[HIGH COURT OF AUSTRALIA.]

MALLAN . . . . . APPELLANT;
DEFENDANT,

AND

LEE . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1949.

ADELAIDE, *Sept.* 20, 21.

SYDNEY, *Nov.* 10.

Latham C.J., Dixon and McTiernan JJ.

Income Tax (Cth.)—Offence—Company understating income—Public officer directly knowingly concerned in offence—Period of limitation for commencement of proceedings against public officer—Income Tax Assessment Act 1936-1944 (*No.* 27 *of* 1936—*No.* 28 *of* 1944), *s.* 230*—*Crimes Act* 1914-1946 (*No.* 12 *of* 1914—*No.* 77 *of* 1946), *ss.* 5, 21.*

In June 1948 a complaint was laid in a court of summary jurisdiction against a limited company and M., its public officer. The company was charged with having, in December 1944, contravened s. 230 of the *Income Tax Assessment Act* 1936-1944 in that M., as its public officer, in the company's

* The *Income Tax Assessment Act* 1936-1944 provides by s. 230: "(1) Any person who, or any company on whose behalf the public officer, or a director, servant or agent of the company, in any return knowingly and wilfully understates the amount of any income or makes any misstatement affecting the liability of any person to tax or the amount of tax shall be guilty of an offence. Penalty: Not less than Twenty-five pounds, or more than Five hundred pounds and, in addition, the court may order the person to pay to the Commissioner a sum not exceeding double the amount of tax that would have been avoided if the statement in the return had been accepted as correct. (2) A prosecution for an offence against this section may be commenced at any time within six years after the commission of the offence."

* The *Crimes Act* 1914-1946 provides by s. 5: "Any person who aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against any law of the Commonwealth, whether passed before or after the commencement of this Act, shall be deemed to have committed that offence and shall be punishable accordingly."; and by s. 21: "(1) A prosecution in respect of an offence against any law of the Commonwealth may be commenced as follows:— . . . (*c*) where the punishment provided in respect of the offence is a pecuniary penalty and no term of imprisonment is mentioned—at any time within one year after the commission of the offence. . . . (3) Where by any law of the Commonwealth any longer time than the time provided by this section is provided for the commencement of a prosecution in respect of an offence against that law, a prosecution in respect of the offence may be commenced at any time within that longer time."

income-tax return had knowingly and wilfully understated the amount of the company's income for the year ended 31st August 1944. It was charged against M. that he " by act was directly knowingly concerned in the commission of the offence above alleged—*Crimes Act* 1914-1946, s. 5."

Held, that the complaint disclosed an offence against M., that the time within which proceedings against him must be brought was regulated by s. 230 of the *Income Tax Assessment Act* 1936-1944, not by s. 21 of the *Crimes Act* 1914-1946, and that the proceedings were therefore not out of time.

Nature of offences created by s. 230 of the *Income Tax Assessment Act* 1936-1944 discussed and nature and effect of s. 5 of the *Crimes Act* 1914-1946 considered.

Decision of the Supreme Court of South Australia (Full Court): *Lee* v. *Mallan*, (1949) S.A.S.R. 17, affirmed.

APPEAL from the Supreme Court of South Australia.

On 7th June 1948 Frank Botham Lee, Deputy Commissioner of Taxation for the State of South Australia, laid a complaint in a court of summary jurisdiction at Adelaide against Telephone Rentals Limited and Valleck Cartwright Mallan, charging that the company on or about 8th December 1944 contravened s. 230 of the *Income Tax Assessment Act* 1936-1944 in that the public officer of the company (to wit Valleck Cartwright Mallan) on behalf of the company in a return knowingly and wilfully understated the amount of income of the defendant company derived from all sources in and out of Australia during the twelve months from 1st September 1943 to 31st August 1944 and charging that the defendant Mallan was " by act directly knowingly concerned in the commission of the offence above alleged—*Crimes Act* 1914-1946 (Commonwealth) s. 5." The complaint came on for hearing by a court of summary jurisdiction at Adelaide, constituted by Mr. *L. E. Clarke* S.M., on 20th July 1948. Before a plea was taken, it was objected, on behalf of the defendant Mallan that the complaint should have been made within twelve months from the date of the alleged offence, whereas on the face of the complaint it was not so made, and claimed that the complaint should be dismissed as against Mallan. After argument, the Special Magistrate ruled that the objection could not be sustained, since the prosecution was commenced within six years after the commission of the alleged offence in accordance with s. 230 (2) of the *Income Tax Assessment Act* 1936-1944. He stated a special case for the opinion of the Supreme Court, substantially as follows :—

1. On 20th July 1948 the complaint was called on for hearing before me in the court of summary jurisdiction at Adelaide, the complaint having been made by the complainant on 7th June 1948.

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2. When the complaint was called on counsel for the defendant Mallan intimated that before a plea was taken he wished to object that the complaint should have been made within twelve months from the date of the alleged offence, whereas on the face of the alleged complaint it was not so laid.

3. I heard argument by counsel for the defendant Mallan and by counsel for the complainant and thereupon expressed my opinion.

4. The questions upon which the opinion of the Supreme Court is desired are :—

(1) Whether by reason of s. 5 of the *Crimes Act* 1914-1946 or otherwise the complaint discloses any offence by the defendant Valleck Cartwright Mallan.

(2) Whether upon the statement of facts in the special case the prosecution in respect of the offence alleged against Mallan in the complaint was commenced in time.

The special case was referred to the Full Court which held (*Reed* and *Ligertwood* JJ., *Mayo* J. dissenting), that s. 5 of the *Crimes Act* 1914-1946 (Cth.) was merely an aiding and abetting section and did not create any offence, and that the offence with which Mallan was charged was an offence against s. 230 of the *Income Tax Assessment Act* 1936-1944 : and that the period of limitation for the commencement of proceedings was therefore six years as provided by s. 230 (2) of the *Income Tax Assessment Act* 1936-1944. The formal answers to the questions in the special case were : 1. " Yes, by reason of s. 5 of the *Crimes Act* " ; 2. " Yes."

