HIGH COURT OF AUSTRALIA

Attorney-General

Vs.

Homebush Flour Mills Limited

(Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.)

1 March 1937

Latham C.J.

This action raises a question of profound constitutional importance. The Commonwealth Parliament has exclusive power to impose duties of customs and excise (*Constitution*, sec. 90). In any coherent system of indirect taxation duties of excise bear a definite relation to duties of customs. The effect of a customs duty upon a particular class of goods may be varied, from the fiscal or from the protective point of view, by the imposition of an internal excise duty upon the same goods. Thus, if customs duties are controlled by one parliament while excise duties can be imposed by another parliament, conflict and confusion are almost inevitable.

The question which arises in this case is whether the Parliament of New South Wales can validly legislate so as to raise money from and in direct relation to the internal production or sale of goods. This end is sought to be achieved by first vesting the goods in a Minister by statute at one price and then allowing the owner of the goods to buy them back at a higher price—with the option of being content to allow them to be taken at the lower price and to go out of business. The statute does not purport to impose a tax—it purports to operate by voluntary agreement with, it is true, unpleasant alternatives. On this occasion the procedure has been limited to flour, but it could readily be applied to all goods, so that the production or sale of any goods in any State could be made a source of revenue. The result would be that the State could secure all the effects of imposing excise duties, fiscally and commercially, though the power of imposing such duties is an exclusive Federal power. The question, as it comes before the court, is purely a question of law. The only objection to the State legislation is that it imposes an excise duty. If it does so, it is invalid. If it does not, it is valid.

The plaintiff, the Attorney-General of the State of New South Wales, sues the defendant, the Homebush Flour Mills Ltd. for a sum of over £8,000, being the difference, at a rate of £1 10s. per ton, between the "fair and reasonable price" (£8 10s. per ton) at which 5,652 tons 14 cwts. of flour were acquired by the Crown in New South Wales from the defendant and the "standard price" (£10 per ton) at which the defendant repurchased or was deemed to have repurchased the flour from the Crown. The claim depends entirely upon the *Flour Acquisition Act 1931* N.S.W. (amendments of the Act made subsequent to 1931 are not material for the decision of this case). The defendant demurred to the declaration, alleging that the Act was invalid. The demurrer was removed into the High Court under sec. 40 of the *Judiciary Act 1903-1934*. The only question argued was whether the Act imposed a duty of excise contrary to sec. 90 of the *Commonwealth Constitution*.

The *Flour Acquisition Act 1931* N.S.W. is plainly an attempt to evade the constitutional provision which prevents a State Parliament from imposing any duties of excise. It provides for raising money

from persons who manufacture or are in possession of flour—the Government of the State receives the money, and the Government spends it as directed by the Act. When the Commonwealth Parliament passed the *Flour Tax Assessment Act* and the *Flour Tax Act in 1933* the State Act imposing an excise duty on flour ceased to operate. While the State Act was in force a miller could not carry on his business without paying money to the State Government. After the State Act ceased to be in force and when the Commonwealth Act was in operation, a miller could not carry on his business without paying money to the Commonwealth Government. The commercial and economic effect of the State legislation is precisely the same in character as that of the Commonwealth legislation. But the provisions of the State Act are entirely different from those of the Commonwealth Act. Under the State Act flour is acquired by the State (secs. 3 and 4) at one price called the fair and reasonable price (sec. 5) and the miller or other owner is entitled to buy it back at another price called the standard price (sec. 6 (2), (4)). The miller is deemed to have repurchased his flour from the State if he deals in the flour by selling it to anyone (sec. 6 (3)). He has the option of not carrying on his business at all—when he has to store the flour at his own risk and to take ultimately no more than the "fair and reasonable price" with deductions for deterioration (secs. 3 (8), 4 (7)). If he buys flour inter-State, the Government may acquire it and bring it within the Act (sec. 4). But the miller avoids all trouble if he simply pays to the State the difference between the reasonable and the standard price. He then carries on business in an ordinary way. The fund created by millers' payments to the State is to be used for the relief of necessitous wheat farmers (sec. 6 (7)). After the Commonwealth entered the field the miller simply paid a direct excise tax, as in the case of tobacco and intoxicating liquor, and under other legislation the Commonwealth paid to the States money for the relief of distressed and other wheat farmers. The question is whether this State legislation is valid or whether it is invalid as imposing an excise duty.

The Constitution provides, in sec. 90, that after "the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive" in the Commonwealth Parliament. The Constitution does not provide that a State Parliament shall not, by any form of legislation, bring about the same results as would be accomplished by the imposition of an excise duty. If the Constitution did so provide, there would be no doubt about the decision in this case. It is transparently clear, upon the face of the State Act, that the State Parliament was using powers, which it believed or assumed itself to possess, for the very purpose of evading the constitutional prohibition. But the existence of this objective does not establish that the State legislation is invalid. The validity of what is done is determined not by its actual practical result, but by its legal character. In this case the validity of the State Act must be determined by what the legislation does as viewed by a lawyer and not by its results, effects or consequences as viewed by a miller. The commercial and fiscal results and consequences of the Act are the same as would follow from an excise duty upon flour. But the State Parliament is not prohibited by the federal Constitution from producing certain consequences—it is prohibited only (so far as this case is concerned) from imposing duties of excise. The only question therefore is: Does the *Flour Acquisition Act 1931* impose a duty of excise?

It is contended that each part of the Act is within the power of the State Parliament. In the first place the Parliament has power to pass a statute acquiring property (*New South Wales v. The Commonwealth* (*The Wheat Case*)[1]; *James v. Cowan*[2]; *Peanut Board v. Rockhampton Harbour Board*[3]; *Crothers v. Sheil*[4]). Then, it is said, the State can sell the property which it has acquired and, if a profit is made, can receive and spend the money. By these steps in reasoning the whole Act is said to be justifiable in law.

This analysis, however, leaves out of account some very important elements. It is an analysis which, like the dissection of a living thing, may destroy reality in professing to exhibit it.

