[HIGH COURT OF AUSTRALIA.]

HOPPER . . . . . PLAINTIFF;

AND

THE EGG AND EGG PULP MARKETING BOARD (VICTORIA) . . . . . DEFENDANT.

H. C. OF A. 1939.

MELBOURNE, *May* 9, 10; *June* 1.

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

Constitutional Law—Excise duty—Marketing scheme—Pool—Commodity vested in board—Payment to producer—Deductions—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 90—*Marketing of Primary Products Act* 1935 (*Vict.*) (*No.* 4337), *secs.* 16 (2), 18 (1) (*i*), 23, 24.

Pursuant to the *Marketing of Primary Products Act* 1935 (Vict.) eggs were proclaimed a commodity and (except such as were the subject of inter-State trade) became vested in the Egg and Egg Pulp Marketing Board constituted under the Act, as its absolute property, and were to be delivered to the board by the producers, whose right of property was "converted into a claim for payment in accordance with" the Act. The Act empowered the board to dispose of the commodity and, out of the proceeds and of other moneys received by it, after making certain deductions, to make payments to each producer in respect of the commodity delivered to the board by him, on the basis of the net proceeds of sale of all the commodity of the same quality or standard delivered to the board during a prescribed period and the proportion of the commodity delivered by each producer, "regard being had to the other circumstances (if any) that affect the amount of the payments." The board was also given power to make advances to producers on account of the amounts to which they would ultimately be entitled. It was authorized to deduct from the proceeds of sale an amount not exceeding one halfpenny in the pound for the purpose of establishing a reserve fund, and also to deduct the expenditure incurred in and about the marketing of the commodity, the costs, charges and expenses of administration and any sums necessary to repay advances and interest thereon. On delivering eggs to the board a producer was given a receipt in the form of a certificate in which he was credited with the amount

H. C. OF A. 1939.

HOPPER v. EGG AND EGG PULP MARKETING BOARD (VICT.).

which the eggs would realize if sold at the current price fixed by the board, less deductions consisting of a "pool deduction" of 1d. per dozen, a grading charge and selling commission, and an advance payment of the balance shown in the certificate was made to the producer.

Held that, if the Act authorized the "pool deduction," it did not thereby impose a duty of excise in contravention of sec. 90 of the Constitution.

Crothers v. *Sheil*, (1933) 49 C.L.R. 399, applied.

Per Evatt J.: A question as to the limits *inter se* of the constitutional powers of the Commonwealth and a State is involved when the validity of legislation of a State is attacked by reference to sec. 90 of the Constitution.

ACTION referred to Full Court.

The plaintiff, Ernest George Hopper, a poultry-farmer in Victoria, brought an action in the High Court against the Egg and Egg Pulp Marketing Board of that State. The board is a corporation constituted under the *Marketing of Primary Products Act* 1935 (Vict.), both eggs and egg pulp having been declared a product and a commodity for the purposes of the Act, and the Governor in Council having, pursuant to sec. 16 of the Act, declared that from and after 16th August 1937 all eggs subject to the Act should be vested in the defendant as the owner thereof and delivered by the producers thereof, including the plaintiff, to the board or its authorized agent.

On 3rd September 1937 the plaintiff, in obedience to the defendant's directions delivered to the defendant nine dozen eggs. In respect of that delivery the defendant paid or credited to the plaintiff 8s. 6d., which was arrived at by fixing or estimating the price or value of the nine dozen eggs at 10s. 3d. and by making therefrom three deductions totalling 1s. 9d. in all:—

(*a*) Pool deduction at 1d. per dozen .. .. .. 9d.
(*b*) Grading charge at $\frac{3}{4}$d. per dozen .. .. .. 7d.
(*c*) Selling commission at 4 per cent. .. .. 5d.

The plaintiff contended that the so-called "pool deduction" of 1d. per dozen was unauthorized by the Act and, alternatively, that the retention thereof by the board amounted in substance to the imposition of a duty of excise within the meaning of sec. 90 of the Constitution.

The plaintiff claimed (*a*) a declaration that the defendant may not lawfully deduct and retain from the price or value of eggs

delivered by the plaintiff to the defendant or its agents the amount of 1d. per dozen or any amount as and for a "pool deduction"; (*b*) an injunction to restrain the defendant from so deducting and retaining such sum or any sum as and for a "pool deduction"; (*c*) payment of the sum of 9d.

Under sec. 18 of the *Judiciary Act* 1903-1937 *Latham* C.J. ordered that the case be argued before the Full Court upon the pleadings, particulars and admissions of fact made by the parties.

Further facts appear in the judgments hereunder.

Gorman K.C. (with him *Sholl*), for the plaintiff. The "pool deduction" is not authorized by the *Marketing of Primary Products Act* 1935. The deduction was made for the purpose of "market stabilization," which is not a purpose for which the board is authorized to spend money. If the deduction is authorized by the Act, it is a duty of excise and the provisions authorizing it are *ultra vires*. The real machinery between the board and the plaintiff was that the board bought his eggs and, instead of paying him the price which it had fixed, it deducted the sum of 1d. per dozen. The case is more like *Matthews* v. *Chicory Marketing Board (Vict.)* (1) than *Crothers* v. *Sheil* (2). The deduction is not a payment for services rendered, and so it is distinguishable from the levy which was upheld in *Hartley* v. *Walsh* (3).

