computation suggested, the amounts of the premiums that would be stated in the returns of the company are substantially the amounts the company would have to pay by way of re-insurance of the fire risk, which, if paid by the company would, under sec. 45, have to be deducted.

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THE YORKSHIRE FIRE AND LIFE INSURANCE CO. v. THE BRITISH AND FOREIGN MARINE INSURANCE CO. LTD.

Appeal allowed. Judgment appealed from discharged. Judgment for the plaintiff with costs. Respondent to pay costs of the appeal.

Solicitors, for appellant company, *Malleson, Stewart & Co.*, Melbourne.

Solicitors, for defendant company, *Moule, Hamilton, & Kiddle*, Melbourne.

B. L.

Roll (Vic) v sen 19 619

Appl Ross-Jones & Marinovich, Re; Ex parte Green (1984) 56 ALR 609

Rev Taxation, Deputy Commissioner of v Mooney (1907) 4 CLR 1439

[HIGH COURT OF AUSTRALIA.]

MOONEY . . . . . APPELLANT;
DEFENDANT,

AND

THE COMMISSIONERS OF TAXATION (NEW SOUTH WALES) . . . } . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Sept.* 7, 8, 11. *Dec.* 22.

Griffith C.J., Barton and O'Connor JJ.

Land and Income Tax Assessment Act 1895 (*N.S. W.*) (59 *Vict. No.* 15), *secs.* 15, 30, 39, 44, 67, 68—*Income—Profits arising from sale of mine—Persons obliged to furnish returns—Income not exceeding* £200 *a year—Default assessment—How far assessment conclusive—Appeal to Court of Review.*

The appellant in 1903 received £1,680 as part of the purchase money of a mine of which he was joint owner, and which had been sold in 1901 for a price payable by instalments. He also received during that year £50 admitted to be income. By the *Land and Income Tax Assessment Act* of 1895, sec. 27, the amount of taxable income for the year immediately preceding the year of assessment is to be taken as the basis of calculation of the amount on which the tax is payable in that year, and by sec. 68 "income" includes "profits"

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and "gains." The appellant did not furnish the return of income required by sec. 30 to be made by all persons "liable to taxation," and the Commissioners treated him as in default, and made an assessment under sec. 39, assessing his income for the year 1903 at £9,000, the whole amount of his share of the purchase money for the mine, and the tax at £225. The Commissioners then sued him for the amount of the tax so assessed. The appellant not having appealed from the assessment to the Court of Review in the manner prescribed by sec. 44, the Commissioners relied upon the assessment book as conclusive evidence of their claim, under sec. 67.

Held, (*per Griffith* C.J. and *Barton* J.; *O'Connor* J. *dissentiente*), that the proceeds of the sale of the mine were capital and not income, and, therefore, that the income of the appellant for 1903 did not exceed £200; and that, inasmuch as the only persons made liable to taxation by sec. 15 are persons whose incomes exceed that amount, the appellant was not bound to furnish a return under sec. 30, and was not in default within the meaning of sec. 39. The assessment by the Commissioners was therefore in excess of their jurisdiction, and invalid, and the appellant was not bound to appeal from it to the Court of Review, but was entitled to wait until sued for the tax, and dispute his liability in the action. The assessment is only conclusive as to matters within the jurisdiction of the Commissioners.

Allen v. *Sharp*, 2 Ex., 352, distinguished.

Per O'Connor J. The question whether the purchase money received by the appellant during 1903 was or was not income subject to taxation is immaterial. It would be impossible to effectively apply the provisions of the Act, unless it were construed as conferring upon the Commissioners, subject to appeal, jurisdiction to determine what income is chargeable with the tax, and, by necessary implication, the power to determine whether the income is above or below the amount exempt from taxation. All persons in receipt of income are subject to the jurisdiction of the Commissioners, and may be assessed in respect of that income, and are therefore "liable to taxation," and bound by sec. 30 to send in returns. The appellant was therefore in default, the assessment was valid, and, not being appealed against, was conclusive.

Decision of the Supreme Court: *Commissioners of Taxation* v. *Mooney*, (1905) 5 S.R. (N.S.W.), 244, reversed, and that of *Simpson* J. restored.

APPEAL from a decision of the Supreme Court of New South Wales.

The following statement of the facts is taken from the judgment of *Griffith* C.J.:—

"This was an action for the recovery of a sum of money assessed by the respondents the Commissioners of Taxation, for income tax claimed to be payable by the appellant in respect of income received by him in the year 1903. The declaration alleged that the defendant was liable to pay income tax for the year 1904 in respect

of his taxable income, then exceeding £200 per annum, arising from sources in New South Wales, and that thereupon the defendant was duly assessed for the said year in the sum of £225 for income tax, that due notice of the assessment was given to the defendant and that he failed to pay the amount, whereupon he became liable to a penalty of £22 10s., which, with the principal sum, the plaintiffs claimed. The defendant by his pleas denied that he was liable to pay income tax for the year 1904, that he had any taxable income exceeding £200, and that he had been duly assessed.

"By the *Land and Income Tax Assessment Act* of 1898, sec. 27, the amount of taxable income derived from all sources for the year immediately preceding the year of assessment is to be taken as the basis of calculation of the amount on which tax is payable for that year.

"At the trial the plaintiffs put in evidence an assessment, called a default assessment, made by them on the defendant, and thereupon closed their case. The defendant then offered evidence to the effect that in the year 1903 his total income did not amount to £200, but that in that year he had received a sum of £1680 as part of the purchase money of a gold mine of which he was a joint owner, and which had been sold in 1901 for a price payable by instalments. The learned Judge before whom the case was tried, without expressing any opinion on the merits, directed a verdict for the defendant, reserving leave to the plaintiffs to move to enter a verdict for them. A rule for this purpose was afterwards made absolute by the Full Court, and the appeal is from this decision."

The material parts of the various sections referred to are set out in the judgments.

Blacket, for the appellant. The *Land and Income Tax Assessment Act* (59 Vict. No. 15) applies only to persons who have an income exceeding £200 per annum: sec. 15. Sec. 30 provides that returns shall be sent in by all persons "liable to taxation," *i.e.*, persons having a taxable income under sec. 15, and sub-sec. (viii.) does not impose any obligation beyond that already imposed by the first sub-section. The Commissioners are not entitled to treat the appellant as in default and make an assessment under

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sec. 39, because he was not bound to send in a return. Default is a condition precedent to the exercise of the power conferred by that section. The Supreme Court treated the question whether the appellant had income or taxable income as immaterial, on the ground that he ought to have appealed to the Court of Review, under sec. 44, and that, not having done so, he was precluded from denying his liability when sued in a Court of law: *Commissioners of Taxation* v. *Mooney* (1). But sec. 44 applies only to "taxpayers" who are defined by sec. 68 to be persons "chargeable with land or income tax." It has been held that incomes under £200 are not taxable incomes under this Act: *Commissioners of Taxation* v. *Burns, Philp & Co.* (2). The *Gazette* tendered at the trial, containing a notice that persons in business need not send in a return unless their income was more than £160, could not extend the operation of the Act to persons outside its scope, and could not by implication compel persons to send in a return who were not compellable to do so under the Act. The production of the assessment book at the trial was not conclusive evidence against the appellant under sec. 67, because he was not within the purview of the Act. He was not a person in receipt of income exceeding £200 a year. The £9,000 which is stated in the assessment as the income of the appellant, is not income but capital. Income is not specifically defined in the Act, though sec. 68 provides that it shall include certain kinds of revenue. In this case the capital of the partners was their mine; if they had retained it they would have been liable to taxation upon the profits derived from it, but, having sold it, they have changed the form of their capital, and are only taxable in respect of the income arising from its investment. The mere receipt of money does not make it income, for, if that were so, money borrowed on mortgage of the mine would come under that head. In England it was held that income tax was not payable on such part of an annuity as represented capital, the annuity being an instalment of the purchase money for a railway, together with interest on the amount of purchase money unpaid: *Secretary of State in Council of India* v. *Scoble* (3). The only "income" which the appellant was proved to have re-