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

J. L. Travers, for the appellant. No public officer can be charged under s. 230 of the *Income Tax Assessment Act* as a principal offender. Nor has Mallan been so charged in this case. Section 230 is pertinent only to taxpayers and not to other persons. Section 252 of the *Income Tax Assessment Act* (especially sub-ss. (e), (f), (g), (i) and (j)) is the charter of the liquidator. *Lean* v. *Brady* (1) shows that in no circumstances will a public officer be called on to pay tax under s. 230. That section, being a taxpayers' section, even if it contains a crime, does not create a crime of which an aider and abetter can be convicted. If there be a crime, it is not a felony. There are therefore no degrees of guilt and the defendant must be liable as a principal or not at all (*Morris* v. *Tolman* (2) ; *Lean* v. *Brady* (3) ; *R.* v. *Goldie* ; *Ex parte Picklum* (4) ; *Ellis* v.

(1) (1937) 58 C.L.R. 328.
(2) (1923) 1 K.B. 166.
(3) (1937) 58 C.L.R., at p. 338.
(4) (1937) 59 C.L.R. 254.

Guerin (1)). But proceedings under s. 230 are not criminal. They are either civil or of some hybrid nature which is of no criminal kind known to the common law. In either case no question of aiding and abetting comes in. At common law the remedy for the recovery of unpaid tax was civil (*R.* v. *Hausman* (1)). The design of the Act is to modernize, but otherwise to utilize, the English provisions for recovery of penalties (*Attorney-General* v. *Bradlaugh* (3) ; *Attorney-General* v. *Radloff* (4) ; 9 *Halsbury* 2nd ed., p. 10 (note) ; *Jackson* v. *Butterworth* (5) ; *Jackson* v. *Gromann* (6) ; *R.* v. *McStay* (7)). The Act itself shows that the proceedings are civil (see ss. 222, 233, 234, 237, 247, 249). As aiding and abetting was purely a common-law principle the liquidator cannot be charged under s. 230, unless there is statutory authority. The only possible statutory authority is s. 5 of the *Crimes Act*. If that is the law which Mallan has broken, the time limit, found in s. 21 of the *Crimes Act*, has expired. *Adams* v. *Cleeve* (8), relied on by the Supreme Court, contributes nothing to the present problem. That problem was not even discussed ; further, in that case the prosecution elected to prosecute the defendant as a principal. Here they have charged him under s. 5 of the *Crimes Act*. There cannot be an amendment to substitute one charge for another (*Harmstorf* v. *James* (9)).

[DIXON J. referred to *Re Bradbury* ; *Ex parte The King* (10).]

The section with which the Court was concerned in *Gould & Co. Ltd.* v. *Houghton* (11) did not extend the offence to other than aiders and abettors. Section 5 of the *Crimes Act* goes further than aiders and abettors.

H. G. Alderman K.C. (with him *C. C. Brebner*), for the respondent. Section 230 of the *Income Tax Assessment Act* is not a taxpayers' section. It simply means what it says. It might have been better to charge the defendant as a principal, but the charge in its present form is valid (*Stacey* v. *Whitehurst* (12) ; *Gould & Co. Ltd.* v. *Houghton* (11)). Section 5 of the *Crimes Act* should be contrasted with s. 7 of that Act. Section 5 has no different effect from what it would have if it were in an *Acts Interpretation Act*. The section may create an offender, but not an offence, and it is the offence which regulates the time limit. The defendant is party to an offence under

(1) (1925) S.A.S.R. 282.
(2) (1909) 3 C.A.R. 3.
(3) (1884) 14 Q.B.D. 667.
(4) (1854) 10 Ex. 84, at p. 101 [156 E.R. 366].
(5) (1946) V.L.R. 330.
(6) (1948) V.L.R. 408.
(7) (1945) 7 A.T.D. 527.
(8) (1935) 53 C.L.R. 185.
(9) (1922) S.A.S.R. 266.
(10) (1931) 3 A.B.C. 204.
(11) (1921) 1 K.B. 509.
(12) (1865) 18 C.B. (N.S.) 344 [144 E.R. 477].

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s. 230 of the *Income Tax Assessment Act*, and it is immaterial whether or not s. 5 of the *Crimes Act* goes beyond the common law. No one can be concerned in an offence without being an aider and abettor (*Du Cros* v. *Lambourne* (1)). As to power to amend—see *Broome* v. *Chenoweth* (2). This case, and also *Byrne* v. *McLeod* (3) assume that the proceedings are criminal in character. Further, on this point—see *In re Income Tax Act* (4) ; *McGovern* v. *Hillman Tobacco Co. & Coward* (5). Section 230 is not a tax-gathering section ; contrast s. 207 which is. Relevant factors, which show that s. 230 creates a criminal offence are : the language of the section, the nature of the offence, that a sum is payable as punishment, that criminal intent is necessary, that there is no automatic liability without the intervention of a court (*R.* v. *Paget* (6)), the amount is not fixed for the court has a discretion, and the nature of the procedure (*R.* v. *Bradlaugh* (7)). In English decisions contrary to my submission, there is a definite sum of money forfeited. That s. 5 of the *Crimes Act* is declaratory is shown by *Berwin* v. *Donohue* (8) ; *Walsh* v. *Sainsbury* (9) ; *R.* v. *Goldie* ; *Ex parte Picklum* (10) ; *R.* v. *Crossley* (11). Section 249 of the *Income Tax Assessment Act*, which was passed to overcome the decision in *Re Bradbury* ; *Ex parte The King* (12) supports my argument.

J. L. Travers, in reply.

Cur. adv. vult.

NOV. 10. The following written judgments were delivered :—

LATHAM C.J. This is an appeal by special leave from an order of the Supreme Court answering questions in a case stated by Mr. *L. E. Clarke*, Special Magistrate, for the consideration of the Supreme Court of South Australia and referred to the Full Court of that Court.

