[HIGH COURT OF AUSTRALIA.]

JOSEPH HUGHES, COMMISSIONER FOR INCOME TAX FOR QUEENSLAND . . . . } APPELLANT;

AND

DONALD MUNRO . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, May 11, 12, 13.

Griffith C.J., O'Connor, and Isaacs JJ.

Income Tax Act 1902 (*Qd.*) (2 *Edw. VII. No.* 10), *sec.* 32, *as amended by* 4 *Edw. VII. No.* 9, *and* 6 *Edw. VII. No.* 11—"*By means of*"—"*To be brought into*"—*Liability of agent for an absentee—Construction of Statute—Jurisdiction of legislature.*

The *Income Tax Act* 1902 (Qd.), 2 Edw. VII. No. 10, as amended by 4 Edw. VII. No. 9 and 6 Edw. VII. No. 11, prescribes by sec. 32 (1): "When a foreign company or an absentee, or person absent from Queensland, herein termed 'the principal,' by means of a company registered in Queensland or carrying on business therein or *by means of* any person in Queensland, herein termed 'the agent,' sells or disposes of any property for the principal, whether such property is in Queensland *or is by the contract to be brought into Queensland*, and whether the contract is made by the agent in Queensland or by or on behalf of the principal out of Queensland, and whether the moneys arising therefrom are paid to or received by the principal directly or otherwise, the moneys arising therefrom shall be deemed to be income accruing to the principal from a business carried on by him in Queensland, and the taxable amount of the income derived therefrom by the principal shall, if such income cannot in the opinion of the Commissioner be otherwise satisfactorily determined, be assessed at an amount equal to five pounds per centum upon the net amount for which such property has been sold or disposed of after taking into consideration any mortgage thereon.

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"In every case the amount assessed shall for the purposes of obtaining income tax be deemed to be income derived by the agent.

"(2) The agent shall as regards such income make the returns, be assessed, be liable to income tax, and otherwise be subject to the provisions of this Act and to do all acts and things thereunder as if such income were actually the income of the agent.

"But nothing herein contained shall exempt or discharge the principal from liability to pay income tax upon such income."

Held: (1) That the words "*by means of*" must be taken to mean "*by the instrumentality of*" or "*through the intervention of.*" (2) That the words "*is by the contract to be brought into Queensland*" apply to cases in which the contract of sale stipulates, either expressly or by implication, that the property shall be shipped to Queensland so that the contract is not completely performed until that is done—and this whether the obligation to ship to Queensland is on the vendor or purchaser.

Per Griffith C.J.—As a rule of construction it should be assumed *primâ facie* that the legislature did not intend to interfere with matters wholly outside its territorial limits, or to impose a tax upon transactions in respect of property not either actually or potentially within those limits.

Decision of Supreme Court of Queensland (*In re Munro*, 1909 St. R. Qd., 167), varied.

THIS was an appeal from the Full Court of Queensland, reversing the decision, on a case stated, of *Sir Arthur Rutledge* D.C.J., sitting as a Court of Review, from the assessment of Donald Munro's income by the Commissioner of Income Tax.

Munro was, as the asserted agent in Queensland of I. & R. Morley, of England, taxed in respect of income accruing in the year 1906 to his principals from the business carried on by the principals in Queensland. The case stated (*inter alia*) the following material facts :—

(1) The appellant for the past twelve years had been the paid representative and commercial agent in Queensland for I. & R. Morley, London.

(2) He had an office and sample room in Queen Street, Brisbane, with a brass plate on the entrance bearing the name I. & R. Morley, London.

(3) He was paid for his services a fixed salary, including allowances for rent, travelling and other expenses.

(4) He kept in stock samples of the principals of the value of one thousand pounds.

(5) He exhibited samples to intending or prospective buyers who ordered direct from the principals without further reference to him.

(6) He received orders from customers for his principals, and transmitted them to London. These were subject to cancellation in London by the customers, their agents, or his principals.

(7) In all cases his principals forwarded the goods direct to the buyers, and payment was made for them either by the London agents of the buyers, or by drafts upon the buyers.

(8) He received no signed orders nor any payment from customers, and handled no documents of title to the goods.

But it did not set out clearly whether the contracts of sale entered into stipulated that it was the duty of the principals to send the goods, or of the purchaser to take the goods, to Queensland.