It is true that a State Parliament can legislate for the purpose of acquiring property. But this power is subject to constitutional limitations. One of these constitutional limitations is to be found in sec. 92. If the real object of the legislation authorizing the acquisition of property is to make it possible to impose restrictions upon inter-State commerce contrary to sec. 92, then the legislation is invalid (*James v. Cowan*[5]; *Peanut Board v. Rockhampton Harbour Board*[6]). Similarly, it must be held that, if the real object of the acquisition of flour under the *Flour Acquisition Act 1931* is to make it possible to impose taxation, and that taxation is an excise duty, the legislation is invalid.

But it is objected that the Act does not involve any imposition of taxation because a miller has an option of not paying money to the Government. If a miller does not repurchase his flour from the Crown—or if he is not "deemed" so to have done by dealing in it—he does not pay the difference between the "fair and reasonable price" and the "standard price." In that event the Government receives no money, and it cannot be said that any tax is exacted. An examination of the Act, however, shows that the option is quite illusory. A miller cannot sell his flour without being deemed to repurchase it (sec. 6 (3)). Accordingly, if he does not repurchase it, so as to become liable for the difference in the two prices, he must go out of business. Even if he obtained other flour than that which he gristed the Minister could acquire that flour under sec. 4. If he does not repurchase his flour he can recover only the fair and reasonable price or the amount actually realized, whichever is the lesser amount (sec. 6 (6)) at such future time as the Minister may select for disposing of the flour (sec. 6 (6)) subject to deductions for loss or deterioration, and in the meantime he must store the flour for nothing (secs. 3 (8) and 4 (7)). It is obvious that it would not be practicable to conduct any flour mill upon such a basis. Further, the Act shows that it is intended that there shall be a difference between a lower "fair and reasonable price" and a higher "standard price" which shall produce a fund to be used for the relief of farmers (sec. 6 (7)). Thus the apparent option is quite unreal and is obviously intended to be unreal.

But, it is further argued that, when the miller agrees to repurchase his flour (or is deemed so to agree), and accordingly becomes bound to pay the difference between the two prices, it is by virtue of his agreement that the liability arises, and, it is said, a sum paid under an agreement cannot be regarded as a tax. This argument has at least the merit of an ancient and hoary lineage. "Voluntary loans" and "gracious offerings" and "forced benevolences" are not unknown in our history. When such transactions amount to the exaction of money by a government in obedience to what is really a compulsive demand, the money paid is paid as a tax (*Attorney-General v. Wilts United Dairies Ltd.*[7]; *Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd.*[8]). Thus, in my opinion, the difference between the two prices is something which the miller is in practice compelled to pay to the Government and amounts to a tax.

The only question remaining is whether the tax is a duty of excise. In so far as it is paid in respect of flour produced or manufactured in New South Wales it is plainly an excise duty within the narrowest definition of that term (*Peterswald v. Bartley*[9]). The flour in question in this case was gristed in New South Wales from wheat grown in New South Wales. But though the flour is acquired upon production (sec. 3 (2)) the difference between the two prices becomes payable by the miller only upon resale of the flour to him by the Government (secs. 6 (3) and 6 (5)). But a tax payable on the occasion of the sale of goods is also an internal revenue duty by way of indirect taxation amounting to an excise duty (*The Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia*[10]). *Isaacs* J.[11] it is true, was of opinion that a tax "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" would not be an excise duty. But the negative proposition was not essential to his judgment in that case. *Higgins* J.[12] analyses the nature of the two forms of indirect taxation—customs and excise—saying "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." *Rich* J.[13] and *Starke* J.[14] take a similar view, holding that a duty on goods collected in respect of the sale of the goods may properly be described as an excise duty. In *John Fairfax & Sons Ltd. and Smith's Newspapers Ltd. v. New South Wales*[15] a State Act imposed a tax of one halfpenny upon each copy of a newspaper issued for sale and actually sold in New South Wales. The tax was payable, not upon production merely, but upon sale. It was held that the tax was an excise duty and that the Act was invalid. These authorities justify the conclusion that, if there is an imposition of a tax in this case (as in my opinion there is) this tax is an excise duty.

I entirely agree that the decision of this question should depend upon the legal effect or character of the legislation in question and not upon the results which it may happen to produce (See *Vacuum Oil Co. Pty. Ltd. v. Queensland*[16], per *Dixon* J.). If a person can discover a lawful method of avoiding the application of a statute he is entitled to do so: what he does must be judged in a court of law by its legal effect and not by reference to the circumstance that he has found a means of disappointing what may be assumed to be the intention of a legislature (*Inland Revenue Commissioners v. Duke of Westminster*[17]). A similar principle applies in the case of a parliament which is constitutionally limited as to its powers. Such a parliament may discover a lawful means of avoiding, from a practical point of view, a particular restriction upon its powers. I do not accept any argument which, ignoring the form of the statute now under consideration, contends that it is invalid because "in substance" it imposes an excise duty for the reason that the practical effect of the legislation is the same as that which would follow from a statute avowedly imposing an excise duty. My conclusion against the validity of this Act is based upon the propositions that the Act does impose a tax and that that tax is a duty of excise which cannot validly be imposed by a State parliament.

Judgment should be given for the defendant upon the demurrer.

Rich J.

This proceeding arises out of an information filed by the Attorney-General of New South Wales against a company carrying on the business of flour milling for the recovery of a large sum under the provisions of the *Flour Acquisition Act 1931-1935* N.S.W.. The information contains two counts both of which were demurred to. It is unnecessary to enter upon a discussion of the distinction between the two counts because it is agreed that under each of them the obligation to pay the money claimed by the Crown must depend upon the validity of the statute. The defendant had challenged the validity of the material provisions of the Act of Parliament upon the ground that it contravenes the provisions of sec. 90 and sec. 92 of the *Commonwealth of Australia Constitution Act*. In view of the nature of this attack upon the constitutional validity of the legislation an order was made under sec. 40 of the *Judiciary Act 1903-1934* removing the proceedings into this court. The argument before us was confined to sec. 90 of the *Constitution*. The defendant's contention is that, properly understood, the liability in respect of which it is sued constitutes a duty of excise and that accordingly the provisions of the *Flour Acquisition Act 1931* which impose it are an attempt to invade the exclusive power of the Commonwealth Parliament to impose duties of excise. In *The Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia*[18] I expressed the

