[HIGH COURT OF AUSTRALIA.]

ERNEST HENRY ADAMS . . . . APPELLANT,

AND

THE COMMISSIONERS OF TAXATION . RESPONDENTS;

AND

THE COMMISSIONERS OF TAXATION . APPELLANTS,

AND

ERNEST HENRY ADAMS . . . . RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 13, 14, 15, 21.

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

Land and Income Tax Assessment Act 1895 (*N.S.W.*) (59 *Vict. No.* 15), *secs.* 15, 17, 28—*Land and Income Tax* (*Declaratory*) *Act* 1898 (*N.S.W.*) (*No.* 37 *of* 1908)—*Land and Income Tax* (*Amendment*) *Act* 1904 (*N.S.W.*) (*No.* 17 *of* 1904), *sec.* 3 (2)—*Local Government Act* 1906 (*N.S.W.*) (*No.* 56 *of* 1906), *sec.* 150—*Income tax—Income from colliery—Ownership or use of land—Business or trade—Land subject to income tax—Taxable income for year preceding year of assessment to be taxable amount for year of assessment.*

The appellant was the public officer of owners of land upon which they carried on coal mining operations, and their income during the years 1906 and 1907 was derived from the working of their coal mines and from the sale of the coal.

Held, that the appellants' income was derived from the ownership or use of land within the meaning of sec. 17 (vii.) (viii.) of the *Land and Income Tax Assessment Act* 1895, and that the appellants in their assessment of their income for the year 1907 were not entitled to the deductions allowed to persons deriving their income from a business under sec. 28 (vi.) of that Act.

Per Griffith C.J.—A trade is not a business within the meaning of sec. 28 if all the income is derived from the ownership or use of land.

The Act 3 Ed. VII., No. 17, *Land and Income Tax (Amendment) Act* 1904, provided (sec. 3 (2)), that in assessing the income tax for the year 1905 or any subsequent year the amount of taxable income for the year immediately preceding the year of assessment should be the taxable amount for the year of assessment.

In 1906 income derived from land subject to land tax was not liable to income tax. In that year the land from which appellant's income was derived was subject to land tax.

Held, by *Griffith* C.J. and *O'Connor* J. (*Isaacs* J. dissenting), that the taxable amount in respect of which the appellants' income tax for 1907 should be assessed was the amount of their taxable income in 1906, and that as the appellants' land was subject to land tax in 1906, no income tax was payable by the appellants in 1907.

Held, by *Isaacs* J., that the word "taxable" in the expression "taxable income" in sec. 3 (2) of the *Land and Income Tax (Amendment) Act* 1904 means "taxable according to the law in force in the year of assessment," and not "taxable according to the law in force in the preceding year."

Decisions of the Supreme Court, *Seaham Colliery Co.* v. *Commissioners of Taxation*, 9 S.R., 782; 26 W.N., 181, and *Commissioners of Taxation* v. *Seaham Colliery Co.*, 9 S.R., 766, reversed.

APPEALS from decisions of the Supreme Court upon the hearing of special cases stated by the Court of Review.

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The case stated by the learned Judge of the Court of Review was as follows:—

1. The Seaham Colliery Company during the years 1906 and 1907 were owners of certain land upon which they carried on coal mining operations and other operations incidental thereto.

2. The appellant is the public officer of the said company.

3. During the year 1906 the said company derived the whole of its income from the use of the said land in the said coal mining operations.

4. Prior to 1st January 1907 the said land was subject to land tax under Parts II. and III. of the *Land and Income Tax Assessment Act* 1895 (59 Vict. No. 15) and the Acts amending the same, and such land tax was duly paid thereon.

5. From 1st January 1907 the said land was included within a shire, and shire rates became payable by the said company in

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respect thereof under the *Local Government Act* 1906; and the operation of the enactments mentioned in Schedule III. of the said Act was suspended from that date.

6. During the year 1909 the Commissioners of Taxation assessed the taxable income of the said company for the purposes of income tax for the year 1907 at the amount of income earned by the said company during the year 1906 from the use of the said land in coal mining operations as aforesaid, and claimed income tax for the year 1907 from the said company in respect of the said income.

7. The appellant contended that, as the said land was during 1906 subject to land tax, the income derived by the said company from the use thereof during that year was exempt from income tax for the year 1907, and appealed from the said assessment of the Court of Review.

8. Sitting as such Court of Review I held that the said company was not entitled to the exemptions claimed.

The question for the determination of the Supreme Court is whether in assessing the amount of taxable income of the said company for the year 1907, the Commissioners are entitled to include the income derived by the company during 1906 from the use of land in coal mining, which land during the latter year was subject to land tax under Parts II. and III. of the Principal Act.

The Supreme Court answered this question in the affirmative, and dismissed the appeal.

The company appealed from this decision upon the grounds:—

1. That the Supreme Court were in error in holding that the income derived by the company during the year 1906 from the use of land subject to land tax under the *Land and Income Tax Assessment Act* 1895 could be included in the taxable amount of income of the company for the year 1907.

2. That the Supreme Court were in error in holding that the suspension of the operation of the provisions and sections mentioned in Schedule III. to the *Local Government Act* 1906 from 1st January 1907, in the shire in which the land of the company was situated, could be taken into account in calculating the amount of taxable income of the said company for the year 1906

within the meaning of sec. 3 of the *Land and Income Tax (Amendment) Act* 1904.

3. That the said land having been during the year 1906 subject to land tax under Parts II. and III. of the *Land and Income Tax Assessment Act* 1895, the income derived by the company from its use during that year was by virtue of the provisions of secs. 15, 17 and 27 of that Act exempt from income tax, and the suspension from 1st January 1907 of the operation of the provisions and sections mentioned in Schedule III. to the *Local Government Act* 1906 in the said shire did not take away that exemption.

