[HIGH COURT OF AUSTRALIA.]

MATTHEWS . . . . . APPELLANT;
DEFENDANT,

AND

THE CHICORY MARKETING BOARD (VICTORIA) . . . . . } RESPONDENT.
COMPLAINANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *May* 10, 11.

SYDNEY, *Aug.* 9.

Latham C.J., Rich, Starke, Dixon and McTiernan JJ.

Constitutional Law—Excise duty—Freedom of inter-State trade—State marketing legislation—Marketing board—Levy imposed in respect of area of land planted——The Constitution (63 & 64 *Vict. c.* 12), *secs.* 90, 92—*Marketing of Primary Products Act* 1935 (*Vict.*) (*No.* 4337), *secs.* 4, 6, 7, 16, 19, 26, 32.

The *Marketing of Primary Products Act* 1935 (Vict.) provided for the appointment of marketing boards, which were authorized to make levies on producers. The Act excluded from its operation any commodity which was the subject of inter-State trade. The Chicory Marketing Board, appointed under the Act, made a levy on producers of £1 for every half acre of land planted with chicory. Prior to the constitution of the board the defendant had sold the chicory planted on his land in Victoria to a purchaser in New South Wales, and the chicory was delivered pursuant to the contract.

Held, by *Rich*, *Starke* and *Dixon* JJ. (*Latham* C.J. and *McTiernan* J. dissenting), that the levy made by the board under the provisions of the Act constituted the imposition of an excise duty within the meaning of sec. 90 of the Constitution and that the levy and the provisions of the Act authorizing it were, consequently, invalid.

Per *Latham* C.J., *Rich*, *Starke* and *McTiernan* JJ.: Such invalidity did not arise from sec. 92 of the Constitution.

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APPEAL, by way of order to review, from a Court of Petty Sessions of Victoria.

The Chicory Marketing Board of Victoria sued Horace Matthews in the Court of Petty Sessions at Melbourne for the sum of £11, being the amount of a levy made by the board under a resolution made by it pursuant to sec. 32 (1) (*a*) of the *Marketing of Primary Products Act* 1935 (Vict.) in respect of five and a half acres of land at Phillip Island planted with chicory by the defendant during the year ending 30th June 1937. Prior to the constitution of the Chicory Marketing Board under the Act, the defendant had sold the produce of the land to a purchaser in New South Wales, and it was duly delivered to him in pursuance of such contract. The defendant refused to pay the sum of £11 claimed by the board as the amount of the levy. The Court of Petty Sessions made an order for the amount claimed.

The defendant appealed to the High Court, by way of order to review, on the ground that the *Marketing of Primary Products Act* contravened sec. 92 of the Constitution. On the hearing of the order to review the defendant was given leave to add the further ground that the Act imposed an excise duty and so contravened sec. 90 of the Constitution.

Sanderson, for the appellant. The question in issue is whether a man who is engaged in inter-State trade is liable to pay the levy made upon him by the board. The appellant had contracted to sell the whole of his crop to a purchaser in New South Wales. Sec. 16 (3) of the Act contains the only real reference to inter-State trade. That section should be read with other sections which relate only to intra-State trade; unless it is so read, it will enable the board to effect serious interference with inter-State trade. The terms of this Act are so general that, if they are not to be limited to intra-State trade, the powers given to the board are contrary to sec. 92 of the Constitution (*James* v. *Cowan* (1)). Sec. 18, which deals with the general powers of the board, makes no reference to inter-State trade. The contract to sell the produce of the land was made before the Act was applied to the growing of chicory. The position would have been different if the chicory had been vested in

(1) (1932) A.C. 542; 47 C.L.R. 386.

the board under the Act. A producer, for the purpose of the Act, is one not engaged in inter-State trade. Levies can be made only on producers whose commodities have been vested in the board, and the Act does not apply to persons having contracts for inter-State trade. The effect of the levy is to interfere with the freedom of inter-State trade at its inception (*James* v. *Cowan* (1)). It increases the cost of production, and in that way it interferes with the producer's right to contract out of Victoria. It amounts to a tax by the State on an inter-State transaction (*R.* v. *Vizzard*; *Ex parte Hill* (2)). The Act should be limited to intra-State growers, and, if it is to be applied to all growers, sec. 92 of the Constitution applies and there is an infringement of that section.

Sanderson applied to amend the grounds of appeal by adding the ground that sec. 32 of the *Marketing of Primary Products Act* imposed an excise duty and was invalid because it infringed sec. 90 of the Constitution.

Fullagar K.C. (with him *D. I. Menzies*), for the respondent. *Counsell* v. *Counsell* (3) shows that the grounds must be complete within the month of the decision of the Court of Petty Sessions. The power to amend an existing ground cannot give a right to substitute a new ground. [He referred to secs. 150-153 of the *Justices Act* 1928 (Vict.).] Sec. 88 (3) of that Act provides that defences must be stated in the Court of Petty Sessions.

Sanderson. This court has all the powers that a Court of Petty Sessions has and has jurisdiction to give special leave to appeal.

LATHAM C.J. The court is of opinion that it has power to make the amendment applied for, and it is also of opinion that it is very desirable that there should not be a duplication of litigation and that the question should now be raised whether sec. 32 of the *Marketing of Primary Products Act* is invalid by reason of sec. 90 of the Constitution.

(1) (1932) A.C. 542; 47 C.L.R. 386. (2) (1933) 50 C.L.R. 30, at p. 80.
(3) (1920) V.L.R. 439; 42 A.L.T. 77.

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Sanderson. This levy is bad according to the decisions. It is in effect an indirect tax on industry within *Bank of Toronto* v. *Lambe* (1), *Brewers and Malsters' Association of Ontario* v. *Attorney-General for Ontario* (2) and *Peterswald* v. *Bartley* (3). The principle laid down in those cases is that a State or in Canada a Province may impose direct taxation or taxation after an article has been produced. But where the tax is imposed on goods coming in from abroad that is a customs duty, and where the goods are in the hands of the producer or manufacturer that is indirect taxation, which increases the cost of the articles and which will be passed on to the consumer and is bad (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (4); *John Fairfax & Sons Ltd. and Smith's Newspapers Ltd.* v. *New South Wales* (5); *Crothers* v. *Sheil* (6); *Hartley* v. *Walsh* (7); *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (8)). A tax imposed on a consumer before his goods go on the market is an excise duty. This is an indirect tax on chicory (*Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (9)). This levy is passed on to the consumer and is, in effect, an excise duty as that term is understood in Australia, and the levy is bad.

Fullagar K.C. The provisions of the *Marketing of Primary Products Act* are applicable to all the producers of the commodity. The most that can be said is that a man who happens to sell inter-State is interfered with by the Act, but sec. 92 of the Constitution does not touch that case. *Australian Scale Co. Ltd.* v. *Commissioner of Taxes (Q.)* (10) does not go as far as that. Inter-State trade is not interfered with because of charges imposed before there is any inter-State trade at all. In any event sec. 16 (3) takes the Act outside the operations of sec. 92. There is no distinction between this type of legislation and legislation imposing land tax, rates, &c., so far as inter-State trade is concerned. Each equally affects the cost of production of the article (*Hartley* v. *Walsh* (7)). Secs. 16 (3) and 19 (*c*) take

(1) (1887) 12 App. Cas. 575.
(2) (1897) A.C. 231.
(3) (1904) 1 C.L.R. 497.
(4) (1926) 38 C.L.R. 408.
(5) (1927) 39 C.L.R. 139.
(6) (1933) 49 C.L.R. 399.
(7) (1937) 57 C.L.R. 372.
(8) (1933) A.C. 168, at p. 176.
(9) (1931) S.C.R. (Can.) 357, at p. 362.
(10) (1935) 53 C.L.R. 534, at pp. 552, 553, 556.

this Act out of the class discussed in *Peanut Board* v. *Rockhampton Harbour Board* (1). The expropriation is not directed towards interference with inter-State trade. Sec. 16 (3) saves the Act from being an interference with inter-State trade. On the principle of *James* v. *Cowan* (2) this Act would be valid so far as intra-State trade is concerned and inoperative as to inter-State trade. If sec. 16 (3) adopts the wrong criterion, the legislation is saved by the *Acts Interpretation Act* 1930 (Vict.). If the object of the Act is to restrict trade in Australia, including inter-State trade, it would be invalid; but, if, on the other hand, the object is not to restrict trade but merely to conduct it through other channels, as through the State, it is valid (*Riverina Transport Pty. Ltd.* v. *Victoria* (3); *O. Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* (4); *R.* v. *Vizzard*; *Ex parte Hill* (5)). As long as there is nothing in the Act which prevents trade flowing across the border, the Act is valid; and if the object of the Act is simply to go on trading but with different persons handling the goods, the Act is valid. The object of the Act is to canalize the trade. In *James* v. *Cowan* (6) the object of the Act was to force the fruit off the Australian market (*Hartley* v. *Walsh* (7)). As to sec. 90 of the Constitution, an imposition of an obligation to pay money, if it comes within sec. 90, must be (1) a tax, (2) an indirect tax, and (3) a tax on goods produced or manufactured within the territory. It must be a tax on an article. This is a tax on persons and not on goods and is a direct tax (*Peterswald* v. *Bartley* (8); *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (9); *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (10); *John Fairfax & Sons Ltd. and Smith's Newspapers Ltd.* v. *New South Wales* (11)). In order to be an excise, the measure of the tax must have some relation to the goods taxed; otherwise it is not a tax on goods. This is a direct and not an indirect tax and has no reference to goods and is not a tax in respect of goods.

