[HIGH COURT OF AUSTRALIA.]

AXELSEN AND OTHERS . . . . . APPELLANTS ;
PLAINTIFFS,

AND

O'BRIEN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 21, 22.

Latham C.J., Rich and Dixon JJ.

Specific Performance—Sale of land—Agreement—Balance of purchase moneys to be secured by mortgage—Terms to be settled by solicitors—Trustees to be nominated by purchasers—Survey—Refusal of vendor to carry out agreement—Readiness and willingness of purchasers—Remedy—Certainty of contract—Want of mutuality.

By an agreement for the sale of land for £900, part of a larger block of land held under one certificate of title, it was provided that, upon the consent of the Treasurer being given, the vendor should execute a nomination of trustees over the land to trustees appointed by the purchasers upon their paying £500 and upon the trustees executing a mortgage securing the balance of the purchase moneys and containing such other terms and conditions as required by the solicitors for the purchasers. The agreement also made provision for delivery of possession and the vendor paying survey fees to enable the land to be transferred. No survey was ever made and although trustees were appointed their names were never notified to the vendor. Possession was not given on the due date and the vendor repudiated on the ground that the purchase moneys were not paid. The purchasers then advised the vendor of their willingness to proceed with the sale and sent £500 which was refused. In a suit for specific performance by the purchasers,

Held that there was a concluded contract as the settlement of the terms of the mortgage and the nomination of trustees did not depend upon further agreement between the parties.

Held, further, that a decree should be made for specific performance of the contract as the conditions not performed by the purchasers were merely the subsidiary means of carrying out the contract.

Williams v. *Brisco*, (1882) 22 Ch. D. 441 ; *Milnes* v. *Gery* (1807) 14 Ves. 400 [33 E.R. 574], distinguished.

Decision of the Supreme Court of Queensland (*Philp* J.) reversed.

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Held, by *Rich*, *Dixon* and *Williams* JJ. (*Latham* C.J. and *McTiernan* J. dissenting), that the purported levy was invalid because it was the imposition of a duty of excise within the meaning of s. 90 of the Constitution.

Construction and validity of s. 30 of the Act considered.

Peterswald v. *Bartley*, (1904) 1 C.L.R. 497, *Commonwealth and Commonwealth Oil Refineries* v. *South Australia*, (1926) 38 C.L.R. 408, *John Fairfax and Sons Ltd. & Smith's Newspapers Ltd.* v. *New South Wales*, (1927) 39 C.L.R. 139, *Crothers* v. *Sheil*, (1933) 49 C.L.R. 399, *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.*, (1937) 56 C.L.R. 390, *Hartley* v. *Walsh*, (1937) 57 C.L.R. 372, *Matthews* v. *Chicory Marketing Board (Vict.)*, (1938) 60 C.L.R. 263, and *Hopper* v. *Egg and Egg Pulp Marketing Board (Vict.)*, (1939) 61 C.L.R. 665, discussed.

Per Rich and *Williams* JJ.: *Hartley* v. *Walsh*, (1937) 57 C.L.R. 372, is inconsistent with *Matthews* v. *Chicory Marketing Board (Vict.)*, (1938) 60 C.L.R. 263, and should not be followed.

Per Latham C.J. and *Dixon* J. (*McTiernan* J. *contra*): In the circumstances of the case the plaintiff's claim that the levy was beyond the powers conferred by the Acts was within the original jurisdiction of the High Court.

DEMURRER.

In an action in the High Court by Eric Moss Parton and Margaret Parton against the Milk Board (Vict.) and Alexander Henry Dennett, the plaintiffs' statement of claim was substantially as follows:—

1. The plaintiffs are, and at all material times have been, carrying on the business of milk distributors as a firm under the style of "Parton's Dairy" at No. 306 Hawthorn Road, Caulfield, in the State of Victoria and are, and at all material times have been, dairymen, not being owners of a milk shop (within the meaning of the *Milk Board Acts* (Vict.)—hereinafter called "the Acts"), who sell or distribute and have sold or distributed milk in the "metropolis" (as defined in s. 4 of the *Milk Board Act* 1933, as amended) and the holders of a licence as owners of a dairy under the provisions of Part II. of the *Milk and Dairy Supervision Act* 1928 (Vict.).

2. The defendant Board, by virtue of the provisions of the *Milk Board Act* 1933, is a body corporate under the name of the Milk Board and by that name capable in law of suing and being sued.

3. The defendant Alexander Henry Dennett is the Minister of Agriculture for the State of Victoria and the responsible Minister of the Crown for the time being administering the Acts.

4. Section 30 of the *Milk Board Act* 1933 (as amended by the *Milk Board Act* 1936 (No. 4463), s. 12, and the *Milk Board Act* 1939 (No. 4676), s. 14) (which section is hereinafter referred to as s. 30 of "the Act") purports to provide that towards the estimated

probable expenditure for each year to be incurred in the administration of the Acts and in carrying out the duties of the defendant Board, there shall be contributed by every dairyman (other than the owner of a milk shop) who sells or distributes milk in the metropolis (as aforesaid) such sum as is determined by the Board in accordance with the regulations under the Acts but such sum shall not in the case of any such dairyman exceed a sum equal to one quarter of a penny per gallon for every gallon of milk so sold or distributed and that the contributions payable under the section shall be assessed and paid at such times and in such manner as may be prescribed by regulations and if any sum is not so paid the amount thereof may be recovered in a court of petty sessions as a civil debt recoverable summarily by the Board and if such sum is not so paid the licence of the dairyman may be cancelled by the Minister and shall thereupon cease to have any further force or effect.

5. Section 37 of the *Milk Board Act* 1933 (as amended by s. 14 (2) of the *Milk Board Act* 1939) purports to provide that the Governor in Council may make regulations for or with respect to contributions payable under the Acts by dairymen (other than the owners of milk shops).

6. Under the authority of the Acts, the Governor in Council has from time to time purported to make and has published in the *Government Gazette* regulations with respect to contributions payable under the Acts by dairymen, and in particular by regulations made on 25th March 1947 and published in the *Victoria Government Gazette*, No. 217, on 27th March 1947, a regulation numbered 6 whereby it is provided: "Any determination by the Board under or pursuant to section 30 of the *Milk Board Acts* shall be made at a meeting of the Board called for that purpose. In arriving at a determination the Board shall have regard to the probable revenue for the year based on the estimated quantity of milk to be sold or distributed in the metropolis. The contributions payable under and pursuant to section 30 of the *Milk Board Act* 1933 as amended by the *Milk Board Act* 1936 and any determination made thereunder shall be assessed on the quantity of milk sold or distributed in the metropolis during each month by every dairyman and owner of a milk depot liable to pay such contributions and every such dairyman or owner of a milk depot shall pay to the Milk Board by the twenty-first day of each month the contributions payable by him in respect of the milk so sold or distributed during the preceding month."

7. (*a*) On 9th June 1948 the defendant Board purported to determine in accordance with the Acts and regulations that the sum to be contributed as aforesaid by every dairyman who sold or

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distributed milk in the metropolis until the period ending 30th June 1949 should be the sum of one-eighth of a penny per gallon for every gallon of milk sold or distributed in the metropolis as aforesaid, and on 15th June 1948 the Governor in Council purported to make a regulation which was published in the *Victoria Government Gazette*, No. 670, on 23rd June 1948 as follows: "Every dairyman who sells or distributes milk in the metropolis and every owner of a milk depot who sells or distributes milk to any person in the metropolis, shall under and pursuant to section 30 of the *Milk Board Act* 1933, as amended by the *Milk Board Act* 1936 and the *Milk Board Act* 1939, and to a determination made thereunder by the Milk Board on the 9th day of June 1948, contribute in accordance with the regulations made under the *Milk Board Acts* the sum of one eighth of a penny per gallon for every gallon of milk sold or distributed by him during the period ending June 30th, 1949." (*b*) On 17th June 1949 the defendant Board purported to determine in accordance with the Acts and regulations that the sum to be contributed as aforesaid by every dairyman who sold or distributed milk in the metropolis until the period ending 30th June 1950 should be the sum of one-tenth of a penny per gallon for every gallon of milk sold or distributed in the metropolis as aforesaid, and on 21st June 1949 the Governor in Council purported to make a regulation which was published in the *Victoria Government Gazette*, No. 561, on 29th June 1949 as follows: "Every dairyman who sells or distributes milk in the metropolis and every owner of a milk depot who sells or distributes milk to any person in the metropolis, shall under and pursuant to section 30 of the *Milk Board Act* 1933 as amended by the *Milk Board Act* 1936 and the *Milk Board Act* 1939, and to a determination made thereunder by the Milk Board on the 17th day of June, 1949, contribute in accordance with the regulations made under the *Milk Board Acts* the sum of one-tenth of a penny per gallon for every gallon of milk sold or distributed by him during the period ending 30th June, 1950."

8. The plaintiffs have sold and distributed milk in the metropolis during the periods referred to in the determinations.

9. The said s. 30 and the regulations and determinations purport to impose a duty of excise contrary to the provisions of s. 90 of the Constitution of the Commonwealth and is and are and at all times have been invalid.

10. The said regulations are and each of them is beyond the power conferred upon the Governor in Council by the said s. 37 (as so amended) and invalid.

11. The defendant Board has demanded and demands from the plaintiffs, or alternatively the plaintiff Eric Moss Parton, payment of the sum of £70 8s. 10d. which it claims to have been due and payable to it on or about 21st July 1949 in respect of the period of seven months prior to the said month of July as contributions determined by it under the provisions of the said s. 30 and the regulations and determinations and threatens to take proceedings for the recovery thereof and if such sum is not paid as demanded the defendant Minister may cancel the said licence of the plaintiffs and each of them, whereby the plaintiffs will be prohibited and prevented from carrying on their said business and will suffer injury and loss.

The plaintiffs claimed :—

(*a*) A declaration that s. 30 of the Act and the said regulations and determinations thereunder with respect to contributions and each of them are and is and have and has at all material times been invalid.

(*b*) A declaration that the said regulations are and each of them is invalid.

(*c*) An injunction to restrain the defendant Board from taking proceedings to recover from the plaintiffs or either of them the said or any sum as a contribution under the said section.

(*d*) An injunction to restrain the defendant Minister and every other person for the time being the Minister administering the Acts from cancelling the said licence of the plaintiffs or either of them as owner of a dairy under Part II. of the *Milk and Dairy Supervision Act* 1928 by reason of non-payment of the said sum of £70 8s. 10d. to the Board or any other contributions under the said section.

The defendants demurred to the statement of claim.

M. Ashkanasy K.C. (with him *G. Gowans*), for the plaintiffs. The levy in question here is clearly a tax. To describe it as a " contribution " does not alter its character. [He referred to *Attorney-General (N.S.W.)* v. *Homebush Flour Mills* (1); *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ltd.* (2).] The levy is a compulsory payment recoverable in a court, and it carries the additional sanction of cancellation of licence and also the possibility of penal liability under s. 35. It is payable to a

(1) (1937) 56 C.L.R. 390, at p. 401.

(2) (1933) A.C. 168, at pp. 172, 173, 175, 176.

