[HIGH COURT OF AUSTRALIA.]

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

AND

ROONEY . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A LOCAL COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1925.

ADELAIDE, *Sept.* 24.

KNOX C.J., ISAACS, HIGGINS and RICH JJ.

Entertainments Tax—Entertainment—Ball and supper—Payment for admission—Composite ticket of admission—Separation of payments for dancing and for supper—Regulation—Certificate of Commissioner as to amount of tax due—Prima facie evidence—Ultra vires—Entertainments Tax Assessment Act 1916 (*No.* 36 *of* 1916), *secs.* 2, 7, 21—*Entertainments Tax Regulations* 1917 (*Statutory Rules* 1917, *No.* 227), *reg.* 54.

A ball was advertised as about to be held, tickets for which would be 5s. each. The tickets that were issued and sold were divided, one part, on which the price of 1s. 6d. was printed, being delivered up on admission to the hall in which the ball was held, and the other part, which was marked "supper ticket" and on which the price of 3s. 6d. was printed, being delivered up at the supper table.

Held, on the evidence, that the ball and supper constituted one "entertainment" within the meaning of the *Entertainments Tax Assessment Act* 1916, payment for admission to which was 5s.

Reg. 54 of the *Entertainments Tax Regulations* 1917, which provides that "in any legal proceedings by the Commissioner against the proprietor of an entertainment for recovery of entertainments tax the certificate in writing of . . . the Commissioner . . . stating the amount of entertainment tax due by the defendant shall be prima facie evidence of the fact stated," is within the power conferred by sec. 21 of the *Entertainments Tax Assessment Act* 1916 upon the Governor-General to make regulations prescribing all matters which are necessary or convenient to be prescribed for giving effect to the Act.

Per Higgins J.: *Quære*, whether a distinction should not be drawn between the two parts of a composite ticket of admission, where part is for an entertainment and part not, so as to charge the tax only in respect of that

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part which is for admission to an entertainment (*Attorney-General* v. *McLeod*, (1918) 1 K.B. 13); and, therefore, whether *Federal Commissioner of Taxation* v. *Bendrodt*, (1920) 28 C.L.R., 101, was rightly decided.

APPEAL from a Local Court of South Australia.

An action was brought in the Local Court at Adelaide by the Federal Commissioner of Taxation against Patrick William Rooney to recover the sum of £3 7s. 1d., being the balance of tax alleged to be due in respect of an entertainment of which the defendant was the proprietor within the meaning of the *Entertainments Tax Assessment Act* 1916. At the hearing evidence was given which, so far as is material, was to the following effect:—On 17th July 1924 the Sacred Heart Collegians' Association held their second annual ball. An advertisement of the ball had been published in a newspaper stating that the price of the tickets was 5s. each. The tickets were divided into two parts by a perforated line. On the larger part was printed:—"Sacred Heart Collegians' Association.—Second Annual Ball.—Osborne Hall, Adelaide, on Thursday, 17th July 1924.—Ticket 1s. 6d." On the smaller part was printed:—"Sacred Heart Collegians' Association.—Second Annual Ball.—17th July 1924.—Supper ticket, 3s. 6d." The defendant applied for the registration of the entertainment pursuant to the *Entertainments Tax Assessment Act*, stating in the application that the charge for admission to every part of the entertainment was 1s. 6d., including tax. A certificate of registration under the Act was thereupon issued. At the door of the hall in which the ball was held the holder of a ticket gave up the larger part to the door-keeper. An officer of the Taxation Department asked at the door for a ticket of admission to the entertainment and was handed the larger part of a ticket for which he was charged 1s. 6d. The supper was laid in a part of the hall divided from the rest of it by curtains, and, dancing having ceased about 10 p.m., the curtains were drawn back and the guests sat down to supper, and the smaller parts of the tickets were collected as the guests were seated. Dancing was resumed after supper. The supper was provided by a caterer at a cost of about 2s. 6d. a head. The defendant made a return as required by the Act, showing that 230 tickets had been sold at 1s. 6d. each; and tax at the rate of 1½d. each, amounting to £1 8s. 9d., was paid. The amount sued for was

the difference between £1 8s. 9d. and £4 15s. 10d., the amount of tax on 230 tickets sold at 5s. each. On 21st November 1924 the Deputy Federal Commissioner of Taxation for South Australia gave a certificate in writing, pursuant to reg. 54 of the *Entertainments Tax Regulations* 1917, that " the sum of £3 7s. 1d. was on 1st October 1924 and still is due " by the defendant in respect of the entertainment. At the close of the plaintiff's case the defendant's counsel asked for a nonsuit. He also asked for a verdict for the defendant. No evidence was called for the defence, and after argument the Special Magistrate who heard the case gave a verdict for the defendant, the Magistrate holding that the payments for admission to the dance and the payments for the supper were severable from one another and that the payments for the supper were not taxable. He also held that reg. 54 was *ultra vires*, and, therefore, that the certificate given under it was inadmissible in evidence.

From that decision the plaintiff now, by special leave, appealed to the High Court.

Ward, for the appellant. On the evidence the dance and the supper together constituted one entertainment to which the charge for admission was 5s. The case is not distinguishable from *Federal Commissioner of Taxation* v. *Bendrodt* (1). Reg. 54 of the *Entertainments Tax Regulations* 1917 is not *ultra vires*. It merely makes a certificate of the Commissioner prima facie evidence that there is an amount due and of what that amount is or, at all events, of what the amount due is.

