[HIGH COURT OF AUSTRALIA.]

DICKSON (AS PUBLIC OFFICER OF ADELONG GOLD ESTATES NO LIABILITY) } APPELLANT;

AND

THE COMMISSIONER OF TAXATION (NEW SOUTH WALES) . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, Aug. 6, 7, 24,

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Income Tax (N.S.W.)—Company—Income derived from any source in State—Gold-mining company incorporated in Victoria—Gold mined in New South Wales—Sale of gold to Mint—Gold exported and sold abroad—Profits on sale received by company—Apportionment between New South Wales and places outside—Income Tax (Management) Act 1912 (*N.S.W.*) (*No.* 11 *of* 1912), *secs.* 4*, 9, 32—*Income Tax Management (Further Amendment) Act* 1914 (*N.S.W.*) (*No.* 32 *of* 1914), *sec.* 2*—*Income Tax Management (Amendment) Act* 1918 (*N.S.W.*) (*No.* 27 *of* 1918), *sec.* 5.

The appellant, a mining company incorporated in Victoria, where its business was managed and controlled, owned a gold mine in New South Wales from which it produced gold. In 1915 the export of gold from the Commonwealth was prohibited, and thereafter the appellant was practically compelled to sell its gold to the Royal Mint at the standard price per ounce. The price of gold in other parts of the world having increased, an arrangement was made with the Treasurer of the Commonwealth whereby he permitted gold producers associated together in a company incorporated in Victoria and called the Gold Producers' Association Ltd. to export sovereigns to the amount of the gold produced by its members and supplied to the Royal Mint. Thereafter the appellant sold its gold to the Mint in Melbourne, the purchase price being paid into the credit of the appellant at its bank in Melbourne. Permission

* By sec. 4 of the *Income Tax (Management) Act* 1912, as amended by sec 2 of the *Income Tax Management (Further Amendment) Act* 1914, "income" is defined as meaning "income derived from any source in the State or earned in the State," &c.

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was given by the Treasurer to the Association in general terms for a certain period to export sovereigns equivalent in amount to the gold produced by its members and delivered to the Mint. Sovereigns were accordingly shipped to a foreign country where they were sold and the balance of the purchase-money was received by the Association as agent for its members, and was distributed among them pursuant to its articles of association.

Held, by *Isaacs*, *Rich* and *Starke* JJ. (*Knox* C.J. dissenting), that the sum received by the appellant from the Association in any particular year could not be wholly excluded from the taxable income of the appellant within the meaning of the *Income Tax* (*Management*) *Act* 1912 (N.S.W.), and (*Knox* C.J. and *Higgins* J. dissenting) that that sum should be apportioned between New South Wales and the places outside New South Wales, where the realization of the gold took place, for the purpose of ascertaining what portion of such sum was income derived from any source in, or earned in, New South Wales.

Mount Morgan Gold Mining Co. v. *Commissioner of Income Tax* (*Q.*), (1922-23) 33 C.L.R. 76, applied.

Per Knox C.J.: No part of this sum was income derived from any source in New South Wales.

Per Higgins J.: The whole of this sum was income derived from a source in New South Wales, within the meaning of the Act.

Decision of the Supreme Court of New South Wales (Full Court): *Adelong Gold Estates No. Liability* v. *Commissioner of Taxation*, (1922) 22 S.R. (N.S.W.) 197, varied.

APPEAL from the Supreme Court of New South Wales.

On the hearing of an appeal by David P. Dickson, as Public Officer of Adelong Gold Estates No Liability, to the Court of Review from an assessment of him, as such Public Officer, for income tax by the Commissioner of Taxation for New South Wales, *Cohen* D.C.J. stated a special case, which was substantially as follows, for the determination of the Supreme Court:—

1. During the month of May 1920 the above-named respondent served upon the above-named appellant, who is the registered Public Officer of Adelong Gold Estates No Liability (hereinafter called "the appellant company"), an assessment notice assessing the amount of taxable income of the appellant company derived from personal exertion based on the income of the year ended 31st October 1919 as £8,441, and assessing the amount of tax payable by the appellant as such Public Officer as aforesaid at £527 11s. 3d.

2. The said appellant duly, and in accordance with the provisions

of the *Income Tax (Management) Acts* 1912-1918 (N.S.W.), paid the amount of the tax as so assessed and lodged and served on the respondent a notice of appeal to the Court of Review, whereby he claimed that the amount of the appellant company's taxable income was £6,525 only and that the balance, the sum of £1,916, was not income of the appellant company in respect whereof the appellant company was liable to income tax on the grounds that the amount of tax fixed by the assessment was excessive, that the appellant company had been wrongly assessed on the said sum of £1,916 received from the Gold Producers' Association and that the said sum of £1,916 therein referred to was not income derived from any source in the State of New South Wales or earned in that State or otherwise subject to income tax.

3. The said appeal came on to be heard before me sitting as a Court of Review on 28th April 1921 in the presence of counsel for the appellant and for the respondent.

