Not on CLR list

153

IN THE HIGH COURT OF AUSTRALIA

MCGOVERN

V.

HILLMAN TOBACCO PTY.LTD. AND CHARLES COWARD

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Monday, 12th September, 1949.

H. E. Daw, Gov. Print., Melb.

C.12280/45

MCGOVERN V. HILLMAN TOBACCO PTY. LTD. AND CHARLES COWARD

DECLARATIONS, CONVICTIONS AND ORDERS

I declare that the defendant company is a company on whose behalf Coward as a director wilfully and by fraud, art and contrivance attempted to avoid taxation within the meaning of section 231(1) of the Income Tax Assessment Act 1936/1946 and I convict the company of an offence under this section. I also declare that the defendant Coward is a person who aided, abetted, counselled and procured the commission of this offence by the company and that this constitutes an offence against a law of the Commonwealth, that is to say against the Income Tax Assessment Act 1936/1946, within the meaning of section 5 of the Crimes Act 1914/1941, and that Coward is therefore a person who shall be deemed to have committed an offence under section 231(1) of the Income Tax Assessment Act 1936/1946 and I convict him of an offence under this section. I order and adjudge that the defendant company pay as a penalty the sum of £500 and in addition the sum of £9,500 making a total penalty of £10,000. I order and adjudge that the defendant Coward pay as a penalty the sum of £500 and in addition the sum of £9,500 making a total penalty of £10,000. I order that the plaintiff be at liberty to exercise for the enforcement and recovery of each of these penalties any power of distress or execution possessed by the Court for the enforcement and recovery of penalties or money adjudged to be paid in any other case. I order that the defendants pay the plaintiff's costs of the prosecution including any reserved costs. I give liberty to apply.

MCGOVERN V. HILLMAN TOBACCO PTY. LTD. AND CHARLES COWARD

RECOMMENDATION

I recommend that if both penalties be paid, the penalty paid by the defendant company be appropriated towards payment of its income tax in respect of income derived by the company during the year ending 30th June 1946. This recommendation of course forms no part of the order. I make it because I have felt it my duty to impose very severe penalties for what I consider to be an attempt to perpetrate a gross fraud on the revenue. But I feel that if the defendants are compelled to pay the company's income tax, the costs of the prosecution, and the penalty imposed on Coward, they may have been sufficiently punished. I also feel that there may be mitigating circumstances, particularly the effect on Coward of the death of his son in action and his illness.

MCGOVERN V. HILLMAN TOBACCO PTY. LTD. AND CHARLES COWARD

JUDGMENT

WILLIAMS J.

MCGOVERN V. HILLMAN TOBACCO PTY. LTD. AND CHARLES COWARD

JUDGMENT WILLIAMS J.

This is a taxation prosecution of the defendants under Part VII of the Income Tax Assessment Act 1936-1946 for offences under sections 227, 230 and 231 of this Act in respect of the return of income of the defendant company derived during the year ending 30th June 1946. Under section 161 of the Act the defendant company was liable to furnish a return for this year setting out a full and complete statement of the total income derived by it from all sources during the year and of any deductions claimed by it. On 7th July 1946 the defendant company furnished a return signed on its behalf by the defendant Coward as a director which purported to be a return made in compliance with this section. In the return the defendant company stated that for the year of income its net profit was £21. 1. 8. It stated that its sales of tobacco and other goods amounted to the sum of £16,620.11. 0. In the amended statement of claim the plaintiff alleges and pursuant to section 243 of the Act avers that the net profit amounted to a sum of not less than £41,348. 0. 0, and that the sales of goods for which the defendant company received payment during the year amounted to not less than £57,941. 6. 2.

The taxpayer is the defendant company but the plaintiff seeks to make the defendant Coward liable for offences under the same sections as the Public Officer of the company under the provisions of section 252(1)(f) (i) and (j) of the Income Tax Assessment Act or alternatively as an accessory under section 5 of the Crimes Act 1914/1941. Difficult questions arise as to whether section 227 of the Income Tax Assessment Act applies to a taxpayer which is a company, and as to the extent of the liability of public

officers under section 252 of the Act. But I find it unnecessary to determine either of these questions because the plaintiff does not contend that I should impose cumulative penalties under sections 227, 230, and 231 of the Income Tax Assessment Act and I am prepared to convict the defendant company of offences under sections 230 and 231. Further I am of opinion that section 5 of the Crimes Act applies to offences under these sections and I am prepared to convict the defendant Coward under section 5 of the Crimes Act, cf. Adams v. Cleeve 53 C.L.R. 185 at p. 194

There is a mass of evidence in the case but I do not propose to set out the facts in great detail. It may be unfortunate that the defendant Coward was too ill to give evidence, although I am left with the impression that if he had gone into the witness box the case for the defendants on the facts would be in even worse plight than it is at present. I only directed the hearing to proceed without his oral evidence after I had formed the gravest suspicions that the defendants were taking advantage of the delay to denude themselves of their assets, and after the defendants had failed to comply with the minimum terms which I thought it proper to impose as a condition of granting any further adjournment of the hearing after 21st August last. But I made an order allowing Coward to give evidence on affidavit and he filed two affidavits, to the admissibility of which the plaintiff's counsel did not object subject to a condition accepted by the defendants' counsel, so that Coward has had an opportunity to place his case, at least in outline, before the Court on sworn evidence.

The return of the defendant company of 7th July 1946 stated on its face that all books of account were kept by the company, that these books were kept by Phyllis McDonell, and audited by W. A. Lacey, a registered tax agent, who prepared the return and certified that these statements were correct. In his affidavit Coward stated that proper books of account were kept by the company and that they consisted of a day book, in which was entered the

receipts and expenditure for the day, a petty cash book, a ledger and a journal, the entries in which were taken from the day book together with the necessary cheque books and cheque butts. In the return of 7th July 1946 the items of income and expenditure in the printed form were not filled in, but there were annexed thereto a trading account, profit and loss account, appropriation account and balance sheet of the defendant company and a firm Hillman Tobacco Trading Co. (retail). In the trading account sales of tobacco were shown at £15,500.11. 0 and of leaf dust at £1,120. 0. 0 totalling the sum of £16,620.11. 0 already mentioned. The items of debit in the trading account included purchases £7,861.16. 4 and excise duty £5,952.17. 3. The directors of the company were stated to be Coward, his wife Eileen Coward and one W. F. Siegmann. The share-holdings in the company were stated to be Coward 300, his wife 2,100, and Siegmann 100.