O'Sullivan A.-G. and *Stumm*, for the appellant. The question to be decided is the construction of sec. 32 of the *Income Tax Act* (Qd.), 2 Edw. VII. No. 10, as amended by the Acts of 1904 and 1906.

The words "*by means of*" must be given a wider meaning than the one given them by the Full Court. They are equal to "*by the instrumentality* of" or "*through the intervention* of": *Green* v. *Bartlett* (1). [They referred to *Toulmin* v. *Millar* (2), and *Grainger & Son* v. *Gough* (3).]

[ISAACS J. referred to *Antrobus* v. *Wickens* (4).]

It is through the instrumentality of the respondent that the principals in London are enabled to enter into these contracts: the respondent must be held to be an "*agent*" within the meaning of the section. The words "*is by the contract to be brought into Queensland*" apply to goods which are, in the contemplation of the parties to the contract, to be brought into Queensland, *i.e.*, goods which are potentially in Queensland.

Lukin and *Graham*, for the respondent. What Munro did was to show samples to prospective purchasers, and the fact that

(1) 14 C.B.N.S., 681.
(2) 58 L.T., 96.
(3) (1896) A.C., 325.
(4) 4 F. & F., 291, at p. 295.

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contracts of sale were subsequently entered into between them and his principals in London was *post hoc non propter hoc.* The respondent took no signed orders and received no payment, handled no documents of title, and never even received particulars of the sales that took place. The *agent* meant by the section must be a person who has authority to make sales: this Munro could not do. A local newspaper, advertising goods of an English firm, could not be taxed, though goods might be sold through the agency of the advertisement.

As to construction of Taxing Statutes, see *per Griffith* C.J., in *King* v. *Lyon* (1), and *King* v. *Atkinson* (2).

It must, in order to come within the meaning of the section, be a term of the contract of sale that the goods are to be brought into Queensland: *Bowden Bros. & Co. Ltd.* v. *Little* (3); *Sale of Goods Act* (Qd.), 60 Vict. No. 6, sec. 34.

[As to extra-territorial jurisdiction of the legislature the following cases were referred to:—*Macleod* v. *Attorney-General for New South Wales* (4); *Harding* v. *Commissioners of Stamps for Queensland* (5); *Lambe* v. *Manuel* (6); *Woodruff* v. *Attorney-General for Ontario* (7).]

[ISAACS J. referred to *Colquhoun* v. *Brooks* (8); *Commissioners of Inland Revenue* v. *Maple & Co. (Paris) Ltd.* (9).]

The Crown should pay the costs whatever the decision of the Court may be, because of the general importance of the matter and because leave to appeal only was granted subject to any order as to costs.

O'Sullivan A.G., in reply. The Act only purports to deal with sales of goods which if not actually are potentially in Queensland. In every case under notice the principals in London send the goods into Queensland. [He referred to *Lecky & Co., Ltd.* v. *Ogilvy, Gillanders & Co.* (10); *Lewis Sutherland's Statutory Construction*, 2nd ed., vol. II., 782.]

(1) 3 C.L.R., 700, at p. 779.
(2) 3 C.L.R., 632, at p. 639.
(3) 4 C.L.R., 1364.
(4) (1891) A.C., 455.
(5) (1898) A.C., 769.
(6) (1903) A.C., 68.
(7) 2 (1908) A.C., 508.
(8) 14 App. Cas., 493, at p. 504, *per* Lord *Herschell.*
(9) (1908) A.C., 22.
(10) 3 Com. Cas, 29.

GRIFFITH C.J. read the following judgment:—The question for determination in this case arises upon the construction of sec. 32 of the *Income Tax Act* of 1902 as amended by the Acts of 1904 and 1906. The section in its present form is as follows:—(1.) "When a foreign company or an absentee, or person absent from Queensland, herein termed 'the principal,' by means of a company registered in Queensland or carrying on business therein or by means of any person in Queensland, herein termed 'the agent,' sells or disposes of any property for the principal, whether such property is in Queensland or is by the contract to be brought into Queensland, and whether the contract is made by the agent in Queensland or by or on behalf of the principal out of Queensland, and whether the moneys arising therefrom are paid to or received by the principal directly or otherwise, the moneys arising therefrom shall be deemed to be income accruing to the principal from a business carried on by him in Queensland, and the taxable amount of the income derived therefrom by the principal shall, if such income cannot in the opinion of the Commissioner be otherwise satisfactorily determined, be assessed at an amount equal to five pounds per centum upon the net amount for which such property has been sold or disposed of after taking into consideration any mortgage thereon.