(1) (1905) 5 S.R. (N.S.W.), 244. (2) (1901) 1 S.R. (N.S.W.), 1.
(3) (1903) A.C., 299.

ceived was £50, and therefore he was not a person "liable to taxation," and was not bound to send in a return, or to take any steps to question his liability in the Court of Review. He is entitled to rest upon his common law right, and dispute his liability to taxation when an attempt is made to enforce it against him: *Weaver* v. *Price* (1). That right can only be taken away by clear words: *Cooper* v. *Commissioners of Taxation* (2). There was never any valid assessment. *Newcastle and Hunter River Steamship Co.* v. *Walker* (3), is not in point, because the appellant in this case never was a taxpayer, whereas in that case the plaintiffs who sued to recover income tax paid were admittedly taxpayers, and had sent in a return; neither is *Knight* v. *Municipality of Rockdale* (4), in point, for the appellant there was virtually appealing from a decision of the justices, on a matter within their jurisdiction, and as to which their decision was final. On matters outside their jurisdiction their decision is open to question in the Supreme Court: *Borough of Balmain* v. *Mort's Dock and Engineering Co.* (5); *Borough of Randwick* v. *Australian Cities Investment Corporation Ltd.* (6); *Webb* v. *England* (7); *Ex parte Hobbs* (8). In *Toronto Railway Co.* v. *Toronto Corporation* (9), there was a right of appeal to a Court of Review on the question of liability, and it was held that where the property taxed was one of the exceptions, and therefore not within the operation of the Act, the assessment was a nullity *ab initio*, and the taxpayer was not precluded even by the decision of the Court of Review from disputing his liability in the Supreme Court. Sec. 52, sub-sec. (1), implies that a person sued for the tax may question his liability, for it contemplates the possibility of a "defence on the merits."

[He referred also to 43 & 44 Vict. c. 19 sec. 111, and *In re Leveson-Gower's Settled Estate* (10)].

C. B. Stephen and *J. L. Campbell*, for the respondents. The appellant was in receipt of income exceeding £200 per annum.

(1) 3 B. & Ad., 409.
(2) 19 N.S.W. L.R., Eq., 1.
(3) (1901) 1 S.R. (N.S.W.) 281, at p. 287.
(4) 20 N.S.W. L.R. Eq., 32.
(5) (1902) 2 S.R. (N.S.W.), 16.
(6) 12 N.S.W. L.R., 299.
(7) 23 V.L.R., 260.
(8) 3 N.S.W. W.N., 134.
(9) (1904) A.C., 809.
(10) (1905) 2 Ch., 95.

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The whole of his receipts for the year in question was profit within the meaning of sec. 68, and therefore it was "income" within the meaning of sec. 15. Profits arising from a rise in the value of investments were held liable to taxation as income or annual profits: *Northern Assurance Co.* v. (*Russell*) *Inland Revenue* (1); *Scottish Investment Trust Co.* v. (*Forbes*) *Inland Revenue* (2); *Robinson on Income Tax*, pp. 190, 202. When a person buys property and sells it at a profit, the gain is income within the meaning of the Act. The appellant and his partners by their exertions succeeded in developing the mine, and so made it more valuable than when they entered upon it. If the profit resulting from their labour were not treated as income, they might go on doing the same thing all their lives, living on the profits of their labour without paying any income tax. The gain made by a miner on his operations for the year has been always assumed to be income: *Commissioners of Taxation* v. *Broken Hill Proprietary Co.* (3). At any rate the Commissioners are entitled to assess him in respect of it, and the question whether it has been rightly treated as income is one for decision by the Court of Review. That Court has exclusive jurisdiction to deal with all questions that can arise under the Act. Where a Statute gives a new right, and establishes a special Court to deal with questions arising with regard to that right, no other Court can be resorted to for that purpose.

[GRIFFITH C.J.—I do not see how that principle applies to the case. The common law right of an individual to dispute any liability that it is sought to impose upon him can only be taken away by clear words. If the assessment was void, the creation of a Court of Appeal would not make it valid or compel him to appeal to that Court. The person charged may wait until he is sued and then dispute his liability.]

The appellant was in receipt of taxable income, and was therefore a person "liable to taxation" within the meaning of the Act, and subject to all the obligations imposed by the Act on such persons. "Taxpayer" in sec. 44 does not only mean persons who eventually turn out to be liable to pay a certain amount of tax.

(1) 26 Sc. L.R., 330; 2 Tax. Cas., 551. (2) 31 Sc. L.R., 219; 3 Tax. Cas., 231.
(3) 19 N.S.W. L.R., 294.

Every person within the jurisdiction of the legislature is *primâ facie* liable to pay a tax, but he may rebut this presumption by evidence. The Commissioners are entitled to treat him as a taxpayer until the contrary is shown. The section includes persons who are not actually liable to pay a tax, because it gives the taxpayer the right to question his *liability to taxation* in the Court of Review. That Court has therefore jurisdiction to decide whether a person who appeals to it is liable or not. Such a construction of the word "taxpayer" in sec. 44, as would restrict it to persons actually liable to pay something by way of tax, is unreasonable and contradictory. If a man receives money he is *primâ facie* in receipt of income. The Commissioners cannot know whether his receipts are income until the question has been tried, and the only way in which that can be settled is by obtaining a return from him, or, in default, by treating him as a person in receipt of income, leaving him to question his liability wholly or in part by an appeal to the Court of Review. Sec. 30, sub-sec. (viii.) prevents him from claiming exemption for sending in a return on the ground that his income does not exceed £200. "Income" in sec. 15 must mean net income, that is, the amount ascertained by making all proper deductions and allowances under secs. 27 and 28. The determination of those matters is for the Commissioners, and, without material supplied by the person whose income is in question, this could not be carried out. On the appellant's construction the working of the Act would be impracticable. The words "liable to taxation" in sec. 16 are used to include all persons having an income which may or may not, after deductions have been made, be of a taxable amount. The appellant therefore was within the jurisdiction of the Commissioners, and not having sent in a return, the Commissioners were justified in assessing him as being in default; sec. 39. He could have appealed from their assessment to the Court of Review, even upon the ground that he was not liable to pay the tax, and, not having done so, he cannot now question the assessment or dispute his liability. The Commissioners by virtue of sec. 32 have absolute power to enter the name of any person in the assessment book, and assess him at their discretion. By secs. 47 and 49 the assessment is valid, and sec. 67 makes it con-

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clusive evidence against him for all purposes except in the Court of Review. A default assessment is on the same footing in this respect as an ordinary assessment. The decision of the Commissioners in matters within their jurisdiction is final unless appealed from in the appointed manner. [They referred to *Allen* v. *Sharp* (1); *Simpkin* v. *Robinson* (2); *In re Calvert* (3); *Antill* v. *Commissioners of Taxation* (4); *Redpath* v. *Allan* (5); *R.* v. *General Commissioners of Taxes for Clerkenwell* (6); *Marshall* v. *Pitman* (7).]

Blacket, in reply. The contention of the respondents practically amounts to this, that every person must send in a return, that all money received must be treated as income, and that the Court of Review, by erroneously deciding that a matter is within its jurisdiction, can give itself jurisdiction, and its decision cannot be questioned. Clearly the last position cannot be supported. But, if the jurisdiction of the Court of Review is not limited to cases in which there is an income exceeding £200, there is no alternative but to make it unlimited. Moreover, it is clear from sec. 52 that some defences are open to a person sued for income tax, whereas upon the respondents' contention no defence at all could be set up, even that the tax had been paid.