Section 243 of the Income Tax Assessment Act provides so far as material that averments of fact shall be prima facie evidence of the matters averred, that the section shall apply to any matter so averred although evidence in support or rebuttal of the matter so averred or of any other matter is given, and that such evidence shall be considered on its merits and its credibility and probative value shall be neither increased nor diminished by reason of the section. Objection was taken that the averments that the net income of the defendant company was not less than £41,348 and that the sales and receipts were not less than £57,941. 6. 2 were not proper averments because they were lacking in precision. I cannot accede to this objection. In The King v. Hush 48 C.L.R. 487 at p. 501, it is said in the joint judgment of Gavan Duffy C.J. and Starke J. that "the averments should be so stated that they are sufficient in law to constitute the offence charged", and the present averments are in my opinion quite sufficient for this purpose. They are as precise as the averment which was before the Full Court and held to be sufficient in The King v. Hughes & Anor.

ex parte Smith (unreported judgment delivered in Sydney on 6th May 1949). And the plaintiff need not rely on the averments to prove a large part of his case because they are supported for the most part by the sworn evidence or by the written admissions of the defendants.

The written admissions, which cover the particulars of 61 pages of foolscap relate to income from sales and receipts amounting to £42,147. 9. 9 out of the sum of £57,941. 6. 2 and are subject to the following qualifications: (1) it is not admitted that any sale took place at any particular place or was illegal; (2) it is claimed that the sale price of certain items marked with an asterisk may include the purchase price of things sold not being tobacco; (3) the sales to and receipts from McWhirters Ltd., Brisbane, £13,467. 0. 8, Lifeguard Tobacco Ltd., Sydney, £11,805, and T. H. Pooley, Brisbane, £1,860, are excluded from the admissions; (4) it is not admitted that the sales were made in all cases by the defendant company or the Hillman Trading Co. as a principal. The plaintiff alleges that the balance of income from sales and receipts included in the £57,941. 6. 2, namely £15,793. 6. 5, consists of P.M.G. Dept. cheques on account C.O.D. parcels £124.19. 4, P.M.G. Dept. cheques on P.M.G. money order account £258.16.11, bank drafts £138, cash receipts from sales to J. L. C. Shearer not banked £900, and sundry cash sales £14,371.10. 2. In his affidavit, Coward admitted all the smaller items.

Before discussing the items which are not admitted, it will be convenient to say a word or two about the manner in which the defendant company was carrying on business in the year of income and some other matters. The company occupied premises at 15 Commercial Road, Brisbane, part of which were used as a factory licensed for the manufacture of tobacco under the Excise Act 1901-1942, another part as a registered leaf store for tobacco, and the front part as a retail shop for the sale of tobacco by a registered firm, the Hillman Tobacco Trading Co. It is not disputed that the trading company was the mere agent of the defendant company in all its dealings, and the sole purpose of

carrying on the retail business in the name of the trading company appears to have been to overcome the provision in section 45 of the Excise Act that no manufacturer of excisable goods shall except by permission sell by retail any excisable goods in his factory or at any place within 50 yards thereof. There were four current accounts with the Commercial Bank of Aust. Ltd., The Valley, Brisbane, in the names of the defendant company, the trading company, the defendant Charles Coward and his wife Eileen Coward respectively. The defendant Coward was in complete control of the business of the defendant company and of the trading company, and carried on these businesses as though they were his own. The defendant company manufactured the tobacco and sold it wholesale or retail through the trading company. Coward was the owner of several racehorses and a heavy bettor. The greater part of the moneys received from sales of tobacco, from prize money, and from betting wins were paid to the credit of the current account of the trading company but there were substantial deposits in the other accounts and substantial transfers from one account to another.

Towards the end of 1946 T. J. O'Neill, Senior Investigator of the Income Tax Department, assisted by another Investigating Officer, A. E. Tobin, began an investigation into the affairs of the defendant company. O'Neill interviewed the defendant Coward at the Taxation Department, George Street, Brisbane, on six occasions, namely 14th and 16th May 1947, and 2nd, 3rd, 16th and 17th March 1948. He also interviewed Mrs. Coward and Miss McDonell. Naturally the investigators wished to see the books of the business but none were produced. Coward told O'Neill, and he now swears in his affidavit, that proper books of the business had always been kept but that all these books up to 30th June 1946 had been taken out of the country to India by one Blanchard about August 1946 and never returned, and that the books after this period and a large number of important documents relating to periods prior to 30th June 1946 had been stolen from his car outside the Taxation Office, Brisbane,

on the morning of 15th May 1947. Shortly stated the defendant's case with respect to Blanchard is that Blanchard met Coward's son, a pilot in the Royal Australian Air Force, in India. Blanchard came to Australia and visited Coward in Brisbane in November 1945 bringing with him a letter from Coward's son, who had been unfortunately killed in action in the meantime. The letter stated that Blanchard was interested in tobacco. Blanchard told Coward he was a representative of a firm called Throva Gunta which grew tobacco in Southern India and suggested an amalgamation between his firm and tobacco manufacturers in Australia and New Zealand. Nothing definite was then decided upon. Blanchard left for New Zealand in December 1945 and Coward did not see him again until some time in May 1946 when he returned to Brisbane, and informed Coward that he had been to the Dutch East Indies and had practically tied up the Indonesian side of the leaf. Coward saw Blanchard again in August 1946 and after negotiations handed the books of the defendant company to Blanchard to take to India, after Blanchard had paid into the trading company the sum of £250 as security for the safe return of the books within six months. Since then Coward had not received any communication from Blanchard and had been unable to find him or the books although he had made enquiries and endeavoured to trace his whereabouts. Coward told O'Neill that Blanchard's address in Australia was C/- Eastern Industries Pty. Ltd., King Street, Sydney, but it is clear this was a fictitious address and that Blanchard had never been heard of by anyone connected with this company. Again shortly stated the defendants' case with respect to the theft of the books and documents outside the Taxation Department is that at O'Neill's request Coward sent all the books and documents in his possession by car to that office in charge of Miss McDonell. The books and documents were in two suitcases, the one containing a lot of useless books and documents, and the other purporting to contain a large number of documents specified in a letter written by Coward to the Taxation Department, including the proposed amalgamation prospectus with New Zealand and Indian

firms interested in tobacco production and signed agreement between the defendant company and Blanchard and all cancelled cheques drawn on the four accounts already mentioned up to 14th May 1947, which would have been of value to the investigators.