H. G. Alderman (with him *Travers*), for the respondent. There is no evidence that more than 1s. 6d. needed to be paid for admission to the dance. This case falls within *Attorney-General* v. *McLeod* (2), and is distinguishable from *Federal Commissioner of Taxation* v. *Bendrodt* (1). In the latter case the charge for the supper was a small part of the whole charge, while here the charge for the supper was more than twice as great as that for the dance. The 3s. 6d. cannot be said to be a charge for admission to anything, but it was

(1) (1920) 28 C.L.R. 101. (2) (1918) 1 K.B. 13.

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a reasonable charge for the supper. If the appeal succeeds, the case should be remitted to the Local Court in order that evidence may be given for the defence. The respondent asked for a nonsuit and should not be prejudiced because the Magistrate gave a verdict for him. [Counsel referred to secs. 138 and 139 of the *Local Courts Act* 1886 (S.A.).]

KNOX C.J. In my opinion, on the facts proved in this case, it is perfectly clear that there was only one entertainment, for admission to which a charge of 5s. was made, and that there were not two entertainments for admission to one of which a charge of 1s. 6d. and for admission to the other a charge of 3s. 6d. were made. That that is so is shown distinctly by the advertisement, and, although after the advertisement was published the promoters, being better advised and desiring to escape from this tax, adopted means to try to make it appear that there were two separate functions, there were never two in reality. So far as the merits are concerned, therefore, the Magistrate was wrong and the appeal should be allowed.

On that view of the facts the question of the validity of reg. 54, strictly speaking, does not arise. But as its validity has been questioned I think I should express my opinion that the regulation is perfectly valid. It merely does for the purposes of the Act what in other Acts is done by sections in the Acts themselves; that is, it provides that a certain certificate shall be prima facie evidence of the facts stated in it.

The only other point is this: Mr. *Alderman* suggested that he was entitled to have the case sent back to the Magistrate for further consideration. I do not think he is. At the close of the case it appears that a nonsuit was asked for, but the respondent also asked for and accepted a verdict in his favour. Having accepted that verdict, the case is not in the same position as if a nonsuit had been granted.

In my opinion the appeal should be allowed.

ISAACS J. I agree. I can add nothing to what the learned Chief Justice has said.

HIGGINS J. I agree with the view that the appeal should be allowed. I am impressed by the fact to which the Chief Justice has referred—that in the advertisements and in the sale of the tickets there was no separation between the dance and the supper. At the same time I do feel that in this case there are facts additional to the advertisement and the methods of selling the tickets, and that, even if the device adopted was for the purpose of defeating the taxation Act, the committee were perfectly entitled to adopt this device, provided that they brought the transaction within the exemption. There is no dishonesty in doing so. Nobody is under any duty to put his head into the mouth of the alligator.

But there are two matters which have given me a good deal of trouble. I am bound by *Bendrodt's Case* (1); but I must say that if I had to decide that case I should probably not have adopted the principle there laid down. I think that to ignore the distinction between payment for admission and payment for the supper was not justified. Further, I do not see why in *Bendrodt's Case* the case of *Attorney-General* v. *McLeod* (2) was not followed. In the latter case the Court took good care to distinguish between the two parts of a composite ticket of admission, and to provide that the tax should be charged, not upon the part which was distinctly not for admission to an entertainment, but only upon that part which was for admission to an entertainment.

I agree also with the view of the Chief Justice as to the regulation being valid; but I hold it valid only upon the first alternative put by Mr. *Ward*. It is only a regulation as to the amount of the tax; it is not even "the facts stated," but "the fact stated," that is the thing as to which the certificate is to be prima facie evidence.

I am afraid too that it is impossible to say that Mr. *Alderman* should be allowed to mend his hand. He has deliberately taken a verdict for the defendant and not a nonsuit, and as he has taken a verdict he must abide by the result.

RICH J. I agree with the view taken by the learned Chief Justice, and I cannot usefully add anything to what he has said.

(1) (1920) 28 C.L.R. 101. (2) (1918) 1 K.B. 13.

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Appeal allowed. Judgment appealed from discharged and judgment entered for the plaintiff for £3 7s. 1d. with costs of action. Appellant to pay the costs of this appeal in accordance with his undertaking.

Solicitor for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth, by *Fisher, Ward, Powers & Jeffries.*

Solicitor for the respondent, *J. L. Travers.*

B. L.

[HIGH COURT OF AUSTRALIA.]

FISHER AND OTHERS . . . . . APPELLANTS; DEFENDANTS,

AND

WENTWORTH AND OTHERS . . . . RESPONDENTS. PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H C. OF A. 1925.

SYDNEY, *Aug.* 21, 24, 27.

Knox C.J., Isaacs and Higgins JJ.

Will—Construction—Absolute gift of residue—Trusts engrafted on gift—Failure of trust—Absolute gift taking effect—Intestacy.

A testator by his will directed his trustees to raise a fund of £10,000 and to hold it upon trust for his son A for life and after his death for his children; and he directed that, if there should be no child or issue of A who should become entitled to a vested interest in the fund, it should sink into and form part of the residue and be applied accordingly. He also directed that the residue of his estate should be divided equally between his five daughters and two sons (who all survived him), and that the share of A in the residue should be held upon such trusts as were declared concerning the fund of £10,000. He further directed that, upon failure of the trusts of the share of any of his five daughters and A in the residue, the share in respect of which there was a failure should go to the survivor or survivors of the testator's children living