4. That on the true construction of sec. 3 of the *Land and Income Tax (Amendment) Act* 1904 the amount of taxable income of the company for the year 1907 was the amount of income earned by the said company from all sources during the year 1906 subject to the exemptions and deductions allowed by the Principal Act of 1895, and the suspension of the operation of the provisions and sections mentioned in Schedule III. to the *Local Government Act* 1906 in the said shire from 1st January 1907 did not affect the computation of the amount of such taxable income nor the said exemptions and deductions.

The material facts and sections of the Act referred to are stated in the judgment of *Griffith* C.J.

Wise K.C., and *C. A. White*, for the appellant. The question is whether the Commissioners are entitled, in assessing the taxable amount of income for 1907, to include income derived from land used for coal mining in 1906, and then subject to land tax. "Income chargeable," in sec. 68 of 59 Vict. No. 15, means the taxable amount less the deductions allowed under the Act. The company's income during 1906 was derived directly from the use of land subject to land tax, and was therefore exempt under sec. 17 (viii). "Taxable income" in sec. 27 (1.) means income taxable under sec. 15. On the proper construction of sec. 3 (2) of 1904 (No. 17), which has been substituted for the last-mentioned sub-section, the company had no income taxable for income tax that could be assessed for 1907. Taxable income in that section has the same meaning as taxable income under 59 Vict. No. 15

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and 59 Vict. No. 17. From 1st January 1907 the land in question was included in a shire and came within the provisions of sec. 150 of the *Local Government Act* 1906. The suspension of enactments under that section did not destroy the exemptions to which the appellant's right had accrued under 59 Vict. No. 15. The taxable amount for 1907 must be ascertained by the law in force in 1906. The decision of the Supreme Court proceeds on the assumption that the suspension under the *Local Government Act* 1906 of the provisions mentioned in the Schedule operated upon income earned during 1906. [They referred also to *Taxation Amending Act* (No. 31 of 1905), sec. 2, and *Interpretation Act* (No. 4 of 1897), sec. 8.]

Knox K.C. and *Brissenden*, for the respondents. The appellant's income is not derived from the ownership, use or cultivation of land within sec. 17 of 59 Vict. No. 15. The appellant's business is the extracting, selling and shipping of coal. The income derived from the ownership of land would be rents, from the cultivation, receipts from the sale of crops, and from the use, income derived from pastoral pursuits. "Arising or accruing" in sec. 15 (iv.) of 59 Vict. No. 15 must be read with sec. 17 (vii.) and (viii.). When the occupation of the land is merely incidental to the business carried on, the income derived is not income "directly accruing": *Commissioner of Taxes* v. *Kauri Timber Co.* (1); *Re Dodds*, cited in *D'Arcy Irvine, Land and Income Tax Law in N.S.W.* p. 409; *Re Gentle* (*Ibid*, p. 418). The question as to the use of land was not raised in the Court of Review.

Income derived from the consumption of the substance of land cannot be said to be derived from the use of the land. The tax assessed in 1907, and to be paid in 1907, is a tax on the 1907 income. The principle of assessment is laid down in sec. 27, and sec. 53, which has since been repealed, shows that the income taxed is the income of the current year. It will not be assumed that the legislature intended that there should be a hiatus in the scheme of taxation. Exemptions were granted by sec. 17 of 59 Vict. No. 15 to prevent certain classes of income from paying a

(1) 24 N.Z.L.R., 18.

double tax. Under the local government legislation this scheme was abandoned, the land tax was handed over to the shires, and the legislature abolished the exemptions in sec. 17. From the commencement of local government a taxpayer became liable to pay income tax on income derived from the ownership, use or cultivation of land : see 1905 No. 33, sec. 33, and 1905 No. 31, sec. 2. These provisions were extended to municipalities by the *Local Government Extension Act* 1905, and were subsequently embodied in the *Local Government Act* 1906. The effect of sec. 3 of 1904, No. 17 was to substitute an absolute for a provisional amount, leaving the incidence of taxation the same as before. Sec. 4, the refund section, does not give the right to have the basis revised, as sec. 53 of 59 Vict. No. 15 did. The Act of 1904 clearly fixed the taxable amount at nothing more or less than the taxable income for the previous year, that is, such income as would during the previous year have been taxable if the law of the current year had been in force in the previous year. The words "taxable income" are words of designation, and have nothing to do with the law as to the taxability of such income in the prior year.

Wise K.C. in reply, as to income derived from the use or ownership of land, referred to *Commissioners of Taxation* v. *Kirk* (1).

Cur. adv. vult.

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The case stated by the learned Judge of the Court of Review was as follows:—

1. The Seaham Colliery Company, during the years 1907 and 1908, occupied certain land for the purpose of mining for coal, and doing the necessary work incidental to loading the said coal into trucks, and despatching it by railway, and exporting the greater portion of it.

2. From the use of the said land as aforesaid the company derived income during the year 1908, and the Commissioners of Taxation duly assessed the amount of income tax chargeable thereon according to law.

(1) (1900) A.C., 588.

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3. The said land was from the 1st January 1907 situated within a shire, and the operation of the enactments mentioned in Schedule III. of the *Local Government Act* 1906 was suspended from that date.

4. The Public Officer of the said company appealed against the said assessment on the ground, *inter alia*, that the company carried on a business within the meaning of the *Land and Income Tax Assessment Act* 1895 and the Acts amending the same, and that the Commissioners had refused to allow him to deduct from the taxable income of the said company a sum equal to 5 per centum on the amount of the unimproved value of the land occupied as aforesaid by the said company, plus 5 per centum on the amount of the value of the improvements thereon which are used and required for the purposes of such business.

5. The said appeal duly came on for hearing before me sitting as a Court of Review on 27th April 1909, when I upheld the contention of the said Ernest Henry Adams and allowed such deduction.

6. The question for the determination of this Court is whether I was right in so holding.

The Commissioners appealed from this decision to the Supreme Court which dismissed the appeal.

