[HIGH COURT OF AUSTRALIA.]

GRECH . . . . . APPELLANT;
APPLICANT,

AND

BIRD AND ANOTHER . . . . . RESPONDENTS.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1936.

SYDNEY, *Aug.* 18; *Dec.* 7.

Starke, Dixon, Evatt and McTiernan JJ.

Regulation—Validity—Statutory power to make regulations "for purposes convenient for" administration of Act or "as may be necessary or expedient to carry out" its objects—Power to prescribe forms—Egg Marketing Board—Returns by producers—Form—Statutory declaration—Marketing of Primary Products Act 1927-1934 (*N.S.W.*) (*No.* 34 *of* 1927—*No.* 7 *of* 1934), *sec.* 34.

By the *Marketing of Primary Products Act* 1927-1934 (N.S.W.) certain boards may be constituted to control the marketing of products duly proclaimed to be commodities under the Act. By sec. 34 the Governor may make regulations for purposes convenient for the administration of the Act, or as may be necessary or expedient to carry out its objects, and, without limiting the generality of the foregoing, for a number of specified matters. In such regulations he may prescribe "forms of returns . . . to be made . . . in accordance with this Act, and the contents thereof, and the persons by whom the same shall be made, and the time and mode of making and furnishing the same." By sec. 34 (2) the regulations may fix a penalty not exceeding fifty pounds for any breach thereof. Where a penalty is not so fixed every person guilty of an offence against a regulation is liable, by secs. 4 and 31 (2), to a penalty not exceeding fifty pounds.

By a regulation purporting to have been made under the Act, returns as to egg production and disposal were required to be furnished by statutory declaration to officials of the Egg Marketing Board constituted under the Act. Refusal or neglect to furnish the declaration, or the furnishing of one false in any particular, was declared to be an offence against the regulation.

Held, by *Dixon*, *Evatt* and *McTiernan* JJ. (*Starke* J. dissenting), that the Act did not confer any power to require the making of a statutory declaration, and the regulation was *ultra vires*.

Decision of the Supreme Court of New South Wales (Full Court): *Ex parte Grech*; *Re Bird*, (1936) 36 S.R. (N.S.W.) 231; 53 W.N. (N.S.W.) 99, reversed.

H. C. OF A. 1936. GRECH v. BIRD.

APPEAL from the Supreme Court of New South Wales.

On an information by Harry Bird, an inspector in the employ of the Egg Marketing Board constituted under the *Marketing of Primary Products Act* 1927-1934 (N.S.W.), for the County of Cumberland, New South Wales, Dolores Grech was charged at the Court of Petty Sessions, Parramatta, for that she, on 16th July 1935, being a person then resident within the County of Cumberland who then owned or controlled or upon whose premises there were then more than twenty fowls, and having on 16th July 1935 been duly ordered by notice in writing by the informant, duly authorized by the above-mentioned board in that behalf, to furnish to him a statutory declaration setting out the number of eggs produced by such fowls, the manner in which and the person or persons to whom such eggs were disposed of, did neglect to furnish such statutory declaration to the informant within the time specified in the notice. In the notice referred to the defendant was required "in the terms of reg. 47 of the regulations under the *Marketing of Primary Products Act* 1927-1934" to furnish to Bird within seven days of the delivery to her of the notice a statutory declaration setting out in respect of the eggs produced by her fowls during the period commenced 15th January 1935 and ended 30th January 1935 the particulars mentioned above. She was informed that "for this purpose a statutory declaration form, to be completed and declared by you, is enclosed herewith," and that it would "be necessary for you after completing the form by adding the necessary particulars to sign the same in the presence of a justice of the peace" and then to return the completed declaration to Bird. The form contained a provision that the declarant made "this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the *Oaths Act* 1900." A copy of regs. 46 and 47 was enclosed and her attention was specially drawn to the fact that the information called for must be furnished

H. C. OF A. 1936. GRECH v. BIRD.

in full, and that failure to return the declaration was "an offence against the regulations, for which a maximum penalty of £50 may be imposed."