4. At the hearing I found the following facts:—The appellant company is a company incorporated in Victoria, and is the owner of a gold mine situate at Tumut in New South Wales, where it produces gold. Prior to the War, gold companies in the Commonwealth of Australia could export their gold or otherwise deal with it as they thought proper, and thus get full value. On 14th July 1915 the Commonwealth Government issued a proclamation under the *Customs Act* prohibiting the export of gold except with the consent of the Treasurer. Thereafter, apart from a few sales to dentists and jewellers for purposes of their business, the only course open to gold producers was to sell their gold to one or other of the Royal Mints within the Commonwealth, who purchased same at the price of £3 17s. 10½d. per ounce standard gold. Shortly after the date of the proclamation the market price of gold rose rapidly in other parts of the world and the restriction on the export of gold was a considerable hardship on the gold producers of Australia. Realizing this hardship the Commonwealth allowed the gold producers to export sovereigns to the value of the gold produced. If the gold producers could sell those sovereigns abroad at a profit, that profit would be theirs. A company called the Gold Producers' Association Ltd. (hereinafter called "the Association") was registered in

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Victoria on 6th March 1919, which acts as agent in these transactions. Its members comprise between 90 and 95 per cent of the gold producers of the Commonwealth, and the appellant company is a member. The appellant company sells the gold produced by it to the Royal Mint at Melbourne. Such gold is sent by post from the town nearest to the mine in New South Wales to the Deputy Master of the Mint in Melbourne, who after an assay of the gold has taken place forwards to the appellant company at the mine a memorandum of out-turn and pays into the credit of the appellant company at its bank in Melbourne the amount shown on that memorandum. The appellant company then returns the memorandum of out-turn to the manager of the company in Melbourne, who sends it to the secretary of the Association. The secretary of the Association hands it to the Commonwealth Treasury as evidence of the production of the gold and of the fact that the gold has been delivered to the Mint. Permission is given by the Treasury to the Association to export from Australia sovereigns equivalent in amount to the gold produced by its members and supplied to the Mint. The permit, which is general for a period, is in writing and consists of a short memorandum stating that the Commonwealth Treasurer approves of gold being exported by the Association equivalent in amount to the gold produced by its members over a period on terms approved by the Treasurer. The Association can export only the equivalent of current production as shown by the Mint vouchers. The gold exported under such permit consists of sovereigns provided by the Commonwealth Bank at the direction of the Treasurer. The sovereigns are shipped by the Commonwealth Bank to an agent of the bank in the foreign country where the sale takes place. The contract of sale is effected there by a representative of the Association. The purchaser pays the purchase-money to the agent of the Commonwealth Bank, and receives from the latter the sovereigns sold under the contract. The purchase-money is remitted to the Commonwealth Bank in Melbourne and the balance thereof, after deduction of the amount representing the sovereigns provided for export and all incidental costs, charges and expenses, is credited to the Association. The Association receives such balance as agent for its members and distributes it among them under art. 98 of the articles of association.

The sum of £1,916 mentioned in par. 2 hereof is the total amount received by the appellant company from the Association during the year ended 31st October 1919, and is the proportion of such balance which became payable to the appellant under the said article as aforesaid.

6. On these facts I decided that the said sum of £1,916 was taxable income of the appellant company within the meaning of the *Income Tax (Management) Acts* 1912-1918, and dismissed the appellant's appeal.

The questions for the determination of the Court are :—

(1) Whether my said decision is correct in law ;

(2) Whether any part of the said sum of £1,916 is taxable income of the appellant company within the meaning of the *Income Tax (Management) Acts* 1912-1918 ;

(3) Whether I was in error in holding that the whole of the said sum of £1,916 is taxable income of the appellant company within the meaning of the *Income Tax (Management) Acts* 1912-1918.

The Full Court of the Supreme Court answered the questions as follows : (1) Yes ; (2) Yes ; (3) No.—*Adelong Gold Estates No Liability* v. *Commissioner of Taxation* (1).

From that decision the appellant now appealed to the High Court.

Leverrier K.C. (with him *Harrington*), for the appellant. Under sec. 4 of the *Income Tax (Management) Act* 1912 the income of the company which is taxable is " income derived from any source in the State " of New South Wales. The word " derived " means directly derived (*Commissioners of Taxation (N.S.W.)* v. *Meeks* (2) ; *Nathan* v. *Federal Commissioner of Taxation* (3)). Here the source of the income was a series of transactions which took place outside New South Wales. The production of the gold in New South Wales was not the source of the income. The income producing transaction, so far as New South Wales was concerned, ceased when the gold was sold to the Mint. The source of the income with which this case is concerned was the subsequent transactions, which took place

(1) (1922) 22 S.R. (N.S.W.) 197. (2) (1915) 19 C.L.R. 568.
(3) (1918) 25 C.L.R. 183.

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wholly outside New South Wales. The production of the gold in New South Wales was no more than the reason why the Commonwealth permitted those transactions to take place. *Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax (Q.)* (1) is distinguishable; for there the company was incorporated and carried on business in Queensland and the tax was imposed on income arising or accruing from a business carried on in Queensland. Here the company was registered in Victoria. If the income is not wholly exempt from taxation, there should, in accordance with the *Mount Morgan Case* and *Meeks' Case* (2), be an apportionment between New South Wales and the places where the realization of the gold took place. The only inference which as a matter of law can be drawn from the facts stated is that there were two separate transactions in this case and not one transaction only. The first was completed when the gold was sold to the Mint, and the second was everything that took place in relation to the export and sale of sovereigns. The second transaction was wholly outside New South Wales.

Brissenden K.C. (with him *McMinn*), for the respondent. The sum in question was income derived from the business of the company, namely, the production and realization of gold (*Mount Morgan Case* (3)), and on the authority of *Meeks' Case* (2) and *Commissioners of Taxation* v. *Kirk* (4) should be apportioned between New South Wales and the places where the realization took place.

Leverrier K.C., in reply.

Cur. adv. vult.

Aug. 24.

