at page 154 and per Menzies J. at page 165).

p.31 et seq.

p.17
p.25
pp.80,81.

p.35
p.45
p.56
p.74

Indeed Kitto, Taylor and Menzies JJ. characterized the tax as one not in respect of commercial dealings in goods, but in respect of a right to engage in commercial dealings. That is to say it is imposed not on goods but on licences.

THE TRUE LEGAL CHARACTER OF THE LICENSED VICTUALLER'S FEE

34. Alternatively, if the correct view be that

a tax may be a duty of excise, although not imposed upon, or as a means of taxing, production or manufacture, provided it is imposed upon a sale or purchase of the goods at any point before sale for consumption, the Respondents submit that Kitto, Taylor and Menzies JJ. were right in holding that Section 19(1)(a) of the State Act did not impose a duty of excise.

35. If the wider definition is adopted, the essential characteristic of a duty of excise is, in the respondents' submission, that it must be imposed upon the taking of some step in a process of producing or distributing goods. "... a tax is not a duty of excise unless the criterion of liability is the taking of a step in a process of bringing goods into existence or to a consumable state, or passing them down a line which reaches from the earliest stage in production to the point
p.37 of receipt by the consumer." (Per Kitto J. at page 144.) The taking of such a step amounts to a commercial dealing with the goods or a commercial transaction in the goods between the taxpayer and someone else, and unless the taxpayer's liability arises by reason of or by reference to some commercial dealing or transaction in the particular goods, it cannot be a duty of excise. It is in this sense that Lord Thankerton in delivering the judgment of the Privy Council in Attorney General for British Columbia v. Kingcome Navigation Co. (1934) A.C.45 at page 59 said -

"Customs and excise duties are, in their essence, trading taxes, and may be said to be more concerned with the commodity in respect of which the taxation is imposed than with the particular person from whom the tax is exacted ... Turning then to the provisions of the Fuel-Oil Act here in question, it is clear that the Act purports to exact the tax from a person who has consumed fuel-oil, the amount of the tax being computed broadly according to the amount consumed. The Act does not relate to any commercial transaction in the commodity between the taxpayer and some one else."

An analysis of the cases reveals that no tax has been held by any judge to be a duty of excise within the meaning of Section 90 unless it has been levied or has been construed as being levied on goods whether in respect of manufacture production, sale or other dealing. See, for example, Commonwealth

of Australia and Commonwealth Oil Refineries Ltd. v. State of South Australia 38 C.L.R.408 (the Petrol Case); John Fairfax & Sons Ltd. v. State of New South Wales 39 C.L.R. 139 (the Newspaper Case); Attorney General for New South Wales v. Homebush Flour Mills Ltd. 56 C.L.R. 390; Matthews v. Chicory Marketing Board (Victoria) 60 C.L.R. 263; Parton v. Milk Board (Victoria) 80 C.L.R. 229. In these cases there were differences of opinion as to whether a duty of excise was imposed, but the decision that such a duty was imposed was predicated upon the discovery of some such commercial dealing with the goods, the subject-matter of the tax.

36. In the present case, the fee payable under Section 19(1)(a) of the State Act is not imposed by reason of or by reference to any commercial dealing in liquor, whether by the applicant for a licence or by anyone else. It is not payable on the sale of any liquor during the currency of the licence: per Kitto J. at page 146, per Taylor J. at page 154-5; per Menzies J. at pages 158 and 165. It is not payable on the purchase of any liquor: per Kitto J. at pages 147 and 149; per Taylor J. at page 155; per Menzies J. at page 165. The event, and the only event, that attracts the fee is the issue of the licence. p.41 p.56 pp.62,73/4 pp.42,45 pp.51,57 pp.73/4

The amount of the fee is calculated by reference to the amount of liquor purchased for the premises in the most recently closed financial year, or in the case of a new licence, by reference to the estimated purchases in the ensuing year. In either case, it is submitted that the standard used is the most equitable way of measuring the value of the right conferred by the licence, but this is quite different from taxing the purchases: per Kitto J. at page 149. His Honour the Chief Justice, at page 131, quoted a single sentence from the Privy Council's judgment in the Kingcome Case, supra, as supporting his view that the licence fees were duties of excise because they were more concerned with the commodity in respect of which the taxation was imposed than with the particular person from whom the tax was exacted. But the Respondents submit that Kitto J. was correct in holding (at pages 148 and 149) that the licence fee is concerned with the taking out or renewing of the licence, and therefore with the person who takes it out or renews it, and is not imposed in respect of any commercial p.45 p.15 pp.44,45

dealings in liquor: the judgment in the Kingcome case, when read as a whole, does not support His Honour the Chief Justice but, on the contrary, is opposed to his view.