A company named Telephone Rentals Ltd. was charged with a contravention of s. 230 of the *Income Tax Assessment Act* 1936-1944. The contravention alleged was that the public officer of the company, V. C. Mallan, on behalf of the company in a return knowingly and wilfully understated the amount of income of the company derived from all sources during the twelve months ending 31st August 1944.

(1) (1907) 1 K.B. 40.
(2) (1946) 73 C.L.R. 583.
(3) (1934) 52 C.L.R. 1.
(4) (1944) A.L.R. 278.
(5) Unreported (High Court, *Williams* J. 13th September 1949).
(6) (1881) 8 Q.B.D. 151, at pp. 156, 157.
(7) (1885) 14 Q.B.D., at p. 693.
(8) (1915) 21 C.L.R. 1, at pp. 20, 21.
(9) (1925) 36 C.L.R. 464, at pp. 476-478.
(10) (1937) 59 C.L.R., at pp. 263, 268.
(11) (1948) 48 S.R. (N.S.W.) 494 ; 65 W.N. 225.
(12) (1931) 3 A.B.C. 204.

The complaint alleged that the company had incurred a penalty exceeding £500 but that the excess above £500 was abandoned.

In the same complaint V. C. Mallan was charged in the following terms: that he "by act was directly knowingly concerned in the commission of the offence above alleged—*Crimes Act* 1941-1946 (Commonwealth) Section 5"—whereby Mallan had incurred a penalty exceeding the sum of £500 but the excess over £500 was abandoned.

The summons upon the complaint was issued on 7th June 1948. The offence by the company in which it was alleged that Mallan was knowingly concerned was alleged to have been committed on or about 8th December 1944. On behalf of Mallan it was objected that he was being prosecuted for an offence against the *Crimes Act*, s. 5, and that s. 21 (1) (c) of the *Crimes Act* applied to the case because the punishment provided in respect of the alleged offence by s. 230 of the *Income Tax Assessment Act* was a pecuniary penalty only, and no term of imprisonment was mentioned, with the result that a prosecution in respect of the offence could be commenced only "at any time within one year after the commission of the offence." It was also contended that s. 5 of the *Crimes Act* had no application because (it was urged) s. 230 of the *Income Tax Assessment Act* provided only for civil proceedings and did not create a criminal offence. It was further argued that s. 230 applied only to taxpayers in respect of returns of their income and that it was impossible for any person other than a taxpayer in relation to a particular return to be guilty of an offence under s. 230, and that for this reason s. 5 of the *Crimes Act* could not be applied where the principal alleged offence was a contravention of s. 230.

For the prosecutor it was contended that s. 230 of the *Income Tax Assessment Act* did create an offence, that a person convicted by reason of s. 5 of the *Crimes Act* was deemed to have committed the offence in the commission of which he was shown to have been knowingly concerned, and that therefore s. 230 (2) of the *Income Tax Assessment Act* applied—"A prosecution for an offence against this section may be commenced at any time within six years after the commission of the offence."

Section 21 (3) of the *Crimes Act* is in the following terms:—"Where by any law of the Commonwealth any longer time than the time provided by this section is provided for the commencement of a prosecution in respect of an offence against that law, a prosecution in respect of the offence may be commenced at any time within that longer time." It was contended for the prosecutor that this provision applies in the present case because the prosecution of the

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appellant is a prosecution in respect of an offence against the *Income Tax Assessment Act*, s. 230, which provides a six-year period of limitation.

The learned Special Magistrate refused to dismiss the complaint upon the grounds relied upon but stated a case for the consideration of the Supreme Court by which the opinion of the Supreme Court was requested upon the following questions :—" (1) Whether by reason of section 5 of the *Crimes Act* 1914-1946 (Commonwealth) or otherwise the complaint discloses any offence by the defendant Valleck Cartwright Mallan. (2) Whether upon the statement of facts in the special case the prosecution in respect of the offence alleged against Valleck Cartwright Mallan in the complaint was commenced in time."

The Full Court of the Supreme Court by a majority (*Reed* and *Ligertwood* JJ., *Mayo* J. dissenting) answered the questions as follows :—(1) " Yes, by reason of section 5 of the *Crimes Act*." (2) " Yes." This Court granted special leave to appeal from the decision of the Full Court.

The *Income Tax Assessment Act* 1936-1944, s. 230 (1) is in the following terms :—" Any person who, or any company on whose behalf the public officer, or a director, servant or agent of the company in any return knowingly and wilfully understates the amount of any income or makes any misstatement affecting the liability of any person to tax or the amount of tax shall be guilty of an offence. Penalty : Not less than Twenty-five pounds, or more than Five hundred pounds and, in addition, the court may order the person to pay to the Commissioner a sum not exceeding double the amount of tax that would have been avoided if the statement in the return had been accepted as correct." Section 230 (2), providing for prosecution within six years, has already been quoted.

Section 5 of the *Crimes Act* 1914-1946 is as follows :—" Any person who aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in, or party to, the commission of any offence against any law of the Commonwealth, whether passed before or after the commencement of this Act, shall be deemed to have committed that offence and shall be punishable accordingly." Section 21 of the *Crimes Act*, sub-s. (1) (c), providing for prosecution within one year, and sub-s. (3), preserving longer periods of limitation in other cases, have already been quoted.