Miss McDonell gave evidence that on 15th May 1947 she drove to the Taxation Department in Brisbane with two suitcases but was unable to park the car in front of the Department and had to park some distance down the street. She went up the stairs to the Department and tried to find O'Neill to give him the letter from Coward but he was not in, so she handed the letter to an officer of the department, told him that she had two suitcases in the car downstairs, and asked if someone would give her a hand to bring them up. The officer went with her to the car and got one of the suitcases which he carried up the stairs in her company. They returned to the car to get the second suitcase but found that it had been stolen. She looked for the suitcase in the car and even looked in the boot although she knew she had not put it there. The officer then pointed out the C. I. Branch just across the road from where she was parked, so she went to the C.I.B. and reported the theft. She and two detectives then got into the car and drove round the streets in the vicinity and to two railway stations but they did not see anyone carrying the suitcase.

Miss McDonell's evidence is quite inconsistent with the evidence of K. J. Parker, an officer of the Department, who said that on the day in question he answered the buzzer for callers at the visitor's entrance, and found a lady there with a large suitcase. She asked him to give this suitcase to O'Neill and said that she had another suitcase for O'Neill. Parker commented on the weight of the first suitcase and the lady said that she had been helped with it and that the other one was much lighter. Parker took the first suitcase to O'Neill's table and then went down the steps to help her up the steps with the second suitcase, but could not find her in the street and never saw her again. His evidence

coincides with a written statement made by him at the time and I have no hesitation in accepting his evidence and rejecting that of Miss McDonell. In fact I regard Miss McDonell as a most unreliable witness and I am not prepared to accept her evidence on this or any other matter. She is, I think, a foolish woman who out of friendship for the Cowards allowed herself to be made a participant in Coward's attempts to throw O'Neill off the scent in the early stages and finally committed perjury in the witness box. I am satisfied that the whole story of the second suitcase is pure invention. I am also satisfied that the whole story of Blanchard's visits to Brisbane is pure invention. Probably Coward's son mentioned such a man in his letters from India, and this was the foundation stone of the elaborate edifice of lies built up around Blanchard. The minute book of the defendant company contains minutes of meetings of directors of the company of 7th December 1945 and 25th September 1946 at which Blanchard was alleged to be present and business with respect to the proposed amalgamation was transacted, and of a further meeting of directors of 14th May 1946, and of the annual meeting of the defendant company and the trading company held on 5th July 1946 at which similar business was transacted. Mrs. Coward was present at all these meetings; Siegmann was present at three; and Brady, Mrs. Coward's brother, who, according to the minute book was elected a director on 14th May 1946, was present at the meeting of 25th September 1946 when it was resolved to allow Blanchard to take all the records of the company to India. But neither Lacey, who stated in the income tax return that he had audited the books of the company and who prepared the return, Mrs. Coward, Siegmann, or Brady, who was present in Court throughout the hearing, entered the witness box to testify that the company kept proper records or to support the story of the negotiations with Blanchard or of his taking the records of the company to India. If Blanchard ever came to Australia, he must have succeeded twice in leaving the country without obtaining a clearance certificate from the Income Tax Department. I am satisfied that the references in

the minutes to Blanchard were inserted by Coward to mislead O'Neill. The defendant company never gave any receipts unless it was forced to, the only book ever seen by Miss McDonell or Mrs. Richardson was a day book, and I am satisfied that the company never kept any proper books, or that if it did, they were deliberately destroyed by Coward to prevent them being seen by O'Neill.

Coward is evidently a firm believer in the value of documentary evidence, and this leads me to the fable of one, Joe Shakleton, which fills even more pages of the evidence than that of Blanchard and, being more important to the defence, is supported by even more fabricated documents than the fable of Blanchard. I accept Pflugradt's evidence that there was a member of the armed forces of the United States named Shakleton in Brisbane as late as the end of the year 1944. And I have little doubt that whilst in Brisbane Shakleton became a friend of the Cowards. But I am not satisfied that Shakleton was ever in Brisbane after 1944, and I reject the whole of the evidence relating to his activities in the tobacco business. But acceptance of this evidence is essential to the defendants' case. Coward states in his affidavit that the defendant company was placed on a quota of manufactured tobacco in or about the year 1940 of approximately 7,500 lbs. per annum and that the company was on this quota in the year of income. He gives details of sales of tobacco by the trading company to certain persons amounting to £7,125. 8. 7 and says that the balance of the sales of £16,620.11. 0 shown in the return was made up of sales of lots of tobacco under three pounds in weight to individual persons. He states that the balance of the admitted sales consists of orders fulfilled by Joe Shakleton and T. H. A. Pooley, and that a considerable portion of receipts represented payment for goods other than tobacco, being goods purchased and delivered pursuant to orders received as a result of circulars sent with tobacco by the defendant company to servicemen and their families and other persons dealing with the company. He states that in or about the year 1943 he came to an arrangement with Shakleton with

respect to orders received from the company's clients which it was unable to fulfill owing to the quota, and that he told Shakleton that he could fulfill orders for tobacco over three pounds in weight as the company preferred to reserve to itself the right to supply orders under this weight. Shakleton stated that he could procure the tobacco from the soldiers' canteens as there was more tobacco in the canteens' quota than they could sell. Coward says that Shakleton used to come down frequently and receive orders to fulfill. Sometimes Coward would give Shakleton £300 or£400 in cash to fulfill orders totalling this amount. At other times Coward or the employees of the company would hand Shakleton orders, Shakleton would fulfill them, and return the orders with the dates on them that the parcels were posted to the company. Coward or Miss McDonell would then pay Shakleton the total amount of these orders. Coward states that the company made no profit on the orders supplied by Shakleton. It simply paid out the money it received with the orders. Coward also states that a similar arrangement was made with Pooley, and that the company made no profit on orders fulfilled by Pooley. This evidence is inconsistent with Coward's story to O'Neill. He then stated that the defendant company was fulfilling these orders itself, but for that purpose had to purchase a great deal of tobacco from Shakleton on the sale of which it made no profit, and that it was also forwarding a lot of tobacco procured by one S. Wilmott to the families of soldiers, sailors and airmen at cost price as a voluntary service on behalf of an association formed by Coward of which he was the president known as the United Soldiers Sailors and Airmen's Families Association. The minute book of this Association shows that it was formed at a meeting of ladies and gentlemen and the staff of the defendant company held at 11 Commercial Road on Friday, 19th March 1943, there being 12 persons present including Mrs. Richardson (then Miss Stone). At this meeting it was decided to form a voluntary association to give domestic help or do any other good deed of assistance to servicemen's families. Coward was elected hon. president and

chairman and William Lacey hon. sec. and accountant. The inaugural meeting was therefore held three weeks after a letter of 26th February 1943 from Coward to Shakleton, to which I shall refer, written on the letterhead of the association which stated that the membership was approaching 60,000 and that there were associations in every city, town and shire in Australia. A total of £278.10. 0 was subscribed at the meeting. According to the minute book the first annual meeting of the association was held on 15th March 1944. No further subscriptions appear to have been received since the inaugural meeting. The expenditure shown in the accounts relates mainly to domestic help to the families of absent servicemen and there was £84. 9. 8 cash in hand. The second annual meeting was held on 14th March 1945. An additional £180 had been subscribed and the expenditure shown in the accounts was mainly for the same purpose as before. These three meetings are the only meetings recorded in the minutes, and contain no reference to purchases of tobacco. At the meeting of 14th March 1945, Coward is reported to have said that he was "proud that most of our original members are still with us who came to this association's assistance in 1943".