The following written judgments were delivered :—

KNOX C.J. The first question raised by this appeal is whether the decision of *Cohen* D.C.J. that the sum of £1,916 received by the company—the Adelong Gold Estates No Liability—in the year ending on 31st October 1919 was taxable income of the company within the meaning of the New South Wales *Income Tax (Management) Acts* 1912-1918, is correct in law.

(1) (1922-23) 33 C.L.R. 76.
(2) (1915) 19 C.L.R. 568.
(3) (1922-23) 33 C.L.R., at p. 104.
(4) (1900) A.C. 588.

The facts found by the learned District Court Judge are set out in the special case stated by him for the opinion of the Supreme Court of New South Wales as follows :—[Par. 4 of the case was here set out.]

Sec. 9 of the Act provides that income tax shall be paid in respect of "taxable income" which has been received by any person during a given period. By sec. 4 "taxable income" means the amount of income remaining after any deductions allowed by the Act have been deducted from the income of any taxpayer. "Income" means "income derived from any source in the State" (of New South Wales) "or earned in the State." By sec. 10 it is provided that nothing in the Act shall apply to (*g*) income derived from sources outside the State. The question for decision, therefore, is whether the facts found by *Cohen* D.C.J. can support his conclusion that the "source" of the sum of £1,916 which was undoubtedly received as income by the company was in New South Wales.

On the facts stated the only acts done in New South Wales were : (1) production of certain gold ; (2) putting the gold so produced in course of transmission to the Mint ; (3) receiving from the Mint the memorandum of out-turn ; and (4) putting this document in course of transmission to the manager of the company in Melbourne.

It is not alleged that the sovereigns so sold were coined from gold produced from the company's mine or from any other mine in New South Wales, but the respondent contends that the production of gold from the company's mine is the "source" of this profit, because the permission to buy and export sovereigns was dependent on the production of gold by the company, and the company's mine from which the gold was produced was in New South Wales. In other words, the respondent's contention is that, as the profit could not have been made but for the production of gold by the company and as the gold produced by the company was produced in New South Wales, the source of the profit was in New South Wales. It is admitted that this profit is not derived from the sale of the gold produced in New South Wales. That gold is sold to the Mint, and the profit made on that sale is admittedly income taxable in New South Wales. In considering the meaning of the phrase "income derived from any source in the

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State" of New South Wales, it must, I think, be taken that "derived" means "directly derived" (see *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (1); *Nathan* v. *Federal Commissioner of Taxation* (2)), and that the source of the income must be its real source as a hard practical matter of fact (*Nathan's Case*; *Studebaker Corporation of Australasia Ltd.* v. *Commissioner of Taxation (N.S.W.)* (3)).

In the present case the immediate source of the income in question was the sale of sovereigns in a foreign country. The more remote source was the purchase in Victoria and export thence of sovereigns under permission of the Commonwealth Government. It is true that that permission was obtained because the company had produced from its mine in New South Wales and sold to the Mint a given quantity of gold, but, in my opinion, this fact affords no support for a finding that the production of the gold was, in any relevant sense, the source of the profit derived from the sale of the sovereigns.

I think Mr. *Leverrier* was right in saying that the only way in which the receipt of this income was connected with or attributable to any act done in New South Wales was that the production in New South Wales of a certain quantity of gold supplied the motive or reason for permission being granted to purchase and export the sovereigns the sale of which was the immediate source of the income.

For the reasons given by my brother *Gavan Duffy* and myself in *Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax (Q.)* (4), I think the decision in *Commissioners of Taxation* v. *Kirk* (5) is not applicable in the facts of this case.

In my opinion the appeal should be allowed and the questions in the special case answered as follows: (1) No; (2) No; (3) Yes.

ISAACS J. From the course the argument took, it is essential first to settle the limits of the jurisdiction of this Court in relation to the case stated by the Court of Review. As our jurisdiction is simply to determine whether the Supreme Court decision was right or wrong, it is necessary to inquire as to the nature of the statutory functions of the Supreme Court in such a case. Our powers of

(1) (1908) A.C., at p. 52.
(2) (1918) 25 C.L.R., at p. 189.
(3) (1921) 29 C.L.R. 225.
(4) (1922-23) 33 C.L.R. 76.
(5) (1900) A.C. 588.

correction cannot go beyond the limits set to those of the Supreme Court. Sec. 32 of the New South Wales *Income Tax (Management) Act*, No. 11 of 1912, as amended to 14th November 1922, confines the jurisdiction of the Supreme Court to " decision by the Supreme Court on any question of law arising before the Court," that is, before the Court of Review. There is no provision, as there is in some other instances of cases stated, by which the Supreme Court is empowered to draw inferences of fact and by which, therefore, this Court, on appeal, might revise those inferences. The *Mount Morgan Case* (1), for example, was an instance where such a provision existed. It has been authoritatively decided by this Court in several cases that no inferences of fact can be drawn by the Supreme Court or this Court in such circumstances; among those cases are *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (2); *Schumacher Mill Furnishing Works Pty. Ltd.* v. *Smail* (3); *Boese* v. *Farleigh Estate Sugar Co.* (4); *Mack* v. *Commissioner of Stamp Duties* (*N.S.W.*) (5); *Alexander* v. *Menary* (6). In the absence of explicit statement of facts, including inferences, the Court engaged in dealing with the case stated may perhaps gather the necessary facts from the construction of the case itself as stated, in the way expounded by Lord *Atkinson* in *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (7). Beyond that, the Court cannot go unless specially authorized. I must, therefore, disclaim any attempt to find facts for myself, even by way of inference, and confine myself to such facts as I can ascertain to have been found by the Court of Review.