In s. 230 of the *Income Tax Assessment Act* the Commonwealth Parliament has enacted that a person or a company contravening the section " shall be guilty of an offence." The section prescribes

a penalty (that is, a fine) of not less than £25, or more than £500. The amount of the fine between the limits stated is in the discretion of the Court. The section further provides that the Court may order the person to pay to the commissioner a sum not exceeding double the amount of tax avoided. The Court exercises a discretion in determining what, if any, amount shall be added by way of further penalty to what I have called the fine. The *Acts Interpretation Act* 1901-1948 provides that the setting out of a pecuniary penalty at the foot of a sub-section of an Act shall indicate that any contravention of the sub-section shall be an offence against the Act, punishable upon conviction by a penalty not exceeding the penalty mentioned. Thus s. 230 quite plainly and unambiguously provides that a person who does certain things shall be guilty of an offence and may be fined therefor and, in addition, may be ordered to pay a further sum by way of penalty. Proceedings under the section are not proceedings for the recovery of a debt. Sections 208 and 209 of the *Income Tax Assessment Act* provide that income tax, when it becomes due and payable, shall be a debt due to the King on behalf of the Commonwealth and payable to the commissioner, and that any tax unpaid may be sued for and recovered in any court of competent jurisdiction by the commissioner or deputy commissioner. Section 207 provides for additional tax in cases of delay in payment of tax. Thus all tax payable is a debt which may be sued for in a civil jurisdiction. Section 230 is quite different in character. Section 230 creates an offence of which a person may be "guilty" and provides for a punishment by way of fine. Section 247 provides that where any pecuniary penalty is adjudged to be paid by any convicted person the Court shall follow one of three courses, course (a) being :—"commit the offender to gaol until the penalty is paid." Section 248 provides for the length of the period of imprisonment to which a defendant may be subjected.

The *Crimes Act*, s. 5, provides that any person who aids &c. or by act or omission is in any way directly or indirectly knowingly concerned in or party to the commission of "any offence against any law of the Commonwealth . . . shall be deemed to have committed that offence and shall be punishable accordingly."

Section 5 of the *Crimes Act* is an aiding and abetting section (*Walsh* v. *Sainsbury* (1) ; *R.* v. *Goldie* ; *Ex parte Picklum* (2)) and it can apply only where what has been called the principal offence has been committed. In this case it has not yet been determined

(1) (1925) 36 C.L.R. 464.

(2) (1937) 59 C.L.R. 254.

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whether the principal offence (the offence alleged against the company) has been committed, and the proposition that s. 5 can come into operation only when the principal offence has been committed is of no assistance to the defendant at this stage of the proceedings.

Argument was addressed to the Court founded upon the procedure by information on the revenue side of the Exchequer for the recovery of customs duties and other taxes and for the recovery of penalties made payable under taxation statutes—" a process of a somewhat peculiar character which still continues, and is occasionally used "—see *Halsbury's Laws of England*, 2nd ed., vol. 9, pp. 662, 666; *Encyclopedia of the Laws of England*, 2nd ed., vol. 4, p. 289. In *Attorney-General* v. *Radloff* (1), there was an even division of opinion on the question whether the trial of an information filed by the Attorney-General for the recovery of penalties for smuggling was " a criminal proceeding." After this case the *Crown Suits Act* 1865 was passed by which it was expressly provided that proceedings by information on the revenue side of the Exchequer should not be deemed to be criminal proceedings (s. 34). In relation to this Act it is suggested on the one hand that it altered the law by turning what had hitherto been criminal proceedings into civil proceedings and, on the other hand, that it simply declared the law as it in truth already existed to the effect that any such proceedings were in their nature civil proceedings. The arguments and the judgments in *R.* (*Sherry*) v. *County Court Judge* (2) refer to the cases on this subject.

The appellant relied strongly upon the case of *Attorney-General* v. *Bradlaugh* (3) where the Court of Appeal considered the *Parliamentary Oaths Act*, which provided that if any member of Parliament voted in the House without having made and subscribed an oath in a specified form he should " for every such offence be subject to a penalty of £500." The question which arose was whether the defendant had a right of appeal to the Court of Appeal. The relevant statute (*Supreme Court of Judicature Act*, 1873, 36 & 37 Vict., c. 66, s. 47) provided that no appeal should lie from a judgment of the High Court " in any criminal cause or matter," with certain exceptions: see article upon this subject in *Encyclopedia of the Laws of England*, 3rd ed., vol. 4, p. 292. The question in *Attorney-General* v. *Bradlaugh* (3) was whether the information before the Queen's Bench was a criminal cause or matter. *Brett* M.R. held that it was not a criminal cause or matter. *Cotton* L.J. did not dissent, but stated that he had " considerable doubt on the

(1) (1854) 10 Ex. 84 [156 E.R. 366].
(2) (1935) N.I.R. 211.
(3) (1885) 14 Q.B.D. 667.

question." *Lindley* L.J. held that it was not material whether the proceeding was a criminal or a civil matter because the only question which arose was whether there was an appeal and the *Crown Suits Act* 1865 clearly provided that there was an appeal. *Lindley* L.J. said (1) :—" Let this proceeding be called criminal, still it is a criminal one in which an appeal is given by that statute." His Lordship added that but for the *Crown Suits Act* 1865 he should have had more doubt than he had. Thus *Attorney-General* v. *Bradlaugh* (2) cannot be regarded as a clear decision even that an information by the Attorney-General under the *Parliamentary Oaths Act* is a civil proceeding. In *R.* v. *Hausman* (3) it was held that proceedings on the revenue side of the King's Bench to recover penalties for smuggling are not " criminal proceedings " and therefore that there was no right of appeal to the Court of Criminal Appeal.

In *Seaman* v. *Burley* (4) however, another decision of the Court of Appeal, three Lords Justices considered whether a proceeding to recover a poor-rate was a criminal cause or matter within the meaning of the *Supreme Court of Judicature Act* 1873, s. 47. The relevant statute provided that a person rated might challenge the rate by appeal to Quarter Sessions in proceedings which were indubitably civil in character. The statute also provided, however, that proceedings might be taken against the person rated and that an application might be made to justices to issue a distress warrant, and that in default of distress the person adjudged liable to pay the rate should be imprisoned (cf. *Income Tax Assessment Act* 1936-1944, s. 247 (a) and s. 248). It was held by all the judges of the Court that, as the proceeding might end in imprisonment, though it would not (even if successful) necessarily do so, it was a criminal proceeding.

