

## MINORITY REPORT OF MR. JUSTICE JOHNSTON

The question this Commission is asked to advise upon is whether, having regard to all the circumstances relevant to the agreement between the Government and the Farmers' Federation, the costs above the price realized incurred in holding the retail price of butter and cheese in New Zealand can, under the provisions of the said agreement, be debited to the Dairy Industry Stabilization Account, being an account raised in the Marketing Department pursuant to the said agreement.

The agreement is contained in letters dated the 18th day of June, 1943, passing between the Minister of Industries and the Chairman of the Farmers' Federation. The parties gave careful consideration to the framing of the question, and in presenting it to the Commission counsel for the Government said :—

The question submitted to the Commission is one of construction and effect of the agreement of the 18th June. That is purely a question of law, and is not a question of equity and good conscience. That being so, considerations of fairness or unfairness, justice or injustice, cannot arise or cannot fail to be considered except in one respect, and that is if and so far as the agreement is ambiguous and if so far as all other legitimate matters of construction fail, it may be possible to refer to possible injustices or otherwise that a particular construction would work.

Every question of law must rest on a basis of predetermined or assumed fact, and the first task is to ascertain what those facts are. The question placed before the Commission predicates that by holding the retail price of butter in New Zealand at less than cost price certain costs have been incurred. In other words, by selling below cost the dairy-farmer has suffered loss. The question of law is whether the cost of failure to equate price to cost can under the terms of the agreement be debited to the Stabilization Account.

The Government claim is that to the dairy-farmer a payment to recoup that loss is a subsidy, and by paragraph 6 of the agreement authorized to be made out of the Stabilization Account. Paragraph 6 is as follows :—

Where a subsidy is required to keep costs of production of any product down to the level existing on the determined date, the amount of that subsidy, excluding the continuation at the level on the determined date, will be debited to the appropriate Stabilization Account subject to the provisions of 7.

The term "subsidy" is not strange to British Legislatures or to law. From the earliest times Parliaments have granted subsidies to the Sovereign out of parliamentary moneys for the Armed Services and other needs. In later days to manufactured products (English Sugar Subsidy Act of 1925). Generally, they have been granted by way of direct money payments—in Canada by grants of land. But always the grant has been free, never in pursuance of an obligation or in satisfaction of a claim. And always by Parliament out of parliamentary-controlled funds to which the recipient has no shadow of title or claim. Judicially such grant has been described as a "bounty": *Calgary and Edmonton Railway Company, Limited v. The King*, [1904] A.C. 765. Unless it complies with these tests a payment or grant, despite the motive that prompts it, is not a subsidy.

Assuming the Government is under no obligation to make the necessary reparation, a grant out of its own funds to do so would unquestionably be by way of subsidy. To make the payment out of some one else's funds, equally unquestionably, would not be a subsidy. How, then, does this particular fund stand ?

Both sides claim ownership. Neither claim is, in my opinion, fully justified, and the need of an agreement authorizing withdrawals is of itself at least a presumptive refutation of uncontrolled ownership in either party. The moneys in the fund come from the sale overseas of the dairy-farmers' butter, and, although the Government has assured ownership of that butter from the date of shipment, the true relationship of the parties to funds accumulated from this source can only be ascertained from the provisions of the Primary Products Marketing Act, 1936, which set up the plan of