REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1934-1935.

[HIGH COURT OF AUSTRALIA.]

BYRNE . . . . . APPELLANT;
INFORMANT,

AND

McLEOD . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF NEW SOUTH WALES.

H. C. OF A. 1934.

SYDNEY, *Nov.* 20; *Dec.* 19.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Sales Tax—Flour tax—Statutory offence—Penalty—Quantum—Discretion of Court—Flour Tax Assessment Act 1933 (*No.* 43 *of* 1933), *sec.* 26—*Sales Tax Assessment Act* (*No.* 1) 1930-1933 (*No.* 25 *of* 1930—*No.* 47 *of* 1933), *sec.* 49—*Acts Interpretation Act* 1904-1930 (*No.* 1 *of* 1904—*No.* 23 *of* 1930), *sec.* 3.

Sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1933, which is incorporated in the *Flour Tax Assessment Act* 1933 by sec. 26, provides that any person who by fraud, default or neglect "avoids or attempts to avoid tax chargeable under this Act shall be guilty of an offence. Penalty: Not less than Fifty pounds nor more than Five hundred pounds and in addition treble the amount of tax payment whereof he has avoided or attempted to avoid."

Held, by *Gavan Duffy* C.J., *Rich*, *Evatt* and *McTiernan* JJ. (*Starke* and *Dixon* J J. dissenting), that the words in the penalty provision of sec. 49 of the *Sales*

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Tax Assessment Act (*No.* 1) 1930-1933, confer upon the competent tribunal one, but only one, discretionary power, namely, to fix the amount of the fine between the amounts of £50 and £500, but the penalty so imposed is, in all cases, to be supplemented by an order for the payment of treble the amount of tax avoided or attempted to be avoided.

APPEAL from a Court of Petty Sessions of New South Wales.

Upon an information laid by John William Joseph Byrne, an officer of the Taxation Department of the Commonwealth, Donald Archibald McLeod was charged with having by fraud avoided tax chargeable under the *Flour Tax Assessment Act* 1933, for the month of February 1934, in that he did in a return, furnished by him to the Commissioner of Taxation pursuant to sec. 16 of the Act, of flour manufactured in Australia by the firm of A. McLeod & Sons, of Merrylands, New South Wales, of which firm he was a partner, understate the aggregate quantity of flour sold and delivered by that firm during February 1934 by 96 tons 731 lbs., the difference between the amount of flour tax actually payable and that shown in the return being £409 10s. 1d.

Separate informations laid by the same informant charged William George McLeod, another partner in the firm of A. McLeod & Sons, and James Larter, an employee of that firm, with aiding and abetting Donald Archibald McLeod in the commission of the offence charged against him as shown above.

It was stated in each information that the defendant therein had incurred a pecuniary penalty exceeding £500, and that the excess over and above that sum had been abandoned.

By sec. 5 of the *Crimes Act* 1914-1932 a person who aids or abets the commission of any offence against any law of the Commonwealth "shall be deemed to have committed that offence and be punishable accordingly."

Each defendant pleaded guilty to the respective informations charged. No sworn evidence was tendered. The amount of the tax avoided was paid before the informations were laid.

The magistrate held that in view of sec. 3 of the *Acts Interpretation Act* 1904-1930, the concluding portion of the penalty provision of sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1933, meant "and in addition not exceeding treble the amount of tax . . .,"

and further that the provisions of sec. 442 (2) of the *Crimes Act* 1900 (N.S.W.), which were made applicable to the matter by the combined operation of sec. 3 and sched. 2 of that Act, and sec. 79 of the *Judiciary Act* 1903-1932, also operated to give him a discretionary power to inflict a less penalty than £500 when sitting in New South Wales exercising Federal jurisdiction.

The magistrate imposed a fine of £500 upon Donald Archibald McLeod and ordered him to pay costs.

The defendant William George McLeod was fined £50 and in addition the sum of £5 on account of the tax avoided, together with a specified sum as costs. A similar penalty was inflicted on the defendant Larter.

From the decision in respect to William George McLeod the informant now appealed, by way of case stated, to the High Court, upon the grounds, *inter alia*, (*a*) that the magistrate was in error in deciding that he could impose a penalty of less than £500; and (*b*) that the penalty provision of sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1933, properly construed, did not confer upon the magistrate a discretion to impose any penalty other than a penalty of £500.

The question for the opinion of the Court was whether the magistrate's determination was erroneous in point of law.