In my opinion it is quite unnecessary in the present case to determine whether or not the description " criminal " should be applied to proceedings under s. 230 of the *Income Tax Assessment Act*. The English decisions to which I have referred are decisions upon the question whether a particular proceeding was a " criminal cause or matter," but s. 5 of the *Crimes Act* comes into operation whenever there is an " offence against any law of the Commonwealth." Parliament has quite clearly declared in s. 230 of the *Income Tax Assessment Act* that certain acts shall constitute an offence, and I can see no reason whatever for a Court ignoring this plain declaration of parliamentary intention and importing into

(1) (1885) 14 Q.B.D., at p. 715.
(2) (1885) 14 Q.B.D. 667.
(3) (1909) 3 C.A.R. 3.
(4) (1896) 2 Q.B. 344.

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the interpretation of s. 5 of the *Crimes Act* the doubts and difficulties which have arisen in Great Britain with respect to the meaning of the term " criminal " in relation to informations by the Attorney-General to recover penalties in taxation or other cases—a procedure for which, in Australia, Part VII of the *Income Tax Assessment Act* has been substituted so far as income tax is concerned. The word " criminal " is sometimes said to be properly applied only to offences against what are called public laws. I should have thought that taxation laws were public laws in every sense, though English cases exhibit a marked reluctance to regard a smuggler or other person who defrauds the Government in matters of revenue as a criminal. Sometimes the possibility of imprisonment upon conviction has been taken as the test. Imposition of a pecuniary penalty as a fine, as distinguished from recovery of a penalty as compensation, equally clearly shows that the Legislature intended to punish an act as being criminal. But, as I have already said, it is unnecessary in the present case to consider whether or not a breach of s. 230 is a " crime " or whether the proceedings in a taxation prosecution adopt a civil or criminal form. Such a breach is plainly an " offence " within the meaning of that term in the statutes of the Commonwealth Parliament, and s. 5 of the *Crimes Act* applies to " offences against any law of the Commonwealth," whether or not they (or legal proceedings to recover penalties in respect of them) may in a particular system of jurisprudence be described as criminal rather than civil in character. I am therefore of opinion that even if s. 230 of the *Income Tax Assessment Act* were held not to create a criminal offence the application of s. 5 of the *Crimes Act* cannot be excluded for that reason. The section plainly creates an offence whether or not that offence should be described as criminal.

In my opinion this conclusion is not affected by the fact that Part VII (ss. 222-251) of the *Income Tax Assessment Act* provides for alternative methods of recovering penalties for breaches of the provisions, including s. 230, contained therein. Section 222 provides that " taxation prosecution " means " a proceeding by the Crown for the recovery of a pecuniary penalty under this Act." Various sections, including s. 230, create offences. Section 233 provides that " A taxation prosecution may be instituted in the name of the commissioner by action in the High Court or in the Supreme Court of any State," or, where the penalty sought to be recovered does not exceed £500, or the excess is abandoned, in a court of summary jurisdiction. Section 235 provides—" In any taxation prosecution in the High Court or a Supreme Court, the case shall be tried and

the penalty, if any, adjudged by a Justice or Judge of the Court," and s. 237 provides that every taxation prosecution in the High Court of Australia or the Supreme Court of any State may be commenced, prosecuted and proceeded with in accordance with (1) any rules of practice established by the Court for Crown suits in revenue matters; (2) in accordance with the usual practice and procedure of the Court in civil cases; or (3) in accordance with the directions of the Court or a Judge.

Thus the proceedings may assume a civil form or a criminal form—see *Attorney-General* v. *Casey* (1). If proceedings are instituted in a court of summary jurisdiction (as in the present case) there is nothing to distinguish the proceedings from any other proceedings for an offence. If proceedings were instituted in the Supreme Court or the High Court they might assume a civil form or, in accordance with the directions of the Judge, a form more nearly approaching to that of criminal proceedings. The case of *R.* v. *Justices of Appeals Committee* (2) where the Court followed *Seaman* v. *Burley* (3) and declined to follow *Sherry's Case* (4) supports the conclusion that in this case the proceedings before the magistrate are criminal.

In *R.* v. *McStay* (5) a taxation prosecution under s. 230 of the *Income Tax Assessment Act* was conducted by civil procedure before the High Court and *Williams* J. held that the proceedings were "not strictly criminal proceedings." So also in *Jackson* v. *Butterworth* (6) where a taxation prosecution was conducted (as in *McStay's Case* (5)) as the trial of an action according to civil procedure, *Fullagar* J. expressed the opinion that the proceeding was a civil and not a criminal proceeding. But even upon this basis it does not follow that a taxation prosecution is not a prosecution for an offence.

The statute not only refers to all the prohibited acts or omissions as offences, but describes the proceedings as prosecutions, and where the prosecution is successful the result is described as a conviction: see ss. 236, 238 and 240. But, as I have already stated, I am of opinion that it is not necessary in the present case to determine whether or not the proceedings are civil or criminal. It is sufficient to apply the clear declaration of Parliament that a breach of s. 230 of the *Income Tax Assessment Act* is an offence against a law of the Commonwealth and to hold that therefore s. 5 of the *Crimes Act* necessarily applies to it.

(1) (1930) I.R. 163.
(2) (1946) K.B. 176.
(3) (1896) 2 Q.B. 344.
(4) (1935) N.I.R. 211.
(5) (1945) 7 A.T.D. 527.
(6) (1946) V.L.R. 330.

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It is, however, further argued for the appellant that the terms of s. 230 are such that it is impossible for any person other than a person who is a taxpayer in relation to the return in which income has been understated or misstated to be guilty of an offence under the section. Section 230, it is argued, applies only to taxpayers or to companies which are taxpayers, and s. 5 of the *Crimes Act*, it is argued, cannot make a non-taxpayer into a taxpayer so as to make it possible for him to be guilty of an offence which only a taxpayer can commit. Section 5 of the *Crimes Act*, where it is applicable, produces the result that the person aiding or abetting &c. "shall be deemed to have committed that offence," that is, the offence against some law of the Commonwealth. In some cases an accessory cannot commit the principal offence. Reference was made to *Morris* v. *Tolman* (1). In that case the Court considered a section which imposed penalties upon licensees of vehicles who used a vehicle for an unlicensed purpose. The licensee was prosecuted for an offence against this section and the information was dismissed. The person who drove the vehicle was charged with aiding the licensee to commit the offence. The injunction was dismissed and the dismissal was upheld. The case might have been decided upon the simple ground that it was not shown that the principal offence had been committed and that therefore no person could be guilty of aiding and abetting (*Walsh* v. *Sainsbury* (2); *R.* v. *Goldie*; *Ex parte Picklum* (3)). It was held that only a licensee could be guilty of the principal offence, that the offence was a misdemeanour, that there was no law as to aiding and abetting affecting misdemeanours, and that the person who, if the charge had been a charge for felony, would have been an aider and abettor was guilty, if at all, as a principal, but that a person who was not a licensee could not be a principal committing the offence under the section.