(1) (1933) 48 C.L.R. 266.
(2) (1932) A.C. 542.
(3) (1937) 57 C.L.R. 327.
(4) (1935) 52 C.L.R. 189.
(5) (1933) 47 C.L.R. 386.
(6) (1932) A.C. 542; 47 C.L.R. 386.
(7) (1937) 57 C.L.R. 372.
(8) (1904) 1 C.L.R. 497.
(9) (1937) 56 C.L.R. 390.
(10) (1926) 38 C.L.R. 408.
(11) (1927) 39 C.L.R. 139.

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Sanderson, in reply. As to sec. 92 of the Constitution, in 1900 when the Constitution was agreed upon, pools of this description were not in contemplation. *James* v. *Cowan* (1) and *Peanut Board* v. *Rockhampton Harbour Board* (2) are practically on all fours with this case. As to sec. 90 of the Constitution, this levy is practically an excise and comes within the cases cited. It is a tax on the producer in respect of the commodity he has for sale, and, as it will be passed on to the consumer, it is an excise. The levy is imposed according to the amount of the taxpayer's production.

Cur. adv. vult.

Aug. 9.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by way of order to review from an order of a police magistrate ordering the defendant, Horace Matthews, to pay £11 to the complainant, the Chicory Marketing Board. This amount was claimed as the amount of a levy made by the board under sec. 32 (1) (*a*) of the *Marketing of Primary Products Act* 1935 (Vict.). The levy was at the rate of £1 for each half acre of an area of five and a half acres which had been planted with chicory by the defendant at Cowes in Victoria during the year ending 30th June 1937. The chicory to be grown upon the five and a half acres had been sold to a New South Wales purchaser before the complainant board had been constituted, and it was duly delivered to the purchaser in pursuance of the contract of sale. It was contended that the order was wrong and should be set aside upon the grounds (1) that the Act did not apply to " inter-State transactions " ; (2) that so far as it did apply it was invalid, and on a further ground, introduced by amendment permitted upon the hearing of the appeal, (3) that sec. 32 of the Act was invalid because it infringed sec. 90 of the Constitution of the Commonwealth.

The *Marketing of Primary Products Act* is an Act which provides for the control of the marketing of products to which the Act is applied. The Act authorizes the establishment of marketing boards and enables the boards to acquire products which have been declared to be commodities under the Act. There is, however, an exception

(1) (1932) A.C. 542 ; 47 C.L.R. 386. (2) (1933) 48 C.L.R. 266.

in the case of commodities which are the subject of inter-State trade or commerce, or required or intended for such trade or commerce. The boards appointed under the Act sell the commodities and pay a share of the total proceeds of the sale of the commodity to the producer after making certain deductions for expenditure. Provision is made for ascertaining the standard quality or grade of the commodities and for making dockages in the manner which is ordinary in the case of pools. Sec. 32 authorizes the board, with the approval of the Governor in Council, to make levies on producers of commodities and to apply the moneys raised by the levies in payment of expenses, in repayment of advances to the board, in effecting insurances, and in work directed to the improvement of the quality of a commodity. The outline of the Act shows that the Act follows the general lines of pooling legislation such, for example, as was considered by this court in *Peanut Board* v. *Rockhampton Harbour Board* (1). The outline of the Act must be supplemented by reference to the particular provisions upon which the determination of the appeal depends.

Sec. 4 defines "product" so as to include any product of agriculture, and, therefore, so as to include chicory, if chicory is declared to be a product for the purposes of the Act. Chicory was so declared under sec. 4 (2). The Act provides in sec. 6 (1) that the Governor in Council, when requested to do so by a petition signed by the required number of producers, may proclaim a product to be a commodity. This was done in the case of chicory. After the Act has been applied to a commodity, the Governor in Council may, under sec. 7, appoint a marketing board in relation to the commodity. This was done in the case of chicory. Sec 16 provides that, when a product has been declared a commodity and a board has been appointed in relation to the commodity, the Governor in Council may by proclamation provide that the commodity shall, from a specified date, be divested from the producers of the commodity and become vested in and become the absolute property of the board as the owner thereof and that upon any of the commodity coming into existence within a time specified it shall become vested in and become the absolute property of the board as the owner thereof.

(1) (1933) 48 C.L.R. 266.

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The section also provides that the board may by further proclamation "obtain possession of the commodity as such owner, and . . . deal with the same as is deemed necessary or expedient in order to give full effect to the objects and purposes for which the board is constituted." Sub-sec. 3 of sec. 16 is particularly important in the present case. It is as follows: "Nothing in this section and no proclamation under this section shall affect such portion of any commodity as is the subject of trade commerce or intercourse between the States or as is required by the producers thereof for the purposes of such trade commerce or intercourse or as is intended by the producers thereof to be used for such trade commerce or intercourse." Sec. 18 provides that, subject to the Act, the board, after ensuring the supply and distribution of any commodity at reasonable prices to consumers thereof in Victoria, may sell or arrange for the sale of the commodity. Sec. 19 (*a*) requires that commodities vested in a board shall be delivered by the producers to the board. Sec. 19 (*c*) provides that "every producer who, except in the course of trade commerce or intercourse between the States and save as prescribed, sells or delivers any of the commodity to any person other than the board and every person (other than the board) who, save as prescribed, buys or receives any of the commodity from a producer shall be liable to a penalty of not more than one hundred pounds." Sec. 26 enables a board to prevent the carriage of any commodity by the Victorian Railways Commissioners, any common carrier, or the owner &c. of any ship. But this section applies only to commodities "not being the subject of inter-State trade or commerce."

By a proclamation made on 15th July 1937 the Chicory Marketing Board made a levy to be paid by all producers of chicory in manner following: "at the rate of £1 for every ½ acre, or part thereof, of the area planted by such producer with chicory during the year ending 30th June, 1937." The term "producer" is defined in sec. 4 in such a way as to include a person who grows a product declared under the Act. The defendant planted five and a half acres with chicory during the year ending 30th June 1937. The amount payable by him in respect of that area was therefore, if sec. 32 is valid, £11—the amount for which the court made the order.

The first contention for the defendant is that sec. 32 of the Act is invalid by reason of sec. 92 of the Constitution. The relevant part of sec. 92 is as follows : " On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." It is contended that a tax upon land to be used for the purpose of growing chicory is necessarily an interference with inter-State dealing in chicory because it places a burden upon the producer and therefore renders less profitable to the producer any sale of chicory, including inter-State sales.

In my opinion the contention cannot be supported. The proclamation made under sec. 32 in this case imposes a levy upon land used for a particular purpose. The effect of the levy doubtless is to increase the expenditure necessarily incurred in growing chicory, including chicory which may be intended or actually disposed of for purposes of inter-State trade. The increase of costs of production or the diminution of disposable profit is a common and often an inevitable result of taxation. But this fact does not show that there is any interference with " freedom at the frontier," to use the phrase adopted by the Privy Council in *James* v. *The Commonwealth* (1). The imposition of a levy upon land used for growing chicory has no more relation to inter-State trade than any legislation which has the effect of increasing costs of production—and a great deal of legislation has such an effect.

A levy imposed under sec. 32 certainly increases the cost of producing any product to which the Act is applied. But there is no inter-State element in growing an article in primary industry or manufacturing an article in secondary industry, and legislation which deals only with producing or manufacturing is not in itself legislation of a character which restricts or limits the freedom of inter-State trade. I refer to what I said upon this matter in *Hartley* v. *Walsh* (2).

If a contrary view were adopted it would be necessary to hold that any taxation legislation was invalid if it increased the cost of producing, or raised the prices of, any goods which could be sold or transported to another State. As *James* v. *The Commonwealth* (3)

(1) (1936) A.C. 578, at p. 630 ; 55 C.L.R. 1, at p. 58.
(2) (1937) 57 C.L.R. 372, at p. 375.
(3) (1936) A.C. 578 ; 55 C.L.R. 1.

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has determined that sec. 92 applies equally and in the same sense to Commonwealth and State Parliaments, all legislation, whether Federal or State, which increased the cost of producing, or raised the prices of, such goods would be, at least in part, invalid. Customs and excise duties which produce revenue may have such an effect and would fall within such a suggested prohibition, though the operation of sec. 92 itself is dependent upon the imposition of uniform duties of customs and excise. Economists have debated the question whether land tax or income tax forms part of the cost of production of goods. But, whatever may be the true economic doctrine developed upon a basis of precise technical definition, it will hardly be disputed that the existence of such taxes, payable by persons who are producers or manufacturers of goods or traders in goods, may have an effect upon price levels. Sales tax obviously has such an effect. But it could hardly be contended that all these taxes are for this reason necessarily invalid in relation to goods which enter into inter-State trade. A contention which would produce such results should not be accepted unless supported by overwhelming argument. In my opinion, for the reasons which I have stated, the contention should be rejected.

I therefore reach the conclusion that sec. 32 and the proclamation made under it in relation to chicory do not in themselves infringe the provisions of sec. 92 of the Constitution.

It was further contended that even if sec. 32 by itself might be held to be valid, the section was part only of a single scheme for the control of the sale of primary products under a pooling system and that that scheme is inconsistent with sec. 92 of the Constitution. A marketing Act such as this deals directly, and not indirectly, with the subject of trade and commerce. It was argued that sec. 32, as an integral part of the scheme, must fail if the provisions of the Act relating to the vesting of products in the board and the sale of products by the board were held to be invalid. The effect of the pooling system of the Act is that, when his product becomes vested in the board, the owner of the product is prevented from engaging in inter-State trade. He loses the right to dispose of the product in an inter-State transaction. Such a provision, being

expressed in general terms, prevents intra-State as well as inter-State trade. But the fact that the provision is general in its terms does not exclude the operation of sec. 92 (*James* v. *The Commonwealth* (1)).