Knox K.C. and *Brissenden*, for the appellants. The question in this case is whether under the last words of sec. 28 of 59 Vict. No. 15, coal mining is excluded from the ownership, use, or cultivation of land. Income derived from coal mining arises either from the ownership or use of the land. This proviso to sec. 28 was passed to prevent a double deduction under sub-sec. (vi.) of sec. 28, and sec. 17 (viii.). The respondent, having argued in the previous case that the company's income was derived from the ownership or use of the land, cannot now be heard to contend that it comes under neither of those heads. Even if the Court is of opinion that this is a business within sec. 28, the respondent can only claim a deduction of 5 per cent. on such proportion of the land as is actually occupied for the purpose of such business. The *Land and Income Tax (Declaratory) Act* 1898 was passed to make this the carrying on of a trade in New South

Wales. Even if it was declared to be a trade, that would not make it a business within sec. 28 (vi.) of 59 Vict. No. 15. This section was intended to apply to cases where the occupation of land was incidental to the business. In that case a deduction was allowed, but where the business was merely incidental to the occupation and use of the land, no deduction was allowed, because this would be an exemption under sec. 17 (viii). [They referred to *Commissioners of Taxation* v. *Broken Hill Proprietary Co.* (1)].

Wise K.C. and *C. A. White*, for the respondent. The effect of sec. 28 (VI.) is that income derived from business does not include income derived from the use of land. But "use of land" in that section must mean mere use of the land for purposes of cultivation and other similar uses. It cannot include coal mining, because that is a trade or business. Business in its ordinary sense includes trade: *Smith* v. *Anderson* (2). The legislature has recognized coal mining as a trade, and, therefore, as coming within the word "business" in sec. 28 (vi.): see Act No. 37 of 1898, sec. 1.

Knox K.C., in reply.

Cur. adv. vult.

April 21.

GRIFFITH C.J. These appeals, which are between the same parties, although in respect of the income tax for different years, involve a question which is common to both cases, and the answer to which in my judgment affords the true guide for the decision of each. I will therefore deal with them together.

Income tax was first imposed in New South Wales in 1896. *The Land and Income Tax Assessment Act* 1895, enacted (sec. 15) that subject to the provisions of the Act there should be charged an income tax, at such rate per pound as Parliament might from time to time enact, in respect of the annual amount of all incomes exceeding £200 per annum—(I.) "arising or accruing . . . from any . . . . trade . . . carried on in New South Wales . . . . . " (IV.) "Arising or accruing to

(1) 19 N.S.W. L.R., 294; 21 N.S.W. L.R., 154. (2) 15 Ch. D., 247.

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any person wheresoever residing from any kind of property, except from land subject to land tax as hereinafter specifically excepted." The exceptions referred to were contained in sec. 17, which provided that there should be exempt from income tax . . . . (vii.) Income derived from the ownership of land subject to land tax under Parts II. and III. of this Act; (viii.) Income derived directly from the use or cultivation of land subject to land tax. Sec. 27 provided that "For the purpose of ascertaining the sum, hereinafter called the 'taxable amount,' on which . . . income tax is payable . . . (ii.) In any case in which profits or moneys derived from any business have been converted into stock-in-trade, or added to capital" certain particulars should be given by the taxpayer in the return of his income made to the Commissioners. Sec. 28 provided that from the taxable amount ascertained as previously prescribed the taxpayer should be entitled to certain deductions, one of which was thus expressed: (vi.) "Where any taxpayer occupies, for the purpose of business, any land in respect of which land tax is payable by him under this Act for the same period, such person shall be entitled, in any return of taxable income derived or received from such business for such period, to deduct a sum equal to five per centum on the amount of the unimproved value of such land, plus five per centum of the amount of the value of the improvements thereon which are used and required for the purposes of such business." Paragraph (vii.) of the same section provided that when a taxpayer was interested in more than one business, and made a profit in one and a loss in another or others, he might deduct the sum of the losses from that of the profits.

Sec. 28 concluded with the following provisions: "For the purposes of this and the preceding section the word 'business' shall be taken to include any profession, trade, employment, or vocation; but shall not include ownership, use, or cultivation of land." As I construe this provision, the word "business" intended to be defined is that word when used in sec. 27 (ii.) and in the expression "derived or received from such business" in sec. 28 (vi.), and not the word where it is used in an adjectival sense in the phrase "for the purpose of business" in the same paragraph. Expanding the paragraph with this interpretation,

we have: "Where any taxpayer occupies for the purpose of business any land in respect of which land tax is payable by him . . . . . such person shall be entitled in any return of taxable income derived or received from such business, but not being income derived from the ownership, use or cultivation of land, to deduct," &c.

The object of the provision was, of course, that a person who carried on business on his own land upon which he pays land tax should have a concession made to him analogous to the deduction which a man carrying on business on another's land was allowed to make for rent.

The Seaham Colliery Co., of which the appellant Adams is the public officer, are the owners of a colliery, and their income for the years in question was derived from working the coal mines, and disposing of the coal by export and otherwise. The question, then, is whether that income is to be regarded as derived from the ownership or use of land within the meaning of sec. 15, or as derived from a business. In one view it was exempt from income tax so long as the land was subject to land tax; in the other it was liable to income tax subject to the deductions allowed by sec. 28 (vi.).

We are informed that income from collieries has, ever since the passing of the Act of 1895, been treated as income arising from land—whether derived from ownership or use is not material. This seems to be a natural construction, and the only doubt cast upon it arises from the language of an Act of 1898 called the *Land and Income Tax Declaratory Act*, which was passed in consequence of a decision of the Supreme Court of New South Wales, afterwards reversed by the Judicial Committee (*Commissioners of Taxation* v. *Kirk* (1), to the effect that the Broken Hill Proprietary Co., which carried on operations of mining for silver and lead on land leased from the Crown, and exported the products for sale abroad, had no assessable income accruing in New South Wales. The Act, after reciting that the legislature in passing the Act of 1895 intended that the income derived from trade carried on in New South Wales, whether the income was received in the Colony or not, should be subject to income tax, declared (sec. 1) that "any

(1) (1900) A.C., 588.

