making the order. Thus s. 171 (1) of *The Local Authorities Acts* 1902 *to* 1935 (Q.), which, through s. 373 of the *Sydney Corporation Act* 1932-1945 (N.S.W.), seems to have inspired the provisions of s. 317B of the *Local Government Act* 1919-1951, was interpreted as requiring an order expressed to give to the owner the alternative choices described in the Queensland section : *Fraser* v. *Hemming* (1). So too with s. 118 of the *Health Act* 1911-1950 (W.A.) dealing with houses unfit for human occupation : *Haddy* v. *Howard* (2). In New South Wales s. 249 (h) of the *Local Government Act* 1919-1951, which in respect of any public road empowers the council to order the owner of any unsightly dilapidated or dangerous fence, verandah, awning, shed or other similar structure on or near to the road to repair or remove the structure has been interpreted as meaning that the owner must be given by the order the option of removing the shed or of repairing it : *Wauchope* v. *Trefle* (3). In s. 58 (1) (*b*) (ii) of the *Public Health Act* 1936 (Imp.) (26 Geo. 5 & 1 Edw. 8, c. 49) the election is expressly given to the owner, a provision taking the place of s. 75 of the *Towns Improvement Clauses Act*, 1847 (10 & 11 Vict. c. 34) : see too s. 106 of the *London Building Act* 1894 (57 & 58 Vict. c. CCXIII).

It must be observed however not only that the terms in which these various provisions were expressed are very different, but also that s. 317B which is to be construed upon the present appeal bears no such relation to any of them as to make it right in principle to reason from the meaning they bear, or have been held to bear, in arriving at the meaning of s. 317B (1).

Within s. 317B itself *Roper* C.J. in Eq. found what his Honour considered to be the determining consideration. It is the direct evidence supplied by sub-s. (3) of the intention of sub-s. (1). Sub-section (2) provides that if the order is not obeyed the council may with all convenient speed enter upon the land upon which it stands and execute the order. It is obvious that if the order to be executed is to demolish the building something must be done with the materials of which it was built, whereas that problem will not arise if it is repaired or re-erected. Sub-section (3) provides as follows :—" Where the order directs the demolition of a building or any part thereof the council, if executing the order, may remove the materials to a convenient place and (unless the expenses of the council under this section in relation to such building are paid to it within fourteen days after such removal) sell the same if and as it, in its discretion, thinks fit." The protasis of this clause

(1) (1911) Q.S.R. 139, at pp. 147, 148.
(2) (1920) 22 W.A.L.R. 48.
(3) (1942) 59 W.N. (N.S.W.) 213; 15 L.G.R. 50.

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introduced by the words " Where the order directs ", appears to me clearly to express a hypothetical condition. It imports that the order may or may not direct demolition and provides for the case of its doing so as a contingency. Sub-section (4) is clumsily and obscurely drawn and it may be an unsafe procedure first to construe it and then to use the construction to elucidate sub-s. (1). But as I read it the second part of sub-s. (4) has the same force. I have come to the conclusion that the view adopted by *Roper* C.J. in Eq. is the correct one. Sub-section (3) shows clearly how the legislation, or its draftsman, understood sub-s. (1) and further, though the language of sub-s. (1) is undoubtedly ambiguous, yet I think that when it is analysed as in the earlier part of this judgment, the sense of it appears rather to be that the choice of alternatives lies with the council.

It is necessary to add one observation by way of qualification or caution. The question does not arise on the facts of this case whether the provision confers a power to order re-erection which is independently exerciseable so that the owner has no choice but must re-erect. What is in question is the existence of a power independently exercisable to order demolition. In spite of some verbal difficulties it may be possible to read the provision as if it were written " may order the owner to demolish or, may order him as an alternative to demolishing to re-erect, such building or any part thereof ". That would mean that while the council may, as it has done in this case, order demolition *simpliciter*, it cannot order re-erection directly and absolutely ; it can only do it as a choice given to the owner. It is of course a strong thing to order an owner to re-erect a building without giving him any choice and an interpretation which gives the council a power to do this may be thought to be improbable *a priori*. It would be avoided by any such reading as the foregoing. If, however, such an interpretation were adopted it might be difficult to treat differently the words which follow the expression " to re-erect such building or any part thereof ", namely " or otherwise to put the same . . . into a state of repair ". That is to say it might be difficult, in that event, to read them as anything but the grant of a further choice to the owner. But perhaps that might not be an objection.

However, these are not questions which arise in this case and all that need be said about them is that they are not necessarily covered or precluded by an interpretation of the power to demolish as one exerciseable independently of the power to order re-erection &c., so that a council may order demolition without expressing in its order an alternative of re-erection or any other alternative.

I think that the provision does mean that the council shall have such a power to order demolition *simpliciter*.

Accordingly I am of opinion that the decision of *Roper* C.J. in Eq. was right and that the appeal should be dismissed.

WEBB J. I would dismiss this appeal for the reasons given by the Chief Justice.