opinion that sec. 90 gives exclusive power to the Commonwealth over all indirect taxation imposed immediately upon or in respect of goods, and does so by compressing every variety thereof under the term "customs and excise." I said that I was not aware of any authority which explicitly denied the application of the word excise to duties upon goods collected in respect of use, consumption or sale because the duty is not confined to goods of home manufacture. These views I repeated in *John Fairfax & Sons Ltd. and Smith's Newspaper Ltd. v. New South Wales*[19]. But I said that I gathered from the opinions of the majority of the court in the *South Australian Case*[20] that they held that the expression "duties of excise" was used in the Constitution with the restricted meaning, that is, restricted to duties upon or in respect of goods of local production. I remain of the opinion which I expressed in those cases, but the limitation to goods of local production is of no importance in the present case. The flour upon which the material part of the *Flour Acquisition Act 1931* operates is flour gristed from wheat so as to come into existence in New South Wales. The real question in the present case is whether the levy of money effected by the Act constitutes a tax. If it does there can, I think, be no doubt that it is a tax upon the production of flour in New South Wales and therefore an excise. The form of the Act is palpably dictated by the want of power in the State Parliament to impose an excise. By sec. 3 (2) all flour coming into existence in New South Wales is expropriated and vested in the Crown. All rights and interests in the flour are converted into claims for compensation (sec. 3 (3)). The amount of compensation is to be calculated at the fair and reasonable price of flour as fixed by a committee upon which officers of the Crown preponderate. The price is to be fixed at a uniform rate without regard to grade or quality (sec. 5 (1)). So far the legislation would appear to be a mere exercise of the State's eminent domain with a provision for proper compensation. But inspection of the other provisions dispels the view that the acquisition of flour by the State for its own purposes was a real object of the legislation. No government purpose for the acquisition or use of flour is suggested. If the Crown is called upon to pay compensation, then the Crown is left with the flour on its hands. All the Crown had to do with the flour is to sell it (sec. 6). Although property in the flour passes to the Crown as it comes into existence, possession is not to be given to the Crown unless and until it is demanded. The flour is left in the possession of the miller who is to hold for the Crown at his own risk. Further, if he forces the Crown to pay compensation he is not entitled to payment until the flour has been resold by the Crown and then he is to receive either the net proceeds which the Crown realizes or the committee's reasonable price, whichever is the lower (sec. 6 (6)). These provisions it will be seen leave the miller in a predicament, if not an impasse. The Act, however, provides a way out for him and there can be no doubt that the way out is the course which the legislation intends that he shall be impelled to take. It provides that he may buy back the flour at a fixed price and that if he sells the flour which he had gristed he shall thereby be deemed to exercise his right of purchase. It provides that the fixed price shall be set off against the compensation and the difference shall be payable. Thus the miller will remain in possession of the flour he grists and can carry on his business and sell his flour as freely as before, provided that he pays to the Crown whatever excess there may be of the price fixed for repurchase from the Crown over the committee's price on which compensation is computed. The Act does not say that the price fixed for resale to the miller shall be higher than the committee's price but it contemplates such an excess, for it provided that the proceeds shall go to a fund for the relief of distressed farmers. The price of resale is to be fixed by proclamation by the Executive (sec. 6 (4)). In fact prices have been fixed the difference between which stood at 30s. per ton. The result was that the miller was compelled either to cease gristing or to pay 30s. per ton to the Crown on the flour which he gristed and sold or to hold the flour at his own risk and expense until the Crown should think fit to sell it to someone else, when he would become entitled to the net proceeds or the committee's price, whichever was the lower. In my opinion statutory provisions which create these alternatives and leave none other really penalize a failure to pursue the course which the legislature desires. On

the face of the statute it is evident that its purpose was to obtain 30s. per ton on the flour gristed in order to apply it to the relief of distressed farmers. Because sec. 90 of the *Constitution* prevents the New South Wales legislature from saying in terms to millers: "You shall pay 30s. per ton on all flour you grist and sell" and from giving all the usual remedies for the recovery of a debt due to the Crown, a complicated set of provisions is adopted producing the result that unless the miller does pay 30s. a ton to the Crown he encounters very unpleasant consequences quite capable of proving his ruin. I think it would be absurd for a court to say that because the consequences of failure to pay the money are a more unpleasant alternative which the party is free to choose and payment is not enforced by means familiar as legal remedies, therefore the actual constraint which they effectually impose to pay the money may be ignored and the payment treated as voluntary or contractual and not as an exaction. Of course when the miller sells the flour and so avoids the unpleasant alternative he does incur a legal duty to pay the excess of the one price over the other, viz., the thirty shillings. The substance of the legislation is to impose a tax subject to a means of escape which no one would adopt if he considered the business and the pecuniary consequences. This in my opinion is taxation. Indeed, it is more clearly taxation then the levies which in the *Wool Tops Case*[21] were held to constitute taxation. The case has no resemblance to *Crothers v. Sheil*[22] where an ordinary statutory pool of a commodity—milk—was upheld. There, as it came into existence, the commodity was made the property of a board. The board sold it and distributed amongst the suppliers the net proceeds in proportion to the supplies. In arriving at the net proceeds, expenses of administration, contributions to sinking fund and interest on advances or loans were to be deducted. It was contended that because of these deductions there was a levy on milk. In answer to this argument I said:—"In my opinion there is no substance in the argument. The provisions of the Milk Act do not exact any pecuniary payment from the dairy farmer. They do not impose any liability in respect of the ownership, transfer, sale or production of goods. They merely contain a scheme for the compulsory acquisition of milk and the payment of the price or compensation to be borne by the proceeds arising from the resale by the board. The fact that these proceeds are subject to deductions would not convert the scheme into one for taxation"[23]. In the present case there is an exaction of a pecuniary payment from the producer of the commodity and a liability is imposed on the production and sale of goods. In my opinion the provisions of the *Flour Acquisition Act* are void as contrary to sec. 90 of the *Constitution* and judgment should be given to the defendant on the demurrer with costs.

Starke J.

