[HIGH COURT OF AUSTRALIA.]

THE BRITISH IMPERIAL OIL COMPANY LIMITED . . . . . } APPELLANT;

AND

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

H. C. OF A. 1925.

MELBOURNE, *Feb.* 24, 25.

SYDNEY, *April* 9.

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

Income Tax—Assessment—Board of Appeal—Validity of constitution of Board—Judicial power of Commonwealth—Reference to Board—Case stated by Board—Tax on person in respect of business controlled abroad—Different subjects of taxation—Severability—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 55, 71—*Income Tax Assessment Act* 1922-1923 (*No.* 37 *of* 1922—*No.* 27 *of* 1923), secs. 28, 41, 44, 48, 50-53—*Income Tax Act* 1922 (*No.* 38 *of* 1922)—*Income Tax Act* 1923 (*No.* 26 *of* 1923).

Held, by *Knox* C.J., *Isaacs*, *Powers*, *Rich* and *Starke* JJ., that the powers which the *Income Tax Assessment Act* 1922-1923 by secs. 44, 50 and 51 purports to confer upon a Board of Appeal created under sec. 41 of the Act are part of the judicial power of the Commonwealth, which under sec. 71 of the Constitution can only be vested in the High Court or a Federal Court, and that, a Board of Appeal not being such a Court, the conferring of those powers is *ultra vires* the Commonwealth Parliament; and, therefore, that no Board of Appeal can be validly constituted under the Act, and the High Court cannot entertain a case purporting to be stated by a Board of Appeal pursuant to secs. 44 and 51 (6) of the Act.

Held, also, by *Knox* C.J., *Isaacs* and *Rich* JJ., that the tax purported to be imposed by the combined effect of sec. 28 (1) of the *Income Tax Assessment Act* 1922-1923 and the *Income Tax Acts* of 1922 and 1923 is a tax and that the subject of taxation is not different from that dealt with by the other provisions of those Acts, and therefore that those Acts are not in that respect obnoxious to the provisions of sec. 55 of the Constitution.

Per Isaacs and *Rich* JJ.: Sub-sec. 3 of sec. 28 of the *Income Tax Assessment Act* 1922-1923 is invalid, and therefore where a taxpayer is dissatisfied with

the Commissioner's decision there is no additional tax; but sub-sec. 3 is severable, and where a taxpayer is not so dissatisfied the rest of the section operates.

CASE STATED.

On a reference to a Board of Appeal, appointed under the *Income Tax Assessment Act* 1922-1923, of an assessment of James L. Kirkland, the Public Officer of the British Imperial Oil Co. Ltd., by the Federal Commissioner of Taxation for income tax for the year 1922-1923, the Board, pursuant to secs. 44 and 51 (6) of the Act, stated a case, which was substantially as follows, for the opinion of the High Court:—

1. On 3rd September 1923 the above-named respondent caused to be given to James L. Kirkland, the Public Officer of the above-named taxpayer, a notice in writing of an assessment under the *Income Tax Assessment Act* 1922 in respect of the financial year 1922-1923.

2. On 13th October 1923 the taxpayer, pursuant to sec. 28 (3) of the said Act, lodged with the Commissioner a written request to refer the taxpayer's case to a Board of Appeal.

3. On the same date the taxpayer, pursuant to sec. 50 of the said Act, duly lodged with the Commissioner an objection in writing against the said assessment.

4. On the same date the taxpayer's solicitors wrote and delivered to the Commissioner a letter of which (omitting formal parts) the following is a copy:—"*Re* Assessment No. 97542.—British Imperial Oil Co. Ltd.—Acting on behalf of the British Imperial Oil Co. Ltd. of William Street, Melbourne, we have this morning served upon you a request to refer this case to a Board of Appeal, under the provisions of sec. 28 (3) of the 1922 Act. We now hand you herewith a notice of objection to assessment. This is not served in substitution for or in cancellation of the above-mentioned request, but is served in order to keep open our client's position as an objector, and to preserve its rights."

