

[HIGH COURT OF AUSTRALIA.]

BRADY APPELLANT;
INFORMANT,
AND
THORNTON RESPONDENT.
DEFENDANT,

H. C. OF A. *Taxation—Offence—Prosecution—Evidence—Return of income—Understatement of*
1947. *income—Proof—Allegations in information—Averments—Sufficiency—Mixed*
law and fact—Income Tax Assessment Act 1936-1946 (No. 27 of 1936—No. 6
of 1946), s. 243 (1), (2) (b).

SYDNEY,
Aug. 18, 19.

Latham C.J.,
Rich, Starke,
Dixon and
McTiernan JJ.

An information laid under the *Income Tax Assessment Act 1936-1946*, contained allegations that “the defendant . . . did make a return of income . . . which said return was false in a particular to wit, the amount of £739 returned by the said defendant therein as total gross income from his business of hairdresser and tobacconist was understated by an amount of not less than £958.”

Held, that the allegations were averments of fact and not of law (Latham C.J. and Dixon J. doubting as to the allegation that the amount of £958 was “income”) and, in the absence of any further evidence, the defendant should be convicted.

The word “averment” as used in s. 243 (1) of the *Income Tax Assessment Act 1936-1946*, means allegation contained in the information, complaint, declaration, or claim as the case may be.

CASE STATED.

An information laid by William Malachy Brady alleged that Brady was authorized to institute the proceedings in the name of and for and on behalf of the Deputy Commissioner of Taxation in the State of New South Wales, who charged that on or about 31st August 1942, at Sydney, in the said State, one Nicholas Thornton, hairdresser and tobacconist of 144 Liverpool Street, Paddington, “did make a return of income of the twelve months ended 30th June 1942, which said return was false in a particular to wit, the

amount of £739 returned by the said defendant therein as total gross income from his business of a hairdresser and tobacconist was understated by an amount not less than £958, contrary to the Act in such case made and provided, whereby the said defendant has incurred a penalty in excess of the sum of . . . £500 but such excess is hereby abandoned."

The defendant pleaded not guilty. The informant did not offer any oral evidence but tendered the information and relied on the averments contained therein, in pursuance of the provisions of s. 243 of the *Income Tax Assessment Act* 1936-1946, and closed his case. The defendant did not offer any evidence.

After hearing the parties the magistrate held that a prima-facie case had not been made out. He dismissed the information, found the defendant not guilty of the offence and acquitted him.

In a case stated for the opinion of the High Court the following facts were set forth as having been found by the magistrate to be established to his satisfaction by the evidence given before him—(a) that the defendant on or about 31st August 1942, did make to the Deputy Commissioner of Taxation in and for the State of New South Wales, a return of income of the twelve months ended 30th June 1942; and (b) that the total gross income shown in such return by the defendant from his business as a hairdresser and tobacconist was £739.

The grounds upon which the magistrate acquitted the defendant were that he, the magistrate, held as a matter of law that the statement in the information that the return of income "was false in a particular to wit, the amount of £739 returned by the said defendant therein as total gross income from his business as a hairdresser and tobacconist was understated by an amount of not less than £958" was a mixed question of law and fact; that the tendering of the information and the matter stated in it was prima-facie evidence of the fact only; and that, as there was no oral evidence or other evidence in support of the averment contained in the information so far as the law was concerned, a prima-facie case for the defendant to answer had not been made out.

The informant contended that the determination of the magistrate was erroneous in point of law on the grounds:—

(a) that the following averments contained in the information were averments of fact and not averments of mixed law and fact:—

- (i) one Nicholas Thornton did make a return of income of the twelve months ended 30th June 1942,
- (ii) the said return was false in a particular,

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(iii) the amount of £739 was returned by the defendant as total gross income from his business of a hairdresser and tobacconist, and

(iv) the said amount was understated by an amount not less than £958 ;

(b) that the matters averred were not mixed matters of law and fact but were matters of fact only ;

(c) that having regard to the substance of the averment there was sufficient evidence to make out a prima-facie case against the defendant.

The relevant statutory provisions are sufficiently set forth in the judgment of *Latham C.J.* hereunder.