An information was filed in the Supreme Court of New South Wales by the Attorney-General for the State of New South Wales against the Homebush Flour Mills Ltd. (called the company). It claimed nearly £8,500 against the company, under and pursuant to the provisions of the *Flour Acquisition Act 1931 of New South Wales* and its amendments. The company demurred to the information, and the demurrer was removed into this court pursuant to sec. 40 of the *Judiciary Act 1903-1934*.

On the argument of the demurrer before this court, the company contended that the *Flour Acquisition Act 1931* and its subsequent amendments imposed a duty of excise which, since the imposition of uniform duties of customs by the Federal Parliament, was beyond the legislative power of New South Wales. By sec. 90 of the *Constitution*, it is enacted: "On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive." The Chief Justice has stated in detail the relevant provisions of the *Flour Acquisition Act 1931* and its amendments, and their repetition is undesirable. It is enough for me to say that the Act compulsorily

acquires all flour (other than self-raising flour) coming into existence in New South Wales after the commencement of the Act and the commencement of the *Flour Acquisition (Amendment) Act 1933*, and converts the rights of every person in the flour into a claim for compensation, which is not the market value of the flour but "the fair and reasonable price of flour" as fixed by a committee under the Act, consisting of the Minister, two of his officers, and two representatives of the Flour Mills Owners' Association of New South Wales and the Master Bakers' Association. The owner of the flour so acquired, however, is given a first right to purchase the flour, and its sale or disposition by such owner is deemed an exercise of such right. The price which the owner must pay for the flour in the case of flour for human consumption is what is called the "standard price" fixed from time to time by the Governor in Council. But the compensation is set off against the "standard price," and any balance is payable under penalty to the Minister of Agriculture, one of His Majesty's Ministers in New South Wales. If the owner does not choose to exercise his right to purchase the flour acquired from him, the Minister may sell it, and the owner then gets his compensation, or the amount realized less expenses, whichever is the lesser amount. The proceeds of any sale received by the Minister are payable into the Treasury, and are applicable for payment of compensation, and of the expenses of realization and administration, and any balance, after such payments, for the relief of necessitous farmers, in such manner as may be prescribed. It is in this last provision that the purpose of the Act is disclosed—the creation of a fund for the relief of necessitous farmers. It can only be achieved if "the fair and reasonable price"—the compensation fixed by the committee for flour for human consumption— is less than the "standard price." Thus in the present case, the information alleges that "the fair and reasonable price" was fixed at £8 10s. per ton, and the "standard price" fixed by the Governor in Council was £10, or a difference of £1 10s. per ton. The owner is compelled to pay this difference if he wants his flour, or else he gets "the fair and reasonable price," or less. The difference between "the fair and reasonable price" and the "standard price," or its equivalent in value, is levied upon or extorted from the owners of flour. The intention of the legislature can only be gathered from its language and the effect in law of that language. Here the effect and operation of the Act is to levy upon or extort from the owners of flour a sum of money or its equivalent in value, not in exchange for any service rendered to them but for a government purpose, namely, the relief of necessitous farmers. Such a charge is properly described as a tax or duty (See *Attorney-General v. Wilts United Dairies Ltd.*[24]; *The Commonwealth v. Colonial Combing, Spinning and Weaving Co. Ltd.*[25]). But is it a tax or duty of excise? Excise duties have often been described as inland imposts levied upon articles of manufacture or sale, and also upon licences to pursue certain trades or deal in certain commodities. But this court, in *Peterswald v. Bartley*[26], denied that the words were used in this extended sense in the Constitution: the Constitution limited the words to duties charged upon goods produced or manufactured in Australia itself or upon a sale of such commodities. Thus *Griffith* C.J.[27] said of the term "excise duty": "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." (See also *The Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia*[28].) *Crothers v. Sheil*[29] was relied upon during the argument. But upon the true construction of the legislation there involved, the court held that it did not impose any liability in respect of ownership, transfer, sale or production of goods, but merely carried into effect a scheme for the compulsory acquisition of milk and the payment of the price or compensation out of the proceeds arising from its resale by the milk board. But the *Flour Acquisition Act 1931* and its amendments levy a charge upon flour coming into existence in New South Wales, amounting to the difference between "the fair and reasonable price" and the "standard price" or its equivalent in value. In my judgment such an imposition is properly described, and operates, as an excise duty.

The demurrer should be allowed.

Dixon J.

The question for decision is whether a sum of money claimed by the Crown in right of New South Wales under the *Flour Acquisition Act 1931* of that State is a duty of excise.

Under sec. 90 of the *Constitution* the power of the Parliament of the Commonwealth to impose duties of excise is exclusive.

The imposition upon those producing flour of an ordinary legal obligation to pay a sum of money to the Treasury of New South Wales was not part of the plan of the material provisions of the *Flour Acquisition Act*. But the statute made elaborate provisions under which flour millers were put in such a position that it was impracticable for them to grist and sell flour systematically unless in respect of every ton of flour sold a fixed amount was paid to a special fund in the Treasury. The system ceased when the Commonwealth Parliament imposed a tax upon flour by the *Flour Tax Assessment Act 1933* and *Flour Tax Act 1933* and passed the *Wheat Growers Relief Act 1933*. But, while it remained in operation, a practical constraint lay upon every miller to pay an amount per ton depending upon the determination of the Executive of the State, an amount which, during part if not the whole of the period, was fixed at thirty shillings. The legislation required that two prices should be fixed for flour. A committee was established to fix one price. The committee consisted of the Minister, two officers of his department, a representative of the millers and a representative of the master bakers. Their duty was to fix a fair and reasonable price of flour at a uniform rate without regard to grade or quality. The other price was called "the standard price." The duty of fixing that price was reposed in the Governor in Council; it was to be notified by proclamation published in the *Gazette*. The statute contains no express provision requiring that the standard price should be higher than the first price, but in fact it was fixed at thirty shillings in excess of that price and it is evident that this accords with the policy of the legislation. As and when flour was gristed in New South Wales the statute vested it *ipso facto* in the Crown. All interests in the flour were converted into rights to compensation. The compensation payable was to be the fair and reasonable price fixed by the committee, but this was subject to a qualification later appearing. It was the duty of the Minister to sell any flour vested in the Crown under the Act. The owner of the flour immediately prior to its so vesting, that is, the miller, was given the first right of buying the flour. But he must buy it at the standard price. If he did, the two prices were to be set off and he became liable to the Crown for the difference. There was no need for him to exercise his option to buy expressly. It was enacted that the sale or disposition by him of the flour should be deemed an exercise of his right to buy and that, if he made a sale or disposition, he should be liable to pay the Minister for the flour. At times prescribed by regulations the miller must send in returns of the flour coming into existence in his hands. The regulations provided for fortnightly returns and prescribed forms of return which all assumed that the miller would sell the flour and thus become liable for the standard price.