Ham K.C. (with him *D. I. Menzies*), for the defendant. The plaintiff's case is based upon a misconception. His eggs, together with all other eggs produced in Victoria within two years from 16th August 1937, except those excluded by sub-sec. 3 of sec. 16 of the *Marketing of Primary Products Act* 1935, became the property of the board as soon as they came into existence. The board could not and did not buy his eggs. Upon delivery of his eggs to the board it made him an advance pursuant to sec. 24 (3) and calculated that advance by deducting certain charges and 1d. from the amount which it was estimated the eggs would sell for at the time of delivery. The price which the board fixed was the price at which its agents

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

H. C. OF A. 1939.

HOPPER v. EGG AND EGG PULP MARKETING BOARD (VICT.).

should sell eggs, not that which producers should receive. The plaintiff was entitled to nothing until after 2nd July 1938, when the pool ended, and was then only entitled to share in the net proceeds of the sale of all similar eggs delivered to the board between 16th August 1937 and 2nd July 1938. This action was commenced on 29th September 1937 and must fail. Even if the pool was not distributed strictly in accordance with sec. 23 (1), the plaintiff is not entitled to, and has not claimed any appropriate relief in this action. If there was a deduction, it is not a tax, and this case falls within *Crothers* v. *Shiel* (1), which was approved in *Hartley* v. *Walsh* (2) and *Matthews* v. *Chicory Marketing Board (Vict.)* (3). In any case, it is a payment for services rendered (*Hartley* v. *Walsh* (2)). The " pool deduction," if it be a levy, is not one which was intended to be nor could be passed on to the public ; if any thing, it was passed back to the producer. It cannot, therefore, be a duty of excise (*The Commonwealth and Commonwealth Oil Refineries Ltd.* v. *South Australia* (4) ; *John Fairfax & Sons Ltd. and Smith's Newspapers Ltd.* v. *New South Wales* (5) ; *Hartley* v. *Walsh* (6) ; *Matthews* v. *Chicory Marketing Board (Vict.)* (3) ; *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.* (7)).

Gorman K.C., in reply. *Matthews* v. *Chicory Marketing Board (Vict.)* (3) is not consistent with *Crothers* v. *Sheil* (1), and the later case should be followed. What the board actually did is best illustrated by the appointment of producer agents whose only obligation was to pay to the board 1d. for each dozen of eggs sold. The Act does not authorize the appointment of producer agents.

Cur. adv. vult.

June 1.

The following written judgments were delivered :—

LATHAM C.J. Under sec. 90 of the Constitution the power of the Commonwealth Parliament to impose duties of excise has become an exclusive power. In this action the plaintiff complains that under a State Act, the *Marketing of Primary Products Act* 1935 of

(1) (1933) 49 C.L.R. 399.
(2) (1937) 57 C.L.R. 372.
(3) (1938) 60 C.L.R. 263.
(4) (1926) 38 C.L.R. 408.
(5) (1927) 39 C.L.R. 139.
(6) (1937) 57 C.L.R., at p. 396.
(7) (1933) A.C. 168.

Victoria, an unlawful excise duty has been imposed in respect of goods. He also complains that the Act upon its true construction does not authorize a deduction made from moneys paid to him. The interpretation of the Constitution of the Commonwealth is involved in the former complaint, and upon this basis the action has been instituted in this court. The case was ordered to be argued before the Full Court under sec. 18 of the *Judiciary Act* 1903-1937.

The *Marketing of Primary Products Act* was examined in this court in *Matthews* v. *Chicory Marketing Board (Vict.)* (1), and it is unnecessary to repeat the analysis of the Act which is contained in the judgments in that case. It is sufficient to say that eggs and egg pulp were proclaimed under the Act as products and as commodities and that an Egg and Egg Pulp Board was constituted under the Act.

Under sec. 16 of the Act the eggs to which the relevant proclamation applied were divested from the producers and became vested in the board as its absolute property. Sec. 16 (3) of the Act excepted inter-State trade from the operation of the Act and thus prevented the Act from infringing sec. 92 of the Constitution (*Matthews* v. *Chicory Marketing Board (Vict.)* (1)).

In order to deal with the eggs which became vested in the board authorized agents were appointed by the board. These agents acted under an agreement under which they took delivery of eggs from producers and made payments to producers. They gave receipts for the eggs in a prescribed form (sec. 24). The authorized agents then sold the eggs at prices fixed by the board. The eggs were valued according to their grade and quality, and in the receipts given in pursuance of the Act the total amount payable to the producers, subject to deductions, was stated. In the case of the plaintiff nine dozen eggs were delivered to an authorized agent of the board. The receipt showed the amount credited to the producer as 10s. 3d. From this amount three sums were deducted, namely :—

Pool deduction at 1d. per dozen	9d.
Grading charge at ¾d. per dozen	7d.
Selling commission at 4 per cent	5d.
	1s. 9d.

(1) (1938) 60 C.L.R. 263.

H. C. OF A. 1939.

HOPPER v. EGG AND EGG PULP MARKETING BOARD (VICT.).

Latham C.J.

This left a balance of 8s. 6d., which was paid by the authorized agent to the plaintiff. The plaintiff complains of the pool deduction of 1d. per dozen.

The board also appointed "producer agents." These persons were producers of eggs who were permitted by the board to sell the eggs at fixed minimum prices. The eggs, as soon as produced, had become the property of the board, and accordingly the producer agents sold them on behalf of the board. The producer agents were allowed to retain the moneys which they received for the eggs subject to the payment of 1d. per dozen to the board as a pool deduction. The total "pool deductions" made in the first period of the board's operations amounted to about £67,000.

Sec. 16 of the Act, which provides for the vesting of proclaimed commodities in a board appointed under the Act, also provides that the rights and interests of every person in a proclaimed commodity shall from and after the date of the proclamation be converted into a claim for payment in accordance with the Act. Sec. 23 provides for the payment to be made by the board to producers. Sec. 23 (1) introduces the general principle of pooling; that is to say, each producer is to receive an amount varying with the quantity and quality of the commodity produced by him and dealt with by the board, but ultimately determined by the amount received by the board for the whole of the relevant commodity during a particular period.