5. On 28th December 1923 the taxpayer wrote to the Commissioner a letter of which (omitting formal parts) the following is a copy:—"*Re* Assessment No. 97542.—British Imperial Oil Co. Ltd.—With reference to the notice of objection to assessment and notice

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requiring reference of case to the Board of Appeal herein, I desire to give you notice that I wish you to make a determination or decision in respect of the objections raised by me in the notice of objection to assessment, in order that, simultaneously with the reference to the Board of Appeal, I may, should it be necessary, carry the appeal from your decision to that tribunal also. You will appreciate this course will save a duplicate hearing, and is therefore in the interests of both parties."

6. On 9th January 1924 the Commissioner gave the taxpayer notice that its objection to assessment had been disallowed, and on the same date the taxpayer wrote to the Commissioner a letter of which (omitting formal parts) the following is a copy :—"*Re* Assessment No. 97542.—British Imperial Oil Co. Ltd.—Referring to your disallowance of this day's date of my objections dated 13th October 1923 to this assessment, I desire you to treat my objections as an appeal and to forward them to a Board of Appeal. The sum of £50 lodged by me with the request for reference of my objections to this assessment to the Board of Appeal I desire shall be regarded and held as a deposit under reg. 38 of Statutory Rule 12 of 1923 on my appeal from the decision of the Commissioner."

7. On the said date the taxpayer lodged with the Commissioner a written statement of the grounds relied upon in support of the request to refer.

8. On 18th January 1924 the Commissioner referred the said case to the Board of Appeal under sec. 28 of the Act by a document of which (omitting formal parts) the following is a copy :—" Whereas the taxpayer is a person carrying on a business in Australia which is controlled principally by persons resident outside Australia And whereas it appears to the Commissioner of Taxation that the said business produces either no taxable income or less than the ordinary taxable income which might be expected to arise from that business And whereas the Commissioner pursuant to the powers conferred upon him by sec. 28 (1) of the *Income Tax Assessment Act* 1922 in his judgment thinks proper that for the purposes of the said Act the taxpayer should be assessable and chargeable with income tax on ten per centum of the total receipts (whether cash or credit) of the said business And whereas the

taxpayer being dissatisfied with the said decision of the Commissioner has required the Commissioner to refer his case to a Board of Appeal constituted under the said Act: Now therefore the Commissioner of Taxation hereby refers the case of the said taxpayer to a Board of Appeal accordingly."

9. On the same date the Commissioner furnished the taxpayer with a statement of his reasons for disallowing the appellant's claims under both secs. 28 and 50 of the Act, of which statement the following is a copy:—"(1) Taxpayer is a person carrying on a business in Australia which is controlled principally by persons resident outside Australia. (2) It appears to the Commissioner that the said business produces either no taxable income or less than the ordinary taxable income which might be expected to arise from that business. (3) The Commissioner, pursuant to the powers conferred upon him by sec. 28 (1) of the *Income Tax Assessment Act* 1922 in his judgment thinks proper that for the purposes of the said Act the taxpayer should be assessable and chargeable with income tax on ten per centum of the total receipts (whether cash or credit) of the said business."

10. On the same date the Commissioner wrote to the taxpayer stating that its case had been referred and its appeal forwarded to the Income Tax Board of Appeal.

11. On the hearing of this appeal and of this reference before this Board the following contentions were made on behalf of the taxpayer: (a) That upon the hearing of the reference this Board is entitled and required to form an independent judgment upon the questions whether (i.) the business of the appellant is controlled principally by persons resident outside Australia, (ii.) the said business produces either no taxable income or less than the ordinary taxable income which might be expected to arise from that business, (iii.) ten per centum of the total receipts (whether cash or credit) of the business or some and what other percentage is a proper percentage upon which to charge the appellant with income tax; (b) that the onus of proof in relation to each of such matters is on the Commissioner and not upon the taxpayer; (c) that sec. 28 of the *Income Tax Assessment Act* 1922 is *ultra vires* of the Parliament of the Commonwealth of Australia and is void; (d) that the