In accordance with the statutory provisions which so far I have summarized, if the miller made the returns and paid the difference between the two prices, he could carry on his operations of gristing wheat and selling flour with no change. This difference went to a special fund established under the *Audit Act* called the "Relief to Necessitous Farmers & Graziers Working Capital Account." The *Flour Acquisition Act* provided that the fund should be applied to the relief of necessitous farmers. The difference went to the fund because the statute provided that the proceeds of any sale received by the Minister should be paid to the Treasury and carried to a special account the balance of which, after payment of any compensation payable under the Act and of expenses, should be applied to the

fund. Thus, if millers carried on their trade by selling the flour they gristed, a levy for a public purpose would be made upon them at a flat rate per ton. On selling the flour the miller would incur a legal liability to the Crown at that rate. But the statute did not impose upon the miller any obligation enforceable at law to re-acquire the flour he gristed. What would be his position if he did not? He would then claim compensation at the fair and reasonable price fixed by the committee. But his right to that compensation was qualified. The Minister could sell the flour when and at such price and on such terms as he chose. If the sale produced less than the price fixed by the committee, the statute enacts that the miller should get only the net proceeds of the sale so made by the Minister. If it produced more, he would get compensation according to the price fixed by the committee. In the meantime the miller would hold the flour on behalf of the Crown, but at his own risk so that, in the event of loss or destruction, he would receive no compensation. The statute so enacted. He would be obliged to hold the flour until the Minister sold it, unless the Minister thought fit to take possession of it. If he had made forward contracts he could not fulfil them out of his own flour, and, if he bought flour from other millers in New South Wales or from other States, it would be open to the Minister to acquire it under a particular power of acquisition conferred by the Act and to do so at the rate fixed by the committee.

It is apparent that the situation in which these provisions of the statute placed the miller afforded a strong incentive to him to take the step of selling whatever flour he gristed and of thus incurring the obligation of paying the rate per ton by which the standard price exceeded the fair and reasonable rate. He might stop milling. If he did, there would have been no flour and for that reason no payment. In the same way an avowed excise might operate to prevent the production of a commodity, and when there is no production then there would be no levy payable. But, if the miller produced flour, he then came face to face with a dilemma created by the statute. The dilemma consisted of alternatives prescribed by or under the statute. The one, namely, sale, involved the levy of a tonnage rate. The other involved loss of his power of disposal of the flour, storage of the flour at his own risk and expense for as long a period as the Executive Government chose, and a title to no greater sum than the net proceeds of the flour when and if sold by the Crown and perhaps to less. It involved also the suspension of the miller's ordinary business. The disadvantages thus artificially created form a strong deterrent under the influence of which he would be extremely unlikely to reject the alternative involving payment of the subvention to the special fund at the ascertained rate per ton. It is evident on the face of the statutory provisions in question that they could achieve no purpose except raising the fund. For, except for the statistical value of the returns of flour milled, the elaborate clauses appear capable of producing no other useful result. It is reasonably clear, therefore, that the desired end is sale by the miller and payment of the subvention. Thus, although it is true that the statute does not impose an ordinary legal duty to pay enforceable by judicial process, it makes the raising of money its purpose and seeks to secure fulfilment of that purpose by imposing a clear detriment upon the miller who refrains from paying. This appears to me to be indistinguishable from a sanction incurred by failure to pay. Suppose the statute had required the miller under penalty to buy back from the Crown at the standard price the flour on his hands which had vested in the Crown as he produced it by milling. The result would have been that, unless he disobeyed the provision and incurred the penalty, a compulsory acquisition and re-acquisition would have taken place at different prices and the excess of the second price over the first would have been payable by the miller to the Crown. As performance of the legal duties in that case imposed by statute would produce no other effect than direct liability to the Crown in a money sum calculated at a rate per ton on flour produced, and to be applied to public purposes, it would, I think, clearly have amounted to a tax in spite of the process of acquisition and re-acquisition and set off of prices by which the result was achieved. Having regard to its incidence the tax would have been a duty of

excise on flour. But, instead of compelling the miller under penalty to re-acquire the flour at the standard price, the statute left him at liberty to take compensation for his flour without re-acquiring it, but imposed upon him conditions or exposed him to consequences calculated to deter him from adopting such a course. The difference between, on the one hand, the express imposition of a legal duty to take a given course with penal consequences for breach, and, on the other hand, the requirement that the party shall pursue either that course or some other course exposing him to greater burdens or other worse consequences lies in the form of the sanction, its nature and the mode of imposing and enforcing it, rather than in the substantial result. When, for the purpose of securing conformity to a prescribed course of conduct, legislation creates for those who do not conform a situation involving greater pecuniary or other burdens, it adopts a method of penalizing departure from the rule it lays down.

The course of conduct in the present case consists in no more than the regular payment to the Treasury of money calculated according to a defined or ascertained measure. Upon the face of the statute and the proclamations considered together, and indeed of the statute considered alone, it appears that it was the purpose of the provision now in question to obtain such payments from millers of flour in New South Wales. When the desired contributions are obtained not by direct command but by exposing the intended contributor, if he does not pay, to worse burdens or consequences which he will naturally seek to avoid, the payment becomes an exaction. The fact that no legal obligation to pay is imposed enforceable by direct legal remedies, civil or criminal, will not, in my opinion, prevent the exaction fulfilling the description of a tax; because in truth it is exacted by means of sanctions designed to that end, sanctions consisting in the detriments arising from the adoption by the taxpayer of the alternative left open by the legislation.