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person . . . who . . . extracts from the soil . . . any . . . substance, and exports the same" shall be deemed to carry on in New South Wales "the trade of extracting . . . such . . . substance," and provided that the value of the substance when exported should be deemed to be the amount on which the income tax should be payable, subject to certain deductions. It then required the Governor, by regulations, to fix rules for fairly adjusting the incidence of the tax, so that it might fall on profits only, and directed that in fixing such rules income derived from the ownership, use, and cultivation of land subject to land tax should be deemed to be exempt. The words of this enactment extend to coal mining, which is therefore to be deemed to be a trade, whether it was so before or not. But, if the whole income derived from coal mining was derived from the ownership or use of land which is subject to land tax, it was exempt from income tax, and the right of exemption is expressly recognized by the concluding words of the section. There is thus an apparent inconsistency. I think that the true explanation is that trade of this kind may be carried on under such circumstances that some part of the income is derived from the ownership or use of land, while another part is not, and that the section only means that the former part shall continue to be exempt, and that such exemption shall be recognized and have full effect in any rules laid down for calculating the income derived from the trade. I think, therefore, that this Act does not affect the question.

Moreover, as already pointed out, a trade is not a business within the meaning of sec. 28, if all the income is derived from the ownership or use of land.

I am, therefore, of opinion that the company's income was income arising or accruing either from the ownership or from the use of land within the meaning of sec. 17 (vii.), (viii.) of the Act of 1895, and was therefore not taxable income so long as the land was subject to land tax.

I pass now to the facts of the cases under appeal.

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This case relates to the income tax, if any, payable in the year 1907.

By an Act passed in 1904 (3 Edw. VII. No. 17) it was enacted by sec. 3 (2) that in assessing the income tax for the year 1905 or any subsequent year "the amount of taxable income from all sources for the year immediately preceding the year of assessment shall, subject to the provisions of sec. 27 of the Principal Act, be the taxable amount, for the year of assessment." The words are plain and unambiguous. For the purpose, therefore, of assessing the appellant's income tax for 1907 the amount of the taxable income from all sources for 1906 was the taxable amount. The company's income from all sources for that year was derived from the ownership or use of land subject to land tax, and the income did not, therefore, fall within the definition of "income arising from any kind of property except land subject to land tax" in sec. 15. It appears to the ordinary mind to follow that the taxable amount was *nil*.

An ingenious argument was, however, addressed to the Court of Review and the Supreme Court, with both of which it found favour, but which seems to me, with all respect to those who differ from me, to be based upon transparent fallacies. When the Principal Act of 1895 was passed, the legislature was minded to obtain revenue in the following year by way of income tax, and, as it was obviously impossible to ascertain the amount of a man's income for any year before the end of the year, it was necessary to make provision for fixing the liability for the year 1896 upon some basis which was capable of ascertainment. It was accordingly provided by sec. 27 (1.) that for the purpose of ascertaining the amount on which income tax was to be payable "the amount of taxable income from all sources for the year immediately preceding the year of assessment shall be taken as the basis of calculation." This was, however, a provisional basis only, and by sec. 53 provision was made for refundment if the taxpayer could prove that he had paid on that basis more than he was properly chargeable with in respect of his actual income for the year of payment.

By sec. 31 it was provided that if at any time after the assessment of income it should be found that the amount of any income was higher than was declared in the returns relating thereto, the excess should be liable to taxation, notwithstanding that the year

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for which the tax was assessed had closed. It is to be noted that the comparison was not between the assessed income and the actual income for the year in which the assessment was made, but between the assessed income and the income declared in the return relating thereto. The return was of the income of the previous year, and I should suppose that the words "relating thereto" mean relating to the income of which a return was made. If this is the right view, a subsequent adjustment of income tax could only be made for the benefit of the taxpayer, except when he had understated his income for any year in the return of his income received in that year. If the words could be strained to a different sense the assessment was always subject to readjustment either for or against the taxpayer.

Whichever view is accepted, the assessment was provisional only, and the taxable income for any year was not definitively ascertained until after the time for payment.

It is not surprising to find that this system should have been found unsatisfactory, or that the Act of 1904 should have been passed. That Act introduced a different system. It repealed the words of sec. 27, already quoted, and sec. 53, and substituted the single provision that the amount of taxable income for the year preceding the year of assessment should be the taxable amount for the year of assessment. The assessment was no longer to be provisional but definitive. It followed that if in any year a person received no taxable income he paid no income tax in the following year. And this was the position of the appellant company until the year 1906, in which year they had, up to 31st December, received no taxable income from any source.

The Commissioners, however, contend that their income for that year is taxable, because by the operation of the *Local Government Act* 1906, which came into operation some time after 1st January 1907, their income derived from their mines in 1907 was taxable income for that year. The argument is put in this way.

It is said—and correctly—that the words "amount of taxable income," used in the Act of 1895, are inaccurate as applied to income for the year when no income was taxable, but that their meaning was plain enough, and that they must have meant "the amount of income which would have been taxable if this

Act had been in force." I do not think that this is quite accurate. I think that the words mean, as applied to the year 1895, "income the amount of which is to be ascertained according to the rules prescribed by this Act for ascertaining the amount of taxable income." If there was no such income there would have been no tax. It is immaterial for the purposes of this case which of the two phrases is accepted. But, although in the particular case they produce the same result, they are not synonymous. The next step in the argument is that, since this was the meaning of the words "taxable income" as applied to income for the year 1895, the same words, when used in the Act of 1904, must mean the income which would have been taxable if the laws in force in the year when the assessment is made had been in force in the preceding year.