In my opinion, if it were not for two matters to which I shall refer later, this argument should be accepted. The provisions of the *Marketing of Primary Products Act* cannot be distinguished in substance from the provisions of the *Primary Producers' Organization and Marketing Act* 1926-1930 of Queensland which was held to be invalid by this court in *Peanut Board* v. *Rockhampton Harbour Board* (2). That case was decided after *James* v. *Cowan* (3), and in *James* v. *The Commonwealth* (4) the Privy Council refers to the *Peanut Board Case* (2) as being a case in which *James* v. *Cowan* (3) was followed and applied by the High Court. The words of the Privy Council referring to that case are as follows :—" The producers of the peanuts, it was held, were prevented by the Act from engaging in inter-State and other trade in the commodity. The Act embodied, so the majority of the court held, a compulsory marketing scheme, entirely restrictive of any freedom of action on the part of the producers ; it involved a compulsory regulation and control of all trade, domestic, inter-State and foreign ; on the basis of that view, the principles laid down by this board were applied by the court " (5).

The Act now under consideration is an Act which (subject to the two considerations to which I am about to refer) falls within the description of the Queensland Act which, if accepted as accurate, justified, in the opinion of their Lordships, the conclusion that that Act was invalid. There are, however, two matters which lead me to a different conclusion in the present case.

In the first place, the Act contains a specific provision in sec. 16 (3) which is plainly intended to prevent any interference with any actual or possible inter-State trade. I repeat the words of sec. 16 (3) : " Nothing in this section and no proclamation under this section shall affect such portion of any commodity as is the subject of trade commerce or intercourse between the States or as is

(1) (1936) A.C., at p. 628; 55 C.L.R., at pp. 56, 57.
(2) (1933) 48 C.L.R. 266.
(3) (1932) A.C. 542 ; 47 C.L.R. 386.
(4) (1936) A.C. 578 ; 55 C.L.R. 1.
(5) (1936) A.C., at p. 623 ; 55 C.L.R., at p. 52.

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required by the producers thereof for the purposes of such trade commerce or intercourse or as is intended by the producers thereof to be used for such trade commerce or intercourse." It is difficult to suggest any provision which could more clearly show the intention of the Act not to interfere with inter-State trade in any commodities which become subject to the Act. The effect of sec. 16 (3) is that actual and intended inter-State trade is removed from the operation of the Act. Sec. 16 (3) excepts from the operation of the vesting provisions of sec. 16 (1) and (2), and, therefore, from the whole marketing scheme of the Act, not only commodities which are actually the subject of inter-State trade and commerce, but also commodities which are required for that purpose and even commodities which are intended by the producers thereof to be used for such trade and commerce. There could hardly be a more complete exclusion of inter-State trade and commerce from the scope of the Act. Possibly the provision goes further than is necessary for the purpose of allowing full freedom of inter-State trade and commerce, but it is not necessary to consider this possibility. In my opinion this provision distinguishes the present case from that dealt with in the *Peanut Board Case* (1) and makes it impossible to contend that the Act interferes in any respect with " freedom at the frontier," or with " the passage of goods out of the State " (See *James* v. *The Commonwealth* (2)). It was said of the Queensland Act in *James* v. *The Commonwealth* (3) that " it involved a compulsory regulation and control of all trade, domestic inter-State and foreign." The effect of sec. 16 (3) is that this statement can be truly applied to the Victorian Act if, but only if, the word " inter-State " is struck out.

Sec. 16 (3) also provides a reply to the contention that sec. 18, in providing that the board should ensure " reasonable prices " to consumers in Victoria, imposes a burden or disadvantage upon persons in other States who may wish to purchase chicory produced in Victoria. Inter-State sales are free from the vesting provisions of the Act and accordingly are not controlled by the board. Further, I do not think that it should be assumed that " reasonable " prices for persons in Victoria necessarily and as of course involve unreasonable prices for other persons. It is unnecessary to examine in

(1) (1933) 48 C.L.R. 266. (2) (1936) A.C., at p. 630 ; 55 C.L.R., at p. 58.
(3) (1936) A.C., at p. 623 ; 55 C.L.R., at p. 52.

detail the provisions of secs. 19 and 26. It is sufficient to say that these sections carry out the principle embodied in sec. 16 (3), namely, the exemption of inter-State trade from the provisions of the Act.

In the second place, the *Acts Interpretation Act* 1930 (Vict.), sec. 2, provides as follows: "Every Act, whether passed before or after the commencement of this Act, shall be read and construed subject to the *Commonwealth of Australia Constitution Act*, and so as not to exceed the legislative power of the Parliament of Victoria, to the intent that where any enactment thereof would, but for this Act, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power." I have already expressed my opinion that the Act as a whole is valid, and, therefore, in my opinion, it is not necessary to consider the application of the provision quoted from the *Acts Interpretation Act*. But, if my opinion (based upon sec. 16 (3)) as to the validity of the whole Act should be ill-founded, the result would then be that the provisions of the Act which relate to the vesting of commodities and the sale of them under the control of the board would be invalid. Sec. 32, however, is capable of independent operation. Even if the portions of the Act mentioned were invalid, the levy could still be imposed and the proceeds applied towards the objects mentioned in sec. 32, namely, the payment of administrative expenses of the board, repayment of advances to the board, creating a fund for insurance against disease, fire, hail, flood or other catastrophes, and work towards the improvement of the quality of commodities. Sec. 32 is, in my opinion, severable from the provisions of the Act which would be invalid by reason of sec. 92 of the Constitution. Polls can be taken, boards can be constituted, and levies can be made and applied in accordance with the Act, even if the marketing provisions were held to be invalid. Difficulties sometimes arise in the application of such provisions as sec. 2 of the *Acts Interpretation Act* (See, for example, the *Harvard Law Review*, vol. 51, p. 76) but there is no difficulty in the present case.

I am, therefore, of opinion, for the reasons stated, that sec. 92 of the Constitution does not invalidate either sec. 32 or the proclamation made under it.

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It is now necessary to consider the argument founded on sec. 90 of the Constitution, which provides that " 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." It is contended that sec. 32 purports to authorize, and that the proclamation purports to impose, a duty of excise upon chicory, and that, as it is contained in a State Act, the section is, therefore, invalid.

The levy is, in my opinion, plainly a tax. It is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered (*Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (1)). The question which it is necessary to consider is whether it is a duty of excise.

If the resolution of the board had imposed a levy upon producers in respect of the quantity or value of chicory produced or treated or sold, the levy would have been an excise duty according to all definitions or explanations of that term. The question is whether the fact that the levy is imposed in respect of areas planted with chicory is sufficient to constitute a real distinction so as to remove the levy from the category of excise duties.

In England the term " excise " has been used in such a manner as to be equivalent, in any classification of taxes, to a heading " Miscellaneous." It is difficult to discover any common characteristic (except that they are all taxes) between inland taxes on intoxicating liquor and tobacco, and taxes on auctioneers, armorial bearings, owners of carriages and keepers of refreshment houses. These examples are taken from a much longer list of English excise duties set out in *Quick and Garran, Annotated Constitution of the Commonwealth* (1901), p. 837, and quoted in *Peterswald* v. *Bartley* (2); see also *Bell and Dwelly, The Laws of Excise* (1873), pp. 1-4 ; *Laws of England,* 1st ed., vol. 24, pp. 532, 533 (list of excise duties and excise licences). Thus, the term as used in England covered, not only the well-recognized excise duties upon liquor and tobacco, but also a most heterogeneous collection of what may be called taxation oddments.

(1) (1933) A.C. 168, at p. 175.

(2) (1904) 1 C.L.R., at p. 508.

Accordingly, in *Peterswald* v. *Bartley* (1) this court, in order to discover the meaning of the term " excise," directed its attention to the use of the term in the laws of the colonies at the time of Federation. The conclusion reached was expressed in the following words :—" Bearing in mind that the Constitution was framed in Australia by Australians, and for the use of the Australian people, and that the word 'excise' had a distinct meaning in the popular mind, and that there were in the States many laws in force dealing with the subject, and that when used in the Constitution it is used in connection with the words 'on goods produced or manufactured in the States,' the conclusion is almost inevitable that, whenever it is used, 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 tax or personal tax. Reading the Constitution alone, that seems to be the proper construction to be put upon the term " (2). See also *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (3).

But the reasoning which led to the conclusion in *Peterswald* v. *Bartley* (1) does not necessarily limit the application of the term " excise " to taxes imposed upon goods at the very moment when they are " produced or manufactured." A tax possessing the other attributes mentioned in the passage which I have quoted may be an excise duty if it is imposed upon the sale or consumption of goods. It has been so held, in relation to sale, in *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (4). If, however, a tax has no relation to the quantity or value (however measured) of goods, it cannot be said to be an excise duty within any of the definitions or explanations of that term which are to be found in the decisions of this court.

Customs and excise duties are essentially indirect taxes. They are regarded as additions of definite amounts to the prices at which the goods upon which they are imposed are, in the ordinary course of business, sold by persons who have paid the duties. The distinction between such taxes and other taxes may be illustrated in the following way : a customs duty or an excise duty is paid in respect

(1) (1904) 1 C.L.R. 497.
(2) (1904) 1 C.L.R., at p. 509.
(3) (1937) 56 C.L.R., at pp. 400, 401, 403, 408.
(4) (1926) 38 C.L.R. 408.