That the only alternative left open involves detriments so substantial as to form a powerful deterrent to its adoption I am unable to doubt. That it was intended to have such an effect appears from an examination of the statute and from the difficulty of discovering any other object it was designed to achieve. There are thus three features present, viz., a course left open to the producer of flour involving contributions to the Treasury for a public purpose, an alternative course, the only alternative if production continues, which involves detriment to the producer who takes that course, and a purpose of so inducing him to make the contribution.

If all this had been done by the State legislature itself, I should have thought that it amounted to the imposition of a duty of excise. But an essential part of the plan is the adoption of a standard price that exceeds the fair and reasonable price fixed by the committee and the duty or power of fixing the standard price is delegated to the executive. It sufficiently appears from the Act itself that it contemplates the adoption of a standard price in excess of the committee's price. For it assumes in its provisions that there will be a difference payable to the Minister by the miller and that there will be a resulting fund for farmers' relief. But, in any case, as the act of the Executive must depend upon the power conferred by the legislation, if it is the Executive determination which completes the plan that results in the imposition of an excise, the attempt to confer the power so to complete the plan must infringe upon the exclusiveness of the federal legislative power to impose duties of excise. It is, perhaps, needless to add that the complicated scheme of State enactment is to be accounted for by the absence of power to impose duties of excise. It is an attempt to raise a fund by contributions obtained as flour is milled and sold, contributions working out at a rate per ton. The fact that it is an attempt to secure the same result as would have been obtained by a duty of excise if such a duty fell within the legislative power of the State Parliament does not necessarily mean that the attempt fails. The same ends may be attainable by different means. Some means may be within power, others may be outside it. But it does explain what otherwise might appear the strange form

and policy of the enactment. It explains why it is that on a close examination of the statute and a consideration of its actual operation, it turns out to be a means of imposing what in truth is a duty of excise.

For these reasons I am of opinion that judgment in demurrer should be given for the defendant.

Evatt J.

Sec. 6 (5) of the *New South Wales Flour Acquisition Act 1931* imposes upon an owner of flour the obligation to pay to the Minister for Agriculture a sum of money euphemistically called the "balance of the purchase money." The question raised by the present demurrer is whether such obligation is a duty of excise within the meaning of sec. 90 of the *Commonwealth Constitution*. If it is such a duty, the imposition is rendered void by sec. 90 of the *Commonwealth Constitution*, which takes away from the State Parliaments all power to impose duties of customs or excise, or to grant bounties on the production or export of goods, and gives such power exclusively to the Commonwealth Parliament.

It is plain that the question is one as to the limits *inter se* of the constitutional powers of the Commonwealth and the State of New South Wales so that, although the demurrer was entered in the Supreme Court of New South Wales, it would, in any event, have fallen to be determined by this court in pursuance of the provisions of secs. 38A and 40A of the *Judiciary Act*. As it was, an order under sec. 40 of that Act was made bringing the matter to this court before any hearing in the Supreme Court.

The true nature of the "balance of the purchase money" in sec. 6 (5) of the *New South Wales Act* is illustrated by examining the claim made against the present defendant by the Government of New South Wales. The claim is for a balance of purchase money amounting to the sum of £8,479 3s. 9d. The sum is calculated as follows: after the commencement of the operation of the *Flour Acquisition Act*, 5,652 tons of flour were produced by the defendant—a flour milling company. By the operation of sec. 3 (2) of the Act, such flour became vested in the Crown. The rights of the defendant as prior owner of the flour became converted into a claim for compensation under sec. 3 (3). Such compensation is assessed on the basis of the "fair and reasonable price of flour," which is fixed by a committee under sec. 5 (1) of the Act. In the present case, such price was fixed at £8 10s. per ton. Subsequently, the 5,652 tons of flour were again vested in the defendant pursuant to sec. 6 of the Act, which provides for an automatic repurchase by the miller of the expropriated flour upon the miller's selling his flour in the course of his business, i.e., selling the flour, which, until the moment of sale is the property of the Government. The "price" payable on such "repurchase" is fixed by the Government itself under sec. 6 (4) of the Act, and is known as the "standard" price. In the present case, the price operating in respect of the subject flour was £10 per ton, and £8,479 3s. 9d. is the price arrived at by charging £1 10s. per ton in respect of each of the 5,652 tons of flour.

It is obvious that the legislative scheme operated as a levy upon the defendant of £1 10s. per ton of flour produced, i.e., the difference between the two prices of £10 and £8 10s. Sec. 6 (5) of the Act shows that the imposition of this levy is a direct object of the Act, because it provides that the so-called "compensation" money shall be set off against the price payable to the Minister under sec. 6 (4), i.e., the so-called "standard" price. The sub-section then goes on to provide that, after such compulsory set-off, the so-called "balance of the purchase money" shall be paid to the Minister "in the manner and at the time prescribed."

What is "prescribed" also illustrates the nature of the scheme of taxation which is so patent on the face of the Act itself. The regulations under the Act provide that "the balance of the purchase money to be paid to the Minister in accordance with sub-sec. 5 of sec. 6 of the Act" shall not only be paid in a certain way, but that (*a*) returns shall be made by flour owners in a form which shows that there will be a balance against the owner, measured by the difference between "compensation" and "standard price" in respect of each ton of flour, and (*b*) that flour owners must enclose the cheque for the "balance of the purchase money" with each return.

By its title, the Act describes itself as one which authorizes the compulsory acquisition of flour in New South Wales, and which provides for compensation in respect of such flour and for its sale and disposal. But such a title only attempts to conceal or camouflage the reality of the matter. The absence from the Act of any permanent machinery for administration shows that it was never intended that the Government should enter into the business of flour merchant. While sec. 6 (1) compels the Minister to sell all flour acquired under the Act, it hurries on to provide that the owner of the flour immediately prior to the acquisition, "shall have the first right to purchase the flour in his possession at the time of the ... acquisition." Further, no provision is made for an owner desiring to exercise a right of purchase in respect of part only of the flour taken from him. The owner who, in the typical case, may be regarded as identical with the miller who produces the flour, is not even expected to notify the Government that he is exercising his so-called right of repurchase, because sec. 6 (3) states that, if an owner sells or disposes of the flour he produces, that in itself is deemed to be an exercise of the right of repurchase. This is the automatic repurchase already illustrated by reference to the facts of the present case. Further, no change of possession of the flour is contemplated by the Act. The normal working of the Act assumes (see sec. 3 (8)) that the owner or producer of it is to hold it on behalf of the Crown, and, unless the Minister takes possession of the flour or the owner exercises his option of repurchase, the flour is to be at the risk of the former owner.