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fund established and kept in the Treasury under the control of the Board, which is a public authority appointed by and representing the Crown, and it is to be used for public purposes. The Board is, in the narrowest sense, an agent of the Crown. The levy is not for services to be rendered to the person who has to pay. It is imposed in respect of goods and is determinable according to the quantity of the goods. It operates at the point of sale or distribution, but it does not follow that it is not a duty of excise such as, under s. 90 of the Constitution, only the Commonwealth can impose. It would be an unreal view to regard the milk distributor as engaged merely in the process of selling or distributing milk. There is a continuous process of keeping the milk chilled and bottling, sealing and delivering it; that is to say, in the hands of the distributor the milk undergoes further processes which are within the description of "production or manufacture." *Commonwealth & Commonwealth Oil Refineries Ltd.* v. *South Australia* (1) shows that an excise may be imposed at the point of sale and supports the view that the present levy is an excise. The reasoning of all the judges (including the dissentients) in *Matthews* v. *Chicory Marketing Board (Vict.)* (2) governs the present case. The dissenting view in the case last cited was that the levy did not relate to a commodity because it was fixed in relation to an area of land. *Crothers* v. *Sheil* (3) does not affect the present case; there it was held that there was no tax. So also in *Hopper* v. *Egg and Egg Pulp Marketing Board (Vict.)* (4). In *Hartley* v. *Walsh* (5) the charge was held to be for services rendered. *Patton* v. *Brady* (6) supports the plaintiffs' submission. It is significant that the case was decided in 1901; it shows what was the understanding of "excise" at the inception of the Commonwealth. [He referred to *John Fairfax and Sons Ltd. & Smith's Newspapers Ltd.* v. *New South Wales* (7); *Vacuum Oil Co. Ltd.* v. *Queensland* (8).] The regulation set out in par. 6 of the statement of claim, being that in accordance with which determinations of the Board are to be made under s. 30 of the Act, is beyond the powers conferred by the Acts. It failed to take into account the amendments to s. 30 made by s. 14 of the *Milk Board Act* 1939, which excluded the owners of milk shops from the description of "dairyman" so that they are excluded from liability under s. 30. The result is that it does not define the persons to be made liable in such

(1) (1926) 38 C.L.R. 408.
(2) (1938) 60 C.L.R. 263: See pp. 276, 279, 280, 281, 287, 289, 302, 303.
(3) (1933) 49 C.L.R. 399.
(4) (1939) 61 C.L.R. 665.
(5) (1937) 57 C.L.R. 372.
(6) (1901) 184 U.S. 608, at p. 617 [46 Law. Ed. 713].
(7) (1927) 39 C.L.R. 139.
(8) (1934) 51 C.L.R. 108.

a way as to keep it within power. The persons expressed to be liable for "contributions" are "every dairyman and owner of a milk depot liable to pay such contributions." Even if the words "liable to pay" attach to the word "dairyman" (which is by no means clear), it is not an adequate method of excepting owners of milk shops. It really says no more than that "every person liable to pay shall be liable to pay." The determinations referred to in par. 7 (*a*) and (*b*) of the statement of claim contain no such qualification (if it is an adequate qualification) of the words "every dairyman." They are therefore beyond power, even if the regulation is not. It follows that the further regulations set out in par. 7 (*a*) and (*b*) of the statement of claim are invalid.

R. R. Sholl K.C. (with him *D. I. Menzies*), for the defendants. The levy challenged here is in all material respects indistinguishable from that which was upheld in *Hartley* v. *Walsh* (1). The *Dried Fruits Act* 1928 (Vict.), s. 18, which was there in question is substantially the same as ss. 30 and 31 of the *Milk Board Act* as to incidence of the levy, machinery for collection and purposes for which raised. If the basis of the decision is that the levy was for services rendered and therefore not a tax or an excise, the same reasoning applies here. Cf. *Cotton* v. *The King* (2). The return of the benefit of the levy to the industry in general is sufficient to constitute such services. Moreover, the levy is not imposed in respect of or in relation to production or manufacture of milk or even in respect of or in relation to the first sale after production; and no imposition is a duty of excise within s. 90 of the Constitution unless it is so imposed. Cf. *Oxford English Dictionary*, s.v. "excise," second definition: "A duty charged on home goods either in the process of their manufacture or before their sale to the home consumer." The reference in s. 93 (i.) of the Constitution to "duties of excise . . . on goods produced or manufactured" &c. shows what is contemplated by s. 90. In the *Crystal Dairy Case* (3) the levy was imposed directly on producers (farmers), but the Privy Council appears to have regarded it as not an excise because it was not imposed before sale. However, the question in the Canadian cases is whether a tax is "indirect," and not all indirect taxes are excises (*Matthews* v. *Chicory Marketing Board* (*Vict.*), per *Starke* J. (4)). A sales tax is not necessarily a customs or excise duty. It is submitted that a State could impose a sales tax on imported

(1) (1937) 57 C.L.R. 372: See pp. 376, 377, 396, 399, 400.
(2) (1914) A.C. 176.
(3) (1933) A.C. 168: See p. 176.
(4) (1938) 60 C.L.R., at p. 285.

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goods or those locally produced without infringing s. 90. The levy here is not imposed in the expectation or intention that it will be passed on to subsequent purchasers or consumers; and it is of the essence of an excise duty within s. 90 that it should be imposed with such an expectation or intention. Alternatively, in any view of the constitutional meaning of excise, s. 30 of the Act is valid; sub-s. 1 (*a*) does not of itself involve a form of contribution which has any relation to the volume of milk sold or distributed. The only thing which is related thereto is a maximum limit on each contribution, which need not of itself reach the maximum or be calculated with reference to volume of anything. A tax on profits, subject to the maximum mentioned in s. 30, would be unexceptionable. [He referred to the *Acts Interpretation Act* 1930 (Vict.), s. 2.] Even on the plaintiffs' view of excise, reg. 6 would not be wholly invalid; only the first branch of the third sentence would be obnoxious to s. 90. The meaning of excise has been considered in *Peterswald* v. *Bartley* (1); *R.* v. *Barger* (2); *Oil Refineries Case* (3); *John Fairfax & Sons Ltd.* v. *New South Wales* (4); *Crothers* v. *Sheil* (5); *Vacuum Oil Co. Ltd.* v. *Queensland* (6); *Homebush Flour Mills Case* (7); *Hartley* v. *Walsh* (8); *Chicory Marketing Case* (9) *Hopper's Case* (10). The views expressed in those cases diverge to some extent, but in the main they are consistent with the defendants' argument; to the extent to which they are not (particularly, in so far as they do not give the weight attached by the defendants to the words of s. 93), it is submitted that they should not be followed. *Patton* v. *Brady* (11) is not an authority on the Australian Constitution; it is inconsistent with the view of the Privy Council in *Atlantic Smoke Shops Ltd.* v. *Conlon* (12). There is no original jurisdiction in the High Court to determine whether the regulations and determinations are outside the powers conferred by the Act itself (*Carter* v. *Egg and Egg Pulp Marketing Board* (13)). Alternatively, it is submitted that the relevant regulations and determinations are within power. The relevant clause of reg. 6 is limited to persons "liable to pay"; this is a reference back to s. 30 of the

(1) (1904) 1 C.L.R. 497, at pp. 506, 508, 509, 511, 512.
(2) (1908) 6 C.L.R. 41, at pp. 73, 74, 117.
(3) (1926) 38 C.L.R., at pp. 419, 420, 426, 430, 434, 435, 437-439.
(4) (1927) 39 C.L.R., at pp. 142, 144-147.
(5) (1933) 49 C.L.R., at pp. 408-410.
(6) (1934) 51 C.L.R., at pp. 120, 124.
(7) (1937) 56 C.L.R., at pp. 396, 403, 406, 408, 417, 419, 421, 422.
(8) (1937) 57 C.L.R., at pp. 376, 377, 396, 399, 400.
(9) (1938) 60 C.L.R., at pp. 276, 277, 281, 284, 285, 291, 292, 298, 299, 300, 303.
(10) (1939) 61 C.L.R., at pp. 686, 687.
(11) (1901) 184 U.S. 608 [46 Law. Ed. 713].
(12) (1943) A.C. 550.
(13) (1942) 66 C.L.R. 557.

Act, and it limits the operation of reg. 6 to the classes referred to in s. 30. The determinations and subsequent regulations are correspondingly limited by the expressions " under and pursuant to section 30 " and " in accordance with " the Acts and regulations. These instruments cannot impose any liability on the owners of milk shops, and they should not be read as attempting to do so. If and in so far as the regulations and determinations purport to have any wider operation, they are merely ineffective ; they do not operate on anyone but the classes rendered liable by the Act. They validly apply to the plaintiffs : Cf. *Acts Interpretation Act* 1928 (Vict.), s. 28. Even if the regulations of 1948 and 1949 are invalid, they are quite unnecessary and their invalidity does not matter.

G. Gowans, in reply. No conclusion as to the validity of the scheme now in question flows from the decision in *Hartley* v. *Walsh* (1) as to the validity of the *Dried Fruits Act*. The Acts are not comparable ; in particular, s. 18 (6) of the *Dried Fruits Act* is not comparable with s. 31 of the *Milk Board Act*, which covers much wider purposes. The true meaning of *Hartley* v. *Walsh* (2) is that three of the judges treated the Act as placing an impost on the grower and providing a scheme for rendering services to him. There was no decision that s. 18 of the Act was valid ; two judges did not mention the point, and the opinion of *Evatt* J., who treated the section as severable, was a tentative one. The reliance in that case on *Crothers* v. *Sheil* (3) shows that the view taken was that the impost was not a tax. Unless this was the basis of the judgments, they are inconsistent with the *Crystal Dairy Case* (4), which was not cited to the Court, and with the views expressed in the *Chicory Marketing Case* (5). The argument that to be an excise a duty must be imposed in respect of or in relation to production or manufacture derives from s. 93 of the Constitution : duties of excise " on goods produced or manufactured " &c. To treat those words as equivalent to " in relation to goods produced or manufactured " may be no real change (see, however, *Attorney-General (N.S.W.)* v. *Collector of Customs* (6)) ; but to treat them as equivalent to " in relation to production or manufacture " is a substantial change, which is not justified. It leads to the argument that an excise duty is one imposed at the point of production or manufacture. *Patton* v. *Brady* (7) shows that the ordinary understanding of excise was

(1) (1937) 57 C.L.R. 372.
(2) (1937) 57 C.L.R. : See pp. 380, 391-393.
(3) (1933) 49 C.L.R. 399.
(4) (1933) A.C. 168.
(5) (1938) 60 C.L.R., at pp. 276, 281, 290.
(6) (1908) 5 C.L.R. 818, at p. 829.
(7) (1901) 184 U.S. 608 [46 Law. Ed. 713].