Reg. 47 is in the following terms:—"(1) Any officer . . . of the board duly authorized by the board in that behalf may by notice in writing order any person resident within the area who owns or controls or on whose premises there are more than twenty fowls to furnish to him a statutory declaration setting out the number of eggs produced by such fowls, the manner in which, and the person or persons to whom such eggs were disposed of. (2) Any person who refuses or neglects to furnish such statutory declaration within the time specified in the notice to him, and any person who furnishes a statutory declaration which is false in any particular shall be guilty of an offence against these regulations."

The defendant was convicted and ordered to pay a fine of £1, and costs, or in default to suffer imprisonment with hard labour for five days.

A rule *nisi* for a statutory writ of prohibition, obtained by the defendant to restrain further proceedings upon the conviction against her on the ground that reg. 47 was *ultra vires*, was discharged by the Full Court of the Supreme Court: *Ex parte Grech*; *Re Bird* (1).

Relevant provisions of the *Marketing of Primary Products Act* 1927-1934 (N.S.W.) are stated in the judgment of *Davidson* J., as follows:—"By sec. 11, the producers, at a time to be specified, must deliver the whole or such part of the commodity they possess to the board or its authorized agents. The Act . . . makes provision for the appointment of a State Marketing Bureau whose duties include the collection of information as to the cost and quantities of production in New South Wales and the prices and quantities of products produced elsewhere and of such of them as are imported into this State. For these purposes the Minister is empowered by sec. 29 to require producers of any product or commodity to furnish to specified persons in a form to be specified in the notice, returns as to the quantities of products or commodities held or under their control. Failure to supply such information or

(1) (1936) 36 S.R. (N.S.W.) 231; 53 W.N. (N.S.W.) 99.

wilfully giving false or misleading returns is also declared to constitute an offence against the Act. Sec. 31 (2) provides that every person guilty of an offence against the Act shall be liable for every offence against its provisions where no other penalty or punishment is imposed to a penalty not exceeding fifty pounds. . . . Under sec. 34 . . . the Governor may from time to time make regulations providing for all or any purposes, whether general or to meet particular cases, as may be convenient for the administration of the Act, or as may be necessary or expedient to carry out its objects or purposes, and in case there may be in the Act no provision or no sufficient provision in respect of any matter or thing necessary or expedient to give effect to the Act, then also providing for and supplying such omission or insufficiency . . . Among the specific powers mentioned there is included one for prescribing forms of returns and of statistics to be made and furnished in accordance with the Act, and as to the time and mode of making and furnishing them . . . In sub-sec. 2 of sec. 34 there is the provision . . . that the regulations may fix a penalty not exceeding in any case fifty pounds for any breach thereof." By sec. 4 the expression " this Act " is defined as including regulations made under the Act.

From the decision of the Supreme Court the defendant, by leave, appealed to the High Court.

Spender K.C. (with him *Dignam*), for the appellant. There is no power conferred by the *Marketing of Primary Products Act* to call for a return by way of statutory declaration, because (*a*) there is no power to require an extra-judicial oath for the administration of any Act unless such a power is either expressly conferred or appears by necessary implication; (*b*) sec. 34 (2) is a limitation upon the regulation-making authority which cannot by any means, directly or indirectly, ask for information which will involve on the person making the declaration a penalty in excess of the penalty specified in the Act; (*c*) it cannot reasonably be said to be convenient for the administration of the Act, or necessary or expedient to carry out its objects, and therefore it does not come within the ambit of sub-sec. 1 of sec. 34; (*d*) adequate provision for the obtaining

H. C. OF A. 1936. GRECH v. BIRD.

of information, and for punishment in the event of non-compliance, is made in sec. 29. Reg. 47 is *ultra vires* because it tends to make compulsory the making of a statutory declaration which can only be made voluntarily under the *Oaths Act*. [He was stopped.]