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Income Tax Assessment Act 1922 is *ultra vires* of the Parliament of the Commonwealth and is void. On behalf of the Commissioner the foregoing contentions were disputed and the following contentions were submitted: (e) That it was not competent for the taxpayer under the Act to have a reference under sec. 28 and at the same time an appeal pending under sec. 50, and that upon the facts stated in this case the attempted appeal was consequently invalid; (f) that the reference should be treated as an appeal by virtue of sec. 44, but as an appeal only in respect of matters covered by sec. 28, sub-sec. 1; (g) that with respect to the said matters the function of the Board of Appeal was to determine upon the facts of the case as accepted by it under sec. 53, and as a matter of good conscience, (i.) whether the determination of the Commissioner that the business of the taxpayer carried on in Australia was controlled principally by persons resident outside Australia was plainly wrong, (ii.) whether the determination of the Commissioner that it appeared to him that the business produced either no taxable income or less than the ordinary taxable income which might be expected to arise from that business was a determination which no reasonable man could come to, (iii.) whether the determination of the Commissioner that in his judgment ten per centum of the total receipts should be the assessable income was one which no reasonable man could arrive at. The foregoing contentions (e), (f) and (g) submitted on behalf of the Commissioner were disputed on behalf of the taxpayer.

The questions asked by the special case were as follows:—

(1) Upon a duly constituted reference to this Board and upon the true construction of the *Income Tax Assessment Act* 1922—(A) Is this Board (i.) entitled, (ii.) required, to consider whether in fact (a) the business of the appellant is controlled principally by persons resident outside Australia, (b) the said business produces either no taxable income or less than the ordinary taxable income which might be expected to arise from that business, (c) ten per centum of the total receipts (whether cash or credit) of the business or some other and what percentage is a

proper percentage upon which to charge the appellant with income tax ? (B) Upon whom is the onus of proof in relation to each of such matters ?

(2) (A) Is it competent for the taxpayer under the Act to have a reference under sec. 28 and at the same time an appeal pending under sec. 50 ? (B) Upon the facts stated in this case is the appeal of the taxpayer valid or invalid ?

(3) (A) Should the reference be treated as an appeal by virtue of sec. 44 ? (B) If yes, should it be treated as an appeal only in respect of matters which come within sec. 28 (1) ?

(4) (A) What are the functions and/or duties of the Board of Appeal when dealing with the determinations of the Commissioner, (i.) in the reference under sec. 28 of the Act ; (ii.) in the appeal of the taxpayer, if such an appeal be competent ? (B) In particular are any and which of the contentions of the Commissioner set out in pars. 11 (g) (i.), 11 (g) (ii.) and 11 (g) (iii.) correct ? (C) If no, in respect of any one or more of such contentions how should such respective determinations be treated by the Board of Appeal, that is to say, should the Board disregard them altogether or treat them as right unless satisfied they are wrong ? (D) In this reference and/or appeal what are the facts necessary to be found by the Board of Appeal in order to make the provisions of sec. 28 and not the provisions of sec. 20 apply to the assessment of the Company ?

(5) Is sec. 28 of the *Income Tax Assessment Act* 1922 and are the *Income Tax Acts* 1922 and 1923, so far as they operate thereon, within the legislative powers of the Parliament of the Commonwealth of Australia ?

(6) Is the *Income Tax Assessment Act* 1922 and are the *Income Tax Acts* 1922 and 1923 within the legislative powers of the Parliament of the Commonwealth of Australia ?

The grounds relied upon in support of the request to refer mentioned in par. 2 were the same as the grounds of the objection referred to in par. 3 ; and were as follows : (1) That the said

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assessment is wrong in law and excessive; (2) that the business of the said British Imperial Oil Co. Ltd. is not controlled principally by persons resident outside Australia; (3) that the said business produces taxable income; (4) that the said business does not in fact produce less than the ordinary taxable income which might be expected to arise from that business or from such a business as that carried on by the said Company, and does not or should not appear to the Commissioner so to do; (5) that, by reason of objections 2, 3 and 4, sec. 28 cannot or ought not to be applied; (6) that if sec. 28 is applied the percentage (10 per cent) of the total receipts of the said business on which the said Company through me, its Public Officer, has been assessed and charged with income tax is not a proper percentage and/or is not a percentage which the Commissioner in his judgment properly exercised thinks proper; (7) that sec. 28 of the *Income Tax Assessment Act* 1922 is *ultra vires* of the Parliament of the Commonwealth of Australia and is void; (8) that the *Income Tax Assessment Act* 1922 is *ultra vires* of the Parliament of the Commonwealth of Australia and is void; (9) that the assumed or fictional income upon which the assessment is based under sec. 28 is not income arising from sources in Australia; (10) that the assumed or fictional income aforesaid is extraterritorial.