On 22nd July 1948 Coward was interviewed at his flat and the flat searched by J. B. Maher the officer in charge of the Special Investigation Branch of the Customs Department, Sydney, and another Customs officer, when a different set of minutes for the association was found. The first three minutes ante dated each of the minutes in the minute book by exactly twelve months. Coward's pride at the third meeting in the minute book is made in the new minutes to refer to "original members who came to the association's assistance in 1942". Then there is a fourth meeting in the new minutes held on 21st May 1946 at which Coward presented the final report for the year 1946 "and for the year ending 1945 which was not held owing to my ill health". According to the minute book the report for the previous year was presented at the meeting of 14th March 1945. In the minutes in the

minute book S. Wilmott is not shown as being present at any meetings, but in the minutes found in the flat he is shown as being present at all the meetings. At the meeting of 19th March 1942 he is reported to have donated £100, the total donations being increased accordingly. At the meeting of 15th March 1943 Wilmott is reported to have estimated that over £8,740 of tobacco and standardised lines had been forwarded to members at security prices which was deeply appreciated by them, and Mr. Coward is reported to have read many letters of thanks from all parts of Australia for their services in obtaining goods and purchasing tobacco which was apparently in shorter supply in some parts than others. At the meeting of 14th March 1944, S. Wilmott is reported to have said that he had "purchased over £9,340 standardised lines at no extra price and these had been sent forward at absolutely no profit, even packing had not been charged, which had been a charge personally on himself and a few old mates who liked doing these things. Hillman's kept accounts of all orders for this effort and not one complaint of non-delivery has occurred which, I think, all considered is really good". Lacey is reported to have said that goods procured and forwarded at no extra cost or profit by the association amount to approximately £19,000 over the two years. At the meeting of 21st May 1946 S. Wilmott is reported to have said that he was pleased to report that for two years ending March 1946 approximately £800 per month, on average totalling £18,342 had been procured by them as agents or brokers for their members at absolutely no profit or gain. "I must move a vote of thanks to the directors and accountant of Hillman Tobaccos for servicing this branch of the association's activities". Mrs. Coward is reported to have said "I would like to move a vote of thanks to Mr. Lacey who has done a lot of work for the association in keeping its records and expenditure in proper shape". The minutes of this meeting conclude by stating that after discussion it was resolved to discontinue all the activities of the association. It may be that a small association, whose activities are set out in the

minute book, existed or was contemplated, although there is no satisfactory evidence even of this. But I am satisfied that there never was an association which bought tobacco in large quantities for servicemen and their families and that the defendant company never acted as the agent of such an association for this purpose free of charge. The minutes in the minute book show that Mrs. Coward, W. Siegmann and Lacey took active parts in the work of the association but none of them were called to give evidence. The name of Mrs. Richardson (then Miss Stone) appears in the minutes as one of those present at the inaugural meeting, but in her evidence she denied that she was present or that she was ever a member of the association. Yet her name appears on a lease of a house at Scarborough from Mrs. Coward to the association dated 1st July 1943 for five years at a rental of £1 as the secretary of the association. Wilmott died on 21st September 1946, and Coward would hardly have dared to introduce Wilmott's name into the minutes before that date, so that the minutes found in the flat must have been concocted after September 1946. The association paper with its elaborate letterhead was probably obtained about the same time. The accounts show no expenditure on such an item. O'Neill had warned Coward early in 1947 that he was faced with a prosecution, and the writ in the present action had issued on 12th July 1948. So that at the time of the search on 22nd July 1948 Coward knew that the worst had happened, yet he told Maher that the defendant company was buying tobacco in the retail shops and from Wilmott for the association approximating £9,000 per annum and that he had the minutes of the association in his attache case.

It is clear to my mind that the bogus minutes found in the flat were prepared to bolster up Coward's story that no profit was being made on a large part of the company's trade. But O'Neill and Tobin exposed the weakness of this story. They examined the bank accounts and the deposit slips, and in this way ascertained the names of the persons who had drawn the cheques

paid into the accounts. They travelled extensively on the east coast of Australia and in Tasmania, and interviewed these persons, and ascertained that the cheques had been sent to pay for tobacco purchased from the defendant company in the ordinary course of business and that none of them had ever heard of the association. This may explain why Coward has now switched from the story of the company carrying on a large part of its business not for profit to the story of the company handing over a large part of its orders to Shakleton to fulfill as a principal and for his own profit. In the course of their travels O'Neill and Tobin interviewed the Lifeguard Tobacco Co. which carries on the business of tobacco and snuff manufacturers in Sydney and had received from this company a letter dated 12th November 1947 containing a list of payments made to the defendants for the purchase of manufactured and leaf tobacco between 19th December 1941 and 26th May 1947. A copy of this letter was found in Coward's flat during the search of 22nd July 1948. In the year of income all the payments are stated to be for manufactured tobacco except a payment of £1,400 made to Coward for leaf tobacco on 29th April 1946.

On his examination by O'Neill/ in March 1948, Coward produced a number of receipts purporting to be receipts given by Shakleton to Coward for tobacco supplied by Shakleton to the Lifeguard Tobacco Co., and a letter purporting to be written by Shakleton to Coward on 19th September 1944 thanking Coward for instructions for direct packing to Lifeguard Tobacco Co. and referring to the method of payment by which the Lifeguard Tobacco Co. would pay Coward and Coward would hand the money on to Shakleton, the profit going to Shakleton and the defendant company making no profit out of the transaction. The receipts consist of a bundle of receipts described as official receipt Joe Shakleton, manufacturers' agent and distributor, Elizabeth Street, Brisbane, also at Sydney and Melbourne. They purport to be receipts of cash from the Lifeguard Tobacco Co. per Charles Coward. I have no doubt that they have all been fabricated by Coward. They all have N.S.W.