E. M. Mitchell K.C. (with him *Harper*), for the respondents. The *Oaths Act* nowhere provides that a person shall not be compelled to make a statutory declaration. A magistrate or justice of the peace is authorized to take a declaration as required by the regulation if the declarant goes before him and volunteers to make it (See *Oliver's Statutes of Practical Utility* (1879), vol. II., pp. 1637, 1639). The requirement that a statutory declaration shall be made is neither new nor rare (See, e.g., the following New South Wales Acts: *Trade Union Act* 1881, sec. 23; *Interpretation Act of* 1897, sec. 20; *Real Property Act* 1900, secs. 38, 59, 111; *Racecourses Admission Tax (Management) Act* 1920, secs. 5, 6; *Bookmakers' Taxation (Amendment) Act* 1920, sec. 5). The obtaining of returns verified by statutory declaration is "convenient for the administration of" the Act, and also "necessary or expedient to carry out" its "objects and purposes" within the meaning of those expressions as contained in sec. 34 of the *Marketing of Primary Products Act* (*Metropolitan Meat Industry Board* v. *Finlayson* (1); *Jones* v. *Metropolitan Meat Industry Board* (2); *Gibson* v. *Mitchell* (3); *Williams* v. *Melbourne Corporation* (4)). Accurate particulars are absolutely essential for the proper and effective administration of the Act, and the board is called upon to insist that such accurate particulars be furnished. The requirement of a certified return and the penalty for non-compliance are within the powers conferred by sec. 34 (1) (i) (*b*) and (*c*). Refusal or neglect to furnish a statutory declaration, and the furnishing of a statutory declaration false in any particular are new offences created by the regulation. The penalty is quite different from the penalty prescribed in the *Oaths Act*. The regulation requires returns with a reasonable and customary form of verification, and in connection with a new offence has specified a penalty of £50 only; therefore it is not for the court to inquire

(1) (1916) 22 C.L.R. 340, at p. 349.
(2) (1925) 37 C.L.R. 252, at p. 259.
(3) (1928) 41 C.L.R. 275, at pp. 278, 279.
(4) (1933) 49 C.L.R. 142, at pp. 147, 150, 155, 158.

further (*R.* v. *Burah* (1)). If in the course of committing a breach of the regulation the declarant also by his own conduct elects to involve himself in a breach of the *Oaths Act*, the regulation is not thereby invalidated. If the declarant chooses not only to commit the offence of a breach of this regulation, but by the inclusion of additional matters to commit the offence of a breach of another Act, that is, the *Oaths Act*, then the latter offence is not dealt with under the regulation but under that other Act. It is brought about not merely by the breach of the regulation *per se*, but the breach plus other things which are not dealt with by the regulation. That is the difference between this case and *R.* v. *Barger*; *The Commonwealth* v. *McKay* (2). Any offence against the *Oaths Act* remains punishable under that Act. If the demand for verification is within the ambit of power and if the penalty fixed is within the ambit of the Act, that is, does not exceed £50, then the direct or indirect consequences from other Acts do not affect the matter: they arise from external causes (*Barger's Case* (3); *Colonial Sugar Refining Co. Ltd.* v. *Irving* (4)). Sec. 29 of the Act deals with an entirely different subject matter. It is concerned only with returns to the Minister for the purpose of official marketing information, and in that Part it is expressly enacted that nothing therein should have anything to do with the powers of the board in exercising its functions. Any words in par. 2 of reg. 47 which may be inconsistent with the *Oaths Act* are separable from that paragraph; also, the whole paragraph is separable from the regulation.

Spender K.C., in reply. A statutory declaration which a person is compelled to make is not a voluntary declaration within the meaning of the *Oaths Act*. The jurisdiction of that Act is limited to the two classes provided in secs. 15 and 18. The Act makes a distinction in the case of a declaration made in lieu of an oath (*R.* v. *Martin* (5)). A declaration made in compliance with the requirement is not, in the circumstances, a voluntary declaration. Such a declara-

(1) (1878) 3 App. Cas. 889, at pp. 904, 905.
(2) (1908) 6 C.L.R. 41.
(3) (1908) 6 C.L.R., at pp. 111, 112.
(4) (1906) A.C. 360, at p. 367.
(5) (1904) 4 S.R. (N.S.W.) 720; 21 W.N. (N.S.W.) 233.

H. C. OF A. 1936.

GRECH v. BIRD.

tion is not the result of the free exercise of the will of the declarant (*In re Wilkinson*; *Page* v. *Public Trustee* (1)). It is neither reasonable nor necessary for the due administration of the Act that the person concerned should have to locate a justice of the peace. Nor is it a "necessary or expedient" requirement that a person should have a form prescribed to which he is compelled to subscribe, and which may involve him in a double sanction. Whether a requirement is "necessary or expedient" must be proved. Ample machinery to obtain the required information from the producers concerned is provided by sec. 27 in conjunction with sec. 29. That machinery renders the regulation unnecessary.

