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not. It is enough to say it is not necessarily right. The evidence rejected ought to have been received and considered at the end with any other relevant facts proved on the question of "just cause or excuse." No definition of "just cause or excuse" has yet been given which would exclude the question under the circumstances. It ought to have been allowed so that the defence might be fully investigated.

Appeal allowed. Order appealed from varied by directing that judgment be entered for the defendant on the fourth count. Costs of appeal to be costs in the cause.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the respondent, *A. G. de L. Arnold.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

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War-time Profits Tax—Assessment—Foreign company—Liability to tax—Failure to make returns—Method of assessment—Objections to assessment—Excessive assessment—War-time Profits Tax Assessment Act 1917 (*No.* 33 *of* 1917), *secs.* 7, 10, 16, 22, 28, 55 (1)—*Income Tax Assessment Act* 1915-1916 (*No.* 34 *of* 1915—*No.* 39 *of* 1916), *sec.* 22.

Isaacs, Gavan Duffy and Rich JJ.

The business of a shipping company incorporated outside the Commonwealth consisted of trading between ports outside and ports within the Commonwealth, and of carrying passengers and cargo from ports outside the Commonwealth to ports within the Commonwealth and *vice versâ*. For this purpose the company owned certain land and was the lessee of certain other land within

the Commonwealth whereon were offices, stores and wharves where employees of the company were engaged in performing services incidental to the company's business, and within the Commonwealth the company booked passengers and cargo and made all usual contracts in connection therewith, and completed in the Commonwealth the performance of similar contracts made elsewhere.

Held, that the company was assessable to tax under the *War-time Profits Tax Assessment Act* 1917 in respect of the business so carried on, and that for that purpose, under sec. 10 of that Act, sec. 22 of the *Income Tax Assessment Act* 1915-1916 was applicable.

In the absence of any return by the company the Commissioner took as the basis of his assessment for the particular period the amount of the total receipts of the company within and without the Commonwealth for that period as shown by its returns for income tax purposes. Of that sum he took 10 per cent. to be its profit for that period. Of the amount so ascertained he took 5 per cent. to be the war-time profit for that period, and assessed the war-time profits tax under the *War-time Profits Tax Act* 1917 as being 50 per cent. of the sum so arrived at, and added 10 per cent. of the amount of tax so ascertained as additional tax under sec. 55 (1) of the *War-time Profits Tax Assessment Act* 1917 for not furnishing returns, and demanded the total sum from the company.

Held, that in the absence of evidence by the company on the matter, the sum assessed was not excessive.

Where the Commissioner makes an assessment under sec. 22 (*c*) of the *War-time Profits Tax Assessment Act* 1917 of a person who has not furnished any return, the person assessed, in order to establish that the assessment is excessive and so escape liability to tax, must object to the assessment in the manner provided by sec. 28, and may rely only on such grounds of objection as are stated in his objection, but he is not limited in his objection to the quantum of the tax only.

CASE STATED.

On the hearing of an appeal by the Union Steamship Co. of New Zealand Ltd. to the Supreme Court of New South Wales from an assessment of it for war-time profits tax, *Cullen* C.J. stated a case, which was substantially as follows, for the opinion of the High Court:—

1. This is an appeal from assessment of war-time profits tax for the financial year commencing on 1st July 1915.

2. The appellant is a foreign company incorporated in the Dominion of New Zealand, and having its board of directors and principal place of business and head office there.

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3. The business of the appellant is that of a shipping company, and consists of trading between ports outside Australia and ports within Australia, and of carrying passengers and cargo from ports outside of Australia to ports within Australia and *vice versâ*. For the purpose of conducting such business the Company owns certain land and is lessee of certain other lands within the Commonwealth on which are offices, stores and wharves where certain employees of the Company are engaged in performing services and duties incidental to the Company's general business; and in the Commonwealth the Company books passengers and cargo and makes all usual contracts in connection therewith, and completes in the Commonwealth the performance of similar contracts made elsewhere.

4 (*a*). By notice in the *Commonwealth Gazette* of 15th November 1917 the Commissioner required persons carrying on business of any description deriving profits from sources within Australia to furnish returns in the prescribed form for the purpose of calculating the pre-war standard of profits and the capital of that business.