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not so restricted. The definition in the *Encyclopaedia Britannica* (cited as the second definition in the *Oxford English Dictionary*) was used by *Higgins* J. in the *Oil Refineries Case* (1), but he did not regard it as preventing an excise duty being imposed in relation to sale. The decision in *Peterswald* v. *Bartley* (2) did not require such a limitation. The references to " first seller " in the *Oil Refineries Case* (3) came from the Act there under discussion. The *Fairfax Case* (4) was a case of publication of a newspaper, not of a sale by a producer: See *McFarlane* v. *Hulton* (5). The *Homebush Flour Mills Case* (6) was a case of sale, though only a notional one. The *Atlantic Smoke Shops Case* (7) involved a tax on the consumer. The definition of " milk " in s. 4 of the *Milk Board Act* shows that production does not cease at the dairy farm. As to the argument that the levy was not imposed by the legislature in the expectation that it would be passed on, there are two answers:—(1) The real test is whether it is susceptible of being passed on or whether the legislature is " indifferent " (*Atlantic Smoke Shops Case* (8)). (2) The exemptions in s. 30 show that the legislature intended that the levy was not to be exacted twice in respect of the same goods. As to the jurisdiction to entertain the claim that the regulations and determinations are beyond the powers conferred by the Act, see *Hopper's Case* (9). The present case is not like *Carter's Case* (10), where there were separate and distinct causes of action. Here the validity of the regulations is challenged on two grounds, the constitutional ground and the width of the regulation-making power. The Court has power to consider both grounds. As to the contention that s. 30 can stand even if the regulations and determination are invalid, the statement of claim asserts that the section and the subordinate instruments in conjunction imposed the levy, and the demurrer joins issue on that assertion.

Cur. adv. vult.

Dec. 21.

The following written judgments were delivered:—

LATHAM C.J. This is a demurrer to a statement of claim in an action in which the plaintiffs Eric Moss Parton and Margaret Parton seek a declaration that s. 30 of the *Milk Board Acts* of Victoria and certain regulations and determinations thereunder with respect to contributions are invalid, a declaration that, even if the Acts are

(1) (1926) 38 C.L.R., at p. 435.
(2) (1904) 1 C.L.R. 497.
(3) (1926) 38 C.L.R. 408.
(4) (1926) 39 C.L.R. 139.
(5) (1899) 1 Ch. 884, at p. 888.
(6) (1937) 56 C.L.R. 390.
(7) (1943) A.C. 550.
(8) (1947) A.C., at pp. 564, 567.
(9) (1939) 61 C.L.R., at pp. 673, 677, 680, 681.
(10) (1942) 66 C.L.R. 557.

valid, the regulations are invalid, and appropriate injunctions. The principal question which arises is whether the Acts or the regulations impose a duty of excise. The Commonwealth Constitution, s. 90, provides that the power of the Parliament to impose duties of customs and excise is exclusive. Accordingly a State Parliament cannot validly impose an excise duty. If s. 30 of these Victorian Acts is invalid, the provisions of the Acts with respect to the collection of money to meet the expenditure of the Milk Board constituted under the Acts will not operate. The actual contributions are fixed by regulations made under the statutes. Even if the Acts are valid, it may still be the case that the regulations are invalid as themselves imposing an excise duty. A further argument submitted for the plaintiffs is that the regulations fixing the amount of the contributions are (independently of all constitutional considerations) ultra vires the Acts.

The *Milk Board Act* 1933, No. 4183, has been amended in many of its sections by subsequent *Milk Board Acts* passed in 1934 (No. 4276), 1936 (No. 4463) and 1939 (No. 4676). Some of the provisions of the Act can be interpreted and applied only by reference to the *Milk and Dairy Supervision Act* 1928. These Acts embody a detailed scheme with respect to the production, distribution and sale of milk, wholesale and retail. The *Milk Board Acts* consist principally of special provisions relating to the metropolis, which is defined in s. 4 of Act No. 4183 as meaning certain municipal districts specified in the Second Schedule to the *Milk and Dairy Supervision Act* 1928, and other proclaimed municipal districts. The municipal districts mentioned in the Second Schedule are the City of Melbourne and twenty-six neighbouring suburbs.

Act No. 4183 provides for the appointment of a Milk Board by the Governor in Council (s. 5). The Milk Board has many powers. They include a power to determine minimum prices to be paid to the owners of dairy farms or milk depots for milk for sale or distribution in the metropolis (Acts No. 4183, s. 15; No. 4463, s. 4). Under Act No. 4676, s. 3, the Board may determine the maximum prices at which milk may be sold by retail in the metropolis. Certain purchases of milk must be made under contracts approved by the Board—No. 4183, s. 18; No. 4276, s. 5; No. 4676, s. 5. The Board may, and when required by the Minister shall, investigate the methods in use for the collection, transport and distribution of milk and make reports thereon—Act No. 4183, s. 21. For the purpose of promoting and encouraging the consumption of milk the Board may spend such amounts as the Minister approves—Act No. 4183, s. 22. The Board also may specify the dairies from which

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milk may be sold in the metropolis and may cancel licences held under Part II. of the *Milk and Dairy Supervision Act* 1928 by dairies not so specified. If the Board fails to specify a licensed dairy as a dairy from which milk may be sold in the metropolis and cancels the licence of a dairy, the Board is required to assess compensation to the holder of the licence and other persons injured by the failure to specify the dairy or by the cancellation of a licence: Act No. 4183, s. 23, as amended by Act No. 4676, s. 11. The Board may cancel licences under the *Milk and Dairy Supervision Act* 1928 of dairymen or owners of a dairy farm or milk depot who buy or sell milk at a price less than the minimum price and shall assess the compensation for cancellation of licences of dairies: Act No. 4463, s. 6. The Board may determine the dairies which shall be allowed to supply milk in specified areas in the metropolis: Act No. 4183, s. 24.

The Treasurer may advance £5,000 to the Board: Act No. 4183, s. 28. The Minister shall cause the Board to prepare for every year an estimate of the probable expenditure for that year to be incurred in the administration of the Act and in carrying out the powers and duties of the Board thereunder. Such estimate shall not exceed a limit fixed by the Minister and shall have no force or effect unless approved by the Governor in Council: Act No. 4183, s. 29.

Section 30 of Act No. 4183 as amended by s. 12 of Act No. 4463 and s. 14 of Act No. 4676 is now in the following terms:—"(1) (*a*) Towards the expenditure so estimated [that is the expenditure referred to in s. 29] there shall be contributed by—(i) every dairyman (other than the owner of a milk shop) who sells or distributes milk in the metropolis; and (ii) every owner of a milk depot who sells or distributes milk to any person in the metropolis—such sum as is determined by the Board in accordance with the regulations but such sum shall not in the case of any such dairyman or owner exceed a sum equal to one-quarter of a penny per gallon for every gallon of milk so sold or distributed. (*b*) Notwithstanding anything in the last preceding paragraph no contribution shall be payable by—(i) any dairyman in respect of milk sold or distributed to another dairyman (other than the owner of a milk shop); (ii) any owner of a milk depot in respect of milk sold or distributed—to a dairyman (other than the owner of a milk shop); or to any person for use in the manufacture of any prescribed article or commodity to be sold by such person by wholesale; or (iii) any person in respect of milk sold or distributed to such charitable institutions as are prescribed by the regulations. (2) The contributions payable under this section shall be assessed and be paid at such times and in such manner as may be prescribed by regulations. (3) If any such sum

is not paid as and when the same becomes payable the amount thereof may be recovered in a court of petty sessions as a civil debt recoverable summarily or in any court of competent jurisdiction by the Board ; and if such sum is not so paid the licence of the dairyman or of the owner of the milk depot (as the case may be) may be cancelled by the Minister and shall thereupon cease to have any further force or effect. (4) Every such dairyman and owner shall as and when prescribed furnish such returns and supply such information as are or is required for the purposes of this section and every such dairyman or owner who fails or refuses to furnish such a return or to supply such information as and when prescribed or who furnishes any false return or supplies any false or incomplete return or information shall be guilty of an offence against this Act."

It is possible to deal at once with the objection to the validity of s. 30 of the Acts, which is based upon s. 90 of the Constitution. Section 30 does not impose any excise duty upon milk. It provides for the payment of contributions which are not to exceed an amount equal to one-quarter of a penny per gallon for milk sold or distributed by any dairyman or owner. This provision simply fixes a maximum total amount of contribution. An amount of contribution might be fixed which was not calculated by reference to milk sold or distributed and a contribution so assessed would be within the authority conferred by the Act provided that the total amount of contribution in any year did not exceed a sum equal to the amount of money which would be produced if one farthing per gallon were paid by the dairyman or other person concerned. If, for example, a particular dairyman was required under a regulation made under the Act to pay £10 and if one farthing per gallon of milk sold or distributed by him would amount to any sum larger than £10 the assessment at £10 would be within the power conferred by s. 30. Section 30 in itself plainly does not impose any specific liability upon any person. That can be done only by regulations made under the Act. As far as s. 30 is concerned, it prescribes a limit only and there is nothing in the section which is in any way inconsistent with s. 90 of the Constitution. If a regulation made under s. 30 purported to impose an excise duty, this fact would not invalidate s. 30. The section should not be construed as purporting to authorize an unlawful regulation. It is to be assumed that the regulation-making authority will act in accordance with any relevant law. Unlawful action under a statute which is not unlawful in its own terms does not invalidate the statute. It would be quite a different case if the statute in terms purported to require or to authorize an unlawful act. Section 30 is not open to this objection.

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The contributions to which the plaintiffs object have been assessed and are required to be paid under regulations made under Act No. 4183, s. 37, as amended.

On 27th March 1947 the following regulation was made by the Governor in Council :—" Any determination by the Board under or pursuant to Section 30 of the *Milk Board Acts* shall be made at a meeting of the Board called for that purpose. In arriving at a determination the Board shall have regard to the probable revenue for the year based on the estimated quantity of milk to be sold or distributed in the metropolis. The contributions payable under and pursuant to section 30 of the *Milk Board Act* 1933 as amended by the *Milk Board Act* 1936 and any determination made thereunder shall be assessed on the quantity of milk sold or distributed in the metropolis during each month by every dairyman and owner of a milk depot liable to pay such contributions and every such dairyman or owner of a milk depot shall pay to the Milk Board by the twenty-first day of each month the contributions payable by him in respect of the milk so sold or distributed during the preceding month."

On 9th June 1948 the Board, purporting to act under that regulation, determined that the sum to be contributed by dairymen who sold or distributed milk in the metropolis until 30th June 1949 should be one-eighth of a penny per gallon for every gallon of milk sold or distributed in the metropolis. Another regulation was made on 15th June 1948 for the purpose of giving effect to this determination, and this is the regulation which actually imposed the contribution—" Every dairyman who sells or distributes milk in the metropolis and every owner of a milk depot who sells or distributes milk to any person in the metropolis, shall under and pursuant to section 30 of the *Milk Board Act* 1933, as amended by the *Milk Board Act* 1936 and the *Milk Board Act* 1939, and to a Determination made thereunder by the Milk Board on the 9th day of June 1948, contribute in accordance with the Regulations made under the *Milk Board Acts* the sum of one eighth of a penny per gallon for every gallon of milk sold or distributed by him during the period ending June 30th, 1949." In the year 1949, a similar regulation, determination, and further regulation were made—except that the contribution was fixed at one-tenth of a penny per gallon.

Regulation 6 of the regulations made under the Act on 27th March 1947 provides that the contributions payable under the *Milk Board Act* 1933 as amended and any determination made thereunder " shall be assessed on the quantity of milk sold or distributed in the metropolis during each month by every dairyman and owner of a milk depot liable to pay such contributions and every such dairyman

or owner of a milk depot shall pay to the Milk Board by the twenty-first day of each month the contributions payable by him in respect of the milk so sold or distributed during the preceding month."