Cur. adv. vult.

Dec. 7.

The following written judgments were delivered:—

STARKE J. An Egg Marketing Board was constituted under the *Marketing of Primary Products Act* 1927-1934 of New South Wales. Under this Act eggs might, within proclaimed areas, be vested in, or delivered to, the board, which, subject to the Act, was empowered to sell or arrange for the sale thereof, and out of the proceeds make payment to each supplier of eggs to it, on a basis prescribed by the Act. The board has considerable powers, but in addition the Act authorized the Governor to make regulations in the following terms: "The Governor may from time to time make such regulations providing for all or any purposes, whether general or to meet particular cases, as may be convenient for the administration of this Act, or as may be necessary or expedient to carry out the objects and purposes of this Act, and where there may be in this Act no provision or no sufficient provision in respect of any matter or thing necessary or expedient to give effect to this Act, providing for and supplying such omission or insufficiency" (sec. 34). And, without limiting the generality of the foregoing provision, such regulations might provide generally for a number of specified matters, including the form of return, the person by whom the same should be made, and the time and mode of furnishing the same. The regulations might fix a penalty not exceeding in any case £50 for any breach

(1) (1926) Ch. 842, at p. 850.

thereof and, failing such a provision, the Act itself imposes a penalty, not exceeding £50. The regulations were to be laid before both Houses of Parliament and might be disallowed wholly or in part by either House, whereupon such regulation or part ceased to have effect.

The Governor, with the advice of the Executive Council, made the following regulation pursuant to the powers contained in the Act:—"47. (1) Any officer, servant, or employee of the board duly authorized by the board in that behalf may, by notice in writing, order any person resident within the area who owns or controls or upon whose premises there are more than twenty fowls, to furnish to him a statutory declaration setting out the number of eggs produced by such fowls, the manner in which, and the person or persons to whom such eggs were disposed of. (2) Any person who refuses or neglects to furnish such statutory declaration to such person so authorised within the time specified in the notice to him, and any person who furnishes a statutory declaration which is false in any particular, shall be guilty of an offence against these regulations." The appellant was charged under this regulation with neglecting to furnish a statutory declaration to an authorized officer of the board, and was convicted. She obtained from the Supreme Court of New South Wales an order nisi for a statutory writ of prohibition restraining further proceedings upon her conviction, but it was discharged. Special leave to appeal was given by this court.

The nature and provisions of the Act render its administration impracticable unless producers of commodities, subject to the provisions of the Act, furnish returns of those commodities and verify the truth of them. It is therefore convenient—indeed it is essential—to the administration of the Act that returns should be furnished and verified. But although this was conceded in argument, the power to require a statutory declaration was denied. This method of verifying extra-judicial statements is commonly used, it is adopted in various statutes, and it seems convenient for the administration of the *Marketing of Primary Products Act* and expedient for the purpose of carrying out its objects. An illustration from English legislation may be found in the *Air Navigation Order*

H. C. OF A. 1936. GRECH v. BIRD. Starke J.

of 1922, clause 23 and schedule 1, clause 2. It is contended, however, that a statutory declaration cannot be required in the case of the *Marketing of Primary Products Act* because any person making a false declaration under and pursuant to the *Oaths Act* 1900 of New South Wales is guilty of a misdemeanour and may be punished accordingly, whereas any breach of the *Marketing of Primary Products Act* and the regulations thereunder is only subject to a penalty not exceeding £50. The argument ought not, I think, to be sustained. Prima facie, the requirement of a statutory declaration verifying returns furnished to the board or its officers is within the authority to make regulations conferred upon the Governor, and the regulation which is now in question itself imposes no penalty in excess of that authority, and it has not been disallowed by either House of Parliament. All that can be said is that the legislature of New South Wales has itself enacted a more severe sanction for a false declaration than it permits the Governor to prescribe. But there is nothing in the regulation repugnant to or inconsistent with the legislative enactment. A person charged with making a false declaration in connection with returns under the *Marketing of Primary Products Act* might be charged under either the *Oaths Act* or the *Marketing of Primary Products Act* or regulations thereunder; though I apprehend that he could not be twice punished for the same offence.