Sec. 24 of the Act, which provides for the issue of certificates to the producer in the form of receipts, also contains the following provision: "(3) The board may make or arrange for advances on account of the commodity delivered to the board, and any such advances and any payment made on account of such commodity may be made at such time or times and on such terms and conditions and in such manner as the board thinks fit."

In my opinion the answer to the first question arising in this case is provided by the provisions of sec. 24 (3). The pool deduction of 1d. per dozen is not a tax imposed upon or extracted from a producer. It is a diminution of the amount of an advance which the board might have made. The eggs were not sold by the plaintiff to the board for 10s. 3d. or for any sum. The receipt issued to the plaintiff did not record any transaction of sale. The eggs, when

produced, became the property of the board. Any sale of eggs was a sale of property of the board. The whole of the proceeds belonged to the board. The board was bound at the end of a period prescribed under sec. 23 (1) to account to the producers for the proceeds of sale of the eggs. The right of the producer was to receive his share of the properly determined final balance. The board need not have made any payment to producers in advance. In fact the board did make advance payments of the sum for which the board expected the eggs would sell upon the market less certain charges and also less 1d. per dozen. The board might have deducted a larger amount. It might have deducted threepence or fourpence, but, whatever deduction was made, in the final result the board would have to account for the proceeds less only deductions allowed by the Act. Thus, what is called a pool deduction really represents only a sum which the board might have advanced if the board had been inclined to take greater risks than it thought justifiable. The deduction is not a tax. It represents an amount held in suspense the whole or part of which it is hoped the producers will ultimately receive. Substantially the same question was dealt with in the case of *Crothers* v. *Sheil* (1), which, in my opinion, is decisive against the plaintiff upon the constitutional point.

But the plaintiff further contends that the pool deduction was not authorized by the Act, and alleges more particularly in the amended statement of claim that the amount deducted has not been used nor is it intended to be used for any purpose authorized by the Act. The plaintiff relies, in order to support these contentions, upon what the board did with the £67,000 representing the one penny pool deduction, of which £24,987, only representing .36 of the pool deduction of one penny, is left as a surplus to be returned to the producers.

The first objection to the procedure adopted by the board is founded upon sec. 23 (1), which provides that the board shall, out of the proceeds of any commodity disposed of under the Act and out of any other moneys received under the Act, make payments to each producer in respect of the commodity delivered by the producer "on the basis of the net proceeds of the sale of all the commodity of

(1) (1933) 49 C.L.R. 399.

H. C. OF A. 1939.

HOPPER v. EGG AND EGG PULP MARKETING BOARD (VICT.).

Latham C.J.

the same quality or standard delivered to the board during or covering such periods of time as are prescribed." The first period so prescribed was the period from 16th August 1937 to 2nd July 1938—a period of ten and one-half months.

Sec. 23 (2) provides for deductions which may be made by the board from the proceeds of the sale of a commodity. It is in the following terms: "The board may deduct from the proceeds of sale of the commodity the expenditure incurred in and about the marketing treatment or (in the case of a board constituted in relation to potatoes) manufacture of the commodity, the costs charges and expenses of the administration by the board of this Act and any sums necessary to repay any advances made to the board and interest thereon." This provision relates to deductions which are to be made from the proceeds of the sale of the commodity before what may be described as the beneficial surplus can be distributed to producers of the commodity under sub-sec. 4 of the same section. Sub-sec. 4 provides that "for the purposes of ascertaining the amount of the payment to be paid to a producer," the decision of the board as to quality, standard or grade of a commodity delivered, the method of determining dockages and deductions to be made, cost of freight, insurance and other charges, and the amounts to be deducted under sec. 23, shall be final and conclusive. Thus, in preparing the final pool account for the purpose of determining the final dividend to be paid to suppliers of eggs, the board may make, *inter alia*, the deductions mentioned in sub-sec. 2.

In December 1938 the board prepared an account for the purpose of sec. 23 (4). That account was prepared on the basis of a single pool for all eggs instead of separate pools for different qualities or standards of eggs. The plaintiff contends that the board has therefore not complied with the provisions of sec. 23 (1) which have already been quoted. But the writ in this action was issued in September 1937. The court cannot in this action deal with questions affecting the ascertainment of moneys due to producers which could arise only after 2nd July 1938, the end of the first prescribed period.

The same observation applies to a further objection that the board has wrongly applied moneys in "stabilizing the market." The board turned eggs into egg pulp and sold in that form eggs

which were regarded as "surplus to market requirements." The eggs so treated were sold for less than the total prices paid to producers therefor by authorized agents. The board recouped the difference to the agents. The losses so incurred were, in the account of December 1938, charged against the pool-deduction receipts of £67,000. It is contended that such a deduction or charge cannot be justified under the Act. It is said that it is not "expenditure incurred in and about the marketing" or "treatment" of eggs and egg pulp under sec. 23 (2). It cannot be justified as a levy under sec. 32, for that section was held to be invalid in *Matthews* v. *Chicory Marketing Board (Vict.)* (1). Sec. 18 (1) (*i*) permits the deduction of an amount not exceeding one halfpenny in the pound of the proceeds of sale of a commodity for "the purpose of establishing a reserve fund to be used for any purpose in connection with the operations of the board." It is contended that this deduction or charge does not amount to a reserve fund under this provision. But the writ was issued before 2nd July 1938, when the relevant pool period expired. The plaintiff's right is a right to receive an amount properly ascertained under the Act after the expiry of that period. That right had not accrued when the plaintiff brought his action.