Taylor K.C. (with him *Whitlam*), for the appellant. The information contains averments within the meaning of s. 243 of the *Income Tax Assessment Act 1936-1946*. These averments are not averments of mixed law and fact but are averments of fact only. The observations appearing in *Ex parte O'Sullivan ; Re Craig* (1) are at variance with the decision in *Ex parte Ryan ; Re Johnston* (2) and *Ex parte Ryan ; Re Johnson* (3). The appellant is in a stronger position in this case because the allegation is that the respondent falsely understated his income from his business. No issue of law is involved in the averments now under consideration. The interpretation of the word "income" is not a matter of law (*The Commonwealth v. Grunseit* (4) ; *Federal Commissioner of Taxation v. Broken Hill South Ltd.* (5) ; *Girls' Public Day School Trust Ltd. v. Ereaut* (6)).

Webb K.C. (with him *St. John*), for the respondent. The averments in the information are averments of mixed law and fact and hence are not in themselves proof of the matters so alleged (*Baxter v. Ah Way* (7) ; *Adelaide Steamship Co. Ltd. v. The King* (8) ; *Symons v. Schiffmann* (9)). In *Schiffmann v. Whitton* (10) the Court refused to review those decisions. Subsequently various relevant statutes were amended. The history of this type of pleading was reviewed by *Isaacs J.* in *Williamson v. Ah On* (11). The Court held in *The King v. Hush ; Ex parte Devanny* (12) in a

(1) (1944) 44 S.R. (N.S.W.) 291, at p. 303; 61 W.N. 197, at p. 208.

(2) (1942) 60 W.N. (N.S.W.) 106, at p. 108.

(3) (1943) 44 S.R. (N.S.W.) 12 at pp. 18, 19; 61 W.N. 17, at pp. 21, 22.

(4) (1943) 67 C.L.R. 58.

(5) (1941) 65 C.L.R. 150.

(6) (1931) A.C. 12.

(7) (1909) 10 C.L.R. 212, at pp. 216, 217.

(8) (1912) 15 C.L.R. 65, at pp. 102, 103.

(9) (1915) 20 C.L.R. 277, at p. 281.

(10) (1916) 22 C.L.R. 142.

(11) (1926) 39 C.L.R. 95, at pp. 112 et seq.

(12) (1932) 48 C.L.R. 487.

matter involving s. 30R of the *Crimes Act* 1914-1932, that an averment of mixed law and fact was not permissible and even if it were permissible it could only be evidence of the fact alleged and not the law. The difficulties of analysing a mixed statement of law and fact referred to in *Ex parte O'Sullivan; Re Craig* (1) were adverted to in *Jackson v. Butterworth* (2). If matters of mixed law and fact are averred then if the matters of fact cannot be segregated from the matters of law there is no evidence of the facts averred. The onus was on the appellant to establish beyond reasonable doubt the matters charged against the respondent. The onus was also upon the appellant to segregate from the averments the matters of fact upon which he relied. The appellant has not in either respect discharged that onus. The determination of what is gross income and what is not, necessarily involves a construction of the *Income Tax Assessment Act*. The word "false" as used may be false with knowledge or false without knowledge on the part of the respondent. The first-mentioned meaning may involve a question of law. The averments as to the amount returned by the respondent as total gross income from his business and the amount understated are matters of law. If, in order to ascertain whether a matter averred is a question of mixed fact or law, it is necessary to have resort to a statute and such statute either defines the words or phrases used or extends the meaning of such words or phrases, then the matter is one of law and not of fact. It involves as a matter of law the resort to the Act and the construction of the Act. For example, there is no difference between gross income and assessable income and in order to determine what is assessable income it is necessary to refer, *inter alia*, to ss. 6 (definitions), 25, 26, 262. To determine "profit" on the disposal of the whole or part of a business reference to s. 36 (1) is necessary, and in respect to the making of returns it is necessary to refer to ss. 161 and 162. The words "public school" under consideration in *Girls' Public Day School Trust Ltd. v. Ereaut* (3) and "mining operations" under consideration in *Federal Commissioner of Taxation v. Broken Hill South Ltd.* (4) were not defined in the respective relevant statutes. Similarly, in *The Commonwealth v. Grunseit* (5) the material words were not defined in the relevant regulations. If an averment contains a word or words which has or have been judicially pronounced upon, the application of the particular pronouncement to the particular word or

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(1) (1944) 44 S.R. (N.S.W.), at p. 303;
61 W.N., at p. 203.

(2) (1946) V.L.R. 330, at p. 333.