Another argument was also presented to the court, which is equally unsustainable. The *Oaths Act* prescribes that certain persons may take and receive the declaration of any person voluntarily making the same before him. It was contended, therefore, that the only declarations that could be received or taken were those made freely and without any compulsion or obligation to make them, and that a declaration which a regulation required or compelled a person to make was not made freely and without compulsion, or voluntarily, and so was not a declaration which could be lawfully taken or received under the *Oaths Act*. But the history of the provision demonstrates the invalidity of the argument. The statutory declaration was introduced to suppress voluntary and extra-judicial oaths and affirmations (5 & 6 Wm. IV. c. 62). The antithesis is between the oath in judicial proceedings, which is a compulsory

oath, and the extra-judicial oath or affirmation, which is not compulsory, and is therefore voluntary.

The appeal should be dismissed.

DIXON J. The Egg Marketing Board is constituted under the provisions of the *Marketing of Primary Products Act* 1927-1934 (N.S.W.). Its purpose is described by its name. It was brought into existence by proclamation under sub-sec. 3 of sec. 5 and sec. 7 of that Act. By another proclamation, made under sub-sec. 8 of the former section, the producers of eggs were divested of their property in that commodity, which, as it came into existence, became the property of the board.

The board sells the commodity and makes a division among the producers on the basis of the net proceeds of sale and the proportion delivered to the board by each producer (sec. 14 (2)). The commodity must be delivered to the board unless other provision is made, as, for instance, by regulations (sec. 11 (1)).

A producer who disposes of or delivers any of the commodity to some person other than the board, unless pursuant to an exemption, commits an offence punishable by a fine of £100. The person who buys, accepts, or receives it from him commits the like offence (sec. 11 (3)).

The statute confers upon the Governor in Council a power to make regulations. The regulations may fix a penalty for any breach not exceeding £50 (sec. 34 (2)). Another section provides the same penalty for any offence against the Act for which no other punishment is imposed (sec. 31 (2)). And the expression " Act " includes the regulations (sec. 4).

The present appeal is concerned with the validity of a regulation made by the Governor in Council. It purports to empower an officer of the board authorized by it in that behalf to order by notice in writing any person owning or controlling or having upon his premises more than twenty fowls to furnish him with a statutory declaration setting out the number of eggs produced by the fowls and the manner in which and the persons to whom the eggs were disposed of. If he refuses or neglects to furnish the statutory declaration, or furnishes one false in any particular, he is to be guilty

H. C. OF A. 1936. GRECH v. BIRD. Dixon J.

of an offence against the regulations. If the expression " statutory declaration " is used in an Act of the New South Wales Parliament, it means prima facie a declaration made by virtue of an Act authorizing a declaration to be made in lieu of an oath (sec. 20 of the *Interpretation Act* 1897). No doubt it should be so understood in the present regulation, although it is not an expression that appears in the Act itself. The statute which authorizes declarations is now the *Oaths Act* 1900. Sec. 15, which was introduced by 9 Vict. No. 9, sec. 1, and is based on sec. 2 of 5 & 6 Will. IV. c. 8, provides that, where by an Act relating to the public revenue or any public office or department, an oath or affidavit might but for the *Oaths Act* be required to be taken by any person, the Governor may substitute a declaration.

Sec. 21 provides that any justice of the peace or other officer by law authorized to administer an oath may take and receive the declaration of any person voluntarily making the same before him in the form or the effect of either of two forms which the statute sets out in the schedules.

By sec. 25 any person who wilfully and corruptly makes and subscribes any declaration which by or under the *Oaths Act* is substituted in lieu of an oath or authorized to be subscribed knowing the same to be untrue in any particular is guilty of a misdemeanour.