These regulations require payments by dairymen and owners of milk depots. "Dairyman" means the owner of a dairy within the metropolis—Act No. 4183, s. 4. "Dairy" means any dairy within the meaning of s. 39 of the *Milk and Dairy Supervision Act* 1928 (Act No. 3736) and includes certain adjacent premises, and "dairy farm" has the like meaning as in s. 39 of that Act—Act No. 4676, s. 2. "Dairy" means (Act No. 3736, s. 39) any premises (not being solely a dairy farm or factory) where milk is kept for sale or where any dairy produce is prepared for sale and every milk depot under Part III. of the *Milk and Dairy Supervision Act* 1928. "Dairy farm" means (Act No. 3736, s. 39)—"any premises where cows are milked or kept for the purpose of producing milk either for sale or for preparing any dairy produce for sale and includes the animals thereon." "Milk depot" in the *Milk Board Acts* means any premises at which milk is received direct from the owner of a dairy farm for the purpose of mixing or treatment and which are prescribed as a milk depot by the regulations—Act No. 4183, s. 4; Act No. 4276, s. 2. "Milk shop" means any premises in the metropolis registered as a shop under the *Factories and Shops Acts* and in respect of which a licence as a dairy is held and is in force under Part II. of the *Milk and Dairy Supervision Act* 1928 and from which milk is sold for delivery only at such premises—Act No. 4276, s. 2.

The duty to pay the contribution is imposed by s. 30 upon every dairyman (other than the owner of a milk shop) and every owner of a milk depot who sells or distributes milk in the metropolis, but subject to the exceptions set out in s. 30 (1) (*b*). The amount of contribution payable depends upon the number of gallons of milk so sold or distributed during a specified period.

The milk is not produced by dairymen or owners of milk depots. It is produced on dairy farms by dairy farmers who sell the milk to such persons as dairymen and owners of milk depots. The dairymen and owners of the depots then sell or distribute the milk again. If they sell or distribute milk within the metropolis they must pay the contributions.

The question which arises in the present case is whether a duty imposed in relation to the sale or distribution, as distinct from the production or manufacture, of goods is a duty of excise. In what follows I refer only to sale, because identical considerations apply to distribution.

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The plaintiff contends that the contributions exacted in pursuance of the statute, though they provide what are regarded by the legislature as benefits to those engaged in the milk industry, should not be regarded as payments for services rendered. They are, it is argued, really a tax because they are complusory contributions levied under statutory authority payable to a body which should be regarded as a Crown agency. I am prepared to deal with the case upon the basis that the contributions are a tax. The amount of the tax depends upon the quantity of milk sold. It is a tax imposed upon commodities in relation to quantity, and is therefore, it is argued, a duty of excise. The fact that it is imposed upon the occasion of sale does not, it is said, prevent it being an excise duty, because cases decided in this Court show that a tax upon sales is a duty of excise—especially the case of *Commonwealth & Commonwealth Oil Refineries Ltd.* v. *South Australia* (1). Reference is also made to statements in other cases which are relied upon to support the proposition that a tax upon the sale of goods is an excise duty : *John Fairfax Ltd.* v. *New South Wales* (2) ; *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (3).

It is not necessary again to outline the history of excise duties. The substance of this history is summarized in *Atlantic Smoke Shops Ltd.* v. *Conlon* (4) :—" ' Excise ' is a word of vague and somewhat ambiguous meaning. Dr. Johnson's famous definition in his dictionary is distinguished by acerbity rather than precision. The word is usually (though by no means always) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer. So regarded, an excise duty is plainly indirect. A further difficulty in the way of the precise application of the word is that many miscellaneous taxes, at any rate in this country, are classed as ' excise ' merely because they are for convenience collected through the machinery of the Board of Excise—the tax on owning a dog, for example."

An account of the origin and development of duties of excise may be found in *Encyclopedia of the Laws of England*, 3rd ed., vol. 4, pp. 384 et seq. The term " excise " has been applied in Great Britain to a number of miscellaneous taxes which had nothing in common except the fact that they were taxes and were administered by a department known now as the Board of Excise. *Patton* v. *Brady* (5) supplies instances of a similar wide and vague use of the term in the United States of America.

(1) (1926) 38 C.L.R. 408.
(2) (1927) 39 C.L.R. 139.
(3) (1937) 56 C.L.R. 390.
(4) (1943) A.C. 550, at pp. 564, 565.
(5) (1901) 184 U.S. 608 [46 Law. Ed. 713].

But the references in the Commonwealth Constitution to duties of excise (in ss. 55, 86, 87, 90 and 93) are all closely associated with the subject of customs duties. I refer to what I have said as to the relation between customs duties and excise duties in *Matthews* v. *Chicory Marketing Board (Vict.)* (1). See per *Higgins* J. in *Commonwealth & Commonwealth Oil Refineries Ltd.* v. *South Australia* (2). It is, I think, plain that the word " excise " in the Commonwealth Constitution was not intended to comprehend all the taxes of various kinds, some of them not even being taxes in respect of goods, e.g. duties on manservants and armorial bearings, which from time to time have been included within the term.

The whole subject was examined in detail in *Peterswald* v. *Bartley* (3). It was there held by a unanimous court that the word " excise " in Australia had a distinct meaning in the popular mind, that the references in the Constitution to duties of excise showed that the word was used in the Constitution with this meaning, and that " 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."

This decision has been followed and applied ever since : see *R.* v. *Barger* (4) ; *Commonwealth & Commonwealth Oil Refineries Ltd.* v. *South Australia* (5) ; *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (6) ; *Hartley* v. *Walsh* (7) : see also *Matthews* v. *Chicory Marketing Board (Vict.)* (8). I am of opinion that the Court should, as a matter of course, still follow and apply the decision in *Peterswald* v. *Bartley* (3).

But in certain cases it has been held that a tax payable on the sale of goods was a duty of excise. The contributions payable under the *Milk Board Acts* are payable on the sale of milk and it is said that therefore they are duties of excise.

In my opinion an examination of the cases upon which the plaintiff relies shows that in each of them a tax payable upon the occasion of the sale of a commodity was held to be a duty of excise because the tax was a tax payable by the producer of the commodity and therefore was truly a tax upon the production of goods. If a tax is imposed upon the producer of goods when he sells the goods the tax is a tax upon production. If, however, the tax is imposed at a later stage after the producer has disposed of the goods, it is a

(1) (1938) 60 C.L.R. 263, at pp. 277, 278.
(2) (1926) 38 C.L.R., at p. 435.
(3) (1904) 1 C.L.R. 497.
(4) (1908) 6 C.L.R. 41.
(5) (1926) 38 C.L.R. 408.
(6) (1934) 51 C.L.R. 108.
(7) (1937) 57 C.L.R. 372.
(8) (1938) 60 C.L.R. 263.

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tax merely upon sale and not upon production. There may be a first sale of raw material. That raw material may then be partly manufactured and sold again. That sale would be a first sale of the partly manufactured material. That material may then be completely manufactured by additional treatment or addition of other material and sold for the first time in a completed state. That sale would be the first sale of the completely manufactured article. A simple example of such a process is to be found in successive sales of hides, of leather manufactured from the hides, and of boots manufactured from the leather. There could be an excise duty at each stage upon the production or manufacture of the goods, just as there could be an excise upon both locally manufactured malt and upon locally manufactured whisky. If the duty were made payable upon the sale by the producer or manufacturer, in each case the duty would be an excise duty, because it would be imposed upon the production or manufacture of the relevant article. In the present case, however, the contribution is exacted, not at the point of production of the material or of disposition by the producer, but when milk which has been produced has already been disposed of to a dairyman other than the owner of a milk shop or to the owner of a milk depot who then sells it to some other person. The contribution is exacted upon the second and not upon the first sale. It is payable only after all processes of production are complete and the milk has passed out of the hands of the producer and has entered the market. It is true, as pointed out in argument, that milk may be chilled and mixed after production and before sale to a consumer. But milk sold by the persons who are liable to pay the contribution is not a new article simply because it has been preserved from spoiling by refrigeration, or because in a particular gallon or quart or pint of milk there may be milk from several dairy farms. It is still the same commodity, namely milk.

I now proceed to consider more in detail the cases upon which the plaintiff relies. In *Commonwealth & Commonwealth Oil Refineries* v. *South Australia* (1) the Court held that a tax imposed on the first sale of petrol refined in South Australia was an excise duty. It was so held because it was regarded by the Court as a tax upon production: see per *Knox* C.J. (2); per *Isaacs* J. (3); per *Higgins* J. (4) and per *Starke* J. (5).

In *Attorney-General* (*N.S.W.*) v. *Homebush Flour Mills* (6) the tax was payable upon a sale of flour by the miller who manufactured

(1) (1926) 38 C.L.R. 408.
(2) (1926) 38 C.L.R., at pp. 419, 420.
(3) (1926) 38 C.L.R., at pp. 425, 426.
(4) (1926) 38 C.L.R., at p. 435.
(5) (1926) 38 C.L.R., at p. 439.
(6) (1937) 56 C.L.R. 390.

the flour. It was a tax upon production or manufacture, although made payable on the occasion of sale. As *Rich* J. expressed it (1), " it is a tax upon the production of flour in New South Wales and therefore an excise ". *Dixon* J. (2) pointed out that the tax was imposed upon the producer of the flour in respect of such production : see also per *Evatt* J. (3)—" The tax was in truth a charge or levy or tax on New South Wales flour producers," and was therefore a duty of excise. In *John Fairfax Ltd.* v. *New South Wales* (4) a tax upon newspapers issued for sale and sold was held to be a duty of excise. The Court applied the decision in *Commonwealth & Commonwealth Oil Refineries Ltd.* v. *South Australia* (5) which, as already stated, depends upon the tax being a tax upon the first sale after production.

In *Matthews* v. *Chicory Marketing Board* (6) a tax was imposed on the producers of chicory, the amount of the tax being determined by the number of half-acres planted with chicory. The tax was not a tax on sales, but the reasons given for the decision of the court show that it was held to be an excise duty because it was a tax upon production. A crop might fail, but it was held by the court that, in view of the ordinary course of affairs, namely, that planting a crop generally produced a crop, the tax should be regarded as a tax upon production of chicory and it was therefore a duty of excise : see per *Rich* J. (7)—" The levy is imposed upon the producer as a producer and not a trader " ; per *Starke* J. (8)—" It remains a tax in respect of the commodity produced for sale " ; per *Dixon* J. (9)—The fact that a crop might fail " does not seem to make the levy any less a tax upon production."

Thus, in the cases in which a tax upon the sale of an article has been held to be an excise, it has been so held because the tax was imposed upon the producer of the article and was a tax upon the production of goods. In the present case the tax is not imposed upon the producer of milk, but is imposed upon a sale made after the producer of milk has disposed of the milk to a dairyman other than the owner of a milk shop or to the owner of a milk depot. It is therefore in my opinion not a duty of excise.