The correct conclusion is, it is submitted, that the tax is properly described as a fee exacted in respect of a right to engage in an otherwise prohibited trade; that it is not imposed on commercial dealings in goods but on the right to engage in such commercial dealings.

37. The Respondents respectfully submit that the minority Justices in the High Court disregard the fact that the legal operation of the Act did not impose the fee upon or in respect of commercial dealings in liquor effected pursuant to the authority of a licence, and based their reasoning upon what they conceived to be the practical economic effects of the fee charged for the issue of the licence. The basal premise upon which the minority reasoning is founded is stated by Dixon CJ. at page 130 in the following terms-

p.12. "A careful consideration of the Victorian Licensing law, which is now embodied in the Licensing Act 1958, has made it clear to me that ..... all liquor sold in Victoria must bear a tax of six per cent of its wholesale price or value before it reaches the consumer."

It is respectfully submitted that such premise, and the conclusions based upon it, are unsound. In the first place, it is inaccurate in fact, as it is apparent from the statutory formula for calculating the fee for a victualler's licence that the great bulk of liquor, when purchased by the consumer, could not have entered into the calculation of any fee. For example, the price paid by a licensed victualler for beer sold to a consumer in the month of December 1960 will not have entered into the calculation of any licence fee paid by him unless the beer was purchased by him prior to June 30th 1959. In the second place, McTiernan J. in order to justify his characterization of the fee was impelled to say
p.25 at page 137 that it was payable on the liquor the subject of the purchases which the formula provisions require to be taken into account. Again, it is respectfully submitted that it is apparent that the great bulk of liquor the subject of such purchases would be non-existent at the time when the fee became imposed by the Act. It is therefore submitted that Dixon CJ. wrongly regarded the fee

as imposed on liquor before it reaches the consumer, and that McTiernan J. wrongly regarded it as imposed on liquor purchased, and in most cases received by the consumers, long before the fee became imposed by the Act. p.81,l.37
At page 170 Windeyer J. it is submitted, fell into a similar error by stating that a broad view of the economic consequences of the tax should be taken, and that so regarded, it appears simply as a tax on all liquor purchased for re-sale in Victoria. In relation to the basal premise selected by the minority Justices, it is submitted that all that can be accurately predicated is that in respect of liquor sold by retail in Victoria, a fee has been paid as a condition precedent to the right to sell it. This predication shows conclusively, in the Respondent's submission, that such a fee is not a duty of excise within any meaning of that expression in the Australian Constitution.

The Respondents accordingly submit that this Appeal should be dismissed for the following, amongst other

R E A S O N S

1. Because the appeal raises a question as to the limits inter se of the Constitutional powers of the Commonwealth and those of a State and in the absence of a Certificate from the High Court under Section 74 of the Constitution the Privy Council has no jurisdiction to entertain the appeal.

Alternatively,

2. Because the licence fee payable under Section 19(1)(a) of the State Act is not a duty of excise. It is not a tax upon the production or manufacture of liquor nor is it imposed as a means of taxing such production or manufacture.

3. Because such fee is no more than the condition of the right granted by the State to participate in a trade which is otherwise forbidden. It is payable in respect of the business generally. It is not a tax upon liquor because no part of the fee is imposed in respect of any commercial dealing in liquor, whether by production or manufacture, distribution, purchase or sale.

4. Because Dixon CJ., McTiernan and Windeyer JJ, were wrong in ignoring the true legal effect of the provisions of the State Act and relying only on their general economic effect.

5. Because Fullagar, Kitto, Taylor and Menzies JJ. were right in holding that the licence fee did not amount to a duty of excise.

H.A. WINNEKE
JOHN Mc. I. YOUNG
ZELMAN COWEN
ROBERT GATEHOUSE

IN THE PRIVY COUNCIL No.7 of 1961

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N :

DENNIS HOTELS PROPRIETARY LIMITED (Plaintiff) — Appellant

- and -

THE STATE OF VICTORIA AND HENRY EDWARD BOLTE (Defendants) — Respondents

- and -

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA — Intervener

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CASE FOR THE RESPONDENTS

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