[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . APPELLANT;
PLAINTIFF,

AND

BENDRODT . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A DISTRICT COURT OF NEW SOUTH WALES.

H. C. OF A.
1920.

SYDNEY,
Aug. 16, 17.

Knox C.J.,
Isaacs and
Rich JJ.

Entertainments Tax—Entertainment—Incidental attraction—"Dancing supper"—"Payment for admission"—Payment made on leaving—Entertainments Tax Assessment Act 1916 (*No.* 36 *of* 1916), *secs.* 2, 7, 8, 11—*Entertainments Tax Act* 1916-1918 (*No.* 38 *of* 1916—*No.* 25 *of* 1918), *sec.* 4.

Sec. 7 of the *Entertainments Tax Assessment Act* 1916 provides that there shall be levied and paid "on all payments for admission to any entertainment" an entertainments tax at such rates as are declared by Parliament.

The respondent conducted at a restaurant certain "dancing suppers," visitors to which were required, before entering, to engage a table for supper, and a charge of ten shillings for each visitor was required to be paid before leaving. The supper was supplied by the proprietor of the restaurant at a cost to the respondent of five shillings per head.

Held, that on the evidence the supper was merely subordinate and incidental to the dancing, and that the whole was an "entertainment" within the meaning of the Act.

Lyons & Co. v. *Fox*, (1919) 1 K.B., 11, distinguished.

Held, also, that the payment of ten shillings was a payment "for admission" although not required to be paid until after admission.

H. C. OF A.
1920.

FEDERAL COMMISSIONER OF TAXATION v. BENDRODT.

APPEAL from a District Court of New South Wales.

The Federal Commissioner of Taxation brought an action in the District Court at Sydney against James Charles Bendrodt to recover £91 10s. 10d. for money alleged to be due under the *Entertainments Tax Act* 1916-1918 and the *Entertainments Tax Assessment Act* 1916 in respect of certain entertainments held at Sargent's Buildings, Market Street, Sydney. The action was heard before *Cohen* D.C.J., who, after hearing the evidence, gave judgment for the defendant.

From that decision the plaintiff now appealed to the High Court.

The material facts are stated in the judgment of the Court hereunder.

F. A. A. Russell, for the appellant. The dancing suppers were " entertainments " within the meaning of the *Entertainments Tax Assessment Act* 1916. The ground of the decision in *Lyons & Co.* v. *Fox* (1) was that the meal supplied was the main thing and the music which accompanied it was merely incidental to it. Here, upon the evidence, the dancing was the essential thing and the supper was only incidental to the dancing. The payment was " for admission " notwithstanding that it was not made until the guests were going away. [Counsel also referred to *Attorney-General* v. *McLeod* (2); *Cordiner* v. *Stockham* (3).]

Milner Stephen, for the respondent. These " dancing suppers " were not entertainments. There is ample evidence to justify a finding that the primary thing was the supper. That finding is supported by the cost of the supper to the respondent. If the supper was not the primary thing, then there was a payment of a lump sum for two separable privileges and it was the appellant's duty to apportion the charge under sec. 11, and he was bound to exercise his discretion fairly in doing so (*R.* v. *Board of Education* (4)). In order for a payment to be " for admission " it must be in respect of the act of admitting persons to the place where the entertainment is held. The whole of the machinery provided by the Act shows that to be the intention.

(1) (1919) 1 K.B., 11.
(2) (1918) 1 K.B., 13.
(3) (1920) 1 K.B., 104; 35 T.L.R., 689.
(4) (1910) 2 K.B., 165, at p. 179.

H. C. OF A. 1920.

FEDERAL COMMISSIONER OF TAXATION v. BENDRODT.

The judgment of the COURT, which was delivered by KNOX C.J., was as follows :—This is an appeal by the Commissioner of Taxation against the decision of *Cohen* D.C.J. dismissing an action brought by the Commissioner against the respondent to recover £91 10s. 10d., entertainment tax in respect of entertainments held at Sargent's Buildings, Market Street.