Accordingly, in my opinion, the action should be dismissed. But this decision will not preclude the plaintiff from enforcing the rights (if any) which he may have against the board which, for the reasons stated, cannot be enforced in this action.

I entirely agree with my brother *Starke* that it is the duty of this court to be satisfied that it has jurisdiction before it deals with a case. The court cannot assume jurisdiction merely because the parties raise no question as to jurisdiction. But in this case I am of opinion that there is jurisdiction because this action is a matter involving the interpretation of the Constitution (*Judiciary Act* 1903-1937, sec. 30 (*a*)). The fact that the constitutional objection has failed does not deprive the court of jurisdiction if "the facts relied on were bona fide raised, and were such as to raise" the question (*Troy* v. *Wrigglesworth* (2), per *Barton*, *Isaacs* and *Rich* JJ.). Although the claim based on the Constitution has failed, I

(1) (1938) 60 C.L.R. 263.

(2) (1919) 26 C.L.R. 305, at p. 311.

H. C. OF A. 1939.

HOPPER v. EGG AND EGG PULP MARKETING BOARD (VICT.).

cannot discern a satisfactory reason for saying that it was not a bona-fide claim so based.

In my opinion the court has jurisdiction to entertain this action and the proper order is that the action be dismissed with costs.

RICH J. The Chief Justice, pursuant to sec. 18 of the *Judiciary Act* 1903-1937, directed this case to be argued before the Full Court upon the pleadings, particulars and mutual admission of facts and documents.

The question which naturally falls first to be determined is that of jurisdiction. The statement of claim in the action alleged that on the facts the retention by the defendant of one penny per dozen of eggs delivered by the plaintiff to the defendant is "the imposition of a duty of excise within the meaning of the Constitution and is illegal." In the circumstances I think that the cause or part of the cause does "really and substantially" involve the interpretation of the Constitution (*Ex parte Walsh and Johnson*; *In re Yates* (1)). "It is not necessary, when removal of a cause, &c., is sought, to establish that the interpretation of the Constitution will necessarily call for decision, but only that that subject is involved or entangled in the controversy. . . . Once the cause is removed, the High Court is clothed with full authority essential for its complete adjudication: it is the *cause* which is removed, and not merely the question involving the interpretation of the Constitution" (2). The principle on this subject is stated and the cases collected in *Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (3). I am, therefore, of opinion that the court has jurisdiction to entertain the action.

Do then the facts show that the retention referred to constitutes a duty of excise—detested by Dr. *Johnson* as "a hateful tax levied upon commodities"? (*John Fairfax & Sons Ltd. and Smith's Newspapers Ltd.* v. *New South Wales* (4)). The relevant sections of the *Marketing of Primary Products Act* 1935 (Vict.) have been discussed by the Chief Justice, and I need not repeat them. The provisions of the Act do not contain a scheme which involves the imposition of a

(1) (1925) 37 C.L.R. 36, at p. 74.
(2) (1925) 37 C.L.R., at p. 130.
(3) (1935) 53 C.L.R. 493, at pp. 501, 504.
(4) (1927) 39 C.L.R., at p. 146.

duty of excise contrary to sec. 90 of the Constitution, and this case, I think, is governed by the case of *Crothers* v. *Sheil* (1). There remains the question whether the deduction for the purposes of the pool is authorized by the Act. I have come to the conclusion that for the purposes of carrying out and giving effect to the scheme contained in the Act the deduction in question and the application of the pool money for stabilizing the market were legitimate and authorized by the Act.

In my opinion judgment in the action should be entered for the defendant with costs.

STARKE J. This action is brought by the plaintiff against the defendant for a declaration that the defendant may not lawfully deduct and retain from the price or value of eggs delivered by the plaintiff to the defendant or its agents the amount of one penny per dozen or any amount as for a pool deduction and for ancillary relief. The jurisdiction of this court is attracted because the right of the plaintiff to the declaration involves, it is said, the interpretation of the Constitution (*Judiciary Act*, sec. 30). An order was made by the Chief Justice that the case be argued before the Full Court upon the pleadings, particulars and admissions of fact made by the parties.

In 1935 the State of Victoria enacted a statute styled the *Marketing of Primary Products Act* 1935 (No. 4337). Its object is to stabilize the prices of certain commodities, always, I take it, at the expense of local consumers. Commodities—eggs in the present case—are divested from the producers and vested in a board as its absolute property. The board is given power to dispose of the commodity and has thus power to fix and control prices. The rights and interests of the producers so divested are converted into a claim for payment in accordance with the Act. Payments are to be made, out of the proceeds of sale and certain other moneys received by the board, to each producer of the commodity delivered to the board in respect of the commodity delivered by him, on the basis of the net proceeds of sale of all the commodity of the same quality or standard delivered to the board during or covering such periods of time

(1) (1933) 49 C.L.R., at p. 408.

H. C. OF A. 1939. HOPPER v. EGG AND EGG PULP MARKETING BOARD (VICT.). Starke J.

as are prescribed and the proportion of the commodity so delivered by each producer, regard being had to the other circumstances (if any) that affect the amount of payments. But the board is allowed to deduct from the proceeds of the sale of the commodity the expenditure incurred by it in and about the marketing and treatment of the commodity, costs, charges and expenses of administration, sums necessary to repay any advances made to the board and interest thereon and an amount not exceeding one halfpenny in the pound of such proceeds for the purpose of establishing a reserve fund to be used for any purpose in connection with the operations of the board: See Act, secs. 16, 18, 23. Under the regulations the period of time prescribed for the purpose of computing payments to producers in respect of eggs delivered to the board was "the period commencing on the day appointed for the vesting of the commodity" (16th August 1937) "up to and inclusive of the Saturday preceding the first Monday in the month of July 1938" (Regulations 1937, reg. 28).