In the present case a number of constituent or evidentiary facts are stated in the body of the case stated. Upon these alone the Supreme Court determined the matter and the arguments before us proceeded. If the matter rested there, there is at least one essential fact which I should be unable to find, either explicitly or, by construction of the special case, implicitly, in order to enable me to arrive at a conclusion whether any part of the profit in dispute should be brought into computation for the purposes of the New

(1) (1922-23) 33 C.L.R. 76.
(2) (1913) 16 C.L.R. 591.
(3) (1916) 21 C.L.R. 149.
(4) (1919) 26 C.L.R. 477.
(5) (1920) 28 C.L.R. 373.
(6) (1921) 29 C.L.R. 371.
(7) (1915) A.C. 433, at pp. 449 450.

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South Wales Income Tax Act. Its liability to taxation in whole or in part under that Act depends upon whether it is in law derived in whole or in part from a source in New South Wales. In the circumstances, there must be, in addition to the other facts set out in the body of the case, a finding, explicit or implied, by the Court of Review, and not by the Supreme Court or this Court, that in effect so connects the dealings before export of sovereigns with that export and its consequences as to constitute the various steps enumerated a continuously connected, though variously conducted, scheme, beginning with production at the mine, proceeding to obtaining at the Mint the Australian value of the gold, and then continuing the business activity of the gold—vicariously but effectively—in the form of sovereigns, selling it abroad, and thus obtaining its full foreign value. From that foreign value, after deducting the Australian value, already paid over, the balance is handed to the company. That connection it is necessary to find established or denied by the Court of Review as a necessary element on which as a *matter of law* the Court can determine the case one way or the other. It certainly does not appear explicitly. In the course of the argument I was referred to par. 6 of the case as implicitly containing it, because it states the decision that the profit was taxable income. I could not accept that " decision " as containing the inference. But, on reading the case more closely, I now observe in par. 6 a reference to the judgment of the Court of Review, which is scheduled to the case and which I treat as part of it. In that judgment I find the necessary fact stated in favour of the Commissioner. I would suggest, in passing, that a double statement of the facts, one in the body of the case, and one in the judgment, might in some cases be embarrassing. If any material difference were found, it might lead to serious difficulty. In the present case we have, however, no difficulty in that respect, and we have some distinct statements of fact in the judgment which are absent from the facts enumerated in the body of the case. For instance, it is stated in the judgment :—" Realizing this hardship, the Commonwealth allowed the gold producer not to export his gold but still to be practically able to dispose of it in the same way. They allowed the gold producer to export sovereigns to the value

of the gold produced. Then if the gold producer could sell those sovereigns at a profit that profit would be his." Again: "They cannot dispose of the gold itself on account of the embargo of the Commonwealth Government, but they are disposing of something else got in exchange for the gold." And again:—"But here the Gold Producers' Association earns no profits. It cannot under its articles of association; it is merely the agent for the appellant company, the channel through which the proceeds derived from the gold produced by the appellant company passes, and the whole of such proceeds less necessary expenses go to the appellant company." This makes the case substantially indistinguishable from the *Mount Morgan Case* (1). That is to say, the profits *ultra* the Australian price did not arise, and could not possibly arise, from the New South Wales source only.

I accordingly answer the questions as follows: (1) No; (2) Yes; (3) Yes.

HIGGINS J. We have recently had to consider the meaning of an income tax Act of Queensland (*Mount Morgan Gold Mining Co.* v. *Commissioner of Income Tax (Q.)* (1)). In that case — as well as the present case—the peculiar arrangements made for the export of gold, through the agency of the Gold Producers' Association, and with the assistance of the Federal Government, were involved; and we reserved judgment in this case as to a New South Wales income tax Act in order that we might have any guidance which the decision of the Judicial Committee of the Privy Council in the *Mount Morgan Case* might afford. But the *Mount Morgan Case* has, as we understand, been settled without any decision. The New South Wales Act has now to be interpreted on its own words.

In the Queensland Act the relevant test of taxability as to income derived from personal exertion is this: was the income "*arising or accruing from any business carried on in Queensland*"; the test in this New South Wales Act is this: was the income "*derived from any source in the State*" (of New South Wales) (sec. 4). It is further provided (sec. 10 (*g*)) that this Act is not to apply to "income derived from *sources* outside the State." The source is

(1) (1922-23) 33 C.L.R. 76.

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local. If a man in New South Wales receive rent from houses in England, or profits from a business carried on in England—or in China—he has not to pay income tax thereon to the New South Wales Government.

There is, indeed, a provision (sec. 19 (2)) as to a taxpayer who *carries on business both in and outside of the State*, that " his taxable income shall be deemed to be a sum which shall bear the same proportion to the net *profits* of such business as the assets of the business in the State bear to the total assets of the business, or, in the discretion of the Commissioner, as the total amount of *sales* in connection with the business effected in the State bears to the total amount of such sales effected both in and outside the State." But to effect a profitable sale in England—or in China—is not necessarily to " carry on business " there. As Lord *Herschell* said, in *Grainger & Son* v. *Gough* (1), at p. 335, " many merchants and manufacturers export their goods to all parts of the world, yet I do not suppose anyone would dream of saying that they exercise or carry on their trade in every country in which their goods find customers " (and see pp. 337, 346). Therefore, sec. 19 (2) does not enable us to affirm that profitable sales made in China involve as a corollary that China is the *source* of the profits from the sales.