I agree with his Honour and with *Roper* C.J. in Eq. that s.317B (1) of the *Local Government Act* 1919-1951 (N.S.W.) taken by itself, is ambiguous: it could be read either as giving the council the alternative, or as giving it to the building owner. But the former meaning is that indicated by the terms of s. 317B (3), although it involves a departure from the general policy of this kind of legislation as revealed in both English and Australian decisions. One does not readily conclude that if, say, a building is unsightly simply because it has broken windows the council has the legal power to order its demolition instead of directing the owner to repair the windows. However there is no reason to suppose that any council would make such a foolish order. But if it did then there is provision in s. 317B (5) for an appeal to a district court judge who is not confined to determining merely whether the council had the legal power to make the order appealed against, but may himself make such order as the circumstances and the public interest warrant and the law permits.

TAYLOR J. For the reasons already given by the Chief Justice, with which I entirely agree, I am of the opinion that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *G. F. C. Griffin*, Dubbo, by *Harold R. Bushby, Steed & Co.*

Solicitors for the respondent, *McDonell & Moffitt.*

J. B.

[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION PLAINTIFF;

AGAINST

BAYLY . . . . . DEFENDANT.

H. C. OF A. 1952.

SYDNEY, *June* 18, 19, 23.

Williams J.

Taxation—Entertainments tax—Provision for refund—Proceeds devoted to public purpose—Expenses—More than fifty per cent of receipts—Partly offset by donation from beneficiary—Notice of assessment—Form—"Satisfaction" of commissioner—Entertainments Tax Assessment Act 1942-1949 (*No.* 41 *of* 1942 —*No.* 5 *of* 1949), *ss.* 16D, 18*—*Entertainments Tax Regulations* (*S.R.* 1942 *No.* 421—*S.R.* 1944 *No.* 116), *reg.* 57.

A notice of assessment under s. 16D of the *Entertainments Tax Assessment Act* 1942-1949 must state that it is a notice in writing of an assessment under that section and should warn the taxpayer that it creates a liability to pay the tax except in so far as he establishes on objection that the assessment is excessive, and it must summarize the procedure on objection.

It was shown in an action for the recovery of entertainments tax that a charity benefiting by the race meetings in question donated the total amount of the prize money, wages and rebates, and thus the expenses of those race meetings were made to appear at less than the fifty per cent of the receipts mentioned in s. 18 of the Act. In respect of other entertainments the

* Section 16D of the *Entertainments Tax Assessment Act* 1942-1949 provides: "(1.) Where—(*a*) any person makes default in furnishing any return; or (*b*) the Commissioner is not satisfied with the return made by any person; or (*c*) the Commissioner has reason to believe or suspect that any person (though he may not have furnished, or been liable to furnish, a return) is liable to pay tax which he has not paid,—the Commissioner may, at any time, cause an assessment to be made of the tax or further tax which, in his judgment, should be paid, and that person shall be liable to pay the tax or further tax so assessed, except in so far as he establishes on objection that the assessment is excessive.

(2.) Any person who becomes liable to pay tax by virtue of an assessment made under the last preceding subsection shall also be liable to pay, by way of additional tax, double the amount of that tax or the amount of One pound, whichever is the greater: Provided that the Commissioner may, in any case, for reasons which he thinks sufficient, remit the additional tax or any part thereof.

(3.) As soon as conveniently may be after an assessment is made, the Commissioner shall cause notice in writing of the assessment and of the

beneficiary by making a contra payment by way of donation produced a similar effect on the apparent expenses.

Held, that as the beneficiary only benefited to the extent of the balance which was less than fifty per cent of the receipts, the taxpayer was not entitled to any refund under s. 18.

The " satisfaction " of the commissioner discussed.

ACTION.

An action was brought in the High Court by the Deputy Commissioner of Taxation for New South Wales to recover from the defendant, A. J. Bayly, the sum of £1,018 for entertainments tax in respect of race meetings held by the Wellington Combined Race Club in the years 1943 to 1948 inclusive. The plaintiff relied upon a letter dated 7th July 1948 demanding payment of the money, and upon a certificate given by him certifying that the defendant owed the amount. It was not disputed that the proceeds of the race meetings were devoted to public purposes within the meaning of s. 18 of the *Entertainments Tax Assessment Act* 1942-1949, but the commissioner stated that he was satisfied that the expenses exceeded fifty per cent of the receipts and therefore the taxpayer was not entitled to a refund under s. 18. In several instances the proceeds of the race meetings were devoted to the Wellington Show and Sports Ground, and the trustees of that ground had by agreement provided the prize money, wages and rebates in respect of those race meetings as a donation to the race club, thus making it appear that the expenses did not exceed the fifty per cent of the receipts referred to in s. 18. In respect of other race meetings contra payments by way of donation had been made.

The action was heard before *Williams* J.

additional tax payable to be given to the person liable to pay the tax or further tax.

(4.) The amount of tax or further tax, and additional tax, specified in the notice shall be payable on or before the date specified in the notice.