4 (*b*). From early in February 1918 to 21st March 1918 conversations and correspondence took place between the Commissioner and the authorized officers of the appellant Company, with regard to the liability of the appellant Company to war-time profits taxation under the said Act and, without prejudice thereto, with regard to the basis upon which the tax, if any, could be assessed against the Company under the said Act.

4 (*c*). On 12th February 1918 the Commissioner requested the appellant to furnish the following information, that is to say: (1) the total freights and passage money earned by the Company from all parts of the world for the said financial year; (2) the total net profits for the said financial year from freights and passage money exclusive of interest from investments or any other income outside the shipping business.

4 (*d*). The appellant did not make the return in the prescribed form in par. (*a*) hereof mentioned or any return.

4 (*e*). The appellant did not give the Commissioner the information asked for as mentioned in par. 4 (*c*).

4 (*f*). During the period covered by the said assessment the appellant made profits in the business described in par. 3 hereof.

4 (*g*). The gross sum receivable by the appellant in Australia and elsewhere throughout the world in respect of passages, general freights (including live-stock), mails and subsidies during the twelve months which ended 31st March 1916 was £956,553, and for the twelve months which ended 31st March 1917 was £1,136,519.

5 (*a*). The respondent alleges that upon the facts hereinbefore mentioned he had reason to believe that the appellant was a taxpayer who had made default in furnishing a return.

5 (*b*). The respondent accordingly, purporting to act under sec. 22 of the said *War-time Profits Tax Assessment Act* 1917 and the *War-time Profits Tax Act* 1917 and all other powers vested in him as such Commissioner, made an assessment of the amount upon which in his judgment war-time profits tax ought to be levied in the case of the appellant, viz., the sum of £5,008; and by notice of assessment and assessment required the appellant to pay tax thereon to the amount of £2,504, together with an amount of £250 8s., being additional tax of 10 per cent. as penalty described in the said notice of assessment as penalty for late return.

6. The appellant paid the sum of £2,754 8s., being the said tax £2,504 plus the said additional tax (10 per cent.) £250 8s., and by notice of objection duly objected to the said assessment, and claimed that the said assessment was excessive and that the appellant was not liable for any war-time profits tax for the following reasons, that is to say: (1) that the amount of the assessment is excessive; (2) that the assessment has not been made in accordance with the provisions of the *War-Time Profits Tax Assessment Act*; (3) that the basis of assessment adopted by the Commissioner (namely, the arbitrary computation of profits at 5 per cent. of 10 per cent. of freights, passages, mails and subsidies as set out on Form No. 3 attached to the notice of assessment) is not authorized by the said Act, and the assessment is therefore invalid; (4) that the basis of 10 per cent. of the amount of freights, passages, mails and subsidies adopted by the Commissioner is not authorized by the Act; (5) that the said assessment is invalid in that it is based on an amount which does not represent either the actual profits or the amount which should be arrived at by applying sec. 7 and/or sec. 10 of the said Act; (6) that the Company is not liable for the

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tax or any part thereof inasmuch as no method or means is provided by the Act whereby the profits and gains of the business from sources within Australia determinable under sec. 10 can be ascertained or the actual profits of the business from sources within Australia can be determined; (7) that the Company is not liable for the tax or any part thereof inasmuch as the said Act incorporates the principles prescribed by sec. 22 of the *Income Tax Assessment Act* 1915-1916 for ascertaining the amount upon which tax shall be payable for purposes of the Commonwealth income tax, and such principles do not provide a means whereby the necessary monthly average of the profit or loss of the business arising in the accounting period from sources within Australia or the actual profits of the business arising from sources in Australia can be ascertained for the purpose of determining whether or not the Company has derived an alleged excess war-time profit upon which the tax can be levied; (8) that the Company is not liable to furnish returns; (9) that the Company is not liable to be assessed in respect of profit made by it from sources within Australia; (10) that the Company, being a foreign company not within the jurisdiction of the Commonwealth Legislature, is not subject to the Act, and that the assessment is therefore invalid; (11) that the alleged war-time or excess profits cannot be ascertained till the War has ended; (12) that portion of such profits, if any, that may have been earned by the Company in respect of the transactions upon which the assessment is made were prior to the passing of the Act distributed by the Company by way of dividends paid to certain shareholders of the Company who are not resident in Australia or within the jurisdiction of the Commonwealth Legislature, and the Company has no right, power or authority to claim or enforce the repayment of such dividends or any part thereof from such shareholders or any of them; (13) that the Company is not liable to pay the sum of £250 8s. claimed as penalty for late return inasmuch as the Company is not liable to furnish any return or pay any tax under the Act; (14) that the assessment is invalid inasmuch as the tax is claimed on excess profits; (15) that the Company is not liable for the tax or any part thereof.