The facts set out in par. 4 of the special case need not be repeated by me. But it should be noticed that in this case the identical gold which was produced by the Adelong Company at Tumut is sold to the Royal Mint at Melbourne—that the identity of the gold has not been lost in the process of refining at a refining company's works; further, that the company is a Victorian company, incorporated in Victoria, directed from Victoria—the directors do not sit and reside in the State in which the mine is situated. The Act, in substance, says that wherever the taxpayer, whether a person or a company, resides or has a principal centre, he must pay income tax on all such income as is derived from any *source* in the State of New South Wales. The words of the Act are not " derived from the carrying on of business operations in New South Wales." If these were the words used—" the carrying on of business *operations* "—it might reasonably be argued that there must be apportionment of the

(1) (1896) A.C. 325.

profits as between the business operations carried on in Victoria (where the directors sit), and the business operations carried on in New South Wales (where the mine is worked).

What, then, does the Act mean by income "derived from any source in the State," as distinguished from income "derived from sources outside the State"? We have to find the locality of the source, as between New South Wales and other countries; the generic source as to nature or character lies, or may lie, in personal exertion.

Now, the word "source" is not technical; it has to be interpreted according to its ordinary use in common language. The original idea, I suppose, is that of a stream issuing from a mountain; but the metaphorical use of the word is very frequent. This company has power under its rules and regulations to get gold from any part of the world; but all its gold comes actually from this land at Tumut in New South Wales. What would the "practical man" say was the "source" of these profits, this income? To be more definite, would the country of "source" be New South Wales, or Victoria, or China? If this Victorian company got gold from a mine in Victoria as well as from this mine in New South Wales, and presented to the Mint the gold from Victoria in the form of bar A, and the gold from New South Wales in the form of bar B, the practical man's answer would be obvious—the source of that gold in bar B is in New South Wales; and the income of the company taxable in New South Wales includes all profit made that would not be made but for bar B. The bar is not all income, but the profit from it is. The position is clear when we look at the matter from the point of view of the company, or of the directors who conduct the business of the company.

But the subsequent processes whereby the profit is made have to be more fully considered. These subsequent processes were essential to the making of the profit; and they did not take place in New South Wales. The mining operations in New South Wales resulted in gold; by the sale of this gold to the Royal Mint the company gets (1) the standard price for it, and the price, less expenses, is profit; and (2) the profit made by the sale in China of equivalent sovereigns. But for the production of the bar gold

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from this mine in New South Wales, neither of these profits would be enjoyed. So that the source—the fountain head—of these profits is in New South Wales.

Everything that has been done is abundantly within the scope of the company's objects, and the powers of the directors. The objects of the company (reg. 3) include these: (a) to purchase or *otherwise acquire* real or personal property of all kinds in Australia, and to sell, exchange or *otherwise deal* with the whole or any part of such property; (b) to *purchase or otherwise acquire gold* and other metals; (g) to transport or ship to any place in Australia *or elsewhere*, and *to sell there any metals* or other products; (p) to establish and form or assist in establishing and forming any association calculated in any way to benefit the company; (q) to enter into *any agreement with any Government* and to obtain from such Government any rights, concessions and privileges which may be thought conducive to any of the objects of the company; (v) to do all or any of the above things *in any part of the world* and either alone or in conjunction with others either by or through agents or otherwise; (w) to do all such other things as are incidental or may be thought conducive to the attainment of any of the objects. In brief, the directors can do substantially anything that will enable the company to get the most profit from the gold that it produces. The supreme purpose is gain—gain through pursuing the objects; but the source of this particular gain is in Tumut, New South Wales, and in the mining operations there.

But it is urged that the gold sold in China is not the gold produced in New South Wales, but sovereigns which have been sold for the benefit of the gold producers who sell their gold to the Mint; and the processes of sale in China are effected, not by the company, but by the Gold Producers' Association. Yet the agreement with the Federal Government and the concessions and privileges as to the profit from the sovereigns were well within the objects of the company. The Gold Producers' Association is an agent of the company for the purpose of selling (art. 97, arts. 98-100A, of Gold Producers' Association articles). It matters not for our present purpose whether the Association is validly incorporated or not—it is directly an agent for the company. By becoming a member of

the Association, this Adelong Company covenants to conform to the regulations, or, at all events, assents to them. The resolution to become a member of the Association is one of the steps taken by the directors of the company with the view of making profit from its mining operations in New South Wales. As for the fact that the gold sold in China is not the identical gold produced from those mining operations, I put, during the argument, the case of a company mining for gold in a back district of Queensland. The company wants to export its gold for sale in China ; it learns that a bank in Sydney, New South Wales, has equivalent sovereigns in its vaults ; the roads are bad, and the company arranges with the bank to send the equivalent sovereigns to China in the meantime in place of the company's gold : could it be said that the profit made by the sale of those sovereigns taken from the bank is not profit derived from "a source" in Queensland ? The test as to income being taxable is not whether the *gold* sold in China was derived from a source in New South Wales, but whether the *income*—the result of all the company's activities under its regulations, including the making of the agreement with the Government—was derived from a source in that State. None but gold producers of Australia belonged to the Gold Producers' Association ; none but gold producers of Australia, who sold their gold to the Mint, were allowed to export gold. The profit from the export of equivalent gold sovereigns could not have been made but for the fact that the original bar gold had been produced in Australia ; and the particular State of Australia from which it was produced was in this case New South Wales.