The Court has considered legislation similar to that contained in the *Milk Board Acts* in the cases of *Crothers* v. *Sheil* (10), *Hartley* v. *Walsh* (11) and *Hopper* v. *Egg & Egg Pulp Marketing Board (Vict.)* (12). In each of these cases contributions were exacted for

(1) (1937) 56 C.L.R., at p. 403.
(2) (1937) 56 C.L.R., at p. 413.
(3) (1937) 56 C.L.R., at p. 419.
(4) (1927) 39 C.L.R. 139.
(5) (1926) 38 C.L.R. 408.
(6) (1938) 60 C.L.R. 263.
(7) (1938) 60 C.L.R., at p. 280.
(8) (1938) 60 C.L.R., at p. 286.
(9) (1938) 60 C.L.R., at p. 303.
(10) (1933) 49 C.L.R. 399.
(11) (1937) 57 C.L.R. 372.
(12) (1939) 61 C.L.R. 665.

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the expenses of a board which had powers of control in relation to an industry and the contributions were designed, as in the case of the *Milk Board Acts*, to meet the costs of administration of the scheme set up under the relevant statute. In each case it was held that the requirement that the contribution should be paid for the purpose mentioned did not amount to the imposition of a duty of excise. It may be pointed out that, if any tax imposed upon or in relation to the sale of a commodity is a duty of excise, the system common in the States whereby the sellers of intoxicating liquor make contributions to a fund to be employed in (*inter alia*) providing compensation for licensed houses which are closed would almost certainly have to be held invalid.

The plaintiff has a further objection to the validity of the regulations which fixed the amount of the contribution first at one-eighth and then at one-tenth of a penny per gallon of milk sold or distributed in the metropolis. The Act as amended makes the contribution payable by dairymen other than owners of milk shops and owners of milk depots—Act No. 4183, s. 30; Act No. 4363, s. 12; Act No. 4676, s. 13. The relevant power to make regulations (No. 4183, s. 37 (*d*), as amended by No. 4463, s. 12 (3), and No. 4676, s. 14 (2)) is a power to make regulations for or with respect to contributions payable under the Act by dairymen other than owners of milk shops and by owners of milk depots. It is contended for the plaintiffs that the regulations do not recognize the exception from liability created by the words "other than the owner of a milk shop" or the exceptions made by s. 30 (1) (*b*), because they purport to impose a liability for contributions upon "every dairyman and owner of a milk depot" with no exception.

But the regulation of 27th March 1947 provides that the contribution shall be assessed on the quantity of milk sold or distributed in the metropolis during each month "by every dairyman or owner of a milk depot liable to pay such contributions." It is therefore clear that the only persons upon whom the contributions are assessed are persons who are liable under the Act. (The same observation applies to reg. 6, which, it was argued, was invalid because it also failed to make the exceptions for which the Acts provide.) The further regulation of 23rd June 1948, made in pursuance of a determination of the Board of 9th June 1948, does, it is true, in terms apply to "every dairyman who sells or distributes milk in the metropolis and every owner of a milk depot who sells or distributes milk in the metropolis" and there is no express exception in the case of dairymen who are owners of milk shops or any other express exception. But the regulation proceeds to provide that

the contribution is to be paid " under and pursuant to s. 30 of the *Milk Board Act* 1933 as amended by the *Milk Board Act* 1936 and the *Milk Board Act* 1939, and to a determination made thereunder by the Milk Board on 9th June 1948." In my opinion, although the regulations are awkwardly expressed, it is sufficiently clear that they purport to impose liability only upon the persons who are actually liable under the Acts, and in the Acts there is a clear exemption of dairymen who are the owners of milk shops. I am of opinion, therefore, that the regulations are not ultra vires the Acts.

It was contended that the claim that the regulations were not within the regulation-making power conferred by the Victorian statute, not being a question arising under and involving the interpretation of the Commonwealth Constitution, was not a claim in respect of which the High Court had original jurisdiction : *Judiciary Act* 1903-1948, s. 30 (*a*) : see *Carter* v. *The Egg & Egg Pulp Marketing Board* (1). In that case, however, the claim upon which it was sought to obtain a decision of the High Court was a claim for an account which was completely separate in all its characteristics from the claim made for a declaration that certain legislation was invalid—as to which latter claim the High Court did have original jurisdiction. A distinction was drawn (2) between such a case and cases where a single claim " was supported upon several grounds, one or more of which involve the interpretation of the Constitution." The present is a case of the latter description, and in my opinion the Court has jurisdiction to deal with it.

For the reasons which I have stated I am of opinion that the allegations in the statement of claim, if taken to be true, (as is proper upon demurrer), do not constitute a cause of action, and that therefore the demurrer should be allowed.

RICH AND WILLIAMS JJ. This is a demurrer to an action, the purpose of which is to obtain a declaration that s. 30 of the *Milk Board Act* 1933 as amended and certain regulations and determinations made thereunder and set out in the statement of claim with respect to the payment of contributions under this section and each of them are and is and have and has at all material times been invalid. Section 29 of the Act provides that the Minister shall cause the Board to prepare for every year an estimate of the probable expenditure for that year to be incurred in the administration of the Act and in carrying out the powers and duties of the Board thereunder. Section 30 (1) (*a*) of the Act provides that towards

(1) (1947) 66 C.L.R. 557. (2) (1947) 66 C.L.R., at p. 580.

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the expenditure so estimated there shall be contributed by (i) every dairyman (other than the owner of a milk shop) who sells or distributes milk in the metropolis; and (ii) every owner of a milk depot who sells or distributes milk to any person in the metropolis such sum as is determined by the Board in accordance with the regulations, but such sum shall not in the case of any such dairyman or owner exceed a sum equal to one-fourth of a penny per gallon for every gallon of milk so sold or distributed. The section provides that no contribution shall be made by these persons in respect of certain sales and distributions, that the contributions payable under the section shall be assessed and paid at such times and in such manner as may be prescribed by regulations, and that if any such sum is not paid as and when the sum becomes payable the amount thereof may be recovered in a Court of Petty Sessions as a civil debt recoverable summarily or in any court of competent jurisdiction by the Board. The regulations made under the Act and determinations of the Board complained of are set out in the statement of claim and in the judgment of the Chief Justice and we shall not repeat them. Their effect is to levy a contribution upon dairymen and owners of milk depots in one case of one-eighth of a penny and in the other of one-tenth of a penny per gallon for every gallon of milk sold or distributed by them in the metropolis during the period ending in the one case 30th June 1949 and in the other 30th June 1950. It is claimed that s. 30 and these regulations and determinations impose a duty of excise contrary to the provisions of s. 90 of the Constitution and that for this reason they are invalid.

The purpose of the levy is to contribute to the expenditure incurred in the administration of the Act and in carrying out the powers and duties of the Board thereunder. Mr. *Sholl* submitted in the first instance, and we agree, that the present legislation is indistinguishable in substance from the legislation passed on by this Court in *Hartley* v. *Walsh* (1). In that case it was held by three members of the Court that the legislation did not impose such a duty. But we are unable to reconcile this decision with the later case of *Matthews* v. *Chicory Marketing Board (Vict.)* (2). In that case the majority of the Court held that the legislation did impose such a duty. In this conflict of opinion we prefer to follow *Matthews* v. *Chicory Marketing Board (Vict.)* (2). We do so because the charge in *Hartley's Case* (1) was considered by the Justices concerned to be of a similar nature to that in *Crothers* v. *Sheil* (3). But the two charges were not, in our opinion, of the same nature because

(1) (1937) 57 C.L.R. 372.
(2) (1938) 60 C.L.R. 263.
(3) (1933) 49 C.L.R. 399.

in *Crothers* v. *Sheil* (1) the Board acquired the property in the milk and then deducted certain charges from the proceeds of sale which were its property before distributing them amongst the dairy farmers in accordance with the Act. The fact that such proceeds are subject to deductions would not convert the scheme into one for taxation. This is made clear in the passage from the judgment of *Rich* J. in *Crothers* v. *Sheil* (1) cited by *Dixon* J. in *Matthews* v. *Chicory Marketing Board (Vict.)* (2) and from the judgment of *Starke* J. in *Hopper* v. *Egg & Egg Pulp Marketing Board (Vict.)* (3), a similar case to *Crothers* v. *Sheil* (1). The present levy is in the words of *Latham* C.J. in *Matthews* v. *Chicory Marketing Board (Vict.)* (4) " 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." In the same case (5), *Rich* J. said : " As to the fact that it (the tax) 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."

In our opinion the present levy must, like the levy there discussed, be an excise unless Mr. *Sholl's* alternative submission is correct that the contributions are not imposed in respect of or in relation to the production or manufacture of milk, or even in respect of or in relation to the first sale after production, and no imposition is a duty of excise within s. 90 of the Constitution unless it is so imposed. In connection with this submission Mr. *Sholl* supplied the Court with a valuable list of extracts from the judgments of this Court on the meaning of such duties of excise in *Peterswald* v. *Bartley* (6) ; *R.* v. *Barger* (7) ; *Commonwealth & Commonwealth Oil Refineries Ltd.* v. *South Australia* (8) ; *John Fairfax & Sons Ltd.* v. *New South Wales* (9) and the cases which we have already mentioned. The lack of unanimity in these judgments indicates the difficulty of the problem. The views there expressed must, of course, be read in the light of the facts of each particular case, and there is not, in our opinion, any decision of this Court that a levy is only a duty of

(1) (1933) 49 C.L.R. 399.
(2) (1938) 60 C.L.R., at p. 289.
(3) (1939) 61 C.L.R. 665, at pp. 676, 677.
(4) (1938) 60 C.L.R., at p. 276.
(5) (1938) 60 C.L.R., at p. 281.
(6) (1904) 1 C.L.R. 497.
(7) (1908) 6 C.L.R. 41.
(8) (1926) 38 C.L.R. 408.
(9) (1927) 39 C.L.R. 139.

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excise within the meaning of s. 90 of the Constitution if it is imposed in respect of the production or manufacture of goods or in respect of the first sale of such goods by the producer or manufacturer. In *Peterswald* v. *Bartley* (1) *Griffith* C.J. for the Court said that excise in s. 90 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. At (2) he said that the term "duties of excise" as used in the Constitution is limited to taxes on goods in process of manufacture. If the latter statement is accepted literally, a levy on the first sale of goods produced or manufactured in Australia is not an excise duty. But it has been decided that such a levy is an excise: *Commonwealth & Commonwealth Oil Refineries Ltd.* v. *South Australia* (3); *John Fairfax & Sons Ltd.* v. *New South Wales* (4). It is submitted this is because the first sale of the goods is usually a sale by the producer or manufacturer, so that such a tax is in effect a tax on their production or manufacture. But we can see no reason why a levy should not be a duty of excise within the meaning of s. 90 of the Constitution although it is imposed at some subsequent stage. It must be imposed so as to be a method of taxing the production or manufacture of goods, but the production or manufacture of an article will be taxed whenever a tax is imposed in respect of some dealing with the article by way of sale or distribution at any stage of its existence, provided that it is expected and intended that the taxpayer will not bear the ultimate incidence of the tax himself but will indemnify himself by passing it on to the purchaser or consumer. As *Higgins* J. said in *Commonwealth & Commonwealth Oil Refineries Ltd.* v. *South Australia* (3), "it matters not whether the duty is imposed at the moment of the actual sale or not, or sale and delivery, or consumption." Then there is the definition of excise duties cited by *Rich* J. in *John Fairfax & Sons Ltd.* v. *New South Wales* (5), "an inland imposition, and one imposed sometimes on the manufacturer or dealer, sometimes on the commodity itself or the retail sale."