The writ in this action was issued on 29th September 1937. On 3rd September 1937 the plaintiff delivered to the board or its agent nine dozen eggs, for which the board paid or caused to be paid to him eight shillings and sixpence. In arriving at that amount the plaintiff alleges that the board fixed the price or value of the eggs at ten shillings and threepence and made therefrom the following deduction: "Pool deduction at one penny per dozen, nine pence." The plaintiff contends that this deduction is either a duty of excise which by reason of sec. 90 of the Constitution cannot be imposed by the State of Victoria or, indeed, by any State or else is wholly unauthorized by the Act.

Let it be assumed that the deduction is authorized by the Act. It is then conclusively established by the decision of this court in *Crothers* v. *Sheil* (1) that the deduction is in no sense a duty of excise. Adapting the words of *Rich* J. in that case, the provisions of the Act do not exact any pecuniary payment from the egg producer. 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 eggs and the payment of the price or

(1) (1933) 49 C.L.R. 399.

compensation to be borne by the proceeds arising from the resale by the board. The fact that these proceeds are subject to deductions would not convert the scheme into one for taxation. Those observations are as applicable to deductions under sec. 18 (1) (*i*) for a reserve fund to be used for any purpose in connection with the operations of the board, though the operations may not concern the particular pool in which the producer is interested, as to the deductions under sec. 23 (2). Sec. 16 (3) of the Act and the decision of this court in *Matthews* v. *Chicory Marketing Board (Vict.)* (1) precluded any argument that the Act contravened the provisions of sec. 92 of the Constitution.

In my opinion an allegation of some contravention of the Constitution which on its face is not such a contravention does not attract or found the original jurisdiction conferred upon this court in matters involving the interpretation of the Constitution. The allegations in the present case are merely colourable: they do not raise any real question involving the interpretation of the Constitution and are in truth fictitious, a view reinforced by the decision in *Crothers* v. *Sheil* (2). *Troy* v. *Wrigglesworth* (3), *Ex parte Walsh and Johnson*; *In re Yates* (4) and *Hartley* v. *Walsh* (5) do not, I think, conflict with this view: the questions in those cases were real and not mere pleading allegations as in the present case. The jurisdiction of the court does not rest on the consent of the parties but upon the existence of some matter founding the jurisdiction of the court. This is well expressed by the Supreme Court of the United States in a recent decision, *Texas* v. *Florida* (6): "The novel character of the questions presented and the duty which rests upon this court to see to it that its power be confined within the limits prescribed by the Constitution make it incumbent upon us to inquire of our own motion whether the case is one within its jurisdiction."

Accordingly I think this action should be dismissed for want of jurisdiction in this court.

But it is perhaps desirable that I should say something about the plaintiff's further contention that the "pool deduction" of one

(1) (1938) 60 C.L.R. 263.
(2) (1933) 49 C.L.R. 399.
(3) (1919) 26 C.L.R. 305.
(4) (1925) 37 C.L.R. 36.
(5) (1937) 57 C.L.R. 372.
(6) (1938) Law. Ed. (U.S.) (Advance Opinions) 549, at p. 553.

H. C. OF A. 1939.

HOPPER v. EGG AND EGG PULP MARKETING BOARD (VICT.).

Starke J.

penny per dozen was unauthorized, which the board disputes and also contends that in any case the facts admitted do not found any claim for relief in this action.

The allegations in the statement of claim are somewhat ambiguous, but the main facts are clear enough. The plaintiff delivered his eggs to an agent of the board, who credited him with the amount which the eggs would realize if sold at the current prices fixed by the board at which its eggs might be sold less a deduction of one penny per dozen called a "pool deduction." The amount was no part of the proceeds of the commodity vested in the board: it was a payment or advance on account of the payment payable to the plaintiff under the provisions of sec. 23 and was warranted by sec. 24 (3) of the Act. But it was not computed under the provisions of sec. 23, for the net proceeds of the commodity could only be computed at the end of the period of time prescribed in accordance with the section, that is, as already mentioned, the Saturday preceding the first Monday in the month of July 1938. The deduction, which was accounted for in cash to the board, was retained, according to the board's statements, for the stabilization of prices in the common interest. It was used for the expenses incurred by the board, for losses incurred in the operations of the board and so forth. The board's pool account of the 1937-1938 pool, which terminated on 2nd July 1938, was published in December 1938 and shows the income from the pool contributions amounted in round figures to £67,743. Expenditure totalled £42,756, and the net surplus of the pool was £24,987. The board, in its report, also of December 1938, announced that "a further and final advance of one-third of a penny per dozen would be made to all contributors to the 1937-1938 pool." Some small balance, we were informed, was still retained, but it does not appear from the facts stated whether that balance is retained by the board or transferred to the reserve fund mentioned in sec. 18 (1) (*i*). But it is admitted that the one-third of a penny per dozen was not calculated with reference to the proceeds of all eggs of the same quality or standard vested in the board during the prescribed period.

Whatever be the rights or wrongs of this distribution or retention of the net proceeds of the pool deduction, the plaintiff at the time of the action brought, namely, on 29th September 1937, had no

cause of action or of complaint in respect of the so-called "pool deduction" of one penny per dozen. Until the pool account closed, the amount actually payable to the plaintiff under sec. 23 (1) could not be ascertained, and he could not enforce any claim for payment until the amount was ascertained or ascertainable. Further, the resolution to distribute and the actual distribution of the one-third of a penny and the retention of the balance of the pool deduction all took place after action brought and cannot, therefore, found any claim in this action. The board was neither doing nor threatening any wrongful act at the time of action brought.