These two sections originated in sec. 9 of 9 Vict. No. 9, which expressly recites the reason for the provision. It was preceded by a preamble stating that in many cases not specified by the Act it may be necessary and proper to require confirmation of written instruments, or allegations, or proof of debt or of the execution of deeds, or other matters. The recital may serve to show that the expression " voluntarily making the same " excludes compulsion on the part of the justice or officer and is not inconsistent with the application of the provision to declarations made in fulfilment of a requirement imposed by some enactment or regulation otherwise validly made. I think the true question upon which the validity of the present regulation depends is whether it falls within the power to make regulations providing for all or any purposes as may be convenient for the administration of the Act, or as may be necessary or expedient to carry out the objects and purposes of the

Act, and, where there may be in the Act no provision, or no sufficient provision, in respect of any matter or thing necessary or expedient to give effect to the Act, providing for and supplying such omission (sec. 34 (1)). The particular matters which the sub-section proceeds to specify " without limiting the generality of the foregoing " may illustrate the meaning of the general power, but none of them, in my opinion, covers the regulation requiring a poultry farmer to furnish upon notice a statutory declaration stating what eggs have been laid by his fowls and what he has done with them.

The evident purpose of the regulation was to create a dilemma for the poultry farmer who does not conform to the marketing system prescribed and does not dispose of his eggs to the Egg Board, or under its authority. Either he must state truly the number of eggs produced and how he has dealt with them and so expose himself to prosecution for disposing of and delivering eggs to some person other than the board, or he must make a false declaration and so expose himself to prosecution under sec. 25 of the *Oaths Act*.

The scope of statutory powers to make regulations necessary or convenient for carrying out or giving effect to an Act has been discussed in this court in *Carbines* v. *Powell* (1), *Gibson* v. *Mitchell* (2) and *Broadcasting Co. of Australia Pty. Ltd.* v. *The Commonwealth* (3). In the first-named case *Isaacs* J. said :—" To ' carry out ' the Act means to enforce its provisions. To ' give effect ' to an Act is to enable its provisions to be effectively administered. There is little, if any, difference between the two expressions. They both connote that the Governor-General's regulations are to be confined to the same field of operation as that marked out by the Act itself " (4).

The ambit of the present power is probably wider, but it is subject to a necessary limitation. It does not enable the Governor in Council to make a regulation which varies or departs from a positive provision made by the Act itself. In my opinion the regulation fails for this reason. It attempts to place a poultry farmer who furnishes untruthful information under a liability to a heavier and different punishment than that which the Act expressly authorizes.

(1) (1925) 36 C.L.R. 88.
(2) (1928) 41 C.L.R. 275.
(3) (1935) 52 C.L.R. 52.
(4) (1925) 36 C.L.R., at p. 91.

H. C. OF A. 1936. GRECH v. BIRD. DIXON J.

When sub-sec. 2 of sec. 34 empowers the Governor in Council by his regulations to fix a penalty not exceeding £50 for any breach thereof, it limits the penal liability which his subordinate law-making power may impose upon the subject. This limit is confirmed by sec. 31 (2), which provides the same penalty where none is otherwise fixed. In the very regulation the Governor in Council makes it an offence against the regulations to furnish a statutory declaration false in any particular. This includes, if it does not mean, "false to the knowledge of the declarant," which is almost co-extensive with "wilfully and corruptly untrue." Thus the regulation itself creates an offence covering all the ground of the misdemeanour provided for by sec. 25 of the *Oaths Act*. So much of the regulation as does so could not stand if the rest were valid. But, in so providing, the regulation merely illustrates the attempt made by it to improve upon the limited penal liability which the Governor in Council is empowered to impose. His power extends to making regulations requiring returns of information. The regulations may prescribe the form and insist upon authentication of the returns. They may make it an offence to include in such returns any statement which is false or wilfully and corruptly untrue. But the penal consequences may not go beyond the punishment which the Act specifies. In my opinion that limitation cannot be overcome by resort to the device of requiring a statutory declaration under the *Oaths Act*.

For these reasons I think the appeal should be allowed. The orders of the Supreme Court should be discharged and the order nisi for statutory prohibition made absolute. The respondents should pay the costs of this appeal and of the proceedings in the Supreme Court.

EVATT J. Reg. 47 (2) made under the *Marketing of Primary Products Act* 1927-1934 purports to penalize every person who neglects or refuses to "furnish" a "statutory declaration" setting out particulars as to production and disposal of eggs in accordance with the order of a board official. The appellant was convicted of the offence of neglecting to furnish a statutory declaration so ordered, but contends that the regulation is *ultra vires*.