Owen Dixon K.C. (with him *Robert Menzies* and *Maurice Cussen*), for the appellant. Sec. 28 of the *Income Tax Assessment Act* 1922-1923 is wholly void. It is neither within the taxing power nor incidental to that power. If it be incidental, it is dealing with a matter which is not taxation, and so brings the Act within the provisions of the first clause of sec. 55 of the Constitution. It does not deal with taxable income, but assumes that there is no taxable income and imposes upon the person who carries on the business here and who has no necessary beneficial interest in the business an exaction measured by the gross receipts of the business. It is not a tax on the gains of the business, as is the tax imposed by the rest of the Act. No recourse is given against the foreign principal of the person who carries on the business. If it is a tax on a person abroad, the subject of taxation is outside Australia. Sec. 28 is an attempt to impose liability upon a person irrespective of his interest

in the receipts of the business, and is invalid within the decision in *Waterhouse* v. *Deputy Federal Commissioner of Land Tax* (1).

[STARKE J. referred to *National Trustees, Executors and Agency Co. of Australasia* v. *Federal Commissioner of Taxation* (2).]

If it is taxation, it deals with more than one subject of taxation. Sub-sec. 3 of sec. 28 is invalid, for part of the judicial power of the Commonwealth has by secs. 44, 50 and 51 of the Act been attempted to be conferred upon a Board of Appeal, which as constituted by sec. 41 is not a Court upon which that power can be conferred. Sub-sec. 3 cannot be severed from the rest of sec. 28, and therefore the whole section is bad (*Cornell* v. *Deputy Federal Commissioner of Taxation* (3)). The power of the Commissioner under sec. 28 (1) was intended to be conditional upon his decision being subject to review by a Board of Appeal, and, the condition being bad, the whole section is bad.

Sir Edward Mitchell K.C. (with him *Keating*), for the respondent. The provisions of sub-sec. 3 of sec. 28 are not a condition, but are a concession to taxpayers. That section must be read with sec. 44, and it enables a taxpayer to go by way of appeal before a Board of Appeal before putting in objections to his assessment. A Board of Appeal is not a Court. It is given power to decide questions of fact only, and the provision in sec. 53 (1) that a Board is not bound by rules of evidence shows that it is not a Court (see *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (4) ; *Moses* v. *Parker* (5)).

[STARKE J. referred to *Canadian Pacific Railway Co.* v. *Toronto Corporation* (6).]

On a reference to a Board no question of law can come in, for the functions of a Board are no higher than those of the Commissioner. Sec. 44 does not make a reference to a Board an appeal within the meaning of sec. 51 (8). A Board of Appeal is not a Court exercising judicial functions either when acting upon a reference or when entertaining an appeal, and its functions in each case are severable. Sec. 72 of the Constitution enables the Parliament to confer appellate

(1) (1914) 17 C.L.R. 665.
(2) (1916) 22 C.L.R. 367.
(3) (1920) 29 C.L.R. 39.
(4) (1918) 25 C.L.R. 434, at pp. 464, 482.
(5) (1896) A.C. 245.
(6) (1911) A.C. 461.

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jurisdiction as well as original jurisdiction, and sec. 73 does not state the whole of the limits of the appellate jurisdiction of the High Court. The right given by sec. 28 (3) to a taxpayer to have a reference to a Board of Appeal is not coextensive with the right given by sec. 51, and, if the taxpayer takes advantage of sec. 28 and has a reference, he cannot appeal under sec. 51. Being given the two alternatives and having taken that of a reference, he cannot be in the position of being able to appeal and take an objection that sec. 28 is invalid. The provisions in the Act as to Boards of Appeal are severable from the rest of the Act (*Owners of s.s. Kalibia* v. *Wilson* (1)).

