THE EXCISE POWER IN AUSTRALIA.[1]

A.G. for N.S.W. v. Homebush Flour Mills Ltd.[2] *Matthews v. The Chicory Board*[3]

The increase in numbers of State schemes for assisting the growers of various primary products has been noticeable in late years and, as most of these schemes involve some sort of a levy in relation to the product handled, the High Court has been asked to pronounce upon the validity of several State Acts under s. 90 of the Constitution which debars the States from levying "duties of excise." These cases divide themselves into two classes in the first of which there is imposed a levy of some sort which is not a tax and therefore cannot be a "duty of excise" although it may satisfy in all other respects the definition laid down, e.g., in the C.O.R. case;[4] the other class includes those levies which are clearly taxes but are imposed, or attempted to be imposed, in such a way as to escape that definition in other respects.

Two recent cases provide an example of each of the two classes. The first of these is *A-G. for N.S.W. v. Homebush Flour Mills Ltd.*[5] The Flour Acquisition Act (N.S.W.) purported to empower the State to acquire compulsorily all flour coming into existence in the State, at a price to be fixed by a committee. The prior owner thereupon became entitled to repurchase the flour at another price, to be fixed by the Governor-in-Council. The second price, as finally fixed, was £1/10/- per ton higher than the first. If the prior owner purported to sell his flour he was deemed to have repurchased it and became liable for the difference between the two prices. The amounts thus realised were to be used for the relief of necessitous wheat farmers. If the miller did not repurchase the flour he had to store it at his own risk and cost until the State should sell it, when he became entitled to the proceeds of the sale, or the price at which the flour was acquired from him, whichever should be the less. In practice the miller was compelled to repurchase the flour or go out of business, and no case occurred of failure to exercise the option of repurchase; in fact it was customary in the State civil service to refer to the miller's liability as a tax. This was an ingenious attempt to circumvent the operation of s. 90; if the miller's liability was a tax then clearly a duty of excise was levied, but the State contended that it was not a tax since the element of compulsion was lacking. However, all the justices of the High Court agreed that, in substance, a tax was imposed which was a duty of excise. This seems to be an unimpeachable decision.

The other case is *Matthews v. The Chicory Board.*[6] The Marketing of Primary Products Act (Vic.) provided for the appointment of marketing boards which were authorised to make levies on the producer. The Chicory Board imposed a levy of £1 per half-acre, to be paid by the grower, on all land planted with chicory. The terms of the imposition

1. The writer gratefully acknowledges the help he has received in the preparation of this note from discussion with the Honours class in Constitutional Law II.
2. (1937) 56 C.L.R. 390.
3. (1938) 60 C.L.R. 263.
4. *Commonwealth and C.O.R. v. South Australia* (1926) 38 C.L.R. 408.
5. (1937) 56 C.L.R. 390.
6. (1938) 60 C.L.R. 263.

of the levy suggest that it was intended to evade the operation of s. 90. Provision was made for the remission of the tax if the crop failed altogether, but not if only a poor crop should be produced. On the other hand the levy was payable by all growers, whether their product was vested in the Board or exempt as engaged in inter-State trade. Thus the case is distinguishable from *Crothers v. Sheil.*[7] The appellant, a grower, refused to pay £11 claimed by the Board and appealed from Petty Sessions to the High Court. It was held by Rich, Starke and Dixon JJ. (Latham C.J. and McTiernan J. dissenting) that the levy was a duty of excise and therefore invalid.

The difficulty in the case arises because of statements made obiter in the *C.O.R.* case.[8] Dicta in that case to the effect that a tax must be connected with production were rejected by both Latham C.J. and Dixon J., who agreed that an excise must indeed be a tax "upon commodities," but that it might well be levied in respect either of their production, manufacture, treatment, sale, or exchange. They differed however as to the tests to be applied in determining whether a tax is properly described as a tax "upon commodities." Latham C.J. with whom McTiernan J. concurred, stated that an excise was a tax imposed upon goods either in relation to quantity or value when produced, sold or manufactured. "If the tax has no relation to the quantity or value (however measured) of goods, it cannot be said to be an excise duty within any of the definitions or explanations of that term which are to be found in the decisions of this court."[9] It followed that as in this case the tax was not computed in respect of the quantity of chicory actually produced it was not a "duty of excise." The test propounded by the Chief Justice is thus a fairly narrow one, based mainly on *Peterswald v. Bartley*[10] and the *C.O.R.* case.[11]