(5.) The omission to give any such notice shall not invalidate the assessment made by the Commissioner."

Section 18 provides :—" Where the Commissioner is satisfied that the whole of the net proceeds of an entertainment are, or will be, devoted to—(*a*) public, patriotic, philanthropic, religious or charitable purposes ; (*b*) such funds of a society or association, not carried on for the profit or gain of the individual members thereof, as the society or association sets apart to provide sick, accident or funeral benefits for or on behalf of any of its members,—and that the whole of the expenses of the entertainment do not exceed fifty per centum of the receipts, he shall repay to the proprietor the amount of the entertainments tax in respect of the entertainment : Provided that where the Commissioner is satisfied that, owing to adverse climatic conditions or unforeseen circumstances, the expenses of the entertainment exceed fifty per centum of the receipts, the Commissioner shall repay to the proprietor the entertainments tax in respect of the entertainment."

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Further facts appear, and the relevant statutory provisions are sufficiently set forth, in the judgment hereunder.

L. C. Badham Q.C. and *E. M. Martin*, for the plaintiff.

N. H. Bowen, for the defendant.

Cur. adv. vult.

June 23.

WILLIAMS J. delivered the following written judgment:—

This is an action in which the Deputy Commissioner of Taxation for the State of New South Wales of the Commonwealth of Australia is suing the defendant who is the secretary of the Wellington Combined Race Club to recover thirteen separate amounts totalling £1,018 17s. 5d. alleged to be due as entertainments tax in respect of thirteen race meetings held by the club on certain dates between 13th October 1943 and 22nd September 1948. The defendant is sued as the proprietor of these entertainments. Under the *Entertainments Tax Assessment Act* 1942-1949, s. 4, "proprietor" includes, in relation to any entertainment, any person responsible for the management thereof. No objection has been taken to the form of the action which is in effect an action against the club.

The action has now been settled with respect to the amounts sued for in respect of the meetings held on 21st and 22nd September 1948 on the basis that the defendant will pay the amount of £99 8s. 1d. claimed in respect of 21st September and the plaintiff will waive his claim to the amount of £148 4s. 5d. claimed in respect of 22nd September. It is therefore only necessary to deal with the first eleven amounts. They fall into three categories—(1) those claimed in respect of the meetings held on 13th October 1943, 10th August and 16th November 1946; (2) those claimed in respect of the meetings held on 1st, 2nd and 21st May; 12th July; 16th August; and 15th November 1947: and (3) those claimed in respect of the meetings held on 29th March 1947; and 21st February 1948.

The action has been tried without pleadings. If there had been pleadings it would have been apparent that the real issue between the parties was whether the defendant was entitled to a refund of tax under the provisions of s. 18 of the Act. This section provides so far as material that where the commissioner is satisfied that the whole of the net proceeds of an entertainment are or will be devoted to public, patriotic, philanthropic, religious, or charitable purposes and that the whole of the expenses of the entertainment

do not exceed 50 per cent of the receipts, he shall repay to the proprietor the amount of the entertainments tax in respect of the entertainment. The section contemplates that the tax has already been paid and obliges the commissioner to refund the tax in the circumstances mentioned. This is presumably because the tax is usually paid in advance by stamping the admission tickets but the Act also provides machinery for the proprietor making returns of the admissions and paying the tax after the entertainment and this was the course adopted in the present case.

The plaintiff contended that a letter of 7th July 1948 from the plaintiff to the defendant relating to the first eleven amounts claimed was a notice of assessment within the meaning of s. 16D of the Act and that since the defendant had not objected to the assessment the plaintiff was entitled to judgment. That section provides that where the commissioner has caused an assessment to be made of the tax or further tax which in his judgment should be paid, the person assessed shall be liable to pay the tax or further tax so assessed except in so far as he establishes on objection that the assessment is excessive. I gave a provisional ruling that the letter was not a notice of assessment and to that ruling I adhere. The letter is at most a letter of demand. One of the amounts claimed was for an entertainment held in 1943 but s. 16D was not introduced into the Act until the amending Act of 1944 which came into force on 3rd April 1944. In my opinion a notice in writing of an assessment, in order to comply with s. 16D (3), must state that it is a notice in writing of an assessment under that section, and to be a fair notice, such as one would expect to emanate from the department, it should warn the taxpayer that the effect of the notice is to create a liability to pay the tax except in so far as he establishes on objection that the assessment is excessive, and at least summarize the procedure upon objection.

In view of this ruling it is unnecessary to discuss other questions relating to s. 16D that were touched on during the hearing. But it should not be assumed, where there has been no objection, that the commissioner can succeed under the section simply by tendering a notice of assessment without proof of the existence of one of the conditions which authorizes him to make the assessment and of the making of the assessment. Further, as I pointed out during the argument, the only remedy open to the person assessed whose objection has been disallowed by the commissioner is to request the commissioner to refer his decision to a board of review. If that is done the only appeal to this Court is on a question of law. In this respect the legislation differs from that in the *Income Tax*