The grounds of defence were (1) that the payments mentioned were payments of ten shillings each by patrons of the defendant's dancing suppers made on leaving the restaurant after supper in the ordinary way, and they were not payments for admission within the meaning of the Act ; (2) that the payments for admission and the total sum of ten shillings were not for the entertainment, since the supper, which was not an entertainment, was substantially, in fact, the most expensive part of the proceedings. The facts found by the District Court Judge were that " the defendant ran certain ' dancing suppers ' at Sargent's refreshment rooms, in Market Street. These were advertised, and the advertisements contained a notice as to how the supper tables could be engaged. The dance generally commenced about 9 p.m., and the supper about 9.30 or 9.45 p.m. The price paid was ten shillings per head, and this was paid as the patrons left the building. Several people went there for the supper only, and did not participate in the dancing or remain after their supper as spectators. No one was admitted who had not previously engaged a table for supper, and, if one had not been already booked by a patron, he could engage it before entering the room, provided always there was one at that time disengaged. Sargent's Ltd. supplied the refreshments for the defendant, who paid them for the same at the rate of five shillings per head, namely, four shillings and sixpence for the supper, and sixpence for liquid refreshments." In addition to these facts, it appears that an advertisement was put in evidence which sets out in effect that dancing suppers were held at Sargent's in Market Street, at a charge of ten shillings, that tables could be engaged by ringing up a certain telephone number, and that the suppers were conducted by Bendrodt and Irving, teachers of dancing.

On the facts proved before him, *Cohen* D.C.J. thought that the case

H. C. of A. 1920.

Federal Commissioner of Taxation v. Bendrodt.

was governed by the decision in *Lyons & Co.* v. *Fox* (1), and dismissed the action. In our opinion that decision is not in point. The ground of the decision of the majority in that case was that the payment was not a payment on admission to an entertainment but a payment for a meal supplied by Lyons & Co., the music which was alleged to constitute the entertainment being held to be merely an incidental attraction. In the present case we think that it is clear that the charge of ten shillings was paid primarily for the privilege of taking part in or looking on at the dancing, and that the supper was merely subordinate and incidental to the dancing. By Act No. 25 of 1918, an entertainments tax is imposed on " payment for admission (excluding the amount of tax)." The *Assessment Act*, No. 36 of 1916, contains certain definitions. The phrase " payment for admission " is not exhaustively defined, though it is made to " include " matters which might not otherwise be considered as within the ordinary meaning of the expression. In its ordinary meaning it denotes a payment for the right of being admitted whenever and however that payment is actually made. " Entertainment " also is not defined further than as " including " any exhibition, performance, lecture, amusement, game or sport for admission to which payment is made. The respondent's advertisements and the facts proved establish that what are called " dancing suppers " are held to which persons are admitted only on condition of paying for admission. The charge is ten shillings and is indivisible. The supper and the dancing go on together, so that the case is entirely unlike the case of *Attorney-General* v. *McLeod* (2). The facts, including the price charged, establish also that the dancing—whether the persons present participate in the actual dancing or merely witness it—is the dominant feature of the proceedings, the supper being merely an agreeable incident but subordinate to the main attraction. Mr. *Stephen* urged two grounds in favour of the respondent, first, that the charge was for the supper and only incidentally for the dancing. In our opinion this is not so. He also urged that since visitors paid only on leaving, and, if so minded, went out without paying, there was no " payment for admission." The words of the Act are not

(1) (1919) 1 K.B., 11.

(2) (1918) 1 K.B., 13.

on admission but *for* admission, a variation from the words of the Imperial Act which we assume to be intentional. He relied on sec. 8. That section is not a limitation of the operation of the Act but a direction for safeguarding and enforcing it. Omission to observe the requirements of that section entails not immunity, but prosecution under sec. 15.

Both objections are, in our opinion, unsound, and the appeal should be allowed, the order of the District Court set aside and judgment entered for the appellant for the amount claimed, with costs in both Courts.

Appeal allowed. Order of District Court set aside and judgment entered for plaintiff for £91 10*s*. 10*d*. *with costs. Respondent to pay costs of appeal.*

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Allen, Allen & Hemsley.*

B. L.