We accept with respect the definition reached by *Dixon* J. in *Matthews* v. *Chicory Marketing Board* (*Vict.*) (6), where his Honour, after a very full discussion of the subject, said: "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 resemblance to the production or manufacture, the sale or the

(1) (1904) 1 C.L.R., at p. 509.
(2) (1904) 1 C.L.R., at p. 512.
(3) (1926) 38 C.L.R. 408.
(4) (1927) 39 C.L.R. 139.
(5) (1927) 39 C.L.R., at p. 146.
(6) (1938) 60 C.L.R., at p. 304.

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." Each of the present levies fulfils these requirements. It is a contribution of a fraction of a penny for every gallon of milk sold or distributed by the taxpayer during a certain period. This affects the goods, that is the milk sold or distributed by these taxpayers as articles of commerce, the basis of assessment is the quantity of the goods sold or distributed, and it is a levy against which it is expected and intended that the taxpayer should indemnify himself at the expense of the persons to whom the milk is sold or distributed. It is the very form of levy which s. 30 of the *Milk Board Act* contemplates and intends, for the section provides for a contribution not exceeding a fraction of a penny per gallon for every gallon of milk sold or distributed *from time to time* (the italics are ours). The regulations and determinations under challenge carry this intention into effect. We are of opinion that the section, the regulations and determinations are all invalidated by s. 90 of the Constitution.

For these reasons we would overrule the demurrer.

DIXON J. The question for decision upon this demurrer is whether the levy under the *Milk Board Acts* of Victoria of contributions to a fund kept in the Treasury called the Milk Board Fund is valid. Its validity is attacked on two grounds. One is that the levy of the contributions amounts to the imposition of a duty of excise within the meaning of s. 90 of the Commonwealth Constitution, which makes the power of the Federal Parliament to impose duties of excise exclusive. The other is that the levy has not been properly made under the authority of the *Milk Board Acts* because it covers a class of persons whom the statutes except. The jurisdiction of this Court to entertain the suit comes from the first ground, in virtue of which it is a matter arising under the Constitution or involving its interpretation.

The *Milk Board Acts* are four statutes of the State of Victoria, the principal Act (No. 4183) passed in 1933 and three amending Acts (Nos. 4276, 4463 and 4676) passed in 1934, 1936 and 1939 respectively. I shall state the result of this somewhat troublesome agglutination of statutes so far as it is material to the two points to be decided.

It begins by establishing as a body corporate a Milk Board consisting of a chairman and two members. The Board is entrusted with wide powers for the control of the trade by which Melbourne and its suburbs are supplied with milk. But the Acts also contain

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provisions directly regulating the trade. The legislation provides for the distinct parts played by the dairy farmers who produce milk, the milk depots which obtain it and mix or treat it and the dairy where milk is kept for sale or dairy produce is prepared for sale and whence milk is distributed in the metropolis. There is one particular kind of dairy, the milk shop, which is registered as a shop, licensed as a dairy and sells milk only for delivery at the premises. For some purposes it is dealt with specially. "Dairyman" and "metropolitan milk distributor" are equivalent terms. Milk for sale or distribution in the metropolis must be purchased by the dairyman either from a dairy farm, a milk depot or another dairyman. Milk depots must keep records of the milk purchased from a dairy farm and must not mix it with milk received for purposes of manufacture. Milk purchased for sale or distributed in the metropolis whether from dairy farms, milk depots or by one dairyman from another can be purchased only under and in accordance with contracts the Board has approved. Both the dairyman and the owner of the dairy farm must make returns to the Board of what they buy and sell and their records may be examined by officers of the Board. The minimum price to be paid for milk to owners of dairy farms and to milk depots is fixed by the Board and also the maximum price at which milk may be sold by retail. The Board may specify the dairies from which milk may be distributed by retail in the metropolis. It may specify dairies which are to be restricted to selling milk for delivery at the dairy premises. When a dairy is not specified as one from which milk may be so sold by retail and when a dairy is restricted to sale "over the counter" it may be compensated. The Board assesses the compensation. A licensed dairy may not be transferred without the approval of the Board and without that approval no new licence may be granted. Annually the maximum quantity of milk to be forwarded by a milk depot to the metropolis in the ensuing year may be fixed by the Board. Another duty of the Board is to license carriers who transport milk by road to the metropolis or to railheads for consignment to the metropolis. It has wide powers, and indeed duties, of inquiry. The extensive field covered by its functions necessarily means a great deal of administration. To the ordinary expenses of administration are added the liability to pay compensation and an authority to expend money on promoting and encouraging by advertisement or otherwise the consumption of milk. The Milk Board Fund is established by the statutes as the fund from which the Board will meet its expenditure. Out of the fund there is to be paid what it expends in promoting the consumption of milk, the compensation

and the costs of assessing it, and all costs and expenses of administration. Any advance the Treasurer makes to the Fund is to be repaid thereout. Lastly the Governor in Council may fix annual contributions from the Fund towards recouping expenditure incurred (sc. by the Treasury) under the *Milk and Dairy Supervision Acts* in improving the quality of milk for consumption in the metropolis.

The fund is fed by contributions exacted under s. 30 of the *Milk Board Act* as amended. Section 29 directs the Board to prepare for every year an estimate of the probable expenditure of the year in administering the Acts and carrying out the duties of the Board. It must not exceed a limit fixed by the Minister and it must obtain the approval of the Governor in Council. The method of raising the money is then dealt with by s. 30, the material sub-sections of which are as follows:—"30. (1) (*a*) Towards the expenditure so estimated there shall be contributed by—(i) every dairyman (other than the owner of a milk shop) who sells or distributes milk in the metropolis; and (ii) every owner of a milk depot who sells or distributes milk to any person in the metropolis—such sum as is determined by the Board in accordance with the regulations but such sum shall not . . . exceed a sum equal to one-quarter of a penny per gallon for every gallon of milk so sold or distributed. (*b*) Notwithstanding anything in the last preceding paragraph no contribution shall be payable by—(i) any dairyman (other than the owner of a milk shop) in respect of milk sold or distributed to another dairyman; (ii) any owner of a milk depot in respect of milk sold or distributed to a dairyman (other than the owner of a milk shop); or to any person for use in the manufacture of any prescribed article or commodity to be sold by such person by wholesale; (iii) any person in respect of milk sold or distributed to such charitable institutions as are prescribed by the regulations. (2) The contributions payable under this section shall be assessed and be paid at such times and in such manner as may be prescribed by regulations. (3) If any such sum is not paid as and when the same becomes payable the amount thereof may be recovered in a court of petty sessions as a civil debt recoverable summarily or in any court of competent jurisdiction by the Board; and if such sum is not so paid the licence of the dairyman or of the owner of the milk depot (as the case may be) may be cancelled by the Minister and shall thereupon cease to have any further force or effect." It should be noticed that the owner of a milk shop is specifically excluded from liability to make a contribution. Why it is important that this should be noticed is that it forms the foundation of the contention

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that the contribution has been levied on too wide a class. The regulation by which it is levied is said to be bad because it ignores the exception. It will be seen that it is left to the Board in accordance with regulations to determine the sum to be contributed. The Governor in Council is given a regulation-making power. It is expressed to extend to making regulations for or with respect to contributions payable under the Act by dairymen other than the owners of milk shops and by owners of milk depots. It will further be seen that a limitation is placed upon the sum to be exacted of a farthing a gallon. The limitation suggests that the contribution is to be at a rate per gallon or is to be measured by the quantity sold. All three exclusions made by par. (*b*) of sub-s. (1) are based on this assumption and they would not be workable unless the levy was calculated upon the amount of milk sold or distributed. For the exclusions are " in respect of milk sold or distributed " to the particular class of customer specified by the sub-paragraphs. But the actual words " such sum as is determined by the Board " occurring in par. (*a*) of sub-s. (1) do not expressly relate the sum to the quantity sold or restrict it to a rate per gallon. It is significant however that neither these words nor the limitation which follows limiting the levy to a farthing per gallon refer to a period of time. It is true that the budget under s. 29 is of course for a year and the rate of contribution must be determined every year. But the provision reads as if it contemplated only a contribution according to quantity, such as a rate per gallon, so that there was no need to calculate the amount per month or per annum. It would be impossible to discover whether a contribution of a sum fixed in any other manner exceeded the farthing a gallon unless the contribution was fixed according to an interval of time and over the same time the quantity of milk sold was taken and the amount at a farthing per gallon was reckoned in order to ascertain whether the limit had been exceeded. I do not think that the section authorizes the levying of a contribution otherwise than according to the quantity of milk sold or distributed.

The existing general regulations under the *Milk Board Acts* were made on 25th March 1947. Clause 6 is as follows :—" *Contributions*— Any determination by the Board under or pursuant to s. 30 of the *Milk Board Acts* shall be made at a meeting of the Board called for that purpose. In arriving at a determination the Board shall have regard to the probable revenue for the year based on the estimated quantity of milk to be sold or distributed in the metropolis. The contributions payable under and pursuant to s. 30 of the *Milk Board Act* 1933 as amended by the *Milk Board Act* 1936 and any

determination made thereunder shall be assessed on the quantity of milk sold or distributed in the metropolis during each month by every dairyman and owner of a milk depot liable to pay such contributions and every such dairyman or owner of a milk depot shall pay to the Milk Board by the twenty-first day of each month the contributions payable by him in respect of the milk so sold or distributed during the preceding month." Two determinations of the Board in purported pursuance of this clause are involved in the demurrer, one adopting a rate of an eighth of a penny a gallon the other of one-tenth of a penny. These determinations, as they are alleged in the pleading, determined that the sum to be contributed by every dairyman who sold or distributed milk in the metropolis until the end of the year for which the determination was made should be in the one case one-eighth and the other one-tenth of a penny per gallon. No mention was made of a dairyman who was an owner of a milk shop. The pleading does not state that owners of milk depots were included in the determination as I think that s. 30 (1) (*a*) requires. The validity of the imposition was not attacked on this ground and I imagine the pleader omitted the words as immaterial. The Governor in Council made a regulation in each case to give effect to the determination. Again the owner of a milk shop was not expressly excepted. But owners of milk depots are included. Each of the two regulations required that the dairyman and owner of a milk depot should "under and pursuant to s. 30 of the *Milk Board Act* 1933 as amended by the *Milk Board Act* 1936 and the *Milk Board Act* 1939 and (pursuant) to a determination made thereunder by the Milk Board . . . contribute in accordance with the Regulations made under the Milk Board Acts the sum of" &c.

The validity of the imposition is, as I have said, attacked upon the ground that owing to the failure in the Board's determinations and in the regulations lastly mentioned to except owners of milk shops, the levy includes too wide a class.

This of course is a matter of State law. But upon it depends the question whether there is a State imposition which would be effectual but for the Constitution. If it is authorized so far as State law is concerned then its validity depends on s. 90 of the Constitution. If it has not the authority of State law the State law cannot be treated as assuming to impose an excise.

In these circumstances I am of opinion that we have jurisdiction to decide the question. The case in respect of this matter is like *O'Neill* v. *O'Connell* (1) and *Hopper* v. *Egg and Egg Pulp Marketing*

(1) (1946) 72 C.L.R. 101, at pp. 115, 116, 124, 125, 126.