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of a particular article: the amount of the tax necessarily bears a relation to the quantity or value of the article in question: it is either a specific duty (per article or per quantity of commodity) or an *ad valorem* duty: to each article in respect of which such a duty has been paid it would be possible to attach a label stating "Duty paid, 5s."—or whatever the amount might be. It is true that commercial competition or other factors may prevent the actual addition of the whole amount of the duty to the price of goods in particular cases, but, even in such cases, a specific amount which has been paid as tax can be assigned to each and every article taxed. If there were an excise duty of 3d. per pound upon chicory, then each and every pound of chicory would have been subjected to that precise amount of tax. But the effect of direct taxes is quite different. A land tax may affect the cost of growing chicory in the case of some or all growers. An income tax may lead dealers in chicory who pay income tax to endeavour to raise their prices. A tax on wholesale or retail businesses may increase the outgoings of a business of dealing in chicory and may, therefore, affect the prices of chicory. But in such cases it is not possible to attribute to each pound of chicory sold a specific amount of money, the same in the case of all producers who are landowners, or income tax payers, or owners of businesses, as a tax paid in respect of that pound of chicory. This reasoning shows, I think, the real difference between an indirect tax and a direct tax. An indirect tax is necessarily a tax which can normally be "passed on" to a purchaser or consumer of the goods taxed, and it must bear, therefore, a definite relation to the quantity or value of the goods. As at present advised, I am unable to discern any basis of taxation of goods other than quantity or value which could constitute a basis for indirect taxation of goods. It is difficult to conceive a tax which is an indirect tax in the sense stated and which is imposed upon goods, unless the amount of the tax is related to quantity or value. If such a tax is ever devised, the questions which would arise can then receive consideration. If it is held that a tax may be an excise duty though it has no direct relation in amount to the quantity or value of the goods upon which it is imposed, it will be difficult, in my opinion, to deny the description to any tax imposed upon persons, land or things which

may, in the normal course of business, affect the prices of goods. I can see no justification for the adoption of such a conception.

I proceed now to apply this reasoning to the present case. The levy is imposed, not upon chicory planted, treated, sold or consumed, but upon land planted with chicory, and the amount of the levy is determined by the area of the land planted. That land may produce a small quantity of chicory or a large quantity or no quantity at all. In the present case the defendant in April 1937 estimated the yield of the five and a half acres at ten tons. In fact the yield was more than fourteen tons. The tax is payable by reason of the planting of the land, irrespective of the actual production of the product. It is not a tax upon goods or upon the production or sale of goods.

All producers pay £1 per half acre. Equal levies are imposed upon equal areas. But the yield of equal areas may obviously vary very greatly indeed. It is impossible, therefore, to establish any relation between the levy and the quantity or value of the article produced. A customs or excise duty (as already stated) is imposed in relation to the quantity or value of goods. It is contemplated that the same amount of taxation will be payable in respect of equal quantities or values of goods. It is, therefore, also contemplated that the amount of this duty will normally and as of course enter into the price of the goods so as to be passed on to the purchaser or consumer. Such a tax is an indirect tax. These assumptions are quite inapplicable to a levy imposed in respect of areas of land used for agricultural purposes. Such a levy possesses none of the characteristics mentioned. I am, therefore, of opinion that the levy imposed under sec. 32 of the Act is not an excise duty within the meaning of sec. 90 of the Constitution.

In my opinion the appeal should be dismissed and the order nisi should be discharged.

The opinion of the majority of the court is that the appeal should be allowed. The appellant has succeeded upon a ground not taken in the order nisi, namely, that the relevant legislation is invalid by reason of the provisions of sec. 90 of the Constitution of the Commonwealth. The appellant has failed upon the grounds taken in the order nisi, which related exclusively to sec. 92 of the Constitution.

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The appellant should, therefore, not have the costs of the argument in the High Court which are exclusively attributable to the argument upon sec. 92.

RICH J. In the argument of this case many matters were touched on which did not appear to me to be entirely relevant to the question whether the appellant was liable to the levy imposed upon him. He is a defendant to a complaint for a civil debt, and his liability is the matter in issue. The marketing board says he is liable because he is the producer of chicory and under their levy every producer of chicory is liable to pay them one pound for every half acre planted by him with chicory during the year. The ground the appellant stood upon to attack this levy was that he could not be liable except at the cost of an infringement of sec. 92 of the Constitution by the State legislation. My mind failed to grasp the intrinsic connection between the payment of a levy on the plantation and production of chicory and trade, commerce and intercourse between the States. No doubt you cannot trade in chicory unless it has been grown, but I imagine you may readily grow it without engaging in inter-State trade. I could understand the contention if it were based on the view that the main purpose of the statute involves an interference with inter-State trade and the levy was only an incident to the main purpose so that the statute collapsed as a whole. But so far from attempting to interfere with inter-State trade the statute on its face exhibits an earnest desire of the draftsman to walk warily along paths which never lead to inter-State trade. The levy is imposed upon the producer as a producer and not a trader and is computed upon acreage planted and not upon chicory sold. My failure to grasp the bearing of sec. 92 upon the appellant's case continues. However, under encouragement from the Bench the appellant was induced to take further ground from the vantage of which he has, in my opinion, succeeded in relieving himself of the liability of which he complained. He turned back from sec. 92 to sec. 90 of the Constitution and contended that the levy was a duty of excise and, therefore, within the exclusive power of the Federal Parliament. The question what is a duty of excise has engaged the attention of

this court in *Peterswald* v. *Bartley* (1), to some extent in *R.* v. *Barger* (2), in *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (3), in *John Fairfax & Sons Ltd. and Smith's Newspapers Ltd.* v. *New South Wales* (4), *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (5), *Crothers* v. *Sheil* (6), and *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (7). In none of these cases, however, has the class of question arisen upon which this case depends. In the present case the levy is clearly a tax (See *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (8)). The reason for saying that the tax is not an excise is found in the peculiar circumstances by which it is governed. These circumstances are that it is imposed by a board which does not represent the Crown in order to raise a fund for the administration of a compulsory pool for marketing the commodity and for other connected purposes, and the tax is levied on the basis of the acreage planted and not the quantity of chicory produced. I do not think that any of these circumstances deprives the tax of the character of an excise. To take the last first, planting chicory is an essential step in its production. If you tax according to planting you affect or influence an operation upon which the extent of attempted production depends. The fact that some producers may have to pay the tax although their attempt fails is merely one of the chances and accidents which attend all the pursuits of man and makes it no less true that the tax is aimed at production. As to the circumstance that the revenue obtained is for the purposes of the board and not for the Treasury, the board is carrying on an operation under statute on the public behalf and the tax is levied in connection with all chicory throughout the State. As to the fact that it is to be applied to meet the expenses of a marketing scheme and for purposes connected with chicory growing, the statute treats these as public purposes to be undertaken by a public body in the public interest. If the State authorizes a levy upon a commodity which in other respects is an excise, I think it is difficult to see how the purpose for which the money is obtained can affect the question whether it comes within an excise

(1) (1904) 1 C.L.R. 497.
(2) (1908) 6 C.L.R. 41.
(3) (1926) 38 C.L.R. 408.
(4) (1927) 39 C.L.R. 139.
(5) (1934) 51 C.L.R. 108.
(6) (1933) 49 C.L.R. 399.
(7) (1937) 56 C.L.R. 390.
(8) (1933) A.C. 168.

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The appeal should be allowed and the order of the magistrate set aside.

STARKE J. The respondent, the Chicory Marketing Board, sued Matthews, the appellant, in the Court of Petty Sessions for a sum of £11, being the amount of a levy made by it under sec. 32 of the *Marketing of Primary Products Act* 1935 (No. 4337 of the State of Victoria). Judgment was entered against the appellant for the amount claimed, and an appeal is brought to this court by means of an order to review. The grounds of appeal are that the Act contravenes the provisions of sec. 92 of the Constitution and is, therefore, invalid.

The *Marketing of Primary Products Act* is of the type now familiar. Amongst other provisions it enables the Governor in Council to proclaim various primary products to be a product for the purposes of the Act (sec. 4 (2)); to declare that such product shall be a commodity under the Act (sec. 6 (1)); to appoint marketing boards (sec. 7); to declare that a commodity shall be divested from the producers and be vested in and be the absolute property of the board, whereupon the commodity becomes the absolute property of the board freed from all contracts and encumbrances affecting the same and the rights and interests of every person in the commodity are converted into a claim for payment in accordance with the Act (sec. 16). The Act also empowers a board so appointed, after ensuring the supply of any commodity at reasonable prices to consumers thereof in Victoria, to sell or arrange for the sale of any commodity vested in or delivered to it and do all such matters and things necessary in that behalf accordingly (sec. 18); and it also provides that a board shall out of the proceeds of any commodity disposed of by it and out of any other moneys (except a levy) received by it make payments to each producer of the commodity delivered to the board on the basis of the net proceeds of the sale of all the commodity of the same quality or standard delivered to the board, subject to certain deductions (sec. 23). Then sec. 32 provides that, a board (*a*) with the approval of the Governor in Council, may from time to time make a levy on and to be paid by the producers of any commodity in relation to which the board is constituted in

such amount or at such rate on and to be paid by such persons and on such basis and for such period or otherwise as the board, with the approval of the Governor in Council and by notification in the Government *Gazette*, specifies, and (*b*) may in any case where it thinks fit retain the amount of such levy out of the funds in its hands arising from the sale or pledge of the commodity.

It is settled, I think, by authority that these provisions, standing alone, involve a contravention of sec. 92 of the Constitution. It would be a compulsory marketing scheme entirely restrictive of any freedom of action on the part of producers in trade, domestic, inter-State or foreign (*James* v. *Cowan* (1); *Peanut Board* v. *Rockhampton Harbour Board* (2)). But these provisions do not stand alone. In sec. 16 (3) it is expressly enacted: "Nothing in this section and no proclamation under this section" (the vesting section) "shall affect such portion of any commodity as is the subject of trade commerce and intercourse between the States or as is required by the producers thereof for the purpose of such trade commerce or intercourse or as is intended by the producers thereof to be used for such trade commerce or intercourse." The effect of the section is to remove from the operation of the Act any portion of a proclaimed commodity that a producer desires to engage in inter-State trade. The object of the section is to avoid any contravention of sec. 92 of the Constitution. And it should be construed so as to give effect to that intention. Consequently, the provision is coextensive with the requirement of the Constitution and enacts in effect that trade, commerce and intercourse among the States in respect of the proclaimed commodity shall be absolutely free. It thus leaves the producers and the commodity free to pass the frontiers of the States and to engage and be engaged in inter-State trade without any hindrance or restriction so far as the Act is concerned (*James* v. *The Commonwealth* (3)). The Act does not, therefore, contravene sec. 92 of the Constitution.