E. M. Mitchell K.C. (with him *Holmes*), for the appellant. The respondent aided and abetted the commission of an offence created by the combined operation of sec. 26 of the *Flour Tax Assessment Act* 1933, and sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1933; therefore, by sec. 5 of the *Crimes Act* 1914-1932, he is deemed to have committed that offence, and is punishable accordingly, that is, as a principal. The proper construction of the penalty provision of sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) is that irrespective of whether an offender is fined the minimum amount of £50, or the maximum amount of £500, or any amount between those limits, he must pay in addition thereto treble the amount of the tax avoided or attempted to be avoided. The quantum of the fine is, but the imposition of the additional penalty is not, a matter within the discretion of the Court; that matter was fixed by the Legislature.

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[EVATT J. referred to *Richardson* v. *Federal Commissioner of Taxation* (1).]

Sec. 3 of the *Acts Interpretation Act* 1904 has no application to an Act which, as here, itself provides a maximum and a minimum penalty.

A. R. Taylor, for the respondent. The practical grammatical meaning of the penalty provision of sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) is that the treble tax is to be imposed only in addition to the maximum amount of £500. A fine less in amount than the maximum amount does not carry the additional penalty of treble tax. If, on a fair reading, the penalty provision is capable of more than one construction, that construction which is favourable to the taxpayer should be adopted. Sec. 64 of the *Sales Tax Assessment Act* does not affect the position ; that section refers only to minimum penalties. The history of this legislation commencing from the *Income Tax Act* 1915, indicates that the Legislature used the words " in addition " to show that the treble tax was only to be in addition to the maximum amount of £500, and not to any lesser amount.

[DIXON J. referred to *Attorney-General for the Commonwealth* v. *Abrahams* (2).]

The scheme underlying treble tax is that it should be imposed in cases where the circumstances are such that the maximum penalty of £500 is manifestly inadequate.

E. M. Mitchell K.C., in reply.

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered :—

GAVAN DUFFY C.J., RICH, EVATT AND MCTIERNAN JJ. By sec. 26 of the *Flour Tax Assessment Act* 1933, sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1933 is included in the provisions made applicable in relation to the tax chargeable under the former Act.

(1) (1932) 48 C.L.R. 192.

(2) (1928) noted, 1 A.L.J. 388.

Sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) of 1930-1933 provides as follows:—" Any person who, by any wilful act, default or neglect, or by any fraud, art or contrivance whatever, avoids or attempts to avoid tax chargeable under this Act, shall be guilty of an offence. Penalty: Not less than Fifty pounds nor more than Five hundred pounds and in addition treble the amount of tax payment whereof he has avoided or attempted to avoid."

At the Court of Petty Sessions the respondent pleaded guilty to having aided and abetted the commission of an offence by one Donald McLeod, the offence being that the latter by fraud avoided tax chargeable under the *Flour Tax Assessment Act* 1933.

By sec. 5 of the *Crimes Act* 1914-1932, one who aids or abets the commission of any offence against any law of the Commonwealth " shall be deemed to have committed that offence and shall be punishable accordingly."

The magistrate rightly regarded himself as bound to treat the respondent as liable to the penalty described at the foot of sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) of 1930-1933. But he interpreted the penalty provision as though it had concluded " and in addition *not exceeding* treble the amount of tax payment whereof he has avoided or attempted to avoid." Accordingly, although he obeyed the first part of the provision and fined the respondent fifty pounds thereunder, he felt himself at liberty to restrict the amount referred to in the second part of the provision to £5. As authority for his action, he relied upon sec. 3 of the *Acts Interpretation Act*, No. 1 of 1904, and sec. 442 (2) of the New South Wales *Crimes Act* 1900 made applicable by sec. 79 of the Commonwealth *Judiciary Act* 1903-1932.

In our opinion, the decision of the magistrate was erroneous, and the words of the penalty provision are of themselves too clear to permit of interpretation by reference to the other statutes mentioned. The words mean to confer upon the competent tribunal one, but only one, discretionary power, namely, to fix the amount of the fine between the amounts of £50 and £500; but the penalty so imposed is, in all cases, to be supplemented by an order for the payment of treble the amount of tax avoided or attempted to be avoided. We agree that, so interpreted, the provision is very

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drastic in character, but that is explained by the fact that it can only be applied to cases of wilful or fraudulent attempts to evade payment of the tax.

The result is that the respondent incurred a pecuniary penalty which, the amount of the tax sought to be evaded being £409 10s. 1d., would have amounted to three times that sum, namely, £1,228 10s. 3d., together with the minimum penalty of £50. But the prosecutor duly abandoned the excess over and above the sum of £500, so that the latter sum should have been the penalty inflicted.

The appeal should be allowed and the question in the special case should be answered: Yes.

STARKE J. In this case the opinions of the members of this Court have fluctuated so much since the conclusion of the argument that I am encouraged in the view that I was possibly right in the opinion I expressed in the case of *Attorney-General for the Commonwealth* v. *Abrahams* (1). At all events I adhere to it.