Owen Dixon K.C., in reply.

Cur. adv. vult.

April 9.

The following written judgments were delivered :—

KNOX C.J. The question raised in this case is whether sec. 28 of the *Income Tax Assessment Act* 1922-1923 and the *Income Tax Acts* 1922 and 1923, so far as they operate thereon, are within the legislative powers of the Parliament of the Commonwealth. Sec. 28 (1) provides that in certain circumstances a person carrying on a business in Australia shall be assessable to income tax on such percentage of the total receipts of the business as the Commissioner in his judgment thinks proper. Sec. 28 (3) provides that, on the request of a taxpayer who is dissatisfied with the decision of the Commissioner under the section, " his case " shall be referred to a Board of Appeal. In my opinion, this sub-section purports to confer on any person on whom an assessment is made under sub-sec. 1 the right to have every part of his case reconsidered by the Board of Appeal. The " case " is to be " referred " to the Board of Appeal, which is empowered by sec. 44 (1) to hear the case and, by sec. 44 (2) coupled with sec. 51 (1), to make such order as it thinks fit, and either to reduce or to increase the assessment. It is clear that on a reference of the case to the Board of Appeal the decision or opinion of the Commissioner is open to review in respect of matters

(1) (1910) 11 C.L.R. 689, at p. 712.

which could not be raised by the taxpayer on an appeal to the High Court or to the Supreme Court of a State under sec. 50. On such an appeal neither the decision of the Commissioner that the business produced no taxable income or less than the ordinary taxable income which might be expected to arise from the business, nor his decision as to the percentage to be charged, would be open to review, for these are matters as to which Parliament has made the opinion of the Commissioner the test of liability subject only to the right of the taxpayer to have his case referred to the Board of Appeal.

The arguments against the validity of the section may be summarized as follows:—(1) Sec. 28 (1) of the Assessment Act and the Income Tax Acts, so far as they operate on that section, are obnoxious to the provisions of sec. 55 of the Constitution, either because the exaction authorized is not "taxation," or because it is a different subject of taxation to that dealt with by other provisions of the Acts referred to, or because the subject matter of the enactment is outside the territorial limits of the Commonwealth. (2) It was beyond the powers of Parliament to confer on a Board of Appeal constituted in accordance with the provisions of sec. 41 the powers conferred on the Board by sec. 51 of the Act. The only Board of Appeal provided for by the Act is a Board of Appeal having these powers, and therefore no "Board of Appeal" can be validly constituted.

The first objection—that founded on the provisions of sec. 55 of the Constitution—in my opinion cannot be supported. Sec. 28 in effect provides a method of ascertaining in certain specified cases the proportion of the total receipts of a business carried on in Australia which is to be treated as taxable income. The provisions of this section are no different in principle from those contained in sec. 23 of the Act, the object in each case being to ascertain what proportion of the amount received by a taxpayer in any year is to be treated as taxable income. The tax is to be levied on a person carrying on a business in Australia in respect of an ascertainable portion of the total receipts of the business so carried on by him. In this view the tax levied under the Income Tax Acts by virtue of sec. 28 of the Assessment Act is clearly a tax on income, and it follows

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that the enactment is not obnoxious to the provisions of sec. 55 of the Constitution.