7. The respondent disallowed the objections mentioned in par. 6 hereof, and appellant duly asked the respondent to treat his said

objection as an appeal pursuant to sec. 28 of the said *War-time Profits Tax Assessment Act* 1917, which was accordingly done.

8. For the purposes of this case the said assessment, the notice of same and the said notice of objection are to be taken to be before the Court.

9. On the hearing of the appeal before me the following questions, which in my opinion are questions of law, having arisen, at the request of the respondent I state this case for the opinion of the High Court.

The questions for the determination of the High Court are :—

(1) Is the appellant liable to tax under the *War-time Profits Tax Assessment Act* ?

(2) Is the appellant liable in the circumstances for any war-time profits tax in respect of the business carried on as aforesaid ?

(3) Is the appellant under the circumstances set out in this case entitled to rely upon any objection other than the objection that the assessment is excessive ?

(4) If the appellant is liable for war-time profits tax as aforesaid, is the assessment made by the Commissioner as aforesaid excessive within the meaning of sec. 22 of the *War-time Profits Tax Assessment Act* 1917 upon the facts herein stated ?

Sir Edward Mitchell, K.C. (with him *Harper*), for the appellant.

Leverrier K.C. (with him *Russell*), for the respondent.

ISAACS J. This is a case stated for the opinion of this Court under sec. 29 of the *War-time Profits Tax Assessment Act* 1917 by the Chief Justice of New South Wales, who sat as a Court of appeal under the Act. His Honor has stated four questions for our determination. The first question is : Is the appellant liable to tax under the *War-time Profits Tax Assessment Act* ? That question appears to have reference to the tenth reason stated in the appellant's objection to the assessment. That reason is not pressed by learned counsel before us, and on general principles it must be answered : Yes.

The second question is in these terms : Is the appellant liable in

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the circumstances for any war-time profits tax in respect of the business carried on as aforesaid? The point of that question, as appears from the argument before us, is that there is no workable scheme in the Act for arriving at the war-time profits of a company carrying on such a business as is carried on by the appellant. The circumstances are set out, so far as is relevant to this question, in par. 3 of the case, which says:—"The business of the appellant is that of a shipping company, and consists of trading between ports outside Australia and ports within Australia, and of carrying passengers and cargo from ports outside of Australia to ports within Australia and *vice versâ*. For the purpose of conducting such business the Company owns certain land and is lessee of certain other lands within the Commonwealth on which are offices, stores and wharves where certain employees of the Company are engaged in performing services and duties incidental to the Company's general business; and in the Commonwealth the Company books passengers and cargo and makes all usual contracts in connection therewith, and completes in the Commonwealth the performance of similar contracts made elsewhere." Those circumstances establish beyond doubt that the appellant carries on a business which is liable to tax. Sec. 7 of the Act provides a method of calculating the war-time profits by having what is called an "accounting period." That period is a period of twelve months for which the accounts of the business are made up. There are other provisions for periods where the accounts of the business are not made up, but we may pass over them for the present case. As the accounting period may fall partly within one financial year and partly within another, monthly averages are to be taken of the respective portions of the accounting period which may fall in each particular financial year, and the amounts of profit or loss are put together, and from the sum of the profits is deducted the pre-war standard of profits as defined for the purpose of the Act. After that has been done, deductions may be made according to the circumstances. But it is said that in this case—this is the concrete point that is made—that there is no workable scheme. It is said that the pre-war standard of profits cannot, as the Act is framed, be ascertained in connection with such a business as is carried on by the appellant. I need not consider the result