Perhaps, I can make the position as it appears to me, clearer thus :—The Federal Government has prohibited the export of gold, and the gold producer has no market for his gold except at the Royal Mint, at the standard price ; whereas if the gold were sold in China the price would be much higher than the standard. The gold producer may hoard his gold and wait for more advantageous opportunities for selling ; but the Federal Government says (I am paraphrasing) :—"We are paying you less than would be paid in the open market, and we prevent you from going to the open market. But if you will sell your gold to us at the fixed standard price we

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are willing to give you not only that price, but also the difference between that price, and the net sum to be realized by the sale of equivalent sovereigns in China; and you will have permission—notwithstanding the prohibition—to export the equivalent sovereigns through your Association." Thus stated, it seems to my mind clear that the *source* of all this profit, all this income, is in the State where the mine is.

It must be borne in mind that we have not to deal with the Gold Producers' Association as a taxpayer, but as an agent for the Adelong Company. If we had to deal with the Association as a taxpayer, it might be fairly contended that any commission earned by itself for acting as agent was not made from a "source" in New South Wales, but from a "source" (its own business operations) in China. But here we are dealing with the Adelong Company as a taxpayer; and, from this point of view its income is made, through agents in China, from a source in New South Wales.

I have examined the cases referred to in argument and I cannot find any case which throws doubt on this reasoning. More than ever I feel the importance of keeping one's mind fixed to the particular Act to be applied. In the case of *Commissioners of Taxation* v. *Kirk* (1) the Judicial Committee had to deal with a previous *Land and Income Tax Act* of New South Wales (Act of 1895). The income of the company—the Broken Hill Proprietary Co. Ltd., incorporated and directed in Victoria—was in part derived from the extraction of ore (base metals) from the soil of New South Wales, and in part from the conversion of the crude ore into a marketable product in New South Wales. The finished product was sold exclusively outside New South Wales. It was held that the profits were assessable for income tax—as to the extraction of the ore, because it was income "derived from lands of the Crown held *under lease*," &c., and as to the manufacturing process because it was included in the words of the Act "from any other *source* whatsoever in New South Wales." The only question asked was, had the company *any* income in the relevant year within the meaning of the Act; and the answer was Yes. The Judicial Committee had not to consider whether *all* the income was taxable. In *Commissioners of Taxation (N.S.W.)* v. *Meeks* (2) the Sulphide Corporation was incorporated and had its head office

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

(2) (1915) 19 C.L.R. 568.

in London, conducted its Australian business at Melbourne, but its practical operations of mining, treating and smelting ore in New South Wales. It was held in this Court, *under this very New South Wales Act*, that the tax was assessable on the profits so far as attributable to the practical operations in New South Wales as the place of *source* of such profits; but it was said that if the company could establish a case for attributing any portion of the profits to England or to Victoria, where it carried on certain business operations, the Commissioner should give effect to such proof. In *Nathan* v. *Federal Commissioner of Taxation* (1) the subject of discussion was the Federal *Income Tax Assessment Act* which taxed "income derived directly or indirectly from *sources* within Australia" (sec. 10). Dividends were received in England by a shareholder from companies incorporated in England and having their control and management there; but the companies carried on their businesses in part in Australia. It was held that the taxpayer was assessable as to the dividends so far as attributable to the profits of that part of the business carried on in Australia. It was said (2) that the place of head office and directorate and declaration of dividend did not govern the matter, "but the *real source of production of the dividend*, namely, *the company's actual operations*, should govern to the extent that they so contributed." This case, so far as it goes, supports the view that the scene of the actual mining operations in the present case (New South Wales), not the seat of direction (Victoria), is the test of the source of income. *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (3) was an appeal from New Zealand. The Act prescribed that income derived from business was to be deemed to include "all profits derived from or received in New Zealand"; and it was merely held that the profits of a commission agent, made by the sale of New Zealand produce in London, were not profits of a business carried on in New Zealand; and as the profit derived from that business in London was not "derived from or received in New Zealand," these profits were not taxable.

But it is argued that "derived" must mean "directly derived," when the Act says "income derived from any source in the State";

(1) (1918) 25 C.L.R. 183. (2) (1918) 25 C.L.R., at p. 191.
(3) (1908) A.C. 46.

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and by "directly," as the context shows, what is meant is "immediately"—the source must be that which is proximately antecedent. Here, it is said, the immediate source of the income is the sale of sovereigns in a foreign country. In my opinion, the word "source," when its metaphorical basis is considered, connotes the very contrary of that which is proximately antecedent. If one, looking at the mouth of the River Murray, were to ask where is the source of the river, no one would say that its source was Lake Alexandrina, from which the river immediately falls into the sea; the answer would be that the source was in mountains of Queensland, New South Wales and Victoria. Nor is there anything in *Lovell's Case* (1) to favour this view of immediacy in connection with "source." The word "source" is not even used in the New Zealand Act; and what was held was that profits made by commission agents in their London business of selling New Zealand produce were not "profits derived from or received in New Zealand *from such business*," although in New Zealand the commission agents did their best to bring goods from New Zealand "within the net of the business which is to yield a profit." The word "directly," as used in that case, is not used in the sense of "immediately," but as contradistinguished from ancillary—the profits were not to be regarded as due to the canvassing and securing orders in New Zealand. The case of *Nathan* v. *Federal Commissioner of Taxation* (2) is actually an authority against this view of immediacy. The taxpayer's dividends came from companies which carried on some of their business in Australia, but the Court rejected the argument that the "source" of the dividends was in the companies or in the shares in the companies, from which the dividends were immediately received.