This argument assumes that a non-natural construction, which a particular phrase used in a Statute must receive so far as it relates to a temporary subject matter, is to be applied to that phrase when used in a later Statute which relates entirely to a permanent subject matter. This is the first fallacy.

In the second place it assumes that, because the words "amount of taxable income" in the Act of 1895 meant (if they did mean) as to 1895 "amount of income which would have been taxable if this Act had been in force," they mean in the Act of 1904 "income which would have been taxable if the laws imposing income tax for the year of assessment had been in force." If the same meaning is given to them in the Act of 1904 as is claimed for them in the Act of 1895, all that follows is that the taxable income for every year is to be calculated as if the Act of 1904 had been in force. But, as it was in force in every succeeding year, this is an idle substitution, and adds nothing to the sense. The fallacy lies in supposing that the application of the provisions of an existing law for the purpose of calculating the amount of the taxable income of a particular year involves also the application of the laws imposing income tax with respect to the income of the year in which—not for which—the calculation is made. *Pring* J. put the point thus (1):—"It follows that the words 'taxable income' in sec. 3 of the Act of 1904 cannot mean income subject

(1) 9 S.R. (N.S.W.), 782, at p. 787.

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to taxation, but must mean income which, if the present state of the law had existed in the previous year, would have been subject to taxation." Here are two assumptions, both, I think, unfounded: First that the words "taxable income" imply "as if this Act had been in force for all purposes," and, second, that the terms "this Act" and "the laws defining what income of the year in which the assessment is made is taxable" are synonymous.

It is said that there would otherwise be an hiatus in taxation, which is not likely to have been intended. I am not impressed by the argument even it were well founded. Up to 1906, inclusive, the appellant company paid no income tax, because their income was all derived from the ownership or use of land which was subject to land tax. For the reasons which I have given this exemption continued as to income tax payable in 1907. But they had paid land tax in 1906, and were liable to pay in 1907 the local taxation which by the *Local Government Act* 1906 was put in the place of land tax. I do not find any hiatus in fact. So far as their income for 1907 was concerned the liability to local taxation no longer operated to exempt them from liability to income tax, but I am quite unable to apprehend any reason why the deprivation of exemption as to their income for 1907 should operate to make any difference in the amount of their "taxable income from all sources for 1906."

For these reasons I think that the company's appeal must be allowed.

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In this case the company contended that they were entitled in the assessment of their income for the year 1907 to the deductions allowed to persons deriving their income from a business under sec. 28 (vi.). But, since their income from their mines was not, for reasons already given, income derived from a business within the meaning of that section, that provision has no application to the case.

This appeal must, therefore, also be allowed.

O'CONNOR J. By sec. 3 of the *Income Tax Amendment Act* 1904 it is enacted that in assessing income tax for the year 1905,

or any subsequent year, the amount of taxable income from all sources for the year immediately preceding the year of assessment shall, subject to the provisions of sec. 27 of the Principal Act, be the taxable amount for the year of assessment. During 1906 the Statutes relating to income tax exempted from tax all incomes derived from the ownership of land subject to land tax, or derived directly from the use of land subject to land tax. In making an assessment for income tax for that year no person could in that state of the law be charged with income tax whose income was so derived. But in the beginning of 1907 there came into force the *Local Government Act* 1906, which empowered the Governor in Council under certain circumstances to suspend by proclamation within any shire the provisions of the Income Tax Acts which allowed the exemption. In the shire in which the Seaham Colliery Co.'s mine is situated such a proclamation was duly made in 1907. To determine in what way the issue of the proclamation had affected the assessment of the company's income for income tax payable in that year was the difficulty put before the Court of Review for solution. In order to arrive at the sum on which income tax for 1907 is to be paid, it becomes necessary under sec. 3 of the *Income Tax Amendment Act* 1904 to ascertain what was the amount of the company's taxable income from all sources in 1906, subject to the provisions of sec. 27 of the Principal Act. That amount when ascertained is the amount on which the tax for 1907 is payable. If the law in force in 1906 is to be applied in the ascertainment of the company's taxable income for that year, there was in that year no income taxable for the purposes of income tax. It was all exempt, as being derived from the ownership of land, or directly from the use of land. On the other hand, if the law in force for the first time in 1907 is to be applied in ascertaining the taxable amount of the company's income in 1906, the whole of their income from the mine, less certain allowed deductions, becomes the taxable amount for the purposes of income tax, because on that assumption there was in that year no law in force authorizing the exemption. The Court of Review decided that in making the assessment the new law of 1907 must be assumed, contrary to the fact, to have been in force in 1906 and upheld

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the assessment made on that basis. The Supreme Court on appeal took the same view. This Court has now to determine whether they were right in so doing. It may be conceded that before the question specially raised in the case can arise it must be shown by the company that their income comes within the exemption, as being derived from the ownership of land or directly from the use of land. The Court of Review decided that the company had established that position. No question regarding it is raised in the case, and I doubt whether it is on this appeal open to question. However, in the view that I take of the matter it is unnecessary to decide that point, as I am of opinion that the income which comes to a coal owner from the sale of his coal is income derived directly from the use of the land. It is a use which no doubt involves the taking away of what may be regarded as portion of the land itself, but none the less it is a use of the land, and it is the use in the case of coal land to which the land can most profitably be put.