if that were so. It might be an unfortunate thing for the taxpayer if in the circumstances of his case there was no possibility, by reason of the absence of materials or other practical difficulties, of his establishing the pre-war standard of his profits. It might be that he would have nothing to deduct from the profits of the accounting period. But that does not arise in this case, because it is provided by sec. 16 (1) that "the profits of any pre-war trade year shall be computed on the same principles and subject to the same provisions as the profits of the accounting period." The particular years of pre-war trading are, to a limited extent, within the selection of the taxpayer, and, when the amount is arrived at, the deduction is to be made. Whatever difficulty exists in this or any particular case in arriving at the pre-war standard of profits is not a legal difficulty but a commercial difficulty. There may be difficulty of dissecting trading accounts or of book-keeping, but that is immaterial from a legal standpoint.

Those, then, are the provisions which apply in general cases, and sec. 10 provides that "(1) The profits arising from any business shall be separately determined for the purposes of this Act, but shall be so determined on the same principles as the profits and gains of the business are or would be determined for the purpose of Commonwealth income tax, subject to the modifications set out in Part IV." (which relates to the computation of pre-war profits) "and to any other provisions of this Act." The result of that is that, except where some specific provision is made in relation to any business or portion of a business or other matter with regard to war-time profits tax, the principles established by the *Income Tax Assessment Act* are to be followed. When we turn to the circumstances of this case which I have mentioned, namely, the trade carried on by the appellant, we find that there is a section in that Act, sec. 22, which does apply to this very class of business, and as to which there is no modification in Part IV. or in any other provisions of this Act so far as the questions raised in this case are concerned. Sec. 22 of the *Income Tax Assessment Act* provides that "(1) Every person whose principal place of business is out of Australia and who either as owner or charterer of any ship carries passengers, live-stock, mails

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or goods shipped in Australia shall by his agent or other representative in Australia, when called upon by the Commissioner by notice published in the *Gazette* or by any other notice, make a return of the full amount payable to him (whether such amount be payable in or beyond Australia) in respect of the carriage of the passengers, live-stock, mails and goods. (2) The agent shall be assessed thereon and liable to pay tax on five pounds per centum of the amount so payable." Now, in this case it is common ground that that is the section under which the appellant ought to be taxed. The result, so far, is that a perfectly workable scheme is provided, needing only the requisite information to apply it in any particular case. The information, of course, comes primarily from returns. The answer to the second question, therefore, must be: Yes.

The third question is: Is the appellant under the circumstances set out in this case entitled to rely upon any objection other than the objection that the assessment is excessive? The answer to that question depends on the proper reading of sec. 22 of the *War-time Profits Tax Assessment Act*, which is as follows: "If . . . (c) the Commissioner has reason to believe that any person (though he may not have furnished any return) is a taxpayer, the Commissioner may make an assessment of the amount upon which, in his judgment, war-time profits tax ought to be levied, and the person assessed shall be liable to war-time profits tax thereon, excepting so far as he establishes on objection that the assessment is excessive." When an assessment is made which I may call a default assessment, the person assessed may or may not be in reality a taxpayer, he may be assessed in respect of a business which is exempt, or he may be assessed in respect of an amount which is erroneous. But for some reason or another he may be called upon by the assessment to pay an amount which is more than he ought, under the circumstances, according to law to be called upon to pay. Now, in my opinion, the words "that the assessment is excessive" in sec. 22 do not limit the person assessed to merely objecting to the quantum of the tax. When sec. 22 is read in conjunction with the other sections of the Act, my view is that it means simply that, although in ordinary cases returns are required to base an assessment upon them, yet, in the cases mentioned in sec. 22, if an assessment is made the person

shall be taken to be a taxpayer unless he renders an objection in the way mentioned in sec. 28 and establishes that objection. When he raises the objection under sec. 28, which limits the time for raising it to thirty days after service of the notice of the assessment, and when he sets out the reasons for his objection he is to have the fullest opportunity of testing his liability on any ground, but he is limited in his appeal to the reasons for objection set out in his objection. He is in no better or worse position than if he had made a return. Therefore, in the sense in which I take the words "that the assessment is excessive," that sense being that the appellant is bound to rely on an objection and on such grounds of objection as are raised in it, I think he is not entitled to rely on any other than the ground mentioned. He cannot, for instance, rely on the want of a return. Whatever ground is taken in his objection for saying that he has been assessed for more tax than he is bound to pay, he is entitled to rely on just as if he had made a return.