I have some doubt whether the board did distribute the one-third of a penny in strict accordance with sec. 23 (1), though the method it adopted results in payments that approximate to the right amounts under the section. The closing words of the section, "and regard being had to the other circumstances (if any) that affect the amount of the payments," may justify what was actually done. But we do not know the facts. Again, the facts admitted do not disclose how the board has applied the amount of the "pool deduction" that it has retained. It is by no means clear that the balance was in fact carried to reserve under sec. 18 (1) (*i*), and it is open to argument whether it could be so dealt with. In my opinion, for all these reasons, the court is not in a position finally to determine the legality of the board's acts in relation to the final distribution and retention of the net surplus in the "pool deduction" account.

The action should be dismissed for want of jurisdiction, but, in any case, because the plaintiff has not on the facts brought before the court established any right or cause of action at the time of action brought.

EVATT J. This action has been brought by the plaintiff, a poultry-farmer in Victoria, against the Egg and Egg Pulp Marketing Board of the State. The board is a corporation instituted under the *Marketing of Primary Products Act* 1935, both egg and egg pulp having been declared a product and a commodity for the purposes of the said Act, and the Governor in Council having, pursuant to sec. 16 of the Act, declared that from and after August 16th, 1937, all eggs subject to the Act should be vested in the defendant as the

H. C. OF A. 1939.

HOPPER v. EGG AND EGG PULP MARKETING BOARD (VICT.).

Evatt J.

owner thereof and delivered by the producers thereof (including the plaintiff) to the board or its authorized agent.

The action has been instituted in this court in the following circumstances. On September 3rd, 1937, the plaintiff, in obedience to the defendant's directions, delivered to the defendant nine dozen eggs. In respect of that delivery the defendant paid or credited to the plaintiff 8s. 6d., which was arrived at by fixing or estimating the price or value of the said nine dozen eggs at 10s. 3d., and by making therefrom three deductions totalling 1s. 9d. in all :—

(*a*) Pool deduction at 1d. per dozen	9d.
(*b*) Grading charge at ¾d. per dozen	7d.
(*c*) Selling commission at 4 per cent	5d.
	1s. 9d.

In the action the plaintiff contends that the so-called "pool deduction" of 1d. per dozen is unauthorized by the Act and the retention thereof by the board amounts in substance to the imposition of a duty of excise within the meaning of sec. 90 of the Commonwealth Constitution, which operates to vest in the Parliament of the Commonwealth exclusive power to impose such duties. In asking for relief, the plaintiff claims :—(*a*) A declaration that the defendant may not lawfully deduct and retain from the price or value of eggs delivered by the plaintiff to the defendant or its agents the said amount of one penny per dozen or any amount as and for a "pool deduction." (*b*) An injunction to restrain the defendant from so deducting and retaining the said amount or any amount as and for a "pool deduction." (*c*) Payment of the sum of nine pence.

I. The court has original jurisdiction to determine not only the question arising under the Constitution but also the question whether there has been a compliance by the defendant with the Victorian statute. In analogous cases this court has exercised original jurisdiction, sometimes disposing of the case without final determination of the constitutional issue, e.g., *Huddart Parker Ltd.* v. *The Commonwealth* (1) ; *Roughley* v. *New South Wales* ; *Ex parte Beavis* (2) ; *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (3) ; *The King* v. *Carter* ; *Ex parte Kisch* (4) ; and cf. also the cases *Ex parte Walsh and Johnson* ;

(1) (1931) 44 C.L.R. 492.
(2) (1928) 42 C.L.R. 162.
(3) (1934) 51 C.L.R. 108.
(4) (1934) 52 C.L.R. 221, at p. 229.

In re Yates (1); *Duncan and Green Star Trading Co. Pty. Ltd.* v. *Vizzard* (2); *The Commonwealth* v. *Australian Commonwealth Shipping Board* (3); *Attorney-General (Vict.)* v. *The Commonwealth* (4); *John Fairfax & Sons Ltd. and Smith's Newspapers Ltd.* v. *New South Wales* (5).

The original jurisdiction is attracted by reason of the constitutional question, but it is not limited to the determination of such question. The legal validity or strength of the plaintiff's constitutional point is quite immaterial so long as it is genuinely raised.

In cases where, as here, the application of sec. 90 and not sec. 92 of the Commonwealth Constitution is brought into question, the original jurisdiction of this court is more conveniently exercised although other questions also are involved. The reason is that in dealing with sec. 92 no question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States arises; but in relation to sec. 90 such a question is involved so that the Supreme Court of a State is completely deprived of jurisdiction by sec. 38A and sec. 40A of the *Judiciary Act*.

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

The decision of the court in the particular case may not mark out the precise limits of State power in relation to taxation, so that it will not completely define the boundary between State and Commonwealth power. But the decision of the court must (1) impliedly, at least, lay down some definition of a "duty of excise," and in that sense assist in the fixation of a boundary at which both State power ends and Commonwealth exclusive power begins, and (2) assert the absence (or presence) of power in the State to pass the

(1) (1925) 37 C.L.R. 36.
(2) (1935) 53 C.L.R. 493.
(3) (1926) 39 C.L.R. 1.
(4) (1935) 52 C.L.R. 533.
(5) (1927) 39 C.L.R. 139.

H. C. OF A. 1939.

HOPPER v. EGG AND EGG PULP MARKETING BOARD (VICT.).

Evatt J.