(3) (1931) A.C. 12.

(4) (1941) 65 C.L.R. 150.

(5) (1943) 67 C.L.R. 58.

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words imports a matter of law into the averment. The expression "gross income" is by virtue of official pronouncement a matter of law. An article on "*Fact or Law in Cases Stated under the Income Tax Acts*" appears in the *Law Quarterly Review*, vol. 62, at pp. 248-265; see particularly p. 263. The words "income" and "capital" are terms of art. In deciding whether a matter is income or capital a question of law is involved (*Van Den Berghs Ltd. v. Clark* (1); *Bean v. Doncaster Amalgamated Collieries Ltd.* (2)). The allegation in the information is, in effect, that the respondent did not bring into account the amount stated as he was required to do under the provisions of the Act itself. This Court determined, as a matter of law, in *Harris v. Burrows* (3) that an understatement by the taxpayer of income was less than as claimed by the Commissioner because the Commissioner had wrongly included income from property owned by the taxpayer's wife. Also, in *Tindal v. Federal Commissioner of Taxation* (4) the Court, as a matter of law, determined what was income and what was capital.

Taylor K.C., in reply.

Aug. 19.

The following judgments were delivered:—

LATHAM C.J. The respondent was charged with an offence under s. 227 of the *Income Tax Assessment Act* 1936-1946. Section 227 (1) provides: "Any person who makes or delivers a return which is false in any particular or makes a false answer," &c., shall be guilty of an offence. The information was in these terms:—"That on or about 31st August 1942, at Sydney . . . one Nicholas Thornton (hereinafter called the defendant) hairdresser and tobacconist, at 144 Liverpool Street, Paddington did make a return of income for the twelve months ended 30th June, 1942, which said return was false in a particular to wit, the amount of £739 returned by the said defendant as total gross income from his business of a hairdresser and tobacconist was understated by an amount not less than £958, contrary to the Act in such case made and provided, whereby the said defendant has incurred a penalty," &c.

The prosecution relied upon s. 243 of the Act and called no oral evidence. Section 243 provides:—"(1) In any taxation prosecution every averment of the prosecutor or plaintiff contained in the information, complaint, declaration or claim shall be *prima facie*

(1) (1935) A.C. 431, at pp. 438 et seq.

(3) (1945) 7 A.T.D. 518.

(2) (1944) 2 All E.R. 279, at p. 283;
on appeal, (1946) 1 All E.R. 642.

(4) (1946) 72 C.L.R. 608.

evidence of the matter averred"; sub-s. (2), "This section shall apply to any matter so averred although—(a) evidence in support or rebuttal of the matter averred or of any other matter is given, or (b) the matter averred is a mixed question of law and fact, but in that case the averment shall be *prima facie* evidence of the fact only."

The defendant called no evidence. The magistrate accordingly had to determine the case upon the basis of the averments made in the information. The magistrate held in accordance with s. 243 that the averments in the information were *prima-facie* evidence of facts only. He dismissed the information, and he stated in a special case that "as there was no oral evidence or other evidence in support of the averment contained in the said information so far as the law was concerned, a *prima-facie* case for the defendant to answer had not been made out." There is some difficulty in understanding the precise meaning of the statement which I have last read, but it is evidently, I think, intended to state that the magistrate regarded some of the averments as being statements of law and not of fact.

Section 243 deals with averments not only in criminal proceedings, but in proceedings generally under the Act. The words of s. 243 (1) relate to averments contained in an information, complaint, declaration or claim. Accordingly it is difficult, and it would be wrong, to apply a conception of averment derived exclusively from either criminal or civil proceedings in the courts. "Averment" must here be understood as meaning allegation contained in the information, complaint, declaration or claim as the case may be.

It is important to observe that the application of the section is not excluded because an averment contains matter of law. The section expressly provides for the case where an averment contains matter of law as well as matter of fact, and in a rather awkward phrase provides that, where the matter averred is a mixed question of law and fact, the averment shall be *prima-facie* evidence of the fact only. Accordingly, if an averment does contain an allegation in respect of the law, if it also contains an allegation in respect of a fact the averment is *prima-facie* evidence of that fact.

The information contains the following allegations: "that . . . the defendant . . . did make a return of income . . . which said return was false in a particular, to wit, the amount of £739 returned by the said defendant therein as total gross income from his business of hairdresser and tobacconist was understated by an amount of not less than £958."