That brings me to the fourth question, which is: If the appellant is liable for war-time profits tax as aforesaid, is the assessment made by the Commissioner as aforesaid excessive within the meaning of sec. 22 of the *War-time Profits Tax Assessment Act* 1917 upon the facts herein stated? This case is stated under sec. 29, and that section limits the power to state a case to questions which in the opinion of the Court are questions of law, and this Court should answer those questions of law and remit its opinion to the Court below. That means that questions of law may be sent to this Court and are to be answered by this Court; and the question, therefore, as I read it, is this: Upon the facts herein stated what should the Court as a matter of law say as to whether the assessment is excessive or not? The assessment for this purpose has to be regarded as consisting of two distinct parts: the primary tax and the additional tax by way of penalty. As to the primary tax the first thing to consider is the proper construction of the assessment. Sec. 24 provides that "The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with." In that assessment the Commissioner put down for the accounting period ending 31st March 1916 the sum of £956,553 as the amount

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received by the appellant during the full period, and £717,415 as the amount received during the appropriate portion of that period. He then put down for the accounting period ending on 31st March 1917 the sum of £1,136,519 as the amount received by the appellant during the full period, and £284,130 as the amount received during the appropriate portion of that period. He then put down the amount of £1,001,545, being the sum of £717,415 and £284,130. The figures which he took as the total receipts for the two accounting periods he got from the income tax returns made by the appellant under the *Income Tax Assessment Act*. That sum of £1,001,545 was the only material the Commissioner had for calculating the war-time profits of the appellant except so far as he was able of his general knowledge and judgment to arrive at some basis that seemed to him to be fair. What he did then was to take 10 per cent. of that sum, namely, £100,154, as a working basis, which was in one sense a purely arbitrary sum, that appeared to him to represent the profits of the appellant. Then he went as near as he could to applying sec. 22 of the *War-time Profits Tax Assessment Act* and took 5 per cent. of the £100,154, and arrived at the sum of £5,008 as being the excess profits, and, since the *War-time Profits Tax Act* provided that 50 per cent. of the excess profits should be the amount of the tax, he arrived at the sum of £2,504 as representing, according to his view, the true amount of the war-time profits tax payable by the appellant. That appears to be such a method of proceeding in the absence of other information as cannot be said to be unlawful or to show any excess on the face of it. But then, inasmuch as there had been a failure by the appellant to send in any return or the return having been sent in too late, he added the sum of £250 8s. under the provisions of sec. 55 (1), which provides that any person who fails or neglects to furnish any return as and when required shall be liable by way of additional tax to pay 10 per cent. of the amount of tax assessable in addition to any additional tax payable under sec. 34, with a proviso that the Commissioner may, in any particular case, for reasons which he thinks fit, remit the additional tax or any part thereof. The total amount of the tax according to this assessment, including the additional tax, amounts to £2,754 8s.