All this roundabout machinery is designed to carry out one scheme, i.e., to compel producers of flour in New South Wales to pay to the Government a sum of money called the "balance of the purchase money." The amount of that sum is really fixed by the Government upon the basis of each ton of flour produced, for the "balance" per ton is always the difference between the compensation per ton fixed by the committee under sec. 5 (1) and the "standard price" fixed by the Government under sec. 6 (4) of the Act. The latter will always be the higher, because the compensation is always to be set off against it. The Act also contemplates that a fund for necessitous farmers will be created.

What is the answer to the defendant's contention that the obligation to pay the balance under sec. 6 (5), which obligation is sought to be enforced in the present action, is a duty of excise within the meaning of sec. 90 of the *Commonwealth Constitution*? First, it was said that no obligation to pay any balance could come into existence unless a miller thought fit to repurchase the flour produced by him, and there was no obligation to repurchase. This argument is not convincing. In the case of a flour miller, the only alternative to repurchasing the flour is to give up his business altogether. If he desires to continue in business, he simply must retain or regain the property in the flour which he has produced, and then proceed to sell it at a profit in the ordinary course of his business. Indeed, the Act also intends that the New South Wales flour miller will continue to produce and sell flour in the ordinary course of his business, because it makes such selling an automatic repurchase by the miller of his own flour. When we investigate the real nature of the obligation to pay the "balance of the purchase money," it stands revealed as a levy, a charge or a tax upon the production of flour. In other words, it is an ordinary duty of excise.

Then it was argued that the State has power to expropriate the flour within its borders and to sell such flour. But all the powers of the parliament of a State, including the power of expropriation, are subject to the Commonwealth Constitution, and no parliament, whether State or Commonwealth, can avoid any of the over-riding mandates of the Commonwealth Constitution by attempting to disguise the real nature and effect of its enactments. A striking illustration of this qualification upon the general power of expropriation was provided by *James v. Cowan*[30], which shows that such power cannot be used to infringe sec. 92 of the *Constitution* (Cf. *R. v. Vizzard; Ex parte Hill*[31]). And what is true of sec. 92 is also true of sec. 90 or any other over-riding constitutional provision.

During argument, I inquired whether any miller had, during the period of the operation of the Act, failed to exercise the option of repurchase. It was stated at the Bar that no such case had ever been known. This is not surprising, because the Act and regulations contemplate that no such case shall ever occur. I am strongly of opinion that, where the court has to investigate the question whether a State enactment imposes a duty of excise, it may be necessary to enquire into the actual operation of the enactment. In such cases, a demurrer may be a very inconvenient form of proceeding. It is to be noted that in the Privy Council case of *Attorney-General for British Columbia v. McDonald Murphy Lumber Co.*[32], Lord *Macmillan*, dealing with a question in some respects analogous to the present, referred to the actual way in which the relevant enactments operated as "the best evidence that the tax was intended to be to all intents and purposes an export tax."

Had the present question been, in my view, susceptible of doubt, I would have favoured an investigation into the operation of the present Act upon the milling business—an investigation which this court could have directed. The annual reports of the Auditor-General of New South Wales would have found a place upon such a hearing. By way of illustration, in the report for the financial year ending 30th June 1932, the Auditor-General thus referred to the results of the *Flour Acquisition Act*: "To 31st December 1931, the charge collected was at the rate of £2 15s. per ton; from 1st January 1932, the rate was reduced to £1 10s. per ton" (p. 63). In the report of the financial year ending 30th June 1933 the accounts were set out with the comment that "the original levy of £2 15s. per ton was reduced as from 1st January 1932" (p. 191). Finally, in the report for the financial year ending 30th June 1935, the Auditor-General gave a summary showing that the Government had collected £277,518 2s. 2d. from the Act, and added: "the original levy of £2 15s. per ton was reduced to £1 10s. as from 1st January 1932, and operated until repeal of the Act on 3rd December 1933" (p. 176). And it appears from such official accounts that no miller ever failed to exercise his so-called "option," and that the obligation to pay "the balance of the purchase money" was universally regarded as a "levy" or a "charge" upon the millers in respect of each ton of flour produced by them.

In my opinion, evidentiary material of the character summarized above might be of decisive significance if the true nature of the present statutory "obligation" were in doubt. But it seems to me that the present question is not attended with sufficient doubt to require reference to such material.

One further matter may be mentioned. I think that counsel for the State of New South Wales was right in insisting that, as a body, the millers have little or nothing to complain of in respect of the imposition we are here considering, and that any suggestion of hardship is fanciful. But the reason for that is that the Act intends that the millers will pass the tax on to their customers to the intent that the public of New South Wales, as the ultimate consumers of bread, will bear the real burden of the charge or levy. And this fact itself reinforces the conclusion that the "obligation to pay the balance," which is in truth a charge or levy or tax on New South Wales flour producers, is a "duty of excise," a well-known characteristic of which is that it will be passed on to the consumer.

The demurrer of the defendant should be upheld and judgment in the action entered for the defendant with costs, here and in the Supreme Court.

McTiernan J.

The validity of the *Flour Acquisition Act 1931*, enacted by the legislature of New South Wales, is called in question by the defendant which demurred to an information filed by the Attorney-General of New South Wales in the Supreme Court of the State in an action brought on behalf of His Majesty to recover from the defendant moneys alleged by the informant to be due and payable by it under the above-mentioned Act. One of the grounds of the demurrer is that the Act invades the exclusive powers of the Parliament of the Commonwealth to impose duties of excise and that the information is therefore bad in law. The question for decision is whether the moneys sought to be recovered are an excise duty on flour.