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Board (1). In *Carter* v. *Egg & Egg Pulp Marketing Board* (2) the claim under State law was collateral to and severable from that involving the Federal questions (3).

The substance of the question depends upon the interpretation of the three steps in combination by which the statutory power was exercised; viz. (1) clause 6 of the regulations of 25th March 1947; (2) the two respective determinations of the Board; (3) the two respective regulations imposing the levy so determined on by the Board. The first clearly limits the determinations which its provisions govern to the class of persons liable. It speaks of "every dairyman and owner of a milk depot liable to pay such contributions." The second, the determinations, professed on their face to be in accordance with the Acts and regulations; and the third, the regulations imposing the levy, recite the Acts that affect the imposition, leaving out No. 4276 which does not, and they recite the determination. On the whole I think that there is enough to show that it was not intended to impose either levy on the owners of milk shops and the regulations imposing the levies should be so interpreted. This point therefore fails. The result is that the question whether the levy amounts to the imposition of an excise must be decided.

In my opinion the levy of the contribution does amount to the imposition of a duty of excise. In stating as briefly as I can my reasons for this conclusion I shall begin by mentioning the characteristics of the contribution in virtue of which I think it is a duty of excise. In the first place I think that it is clearly a tax. It is a compulsory exaction. It is an exaction for the purposes of expenditure out of a Treasury fund. The expenditure is by a government agency and the objects are governmental. It is not a charge for services. No doubt the administration of the Board is regarded as beneficial to what may loosely be described as the milk industry. But the Board performs no particular service for the dairyman or the owner of a milk depot for which his contribution may be considered as a fee or recompense. There is nothing comparable with the facilities for which the wharfage rates were imposed in *Melbourne Harbour Trust Commissioners* v. *Colonial Sugar Refining Co. Ltd.* (4). The purposes for which the money is expended are extensive and cover not only all the activities in which the Board may engage, including the compensation of dairies whose licences are cancelled and promotion of milk consumption,

(1) (1939) 61 C.L.R. at pp. 673, 674, 680, 681.
(2) (1942) 66 C.L.R. 557.
(3) (1942) 66 C.L.R., at pp. 580, 587, 588, 593, 594, 601, 602.
(4) (1926) V.L.R. 140.

but also subventions contributed towards the cost of the measures taken under the *Milk and Dairy Supervision Acts* to improve the quality of milk in Melbourne. In *Matthews* v. *Chicory Marketing Board (Vict.)* (1) in conditions that are very similar all the judges regarded the levy there in question as a tax. The contribution is a compulsory levy by a public authority for public purposes and that is enough to show that it is a tax: *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ltd.* (2); *City of Halifax* v. *Nova Scotia Car Works Ltd.* (3).

In the next place the tax is a tax upon goods. It is a levy of an eighth or a tenth of a penny upon every gallon of milk sold or distributed in the metropolis by a dairyman or a milk depot. That means a tax upon the milk sold or distributed for consumption in Melbourne. It is not a licence fee payable as a condition of a right to carry on a business. On the other hand it is a trading tax. "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": *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* (4). Again the exaction is not a tax imposed upon the dairyman and owner of a milk depot because they are selected as the parties to the trading who should bear a particular contribution but on the contrary it is imposed on them as the persons to pay, it being a matter of indifference which of the parties ultimately bears the burden and the tax having from its nature a tendency to enter into the price obtained for the milk. The tax is therefore indirect: *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* (5). "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" (*Matthews* v. *Chicory Marketing Board* (6), per *Starke* J.). It is a sales tax and as I understand it that is generally regarded as an excise.

Finally it falls within the definition of "excise" given by the *Encyclopaedia Britannica*, 11th ed., vol. 10, and adopted by the *Oxford English Dictionary s.v.* viz.: "a term now well known in public finance, signifying a duty charged on home goods, either in the process of their manufacture or before their sale to the home consumers."

Only if the conception of what is an excise is limited by the condition that the tax must be levied on the manufacturer, that is to

(1) (1938) 60 C.L.R. 263.
(2) (1933) A.C. 168, at p. 175.
(3) (1914) A.C. 992, at p. 998.
(4) (1934) A.C. 45, at p. 59.
(5) (1934) A.C. 45, at p. 57.
(6) (1938) 60 C.L.R. at p. 285.

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say upon the goods while they are still in his hands, can I see any escape from the conclusion that the levy of the contribution is an excise.

I cannot adopt the view that this is an essential feature of the conception. What probably is essential is that it should be a tax upon goods before they reach the consumer. Though in *Commonwealth & Commonwealth Oil Refineries* v. *South Australia* (1) *Higgins* J. said: "Excise means a duty on the manufacture, production &c. in the country itself; and it matters not whether the duty is a duty imposed at the moment of actual sale or not or sale and delivery or consumption." In making the power of the Parliament of the Commonwealth to impose duties of customs and of excise exclusive it may be assumed that it was intended to give the Parliament a real control of the taxation of commodities and to ensure that the execution of whatever policy it adopted should not be hampered or defeated by State action. A tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon its manufacture or production. If the exclusive power of the Commonwealth with respect to excise did not go past manufacture and production it would with respect to many commodities have only a formal significance.

I am aware that *Isaacs* J. in *Commonwealth & Commonwealth Oil Refineries* v. *South Australia* (2) expressed the view that a tax with respect to the sale of goods as existing articles of commerce independently of the fact of their local production is not an excise duty. But upon this there are two observations to be made. One is that in *Attorney-General* (*N.S.W.*) v. *Homebush Flour Mills Ltd.* (3) *Starke* J. explicitly said on the authority of *Peterswald* v. *Bartley* (4) that the Constitution limited the words to duties charged upon goods produced or manufactured in Australia itself or upon a sale of such commodities; and *Latham* C.J. pointed out that the negative proposition was not essential to the judgment of *Isaacs* J.

The other observation is that the *Milk Board Acts* ensure that, excepting milk shops, the sale and distribution of milk in the metropolitan area of Melbourne will be through dairies and milk depots. They will obtain the milk from the dairy farms. Thus the case is, I imagine, one which *Isaacs* J. would regard as coming within the qualification he made to his proposition. In his language, the tax is "so connected with the production of the article sold or

(1) (1926) 38 C.L.R. at p. 435.
(2) (1926) 38 C.L.R. at p. 426.
(3) (1937) 56 C.L.R. at pp. 401, 408.
(4) (1904) 1 C.L.R. 497.

is otherwise so imposed as in effect to be a method of taxing the production of the article."

In *Matthews* v. *Chicory Marketing Board (Vict.)* (1) I examined the history of the word " excise " and its meaning and I shall not go over the same ground again. It is probably a safe inference from *Atlantic Smoke Shops, Ltd.* v. *Conlon* (2), which has since been decided, that a tax on consumers or upon consumption cannot be an excise. This decision perhaps makes it necessary to that extent now to modify the statement: " 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 " (3). The modification is with respect to consumption.

I do not regard *Hartley* v. *Walsh* (4) as governing the decision of the present case. The liability to contribute to which reference was there made was imposed upon persons in whose name packing sheds were registered under the *Dried Fruits Act* 1928. The contribution was to be determined by the Dried Fruits Board and was not to exceed a thirty-second of a penny a pound of the quantity of fruit sold from the packing shed and also the quantity of dried fruits forwarded therefrom for the purposes of trade or sale in the preceding year. A packing shed performs a service in processing or packing the fruit. It may do so for the grower or it may purchase the unprocessed fruit. The contribution was therefore levied upon the person responsible for the performance of the service and, at all events as to the limitation on the charge, was calculated on the goods passing through his hands in the preceding twelve months. It was therefore not a levy directly imposed upon a commodity.

Further I do not think that the question of the validity of the levy could have been material to the decision in *Hartley* v. *Walsh* (4). It was an appeal from a conviction upon an information for selling dried fruits which had not been packed in a registered packing shed contrary to a regulation made under the *Dried Fruits Acts*. The levy was made under s. 18 of the Act. The validity of the regulation could not have been affected even if s. 18 were void and of course the liability of the packing shed to pay a contribution had no relevance to the charge. *Evatt* J. said so much expressly (5). The opinions that were expressed were, I think, *obiter dicta*. Three

(1) (1938) 60 C.L.R., at pp. 287 et seq.
(2) (1943) A.C. 550.
(3) (1938) 60 C.L.R., at p. 300.
(4) (1937) 57 C.L.R. 372.
(5) (1937) 57 C.L.R., at p. 396.

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judges dealt with the liability of the packing shed to pay contributions. *Latham* C.J. said: "This contribution is specifically provided as a contribution towards carrying out the Act and as a payment for services rendered and cannot, in my opinion, be regarded as a tax forbidden by s. 90 of the Constitution. A similar charge was dealt with by this Court in *Crothers* v. *Sheil* (1). In that case an Act dealing with the marketing of milk provided that the price of the milk should be paid to the suppliers with a deduction for charges incurred in the treatment, carriage, distribution and sale of the milk and for the costs, charges and expenses of the administration of the Act by the Milk Board. It was held that this provision for deductions did not 'convert the scheme into one for taxation.' In view of this decision I do not see how it can be held that the charge made under the *Dried Fruits Act* is a contravention of s. 90 of the Constitution" (2).

If the contribution in that case was for services rendered, nevertheless I am quite certain that the contribution levied upon dairymen and owners of milk depots in the present case was not of that description. As to the decision in *Crothers* v. *Sheil* (1), I should respectfully doubt whether it was in point in *Hartley* v. *Walsh* (3). But I am clearly of opinion that it is quite irrelevant to the present case. Like *Hopper* v. *Egg & Egg Pulp Marketing Board* (4), *Crothers* v. *Sheil* (1) was a case in which there was no tax (cf. (5)).

The New South Wales *Milk Act* 1931 vested the milk in a Milk Board. Section 28 (2) then provided:—"The Board shall, out of the proceeds of milk disposed of by the Board under this Act, make provision for expenditure incurred in the treatment, carriage, distribution, and sale of milk, the costs, charges, and expenses of the administration by the Board of this Act, and any amounts necessary to repay advances made to, and to provide a sinking fund in respect of any loan raised by the Board, and interest on any such advance or loan; and subject to this Act shall make payments to each dairyman in respect of the milk delivered by him on the basis of the minimum price or prices notified in relation thereto."

The point was put by *Rich* J.:—"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 of compensation to be borne by the proceeds arising from the resale

(1) (1933) 49 C.L.R. 399.
(2) (1937) 57 C.L.R., at p. 376.
(3) (1937) 57 C.L.R. 372.
(4) (1939) 61 C.L.R. 665.
(5) (1939) 61 C.L.R., at pp. 676, 677.

by the Board. The fact that these proceeds are subject to deductions would not convert the scheme into one for taxation. . . . In the *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ltd. Case* (1) there was an actual levy of a money sum upon the producers of milk who sold it in a liquid form; here there is no tax and no duty of excise" (2). In *Hartley* v. *Walsh* (3) *Evatt* J. also referred to *Crothers* v. *Sheil* (4). But he does not appear to have expressed himself definitively. *Evatt* J. said: "Having regard to the decision in *Crothers* v. *Sheil* (4), it is very difficult to regard the charge as a duty of excise, more especially as the charge is not intended to be passed on to the consumer, but back to the grower. Even if the charge was a duty of excise, its invalidity would not affect the validity of the rest of the Act (see s. 2 of the *Acts Interpretation Act* 1930 of the State of Victoria)." *McTiernan* J. simply said: "I agree that there is no substance in the submission (see *Crothers* v. *Sheil* (4))" (5).