But in my opinion the contention on behalf of the taxpayer which is rested on the provisions relating to the constitution and powers of the Board of Appeal is well founded and must prevail. By sec. 50 (4) of the Assessment Act a taxpayer who is dissatisfied with the assessment made by the Commissioner may appeal to the High Court or to the Supreme Court of a State or to the Board of Appeal. It is clear that there is a right of appeal to the Board on questions of law, provided the objection also raises a question of fact. By sec. 51 the Board is empowered on the hearing of the appeal to make such order as it thinks fit, whether on questions of law or on questions of fact—the only distinction being that, while the decision of the Board on questions of fact is final and conclusive, its decision on questions of law is subject to appeal to the High Court "in its appellate jurisdiction." The power conferred on the Board of determining questions of law, the association of the Board as a tribunal of appeal with the High Court and the Supreme Court of a State, and the provision for an appeal to the High Court in its appellate jurisdiction from any order of the Board, except a decision on a question of fact, in my opinion establish that the expressed intention of Parliament was to confer on the Board portion of the judicial power of the Commonwealth, which at any rate includes the power to adjudicate between adverse parties as to legal claims, rights and obligations, and to order right to be done in the matter (per *Griffith* C.J. in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1)). And it is clear by the express terms of sec. 44 that the Board of Appeal in hearing references is to have the same powers, so far as applicable, as are conferred on it by sec. 51 in regard to appeals. It follows that Parliament has by this legislation purported to vest in the Board of Appeal on the hearing of either appeals or references under the Act portion of the judicial power of the Commonwealth. The decision in *Alexander's Case* establishes that the judicial power of the Commonwealth can only be vested in "Courts," that is, in Courts of law in the strict sense; and that, if any such Court be created by the Parliament, the tenure

(1) (1918) 25 C.L.R., at p. 442.

of office of the Justices of such Court, by whatever name they may be called, shall be for life subject to the power of removal contained in sec. 72 of the Constitution. Now, the Board of Appeal created by the Assessment Act either is or is not a "Court" in the strict sense. If it be not, Parliament has no power to invest it with functions appertaining to the judicial power of the Commonwealth; if, on the other hand, it be a "Court," its members have not the tenure of office required by the Constitution. In either event the provisions of the Constitution are infringed, and it follows that the Board of Appeal which Parliament has purported to create is not, and cannot lawfully be, constituted under the Assessment Act in its present form.

The result is that the case stated by the Board must be struck out.

ISAACS J. This is a case stated under the *Income Tax Assessment Act* 1922-1923. The Commissioner assessed the taxpayer under sub-sec. 1 of sec. 28. Thereupon the taxpayer, being dissatisfied with the Commissioner's decision, required him under sub-sec. 3 of sec. 28 to refer the case to a Board of Appeal. On the same day the taxpayer under sec. 50 objected to the assessment, stating the grounds of objection. These included a contention that sec. 28 was *ultra vires* of the Parliament. The matter came before the Board of Appeal, and at the request of the parties a case was stated for the opinion of this Court on various questions. These include questions as to the duties of the Board in the proceeding before it, as to whether it could entertain both a reference under sec. 28 and an appeal under sec. 50 and as to the validity of sec. 28, and also a general question as to the validity of the whole Acts.

The invalidity of sec. 28 primarily relied on was that it attempted to create a tax other than a true income tax and, therefore, there was a contravention of the second branch of sec. 55 of the Constitution. If such a contravention were established, the consequences might not be limited to sec. 28; and this is probably the reason for inserting the question as to the validity both of the Income Tax Acts of 1922 and 1923 and the whole Assessment Act of 1922.

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The argument to establish the invalidity of sec. 28 was that the word " receipts " showed that something more than " profits and gains " were taxed, and it was urged that " profits and gains " alone were true " income " for taxation. There is no substance in the contention. There is nothing in the Constitution to compel the Parliament to limit a tax which it chooses to describe as " income tax " to " profits and gains." Parliament has the full range of the word " taxation," limited only by the express restrictions of the Constitution itself. Examination of the relevant Acts will show that Parliament has taken as a single subject of taxation gross income as the basis less such exemptions and deductions as it considers just. That is its general scheme. But special cases have to be met. One of these special cases is provided for in sec. 28, namely, the case of a business in Australia carried on by some person here, the business drawing its receipts from Australian sources but being so controlled by persons resident outside Australia that those receipts apparently show no such surplus as would be taxable income or ordinarily taxable under the general scheme if the business were independent of the outside control. Internal manipulation may thus easily, by conforming outwardly to technicalities of law, conceal the realities of the Australian " business "—regarded as a productive entity; and therefore the Commissioner is empowered to inquire into the facts and ascertain what percentage of the total receipts represents the true measure of the net income result of Australian trading. Parliament then for the special case accepts that percentage as the " taxable income " in respect of the business in place of the misleading result that would be arrived at under the general scheme. It must be remembered that this special provision is not new taxation but a new method of assessment, and that is entirely within the power of Parliament.