[GRIFFITH C.J. referred to *R.* v. *Commissioners for Special Purposes of Income Tax* (8)].

Cur. adv. vult.

The following judgments were read—

GRIFFITH C.J. [Having stated the facts as already set out, His Honor proceeded:] The term "income" as used in the Land and Income Tax Assessment Acts includes "profits gains rent interest salaries wages allowances premiums stipends charges and annuities" (sec. 68). It was contended for the plaintiffs that part at least of the proceeds of the sale of the gold mine must be taken to have represented "profits" within the meaning of

(1) 2 Exch., 352.
(2) 45 L.T.R., 221.
(3) (1899) 2 Q.B., 145.
(4) (1902) 2 S.R. (N.S.W.), 225.
(5) L.R. 4 P.C., 511.
(6) (1901) 2 K.B., 879.
(7) 9 Bing., 595.
(8) 21 Q.B.D., 313.

the Act, and that the defendant had therefore failed to show that he had not received an income exceeding £200 in 1903. Reliance was placed on two cases decided by the Court of Session of Scotland: *Northern Assurance Co.* v. (*Russell*) *Inland Revenue* (1), and *Scottish Investment Trust Co.* v. (*Forbes*) *Inland Revenue* (2), in which it was held that under the circumstances of those cases profits made by the appellant companies on the sale of shares which they held as investments were profits within the meaning of the English *Income Tax Act*. In the former case, however, it appeared that the profits had been treated by the company as available for the purpose of dividends, and in the latter case it was one of the objects of the company to buy and sell shares. In my opinion these cases afford no assistance for the decision of the question before us. The proceeds of property sold are *primâ facie* capital and not income, and I do not think that the term "profits" in sec. 68 of the Statute of New South Wales includes the difference between the cost price of property and the price at which it is afterwards sold, unless the buying and selling of such property is the ordinary business of the person alleged to be a taxpayer. It cannot, in my opinion, be successfully argued that because mining is a speculative enterprise the profit made upon the sale of a mine is necessarily such profits as are to be deemed income. In my judgment, therefore, the appellant had not, upon the evidence, an income exceeding £200 in the year 1903.

It is, however, contended by the respondents that all assessments of the Commissioners are conclusive, unless appealed from, so that, when they have made an assessment of income, it is immaterial whether the alleged taxpayer had or had not, in fact, any taxable income. An authority to adjudge a man liable to pay a sum of money which he does not owe must obviously be derived from some Statute, and one would expect to find such a power conferred in clear and unmistakeable terms. It is necessary, therefore, to examine the Statute in question with some care.

The tax is imposed by sec. 15, which provides that "Subject to the provisions of this Act, and regulations hereunder, there shall

(1) 26 Sc. L.R., 330; 2 Tax. Cases, 551.
(2) 31 Sc. L.R., 219; 3 Tax. Cases, 231.

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be charged, levied, collected, and paid to the Commissioners for the use of Her Majesty, an Income Tax at such a rate per pound as Parliament shall from time to time declare and enact in respect of the annual amount of all income exceeding two hundred pounds per annum" arising from certain specified sources. Sec. 16 provides that, except in the case of a company, "the person liable to taxation in respect of an income exceeding £200" shall be entitled to a deduction of £200 in the assessment of his income for the purposes of taxation. Sec. 17 provides that the incomes of certain corporations and persons, and incomes derived from certain sources, shall be exempt from taxation. Sec. 27 contains directions for "ascertaining the sum, hereinafter termed the 'taxable amount,' on which (subject to the deductions hereinafter mentioned) income tax is payable;" and sec. 28 entitles the taxpayer to certain deductions from the amount so ascertained. It is important to remember that the tax is imposed only in respect of incomes exceeding £200 per annum. The English *Income Tax Act* (5 & 6 Vict. c. 35) first (sec. 1) imposes a tax in respect of all incomes arising from the specified sources irrespective of amount, and then provides (sec. 163) that any person who proves to the Commissioners of Taxes that his aggregate annual income is less than £150 shall be exempted from the duties imposed by the Act. The area of taxation under that Act is the whole income of every person who falls within the provisions of the Act, and the burden of proof that any such person is entitled to exemption lies upon him. By the New South Wales Statute, on the other hand, the area of taxation is limited to incomes exceeding £200 a year, but a person whose income exceeds that amount may, nevertheless, claim exemption from taxation by showing that, after making the permitted deductions from the taxable amount, his net income does not exceed £200. The burden of proof of this right to exemption is upon him, as under the English Act. The provisions of the two Acts are therefore analogous so far as regards the imposition of a liability in respect of certain incomes, and the conferring of a right of exemption, if claimed, in certain cases, but differ in this, that under the English Act there is, *primâ facie*, a liability in respect of all income derived from certain sources, while in the

New South Wales Act the liability is only in respect of income exceeding £200 derived from certain sources.

With respect to the land tax the scheme of the English *Income Tax Act* is exactly followed. Sec. 10 provides that there shall be levied and paid to the Commissioners for the use of His Majesty a land tax at such rate as Parliament shall from time to time declare and enact per pound sterling of the assessed value of all lands situate in New South Wales and not included in the exemptions specified in sec. 11. Then follow directions for levying the tax, which allow a deduction of £240 from the assessed value. The area of taxation is, therefore, all land in New South Wales not specifically exempted from taxation.

The actual income of the appellant in the present case, then, not being within the taxable area, I proceed to examine the arguments by which the claim of the respondents to tax him is sought to be sustained.

Sec. 30 provides that the Commissioners shall in the prescribed manner give thirty days' notice of the time and place at which "all persons liable to taxation . . . under the provisions of the Act" shall furnish returns for the purpose of the assessment of land and income tax. Pausing here, it is plain that every land owner is bound to send in a return as a person "liable to taxation." But *primâ facie* a person whose income does not exceed £200 is not bound to do so under the words which I have quoted, since he is not within the area of taxation. It is contended, however, for the respondents that the words "persons liable to taxation" include every person who has received a sum of money as to which it might be alleged, with or without foundation, that it is income, *e.g.*, a legacy. This is not the natural meaning of the words, having regard to sec. 15, which imposes the liability, especially when the distinction between the scheme of sec. 15 and that of sec. 10 is remembered. Other alternative constructions suggested were that the words "persons liable to taxation" include all persons subject to the jurisdiction of the legislature of New South Wales, or all persons in receipt of any income, however small. Assuming any of these constructions to be possible, it appears to me that they are excluded by the succeeding words of sec. 30, in which the legislature has provided its own dictionary. That section goes on

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to say that the notice shall state the place at which the prescribed forms of return may be applied for and obtained, and that "it shall be the duty of all such persons, and of all persons required by this Act or any regulation hereunder to furnish any such return to apply for the prescribed forms." The legislature, therefore, recognizes the existence of two classes of persons; (1) "all such persons," *i.e.* "persons liable to taxation under the provisions of the Act," and (2) all persons, *i.e.* other persons, required by the Act or regulations to furnish returns. Sec. 57 authorizes the Governor to make such regulations either general or particular as may be necessary or desirable to carry out the objects and purposes of the Act. I cannot doubt, reading this section with the words just quoted from sec. 30, that the Governor might make regulations requiring persons in receipt of money from any source to furnish returns for the purpose of ascertaining whether the money so received was income, or whether it exceeded £200 in the year, and was so liable to income tax. No such regulations, however, have been made. But it is contended that there are other provisions in the Act which show that the words "persons liable to taxation" must receive a more extended meaning. The same sec. 30 contains various subsidiary provisions as to returns. Subsec. (viii.) provides that: "No person shall be released from the obligations and penalties by this Act or the regulations imposed in respect to the making of the returns herein mentioned by reason only that such person may be within the exemptions as to value of lands or amount of income taxable hereinbefore declared." It is contended that this provision shows that every person in receipt of income is intended to be included in the words "persons liable to taxation." It is to be observed, in the first place, that the provision is negative in form, and does not purport to impose an obligation not otherwise imposed. It assumes, on the contrary, that the persons spoken of are *primâ facie* subject to the obligation, and negatives an exception which might be set up, the suggested exception being that a person is not obliged to make a return if he is "within the exemptions as to the value of land or amount of income taxable." Every exception, indeed, assumes that the case excepted is *primâ facie* within the class. What then is the meaning of the term "exemptions?"