A more difficult question is raised under sec. 90 of the Constitution. The power of the Commonwealth Parliament to impose duties of customs and of excise and to grant bounties on the production or

(1) (1932) A.C. 542; 47 C.L.R. 386. (2) (1933) 48 C.L.R. 266.
(3) (1936) A.C. 578; 55 C.L.R. 1.

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export of goods is now exclusive. The question is whether the levy sued for is a duty of excise which the State of Victoria can neither impose nor authorize. The Chicory Board made a levy with the approval of the Governor in Council in the following form: —" Every producer of chicory shall in and for the year ending on the 31st of August, 1937, pay to the Chicory Marketing Board, a levy at the rate of £1 for every half acre, or part thereof, of the area planted by such producer with chicory during the year ending the 30th June, 1937. For the purposes of determining the amount of such levy the area planted by a producer shall be deemed to be the area registered by him with the Chicory Marketing Board, pursuant to and in accordance with a regulation made " under the Act. The levy so made is a tax (*Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (1)). " Excise," however, is not a technical term of the law, and the popular meaning is not rigid (*John Fairfax & Sons Ltd. and Smith's Newspapers Ltd.* v. *New South Wales* (2), per *Higgins* J.). But the meaning of the words " duties of excise " in the Constitution has been the subject of several decisions in this court (*Peterswald* v. *Bartley* (3) ; *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (4) ; *John Fairfax & Sons Ltd. and Smith's Newspapers Ltd.* v. *New South Wales* (5) ; *Attorney-General* (*N.S.W.*) v. *Homebush Flour Mills Ltd.* (6)). An excise duty within the meaning of the Constitution is " a duty analogous to a customs duty imposed upon goods either in relation to quantity or value when produced or manufactured and not . . . a direct tax or a personal tax " (*Peterswald* v. *Bartley* (7)). In *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* (8) Lord *Thankerton*, delivering the opinion of the Judicial Committee, observed : " In their Lordships' opinion the customs or excise duties on commodities ordinarily regarded as indirect taxation . . . are duties which are imposed in respect of commercial dealings " (9), such as, he explains, " their import or sale or production for sale " (10). These observations are dealing with the

(1) (1933) A.C., at pp. 175, 176.
(2) (1927) 39 C.L.R., at p. 144.
(3) (1904) 1 C.L.R. 497.
(4) (1926) 38 C.L.R. 408.
(5) (1927) 39 C.L.R. 139.
(6) (1937) 56 C.L.R. 390.
(7) (1904) 1 C.L.R., at p. 509.
(8) (1934) A.C. 45.
(9) (1934) A.C., at pp. 58, 59.
(10) (1934) A.C., at p. 57.

question of the test that should be applied in determining what is " direct " or " indirect " taxation for the purposes of the Canadian Constitution (*British North America Act* 1867). The leading characteristic of an indirect tax is that it is susceptible of being passed on, and customs and excise duties ordinarily exhibit this characteristic (*Attorney-General (British Columbia)* v. *McDonald Murphy Lumber Co. Ltd.* (1)). The cases under the Canadian Constitution are descriptive rather than definitive of a customs and an excise duty, and they are no authority for the proposition that a tax cannot be an excise duty unless it has the characteristics of an indirect tax. Substantially, the interpretation given to the words " duties of excise " in the decisions of this court accord with the views expressed by the Judicial Committee. It would follow, as *Griffith* C.J. observed in *Peterswald* v. *Bartley* (2), that personal taxes, such as fees for brewers' licences, &c., are not excise duties (Cf. *Bank of Toronto* v. *Lambe* (3) ; *Brewers and Malsters' Association of Ontario* v. *Attorney-General for Ontario* (4)). But " in every case the first requisite is to ascertain the real nature of the tax " (Cf. *R.* v. *Caledonian Collieries* (5) ; *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (6)). It does not depend upon the name given to the tax or levy in the taxing Act, but upon its operation and effect, as gathered from the language of the Act itself (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (7) ; *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (8)).

The levy is imposed by sec. 32 on the producers of any commodity. A producer, under the Act, sec. 4, means " a person by whom or on whose behalf a product is actually grown produced obtained or prepared (otherwise than by any process of manufacture) for sale; and, where the product is so grown produced obtained or prepared pursuant to any share-farming or partnership agreement (whether express or implied), includes any party or parties to such agreement; but does not include a person engaged as an employee on wages or salary or piece-work rates." A product means (*a*) " any product (other than wool fresh fruit not being pears or apples or citrus fruit and

(1) (1930) A.C. 357.
(2) (1904) 1 C.L.R., at p. 509.
(3) (1887) 12 App. Cas. 575.
(4) (1897) A.C. 231.
(5) (1928) A.C. 358, at p. 362.
(6) (1930) A.C. 357, at p. 363.
(7) (1926) 38 C.L.R. 408.
(8) (1937) 56 C.L.R. 390.

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hay) of agriculture horticulture viticulture grazing poultry-farming bee-keeping or fishing operations and any dairy produce (including bacon and pork); and (*b*) any other article of commerce prepared (otherwise than by process of manufacture) from the produce of agriculture horticulture viticulture grazing poultry-farming bee-keeping or fishing operations" (sec. 4). The levy itself prescribes that every producer of chicory shall pay the levy to the board. So far I should think that the Act imposes an excise duty, for the levy is imposed upon producers in respect of proclaimed commodities produced by them for sale within Australia: namely, in the State of Victoria. It is true that the levy is not imposed "in relation to the quantity or value" of the commodity produced but at the rate of £1 for every half acre or part thereof planted by such producer with chicory. Still, that merely prescribes the basis of the levy, to use the language of sec. 32, and does not alter the nature of the tax. It remains a tax in respect of the commodity produced for sale. It is not a land tax nor a tax upon the producer irrespective of the production of the commodity. Unless a product is actually grown, produced, obtained or prepared for sale within the terms of the Act no levy can be made on or be payable by the producer. But, further, it is argued that the tax or levy "is not susceptible of being passed on" and cannot, therefore, be an excise duty. The Act no doubt vests the commodity in the board (sec. 16), gives it power of sale (sec. 18), and prescribes in sec. 23 the compensation that producers shall receive. It may be that the board does not consider the tax or levy in disposing of the commodity. But that is because of the terms of the Act, just in the same way as in the case of an ordinary sale the "question whether it is to be borne by the purchaser or the seller is determined by the bargain made" (See *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* (1)). The nature or effect of the tax or levy is not, however, altered. It still remains a tax or levy upon production for sale. Such a tax or levy is usually and normally susceptible of being passed on, which assists the conclusion that it is an excise duty. In my opinion the provisions of sec. 32 of the *Marketing of Primary Products Act* are not within the competence of the Victorian Parliament and are, therefore, void.

(1) (1934) A.C. 45, at pp. 58, 59.

The grounds of the order nisi do not attack the levy on the ground that it is beyond the powers contained in the Act. I do not suggest any doubt on the matter but merely point out that the objection is not taken and therefore cannot be considered in the present proceeding.

The order nisi should be made absolute.

DIXON J. The question of liability raised by this appeal is whether a sum of £11 is recoverable from the appellant, a grower of chicory, by the respondent, a marketing board constituted in respect of chicory under the *Marketing of Primary Products Act* 1935 of Victoria. The Chicory Marketing Board, acting under sec. 32 of that Act, assumed to make a levy upon every producer of chicory in Victoria of £1 for every half acre of the area planted by the producer with chicory during the year ending 30th June 1937. The matter for decision is whether the attempt to impose such a levy is valid.

I am of opinion that it is invalid upon the ground that it would amount to the imposition of a duty of excise.

The *Marketing of Primary Products Act* 1935 provides means for establishing a system of collective marketing for any of the products of certain of the primary industries, including agriculture. A poll may be taken of the producers of a commodity, and, if the required number vote and a sufficient majority favour the constituting of a marketing board in respect of the commodity, it may be established by proclamation by the Governor in Council. The commodity may be a primary product or an article of commerce prepared otherwise than by a process of manufacture from the produce of the primary industries concerned. Of the members of a marketing board one is appointed by the Governor in Council and the others are elected by the producers of the commodity. The duties of the marketing board are to acquire the commodity, to sell it and, after making deductions on account of expenses and for other purposes, to distribute among those who supplied the commodity during the period concerned the balance of the proceeds in such a manner as to give each an appropriate proportion (secs. 16, 18, 19 and 23). Subject to the exigencies of inter-State trade,

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there may be a compulsory acquisition of the commodity by proclamation. In that case, as and when it comes into existence, the commodity becomes the property of the marketing board. Such a proclamation was made in respect of chicory.

Sec. 32 authorizes the making of levies. It provides that a marketing board with the approval of the Governor in Council may from time to time make a levy on and to be paid by the producers of any commodity in relation to which the board is constituted in such amount or at such rate on and to be paid by such persons and on such basis and for such period or otherwise as the board with the approval of the Governor in Council specifies. Where the board thinks fit the amount of the levy may be retained out of the funds in the board's hands. The purposes to which the moneys raised by a levy may be applied are limited to the payment of administrative expenses, the repayment of advances made to the board, the establishment and maintenance of a fund for insurance against pests, hail, flood or other casualty and the purpose of instruction and experiment for the improvement of the commodity or some other special object considered to be in the common interest of the producers of the commodity.