2nd duty stamps upon them. They commence on 1st April 1943 and end on 20th May 1947. The last receipt is for £2,000 cash so that Shakleton must still have been in business, apparently in Sydney, in the middle of 1947. The receipts are intended to tally with the payments made by the Lifeguard Tobacco Co. to the defendant company shown in the schedule to the letter of 12th November 1947, a copy of which, as I have already said, was found in Coward's flat. The first receipt dated 1st April 1943 is for £576.10. 6 and combines the two payments shown in the schedule of 7th April, 1943, for £360. 0. 0 and 20th September 1943 for £216.10. 6. It is difficult to see how in April 1943 Coward could have paid Shakleton for £216.10. 6 of tobacco which was only sent to Lifeguard Tobacco Co. five months later. Coward evidently read the 20th September 1943 as 20th April 1943. Further, an examination of the dealing, the subject of the receipt of 20th September 1943, shows that Coward supplied the Lifeguard Tobacco Co. with tobacco worth £285. 0. 0, and that the amount of £216.10. 6 was arrived at by deducting from £285. 0. 0 the sum of £68. 9. 6 for a purchase made and paid for by Lifeguard Tobacco Co. on behalf of Coward. Shakleton should therefore have received from Coward not £216.10. 6 but £285. 0. 0. For similar reasons Shakleton should have received from Coward not £591. 5. 0, the amount shown on the receipt of 20th November 1946, but an additional £66. 5. 0.

In the search of Coward's flat on 22nd July 1947 further Shakleton letters were found. The letters consist of (i) a letter from Shakleton to Coward dated 15th February 1943 written from Melbourne offering Coward tobacco supplies procured from United States and Australian canteens and Red Cross supplies which were unsaleable in canteens and other army and Red Cross centres, these tobaccos being mostly manufactured in Melbourne, Western Australia and Sydney, present price duty paid 21/- per pound done up in 5 and 10 lb. parcels; (ii) a letter from Shakleton written from

Sydney on the following day, address C/- R. J. M. Foord, 92 Pitt Street, Sydney, to the Secretary of the United Soldiers Sailors and Airmen's Families Association, offering the association similar supplies of tobacco at 21/-, 22/- and 23/- per pound and stating that Mr. Foord "whose office we are partly using at present has recommended us to write to you"; (iii) a reply dated 26th February 1943 from the association signed by Coward addressed to Shakleton C/- R. J. Foord, 92 Pitt Street, Sydney, stating that the association was a non-trading association and sending regards and thanks to Mr. Foord; (iv) a letter from Shakleton to Coward written in Brisbane on 18th March 1946 signed J. Ooze stating that "we are on the verge of closing our agency. I have been requested by Mr. Shakleton to offer you the balance of our tobacco holdings in Brisbane and Sydney" and giving details; (v) a letter from Shakleton to Coward dated 6th June 1946 written in Sydney thanking Coward for his promptness in winding up our remaining tobacco stocks ..... it has been one of my life's greatest pleasures to have known you Mr. Coward ..... Reg. Foord has paid me in final and I enclose receipt docket. I will try and see you in Brisbane before my departure"; (vi) a letter from Shakleton to Coward written from Sydney 3rd January 1947 C/- R. J. M. Foord, 92 Pitt Street, Sydney, stating "it seems I will be detained here for months yet owing to transport. I could leave by air, but I would rather wait for a ship and have a swell trip over ..... Reg. Foord has paid me the compliment of being a good go-getter and said I would do swell hereif I stayed, but nope I know I can do right fine back home just the same". The letterheads are remarkable for they describe Shakleton as a manufacturers agent carrying on business in Elizabeth Street, Brisbane, and also at Newtown, Sydney, and Fitzroy, Melbourne, but they give no street number in Elizabeth Street, and no address in Newtown or Fitzroy.

Coward told O'Neill that Shakleton shared an office in Brisbane in a lane opposite the Ulster Hotel (that is behind Weir's Hardware Store) in Elizabeth Street, but a determined

search failed to locate it, there was no building in the lane where he could have had an office but only an air raid shelter, and no one who carried on business in the vicinity had ever heard of him. He was not known in the office of Mr. Foord, a Sydney solicitor who died on 11th August 1947, although he was supposed to be sharing this office. The number of Mr. Foord's office should be 94 Pitt Street and not No. 92 and Nos. 92 and 94 are in different buildings. Truly Shakleton was a remarkable man. He appears to have arrived in Australia as a member of the United States Forces and to have deserted or been demobilised from such Forces soon after he arrived. Then he managed rapidly to work up a thriving business as a manufacturers agent in three States and to buy and sell tobacco freely in spite of all restrictions, without an office or a telephone, without obtaining any of the necessary licences, without paying any income tax, and without any publicity. Finally, like Blanchard, he vanished from Australia without obtaining a clearance certificate from the Income Tax Department. The evidence of Detective Rogers proves that all the Shakleton letters and receipts were written on the typewriters of the defendant company. At attempt was made at a late stage of the defendants' case in Coward's and Mrs. Richardson's evidence to explain this by saying that Shakleton used the typewriters of the defendant company in its office and that he took them away to be repaired. It may be that Shakleton did Coward a friendly turn by having the typewriters repaired in some American workshop and that on occasions he did use them in the company's office. But this is a quite inadequate explanation of letters and receipts being written on such typewriters in Melbourne and Sydney over a period of years. The letters of 18th March 1946 and 6th June 1946, which suggest that Coward was buying Shakleton's stocks on a winding up of his business are of course quite inconsistent with Coward's evidence that Shakleton was busy fulfilling the defendant company's orders over three pounds in weight. I am satisfied that all these letters and receipts were fabricated by Coward, and

that the whole story of Shakleton as a businessman is a wicked lie. It is difficult to determine which is the most remarkable feature of the defendants' case, the men who vanish , the use that is made of dead men's names, or the failure of a number of persons to enter the witness box who obviously could have corroborated Coward's evidence if it contained a scintilla of truth.