Upon the decision of this Court in *R.* v. *Goldie*; *Ex parte Picklum* (3) it must be held that if it is not proved in the proceedings against an aider or abettor (whatever may have been the result of proceedings against the alleged principal offender) that an offence against a law of the Commonwealth has been committed by some person, the aider or abettor cannot be convicted by virtue of s. 5 of the *Crimes Act* in relation to that offence. But this statement leaves untouched the contention for the appellant that s. 230 of the *Income Tax Assessment Act* creates an offence of which only a taxpayer can be guilty, that is, a taxpayer who is a taxpayer in

(1) (1923) 1 K.B. 166.
(2) (1925) 36 C.L.R. 464.
(3) (1937) 59 C.L.R. 254.

relation to the income-tax return understatement or misstatement of income in which is the basis of the charge made.

The learned judges who constituted the majority of the Full Court of the Supreme Court based their decision in part upon *Adams* v. *Cleeve* (1). In that case it was held that the manager of a company should be convicted of the offence of avoiding sales tax—the sales tax avoided being that of the company. In the reasons for the judgment of the Court reference was made to s. 5 of the *Crimes Act* as justifying a conviction of an individual person for that offence. It does not clearly appear that the respondent relied upon a contention that only a person liable to pay tax under the taxation Act could be guilty of the offence charged and that therefore s. 5 of the *Crimes Act* was not applicable. But the actual decision in the case is inconsistent with the contention now submitted that s. 5 of the *Crimes Act* does not make it possible to convict a non-taxpayer of an offence against s. 230 of the *Income Tax Assessment Act*.

I see no difficulty in accepting the proposition that, when a person or a company is guilty under s. 230 of an offence of understating income in a return, another person who, with knowledge of the relevant facts, prepared the return would be a person who had aided the person or company in committing the offence, with the result that such a person would, by reason of s. 5 of the *Crimes Act*, be " deemed to have committed that offence," and be punishable accordingly. When under a statute a person is to be deemed to have done something which he has not in fact done the result is that he is to be treated by a court engaged in the interpretation and administration of the law as having incurred the consequences of that which he is deemed to have done for the purposes for which the " statutory fiction is to be resorted to "—*Ex parte Walton* ; *In re Levy* (2) : and see *Muller* v. *Dalgety & Co. Ltd.* (3). The purpose of s. 5 of the *Crimes Act* is to make it possible for a person to be prosecuted for an offence against another law of the Commonwealth and to be punished as for that offence.

The application of s. 5 of the *Crimes Act* is not, in my opinion, limited by the common law rules that in cases of felony there is a distinction between principals and accessories whereas in cases of misdemeanour a person who would be an accessory if it were a matter of felony is called a principal. Section 5 provides that in cases to which it is properly applicable a person who infringes the section shall be deemed to have committed an offence against the

(1) (1935) 53 C.L.R. 185.
(2) (1881) 17 Ch. D. 746.
(3) (1909) 9 C.L.R. 693, at pp. 696, 704.

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relevant law of the Commonwealth. The words of the section prevent any such question arising as that which led to the decision in *Morris* v. *Tolman* (1). *Gould & Co. Ltd.* v. *Houghton* (2) is a case which is directly in point. It was there held that a person prosecuted as accessory to an offence which was a misdemeanour was prosecuted as a principal, and that the prosecution was therefore subject to the period of limitation prescribed in relation to that offence.

There is no doubt that a person who falls within the terms of the section has infringed s. 5. But s. 5 provides no penalty for any offence. In order to ascertain what penalty is permissible it is necessary to look at the " law of the Commonwealth " against which the offence has been committed. The person is deemed to have committed an offence against that law and is " punishable accordingly." Thus the penalty applicable is the penalty appropriate to the offence against the law of the Commonwealth which a defendant is deemed to have committed. That is the offence for which he is prosecuted, and the law relating to prosecutions for that offence is the law which is applicable. That law in the present case is contained in s. 230 (2) of the *Income Tax Assessment Act*, namely, that a prosecution can be instituted within six years of the commission of the offence. The *Crimes Act*, s. 23 (3), applies that provision to persons knowingly concerned in the commission of the offence.

I have dealt with the arguments which were presented on behalf of the appellant. They relate to the possibility of *any* person becoming punishable by reason of being knowingly concerned in the commission of an offence against s. 230. But in this case the particular person charged with the offence is the public officer of the company by reason of whose act the company is alleged to have committed the offence. No argument based upon this fact was addressed to this Court. But I agree with my brother *Dixon*, for the reasons which he states, that s. 230 makes it an offence for any person to understate or misstate income in any income-tax return, whether his own or that of another person. Thus the appellant, if guilty at all, is simply guilty of an offence against s. 230 and s. 5 of the *Crimes Act* has no application in the present case. The complaint is not entirely satisfactory in form, but it does sufficiently allege an offence against s. 230 as the offence for which it is sought to recover against the appellant the penalties for which that section provides. The penalty would be joint (s. 252 (i)) but only the appellant could be imprisoned under s. 247, because a company, though it may have many capacities, is incapable of going to gaol.

(1) (1923) 1 K.B. 166.

(2) (1921) 1 K.B. 509.