It was also said that, inasmuch as not the owners of the business but the person carrying it on was made liable, it was not an income tax but a personal or other tax. That is equally unsustainable. A person who carries on a business within the jurisdiction, is sufficiently identified with it and with the control and receipt of income to be justly regarded as answerable for payment of the income tax in respect of it. If the owners place him in that position,

they have no reason to complain, and, if he desires any indemnity beyond what appears to be the full and sufficient protection of secs. 89 and 90 of the Assessment Act, he must obtain it from his principals. The objection referred to therefore fails.

But the section was attacked on an independent ground much more serious. Sub-sec. 3 of sec. 28, on which the objection is founded, is in these terms: "A taxpayer who is dissatisfied with the decision of the Commissioner under this section may require the Commissioner to refer his case to a Board of Appeal, and the Commissioner shall refer the case accordingly." It is contended on behalf of the taxpayer, in the first place, that sub-sec. 3 is invalid because it purports to invest a tribunal which is not a Court with judicial power, and thereby it violates sec. 71 of the Constitution; and, in the next place, that the sub-section is inseparable from the rest of the section and consequently the whole is void. It is necessary to examine this objection step by step. Assuming the existence of a Board of Appeal free from any constitutional objection, sub-sec. 3, if nothing more were said as to the functions of the Board, would be unimpeachable. It would raise an implication that in the event of the taxpayer's dissatisfaction with the Commissioner's decision the Legislature entrusted the Board with the duty of reviewing the decision of the Commissioner, and, in case of difference, of substituting its opinion for his, with the legal effect that would otherwise have attached to the Commissioner's decision. The Board of Appeal would in that case be a mere revisory body of the same nature as the Commissioner and in no way exercising judicial power, because its decision would not be one determining existing rights and duties as they already stand, but would be one merely ascertaining a fact which the Legislature adopted as the standard upon which its will operated to create rights and duties. And that is the position asserted for it now by learned counsel for the Commissioner. That simple position, however, does not exist. The Legislature has certainly not left the Board's functions to implication. They have been expressed, and therefore there is no room for implication. Sec. 41 provides for a Board, consisting of a chairman and two other members, and fixes the tenure of its members at seven years. The nature of the tenure makes it impossible to be a Court (sec. 72

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of the Constitution). Consequently no portion of the Commonwealth judicial power can be vested in a Board so constituted. This is, if possible, accentuated by the provisions of sec. 43 providing for temporary membership. Sec. 41 (1), however, distinctly states that the Board is to be created " for the purposes of this Part," which means that, if those purposes were inapplicable, no Board would be created. Then sec. 44, which is extremely important in this connection, says :—" (1) A Board of Appeal shall have power to hear such cases as are prescribed, or are referred to it by the Commissioner under this Act. (2) The provisions of section fifty-one, fifty-two, and fifty-three of this Act shall apply, so far as applicable, to references by the Commissioner to the Board as if those references were appeals." " References " are thus placed, as far as they can be, in precisely the same position as " appeals " so far as the Board's duty and powers are concerned ; and this compels us to examine the provisions as to appeals. Turning then to sec. 50, dealing with " appeals," it provides by sub-sec. 4 that a taxpayer dissatisfied with the decision of the Commissioner may, by the method stated, require the Commissioner to forward his case, where the objection does not raise questions of law *only*, to (1) the High Court or (2) a Supreme Court or (3) a Board of Appeal. Pausing there for a moment, it is quite evident that judicial power is thereby conferred on the Board, because the power invested in the High Court is necessarily judicial (*In re Judiciary and Navigation Acts* (1)) and it is the identical power given by sec. 50 to the Supreme Court and the Board. The power thus given is one of ascertaining and determining whether and how far the rights and duties independently enacted have been accurately declared by the Commissioner, and not for the purpose of superseding his discretionary judgment to create a constitutive element of liability. This at once affects the third sub-section of sec. 28 in two ways. First, even assuming the Board's functions under that sub-section to remain always non-judicial, still a validly constituted Board is necessary. But, if the only Board intended by sub-sec. 3 is a Board as constituted under Part V., the invalidity of Part V. strikes also at sub-sec. 3 of sec. 28. Again, sub-sec. 3 is affected as to functions by force of