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

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

Similarly in regard to Commonwealth powers under sec. 51 and sec. 52 of the Constitution. There the validity of each Commonwealth enactment is determinable by reference to its relation to a specified subject matter of power. Nothing is said in sec. 51 about *State* legislative powers, but in sec. 52 the Commonwealth powers are referred to as " exclusive " (i.e., exclusive of the powers of the States).

In cases under sec. 51, the question as to whether a Commonwealth enactment is valid (e.g. as to aliens, sec. 51 (xix)) necessarily involves the possibility of answering the question adversely to the Commonwealth. If it is so answered, the court is declaring that, whatever the boundary of the Commonwealth legislative power as to " aliens," that boundary falls short of the power to pass the particular enactment. It is not merely that the Commonwealth is forbidden to pass the enactment (though that is true), it is that under the constitutional division of powers only the States can pass it. If so, each question of the validity of Commonwealth legislation under sec. 51 (and *a fortiori* under sec. 52) necessarily raises a question " as to " the limits of Commonwealth and State power. Of course, mere prohibitions or mandates contained in sec. 51 such as those in sec. 51 (ii) against discrimination and in sec. 51 (iii) in favour of uniformity stand in a special category.

But the general rule in relation to the powers enunciated in sec. 51 and sec. 52 is that " there *are* boundaries between the one " (i.e., the Commonwealth) " and the other " (i.e., the States) " which come

into question," to adapt Lord *Atkin's* phrase in *James* v. *Cowan* (1)*. The object of sec. 51, sec. 52 and sec. 90 is to delimit the boundaries of power as between Commonwealth and States. It is immaterial that sec. 51 and sec. 52 do not include an express declaration that the powers of the State legislatures over subject matters *not* contained either in the thirty-nine placita of sec. 51 or in the three placita of sec. 52 shall be exclusive of the powers of the Commonwealth; for, having regard to sec. 107 and the general scheme of distribution of constitutional powers between Commonwealth and State, such an additional declaration would be unnecessary.

Questions arising under sec. 92 do not necessarily involve questions arising as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State. Sec. 92 operates as a limitation upon the powers both of the Commonwealth and of the States. A decision that a State enactment does not infringe sec. 92 does not tell us that a similar enactment of the Commonwealth could lawfully be passed. Commonwealth power on the topic might be denied because not included as a subject specified either in sec. 51 (i) or elsewhere in the Constitution. Moreover, a decision that a State enactment (e.g., as to expropriation) infringes sec. 92 may tell us nothing as to whether or not the Commonwealth possesses power to pass such an enactment. The most that it tells us is that, provided the subject matter of the enactment is otherwise within Commonwealth legislative jurisdiction, sec. 92 invalidates it also. Sec. 92, in short, lays down a prohibition upon the legislative powers of the Commonwealth and State alike. If either infringes the prohibition, the respective limits of power are exceeded, no doubt. But the limits are not limits "*inter se*." If sec. 92 had declared that "the power of the Commonwealth to pass laws in respect of trade, commerce and intercourse among the States shall be exclusive" the position would be quite different because in that case an interpretation of sec. 92 would necessarily involve a question as to the mutual boundaries of Commonwealth and State power. But sec. 92 is not so framed, and is not directed to making out boundaries between

(1) (1932) A.C. 542, at p. 560; 47 C.L.R. 386, at p. 398.

*There are valuable comments upon the problem here discussed in the magazine *Res Judicata*, 1936, at pp. 81 et seq. and 1937, pp. 224-231, by Professor *K. H. Bailey* and Messrs. *C. McPherson* and *C. I. Menhennitt*.—*H.V.E.*

H. C. OF A. 1939. HOPPER v. EGG AND EGG PULP MARKETING BOARD (VICT.). Evatt J.

Commonwealth and State. Sec. 90 on the other hand is directed to achieving that very purpose: Cf. *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* (1); *Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (2).

II. The plaintiff contends that by deducting or failing to credit him with the nine pence "pool deduction" the board has failed to comply with sec. 23 (2) of the Victorian Act.

The aggregate of the sums representing this so called "pool deduction" was utilized by the board (to use its own words) "for the stabilization of prices and in the common interest of all controlled producers." According to the board, "the benefit to producers, like the deduction, is in ratio to the number of dozen eggs marketed, thus establishing the necessary equity as between producers large and small." During the period of the pool the aggregate sum so utilized exceeded £67,000. Further, the fund thus derived from the "pool deduction" was used for administrative expenses, including salaries and expenses of pool. A sum exceeding £24,000 was lost "on pulp as per trading account." The balance of the "pool account" or "pool deduction account" was £24,987, and this was used to pay the producers an equivalent of one-third of a penny per dozen eggs pooled. In the result, therefore, each producer was treated upon the footing that the "pool deduction" amounted, not to 1d. per dozen, but to two-thirds of a penny per dozen. The object of the "pulp trading" was to dispose of "eggs which were surplus to market requirements in shell and their transference to pulp enabled prices to be maintained. This was particularly the case during December and January, when it would have been impossible to pay producers the prices ruling at that time, viz., 1s. 4d. and 1s. 6d. per dozen for hen eggs had these surpluses not been transferred to pulp."

It is to be noted that under the Act there is an express power to make a levy on the producers of any commodity and that moneys that are thereby raised are to be used and applied for (1) administrative expenses; (2) payment of advances; (3) establishing a fund for insurance and for other purposes of advantages to the producers of the particular commodity.

(1) (1934) 51 C.L.R. 108. (2) (1937) 56 C.L.R. 390.