It must be remembered that the exemptions referred to are "as to value or amount," and not exemptions on other grounds. In the case of land the reference is plainly to sec. 10, which provides that land tax shall be payable by every owner of land after deducting £240 from the assessed value. This may be, not inaptly, described as "an exemption as to value," and it results from the deduction made under sec. 10. With respect to incomes the term "exempt" is used as an adjective in sec. 17, which provides that income derived from certain sources shall be "exempt" from income tax, and the word "exemptions" is used in sec. 27 (vi.) with reference to sec. 17. As already shown, the word "exemptions" in the phrase now under consideration cannot refer to sec. 17, which deals not with amount but with sources. But it obviously includes the deductions made under sec. 16. Does it then refer to anything else? As already pointed out, the term "exemptions" assumes the existence of something from which the exemption is to be made, but neither that term nor the term "deduction" is apt as referring to a case which does not fall within some category with respect to which there may be an exemption or deduction. Still, the context may show that the word "exemptions" must have a larger meaning. The phrase "amount of income taxable" is not used elsewhere in the Act, although other somewhat similar phrases are used in secs. 27, 28, and 68. Sec. 27, as already pointed out, refers to what is called the taxable amount, and the first direction is that the "amount of taxable income" from all sources for the preceding year shall be the basis of calculation. "Taxable income" does not include income from the sources mentioned in sec. 17. The fourth direction uses the words "taxable amount of any income." Sec. 28 provides that "from the taxable amount so ascertained" every taxpayer shall be entitled to deductions in respect of certain specified out-goings. Sec. 68 defines the term "income chargeable" as meaning "the taxable amount less the deductions allowed" in the Act.

In my judgment the word "exemptions" in sec. 30 (viii.) must receive the same meaning with respect to the words "amount of income taxable" as with respect to the words "value of land," *i.e.* exemption from liability by reason of permitted deductions, £200

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in the one case and £240 in the other; and I cannot see any reason for holding it to include a case which does not fall within the original area of taxation. Thus construed, sub-sec. (viii.) provides that no person shall be relieved from the obligation to make a return as to income merely because the provisions of the Act for deductions from the total income would reduce his chargeable income below £200, and so exempt him altogether under sec. 16. That is to say, every person who has a gross income exceeding £200 is bound to furnish a return notwithstanding those provisions. To support the extended construction of the words "all persons liable to taxation" contended for by the respondents, it is necessary, first, to read negative words as extending an obligation imposed by positive words; then to read the single expression "within the exemptions" as bearing two distinct meanings in the same phrase, that is to say, with respect to land tax as meaning "entitled to the benefit of the statutory deduction from the total value," and with respect to income tax as meaning not only "within the benefit of the statutory deduction from the taxable amount of income," but also "within the benefit of non-liability to taxation by reason of insufficiency of total income." If the legislature meant to include all persons in receipt of income in the obligation to make returns nothing would have been easier than to say so. I cannot see my way to do such violence to the language of the Statute, or to hold that the term "all persons liable to taxation" is synonymous either with "all persons in receipt of income," or with "all persons alleged to be in receipt of income," or with "all persons subject to the jurisdiction of the legislature," unless, indeed, no other construction is open which would make the other provisions of the Statute intelligible. But, in my opinion, the intention of the legislature was that persons who were not in receipt of a gross income exceeding £200 a year—a fact easily ascertained just as ownership of land can be ascertained—should not be in any way concerned with its provisions. If a person with an income exceeding that amount failed in the obligation imposed upon him by the Statute, provisions, considered by the legislature to be ample, were made for punishing him both by fine and penalty, and, if these provisions were found inadequate, authority was

given to the Governor in Council to make regulations which would have the effect of compelling returns from other persons. I think, therefore, that the argument drawn from sub-sec. (viii.) cannot prevail over the strong reasons for adopting a contrary conclusion.

Sec. 31 provides that from the returns furnished to the Commissioners "or from any other available sources" the Commissioners shall cause separate assessment books to be prepared for land tax and income tax. It was suggested that this provision empowers the Commissioners to assess any person to income tax who has not sent in a return, whether he was bound by law to do so or not. In my opinion sec. 31 is merely subsidiary to sec. 30, and was not intended to confer an additional and paramount authority, which would in effect supersede all the absolute directions of sec. 30. Such a construction is also, in my opinion, inconsistent with sec. 39, under which the assessment relied upon in the present case was made, and to which I will now refer. That section provides that "if any person makes default in furnishing any return of lands or income, or if the Commissioners are not satisfied with the return made by any person, they may make an assessment of the value or amount on which, in their judgment, tax ought to be charged, and the tax shall be payable accordingly. Now the term "default" implies that something that ought to have been done has been left undone. Where there is no duty there can be no default. Sec. 60 imposes a penalty upon any person who "fails or neglects to furnish any return within the prescribed time." If this section could be read as applying to the whole community, so that every person who does not make a return becomes liable to the penalty, sec. 39 might perhaps be read in the same way. But I cannot see any valid reason for accepting this construction. If the views which I have expressed are sound, the occasion for the exercise of the powers conferred by sec. 39 had never arisen with respect to the appellant, and the default assessment was made without jurisdiction.

The respondents met this difficulty by the argument that by sec. 44 provision is made for appeals to the Court of Review from assessments of the Commissioners; that if the appellant had

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appealed to that Court he would have been entitled (if his view of the facts is correct) to have the assessment set aside on the ground that he was not liable to pay the tax; and that, therefore, the jurisdiction of the Commissioners cannot be impeached in any other way. This argument was accepted by the learned Judges in the Full Court. They referred to the well known rule that when a new right is created by Statute, and a special mode of enforcing it is provided by the same Statute, that mode must in general be taken to be exclusive. But, with deference, I am unable to see how this rule applies to the case where a tribunal of limited jurisdiction exceeds its jurisdiction. The circumstance that an appeal lies from a tribunal of limited jurisdiction is quite irrelevant to the question whether a particular case is within its jurisdiction. The fact that an appellate tribunal has jurisdiction to reverse the decision of a tribunal of first instance on the ground of excess of jurisdiction does not in general affect the right of persons complaining of the excess to ask for a prohibition, or to set up the invalidity of the judgment in any other appropriate proceeding. In the case of *Rex* v. *General Commissioners of Taxes for Clerkenwell* (1), this was taken for granted by the Court of Appeal and by the very learned counsel by whom the case was argued.

It is said, however, that if the appellant had appealed to the Court of Review, as he might have done, that Court would have had jurisdiction to inquire whether he had any taxable income, and that if the Court had (though erroneously) decided that he had a taxable income, its decision would have been binding on him (unless appealed from to the Supreme Court on case stated), and would have established conclusively as between him and the Commissioners that he was a person liable to taxation, and consequently a person who had made default under sec. 39. Possibly this result would have followed if the appellant had invoked the jurisdiction of the Court of Review. On that point I express no opinion. But it does not follow that a person against whom an order is made by a tribunal which has no jurisdiction, and from which an appeal lies, is bound to appeal from the order, and cannot take his objection by way of prohibition or otherwise.

(1) (1901) 2 K.B., 879.