"In every case the amount assessed shall for the purposes of obtaining income tax be deemed to be income derived by the agent.

"(2.) The agent shall as regards such income make the returns, be assessed, be liable to income tax, and otherwise be subject to the provisions of this Act, and to do all acts and things thereunder as if such income were actually the income of the agent.

"But nothing herein contained shall exempt or discharge the principal from liability to income tax upon such income."

Three questions have been discussed before us: (1) the jurisdiction of the legislature of Queensland to impose taxation in respect of transactions wholly carried on abroad by a person not resident in Queensland, and with reference to property not actually in Queensland; (2) as to the meaning of the words "by means of"; and (3) as to the meaning of the words "is by the contract to be brought into Queensland." On the first point the

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respondent contends that, since the foundation of the jurisdiction of a legislature of limited authority is the presence within its territorial limits of the person or thing with respect to whom or which it assumes to act, or the doing of some act within the territorial limits on behalf of an absent person who may be considered as constructively present, a law which purports to tax an absent person in respect of a transaction entered into abroad in relation to property which is also abroad is invalid, and that a law which purports to make a person resident in Queensland liable to pay a tax in respect of such a transaction is equally invalid.

Without expressing any decided opinion whether this contention can be supported with or without qualification, I think that as a rule of construction it should be assumed *primâ facie* that the legislature did not intend to attempt to meddle with matters wholly outside its territorial limits, or to impose a tax upon transactions in respect of property which is not either actually or potentially within these limits. With these preliminary observations I proceed to deal with the other points, of which only one was decided by the Supreme Court.

Sec. 32 in its original form ran as follows:—"When . . . a principal . . . by means of any person in Queensland, herein termed the agent, sells or disposes of any property in Queensland for the principal . . . the moneys arising therefrom shall be deemed to be income accruing to the principal from a business carried on by him in Queensland," &c. In this context there is no doubt as to the meaning of the words "by means of." The contract of sale mentioned was one having relation to property in Queensland, and entered into by an absent principal by means of an agent present in Queensland. The case referred to is therefore one in which a resident agent makes a contract on behalf of his absent principal. But in 1906 the words "Whether the contract is made by the agent in Queensland or by or on behalf of the principal out of Queensland" were inserted, and the section must now be construed as it stands with those words in it. The words "out of Queensland" qualify the word "made," not the word "principal." Now, when the legislature speaks of a contract made out of Queensland by a principal out

of Queensland and by means of an agent in Queensland, the notion that the contract is made by the agent is negatived. The words "by means of" must therefore have some other meaning, and the only one that can be suggested seems to be "by the instrumentality of" or "through the intervention of." The case of *Green* v. *Bartlett* (1) affords an instance in which the words "by means of" were used by very learned persons in that sense. It is a not unusual signification of the expression, and I think it must be adopted.

By the Act of 1904 the words "in Queensland" in the phrase "any property in Queensland for the principal" were omitted, and the words "whether such property is in Queensland or is by the contract to be brought into Queensland" were inserted. The result was to make the section apply not only to property which is in Queensland at the time of the sale or disposition, and so within the territorial jurisdiction, but also to property which is to come within that jurisdiction. Now, when a transaction with respect to goods is entered into abroad, the operation of which is not complete until the goods are in Queensland, I think that the transaction may fairly be regarded as relating to goods which are in the contemplation of the parties potentially in Queensland. Applying, therefore, the rule of construction already stated, I think that the provision is not open to attack if this is its real meaning. And, both upon the literal construction of the words "is by the contract to be brought into Queensland," and for the reasons already given, I think that the section is to be read as applying only to cases in which the contract of sale or disposition itself provides, either expressly or by implication, that the property shall be brought into Queensland, so that the contract is not completely performed until that has been done. It is immaterial whether the duty of importation is imposed upon the vendor or the purchaser. The words at any rate cover the case where it is the vendor's duty to take the necessary steps to bring about that result, so that if he failed to do so he would be guilty of a breach of the contract.

The respondent is the Queensland agent for English principals, and through his intervention they are enabled to enter into con-

(1) 14 C.B. N.S., 681.