DIXON J. Sec. 3 of the *Acts Interpretation Act* 1904-1930 makes the following provision—"The penalty, pecuniary or other, set out—(*a*) at the foot of any section of any Act . . . shall indicate that any contravention of the section . . . whether by act or omission, shall be an offence against the Act, punishable upon conviction by a penalty not exceeding the penalty mentioned."

Sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1933, which is incorporated in the *Flour Tax Assessment Act* 1933, provides—"Any person who, by any wilful act, default or neglect, or by any fraud, art or contrivance whatever, avoids or attempts to avoid tax chargeable under this Act, shall be guilty of an offence. Penalty: Not less than Fifty pounds nor more than Five hundred pounds and in addition treble the amount of tax payment whereof he has avoided or attempted to avoid."

The question for decision upon this appeal is whether, under this legislation, the offender is liable to a fixed penalty of treble the amount of tax which he has avoided, or attempted to avoid, as well as to a penalty of a discretionary amount not less than £50 and not

(1) (1928) noted, 1 A.L.J. 388.

more than £500 ; or is liable to a penalty of a discretionary amount which cannot be less than £50 and cannot exceed treble the amount of such tax and £500 added together. If sec. 3 of the *Acts Interpretation Act* 1904-1930 did not exist, the frame of sec. 49 of the *Sales Tax Assessment Act* (*No.* 1) 1930-1932, although, perhaps, not necessarily inconsistent with the latter meaning, would at least suggest the former interpretation. But, in the absence of an interpretation clause, some surprise might be felt at the very compendious manner in which the section expresses the consequences of an infringement upon its provisions. The existence of sec. 3 of the *Acts Interpretation Act* 1904-1930 seems to explain its form if not its meaning. In other words, the enactment is apparently framed in some degree at least by reference to sec. 3, or to the drafting practice which that section justifies. Does sec. 3 directly apply so as to make the penalty mentioned a maximum only ?

The phraseology is taken without alteration from secs. 68 and 69 of the *Income Tax Assessment Act* 1922-1933, which must receive the same interpretation. Upon these sections, in the unreported case of *Attorney-General for the Commonwealth* v. *Abrahams*, (1), *Starke* J. made the following observations :—" Under sec. 68 a penalty is imposed of not less than £50 nor more than £500 and in addition treble the amount of income tax which would have been avoided if the income stated in the return had been accepted as the correct income. Under sec. 69 a penalty is imposed of not less than £50 nor more than £500 and in addition treble the amount of tax payment of which has been avoided or attempted to be avoided by each defendant. By force of the *Acts Interpretation Act* 1904, sec. 3, however, the penalties imposed by secs. 68 and 69 indicate that any contravention of the sections shall be an offence against the Act punishable upon conviction by a penalty *not exceeding* the penalty mentioned. Consequently, secs. 68 and 69 prescribe a minimum and also a maximum penalty, and within these limits the Legislature has reposed in the judicial power, and not in the executive government, the authority and duty to determine the penalty. It is the penalty so adjudged that is payable according to law and no other penalty."

(1) (1928) noted, 1 A.L.J. 388.

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This appears to be a direct decision of a Justice of this Court that the reference to treble the amount of tax avoided must, by force of the *Acts Interpretation Act* 1904, be taken to be no more than part of the expression of a maximum penalty. Of course sec. 3 of the *Acts Interpretation Act* 1904-1930 cannot be applied so as to defeat an inconsistent intention which a penalty provision actually discloses.

In the present case, on the terms of the penalty clause, there is much reason to suspect that the real intent of the draftsman was to make the second or additional part of the penalty absolute and not a maximum only. But certainty and not surmise is required before adopting an interpretation which, not only excludes the *Acts Interpretation Act,* but, in doing so, operates to impose a rigid and possibly harsh penalty. Having regard to the reliance which in some respects the clause appears to place on sec. 3 of the *Acts Interpretation Act* 1904-1930, to the form in which it is expressed and to the interpretation which in 1928 *Starke* J. without hesitation placed upon it, I have not been able to satisfy myself affirmatively that this composite enactment really means to impose a penalty in the fixing of which the Court has no discretion. The principles of interpretation require that, in case of doubt, that meaning shall be adopted which will avoid harshness and will give the Courts authority to do what appears just in each particular case. In my opinion, it follows that the legislation ought to receive a construction which would leave it in the Court's discretion to fix the entire penalty between the prescribed maximum and minimum and would not expose the offender to a fixed penalty capable of amounting to a crushing imposition. Upon this principle I think that we should adhere to the interpretation already adopted by *Starke* J. and dismiss the appeal.

Appeal allowed. Question in the special case answered: *Yes. Case remitted to magistrate.*

Solicitor for the appellant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Harold T. Morgan & Sons.*

J. B.