For these reasons I am of opinion that the appeal should be dismissed but that instead of the answer to the first question being based upon s. 5 of the *Crimes Act*, the answer should be " Yes, by reason of the *Income Tax Assessment Act* 1936-1944, s. 230." Section 250 of the *Income Tax Assessment Act* provides that costs may be awarded and in my opinion the appeal should be dismissed with costs.

DIXON J. In my opinion the manner in which the complaint is framed in this case is a result of a misunderstanding of s. 230 (1) of the *Income Tax Assessment Act* 1936-1944. The complaint contains a charge under that section against an incorporated trading company and a charge under s. 5 of the *Crimes Act* 1914-1946 against the appellant. The averments accompanying the complaint describe the appellant as the public officer of the company and he is so described in the charge against the company contained in the complaint.

Where separate offences arise out of the same set of circumstances s. 51 of the *Justices Act* 1921-1943 (S.A.) allows them to be joined in one complaint and this is taken to include offences by different defendants. The company is charged with contravening s. 230 of the *Income Tax Assessment Act* in that the public officer of the company to wit the appellant in a return knowingly and wilfully understated the amount of income of the company derived from all sources during a specified accounting period. The charge against the appellant is that by act he was directly knowingly concerned in the commission of the offence above alleged. The charge refers to the *Crimes Act* 1914-1946, s. 5. I think that the charge against him should have been for an offence against so much of s. 230 (1) as says that any person who in any return knowingly and wilfully understates the amount of any income shall be guilty of an offence. It was in my opinion neither necessary nor possible to treat the appellant's signature as public officer of the company's return, in which, according to the allegation, he knowingly and wilfully understated the income, as exposing him to liability under s. 5 of the *Crimes Act* as one knowingly concerned in the company's offence under s. 230 (1). The company's offence consists only in its vicarious responsibility for his alleged act in knowingly and wilfully understating on behalf of the company in its return the amount of income derived by the company. That act amounts in my opinion to an offence by him under s. 230 (1). The provision may be divided into two parts. The one part says that any person who in any return knowingly and wilfully understates the amount

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of any income or makes any misstatement affecting the liability of any person to tax or the amount of tax shall be guilty of an offence. The other part says that any company on whose behalf the public officer or a director servant or agent of the company in any return knowingly and wilfully understates the amount of any income or makes any misstatement affecting the liability of any person to tax or the amount of tax shall be guilty of an offence. A public officer cannot, I think, make his company responsible under the second part of the provision without himself becoming liable under the first part. The first part is not confined to a taxpayer making a return of his own income. This is designedly done because there are many cases in which persons may or must make returns of income in which they have no beneficial interest or which they do not derive. A trustee or an agent may as a result of s. 254 make a return of the income of others, and an executor of a deceased taxpayer may make a return of the deceased's income. A partner may make a return of the income of the partnership. The master, agent or other representative in Australia of the owner or charterer of a ship may be called upon to make a return of freight or passage money: s. 130. The expressions "any person" and "any income" in s. 230 (1) were adopted so as to cover cases where the person making the return did so in a representative capacity and did not derive the income. The expression "any person" where it secondly occurs does not necessarily mean, or refer to, the same person as is designated by the expression where it first occurs. A curious thing is that, where it first occurs, it probably does not cover a company falling under the second part of the provision; but where the expression secondly occurs the expression must do so. I think that a public officer of a company falls under the words "any person who understates the amount of any income" and that the words "any income" cover his company's income. In the same way, if the public officer knowingly and wilfully made a misstatement affecting the liability of his company to tax, he would fall within the provision. The company's income would be the income of a person within the words "income of any person."

It might be argued that the express provision made by s. 230 (1) relating to the case of a company shows an intention on the part of the legislature to make the company and not the public officer director or servant of the company penally liable for a wilful understatement of income or misstatement, and that the wide words of the other part of the sub-section should not be interpreted as including the public officer director or servant making a return. Such an inference would in my opinion be mistaken. I understand the

policy of the more general part of s. 230 (1) to be to place upon all persons who make in a return a wilful understatement of income or misstatement, a penal responsibility whether they do so on behalf of themselves or of others. There is no reason why this principle should not extend to public officers &c. of companies. The purpose of the express reference to the company is to make the corporation vicariously liable, not to exclude the liability of the public officer or other agent of the company whose act and guilty mind form the essential elements in the offence. This view is supported by the history of the provision: cf. s. 68 of No. 37 of 1922 and s. 60 of No. 34 of 1915. The result of the view I have adopted is not necessarily that the company and its public officer are each separately liable to the penalty stated at the foot of s. 230 (1). That "penalty" may not exceed £500 and double the amount of the tax which would be avoided, but of course it may reach that maximum. Section 252 (1) (i) of the *Income Tax Assessment Act* 1936-1944 provides that any proceedings under that Act taken against the public officer shall be deemed to have been taken against the company and that the company shall be liable jointly with the public officer for any penalty imposed upon him. Probably this provision was made in contemplation of s. 252 (1) (f) which makes the public officer liable to the same penalties as the company in the case of default in the requirements imposed by the Act or regulations. But I do not see why it should not apply to s. 230 (1). If it does apply, it is perhaps logically possible to give it an operation by which it makes the company jointly liable with the public officer for his offence and separately liable for its own offence, incurring a separate penalty for each. But I think the more reasonable interpretation of the two provisions in combination is that they show a legislative intention that the public officer and the company shall both be liable, but only in one penalty. On either view, s. 252 (1) (i) tends to confirm the conclusion that s. 5 of the *Crimes Act* 1914-1946 can have no application to the public officer who brings his company under the sanctions of s. 230 (1). For it shows that for penal purposes the company and the public officer are to be identified and the company is to be jointly liable with him for any penalty he incurs.

On the interpretation I have given to s. 230 (1), for more than one reason s. 5 of the *Crimes Act* cannot apply to a public officer so as to make him an accessory to the offence of the company. In the first place, the public officer's act on behalf of the company making it an offender *ipso facto* amounts to a substantive offence on his part under s. 230 (1). In the second place, the sub-section

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makes him the actor, the principal, for whose guilty conduct the company is responsible vicariously. It would be an inversion of the conceptions on which the degrees of offending are founded to make the person actually committing the forbidden acts an accessory to the offence consisting in the vicarious responsibility for his acts.