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tracts in England for the sale of goods in England destined to be sent to Queensland. It does not, however, clearly appear upon the special case whether the contracts of sale in all cases (or indeed in any case) stipulate that it shall be the duty of the principals to send the goods, or of the purchaser to take the goods, to Queensland, and the attention of the learned Judge of the Court of Review does not seem to have been directed to that point. The words of the case are capable of either construction, but, as leave to appeal was granted to raise the important question of the construction of the Statute, it is not desirable to base our decision upon the construction of doubtful words in the special case.

In my opinion the order appealed from should be varied by substituting for the declaration made by the Supreme Court a declaration that the respondent is liable to be assessed in respect of the moneys arising from the sale or disposition of goods sold or disposed of by his principals under the circumstances mentioned in the special case in all cases in which the sales or dispositions were made under contracts containing a stipulation, express or implied, that the goods should be brought into Queensland, and by omitting the direction as to the costs in the Supreme Court.

O'CONNOR J. In this case the parties seek from the Court the interpretation of sec. 32 of the *Income Tax Act* 1902, as amended by the Acts of 1904 and 1906. If the special case had been in its findings of fact free from ambiguity there would have been no necessity to do more than determine whether on the facts stated the respondent was liable to duty; but the finding is ambiguous on a material question of fact, namely, whether the goods were or were not brought into Queensland under the contract by which they were sold. It therefore becomes necessary for this Court to express an opinion upon the construction of the section generally. In this, as in other cases where an ambiguity arises as to the meaning of words used in a Statute, it will be useful to review the history of the provisions under consideration. By the *Income Tax Act* 1902 a tax was imposed upon property sold in Queensland by an agent in Queensland for a foreign or absentee

principal. I need not refer now to the machinery by which the collection of the tax on that income was made effective, but it is obvious that under that provision all income escaped taxation which was derived from sales of goods to be delivered in Queensland effected under contracts actually made abroad by the principal, but brought about by the exertions of the absentee's agent in Queensland. The legislature, in order to stop that leakage, amended the section in question, in the first place, by the Act of 1904. It was found that that was not sufficient, and another amendment directed to the same end was made in 1906.

The necessity for these successive amendments was largely due to the difficulty in framing the enactment so as to be effective without going beyond the jurisdiction of the legislature. The Queensland legislature has no control over sales in England by persons in England of property in England, nor can it tax income coming to persons in England through those sales, but I take it as beyond question that it has jurisdiction over incomes arising in Queensland from property which is actually in Queensland, and from sales which whenever made must be completed in Queensland by delivery in Queensland of the property sold. The legislature apparently took that view, and in the amendment of 1906 they provided that where the contract of sale is effected by means of the agent in Queensland, whether the actual contract is made by the principal abroad or by the agent in Queensland, the income from such sale is liable to assessment if the property sold is already in Queensland, or is by the contract to be brought into Queensland. Such being the history of the section, I now proceed to consider what is its meaning, and whether it is applicable to the circumstances set forth in the special case. Two questions of construction have been raised. It was contended that the expression "by means of" imports that the agent must actually effect the sale. That was so no doubt as the original section stood in 1902, but its meaning has been entirely altered by the subsequent amendments. Indeed effect cannot be given to the whole section as it now stands without reading "by means of" as synonymous with "by the instrumentality of." If it is not so read, the expression "by means of" is absolutely inconsistent with the subsequent provisions of the section making it applic-

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able to cases in which the sale is effected abroad by the principal himself as well as to cases in which it is effected in Queensland by the agent.

A question has also been raised as to the meaning of the words "is in Queensland or is by the contract to be brought into Queensland?" I have been unable to see any difficulty in their interpretation. The proceeds of a sale in England of goods in England cannot be made liable to assessment unless it was a term of the contract of sale that the goods should be brought into Queensland.