It is also contended, if I rightly appreciate the argument, that since the Court of Review had jurisdiction to inquire whether the alleged taxpayer was or was not liable to taxation, it must be inferred that the Commissioners, who are the tribunal of first instance, must have a correlative and co-extensive jurisdiction to determine that he was so liable, whether his income in fact exceeds £200 or not. If there were any ambiguity in the language of the Statute by which their jurisdiction is conferred, it is possible that this argument might be called in aid. But when a provision in a Statute is free from ambiguity it does not seem to be consistent with recognized canons of construction to call in aid some other provision for the purpose of first suggesting and then resolving a doubt. Moreover in the present case there is no need to invoke any such assistance. For, if a regulation were made to the effect already suggested, it would be necessary that the Court of Review should have such a power, which may well be considered to have been conferred in view of that contingency. And, further, it might well happen that a person with an income exceeding £200, and therefore within the words "persons liable to taxation" as used in sec. 30, might be able to show that by reason of exemptions and deductions disallowed by the Commissioners he was not liable to pay any tax. For all these reasons I am of opinion that no extension of the powers of the Commissioners can be inferred from the powers of the Court of Review. The condition precedent to the jurisdiction of the Commissioners to make a default assessment is that the person in question should have "made default." If he has not done so, their jurisdiction never arises, and anything done in their asserted exercise of it is absolutely inoperative.

It is said further that a person cannot be in a better position by failing to take advantage of his right to appeal. Whether he would or not be in a better position, depends upon whether he would by appealing have submitted to the final decision of the Court of Review the question of fact on which the jurisdiction of the Commissioners to make the default assessment depended. But, if he would have been bound by their decision, it does not follow that he was under any obligation to abandon his right to object to the jurisdiction of the Commissioners in any other way.

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Such an obligation, which would oust the jurisdiction of the Supreme Court to keep the exercise of the powers of the Commissioners within due bounds, must be imposed by the legislature, and cannot be lightly inferred from ambiguous language.

We were referred to the case of *Allen* v. *Sharp* (1), which, it was contended, was conclusive to show that the Commissioners had jurisdiction in the present case. The first observation that occurs on that case is that it was a decision upon the construction of a particular Statute, and is no guide to the construction of another Statute, unless the provisions are substantially identical so far as regards the *ratio decidendi*. A difficulty often arises in determining to what extent a tribunal of limited jurisdiction has authority to determine the existence of the facts upon the existence of which its own jurisdiction depends. This was the difficulty in *Allen* v. *Sharp* (1), as it is in the present case. In *R.* v. *Commissioners for Special Purposes of the Income Tax* (2), Lord *Esher* M.R., dealing with this point, said: "When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none."

(1) 2 Ex., 352.

(2) 21 Q.B.D., 313, at p. 319.

Allen v. *Sharp* (1), was an action of replevin for the recovery of goods and chattels taken by the defendant under a warrant of distress issued by the Commissioners of Taxes to enforce payment of duties for which the plaintiff had been assessed by the assessors for his parish under the Act 43 Geo. III. c. 99. The Court treated the case as if it had been an action of trespass for taking goods without legal justification. The main question in the case was whether under the Act of 43 Geo. III. c. 99, the jurisdiction of the parish assessors was limited to assessing the taxes payable by persons who in fact and law were liable to pay them, or whether it also extended to determining whether persons alleged to be liable were in fact and law so liable. The Court of Exchequer, on consideration of the provisions of the Statute, took the latter view. In the course of the argument of *Sir F. Thesiger* for the plaintiff, *Parke* B. is reported to have said (2):—"Wherever a Statute gives to certain persons the power of adjudicating upon a particular matter, their decision excludes all further inquiry. Here it is as if the Statute had said, that the assessor shall decide whether or no the party is a horse-dealer; and the assessor having done so, his decision is final and conclusive, unless appealed against in the manner pointed out by the Act: *Brittain* v. *Kinnard* (3); *Reg.* v. *Bolton* (4)." In delivering judgment he said (5):—"On a careful consideration of these Acts of Parliament, they seem to me to differ from the Statute of Elizabeth, as to poor-rate (42 Eliz. c. 2), and that the legislature intended that the assessment of the assessors appointed by the Commissioners should be final and conclusive, unless appealed from, in the first place, to the Commissioners, and further, if necessary, to the Judges of the superior Courts;" and again, "Without referring to the Statutes, I should say, *à priori*, that the object of the legislature was to make the decision of the assessor final and binding, unless disputed in the manner pointed out. On reading the Statutes, I come to the same conclusion. By the 9th section of the 43 Geo. III. c. 99, the Commissioners are to meet and appoint assessors, who are to bring in their certificates of assessments verified on oath; and the assessors are

(1) 2 Ex., 352.
(2) 2 Ex. 352, at p. 360.
(3) 1 Bro. & B., 432.
(4) 1 Q.B., 66.
(5) 2 Ex. 352, at p. 363.

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thereby 'required, with all care and diligence, to charge and assess themselves and all other persons chargeable with the said duties.' If the language had been 'to charge and assess all such persons as they honestly and *bonâ fide*, after due care and diligence, believed to be chargeable,' their assessment would, beyond all question, be final. But though the Statute does not, in express terms, say that the assessment shall be conclusive, yet I find, on referring to the 30th section of the 43 Geo. III. c. 161, which enables the assessors to assess persons who neglect or refuse to deliver lists, it is enacted that every such assessment 'shall be final and conclusive upon the person thereby charged, who shall not be at liberty to appeal therefrom, unless such person shall prove that he or she was not at his or her dwelling-house or place of abode at the time of delivery of such notice, nor between that day and the time limited for delivering such lists aforesaid to the assessor, nor unless such person shall allege and prove some other excuse for not having delivered his or her list, as the Commissioners shall, in their judgment, think reasonable and sufficient.' In that special case, the legislature has expressly made the assessment final and conclusive; and unless the party can bring himself within the exception, he has no opportunity of appealing. That being so, if a party, who has an opportunity of appealing, does not avail himself of it, it would be reading the Acts very inconsistently to say that he is not equally bound by the assessment. Let us then look to the power of appeal, which possibly might be framed in such a way as to show that the legislature did not mean it to be conclusive. This provision is contained in the 24th sec. of the 43 Geo. III. c. 99, which enacts, 'that, if any person shall think himself overcharged or overrated by any assessment or surcharge,' &c., 'it shall be lawful for him to appeal to the Commissioners,' &c. It is argued, that the wording of this clause shows that the legislature meant it to apply only to persons liable to be rated, but rated for too much. Admitting it to be so, and that the word 'overrated' has that meaning, then this plaintiff is in the predicament of a person 'overrated,' since he is clearly liable to part of the rate; for it is stated by the avowry, that he was liable to 'other duties amounting to £3 8s. 9d., in which he was duly assessed,' and which he paid." The learned Baron

then distinguished the case of *Weaver* v. *Price* (1), in which it was held that under the *Poor Rate Act*, 42 Eliz. c. 2, which enabled overseers to rate the inhabitants of a parish, justices had no jurisdiction to grant a warrant for enforcing a rate assessed on a party who had no land in the parish; and added (2): "But the case of *Earl of Rudnor* v. *Reeve* (3), is in point. There the Court said, 'that it had been determined by all the Judges of England, that, when a Statute provides that the judgment of Commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way.' In like manner, if a Statute gives magistrates jurisdiction to decide on a certain matter, and they, having the facts before them, do decide it, the propriety of their judgment cannot be inquired into, although they may have come to an erroneous conclusion."