But if the interpretation were placed on s. 230 (1) opposed to that which I have adopted, I should think it would equally follow that s. 5 of the *Crimes Act* could not be applied to make the public officer liable under that provision. For it would mean that by s. 230 (1) the legislature had made the company responsible as an offender for the knowing and wilful understatement of income by the public officer to the exclusion of any such liability of the public officer. If that conclusion were reached it would be impossible to make him liable for the same conduct under a provision dealing with accessories. There is a number of cases which show that the application of sections dealing with aiding and abetting may be excluded by the nature of the substantive offence or the general tenor or policy of the provisions by which it is created: cf. *R.* v. *Tyrrell* (1); *Morris* v. *Tolman* (2); *Ellis* v. *Guerin* (3).

The first question which is asked in the amended special case asks whether by reason of s. 5 of the *Crimes Act* or otherwise the complaint discloses any offence by the appellant. On the interpretation I place upon s. 230 (1) the complaint alleges the facts which constitute an offence by the appellant and in this sense "discloses" the offence. It necessarily does so in the charge against the defendant company. But the further statement of the charge against the appellant is wrong in referring to and following the words of s. 5 of the *Crimes Act*. I would amend the order of the Supreme Court by substituting for the answer to the first question an answer to the effect that the complaint while alleging facts amounting to an offence on the part of the appellant under s. 230 (1) of the *Income Tax Assessment Act* incorrectly charges an offence by the appellant under s. 5 of the *Crimes Act* and should be amended so as to charge him under s. 230 (1): see s. 240. Of course it follows that sub-s. (2) of s. 230 fixes the time within which the prosecution may be brought. Accordingly it is within time.

Although it can form no part of the grounds of my decision, I think that it is desirable to add that I agree in the interpretation given by *Ligertwood* J. to the concluding words of s. 5 of the *Crimes Act*, "and shall be punishable accordingly." That is to say I think that they mean that the accessory shall be liable to be tried

(1) (1894) 1 Q.B. 710.
(2) (1923) 1 K.B. 166.
(3) (1925) S.A.S.R. 282.

convicted and punished as a principal offender. It would follow that where prosecution for the principal offence is subject to a limitation in point of time the limitation would apply to the exclusion of that stated in s. 21 (1) of the *Crimes Act*: *Homolka* v. *Osmond* (1). It is also perhaps desirable to add that I do not think that the fact that penalties for an offence are recoverable by a taxation prosecution within the meaning of s. 222 of the *Income Tax Assessment Act* 1936-1944 is enough to exclude the application to the offence of s. 5 of the *Crimes Act*. The reasons advanced to the contrary and the authorities relied upon appear to me to be sufficiently met by *R.* v. *Justices of Appeals Committee of the County of London Quarter Sessions* (2).

Subject to the foregoing variation which I would make in the order of the Supreme Court I think that the appeal should be dismissed with costs.

McTiernan J. I agree that the appeal should be dismissed.

Section 230 of the *Income Tax Assessment Act* 1936-1944 says that any person or company whom the section makes answerable for an understatement of income done in breach of the section "shall be guilty of an offence" and that "a prosecution for an offence against this section" may be commenced within six years after the commission of the offence. Section 5 of the *Crimes Act* 1914-1946 applies to any person who aids and abets "the commission of any offence against any law of the Commonwealth." The section provides that an aider and abettor "shall be deemed to have committed that offence and shall be punishable accordingly." It is clearly in accordance with the ordinary meaning of the words of s. 230 and s. 5 to say that any person or company made answerable by the former section for the understatement of income in breach of it commits an offence against a law of the Commonwealth. But it is argued that the understatement cannot be aided and abetted in the proper sense of the words because the understatement does not amount to the commission of a crime. In order to accept that argument it would be necessary to ascribe to the words of s. 230 a meaning, other than their ordinary meaning, which the words could bear. The argument is based upon other sections of the Act providing procedure which is more appropriate to civil than to criminal matters, for the prosecution of "offences" against the Act. The authorities which have been cited in connection with this argument do not enable a clear conclusion to be reached that

(1) (1939) 1 All E.R. 154. (2) (1946) K.B. 176.

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such procedural provisions alter the character which the words, "guilty of an offence," naturally ascribe to the conduct of understating income in breach of s. 230. I think that the better test is to accept the legislative definition of the conduct: I should hold accordingly that it is an offence and is criminal. It follows that the commission of this offence is within the scope and operation of s. 5.

This section is expressed to apply not only to any person who aids, abets, counsels or procures the commission of an offence against any law of the Commonwealth, but also to any person who "by act or omission is in any way directly or indirectly knowingly concerned in or party to the commission" of any such offence. The charge against the appellant is that he "by act was directly knowingly concerned in" the understatement of income in breach of s. 230 on behalf of a company of which he was the public officer. Besides the argument that s. 5 did not apply to the understatement it was argued that the particular participation by the appellant alleged in the charge was not aiding and abetting and while an aider and abettor was punishable as a principal offender, a person connected with the offence in the manner charged in the complaint could not be so punishable. It is a matter for the legislature whether if a person is not an aider and abettor in the strict sense he should be subject to the same criminal liability as an aider and abettor. It follows that the complaint under s. 5 lies and was made within time.

I agree however that it was not necessary to have recourse to s. 5 because upon the allegations in the complaint a charge would lie against the appellant under s. 230 of the *Income Tax Assessment Act*.

Answer to first question varied by substituting the following answer:—"Yes, by reason of the Income Tax Assessment Act 1936-1944 *s.* 230." *Appeal otherwise dismissed with costs.*

Solicitors for the appellant: *Kelly Travers, Melville & Hague.*

Solicitor for the respondent: *K. C. Waugh,* Acting Crown Solicitor for the Commonwealth.

C. C. B.