It seems clear, then, that question 2 should be answered in the affirmative—"Whether any part of the said sum of £1,916 is taxable income of the appellant company"—as answered in *Kirk's Case* (3). But we are asked the further question, whether the Judge was in error in holding that the *whole* of the said sum is taxable income. I cannot say that the learned Judge was in error; on the facts stated he was, in my opinion, absolutely right.

(1) (1908) A.C. 46.
(2) (1918) 25 C.L.R. 183.
(3) (1900) A.C. 588.

This is a special case, and we cannot go beyond the facts as stated. If the company desired to raise the point that there was some further source for the income in question in Victoria or in China or elsewhere than in New South Wales, the relevant facts should have been inserted in the special case; and, without the consent of both parties, we are not, in my opinion, justified in ruling as to facts not inserted. The case is stated under sec. 32 of the *Income Tax (Management) Act* 1912, and the section does not give any express power to the Supreme Court to draw inferences of fact. The decision of the Supreme Court, and of this Court, must be "on any question of law arising before the Court" (of Review). The learned Judge of the Court of Review said:—"On these facts I decided that the sum of £1,916 was taxable income of the appellant company within the meaning of the *Income Tax (Management) Acts* 1912-1918 . . . . The questions for the determination of the Court are:—(1) Whether my said decision is correct in law." In my opinion, question 1 by itself is a good question within sec. 32. In effect, the Judge had *decided* that the whole sum of £1,916 was taxable income—so far the question depended on facts, and conclusions of fact; but as his decision involved the construction of the Act, a question of law, he asked the Supreme Court to say was "my said decision . . . correct in law." I am glad to feel that this important case is not to be returned unanswered because of what I regard as extremely cramped views as to the duty of this Court on special cases.

In *Kirk's Case* (1) the Judicial Committee confined itself strictly to answering the precise question asked by the special case; the question being whether the companies had *any* income taxable within the New South Wales Act, the answer was Yes. In *Meeks' Case* (2), the question being was all the sum in question taxable, this High Court said, in its reasons for the judgment and on the facts stated in the case, that the sum was apportionable between New South Wales and any other places where the business was carried on; but it is to be noticed that there is no mention of apportionment in the formal judgment as expressed at p. 592. We

(1) (1900) A.C. 588. (2) (1915) 19 C.L.R. 588.

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have been shown the formal judgment as passed and entered. No apportionment was actually directed.

In my opinion, the Court of Review was right, the three Justices of the Full Court of New South Wales (*Gordon*, *Ferguson* and *Wade* JJ.) were right, and the appeal should be dismissed with costs.

RICH J. The jurisdiction of this Court is to do what the Supreme Court could have done. That Court has only such jurisdiction in this matter as can be found in the statute enabling the case to be stated. Sec. 32 of that statute distinctly restricts the jurisdiction of the Supreme Court to questions of law. This Court has been very firm in insisting that where the jurisdiction is so restrictively defined it cannot be exceeded even by finding inferences of fact unless that power is expressly given. Because that power was expressly given in the *Mount Morgan Case*, I acted upon it (see that case (1) and Order XXXVIII., rule 1, Queensland *Rules of the Supreme Court*). There is no permission given by any Act to draw inferences in this case and I agree that, if it were necessary to add anything by way of inference to the facts stated, it would be beyond my competency to make the addition. In my opinion, however, all necessary facts, including inferences, can be found included in the case stated by the learned Judge of the Court of Review. The sum total of the matter is, if not exactly, yet substantially, the same as what took place in the *Mount Morgan Case*. Whatever differences exist are not, in my opinion, sufficient to alter the result either commercially or legally. I therefore think the questions should be answered as follows: (1) No; (2) Yes; (3) Yes.

STARKE J. The Court of Review constituted under the *Income Tax (Management) Act* 1912 of New South Wales is empowered to state a case for decision by the Supreme Court on any question of law arising before the Court. This appeal is from a decision of the Supreme Court given upon a case so stated. I agree that the Court must state the facts—not the primary or evidentiary facts but the ultimate facts—necessary for the determination of the question or questions of law stated by the case (see *Merchant Service Guild Case* [*No.* 1] (2)). The Court of Review has in this case set forth, in my

(1) (1922-23) 33 C.L.R., at p. 98.

(2) (1913) 16 C.L.R., at pp. 621-625.

opinion, both the evidentiary facts and (in par. 6) the ultimate conclusions in fact and in law. Now, the facts so stated may be thus summarized:—The Adelong Gold Estates No Liability is a mining company incorporated in the State of Victoria under the *Companies Act* of 1890. The objects of the Company are somewhat extensive, but, speaking broadly, they are to acquire property, real or personal, for the purpose of mining for gold and other metals and mineral substances, and to sell its products in Australia and elsewhere. The place where the central management and control of the business actually abides is undoubtedly Victoria, in which State the directors and shareholders meet and settle the company's affairs. The company acquired a mine in the State of New South Wales, which it works for the purpose of obtaining gold; but whether this is the only mine possessed by it is not stated in the case. Prior to the War the company was able to dispose of its gold as it thought proper. But in 1915 the Commonwealth Government prohibited the export of gold, which practically compelled the company to sell its gold to the Royal Mint at the standard price per ounce. And as the price of gold appreciated in the East and elsewhere, this restriction on export was regarded by gold producers as a hardship. An arrangement was therefore made with the Treasurer of the Commonwealth whereby he permitted gold producers associated together in a company incorporated in Victoria and called the Gold Producers' Association, to export from Australia coin or bullion equivalent to the amount of gold produced by its members and supplied to the Royal Mint. This arrangement is not so clearly set forth in this case as it was in the case of *Mount Morgan Gold Mining Co.* v. *Commissioner of Taxes* (*Q.*) (1), but the parties agreed that the Court might treat any relevant facts as to procedure set forth in that case as stated in this case, and we are able to say that the arrangement for export was substantially the same in both cases. It is unnecessary to repeat here the various steps by which the arrangement was carried out, and I merely refer to the facts stated in the *Mount Morgan Case*. But the facts principally relied upon in the present case were these: that the Adelong Company sold its gold to the Royal Mint