In exercising the power thus given by sec. 32 a board must necessarily make the levy upon producers in that character. It is true that, in specifying the persons upon whom a levy may be made, the language of the section is not free from confusion. It says that a board " may make a levy on and to be paid by the producers " but it goes on, " in such amount or at such rate on and to be paid by such persons . . . as the board . . . specifies." The explanation of the words " on and to be paid by such persons," which appear incongruous with the words " on and to be paid by the producers," must lie in the consideration that for purposes of collection or retention of the levy it may be necessary to specify persons, as, for instance, crop lienees, who shall actually discharge the amount levied on the producer. But it is plain that the producer is to be the person primarily liable.

Apart from special cases, such as share-farming or partnership, the word " producer " is defined to mean a person by whom or on whose behalf a product is actually grown, produced or prepared

(otherwise than by any process of manufacture) for sale. The resolution or determination of the Chicory Marketing Board imposing the levy is expressed as making the levy on and to be paid by producers of chicory. Under the words " in manner following " it then proceeds to prescribe that every producer of chicory shall pay the board a levy at the specified rate for every half acre " of the area planted by such producer with chicory." It thus appears that every person who during the relevant period actually grows or produces chicory is to be liable to pay to the board a sum calculated in respect of the area he has planted. The attempted imposition of the liability is quite independent of the manner in which the grower disposes of his chicory. It does not matter whether it is delivered to the board, or, as in this case, it is sold by the grower in the course of inter-State trade, or it is used by the grower for his own manufacturing or trade purposes. It is thus quite unlike the charge for administration expenses, advances, sinking fund and interest to be provided out of the proceeds of the milk which in *Crothers* v. *Sheil* (1) we held to involve no excise. *Rich* J. said : —" The provisions of the *Milk Act* do not exact any pecuniary payment from the dairy farmer. They do not impose any liability in respect of the ownership, transfer, sale or production of goods. They merely contain a scheme for the compulsory acquisition of milk and the payment of the price or compensation to be borne by the proceeds arising from the resale by the board. The fact that these proceeds are subject to deductions would not convert the scheme into one for taxation " (2).

The Chicory Marketing Board is a public authority constituted under the statute by the Executive Government of the State. It is true that sec. 8 (4) provides that a board shall not be deemed to represent the Crown for any purpose whatsoever. But this simply means that it is not a corporate servant or agent of the Crown, so that nothing it does can impose any liability upon the Crown nor, on the other hand, can it claim any of the immunities of the Crown.

The levy is clearly taxation. In *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (3) *Duff* J. dealt with a levy

(1) (1933) 49 C.L.R. 399.
(2) (1933) 49 C.L.R., at p. 408.
(3) (1931) S.C.R. (Can.), at p. 362.

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indistinguishable from the present, except possibly in the basis of calculation and in the fact that the body, though directing and controlling marketing, did not itself acquire and resell the commodity, and he held that it was a tax and an indirect tax. He said:— "I think . . . that such levies so imposed have a tendency to enter into and to affect the price of the product. I think, moreover, that levies of that character, assuming for the moment that they come under the head of taxation, are of the nature of those taxes on commodities, or trade in commodities, which have always been regarded as indirect taxes. If they are taxes, they cannot be justified as direct taxation within the Province. That they are taxes, I have no doubt." His decision was mentioned with approval by the Privy Council in *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (1) in the course of a judgment delivered by Lord *Thankerton* deciding that two levies made under a statute of British Columbia relating to the dairy industry amounted to indirect taxes. The statute set up a committee for the purpose of insuring that producers of milk received the same return whether the milk was sold for retailing as a fluid or used for the purpose of manufacturing. A levy was made upon those selling milk for fluid consumption, for which the higher prices were paid, in order to equalize the return to those whose milk was used for manufacturing purposes. A second levy was made upon all producers in order to meet the expenses of administration. As indirect taxes outside the provincial power both taxes were held bad by the courts of British Columbia (2) and by the Privy Council (3). They were held to be taxes because they were imposed by a statutory body, a public authority, and for a public purpose or purposes, and the levies were enforceable by law. The application of the levies, the one in payment of a bonus to those supplying milk for the manufacture of products, and the other in providing the expenses of a scheme, did not affect their character as taxation. "While not saying that these elements are exhaustive of the elements which might be found in other cases to point to the same conclusion, their Lordships are of opinion that they are sufficient to characterize

(1) (1933) A.C., at p. 176. (2) (1932) 2 D.L.R. 277.
(3) (1933) A.C. 168.

the adjustment levies in the present case as taxes. . . . It seems to follow that the expenses levies in the present case, which are ancillary to the adjustment levies, must also be characterized as taxes " (1). As taxes they were held to be indirect because they were imposed in proportion to milk or milk and manufactured products sold. " In effect, both levies are imposed on the sale of commodities by the persons taxed, and, in their Lordships' opinion, there can be little doubt that such taxes have a tendency to enter into and affect the price which the taxpayer will seek to obtain for his commodities, as is the case with excise and customs " (1).

The reasons given by the Privy Council in the *Crystal Dairy Co.'s Case* (2) and by *Duff* J. in *Lawson's Case* (3) appear to me to apply to the Victorian levy upon chicory growers and to establish that it constitutes a tax or duty. They do not show that the chicory levy is a duty of excise, nor even that it is necessarily an indirect tax, but they go some way towards doing at least the latter. The only distinctions upon which the character of indirect taxation could be denied to it consist in the adoption of an acreage basis for calculating the amount and possibly in the intention that the marketing board should, except for chicory sold in inter-State trade, acquire and sell all the chicory grown in Victoria. These considerations, together with the purpose to which the levy is applied and the nature and functions of the board making it, form the foundation for the contention that it does not answer the description " duty of excise " within sec. 90 of the Commonwealth Constitution.

The expression " duties of excise," as used in the Commonwealth Constitution, has caused some difficulty because of the very wide denotation of which it was capable. The tendency of the decisions of this court has been to restrict the meaning of the word, but I do not think that any connotation has been fixed upon it which the levy in the present case would not satisfy. The expression " duties of excise " occurs in secs. 55, 86, 90 and 93 of the Constitution. In sec. 55 laws imposing duties of customs or of excise are excepted from the requirement that laws imposing

(1) (1933) A.C., at p. 176. (2) (1933) A.C. 168.
(3) (1931) S.C.R. (Can.), at p. 362.

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taxation shall deal with one subject of taxation only, and it is provided that laws imposing duties of customs or of excise may not deal with anything but duties of customs or of excise respectively. Sec. 86 transferred the collection and control of duties of customs and of excise and the control of bounties to the Executive Government of the Commonwealth. Sec. 90 provided that 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 and export of goods should become exclusive. It also provided that at the same time all laws of the several States imposing duties of customs or of excise or offering bounties on the production or export of goods should cease to have effect. Sec. 93, by reference to the provisions of sec. 89, prescribed how, for the first five years after the imposition of uniform duties of customs, the balance of the revenue collected by the Commonwealth within a State over the expenditure debited to that State was to be computed and paid over to the State. For the purpose of the calculation, the first paragraph of sec. 93 directed, among other things, that " the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State."

Upon the face of these provisions, it is evident that customs, excise and bounties on production and export are treated as complementary one to another, or, at least, closely associated, and that the payment of excise on the production and manufacture of goods is contemplated. But these considerations scarcely supply a foundation for a logical inference that no duty is an excise unless it is levied immediately on the manufacture or production within Australia of a commodity.

In *Peterswald* v. *Bartley* (1) the court directed a conviction under sec. 75 of the New South Wales *Liquor Act* 1898 for carrying on the trade or business of a brewer without holding a licence, notwithstanding that under sec. 71 of that Act a licence fee of £30 a year was imposed. The court regarded it as passed for the purpose of regulating or controlling the manufacture of beer. It required

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

the manufacturer to give his name and the place of manufacture as well as to pay the fee and to submit to the entry of inspectors in order to prevent adulteration. The amount of the licence fee did not depend on the quantity of beer manufactured. The Supreme Court had interpreted the expression " duties of excise " as including all kinds of inland revenue imposts and, accordingly, had held that under sec. 90 of the Constitution the brewer could no longer be compelled to pay such a licence fee. The decision of this court was summarized in a sentence by *Griffith* C.J. : " Rejecting, then, the larger view as to the meaning of the term ' duties of excise,' which found favour with the majority of the Supreme Court, and regarding the term as it is used in the Constitution, where it is limited to taxes imposed upon goods in process of manufacture, we find nothing in the State Act to show that this licence fee was other than a direct tax upon the manufacturer " (1). But in an earlier part of the judgment (2) *Griffith* C.J. had formulated a definition of the expression as " 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 tax or personal tax." This definition, particularly the words " in relation to quantity or value when produced or manufactured " may well be found to be too narrow.

Unfortunately the word " excise " has never possessed, whether in popular, political or economic usage, any certain connotation and has never received any exact application. The word came into English apparently as a description of a tax, strange to England, but in operation in the Low Countries and elsewhere upon the Continent, a tax upon articles of consumption. Even its derivation was misunderstood, and the misunderstanding seems to have coloured its meaning. For it was supposed that the duties were called " excises " because they meant the excision of a part of the goods taxed (See *Skeat's Etymological Dictionary* and the *Oxford English Dictionary*, *s.v.* " Excise," and compare *Dowell*, *History of Taxation*, 2nd ed. (1888), vol. II., at pp. 8, 9). When, in Elizabeth's reign, a proposal was mooted of appointing a surveyor of brewers in London, the Queen was advised against it because, among other reasons, " it was certain that, should she grant never so small a fee, the people

(1) (1904) 1 C.L.R., at p. 512. (2) (1904) 1 C.L.R., at p. 509.