Rolfe, B. said (4): "But our decision is not that an assessment made without jurisdiction will bind. For instance, if an assessor were to assess a person living altogether out of his district, or dealing in something in respect of which the Act did not give any authority to assess him, the assessment might be questioned in an action. By the 9th section of the 43 Geo. III. c. 99, the assessors are to make their assessments 'according to the provisions of the laws then in force.' But reading that and the other Statutes *in pari materiâ*, I cannot feel a doubt but that the legislature meant to make the decision of the assessor as to matters within his jurisdiction, whether acquiesced in or appealed from and confirmed, absolute and conclusive."

The decision of the Court turned, therefore, entirely upon the particular language of the Statute there in question, which is very different from that now before us for interpretation. I cannot read this judgment as laying down the doctrine that the jurisdiction of a new tribunal from which an appeal to another tribunal is given can only be questioned by appeal to that second tribunal. It is also to be remembered that there is a well known distinction between the case of an action for trespass brought against an executive officer for executing the warrant of a

(1) 3 B. & Ad., 409.
(2) 2 Ex., 352, at p. 366.
(3) 2 Bos. & P., 391.
(4) 2 Ex., 352, at p. 366.

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tribunal as to a matter *primâ facie* within its jurisdiction and the case of a similar action against the person by whom, or the party at whose instance, the warrant is issued. In the former case the action will not lie. In the latter it will, if the matter were not in fact and law within the jurisdiction of the tribunal. (See *Andrews* v. *Marris* (1)). In my judgment, therefore, the case of *Allen* v. *Sharp* (2), does not govern the present case, which depends upon a Statute framed on quite different lines. And, in any case, I do not think it is an authority for the proposition that parties who have acted without jurisdiction can themselves as plaintiffs invoke the authority of a Court of justice to enforce their unauthorized order on the ground that the defendant might have appealed from it to another tribunal.

If the contention of the plaintiffs, founded on the right of appeal to the Court of Review, is sound, a default assessment for land tax upon a man who had no land in New South Wales would be equally binding. This is directly contrary to the authority of *Weaver* v. *Price* (3). In each case the argument must be founded upon the words "persons liable to taxation," which, in one case, certainly mean "persons who are owners of land subject to taxation." Why, in the other case, should it include persons who have received money which is not liable to taxation, either because it is not income at all or because it is not within the area of taxation?

A final argument was founded on sec. 67 of the Act, which provides that the production of an assessment book or of a document under the hand of the Commissioners purporting to be an extract from it "shall be conclusive evidence of the making of the assessment and . . . that the amount and all the particulars of such assessment appearing in such book or document are absolutely correct." In my opinion it is impossible to read this section as applying to a case where an assessment is made without jurisdiction, without either rejecting the express provisions and conditions of secs. 30 and 39, or holding that it applies to assessments to land tax of persons who are not owners of land as well as to assessments to income tax of persons who

(1) 1 Q.B., 3. (2) 2 Ex., 352. (3) 3 B. & Ad., 409.

are not liable to pay it because their incomes do not fall within the area of taxation. I think the appeal should be allowed.

BARTON J. I am in entire agreement with the Chief Justice in the conclusions at which he has arrived, and the reasons he has given are so elaborate and so complete that they might well stand by themselves. I shall therefore make no attempt to deal exhaustively with the questions raised. To my mind the case largely turns on the 15th section of the Assessment Act. In a Statute of which the main characteristic is certainly not clearness of expression, we find the remarkably clear pronouncement that the tax, the rate of which per pound is to be declared in a separate enactment, "shall be charged, levied, collected and paid . . . in respect of the annual amount of all incomes exceeding £200 per annum." No one doubts that the incomes here meant are gross incomes. To my mind nothing can be plainer than that this section places incomes, which in the gross fall below £200, outside the pale of the taxation authorized. As this is the statutory authority for the tax, the amount only of which is to be declared by separate enactment, nothing but the most cogent expressions in other parts of the Act could have the effect of controlling its clear terms. We do not diminish their plainness by pointing to other provisions more or less obscure. To take away from its effect, "you must have" as *Jessel* M.R. said in *Bently* v. *Rotherham Board of Health* (1), "a context even more plain, or at least as plain—it comes to the same thing—as the words to be controlled." Applying Lord *Wensleydale's* golden rule, I find first a clear exclusion of all gross incomes under £200, and in the sense, justly attributed to the rule by *Willes* J. in *Christophersen* v. *Lotinga* (2), I fail to find in the expressions having that effect anything "which would be so absurd with reference to the other words of the Statute as to amount to a repugnance." I see no absurdity, no manifest injustice, in the words, which, occurring where we find them, are the dominant command of the Statute as to income tax, and practically the only authority for it. But if I suspected any such absurdity or injustice, I should consider, with *Jervis* C.J. in *Abley* v. *Dale* (3),

(1) 4 Ch. D., 588, at p. 592. (2) 33 L.J., C.P., 121, at p. 123.
(3) 20 L.J., C.P., 233, at p. 235.

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that "We assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see or fancy we see an absurdity or manifest injustice, from an adherence to their literal meaning." I know of no judicial utterance which puts a position like the present better than that of *Jessel* M.R. in *Nuth* v. *Tamplin* (1), where he says that "Any one who contends that a section of an Act of Parliament is not to be read literally must be able to show one of two things, either that there is some other section which cuts down its meaning, or else that, the section itself is repugnant to the general purview of the Act." The next section, 16, seems to make it pretty clear that it is in respect of an income exceeding in the gross £200 a year that a person is *liable* to taxation.

If, then, the appellant had not, in the year in respect of which the tax is claimed, an income exceeding £200 a year, was he called on by law to furnish any return? If he was, then, as he did not make any return, he made default within the meaning of sec. 39, and the Commissioners have some foundation for the argument that, even if he had not an income exceeding £200 they could assess the "amount on which, in their judgment, the tax ought to be charged," and make him pay according to that assessment. But I think it clear that, before he could be held in default, the Commissioners must establish that he was under a duty to make a return, and this I am of opinion they have failed to do, and therefore their assessment of the appellant was not justified. For sec. 30 provides that the Commissioners shall give notice of the time and place at which all persons "liable to taxation . . . under the provisions of this Act shall furnish returns" for assessment purposes; and the section then enacts that "it shall be the duty of all *such* persons, and of all persons required by this Act, or any regulation thereunder, to furnish any such returns," to apply for the returns, and having filled them up, to sign and deliver them in the proper quarter.

Now, if I am right in holding that incomes not exceeding £200 are not within the taxing provision and that the appellant, if he had not such an income, was not a person "liable to taxation," he was not under a duty to make a return unless he came within

(1) 8 Q.B.D., 247, at p. 253.

the second class of persons described in sec. 30, namely, "persons required by this Act or any regulation thereunder to furnish any such returns." The Act is, I think, destitute of any provision which would impose this duty on the appellant unless his income exceeds £200. It is admitted that there is no regulation imposing such a duty. I am of opinion, therefore, that the Commissioners cannot rely on their assessment under sec. 39, as there was no duty to make a return, and consequently no default; and that such assessment was made without jurisdiction. The argument based on sub-sec. (iv.) of sec. 30 may be briefly noticed. "Any person" there obviously means any person of the classes previously enumerated, namely, "persons liable to taxation under the provisions of the Act," and "persons required by the Act or any regulation thereunder to furnish any such returns." The mere use of the words "any person" in such a connection can scarcely be made the foundation of a serious contention that it was intended, framed as it is and occurring where it is found, to impose on the whole population the duty of making these returns. Similarly, failure or neglect to furnish any return within the prescribed time (sec. 60, sub-sec. 1), has relation to returns required by the Act or regulations. Probably the object of sub-sec. (iv.) of sec. 30 is to obtain the making of returns on behalf of persons and companies having no representative here with positive authority to make the returns in their representative capacity.