Before leaving *Hartley* v. *Walsh* (6) it is perhaps desirable to refer again to the character of the levy in that case. Not only was the imposition upon the proprietor of the packing shed and one measured, at least as to the maximum, by the fruit handled, but the fruit was the fruit of the previous year. This appears to me to place the imposition more in the category of a licence fee in respect of a business calculated on past business done; something like the licence fee of a licensed victualler calculated on the amount expended by him in the previous year in purchasing liquor, which I should not regard as an excise.

But for the reasons I have given I think that the contribution which the two regulations in the present case purport to impose under s. 30 of the *Milk Act* 1933 (Vict.) as amended amounts to an excise and the purported imposition is void.

In my opinion the demurrer should be overruled.

McTIERNAN J. The principal question is whether s. 30 of the *Milk Board Acts* 1933-1939 of Victoria invades the field reserved by s. 90 of the Constitution to the Parliament of the Commonwealth, because the payment which s. 30 requires to be made to the Government is a duty of excise within the meaning of s. 90. This section does not give the Commonwealth Parliament the power to impose duties of customs and of excise. This power is derived from s. 51 (ii.) of the Constitution. There is no definition of the classes of duties,

(1) (1933) A.C. 168.
(2) (1933) 49 C.L.R., at p. 408.
(3) (1937) 57 C.L.R. at p. 396.
(4) (1933) 49 C.L.R. 399.
(5) (1937) 57 C.L.R., at p. 400.
(6) (1937) 57 C.L.R. 372.

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whether customs or excise, which the Commonwealth Parliament has power to impose. The Parliament is given power to legislate with respect to taxation. Customs and excise are of course included in the term "taxation." The extent to which the taxing powers of the States are curtailed by s. 90 depends upon the interpretation of the words "duties of customs and of excise." It is necessary to consider the meaning of the words, their connection with other parts of the Constitution and the object of providing that after the imposition of uniform duties of customs only the Parliament of the Commonwealth shall have power to impose "duties of customs and of excise."

It is obviously necessary to imply after the words "customs" and "excise" some subject matter to which these duties are appropriate.

The term "duty of customs" means a duty upon the importation or exportation of goods or any duty which, irrespective of its form, burdens the importation or exportation of goods: for example a tax upon the importer in respect of the sale of the goods. It may be inferred from the term "duties of customs" that Parliament is intended to have exclusive power to impose duties upon the importation of goods into or the exportation of goods from the Commonwealth.

But by the term "excise," s. 90 does not so plainly indicate the subject matter upon which only the Parliament of the Commonwealth can impose duties of excise.

The term "excise" includes exactions for licences to carry on certain trades or occupations and it is used to cover miscellaneous taxes on various articles and sometimes as a synonym for inland revenues. Excise also means a duty on the manufacture, production, sale or consumption of goods. A duty of excise of this kind and a duty of customs are classified as indirect taxes.

Duties of customs on imported goods have a relationship to the price paid by the user or consumer of the goods similar to that which duties of excise imposed upon goods produced or manufactured in the country have to the price paid by the user or consumer of those goods. There is an important relationship between duties of customs and duties of excise levied upon production or manufacture. In *Stephen's Commentaries on the Laws of England*, 16th ed., vol. II, p. 668, there is this statement: "The relationship of excise to customs duties is always of great importance; though the views taken of it naturally vary with the fiscal policy followed by the country at any given time. Thus, for example, if the desire of Parliament is to favour British manufacturers at the expense of

the nation at large, customs duties will be placed on articles coming from abroad which could be manufactured in the United Kingdom, but no corresponding or 'countervailing' excise duties on articles produced at home will be levied. If, on the other hand, Parliament takes the view that open competition between British and foreign manufacturers will, in the long run, produce the best results for the country, then, on every article which is taxed at the Custom House, it will place a 'countervailing' excise duty on the articles of the same class manufactured in the United Kingdom."

It may be inferred from the event mentioned in s. 90 and the inclusion of customs, excise and bounties in the section that the duties of excise to which it refers have this relationship to duties of customs and that the object of the section is a uniform fiscal policy for the Commonwealth. The meaning of the term "excise" in s. 90 is governed by the object of the section.

In *Peterswald* v. *Bartley* (1), *Griffith* C.J. cites a passage in the work written by *Quick & Garran* "on the origin and use of the term 'excise'" in which the learned authors say: "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 manufactured in the country; and this is the sense in which excise duties have been understood in the Australian colonies, and in which the expression was intended to be used in the Constitution of the Commonwealth."

Section 90 does not restrict the power of a State legislature to the utmost extent that the widest meaning of the words "duties of excise" would allow, but to the extent only that the object of the section requires.

The words "duties of customs and excise" are used in ss. 86, 90 and 93. In s. 93 the term "customs" is used to mean a duty chargeable "on goods imported into a State," and "excise" to mean a duty "paid on goods produced or manufactured in a State."

In *Peterswald* v. *Bartley* (2) it was decided that the duties of excise mentioned in s. 90 are taxes levied on the production or manufacture of goods. In the *Motor Spirit Case* (3) a State tax levied upon the "first sale" made by "a producer" was held to be a tax on production and consequently a duty of excise within the meaning of s. 90. In *John Fairfax & Sons Ltd. & Smiths Newspapers Ltd.* v. *New South Wales* (4) another State tax was

(1) (1904) 1 C.L.R., at p. 508.
(2) (1904) 1 C.L.R. 509.
(3) (1926) 38 C.L.R. 408.
(4) (1927) 39 C.L.R. 139.

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held to be such a duty of excise for the same reason. The nature and incidence of the tax may be ascertained by reference to s. 2. of the *Finance (Taxation Management) Act* 1926 and s. 3 of the *Finance (Newspaper Taxation) Act* 1926. In *Matthews* v. *Chicory Board (Vict.)* (1) a State tax was held to be a duty of excise within s. 90 because it was levied upon production. In an earlier case, *Attorney-General* v. *Homebush Flour Mills Ltd.* (2), a contribution levied upon a miller in respect of the sale of flour was held to be an excise tax which s. 90 put beyond the powers of the State legislature.

In the *Motor Spirit Case* (3) *Isaacs* J. said, after referring to the interdependence of customs, excise and bounties in the Constitution, that he agreed with the reasoning in *Peterswald* v. *Bartley* (4).

In that case *Griffith* C.J. (5) said that, "when used in the Constitution it (the term 'excise') 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."

The passage in the reasons for judgment of *Isaacs* J. in the *Motor Spirit Case* (6) in which he expressed agreement with the reasoning in *Peterswald* v. *Bartley* (4) is as follows: "Licences to sell liquor or other articles may well come within an excise duty law, if they are so connected with the production of the article sold or are otherwise so imposed as in effect to be a method of taxing the production of the article. But if in fact unconnected with production and imposed merely with respect to the sale of the goods as existing articles of trade and commerce, independently of the fact of their local production, a licence or tax on the sale appears to me to fall into a classification of governmental power outside the true content of the words 'excise duties' as used in the Constitution. Such taxing regulations are, in my opinion, not 'withdrawn' from the States, however they might stand in presence of relevant Commonwealth legislation respecting foreign or inter-State trade. I agree with the reasoning in *Peterswald* v. *Bartley* (4)."

Higgins J. (7) gives instances of excise duties within the meaning of s. 90. One is a tax upon the distillation of spirits: another is a duty imposed upon tobacco manufactured in any tobacco factory

(1) (1938) 60 C.L.R. 263.
(2) (1937) 56 C.L.R. 390.
(3) (1926) 38 C.L.R., at p. 426.
(4) (1904) 1 C.L.R. 497.
(5) (1904) 1 C.L.R., at p. 509.
(6) (1926) 38 C.L.R. 408, at p. 426.
(7) (1926) 38 C.L.R., at p. 434.

and entered for home consumption. There is also this statement by *Higgins* J. (1): "for the purpose of section 90 and our Constitution as a whole, customs duty is a duty on the importation or exportation whether by land or by sea; whereas excise duty means a duty on the manufacture, production etc. in the country itself; and it matters not whether the duty is imposed at the moment of actual sale or not, or sale and delivery, or consumption." This means that it matters not if a duty "on the manufacture, production etc." is imposed "at the moment of" any of the transactions which are mentioned.

The weight of judicial authority favours the view that s. 90 withdraws from the States power to levy a duty on the production or manufacture of goods, but not that s. 90 goes as far as to withdraw from the States the power to levy a tax on goods which is in fact unconnected with their production and is imposed merely with respect to the sale of the goods as existing articles of commerce.

Section 30 of the *Milk Board Act* 1933-1939 requires "a dairyman other than the owner of a milk shop" and "every owner of a milk depot" to contribute towards the expenditure incurred in the administration of the Acts. The dairyman as owner of a milk depot is made subject to liability only if he sells or distributes milk in the metropolis. In order to ascertain what is meant by "dairyman" and "owner of a milk depot," it is necessary to refer to definitions in the *Milk Board Acts* and the *Milk and Dairy Supervision Act* 1928. Upon reference to those definitions, it is seen that the authority given by s. 30 is limited to exacting contributions from distributors of milk and not from dairy farmers or producers as such. The Act gives authority to exact a contribution in respect of sale or distribution. The Milk Board is given power to determine the sum to be paid by any person who is liable to contribute but subject to the condition that "such sum shall not in the case of any such dairyman or owner exceed a sum equal to one quarter of a penny per gallon for every gallon of milk so sold or distributed."

The pecuniary impost which s. 30 authorizes is a burden upon the sale or distribution of milk to users and consumers. It is not levied upon the producers and it is in fact not connected with production. The impost is levied with respect to the sale of milk as an existing article of commerce independently of the production of the commodity. The impost is not a duty of excise within the meaning of s. 90.

The sellers and distributors who are required to make the payment provided by s. 30 may pass on the amount of the liability to the

(1) (1926) 38 C.L.R., at p. 435.

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users and consumers of the milk and the Parliament may have expected that they would do so. The burden of the payment may be an indirect tax, but the Constitution does not withdraw power from the States to impose any indirect tax unless it is a duty of customs or of excise within the meaning of s. 90.

The payment which s. 30 requires to be made is a tax because it is a forced contribution to the government for public purposes. The objects of the Acts are directed to the general welfare rather than to the performance of services for the sellers and distributors who may be required to contribute. But the tax is not a duty of excise within s. 90 and is therefore within the constitutional power of the State.

As s. 30 is not in conflict with the Constitution, the question whether the regulations and determinations are invalid arises under and involves only the interpretation of the *Milk Board Acts*. Such a question is not within the original jurisdiction of this Court. No declaration should therefore be made as to the validity of the regulations and the determination: *Carter* v. *The Egg Board* (1).

In my opinion the demurrer should be allowed.

Demurrer overruled.

Solicitors for the plaintiffs: *Wm. J. Clarke & Co.*

Solicitor for the defendants: *F. G. Menzies*, Crown Solicitor for Victoria.

E. F. H.

(1) (1942) 66 C.L.R. 557.