The Act provides that the Crown shall sell all flour which was vested in or acquired by it under the Act. The rights of all persons divested of property under the Act are converted into claims for compensation according to the rate fixed under its provisions. The Act obliges them to hold the flour after its expropriation for the Crown and exposes them to the risks incident to property in the flour as if it had not passed to the Crown. The Act gives a discretionary power to the Crown to take possession of the whole or any part of the flour. It says that the expropriated owner of any flour shall have the first right to purchase it from the Crown, and by a peculiar provision declares that he may exercise this right by selling the flour, and if he does, he shall be deemed to have purchased it. The Act sets up machinery for fixing a standard price to be paid on the purchase of the flour from the Crown. It directs that there is to be set off against the moneys, the amount of which is based on the standard price, payable to the Crown by any person, who either bought or is deemed to have purchased flour from the Crown, the compensation payable in respect of the expropriation of the flour. The excess of the purchase money over the compensation is cloaked under the title of "the balance of the purchase money." It is payable to the Crown by the purchaser or the presumed purchaser, as the case may be. The moneys paid in discharge of the liability are directed to be applied by the Executive for the relief of necessitous farmers.

It follows that a miller could sell any flour which he produced in his business and to which the Act applied, notwithstanding its acquisition from him by the Crown: such sale took effect as a purchase from the Crown by the miller as well as a sale by the miller to his buyer; the miller became liable to make a contribution to the revenue, and the liability was dependent on the sale which he made to the buyer of the flour. Now the Act did not lay the miller under a legal obligation to exercise this power of disposing of the flour after its acquisition without expressly purchasing it from the Crown. But legal compulsion to do an act to which liability to pay moneys to the Crown attaches, is not necessary to make such liability taxation. It may be an exaction although there is no legal compulsion to do the act to which it attaches. A liability becomes an exaction if the legislature attaches it to an act which a person is constrained to do in order to avoid loss or inconvenience to his business or other serious detriment. The miller was confronted with the alternative of holding the flour or purchasing it from the Crown or selling it to his customers without actually purchasing it from the Crown. If he merely held the flour, his possession of it would be regulated by provisions which indeed were calculated to deter an expropriated owner from such a course. Moreover, it is manifest that the intention of the Act was that the flour should be sold in order to enable the Crown to derive revenue. It was not necessary for the miller to purchase the flour from the Crown to qualify himself to sell it, and if he purchased it the Minister could compulsorily resume the whole or any part of the stock. Further, by purchasing the flour he became liable to pay the excess of the

purchase money over the statutory compensation payable in respect of the first expropriation; a subsequent acquisition from him of the same flour could be made by the Minister at the rate fixed by the statutory committee. The legislature has however contrived to enable the miller to sell any flour which had been expropriated as if there had been no expropriation. But it has attached to any sale made under this power the liability of contributing money to the revenue, the expropriation being the means to an end. In my opinion this liability is a tax or an exaction levied on the miller by the Act. For if he were to refrain from exercising the power to sell the flour without expressly purchasing it and made all his sales to customers from stocks actually purchased from the Crown, he would forgo valuable immunities and advantages and expose himself to serious interference by the Executive in his business. The occasion for levying the liability created by the Act on a miller or any person exercising the power to sell any flour is the sale of such flour. In my opinion the liability is therefore an excise tax on flour (See *Peterswald v. Bartley*[33]; *The Commonwealth and Commonwealth Oil Refineries Ltd. v. South Australia*[34]; *John Fairfax & Sons Ltd. and Smith's Newspapers Ltd. v. New South Wales*[35]).

Judgment upon the demurrer should be given for the defendant.

Judgment for defendant upon the demurrer with costs including costs of motion to refer to High Court.

Solicitor for the informant, J. E. Clark, Crown Solicitor for New South Wales.

Solicitors for the defendant, D. R. Hall & Co.

[1] [1915] HCA 17; (1915) 20 C.L.R. 54.

[2] (1932) A.C. 542, at pp. 558, 559; 47 C.L.R. 386, at pp. 396, 397.

[3] [1933] HCA 11; (1933) 48 C.L.R. 266.

[4] [1933] HCA 42; (1933) 49 C.L.R. 399.

[5] (1932) A.C., at p. 558; 47 C.L.R., at p. 396.

[6] (1933) 48 C.L.R., at pp. 274, 275, 280, 287, 294, 307-310.

[7] (1922) 38 T.L.R. 781.

[8] [1922] HCA 62; (1922) 31 C.L.R. 421.

[9] (1904) 1 C.L.R., at p. 509.

[10] [1926] HCA 47; (1926) 38 C.L.R. 408.

[11] (1926) 38 C.L.R., at p. 426.

[12] (1926) 38 C.L.R., at p. 435.

[13] (1926) 38 C.L.R., at p. 437.

[14] (1926) 38 C.L.R., at p. 439.

[15] [1927] HCA 3; (1927) 39 C.L.R. 139.

[16] (1934) 51 C.L.R., at pp. 124, 125.

[17] (1936) A.C. 1.

[18] (1926) 38 C.L.R., at p. 437.

[19] (1927) 39 C.L.R., at p. 146.

[20] [1926] HCA 47; (1926) 38 C.L.R. 408.

[21] [1922] HCA 62; (1922) 31 C.L.R. 421.

[22] [1933] HCA 42; (1933) 49 C.L.R. 399.

[23] (1933) 49 C.L.R., at p. 408.

[24] (1922) 91 L.J. H.L. 897; 37 T.L.R., at p. 885, per Bankes L.J.

[25] (1922) 31 C.L.R., at pp. 443-445.

[26] [1904] HCA 21; (1904) 1 C.L.R. 497.

[27] (1904) 1 C.L.R., at p. 509.

[28] [1926] HCA 47; (1926) 38 C.L.R. 408.

[29] [1933] HCA 42; (1933) 49 C.L.R. 399.

[30] (1932) A.C. 542; 47 C.L.R. 386.

[31] [1933] HCA 62; (1933) 50 C.L.R. 30, at p. 93.

[32] (1930) A.C., at p. 363.

[33] [1904] HCA 21; (1904) 1 C.L.R. 497.

[34] [1926] HCA 47; (1926) 38 C.L.R. 408.

[35] [1927] HCA 3; (1927) 39 C.L.R. 139.

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