Now had the appellant "an income exceeding £200 per annum?" All that I have said falls to the ground if he had. The Commissioners assessed his income at £9000. His evidence is that his income (proper) for 1903, the basic year, was under £50. But in that year he received £1680 as "final part" of his one-third share of £27,000, the purchase money of a mine which he and certain co-owners had sold, and the payments for which were spread over some years. His share of the purchase money, he said, was his whole capital. His evidence is not challenged.

By the interpretation section, (sec. 68), "income" includes (*inter alia*) profits and gains, and it was contended for the Commissioners that the sums received on the sale of an interest in a mine must be held to come under one or both of these heads. For the reasons given by the Chief Justice I do not think the two Scotch cases

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cited by Mr. Stephen support that contention in respect of this appeal. The moneys received by the appellant (apart from his income proper of under £50) cannot be held to be profits or gains as included in the meaning of an annual income. The appellant does not appear to have been carrying on the buying and selling of mines as a business. This was a case of three men taking up land for mining, developing their mine by their own labour, and then accepting a good price for that which had gained value from their labour. So far as we know it was an isolated transaction, and the price was not profit as generally known, but capital value.

With reference to the decision in *Allen* v. *Sharp* (1), so strongly pressed on us, I agree in thinking that it does not apply to the present case. It seems to me to fall within the second branch of Lord *Esher's* rule in *The Queen* v. *The Commissioners for Special Purposes of the Income Tax* (2), as an instance in which the legislature "intrusts the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists, as well as the jurisdiction, on finding that it does exist, to proceed further or do something more." Much light is thrown on the judgment by the observations of *Parke* B., interposed during argument at p. 360 of the report, in the passage which my learned brother has cited. The first branch of the rule, however, is important to the present case. Parliament, his Lordship observes, "may in effect say that, if a certain state of facts exists and is shewn to the tribunal or body" established by Statute, "before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise." That is what I conceive the legislature has said in this Assessment Act. The jurisdiction of the Commissioners depends on a state of facts which in this case does not exist.

Finally, it is argued that, as the appellant could have appealed to the Court of Review under sec. 44 instead of merely treating the assessment as a nullity, that is the only way in which the jurisdiction of the Commissioners could be tested. Assuming that an appeal lay to the Court of Review on the question of jurisdiction, it does not follow that the existence of such a

(1) 2 Ex., 352.

(2) 21 Q.B.D., 313, at p. 319.

recourse deprives the Supreme Court of power to say whether the Commissioners have acted within their jurisdiction. If that were so, a prohibition could not be directed from the Supreme Court to the Commissioners. It may be that, if Mr. Mooney had appealed to the Court of Review on the question of jurisdiction, he would have been concluded by the decision of that tribunal. But that does not show that he was bound to go to them, and that he was deprived of his normal right to contest the demand of the Commissioners by awaiting their resort to the Supreme Court and there establishing their want of jurisdiction to make it.

On the whole case, then, I come to the conclusion that the appellant was not liable to income tax, having no taxable income; and that he was not duly assessed; and that the judgment of the Full Court should be reversed and the verdict for the defendant, now the appellant, formally entered at the trial by G. B. *Simpson* J., should stand.

O'Connor J. I regret that I am unable to concur in the judgment of the majority of the Court. This was an action by the Commissioners of Taxation to recover from the defendant a certain sum in respect of income tax for the year 1904. Under the *Land and Income Tax Assessment Act* the assessment for 1904 is based upon the income received in 1903. In 1903 the defendant was in the receipt of £50 admitted to be income. He also received during that year £1,680 odd being the final instalment of his share of the purchase money of a mine sold by him and his partners in 1902. The defendant sent in no return of his income to the Commissioners, and they then made what has been described as a default assessment under sec. 39 of the Act, assessing him on an income of £9,000, the total amount of his share of the purchase money which on the information at their disposal they assessed as his income for 1903. The defendant having failed to pay income tax on that assessment, the action was brought. At the trial the plaintiffs relied upon the assessment as being conclusive evidence of their claim. The defendant proved the facts I have stated. In the view I take of the case it is unnecessary for me to express any opinion on the question

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whether the defendant's receipts from the sale of the gold mine were income subject to taxation, nor need I say more about the trial than this—that apart from the assessment there was no evidence to go to the jury in support of the plaintiffs' claim. If the assessment was valid it was undoubtedly conclusive against the defendant by virtue of sec. 67. To constitute a valid assessment under sec. 39 there must have been default on the part of the defendant. There could be no default unless he was a person bound under sec. 30 to send in a return to the Commissioners for purposes of assessment. The whole argument as to defendant's liability therefore turns upon the proper answer to be given to the question, was, or was not the defendant a person bound to send in a return under sec. 30? That is the section which empowers the Commissioners to obtain information for purposes of assessment, and directs that returns are to be sent in by "all persons liable to taxation." The defendant contends that he is not "a person liable to taxation," and states his argument as follows:—

The Commissioners have jurisdiction to assess only those incomes which sec. 15 authorizes to be taxed, and no person is bound to send in a return unless he is in receipt of an income which can be legally taxed under that section. Sec. 15 enacts that the tax shall be charged on all incomes exceeding two hundred pounds, and no income can be taxed, assessed or in any way come under the jurisdiction of the Commissioners if it is in fact under two hundred pounds. His income, being in fact under two hundred pounds, was not liable to be taxed, and he was therefore not in default within the meaning of sec. 39 in failing to send in a return in respect of it. This argument rests, as it appears to me, upon a misapprehension of the effect of sec. 15 and of the underlying principles of the Act in regard to levying assessing and collecting the tax. In order to properly interpret sec. 15 it will be necessary to consider it in relation to several other sections and to the general scheme of assessment which the Act has provided.

Income tax in New South Wales becomes payable by virtue of two Statutes, which must be read together. The *Land and Income Tax Assessment Act* of 1895 which contains the machinery

for assessing and collecting the tax, and the *Income Tax Act* of the same year which fixes the rate of the tax. The latter Act provides in sec. 1 that there shall be "annually levied and paid, under the provisions of the *Land and Income Tax Assessment Act* 1895, and in the manner therein prescribed an Income Tax of sixpence in the pound on the amount of *all incomes chargeable thereunder*." The *Land and Income Tax Assessment Act* in sec. 68 defines "income chargeable" as "the taxable amount less the deductions allowed under this Act." The meaning of "taxable amount" is elucidated by sec. 27 as follows:—"For the purpose of ascertaining the sum, hereinafter termed the 'taxable amount,' on which (subject to the deductions hereinafter mentioned) income tax is payable, the following directions and provisions shall be observed and carried out." After that come directions for the basis of assessment, two definitions of "taxable amount" in special cases, and then the following general provision in sub-sec. (vi.):—"In all other cases the taxable amount shall be the total amount of taxable income arising or accruing to any person from all sources except to the extent of the exemptions provided by section seventeen." Sec. 17 contains the list of incomes which on various grounds of public policy are altogether exempt from income tax, as for instance the revenues of Municipal Corporations and the funds and incomes of Registered Friendly Societies. Before we can arrive at the amount of income upon which sec. 15 charges the tax we must deduct from the total amount of the income which is liable to be taxed the deductions authorized by sec. 28 in accordance with the method prescribed by that section. These deductions are, speaking generally, such as would be necessarily made on ordinary business principles to arrive at nett income—but in many cases it is clear that they cannot be made without the intervention of the Commissioners. For example, in the case of a business where machinery or utensils is employed, the deductions for diminished value of machinery or utensils by wear and tear during the year is to be such as the Commissioners may think just and reasonable. By sub-sec. 1, losses, outgoings and expenses incurred in the production of income can be deducted only if actually incurred in New South Wales. But by sec. 5 the Commissioners may, where

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it seems fair, allow such losses outgoings and expenses to be deducted even if incurred outside New South Wales. Again, under sec. 29 certain deductions are forbidden, amongst them deductions for debts owed to the taxpayer, but by sub-sec. (ix.) of that section the deductions may be allowed in cases where the debts are proved to the satisfaction of the Commissioners to be bad, or doubtful, and in the latter case the doubtful debts can only be allowed at the value estimated by the Commissioners. All these deductions may no doubt be claimed in the returns where the taxpayer sends in a return, but it is quite clear that they cannot be allowed in reduction of the amount of income to be taxed until the Commissioners have adjudicated upon them in the course of an assessment.