Turning now to the real matter in controversy, the question is what is the right interpretation of sec. 3 of the Act of 1904? The expression "taxable income," whether it is to be taken in the sense explained in the various sections of the Principal Act, or merely in accordance with the ordinary meaning of the words, necessarily involves the notion of legal liability to be taxed. In other words, the amount of the taxpayer's income which was taxable in 1906 can be ascertained only by applying some law to the facts of the income. What law? The section itself furnishes the answer. When it enacts that the amount which is the taxable income for 1906 shall be the taxable amount for 1907, it directs as plainly as language can direct anything that the income tax law of 1906 is to be applied to the income tax facts of 1906 and that the result is to be taken as the amount on which the income tax for 1907 shall be paid. But it is said that that meaning, which it cannot be denied is the plain meaning of the words used, cannot in this case be adopted as expressing the intention of the legislature. The argument chiefly relied on was based on an assumed analogy between the question now under consideration and that involved in the application of the Principal Act of 1895 to the fact of income existing in the

year before the Act came into operation. I can see no analogy between the two positions. The Principal Act embodied a series of principles for ascertaining the amount of income liable to income tax. By sec. 27 it provided, in effect, that the amount on which the income tax for 1895 was to be paid was to be ascertained by taking as a basis the amount of taxable income for 1894. That was interpreted as directing that the amount taxable in 1905 was to be ascertained by applying the provisions of the Statute to the facts of 1904. It is true that in 1904 there was no law in force for the computation of taxable income. But in the first year of the Act's operations the construction adopted was necessarily adopted to give effect to the enactment. It must be taken that the legislature in passing the enactment in that form necessarily intended that legal directions for ascertaining taxable income were to be applied as if they were in force in 1904. But beyond that year the necessity did not continue, and the fact of that departure from the ordinary meaning of the language used, which the subject matter of legislation made necessary in that year, affords no reason for departing in other years from the plain meaning of the words of the enactment. I am, therefore, of opinion that the law in force in 1906 must be applied in ascertaining the taxable amount of the company's income in 1906, and that in the ascertainment of that amount the company was entitled to have deducted all the income derived from their mine. In other words, they were entitled to claim that their income from the mine was not liable to pay income tax in 1907. It follows in my opinion that the appeal must be allowed.

In dealing with the assessment of the company's income for 1908, I am of opinion that the Court of Review and the Supreme Court on appeal came to a wrong conclusion. The company in support of the deductions which they claim rely on the provisions of sec. 28 (vi.) of the Principal Act. Their contention is that they occupy their land for the purposes of a "business" under that sub-section. But the definition of "business" in the next following sub-section expressly excludes businesses in which the income is derived from the ownership and use of land. It was no doubt the case that in the operation of the Principal Act before the passing of the *Local Government Act* 1906 income

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from a coal mine was altogether exempt from income tax. But the suspension of the provision allowing that exemption in no way affected the provisions of the Income Tax Acts, which regulated the method of ascertaining which income is liable to taxation, nor did it alter the meaning of the words defining business in the sub-section I have referred to. The *Land and Income Tax Declaratory Act* 1898 does not touch the matter in my opinion. That Act was obviously passed to meet the difficulty of collecting income tax in cases where a commodity produced or won from the soil in New South Wales was sold outside the State. It in no way affected the provisions of the Acts under which income tax and land tax are assessed and become payable within the State. In allowing the deductions claimed the Court of Review in my opinion fell into an error, inasmuch as the Seaham Colliery Company, deriving as they do their income directly from the use of land, do not carry on a "business" within the meaning of the sub-section relied on.

I am therefore of opinion that in this case also the appeal must be allowed.

ISAACS J. As to whether the income of the company is derived directly from the use of the land, I have no doubt it is.

The only reason urged against it was that the use of land negatived consuming any part of it. That is rather narrowing the meaning of the word as employed in relation to the subject matter. It regards it rather from the standpoint of usufruct in the civil law, which implied *salva rerum substantia*. But even in that sense consumption was to some degree allowable. As pointed out by *Hunter* (Roman Law, 4th ed., pp. 399, 400, quoting the Digest), a usufructuary could burn lime or dig for gravel for his house, or work in a husbandlike manner quarries, or clay, or sandpits; or open and use when opened mines of gold, silver, copper, iron, &c., even to the prejudice of the agriculture, if such were a better use of the property.

The "use" intended by sec. 17 (viii.) has reference to the use which an owner—the dominus—makes of his land. Consumption of the thing used may be important when considering the respective rights of owner and usufructuary, but is wholly unim-

portant when there is no such division of rights. The observations of Lord *Blackburn* in *Wilson* v. *Waddell* (1), relied on by Mr. *Knox*, are much in point, and it is of the right of the owner that the learned Lord speaks. If instead of coal, the land in the present case contained oil, or mineral water, or pitch, or diamonds, the result would be the same. If, however, instead of selling the coal as raised, and so deriving the income from a use as direct as nature will allow, the land owner were to convert it into gas, or manufacture aniline dyes, there would be interposed processes which would destroy the directness of the source, and make the use of the land the remote and not the proximate origin of the income. As to the Act of 1898 (62 Vict. No. 37), it does not affect this question. It was passed to separate exportation from previous processes, and to declare the first part a trade in New South Wales. And by the concluding words of sec. 1 the effect of the exemptions in sec. 17 (vii.) and (viii.) are preserved.

The other question is very short, but extremely important. It is whether the word "taxable" in the expression "taxable income," found in sub-sec. 2 of sec. 3 of the *Land and Income Tax (Amendment) Act* 1904, means taxable according to the law in force in the year of assessment, or taxable according to the law in force in the preceding year.

The appellant, by whom I mean Adams, contends for the second meaning, the Commissioners for the first, and I agree with the Commissioners, and am of opinion that the decision of Judge *Murray* and that of the Full Court of New South Wales, confirming the primary decision, are substantially right.

But for the contrary opinion entertained by my learned brothers, I should be content to adopt the judgment of *Pring* J. In the circumstances, however, I think it proper to state in my own words the reasons which have led me to my conclusions. Reading the words of the sub-section in question as if they stood alone, it is not difficult to get a *primâ facie* impression in accordance with that suggested by the appellant, but when the whole legislation on the subject is examined together, the reasons for the contrary conclusion are overwhelming, and the other Acts must be looked at for this purpose. Lord *Macnaghten* said a few

(1) 2 App. Cas., 95, at p. 99.