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This is a statement first, that the defendant made a return in which he stated that an amount of £739 received by him in and from his business of hairdresser and tobacconist was income of the relevant year. There is a statement of fact, namely, that the defendant made that return. That is simply an allegation of fact, and the section applies. The difficulty arises in connection with the following part of the allegation which refers to the understatement of income by an amount not less than £958. It has been argued strongly by Mr. Webb that the conception of income in the *Income Tax Assessment Act* is a complex conception which has been explained and expounded in many decisions of the courts, that the description of any particular sum as income involves a statement of law, and that, further, the statement that the defendant understated his income is an allegation of law and therefore does not assist the prosecution under s. 243. But this statement involves a statement of fact, namely, the statement that he received an amount of £958 from his business as a hairdresser and tobacconist. That is a statement of fact.

Secondly, it involves this statement, that he did not disclose that fact in his return. That also is a statement of fact. The allegation that that amount is income is an allegation, it may be, with respect to the law, but the facts so stated, if no other facts appear, are sufficient to ground the prosecution because these facts *prima facie* show a non-disclosure of income.

Accordingly, in my opinion there was evidence upon which the magistrate, in the absence of any further evidence, should convict the defendant.

In my opinion the appeal should be allowed, and the case remitted to the magistrate for determination in accordance with law.

RICH J. I agree that the averments in question justify the magistrate in proceeding with the case and I am of opinion that his determination was erroneous in point of law.

STARKE J. The word "averment" has no very definite meaning. It may include both allegations of law and allegations of fact, but under this particular section, the averment is taken to be *prima facie* evidence "of the fact only." In this information here in question the allegation is entirely one of fact which involves no question of law.

Accordingly, in my opinion the magistrate was wrong.

DIXON J. I understand the question we have to decide to be whether, within the meaning of s. 243 (2) (b) of the *Income Tax Assessment Act*, there is matter averred which involves a mixed question of law and fact, and whether it is averred in such a form that there cannot be disentangled sufficient allegations of fact to carry the case forward and call upon the accused for an answer.

In my opinion the material part of the information does not contain an allegation of mixed law and fact except in one small point, and in that small point it is possible to disentangle enough of the facts from the law. The allegation which is contained in the information, so far as it is material to the question before us, may be analysed thus. First, it alleges that the defendant made a return of his income. That, I think, is purely a matter of fact. It means that the defendant sent in a document which answered a well-known description which, *prima facie*, involves no difficulty of law. The next matter alleged is that in that return he made a statement that his total gross income from his business as a hair-dresser and tobacconist was of an amount of £739. The allegation of what statement he made in his return is purely an allegation of fact. The third matter alleged is that the figure in fact was an understatement by £958. When that allegation is analysed, it means that the defendant in fact received a further sum of £958, that he in fact received that sum in connection with his business of a hairdresser and tobacconist. It further involves an allegation that the £958 answers the description of "income."

It is only in that last point I can see any possible matter of law at all, and the possibility of there being matter of law only arises from the circumstance that the word "income" has a legal meaning. In other words, the allegation may be taken as meaning that the £958 answers the description of "income" as known in law. Whether or not that does in truth involve any question of law cannot be actually known except by recourse to facts. It does not appear on the face of the information. It begins as an allegation that some money receipts had the character of income and whether or not, if the true facts were investigated, they would raise any question depending on the legal definition of that character cannot be known. However, the allegation, in my opinion, advances the case sufficiently to call upon the defendant for an answer because it only leaves doubtful the very small point as to whether any question of law arises in applying the description given by the averment's use of the word "income."

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For these reasons I think that the information contained sufficient allegations of fact to carry the case forward, and the magistrate was therefore wrong.

The appeal should be allowed and the matter remitted.

McTIERNAN J. I agree that the appeal should be allowed.

The word "averment" in s. 243 of the Act appears to mean an allegation. The averments in the present information, upon which the prosecutor relies, as prima-facie evidence, are, I think, allegations of fact and hence prima-facie evidence of fact. They amount to prima-facie proof of the offence. The magistrate was wrong in the view which he took of the probative effect of the averments under the section.

Appeal allowed with costs. Case remitted to the magistrate for determination in accordance with law.

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Baldick & Macpherson*.

J. B.