Dixon J. denied that computation in respect of quantity or value was an essential mark of a duty or excise;[12] he considered that the earlier cases had tended to narrow unduly the scope of that term. "The basal conception of an excise which the framers of the constitution adopted is a tax directly affecting commodities."[13] In this case there would, over a period, be a natural, though not an arithmetical, relation between the quantity of chicory produced and the amount of tax paid and this was, according to Dixon J., sufficient to establish that it was a duty of excise. Rich and Starke J.J. also denied that computation in respect of quantity or value was essential,[14] and agreed that an excise was essentially a tax on commodities. This test is considerably wider than that of the minority.

The law on this subject is, then, in a somewhat uncertain state, the more so as Evatt J. has indicated, in *Hopper v. The Egg Board,*[15] that he disapproves of the decision in *Matthews'* case and saying that he doubts

7. (1933) 49 C.L.R. 399.
8. (1926) 38 C.L.R. 408.
9. (1938) 60 C.L.R. p. 277.
10. (1904) 1 C.L.R. 497.
11. (1926) 38 C.L.R. 408.
12. (1938) 60 C.L.R. p. 302.
13. Ibid., p. 303.
14. Ibid., pp. 281, 286.
15. (1939) A.L.R. 249.

whether the levy there was one "upon" commodities at all. In view of this fact it seems likely that, should this question again come before the present High Court, the decision in *Matthews'* case will not stand and that the opinion of the minority in that case will prevail by statutory majority.

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WORKERS' COMPENSATION AND ACCIDENTS OUTSIDE THE STATE.

Mynott v. Barnard[1]

The Appellants were dependants of a workman killed whilst working on a mill in Tocumwall (N.S.W.). The deceased had been engaged in Cobram, Victoria, where he lived and was domiciled. The respondent employer carried on business throughout Victoria and on this occasion in New South Wales. The trial judge found as a fact that the parties intended their contract to be governed by Victorian law. The dependants claimed compensation under the Victorian Workers' Compensation Act 1928. The County Court judge, sitting as arbitrator dismissed the claim and this decision was upheld by the Full Court of the Supreme Court. From this decision the applicants appealed to the High Court. The appeal was dismissed.

The problem which arose was this: Does the Victorian Workers' Compensation Act cover accidents occurring and injury sustained outside Victoria? In *Tomalin v. Pearson*[2] the Court of Appeal held that the corresponding English Act did not apply when the accident took place in Malta, though the contract of employment was made in England between parties domiciled in England. This case was followed in *Schwartz v. India Rubber Coy.*[3] In the Privy Council in *Krzus v. Crow's Nest,*[4] Lord Atkinson approved *Tomalin's* case, saying that the Act did not apply "to an accident happening in Malta arising out of an employment carried on in Malta." The Irish Supreme Court however in *Keegan v. Dawson*[5] refused to follow *Tomalin's* case, maintaining that the approval of Lord Atkinson did not extend to the general proposition there laid down. In America this problem has also frequently arisen.[6] In *re Cameron,*[7] it was said, "Nothing in the statute suggests that the state of New York has attempted to stretch forth its arm to draw within the scope of its own regulations the relations of employer and employee in work conducted beyond its borders. Hazardous employment here is regulated by the Workmen's Compensation law; hazardous employment elsewhere though connected with a business conducted here does not come within its scope." In Australia we find that the matter has not been

1. (1939) A.L.R. 193.
2. (1909) 2 K.B. 61.
3. (1912) 2 K.B. 299.
4. (1912) A.C. 590.
5. (1934) I.R. 232.
6. See 31 H.L.R. 619, Beale on *Conflict of Laws,* Vol. II., 1317-20,*Cameron v. Ellis Construction Co.* 252 N.Y. 394, *Wright's* case 291 Mass. 344. *Tallman v. Colonial Transport Co.,* 259 N.Y. 512.
7. See note 6.