Under sec. 16 (1) (*a*) of the Act the commodity was vested in the board and the right of every person in the commodity was converted into a claim for payment under sec. 16 (2) (*b*). The Act contemplated payments to the producers by pooling the net sums realized from the marketing of the proceeds. Under sec. 24, the board was bound to issue to each producer a certificate upon the delivery of his commodity to the board. In the particular case of the plaintiff's nine dozen eggs the " certificate " mentions the " pool deduction " of one penny per dozen. The certificate has been referred to as an " account sales " and as though it was the definitive expression of the entire transaction between the plaintiff and the defendant in relation to the eggs which are the subject of the present claim. Upon this basis, the plaintiff contends that, on September 3rd 1937, the day of delivery of eggs, he was entitled to receive from the board 10s. 3d. for the eggs and the board, while entitled to deduct a charge for grading and for commission was not entitled to deduct the " pool deduction " charge.

But this interpretation of the transaction is inadmissible. The certificate was not an account sales but merely a certificate evidencing the receipt of the plaintiff's eggs (sec. 24 (1) ; reg. 24 and form 1). By sec. 23 (1) of the Act the obligation of the board to make payments to each producer in respect of the delivery of his commodity is to be upon the basis of the sale of " all " the commodity delivered to the board during " such periods of time as are prescribed." Reg. 28 prescribes the periods of time for the purpose of computing payments to producers as " the period " commencing on August 16th, 1937, and terminating on July 2nd, 1938. It would seem, therefore, that no right to payment accrued to the plaintiff until the whole of the commodity delivered to the board during the prescribed period had been sold and authorized deductions had been made, whereupon the balance was to become available for distribution. In the meantime, the producer was intended to retain his certificates of delivery to evidence his ultimate share in the pool. Accordingly, there could not be a final accounting to the producer at the time of the delivery of each consignment to the board, and everything had to await final adjustment at the end of the pooling period, although provisional payments to the producer in the form of " advances " could be made.

H. C. OF A. 1939.

HOPPER v. EGG AND EGG PULP MARKETING BOARD (VICT.).

Evatt J.

Upon this footing the amount received by the plaintiff in respect of his nine dozen eggs, viz., 8s. 6d., has to be regarded as an advance by the board to the plaintiff pending final realization of the whole of the commodity acquired by the board during the period of the pool.

This interpretation of the transaction between the parties is fatal to the plaintiff's present action. In his able but necessarily difficult argument, Mr. *Gorman* contended that sec. 23 (2), which enables the board to deduct from the proceeds of the sale of the commodity the expenditure incurred "in and about" its "marketing," did not authorize any attempt to stabilize the market. It is unnecessary and undesirable to deal finally with that argument, because, even if it is well founded, the present action does not bring into question the right of the board to deduct such expenditure from the total proceeds of its sale of the commodity, even if the action were properly constituted for that purpose. It may, however, be pointed out that any scheme of pooling and marketing products which are subject to price fluctuations would seem to be doomed to futility if the pooling authority was compelled to flood the market with ruinous results to all the shareholders in the pool.

In the present action it is clear that the so-called "pool deduction" of one penny per dozen cannot be separated from the rest of the transaction between the parties, which was in truth one of money advanced on account of an ultimate payment, reckoning one penny per dozen as a fair estimate of deductions which would be authorized by the Act. The so-called "deduction" merely amounts to an intimation that the board intends to retain and create a fund all of which will be brought into account on realization of the product and adjustment with each producer.

III. The same consideration is sufficient to defeat the plaintiff's case, so far as it is based on sec. 90 of the Constitution. It may be conceded that, if sec. 90 is otherwise applicable, the fact that the State exacts a contribution from a producer by way of deduction from moneys which are his rather than by direct levy can make no difference, and the State law would be invalid. Equally, it is erroneous to suppose that, quite irrespective of the benefits conferred upon a producer by the administration of a pooling scheme, even a direct charge or levy by the State upon the producer who receives such a

service is invalid as a duty of excise merely because the charge is measured by the value or quantity of the commodity handled by the pooling authority on the producer's account.

The recent case of *Matthews* v. *Chicory Marketing Board (Vict.)* (1) seems to be based upon the view that the levy there called into question was imposed upon a commodity although it did not go through the pool at all: so that the producer was called upon to pay although he received no service or benefit whatever from the pool (2). This seems to have been relied upon to distinguish the levy deemed unlawful in *Matthews* v. *Chicory Marketing Board (Vict.)* (1) from what was described as " the charge for administration expenses, advances, sinking fund and interest to be provided out of the proceeds of the milk which in *Crothers* v. *Sheil* (3) we held to involve no excise " (*Matthews* v. *Chicory Marketing Board (Vict.)* (2)). Apart from *Crothers* v. *Sheil* (3), which was distinguishable, there is very great difficulty in reconciling the decision in *Matthew's Case* (1) from an opinion of the majority of this court expressed in *Hartley* v. *Walsh* (4). And apart altogether from the question whether the levy could be regarded as a contribution exacted for services rendered, it would seem that the Chicory Board contribution was not a levy " upon " any commodity at all.

For present purposes it is quite sufficient to say that *Crothers* v. *Sheil* (3) is a complete answer to the argument of the plaintiff that an excise duty was unlawfully exacted from the plaintiff by the defendant.

The action should be dismissed with costs.

McTIERNAN J. I agree that judgment should be entered for the defendant.

I concur in the reasons for judgment of the Chief Justice.

Action dismissed with costs.

Solicitor for the plaintiff, *Joan Rosanove.*

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

H. D. W.

(1) (1938) 60 C.L.R. 263.
(2) (1938) 60 C.L.R., at p. 289.
(3) (1933) 49 C.L.R. 399.
(4) (1937) 57 C.L.R., per *Latham* C.J., at p. 376 ; *Evatt* J., at p. 396 ; and *McTiernan* J., at pp. 399, 400.