And it now has to be considered whether, as contended by the appellant, the assessment is excessive by reason of the additional tax of £250 8s. It is now necessary to refer to some circumstances mentioned in the case in pars. 4 (*a*), 4 (*c*), 4 (*d*) and 4 (*e*). [His Honor read those paragraphs and continued :—] I should add in reference to par. 4 (*a*) that in the notice in the *Gazette* the date for sending in the reasons is stated as 15th December 1917. The position then was that the material which was asked for in the returns mentioned in the *Gazette* notice and the information which was otherwise asked for by the Commissioner were not given, and the Commissioner, not being in possession of sufficient material upon which to proceed strictly in accordance with the figures which would answer the requirements of sec. 22 of the *Income Tax Assessment Act* as read into the *War-time Profits Tax Assessment Act*, made the assessment. The date of that assessment was 20th April 1918, and that date indicates what is meant by the term "late return." There was no return. The appellant urged that the return asked for by the *Gazette* notice was irrelevant to this taxpayer's business. The answer is that that is no sufficient reason. The Act places the administration in the hands of the Commissioner; its terms are explicit and necessarily wide; returns are required in sec. 18 from "every person liable to be taxed," an expression which includes the present appellant; and the return asked for goes no further than a full and complete statement of the net profits of his business, which is what the Act expresses. One purpose of returns is to enable the Commissioner to "assess" taxpayers, and the final outcome that appears—particularly in the absence of a return—cannot determine whether or not a return should or should not have been made. Sec. 19, though not applicable in the circumstances of this case, shows that there is no such limitation as is contended for. There was a failure to comply, and the additional tax accrued by reason of sec. 55 (1). The position, so far, is that neither in respect of the primary tax nor of the additional tax is there anything to show an excess in any sense.

What, then, should be the answer to the fourth question? Sec. 25 provides that "(1) The production of any notice of assessment . . . shall (*a*) be conclusive evidence of the due

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making of the assessment, and (*b*) be conclusive evidence that the amount and all the particulars of the assessment are correct; except in proceedings on appeal against the assessment, when it shall be *primâ facie* evidence only." This is a proceeding on an appeal, and therefore the notice of assessment is *primâ facie* evidence only. Reading secs. 22 and 25 together, it appears to me that the position is this:—The amount claimed is *primâ facie* proved to be correct, and upon the evidence before us the question is, is there any evidence to the contrary? There is no evidence whatever that the assessment is incorrect for any reason. The position is one in which, if we were to apply the term used in trials before a jury, the evidence is all one way, and in that view the question must, in my opinion, be answered that on the facts stated in the case the assessment made by the Commissioner is not excessive within the meaning of sec. 22.

GAVAN DUFFY J. I agree with the answers suggested by my brother *Isaacs*, but I should like to put the answer to the fourth question in these terms, which I think are not inconsistent with anything he has said: I am unable to say whether the assessment is excessive or not, but in my opinion the appellant has not established that it is excessive.

RICH J. I would add a few words on one or two of the questions asked by the case. As to the first question, it is apparent on the face of the *War-Time Profits Tax Assessment Act* that the ordinary liability of a foreign company drawing profits from Australia is not to be lost. The proviso to sec. 15 (1) makes special provision for "a person not resident in Australia." Then sec. 46 requires every company which carries on business in Australia to have a public officer here, and that obviously includes a foreign company. With regard to the fourth question, the Legislature in passing a taxing Act, in which so much depends on information given by the taxpayer or possible taxpayer, is sometimes forced to require people to give information which may turn out to be immaterial, but it may be material. It is essential for the efficient working of the Department that returns should be furnished so that the Commissioner may

proceed on the making of the assessment. In this connection I would quote a few words from the opinion of Lord *Loreburn* L.C. in *Attorney-General* v. *Till* (1). There his Lordship, discussing the delivery of returns under the English *Income Tax Act*, said :—"It is necessary, therefore, that there should be a sharp weapon available in order to prevent the requirements of the Act being trifled with. On the other hand the making of the return or statement is not always easy, and mistakes may occur notwithstanding that care may have been used to avoid them, still more when proper care has not been used. Accordingly provision is made for penalties which are to fall in the event either of unpunctuality or of inaccuracy in the return or statement required. But alongside of that are to be found provisions to relieve a man from the penalty if he mends his mistake. . . . I see nothing either harsh or unreasonable in this. A fair balance is held, and while the revenue is protected against procrastination and carelessness which, if practised on any large scale, would make the collection of the tax an intolerable business, anyone who though honest has been neglectful may redeem his neglect." Those remarks apply to the statutory duty of furnishing returns and to the imposition and remission of penalties under sec. 55 of the Act now under consideration. I agree with what has been said by my brother *Isaacs*, and with the answers to the questions proposed by him.

Questions answered : (1) *Yes* ; (2) *Yes* ; (3) *No, in the sense that "excessive" means more than the appellant is bound to pay* ; (4) *No.*

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

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

(1) (1910) A.C., 50, at p. 53.