In my opinion this contention is correct. But with the appellant's

main argument I am unable to agree. That argument is this ; that the maximum penalty under the *Marketing of Primary Products Act* for furnishing a statutory declaration " false in any particular " is that prescribed by sec. 34 (2) and sec. 31 of the Act, viz., a fine of £50 ; whereas, under sec. 25 of the *Oaths Act*, any person who wilfully or corruptly makes a statutory declaration knowing the same to be untrue in any material particular is guilty of a misdemeanour and liable to imprisonment. Accordingly, it is argued, a different and greater penalty may result from use of the statutory declaration than can lawfully flow from breach of any regulation under the *Marketing of Primary Products Act*.

But, as *Stephen* J. rightly says (1), the offence under reg. 47 (2) is that of furnishing a declaration which is false in fact. The object of the regulation is to ensure accuracy in fact of returns, not to punish dishonest returns. If a regulation under the Act made it an offence punishable with a fine to assault an officer of the Egg Board who was (say) performing the duty of inspecting the commodities delivered to the board, I fail to see how the validity of such a regulation would be affected by the fact that such an assault might, if accompanied by circumstances of aggravation, be liable to a much greater punishment under the *Crimes Act*.

The real question is whether it was within the competence of the regulation-making authority to require a statutory declaration at all. The essence of the statutory declaration authorized to be taken and received by justices &c. under sec. 21 of the *Oaths Act* 1900 is that the person making the same does so " voluntarily." The phrase " statutory declaration," where used in an Act, means a declaration made by virtue of any Act authorizing a declaration to be made in lieu of an oath (*Interpretation Act* 1897, sec. 20).

In the *Marketing of Primary Products Act* itself there is no reference either to an oath to be administered to producers or to a declaration to be made by such producers, and no express authority to require producers to use such a declaration has been conferred upon the regulation-making authority.

It is urged that sec. 34 (1) of the Act contains an extensive grant of power to make regulations, convenient, necessary or expedient

(1) (1936) 36 S.R. (N.S.W.), at p. 238.

H. C. OF A. 1936. GRECH v. BIRD. Evatt J.

for the purpose of giving effect to the Act. But in *Broadcasting Co. of Australia Pty. Ltd.* v. *The Commonwealth* (6) a somewhat similar power was considered by this court as insufficient to warrant a regulation which operated to deprive a company of remuneration which it had already earned. Regulation-making bodies are necessarily limited by the terms of their charter from Parliament, and it is difficult to support a grant of power which will enable them to exercise in all respects the original authority or capacity of Parliament itself.

No doubt the word " voluntarily " in sec. 21 of the *Oaths Act* emphasizes that the magistrate who takes and receives the statutory declaration is acting extra-judicially and without using the force of law against the declarant. None the less, it would be a most extraordinary position if, without clear legal authority, a person could be compelled by law to make an extra-judicial declaration, and for a court to say that it was " voluntarily " made.

In my opinion, no regulation can, without the grant of clear authority by Parliament, *compel* a citizen to make a " statutory declaration " under pain of fine or imprisonment. Of course, the position is not necessarily the same where a citizen is (say) an applicant for some grant or concession and is required by regulation to verify by statutory declaration an application he is entitled to make. In such event he is left at liberty to refuse to make the statutory declaration, because no law compels him to proceed with his application.

For these reasons I think the appeal should be allowed.

McTiernan J. The ground of this appeal is that a regulation purporting to have been made by the Executive under the *Marketing of Primary Products Act* 1927-1934 of New South Wales is *ultra vires*. The power to make regulations is conferred by sec. 34 of that Act. It confers general and special powers. The power to make the regulation which is challenged is included, if at all, in the general powers. These powers are conferred in wide words, but Parliament has not delegated to the Executive powers equal to its own to regulate the matter in hand. The limitation which is now

(1) (1935) 52 C.L.R. 52.

important is sec. 34 (2), which says that £50 is the maximum penalty which may be prescribed for a breach of the regulations. Sec. 3 provides that the regulations are to be deemed part of the Act and where no penalty is specially provided for an offence against the Act sec. 31 (2) says that the maximum penalty which may be imposed in such case is £50. An examination of the preamble and the provisions and the regulations shows that it is within the power of the Executive by sec. 34 to make regulations enabling a marketing board to find out how much of a commodity, which is vested in it, is in the hands of every producer and how he has disposed of it.