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years ago, "How can you understand the true meaning and effect of an amendment unless you bear in mind the state of the law which it is proposed to amend? It is necessary, therefore, to take a wider survey and then, I think, the meaning of the enactment becomes plain enough." These words would in principle pass without controversy, but the learned Lord found it desirable to give utterance to them in the case of *London County Council* v. *Attorney-General* (1), because an erroneous view had been taken by the Court of Appeal of an amending Income Tax Act, which could not be properly understood without reference to the earlier Acts on the same subject.

When those Acts in New South Wales are examined, and their true nature ascertained, it appears that the error into which the appellant has fallen is fundamental.

On 12th December 1895 the Parliament of New South Wales passed three Acts. The first is number 15, and is called the *Land and Income Tax Assessment Act* 1895; the second, number 16, is called the *Land Tax Act* 1895; and the third, number 17, is called the *Income Tax Act* 1895.

The *Assessment Act* creates machinery for collecting the land and income taxes. It is an Act of a permanent nature not imposing taxation, but for *assessing* it, and for that purpose, of prescribing constant definitions and other ancillary provisions for the regular working out, collection and payment, and the enforcement of whatever taxes of the nature mentioned may from time to time be imposed. In Part II. it is enacted what persons shall be liable for land tax when imposed, and on what value, and what deductions and exemptions shall be made. Part III. relates to adjustments of the burden as between those who have to bear it.

Part IV. declares what shall be *the character of incomes* subject to any tax that may from time to time be imposed in general terms, and—most important of all for the present case—says, in sec. 15:—"There shall be *charged*, levied, collected, and paid . . . an income tax at such rate per pound as Parliament shall from time to time declare and enact in respect of the *annual amount* of all incomes exceeding £200 per annum." The special force of this provision will be presently indicated.

(1) (1901) A.C., 26, at p. 35.

Then by sec. 17 exemptions are declared, and down to sec. 26 inclusive, the provisions are, broadly speaking, declarations of the *nature* of incomes, and some practical working provisions immaterial to this appeal and designed for facilitating and adjusting the operation of the Statute. When we reach sec. 27, however, we arrive at the crucial point of the discussion, and, therefore, before proceeding to interpret that section it is necessary to complete the consideration of the earlier part. So far, we have seen that by sec. 15 an income tax is to be "*charged*, . . . in respect of the *annual amount* of all incomes" of the described character.

But that does not impose the tax. It is Act No. 17 which creates the imposition. It enacts that an income tax of sixpence in the pound on the *amount* of all incomes *chargeable* under the *Assessment Act*, shall, after 1st January 1896, be annually levied and paid under the provisions of that Act and in the manner therein prescribed.

It is vital to this appeal to consider what that means, when taken in conjunction with the *Assessment Act*.

No. 17 is a constantly speaking enactment, and imposes an annual income tax on *the amount* of all "chargeable" incomes. It is not retrospective, and applies only to future income. It does not tax annual amounts as if they constituted separate incomes, which is really the source of the appellant's fallacy. It also requires the tax which it imposes to be "levied and paid"—that is, *enforced*—under the provisions of the *Assessment Act*, and that Act is to be looked to in order to see what kinds of incomes are "chargeable," and what enforcement provisions exist. Among other provisions we find that for convenience incomes are to be computed annually. The tax, though it is to be annually levied and paid as directed by the Act imposing it, might have been leviable upon incomes as calculated every fifth year, as is the case as regards to land tax, or upon an average of three years as in Schedule D of the English Act. But the working system adopted by the *Assessment Act* is to ascertain year by year the amount of income received, and to let each year's actual results be the measure of the tax for that period. Income then is not treated as a spasmodic or desultory thing, as a sort of

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annual plant that is sown and grown afresh each year, and dies with the year, to be succeeded by another distinct and independent specimen of the same species.

It is regarded as a matter of assumed permanence and continuity. It is the same "income" year after year. Indeed, income denotes recurrence of receipts: compare *Blakiston* v. *Cooper* (1). If a man carries on a profession, trade, employment or vocation, that is his habitual and constant mode of gaining a livelihood, and its results are not confined to one year, nor are they separable as on 31st December or any other place in the almanac. The income is in contemplation of law a regularly flowing stream, of alterable volume no doubt, and is constantly affected as it flows, by the law of income tax for the time being. Its "chargeability" is determined by what the law says on that subject for the moment; its levy and collection may for convenience sake require an arbitrary method of calculation, and among other rules is that of ascertaining its amount annually. But that is only an artificial stopping place, and requires for public financial reasons artificial means of ascertaining the annual amount.

This brings us back to sec. 27 of the *Assessment Act*, which is framed for the purposes self-declared in these words: "For the purpose of *ascertaining* the *sum*, hereinafter called 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."

That section obviously assumes the imposition of the tax, and assumes that certain income only is taxable, twice calling it "taxable income," and it assumes further that it is payable for the year only on the "annual amount," and in order to ascertain that annual amount which is represented by a term coined for the purpose—namely, "taxable amount"—certain rules are provided. But the heart and soul of sec. 27 is mere ascertainment of *amount*, and simply for purposes of *payment*—the word used is "payable"—and when it coins the phrase "taxable amount" and *defines* it, we see that the phrase means the annual amount in respect of which the law for the time being requires payment of income tax. And so in enacting the first rule the

(1) (1909) A.C., 104.

intention of Parliament seems to me plain beyond possibility of mistake.

The original words of that rule were: "The amount of taxable income from all sources for the year immediately preceding the year of assessment shall be taken as the basis of calculation."