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would say their drink was ' excised ' as it was in Flanders, and would repine at it " (*Dowell, op. cit., ibid.*). Under James I. an attempt to introduce duties on commodities was relinquished in face of a fear that the " impositions might be extended to commodities which growing in the kingdom, are not transported, but uttered (that is, put out, retailed) to the subjects of the same " (*Dowell, op. cit.*, vol. I., p. 188). But in the Long Parliament in 1643 a resolution was passed and an ordinance made imposing an excise and new impost on a list of articles of consumption. During the period of the Commonwealth this form of taxation was much relied upon, and, in 1656, by an ordinance a long list of commodities was made subject to duty. It is worth notice that the list was divided into two parts, one relating to foreign and imported goods, and the other to native or inland goods (*Dowell, op. cit.*, vol. II., p. 12). The expression " excise " was thus used to cover inland taxes on commodities, whether imported or produced or manufactured in England. This was so, too, when the Restoration Parliament granted the " hereditary excise " and the " temporary excise " (12 Car. II. c. 23 and c. 24) (*ibid.*, p. 25).

Perhaps the occasion when the use of the word " excise " proved of the greatest consequence was in Walpole's plan for avoiding all the evils of smuggling arising out of customs duties by taxing commodities, not at the ports, but as they went from a merchant's warehouse into consumption. His " Excise Bill," introduced in 1733 as the first step in the plan, related to tobacco and in its second part was to have included wine. " Walpole proposed in his Bill to do away " with " the customs duty on tobacco and to substitute for it an excise duty at a slightly lower rate. When tobacco was imported it would be stored in bonded warehouses, and no duty would be demanded until the owner wished to remove it for purposes of sale within the United Kingdom. It would then be weighed on government scales and the duty would be assessed and exacted before its removal. Or if, on the other hand, the owner wished to re-export it, he would be allowed to do so without hindrance. In this case there would be no need to weigh the bales at all, because, as no duty had been paid, no drawback could be claimed. By this means fraudulent practices of nearly every kind would be dried up

at their sources " (*F. S. Oliver, The Endless Adventure* (1931), vol. II., p. 241). The associations of the word " excise " formed a very powerful element in arousing against the proposal one of " the strange and feverish agitations which sometimes suddenly gripped the English people during this century," before which Walpole abandoned the plan (*Cambridge Modern History* (1909), vol. VI., c. II., p. 47). " The mass of the people did not object to the principle of excise, for they did not understand what the principle was. . . . They merely hated a word, as people so often do " (*F. S. Oliver, op. cit.*, p. 251). Where so much depended on the use of an unpopular term, it is not easy to suppose that Walpole gratuitously wrested the word " excise " from what he understood to be its true meaning and applied it to a tax which ought not to have been so called. Yet the " Excise Bill " dealt with imported commodities. Thirty-four years later, when there was again talk of such a tax, Lord *Chesterfield* wrote : " As for a general excise, it must change its name by Act of parliament before it will go down with the people who know names better than things " (*Miscellaneous Works*, vol. IV., p. 214, quoted by *Dowell, op. cit.*, vol. II., p. 105). *Blackstone's* account of the excise, which was published about that time and is the source of many dictionary definitions, begins by drawing a contrast with customs duty :—" Directly opposite in its nature to this is the excise duty ; which is an inland imposition, paid sometimes upon the consumption of the commodity, or frequently upon the retail sale, which is the last stage before the consumption. This is doubtless, impartially speaking, the most economical way of taxing the subject : the charges of levying, collecting and managing the excise duties being considerably less in proportion, than in other branches of the revenue. It also renders the commodity cheaper to the consumer, than charging it with customs to the same amount would do ; for the reason just now given, because generally paid in a much later stage of it." After tracing the history of the tax, he concludes his account with a description of the taxes then in force under the name of excise which shows that already the tendency had set in of bringing under that head inland taxes of another description, namely, licence fees exacted from those using such things as carriages, a tendency which has led to still

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wider applications of the word "excise." "From its first original to the present time, its very name has been odious to the people of England. It has nevertheless been imposed on abundance of other commodities in the reigns of King William III., and every succeeding prince, to support the enormous expenses occasioned by our wars on the continent. Thus brandies and other spirits are now excised at the distillery; printed silks and linens, at the printer's; starch and hair powder, at the maker's; gold and silver wire, at the wire-drawer's; all plate whatsoever, first in the hands of the vendor, who pays yearly for a licence to sell it, and afterwards in the hands of the occupier, who also pays an annual duty for having it in his custody; and coaches and other wheel carriages, for which the occupier is excised; though not with the same circumstances of arbitrary strictness with regard to plate and coaches, as in the other instances. To these we may add coffee and tea, chocolate and cocoa paste, for which duty is paid by the retailer; all artificial wines, commonly called sweets; paper and pasteboard, first when made, and again if stained or printed; malt as before mentioned; vinegars; and the manufacture of glass; for all which the duty is paid by the manufacturer; hops, for which the person that gathers them is answerable; candles and soap, which are paid for at the maker's; malt liquors brewed for sale, which are excised at the brewery; cyder and perry, at the vendor's; and leather and skins, at the tanner's. A list, which no friend to his country would wish to see farther increased" (*Blackstone, Commentaries*, vol. I., pp. 318, 320). During the War of Independence the system of taxing by means of licences was extended. There existed already annual taxes on hawkers, hackney-coachmen, publicans and dealers in gold and silver plate which dated from the Marlborough Wars, or shortly after. Toward the end of the War of Independence, Burke was able to say of Lord North's taxation that "the blessed fruits of the noble lord's administration were an additional load of ten new taxes," including impositions in respect of beer, wine, houses, coaches, post-chaises, post-horses and servants. "He did not wonder that the noble lord was at a loss about new taxes. We were already taxed if we rode or if we walked; if we kept at home or went abroad; if we were masters or if we were servants; if we drank wine or if

we drank beer ; and, in short, we were taxed in every way possible " (*Dowell, op. cit.*, vol. II., pp. 82, 172, 174 ; cf. vol. III., pp. 223 et seq., 240, 243). The extension of the system of taxation by means of licences was an important part of Pitt's budget of 1784, and the extension continued during his administration. It was natural to seek to place the collection of inland taxes under one authority, and this was done, but only by steps. In deciding a case depending on referential provisions in the confused excise laws, *Ashhurst* J. expressed as early as 1788 the difficulty of distinguishing between the original excises and taxes placed under the authority of the Commissioners of Excise. In *R.* v. *Justices of Surrey* (1) he says that he was led " to apply to a person who has long been concerned in the business of the Excise, to know what was the distinction generally understood between excise laws, and inland duties under the management of the Commissioners of the Excise. He said the difference they understood is this, that the law of excise is understood to relate only to liquors ; and that inland duties under the management of the Commissioners of Excise are understood to relate to malt, dry goods, and other articles, which have of late been put under their management." The distinction thus taken did not depend upon the true meaning of the word " excise " ; it depended on the use of it in the course of legislation. But, in the case of licences to carry on pursuits of business or pleasure, the course of legislation ignored the meaning of the term and so caused its misapplication. In 1824 one set of commissioners was established, but in the subsequent consolidation of the laws relating to the management and regulation of the excise the expression " revenue of excise " could only be defined as " the whole revenue under the collection and management of the Commissioners of Excise " (7 & 8 Geo. IV. c. 53, sec. 3).

In the meantime, in writings concerned with economic theory and fiscal principles the word " excise " was employed as the natural and convenient name for inland taxes directly levied upon goods, as opposed to customs duties upon imported goods. The distinction of importance for such writers is that between burdens upon domestic production and upon importation, and, accordingly, they used the

(1) (1788) 2 T.R. 504, at p. 510 ; 100 E.R. 271, at p. 275.

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word " excise " as the name for inland taxes upon home manufactures and products. *Mill*, in his *Political Economy* (1848), Book. V., c. IV., sec. 1, says : " Taxes on commodities are either on production within the country, or on importation into it, or on conveyance or sale within it ; and are classed respectively as excise, customs, or tolls and transit duties." Sir *Robert Giffen* in his article upon *Taxation* in the *Encyclopædia Britannica*, 11th ed. (1911), vol. 26, at p. 460, says :—" Excise duties are charges upon commodities produced at home on their way to the consumer, and customs duties in the United Kingdom are charges upon commodities brought into the country from abroad ; and they are of essentially the same nature. Not only so, but excise duties and customs duties are in some cases supplementary to each other, like articles being produced at home and imported from abroad, so that for the sake of the revenue they have both to be taxed alike." Again, *McCulloch's Commercial Dictionary* defines excise as " the name given to the duties or taxes laid on certain articles produced and consumed at home," although it proceeds to show how the term was extended to include duties upon certain licences. The *Concise Oxford Dictionary* adopts this view, its leading definition being : " Duty charged on *home* goods during manufacture or before sale to home consumers." In the note to sec. 90 in *Quick and Garran's Constitution*, which supplied the foundation of the decision in *Peterswald* v. *Bartley* (1), the concern of the learned authors appears to be to show that the extension of the application of the word to licences upon the exercise of trades, the ownership or possession of articles of luxury, the employment of servants and the pursuit of game was not within the ambit of the word " excise " in the Commonwealth Constitution. But the note goes further because it limits the word to taxes on articles of home production :—" The fundamental conception of the term is that of a tax on articles produced or manufactured in a country. In the taxation of such articles of luxury, as spirits, beer, tobacco and cigars, it has been the practice to place a certain duty on the importation of these articles and a corresponding or reduced duty on similar articles produced or manufactured in the country ; and this is the sense in which excise duties have been understood in

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

the Australian colonies, and in which the expression was intended to be used in the Constitution of the Commonwealth. It was never intended to take from the States those miscellaneous sources of revenue, improperly designated as 'excise licences' in British legislation. It was considered essential that the two correlative powers over customs and excise, properly so called, should run together and be exclusively vested in the Federal Parliament." The statement as to the Australian use of the term is founded upon the circumstances that in Australia taxes called excise duties were in fact confined to goods produced in the colony, or at least the subject of some process within the colony. An account is given of the excise duties of the various colonies by Mr. *Stephen Mills* in his book, *Taxation in Australia* (1925), pp. 54, 81, 108, 138, 156 and 173). But it appears that in Tasmania the duties imposed in 1829 under the name of "excise" covered spirits distilled in Van Dieman's Land or in New South Wales and imported directly therefrom (*op. cit.*, p. 173).