A term of that kind is embodied in many agreements for the sale of goods, *e.g.*, the ordinary mercantile contract known as c.i.f., under which the vendor sells goods at a price which includes freight, insurance and all shipping charges, and undertakes to ship them to a named port of destination. It is as much a part of the vendor's obligation to ship to that port as to deliver the goods. It is for him to select the ship and arrange the shipment, and he is entirely responsible under the contract if the goods are not shipped to the named destination. If authority were necessary on that point it is to be found in *Lecky & Co., Ltd.* v. *Ogilvy, Gillanders & Co.* (1). In that case goods were sold under c.i.f. contract to be shipped for Tripoli. There were two Tripolis, and the goods had been shipped to the wrong one. In a judgment holding the vendors liable, *A. L. Smith* L.J. says:— "The obligation of the defendants at Calcutta under the contract, which they had entered into with the plaintiffs, was to put the bags on board ship at Calcutta with such proper shipping documents as would ensure the bags getting to Tripoli." In this passage of the judgment as printed the word "Tunis" is used obviously in mistake for "Tripoli." In quoting I here make the necessary correction. Where therefore goods are sold by the instrumentality of the agent in Queensland, but under a contract of sale made by the principal in London, and it is a term of the contract that the goods should be shipped to Queensland, then and then only does the sale come within the section. I agree with the learned Chief Justice that it does not matter whether the obligation to ship to Queensland is on the vendor

(1) 3 Com. Cas., 29.

or the purchaser. So long as one of the parties undertakes by the contract that the goods shall be shipped into Queensland the Act will apply. Under these circumstances I am of opinion that the section under consideration applies to all goods mentioned in the special case in respect of which there was an obligation on one of the parties to ship the goods into Queensland. I agree therefore that the order of the Supreme Court should be varied by remitting the case to the learned District Court Judge on the terms mentioned by my learned brother the Chief Justice.

ISAACS J. read the following judgment:—If a London merchant were to visit Brisbane periodically and do precisely what Munro does, and then return and do what Morley & Co. do abroad, it cannot be doubted the Queensland legislature would have power to make him liable in the terms of sec. 32 as amended. He would be partly carrying on his business operations in Queensland, and the part transacted here would be essential to any of his Queensland business.

The fact that he employs another person to do the Queensland part of the business cannot alter the right of the State legislature in respect of his Queensland sales.

Qui facit per alium facit per se; Morley & Co. are present in Queensland by their agent Munro for the purpose of his agency.

The acts done in this territory are the acts legislated for, together with the consequences resulting from them and which could not exist without them. Some of the fruit may be gathered abroad, but the roots of the tree are always here. There is certainly nothing contrary to the received principles of international law in so legislating (*Commissioners of Inland Revenue* v. *Maple & Co. (Paris), Ltd.* (1)), and in my opinion sec. 32 is within the powers conferred by the State Constitution. Besides, the section also imposes the tax directly and independently on the agent (sub-sec. (3)).

The next question is the construction of the section. With great respect for the learned Judges from whom this appeal comes, it appears to me that two of their Honors gave no weight

(1) (1908) A.C., 22.

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at all, and one of them insufficient weight, to the provision that the section applies also to a case where the contract is made by the principal himself out of Queensland. The legislature expressly contemplated the case where the foreign principal made the actual contract of sale, but yet did so "by means of a person in Queensland," that is the agent. It therefore follows inevitably that the legislature contemplated the agent as one whose agency fell short of making the actual binding contract. Plenary power in the agent to make a binding contract was not a condition; the only condition in respect to him is that the sale is to be "by means of" him, not that he is to be the only means, that he is to be *an* instrument—not the sole instrument—of securing the business: see *Green* v. *Bartlett* (1) and *Antrobus* v. *Wickens* (2). Provided the person in Queensland really holds the character of "agent," the extent of his agency is immaterial so long as it extends far enough to make his exertions a means of obtaining the business for his principal.

The only other condition material to be considered is that the property either "is in Queensland or is by the contract to be brought into Queensland." Effect must be given to the words "by the contract"; they cannot be eliminated or altered, and I agree that they require this, that it must be gathered from the contract as a term, express or implied, that the goods are to be brought into Queensland, not necessarily by the vendor on his own behalf, nor even by him at all; it may be that they are to be brought here by the purchaser, or some other person nominated by the purchaser, as, for instance, a sub-purchaser, to whom the vendor is directed to deliver them, for transit to Queensland. I concur in the judgment proposed by the learned Chief Justice.

Order varied.

Solicitor, for appellant, *Hellicar*, Crown Solicitor for Queensland.

Solicitors, for respondent, *Atthow & McGregor*.

H. V. J.

(1) 14 C.B.N.S., 681, *per Byles* J. *in arguendo*.

(2) 4 F. & F., 291, at p. 296, *per Cockburn* C.J.