I shall proceed to discuss certain items in the particulars not admitted by the defendants: (1) Lifeguard Tobacco Ltd. £11,805. Of this sum cheques totalling £3,800 were paid into the current account of the trading company, £325 into the current account of Mrs. Coward, and the balance £7,680, as to one cheque of £500 was made payable to cash but was credited to the account of G. C.A. Bernays, and the rest made payable to one G. Ray and all cashed by Ray except three cheques, one of which was paid to W. Inglis & Son, another to Anthony Hordern & Sons, and another to R. W. Bowcock for the purchase of a yearling. Bernays, who is the managing director of Lifeguard Tobacco Ltd.,is an old friend of Coward's and they have had many transactions including not only dealings in tobacco but also transactions on the turf and the purchase of articles other than tobacco. With respect to this item Coward states in his affidavit that from 1940 to 1942 the defendant company sold a considerable quantity of its manufactured tobacco to the Lifeguard Tobacco Ltd., but that after 1942 the defendant company procured tobacco from Shakleton and Pooley, mainly from Shakleton, and that the full amount received from Lifeguard Tobacco Ltd. was handed to Shakleton or Pooley upon their fulfillment of orders from the Lifeguard Tobacco Ltd. without any profit to the defendant company. According to Coward the only sale of tobacco to the Lifeguard Tobacco Ltd. at a profit in the year of income was for £1,500 which Coward states was paid for the sale of tobacco manufactured by the defendant company, but it is probable that he is referring to the payment of £1,400 for the sale of leaf tobacco. Bernays gave evidence for the defendants. He said that the payments to the defendants for manufactured and

leaf tobacco in the year of income, apart from £1,500 at the most, were for all sorts of proprietary lines of tobacco manufactured by almost every company in Australia which Coward had managed to obtain for him in Brisbane, mainly from retail tobacconists, and for other goods including cigarette papers and blades for tobacco cutting machines. He said that Coward forwarded these goods to Sydney in their original containers, and that his company removed the tobacco from its containers and blended it with its own manufactured tobacco. After mentioning several of the leading Australian brands of pipe tobacco, cigarettes and cigars, he said it would probably take 10 minutes to a quarter of an hour to mention all the brands. According to Bernays, payment was made to Coward mostly in advance. A cheque for £1,000, £2,000 or £500, as the case might be, was forwarded to the defendant company or Coward with which he went out and acquired the goods. When Coward had acquired the requisite amount of goods they were railed or air freighted to Sydney, and there was a list in each carton or box of its contents and this was confirmed by letter from the defendant company. None of these lists or letters were produced. In the purchase journal of the Lifeguard Tobacco Ltd. the goods are entered as manufactured or leaf tobacco. According to Bernays, Coward was obliging him by sending out his staff to buy tobacco from retailers in Brisbane intended for distribution to the general public and forwarding it at cost price. According to Coward, Shakleton and Pooley were forwarding the tobacco and making a profit. Presumably Shakleton and Pooley sent the lists of articles and confirmatory letters with the consignments. I am unable to accept Bernays' evidence. He is now the chairman and was in the year of income a member of the Tobacco Manufacturers Advisory Committee. This Committee was set up under the National Security (Tobacco Rationing) Regulations. He said that its duties were to ascertain the supplies of leaf in the hands of all manufacturers in Australia and to ascertain their manufacturing capacity and to find out from time to time the requirements of

the armed forces, Red Cross, Comforts Fund and various other bodies which the government considered should receive preference such as munition canteens. Whilst a member of this committee he was, it seems to me, on his own admissions engaged in obtaining supplies of manufactured tobacco for his company intended for the canteens and the public in a manner incompatible with his public duties. But he excused himself by saying that he was only a member of the committee and not the chairman. He was obviously nervous in the witness box, as well he might be, for nearly all his evidence in chief was destroyed in cross examination. In such an atmosphere the only safe course is to rely on the documents, and I find that the whole sum of £11,805 was paid by the Lifeguard Tobacco Ltd. to the defendant company for the purchase of manufactured and leaf tobacco of the defendant company; (2) McWhirters Ltd. £13,467. I am satisfied from the evidence of H. G. Fielding, the managing director of this company, that the whole of this sum was paid to the defendant company for the purchase of tobacco in the ordinary course of business. A copy letter dated 29th May 1945 from Coward to McWhirters Ltd. suggesting that he could procure for this company 36,000 lbs. of re-treated tobacco at about 12/9d. to 12/10d. per lb. f.o.b. Brisbane at absolutely no profit to Coward (this being about the price McWhirters were paying the defendant company for its tobacco) was shown to the witness. This was done presumably on instructions from Coward that the defendant company was supplying McWhirters Ltd. at no profit. But the witness said that Coward was told that it was too big a quantity of tobacco for his company to consider and that Coward was assured that he would get the company's business in the form of manufactured tobacco which he was supplying to the company which witness described as a low grade coarse cut smoking mixture; (3) T.H.A. Pooley £1,860. I find that this item includes repayments of loans made to Pooley by Coward to the extent of £400 and that this item should be reduced to £1,460. In the year of income Pooley was carrying on the business of a tobacco jobber but has since

become a bankrupt. He said that he was able to purchase large supplies of surplus canteen tobacco which he described as second grade tobacco which it was always difficult to get the public to smoke. At Coward's request he used some of this tobacco to supply some of the orders for tobacco received by the defendant company from its customers. He said that he did not know whether any of these orders still existed but if they did they were in the possession of his trustee in bankruptcy. No such orders were ever produced. Payment was made by money being sent with the orders by the defendant company or by the orders being sent back to the defendant company and paid for in cash after the goods had been despatched. On several occasions orders were brought by Shakleton after Coward had asked Pooley whether he would supply Shakleton with tobacco, and Pooley had replied that he would do so provided Shakleton paid cash with the orders. The case for the defence is that orders were handed by Coward to Shakleton to supply at his own profit, but Pooley said that if Shakleton presented orders but no cash then Shakleton had to have a signature of some person authorised by the defendant company before he would supply the tobacco, and then strangely enough Pooley collected the money from the defendant company in cash. Shakleton's business with the Lifeguard Tobacco Ltd. and Pooley was strangely complicated. Coward had to collect the moneys from the Lifeguard Tobacco Ltd. on behalf of Shakleton, Pooley had to collect money from Coward owed to him by Shakleton, and Coward had apparently to reimburse himself by collecting from Shakleton or debiting Shakleton in some account. Pooley would not accept a cheque from anyone, not even from Coward, although the defendant company accepted cheques from Pooley. All Pooley's dealings had to be in cash. Pooley said that all his dealings with Coward and Shakleton went through his sales and would be recorded in his books in the possession of his trustee in bankruptcy. The books may not have been admissible in evidence if they had been produced, but they were not even produced. I am unable to accept this evidence. I can

see no reason why the defendant company should sell some of its available stocks of manufactured tobacco to Pooley and thereby leave itself so short of tobacco that it was unable to fulfill orders from its customers over three pounds in weight and had to hand these orders to Shakleton or Pooley to fulfill for their own profit.

The remaining item in the total of £57,941. 6. 2 with which I need deal is the sum of £14,371.10. 2 being the amount of cash deposited in the account of the trading company which the plaintiff alleges was paid for the purchase of tobacco from the defendant company. This figure was reached after an exhaustive examination of all the current accounts by O'Neill and Tobin, and after all transfers from one account to another and all payments which appeared not to be assessable income such as sundry turf club and betting wins and all other doubtful payments had been eliminated. I am satisfied that at least this sum was received in cash from sales of tobacco by the defendant company.