Until the Commissioners have so adjudicated, the portion of income upon which the tax is to be charged cannot be ascertained. There is nothing to show that the Act intended the words "income chargeable" to have a different meaning in the cases where these special deductions were applicable than in other cases. On the contrary, it is plain that the "income chargeable" is to be ascertained by one uniform system in all cases—that is by the system which allows deductions only upon assessment—and declares the income chargeable to be that portion of it which is left after the deduction has been allowed. As further showing that "income chargeable" represents the result of assessment by the Commissioners, it is provided by sub-sec. (iii.) of sec. 31 that the assessment book in respect of income tax shall be so prepared as to show the gross and taxable amounts of the income of any taxpayer, the "income chargeable," and the amount of tax to be paid by each taxpayer. The introductory words of sec. 15 "subject to the provisions of this Act" govern the whole section, and I can see no way of giving full effect to those words, and to the scheme of assessment for ascertaining the amount of income to be taxed, unless by interpreting the section as imposing the tax only upon that portion of each income adjudged by the Commissioners to be "chargeable." It is thus for the Commissioners, subject to appeal, and not for the taxpayer or a jury, to determine what portion of income is chargeable with the tax, and that necessarily involves the deter-

mination of the question whether the income is above or below the amount exempt from taxation. It being, therefore, the duty of the Commissioners to determine in the first instance as to every income, whether it is within or without the taxable value, their jurisdiction must extend to every income described in sec. 15—whatever its amount. That jurisdiction must necessarily be implied if reasonable effect is to be given to the sections I have referred to. If the defendant's contention were to prevail, no steps could be taken by the Commissioners in the assessment of an income unless they were prepared to establish the fact that the portion of income chargeable under the Act exceeded £200. But, as I have pointed out, no portion of an income can be made chargeable until the Commissioners have determined by assessment what portion shall be chargeable. Again, if the defendant's contention is right the amount of income chargeable in each case where the jurisdiction of the Commissioners was disputed would be for a jury to determine. That amount could not be arrived at without putting into operation the provisions of secs. 28 and 29 as to deductions—but those provisions are absolutely inapplicable to the ascertainment of the amount chargeable by any tribunal other than the Commissioners. It is needless to multiply instances of the impossibility of applying the provisions of the Act if the jurisdiction of the Commissioners, even as to obtaining information under sec. 30, depended upon the question of fact, whether the gross income in each case did or did not exceed £200, and if the decision of that question was left in the first instance in the hands of the taxpayer himself, or when disputed by the Commissioners was left to be determined by a jury.

In the interpretation of the Act which I have adopted, the Commissioners may inquire into and assess every income accruing to any person in New South Wales from any source of earnings or profit in New South Wales, because in regard to every such income they have jurisdiction to determine, subject to appeal, the question what amount, if any, is "chargeable" under sec. 15. It follows that any person in receipt of an income which may be assessed by them, subject to appeal, as an income liable to taxation is a "person liable to taxation" within the meaning of sec. 30,

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and therefore under an obligation to send in a return for purposes of assessment. So far I have shown that the defendant was bound to send in a return under sec. 30, because he was in receipt of an income which the Commissioners had power, subject to appeal, to assess as chargeable with income tax, and that he was therefore "a person liable to taxation" within the meaning of that section. But there is another although a narrower ground resting on the provisions of sec. 30 alone upon which the defendant's liability to make the return may be just as clearly established. The central feature of the system of assessment under the Act is the preparation and maintenance of the assessment books for land tax and for income tax. They are the records of the assessment, with which the Court of Appeal deals, and if unaltered on appeal, they are the record of the taxpayer's liability. By sec. 31 they must be prepared so as to show in regard to each taxpayer the gross and taxable amount of his income, the "income chargeable," and the amount of the tax to be paid. The Commissioners are directed to prepare the books containing such particulars from the returns provided to them, or from any other available source. Sec. 30 enables the Commissioners under penalty of fine to compel the sending in of the returns by taxpayers, and by its several sub-sections gives extensive power of further inquiry and examination into the truth and accuracy of the returns forwarded. Indeed, the main source of the information from which the assessment books are prepared must be the information which each taxpayer is compelled to furnish about his own land and his own income under this section. If this source of information were not generally available it is difficult to see how the assessment books could be prepared. The working, therefore, of the whole system of assessment depends very materially upon the power of the Commissioners to demand and enforce the supply by each taxpayer of the information as to his land or his income which is peculiarly within his own knowledge. The defendant, however, contends that he is not liable to send in a return of income because his income for the year in question was in fact under £200. If the Act has left that contention open to him the defendant must have the benefit of it, even though such a construction might render sec. 30 to a large extent ineffective. But the Act, so far from leaving such a contention open, has by

sub-sec. (viii.) of that section provided for exactly such a case in the following words: "No person shall be released from the obligations and penalties by this Act or the regulations imposed in respect to the making of the returns herein mentioned by reason only that such person may be within the exemptions as to value of lands or amount of income taxable hereinbefore declared." There is only one exemption as to value of lands to be found in the Act, that is in sec. 10; which, although it does not use the word "exemption," in effect, exempts from taxation all lands the unimproved value of which is under £240. Also, there is only one exemption as to amount of income taxable to be found in the Act —that is the implied exemption from taxation of all incomes under £200—in other words the exemption upon which the defendant relies. It may be admitted for the purposes of interpreting sub-sec. (viii.) that the Commissioners have no power to assess an income as over £200 which is in fact under £200, that the decision of the Court of Review on the assessment is not conclusive as to fact or law, and may be reviewed by any Court in which an action for the amount of tax is brought—all that may be admitted, and yet the obligation to furnish information required in the return as the material for the assessment is not affected. It is true that the words are negative—they do not direct taxpayers whose incomes are within the exemption as to value to send in a return, but, where a taxpayer's only reason for failing to send in a return is that his income is under the amount exempted, they declare that that reason shall not exempt him from the obligation to send in a return of his income or relieve him from penalties for failing in that obligation. The defendant admits an income of £50 for the year in question—an income clearly within the section in all other respects, but he contends that his other receipts in that year were not income, and therefore his income was £50 only and below the exemption. That was his only reason for failing to send in his return. I see no way of giving effect to the words of sub-sec. (viii.) except by holding that that is no valid reason for failing to send in his return, and that, having so failed, he was a person making default in furnishing a return of income under sec. 39. That section provides that where such default is made the Commissioners may "make an assessment of the . . .

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amount on which, in their judgment, tax ought to be charged, and the tax shall be payable accordingly." A default assessment was in due form made under that section. The defendant had due notice of it. He did not appeal to the Court of Review—the assessment became complete, and after due notice the tax became payable. Under the circumstances of this case it was not open to the defendant to contest his liability. The assessment book became by virtue of sec. 67 conclusive evidence against him as to the making of the assessment, the amount of it, and the sum due to the Commissioners in respect to the tax. For these reasons I am of opinion that the decision of the Supreme Court was right, and that the appeal should be dismissed.

Appeal allowed. Order appealed from discharged with costs. Rule nisi discharged with costs. Respondents to pay the costs of the appeal.

Solicitors, for the appellants, *Pigott & Stinson.*

Solicitor, for the respondents, *The Crown Solicitor of New South Wales.*

C. A. W.