(1) (1922-23) 33 C.L.R. 76.

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in Victoria and was there paid, that the arrangements made by the Gold Producers' Association for the export of coin and bullion equivalent in amount to this gold were also made in Victoria, that the actual export took place from Victoria, and that the sovereigns were disposed of in the East and the proceeds of the realization remitted to Victoria to the Gold Producers' Association, which distributed the same amongst its members pro rata according to its articles of association.

The amount received by the Adelong Company from the Association during the year ending on 31st October 1919 was £1,916. The company was, through its public officer, Dickson, assessed to income tax in respect of this sum, under the Income Tax Acts 1912-1918 of New South Wales; and the question is whether it was rightly so assessed. Both the Court of Review and the Supreme Court of New South Wales answered that question in the affirmative, and the company now, pursuant to the special leave granted to it, appeals to this Court against these determinations.

The matter falls for decision under the *Income Tax (Management) Acts* 1912-1918 of New South Wales, which are substantially the same as the Acts under which *Kirk's Case* (1) and *Meeks' Case* (2) were decided. The question is, what income was arising or accruing to the company from the business operations carried on by it in New South Wales (*Kirk's Case* (3)). Now, there is evidence upon which the Court of Review might find that the company engaged in a series of operations in earning its income—the recovery of gold in New South Wales, its realization outside New South Wales, and the receipt of the proceeds also outside New South Wales; and its decision involves that finding. As Lord *Davey* observed in *Kirk's Case* (4), all these operations "are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages." Or, to repeat what was said by my brother *Isaacs* in *Meeks' Case* (5) and referred to by me in the *Mount Morgan Case* (6), the essence of the business of the Adelong Company is a "whole set of operations" from production to realization. Consequently, the place where one

(1) (1900) A.C. 588.
(2) (1915) 19 C.L.R. 568.
(3) (1900) A.C., at p. 593.
(4) (1900) A.C. at p. 592.
(5) (1915) 19 C.L.R., at p. 588.
(6) (1922-23) 33 C.L.R., at p. 110.

operation is performed cannot be fastened upon as the locality from which the whole income is derived. It is quite true that the taxable income must be directly derived from a source in New South Wales, but to say that the direct source of the income in question here is the sale of coin or bullion abroad involves the fallacy condemned by the Judicial Committee in *Kirk's Case* (1). Such a sale is only one stage of a series of operations which together result in the income, and to regard it as the direct source of income is to leave out of sight the initial and other stages of those operations. The arrangement for the sale of coin or bullion was but a final stage of the company's operations, which aimed at the realization of the full value of the gold content of the auriferous ore or stone extracted by it from the earth, in New South Wales. It was, as *Wade* J. well said, merely incidental to the main purpose of the business of the company and a conventional way of carrying it out.

The Courts below were therefore right, in my opinion, in refusing wholly to exclude the sum of £1,916 from assessment to income tax under the Acts of New South Wales. But I do not think, on the facts stated, that the whole of that amount can or ought to be attributed to a source in New South Wales. If the income was derived from a series of operations, some of which were performed in New South Wales and some outside that State, then some part of that income must be attributed to sources outside New South Wales, and an apportionment is necessary (*Kirk's Case* (1); *Meeks' Case* (2)). It may be that sec. 19 of the Act applies to the case, or, if not, some practical and just method, other than that set out in the section, must be found. So far, there has been no attempt to make any such apportionment. *Studebaker's Case* (3) is consistent with the view taken by me. There, the income flowed from a contract made in America, and the contract formed the "essence of the business," and, as was said in *Lovell's Case* (4), you therefore looked no further, backward or forward, for the purpose of determining the locality in which the income was derived, than the place where the contract was made.

(1) (1900) A.C. 588.
(2) (1915) 19 C.L.R. 568.
(3) (1921) 29 C.L.R. 225.
(4) (1908) A.C. 46.

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The appeal ought, in my opinion, to be allowed, and the questions answered as follows:—(1) No. (2) Yes; the said sum is apportionable between New South Wales and places outside New South Wales. (3) Yes.

Appeal allowed. Order of Supreme Court discharged. Questions answered as follows:—(1) *No.* (2) *Yes*: *The sum of* £1,916 *cannot be wholly excluded from the taxable income of the taxpayer within the meaning of the Income Tax (Management) Act* 1912: *The sum should be apportioned as between New South Wales and places outside New South Wales for the purposes of ascertaining what portion of the said sum was income derived from any source in the said State or earned in the said State.* (3) *Yes. Remit case to Court of Review to proceed in conformity with the judgment. Respondent to pay appellant his costs in the Supreme Court and in this Court.*

Solicitors for the appellant, *Perkins, Stevenson & Co.*

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

B. L.