For these reasons I am satisfied that the sales and receipts from sales of the defendant company's tobacco in the year of income were as the plaintiff avers at least £57,941. 6. 2 less the sum of £400 - that is £57,541. 6. 2.

During the year the defendant company only paid Excise duty on 11,550 lbs. of leaf used in the manufacture of tobacco and this produced 12,021 lbs. of cut tobacco and 210 lbs. of plug tobacco. The question naturally arises where the defendant company obtained the quantity of tobacco necessary to supply its customers with over £57,000 worth of orders. The prices for the tobacco supplied by the defendant company varied considerably so that it is impossible to estimate how many pounds of tobacco were required for this purpose. At one stage Mr. Weston said that evidence would be given for the defendants that the sum of £6,781.16. 4 shown in the trading account as purchases would include tobacco purchased from other manufacturers. There are

vague suggestions to this effect in the evidence, but there is no such evidence which I can accept. And the defendants' case in its final form was that it only fulfilled those orders which it could fulfill with its own tobacco and handed the rest of the orders over to Shakleton and Pooley. The evidence of the purchasers is that the tobacco which they received was loose cut coarse tobacco of poor quality, and I am satisfied that they were all supplied with tobacco manufactured by the company from its own leaf. It is the duty of a taxpayer under section 161 to include in his return any deductions claimed by him. It is the duty of the Commissioner under section 166 from the returns and from any other information in his possession, or from any one or more of these sources, to make an assessment of the amount of taxable income of any taxpayer, and of the tax payable thereon. It is clear that O'Neill gave Coward every opportunity to increase the deductions claimed in the return and the same opportunity has existed during the hearing, but the defendants have not availed themselves of either opportunity. They prefer to sink or swim on the defence, the substance of which in its various embodiments is that the whole of the profitable trading has been included in the return. Accordingly neither the plaintiff nor the Court has any reliable information of any deductions that should be allowed in addition to those claimed in the return. On 17th February 1949 an assessor of the Income Tax Department on behalf of the plaintiff assessed the taxable income of the defendant company at £41,348. 0. 0 later and/the tax payable thereon at £12,404. 8. 0. In this assessment the deductions allowed are those claimed in the return, and the assessable income has been increased from £21. 1. 8 shown in the return by receipts from sales omitted from the return £41,320.15. 2 and interest from fixed deposits omitted from the return £6. 8. 0.

For the reasons already given I am of opinion that the assessable income omitted from the return should be reduced by at least £400. As the defendant has chosen not to give evidence in the matter, I am not really concerned to increase the deductions

claimed in the return. But it would seem that the defendant company must have required at least an extra 40,000 lbs. of manufactured tobacco to fulfill £57,541 of sales. The question naturally arises how the defendant company could have acquired this extra tobacco. There is no evidence that it was tobacco on which excise duty had been paid. The defendant company had sufficient leaf to manufacture the extra tobacco. Its leaf in store at the end of 1946 was supposed to be 314,592 lbs. In November 1946 the leaf store was moved to Meandah. In June 1947 the leaf in store was supposed to be 172,438 lbs. But there had been no weigh up of the leaf under Customs supervision for years. This marked drop in weight was explained by Coward by saying that about 84,000 lbs. of leaf had to be destroyed early in January 1947 at Doomben because it had become infested with maggots. Coward claimed that it was destroyed under Customs supervision but it is clear that no officers of the Customs witnessed its destruction. They had to accept his statement. There was also a loss in weight of 31,524 lbs. shown in the return during the transfer of the leaf from Brisbane to Meandah. Coward claimed that this was a loss in weight over a long period but this again rests on his word. A large part of the leaf claimed to have been destroyed or included in this loss of weight was probably used to manufacture tobacco outside the factory or possibly in the factory. Coward was playing for high stakes on the turf and in his business. He was prepared to perpetrate a gross fraud on the plaintiff and there is no reason to suppose that he was not also prepared to perpetrate an equally gross fraud on the excise authorities. I think that if I allow 2/- a lb. as the cost of 40,000 lbs. of manufactured tobacco in addition to the deductions claimed, I shall be making a generous allowance. I do this as of grace because as I have said any extra deductions should have been proved by the defendants. I do not believe that any goods other than tobacco were sold to the purchasers, and I am not prepared to allow any deduction on this account. I shall therefore reduce the

taxable income omitted from the return by £4,400 to £36,950 in round figures. The income tax assessed at 6/- in the pound on this sum is £11,071 so that in round figures at least £11,000 of tax would have been avoided if the defendant company's return had been accepted as correct.

I must now consider certain submissions of law made on behalf of the defendants. The first submission was that the plaintiff must prove the offences charged beyond reasonable doubt. Section 237 of the Act provides that taxation prosecutions in the High Court or the Supreme Court of a State may be commenced, prosecuted and proceeded with in accordance with any rules of practice established by the Court for Crown suits in revenue matters or in accordance with the usual practice and procedure of the Court in civil cases. Accordingly proceedings must for many purposes be considered as being in the nature of a civil action; Robertson, Civil proceedings by and against the Crown p. 174; A. G. v. Freer 11 Price 183 at p. 197; Jackson v. Butterworth 1946 V.L.R. 360; Commissioner of Taxation v. McStay 7 A.T.D. 527. The standard of proof is therefore the standard of proof required in civil cases. But offences under sections 230 and 231 are serious offences and the Court must examine the evidence with great care and caution before it is satisfied that they have been established; Briginshaw v. Briginshaw 60 C.L.R. 366. And further the same standard of proof must apply I think to a prosecution of a person under section 5 of the Crimes Act for aiding and abetting the commission of these offences. It may be that Briginshaw v. Briginshaw will have to be reconsidered on some future occasion by the Full Bench in the light of the recent decision of the Court of Appeal in Ginesi v. Ginesi 1948 P. 179, but I am of opinion that as a single judge I should follow Briginshaw v. Briginshaw. The discussion is however really academic because, if the offences have to be proved beyond all reasonable doubt, I am satisfied of the guilt of the defendants beyond all reasonable doubt.