The history of the word "excise" does not disclose any very solid ground for saying that, according to any established English meaning, an essential part of its connotation is, or at any time was, that the duty called by that name should be confined to goods of domestic manufacture or production. The application of the word by economists and others to duties so confined is scarcely logical proof that the word is inapplicable to inland duties levied on commodities independently of the place of manufacture. But, of course, it is a factor to be weighed, and context and other considerations may show that the word is so restricted. Whether the limitation of the word "excise" in the Constitution to duties upon commodities produced or manufactured within Australia is justified is a question which I think should be regarded as open for future decision. In all the cases so far dealt with by the court, except *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1), home production or manufacture alone has been in question. In that case the duty included petrol produced, refined, manufactured or compounded in Australia, and it was considered enough that it fell on goods thus treated at home although

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

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the duty did not discriminate between petrol produced, refined or the like before, and petrol so dealt with after, importation. No doubt there are strong dicta in the judgments of *Isaacs* J. and *Higgins* J. to the effect that the tax must be connected with production. But I think that it should not be overlooked that so far there is no direct decision inconsistent with the view that a tax on commodities may be an excise although it is levied not upon or in connection with production, manufacture or treatment of goods or the preparation of goods for sale or for consumption, but upon sale, use or consumption and is imposed independently of the place of production (Cf. the judgments of *Rich* J. in *The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (1); *John Fairfax & Sons Ltd. and Smith's Newspapers Ltd.* v. *New South Wales* (2)). What is decided is that to be an excise the tax must be imposed in respect of commodities. A tax imposed upon a person filling a particular description or engaged in a given pursuit does not amount to an excise. In this way a distinction arises which resembles that required by sec. 92 (2) of the *British North America Act* 1867, which confers upon a provincial legislature exclusive power to make laws in relation to direct taxation within the Province in order to the raising of revenue for provincial purposes. " The principle is that a direct tax is one that is demanded from the very person who it is intended or desired should pay it. An indirect tax is that which is demanded from one person in the expectation and with the intention that he shall indemnify himself at the expense of another. Of such taxes excise and customs are given as examples " (per Lord *Haldane*, *Attorney-General for Manitoba* v. *Attorney-General for Canada* (3)). But " it is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity " (per Lord *Cave*, *City of Halifax* v. *Fairbanks' Estate* (4)). In that case and in *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (5) duties of customs and excise are referred to as types of indirect taxes. In *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* (6) Lord *Thankerton*, speaking for the Privy Council, says that the

(1) (1926) 38 C.L.R., at p. 437.
(2) (1927) 39 C.L.R., at p. 146.
(3) (1925) A.C. 561, at p. 566.
(4) (1928) A.C. 117, at p. 126.
(5) (1930) A.C. 357.
(6) (1934) A.C. 45, at p. 59.

customs or excise duties on commodities ordinarily regarded as indirect taxation, referred to in those cases, are duties which are imposed in respect of commercial dealings in commodities. "They do not extend, for instance, to a dog tax, which is clearly direct taxation, though the machinery of the excise law might be applied to its collection, or to a licence duty. . . . 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." It is evident that, in the application of this distinction to manufacturing or trading businesses or productive enterprises, it may be difficult to say where a licence fee or duty ceases to be a tax imposed upon the person expected to bear the burden so that it is a direct tax and when it is so closely connected with the manufacture, production, or distribution of commercial goods that it forms an element naturally incorporated in the price of every article and constitutes an indirect tax. In *Bank of Toronto* v. *Lambe* (1) a Quebec Act to impose certain direct taxes on certain commercial corporations was upheld. It enacted that every bank carrying on the business of banking in that Province, every insurance company accepting risks and transacting insurance business there, every incorporated company carrying on any labour, trade or business in the Province, and some other companies, should pay annual taxes severally imposed upon them. The decision related to the tax upon banking. Lord *Hobhouse*, for the Privy Council, said:—"It is not a tax on any commodity which the bank deals in and can sell at an enhanced price to its customers. It is not a tax on its profits, nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings the bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of tax paid, and if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec Government" (2). In *Brewers and Malsters' Association of Ontario* v. *Attorney-General for Ontario* (3) the provincial legislation under attack imposed upon brewers an obligation

(1) (1887) 12 App. Cas. 575. (2) (1887) 12 App. Cas., at p. 583.
(3) (1897) A.C. 231.

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to obtain a licence and pay a small fee without any relation to the quantity of goods sold. It was decided that the fee was demanded from the very person intended to bear the duty. The Privy Council held that it was a direct tax, but Lord *Herschell*, who delivered the judgment, said :—" It was argued that the provincial legislature might, if the judgment of the court below were upheld, impose a tax of such an amount and so graduated that it must necessarily fall upon the consumer or customer, and that they might thus seek to raise a revenue by indirect taxation in spite of the restriction of their powers to the imposition of direct taxation. Such a case is conceivable. But if the legislature were thus, under the guise of direct taxation, to seek to impose indirect taxation, nothing that their Lordships have decided or said in the present case would fetter any tribunal that might have to deal with such a case if it should ever arise " (1). In accordance with this view, in *R.* v. *Caledonian Collieries Ltd.* (2) a provincial *Mine Owners Tax Act* was held invalid as imposing indirect taxation, because, although the tax was on the mine owner, it was calculated on the gross revenue from the mine. " First it is necessary to ascertain the real nature of the tax. It is not disputed that, though the tax is called a tax on ' gross revenue,' such gross revenue is in reality the aggregate of the sums received from sales of coal, and is indistinguishable from a tax upon every sum received from the sale of coal. The respondents are producers of coal, a commodity the subject of commercial transactions. Their Lordships can have no doubt that the general tendency of a tax upon the sums received from the sale of the commodity which they produce and in which they deal is that they would seek to recover it in the price charged to a purchaser. Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains " (per Lord *Warrington* (3)). In the same way for the purpose of judging whether an imposition is an excise it is necessary to see what is the real nature of the tax.

The chief purpose of the foregoing discussion of the considerations governing the connotation of the word " excise " is to show that, although, as it is used in the Commonwealth Constitution, it describes a tax on or connected with commodities, there is no ground for restricting the application of the word to duties calculated directly

(1) (1897) A.C., at p. 237. (2) (1928) A.C. 358.
(3) (1928) A.C., at p. 362.

on the quantity or value of the goods. A definition which makes quantity and value the only basis of taxation which would satisfy the notion of " excise " has no foundation either in history, economic or fiscal principle, nor in any accepted specialization. The basal conception of an excise in the primary sense which the framers of the Constitution are regarded as having adopted is a tax directly affecting commodities.

The levy made by the Chicory Marketing Board is not ascertained by direct reference to the quantity or value of the chicory produced. It is imposed upon a producer, and presumably under the definition of that word he must actually obtain some chicory from the crop he has sown before he satisfies that description. But the basis of his assessment is not what he garners but what he plants. By calculating the levy upon the number of half acres which the producer plants with chicory the board makes it at least theoretically possible that owing to a failure of his crop the levy upon him has little or no relation to his actual production of chicory. But the basis adopted for the levy has a natural, although not a necessary, relation to the quantity of the commodity produced. Although many other factors go to the determination of the actual quantity of chicory produced, the area planted is, if not the chief, at all events a controlling element. By adopting area planted as the criterion of the amount of the levy upon each producer the board has taxed the production of the commodity as effectually as if it had selected, for instance, the weight of the chicory gathered in its raw state, the quantity treated or the gross returns. For it has placed upon an essential step in production, namely, planting, an impost computed quantitatively. There is no distinction of substance and scarcely any even of form between levying a tax upon the area planted and levying a tax upon the act of planting the area. The levy is directed to the normal case of a man reaping even as he sows. The fact that the tax would also fall upon a chicory farmer whose expectations are disappointed through some of the mischances of agriculture does not seem to me to make the levy any less a tax upon production. The natural or practical relations between manufacture or production and activities or conditions chosen as the tests or standards of liability to taxation depend, not upon logical definitions, but upon the actual course of industrial organization and technique and of the productive arts.

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If the word "excise" received a meaning which confined its application to taxes the relation of which to the commodity concerned was of some narrow and strictly defined nature, as, for instance, by an arithmetical relation to quantity, it would not only miss the principle contained in the use of the word "excise," but it would expose the constitutional provision made by sec. 90 to evasion by easy subterfuges and the adoption of unreal distinctions. 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. But if the substantial effect is to impose a levy in respect of the commodity the fact that the basis of assessment is not strictly that of quantity or value will not prevent the tax falling within the description, duties of excise.

I do not think that the fact that the board does not form part of or represent the central Government of the State, or the fact that the purpose is to defray expenses in connection with the marketing and improvement of a commodity make the levy any less an excise.

In my opinion the appeal should be allowed. The order of the court of petty sessions should be set aside and the complaint dismissed. The appellant succeeds as a result of an amendment, but I think that he should have the costs of the appeal other than the costs thrown away upon the ground first taken.

McTIERNAN J. In my opinion the order nisi should be discharged. I agree with the judgment of the Chief Justice.

Appeal allowed. Order absolute with costs except such costs as are exclusively attributable to the argument in the High Court upon sec. 92 of the Constitution. Order of Court of Petty Sessions set aside. Complaint dismissed with costs.

Solicitor for the appellant, *R. John Horsfall.*

Solicitor for the respondent, *F. G. Menzies*, Crown Solicitor for Victoria.

H.D.W.