"Amount" there means actual amount, it can mean nothing else. "Taxable income" means income of a *character* declared by the law of 1896—that is the *Assessment Act*—to be "chargeable" with income tax. It cannot possibly mean income which was taxable in the year 1895. That would give no income tax for 1896, because for assessment purposes for that year no property would answer the description. There would thus be, as *Pring* J. says, a hiatus which is not affected by reason of this particular appellant not having had income, but must be regarded from a general standpoint. Unless the argument of the appellant is to go so far, and nullify the very words of Act 1895, No. 17, imposing the tax, which is a subsequent Act, and says the tax *shall* be levied and paid for the year 1896, it must concede that in 1896 the word "taxable" in that connection meant taxable according to the law in 1896, that is the year of assessment. In other words, the first direction meant that in 1896, the first year of the tax, you were to first consider what classes of incomes were made taxable for that year, then you were to ascertain the total amount of such incomes received from the preceding year 1895, and when so ascertained, that amount was to be taken as the basis of calculation for the taxation of 1896, and was considered as the "taxable amount"—subject to deductions. If the words properly construed did not so operate, I do not see how any supposed necessity could give them that operation.

The sixth rule of sec. 27 is important because it also uses the words "taxable income." That rule remains untouched by amendment, indeed it has been reaffirmed by the Act of 1905, because it is one of the rules to which sec. 3 (2) has been expressly made subject, and in that 6th rule, the expression "taxable income" originally meant, and therefore still means, income which is taxable according to the law of the assessment year.

Among the deductions then from the taxable amount in 1896

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were those provided by sec. 28 (vi.). That sub-section, which upon the appellant's view has a most remarkable operation, provides, in the case where a taxpayer occupies for the purpose of business any land for which he pays land tax *for the same period*, he may deduct a sum equal to 5 per cent. of the unimproved value plus 5 per cent. of the value of improvements used in the business. This is a fair and equitable provision, and is easily applied if the Commissioners' view is correct. But how could it be applied in 1896 on the opposite assumption? The land tax was payable for 1896 on the values for *that year*; and the permitted deductions under the 6th sub-section are in respect of land tax for that year, and in respect of improvements existing and used *that year*, and the only method of obtaining those deductions allowable by law is, "from the taxable income derived or received from such business *for such period*," that for 1896 to begin with. On the appellant's view, therefore, assuming income tax was then payable at all, no deduction for land tax could be made in 1896, because on his contention the periods were different —there being no land tax payable for 1895, and no returns in 1896 of "taxable income" derived or received from such business *for such period*." The legislature therefore must have meant that in 1896 every such person should pay a double tax. Moreover in 1897 the land tax for that year could not be set off: but on the appellant's construction the taxpayer could in 1897 set off his 1896 land tax and improvement charge against his returns of 1896 income, and so on from year to year leaving him always a year's land tax out of pocket, notwithstanding the evident intention of the 6th sub-section is to allow whatever is paid for land tax in any year, in that same year, and in respect of the same values, to be the subject of deduction—and so as to the percentage on the improvements.

I much prefer the Commissioners' interpretation that taxable income in 1896 meant income of a class that was taxable according to the law of that year.

And if that was the true construction of the Act in 1896 it must have remained so in every succeeding year until the first direction of sec. 27 was repealed by the Act of 1905. Consequently if, in say 1897, the exemptions had been suspended for

that year, they could not have been claimed in computing the taxable amount on which to pay that year's tax.

If again, for instance, in 1901 an Act had been passed repealing as from 1st January of that year all the words of sec. 15 charging incomes from "all other sources" (see final words in subsec. (iv.)) how could tax have been charged in that year, from incomes arising from such "other sources" merely because they were taxable the year before? Other examples easily present themselves.

The appellant's argument must rest then upon some change in the signification of the expression "taxable income" effected by the Act of 1905.

Comparing the language of the repealed sub-sec. (1) of sec. 27 with that of the second sub-section of sec. 3 of the new Act, that expression is left unaltered. The new sub-section enacts a provision which it says is for *assessing* the income tax for 1905 and after, and that provision is in terms identical with the old direction up to a certain point. To emphasise this I shall read the words which are identical in both enactments. They are as follows: "The amount of taxable income from all sources for the year immediately preceding the year of assessment shall" . . . So that all the words important for our present purpose are the same, and their signification is not attempted to be altered. Then comes a proviso—"subject to the provisions of sec. 27 of the Principal Act"—which is only placing those provisions in the same relation to the new direction as that in which they stood to the old, and of course confirming them in their original meaning. The words "taxable income" in sec. 27 (vi.) have not been changed by the later Act. Are the same words in the same connection, and really in the same section, to have reference to different years? That is not only incongruous, but unworkable. I think no change has been made so far. But then comes the real change, indeed the only change. Instead of the words "be taken as a basis of calculation," there are substituted the words "be the 'taxable amount' for the year of assessment"; "taxable amount" being the artificial phrase already defined by sec. 27 of the *Assessment Act*. That, with the repeal of sec. 53, merely renders final and definite what was subject to adjustment before.

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But it is the *same thing*, which is to have a different force. It is as if there had been a repeal merely of the words as to "basis of calculation," leaving all the other words of the first direction to stand untouched, and a substitution for the repealed words in the original direction of the following words: "be the taxable amount for the year of assessment." No one could then have suggested a different meaning to the expression, "amount of taxable income."

And if no change has been effected in the test of taxability, but merely in the manner of computing the amount of income taxable for the time being, or, rather, in the effect to be given to the old computation as regards the amount, it follows that there is no substance in the appellant's contention.

It was suggested by Mr. *Wise* that the least onerous construction should be placed on the words of a taxing Act. But that principle has no application to the present case, because it is impossible to tell of two given years which would be the more onerous to the appellant. And, besides, what is more onerous to one taxpayer may be less burdensome to another, even in the same year.

I am therefore of opinion the appeal *Adams* v. *The Commissioners of Taxation* should be dismissed. The second in *The Commissioners of Taxation* v. *Adams* should be allowed.

Appeals allowed.

Solicitors, for appellant, Adams, *Minter, Simpson & Co.*

Solicitors, for Commissioners of Taxation, *J. V. Tillett*, Crown Solicitor for New South Wales.

C. E. W.