The other submissions are that (1) the whole action is premature where there has been a return and no assessment on the return; (2) alternatively, in such a case, no part of the additional sum as distinct from the primary penalty can be ordered to be paid unless there has been an assessment; (3) the Court cannot make an assessment; and (4) in any event, the Court will not at this stage impose any additional penalty. In my opinion the action is not premature. The offence under section 230(1) is committed when the income is knowingly and wilfully under-stated in the return. In the present case this offence was committed on 7th July 1946. The offence under section 231(1) is committed when the wilful or fraudulent attempt is made to avoid taxation. In the present case this offence was also committed on 7th July 1946. The present action had to be commenced within six years of this date. Sections 230(2) and 231(2). Neither section provides expressly or by implication that there must be an assessment or notice of an assessment before the proceedings can be commenced. Section 251 provides that the adjudgment or payment of a penalty under the Act shall not relieve any person from liability to assessment and payment of any tax for which he would otherwise be liable. This section contemplates that a prosecution may be commenced before a taxpayer has received a notice of assessment. Proceedings under Part VII may often be necessary to place the Commissioner in a position to assess the taxable income of a taxpayer and the tax payable thereon. If the Commissioner makes an assessment and gives notice of the assessment to the taxpayer, section 177(1) provides that the notice of assessment shall be conclusive evidence (except in proceedings on appeal against the assessment) that the amount of the assessment is correct. This provision might place the Court in a real difficulty in determining what sum should be paid by way of penalty in addition to the primary sum until an appeal against the assessment had been disposed of. But the Court has a wide discretion with respect to the amount of this

additional sum, and if it was placed in any real difficulty by this artificial provision could postpone its judgment until the appeal against the assessment had been disposed of. But there has been no notice of assessment in the present case, so that I am free to ascertain the amount of tax attempted to be avoided from the evidence. There is, in my opinion, as I have already said in McStay's Case, only one penalty although two items are involved in its calculation and the Court must impose the whole penalty at the same time. In the present case I can see no reason why I should not deliver judgment at once, and adjudge the whole of the penalty. In view of the evidence that the defendants are attempting to denude themselves of their assets, it is imperative that I should do so.

Section 247 of the Income Tax Assessment Act prescribes the duties of the Court where a pecuniary penalty is adjudged to be paid by any convicted person. Fullagar J. discussed the meaning of this section in Jackson v. Gromann 1948 V.L.R. 408. I agree with him that the penalty to which the section refers comprises both the primary sum and the additional sum which the defendant is ordered to pay. I had already expressed the same opinion in McStay's Case. I also agree that once the Court has made an order under paragraph (c) it cannot make an order under paragraph(a). But I am not sure that I agree with His Honour's obiter dictum that if the power of committal under paragraph (a) is exercised and the defendant serves the statutory period in gaol without paying the penalty the ordinary civil processes of execution cannot be invoked and the judgment debt is in effect discharged. His Honour's approach to this question seems to have been influenced by the fact that at common law a judgment creditor had his choice between execution against the person of his debtor and execution against his property. But the judgment creditor in this case represents the Crown,and the judgment creates a debt to the Crown of record and payable instanter. The principle of the common law is that the Crown "who represents the public is entitled to levy for its debts by a united process against the body, goods, and lands of its debtor", The King v. Woolf

2 B. & Ald. 609: In re Pascoe 1944 1 Ch. 310. In the light of this principle it is difficult to see why the debt should be discharged otherwise than by payment. It seems to me that where any pecuniary penalty is adjudged to be paid by any convicted person, the Court must upon the conviction under paragraph (a) commit the offender to gaol until the penalty is paid, or alternatively under paragraph (c) exercise its powers of distress and execution for recovery of the penalty. If the offender is committed to gaol, the Court must under paragraph (b) release the offender upon his giving security for the payment of the penalty, which must mean upon his giving security to the satisfaction of the Court for the payment of the penalty. The security could of course be given at the moment of committal and the offender would not then be imprisoned at all. But I do not see why it should not be given after the offender has been imprisoned. The defendant is not sent to gaol as a direct punishment for having committed offences under Part VII of the Act. If he was, section 234(4)(b) would prevent the section applying to any of the averments. The direct punishment for the offence is the penalty which is imposed and the defendant is sent to gaol chiefly as a means of enforcing the penalty. Otherwise it is difficult to see why he should be entitled to be released upon payment. Accordingly so long as the defendant was imprisoned, the Court would be unlikely to authorise any other means of enforcement. Having committed the offender to gaol, it could no longer be required to make an order under paragraph (c) and would have no jurisdiction to do so. But section 247 does not expressly provide that imprisonment for the statutory period will release the debt, and as at present advised I am of opinion that it is not released by implication, and that the plaintiff could move the Court for leave to enter judgment for the amount still unpaid, and that this judgment could be enforced like any other judgment of the Court. The point is a difficult one, and it would assist if Parliament made its intention clear. It does not arise in

the present case because I do not think I should commit Coward to gaol in view of his precarious state of health. Otherwise I would do so on the plaintiff's application without hesitation. The offences of which I am asked to convict the offenders are separate offences so that legally I could fine both the defendant company and Coward under section 230(1) or 231(1) £500 and in addition £22,000. But I feel like Starke J. in Adams v. Cleeve supra. the injustice of this double penalty for what is in substance the same attempt to defraud the revenue. It is unfortunate that the Court cannot order one penalty to be paid by the defendants jointly and severally. I therefore propose to adjudge that the total penalty to be paid by each defendant be £10,000. I am prepared to convict the defendants of an offence either under section 230(1) or section 231(1) but I think that the proper course is to convict them of what appears to me to be the more serious offence, that is an offence under section 231(1). Accordingly I declare that the defendant company is a company on whose behalf Coward as a director wilfully and by fraud, art and contrivance attempted to avoid taxation within the meaning of section 231(1) of the Income Tax Assessment Act 1936/1946 and I convict the company of an offence under this section. I also declare that the defendant Coward is a person who aided, abetted, counselled and procured the commission of this offence by the company and that this constitutes an offence against a law of the Commonwealth, that is to say against the Income Tax Assessment Act 1936/1946, within the meaning of section 5 of the Crimes Act 1914/1941, and that Coward is therefore a person who shall be deemed to have committed an offence under section 231(1) of the Income Tax Assessment Act 1936/1946 and I convict him of an offence under this section. I order and adjudge that the defendant company pay as a penalty the sum of £500 and in addition the sum of £9,500 making a total penalty of £10,000. I order and adjudge that the defendant Coward pay

as a penalty the sum of £500 and in addition the sum of £9,500 making a total penalty of £10,000. I order that the plaintiff be at liberty to exercise for the enforcement and recovery of each of these penalties any power of distress or execution possessed by the Court for the enforcement and recovery of penalties or money adjudged to be paid in any other case. I order that the defendants pay the plaintiff's costs of the prosecution including any reserved costs. I give liberty to apply.