The regulation now in question assumes, rightly or wrongly, that any person who owns or controls or has on his premises more than twenty fowls is in a position to make a statutory declaration setting out the number of eggs laid by each fowl since each fowl began to lay, for there is no limitation of the period for which these particulars, thus solemnly verified, may be demanded. But if the regulation is a real exercise of the power conferred on the Executive and evades no restraint on the power, the court will not inquire whether it is reasonable.

The regulation makes it an offence to decline to confirm by a statutory declaration the truth of the particulars required by the board or to furnish a statutory declaration which in any respect falsely declares such particulars. The statutory declaration is exacted as added security for the truth of the particulars.

The *Interpretation Act* 1897 defines the expression "statutory declaration," used in any Act or regulation, to mean, unless the contrary intention appears, a declaration made by virtue of any Act or regulation authorizing a declaration to be made in lieu of an oath (secs. 18, 20). It is not disputed that this definition applies to the present case. The statutory declaration was introduced into New South Wales by the Act 9 Vict. No. 9, passed in 1845. This Act followed 5 & 6 Will. IV. c. 62, and was passed to suppress the practice of administering and receiving oaths and affidavits voluntarily taken and made in matters not the subject of any judicial inquiry or in any pending case. This Act, 9 Vict. No. 9, contained a provision empowering a justice of the peace or other person authorized by law to administer an oath to take and receive the

H. C. OF A 1936.

GRECH v. BIRD.

McTiernan J.

declaration of any person voluntarily appearing before him in cases where it might be necessary to require confirmation of written instruments or allegations or proof of debts or of the execution of other matters. The *Oaths Act* 1900, which repealed this Act, provides that a justice of the peace and the other persons mentioned therein may take and receive the declaration of any person voluntarily making the same before him in the form or to the effect of the form in either the eighth or the ninth schedule to the Act (sec. 21). This section gives no compulsory jurisdiction to the justice of the peace or any other person to compel a person to make a statutory declaration. But a declaration made in compliance with a demand under the regulation now in question could be taken by a justice of the peace under sec. 21 as the declaration of a person "voluntarily making the same" before him. Any person who wilfully and corruptly makes and subscribes any such declaration knowing the same to be untrue in any material particular is guilty of a misdemeanour (*Oaths Act* 1900, sec. 25). Further, sec. 339 of the *Crimes Act* 1900 says that where a solemn declaration is required to be taken or is authorized to be received any person who wilfully makes a false statement in any such declaration shall be guilty of a misdemeanour. The history of this section, which is taken from the *Acts Shortening Act* 1852, 16 Vict. No. 1, sec. 13, shows that a statutory declaration is a solemn declaration within the meaning of this section. The regulation now attacked exacts as security for the truth of the particulars to be furnished the form to which the sanctions of sec. 25 of the *Oaths Act* 1900 and sec. 339 of the *Crimes Act* are attached. It is from these sanctions that the statutory declaration derives its efficacy as a confirmatory instrument. The result is that where particulars are demanded under the regulation the penalty provided for failure to comply with the demand can be avoided only by the observance of a form which exposes the producer furnishing the particulars to punishment which it is not in the power of the Executive to impose. For any offence which is created by the regulation the Executive cannot provide a penalty exceeding £50. It follows that the Executive may not lawfully apply the punishment provided by any Act, where it exceeds that limitation, to any offence against the regulation. If the Executive had seen fit to make it an

offence to furnish particulars that were wilfully and corruptly false, it could not prescribe the punishment provided by sec. 25 of the *Oaths Act* 1900, that punishment being in excess of what may be lawfully prescribed. For the same reason it could not prescribe that any person who wilfully furnished false particulars should be liable to the punishment provided by sec. 339 of the *Crimes Act* 1900. The regulation now in question requires the producer by the sanction of a penalty to expose himself to the punishment provided by these sections if the statutory declaration is not true. His punishment exceeds that which the Executive may lawfully prescribe. The statutory limitation on the power of the Executive cannot be evaded by this device.

In my opinion the appeal should be allowed.

Appeal allowed with costs. Order of Supreme Court discharged. Order nisi for statutory prohibition made absolute. Respondents to pay costs of proceedings in the Supreme Court.

Solicitors for the appellant, *J. J. Carroll & Son.*

Solicitors for the respondents, *Carruthers, Hunter & Co.*

J. B.