(1) (1921) 29 C.L.R. 257, at p. 264.

sub-sec. 2 of sec. 44 and sec. 51, which carries on the judicial functions of sec. 50, because the Board, when sitting on a "reference" under sec. 28, would in deciding the "case" have to determine, if disputed, even the applicability of sec. 28 to the "case." That is, the Board would have to determine whether the "business which is carried on in Australia is controlled principally by persons resident outside Australia." Unless that is so, sec. 51 does not apply to a reference at all in any intelligible sense.

By sec. 51 the Board is empowered by sub-sec. 1 to make such "order" as it thinks fit. By sub-sec. 2 its order on questions of fact is final and conclusive. By sub-sec. 4 it has jurisdiction over the costs. By sub-sec. 5 it can order the forfeiture of deposit. By sub-secs. 6, 7 and 8 it is enacted:—"(6) On the hearing of the appeal the Board shall, on the request of a party, and the Court may, if the Court thinks fit, state a case in writing for the opinion of the High Court upon any question arising in the appeal which in the opinion of the Board or of the Court, as the case may be, is a question of law. (7) The High Court shall hear and determine the question, and remit the case with its opinion to the Court below or to the Board, as the case may be, and may make such order as to costs of the case stated as it thinks fit. (8) An appeal shall lie to the High Court, in its appellate jurisdiction, from any order made under sub-section 1 of this section, except a decision by the Board on a question of fact." Sub-sec. 8 completes the chain of proof that Parliament has endeavoured to invest the Board with what is strict judicial power. Read with sub-sec. 2, it leaves the Board's decision on facts final and conclusive, and allows to the High Court, *in its appellate jurisdiction*, an appeal from the Board's order under sub-sec. 1 on a matter of law. These provisions offend against sec. 71 and sec. 73 of the Constitution because the Board is not by sec. 72 constituted as a Court. It follows that, so far as the purposes of Part V. of the Act are concerned, they are not purposes for which a Board as described in sec. 44 could be validly created. As sec. 41 declares that it is "for the purposes of this Part" there shall be the "Board or Boards of Appeal" described in that section, sec. 41 cannot stand alone, and the whole of the provisions of Part V.

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relating to Boards are invalid and of no effect. In law, therefore, there is no Board of Appeal.

Before parting with this branch of the subject, one argument in support of the Board's position should be noticed. Sec. 53—one of the sections applied to references, " so far as applicable " (which means so far as the nature of the proceeding permits)—provides in the first sub-section that " the Governor-General shall make rules for regulating the practice and procedure in relation to appeals dealt with by a Board of Appeal, and a Board shall not be bound in its consideration of any question by any rules of evidence, but in forming its decision shall be guided by good conscience and the facts of the case." It was urged that the latter part of the sub-section was decisive that the Board was not a Court and that the Act did not purport to invest it with judicial power, because, as it was urged, the provision was inconsistent with strict judicial power. For this position *Moses* v. *Parker* (1) was relied on. But in that case, as I pointed out in the *Tramways Case* [*No.* 1] (2), the enactment that the tribunal was " expressly exonerated from all rules of law or practice " (see *Canadian Pacific Railway Co.* v. *Toronto Corporation* (3)) was an extremely important factor and was the turning-point of the case. It cannot be maintained here that, by virtue of the words relied on, the Board is absolved from all rules of law, as, for instance, the express provisions of the Taxing and Assessment Acts themselves, or the rules of practice and procedure made by the Governor-General. Nor, as already shown, can it be maintained that the functions of the Board on appeals are confined to mere ascertainment of facts unaffected by law. Many of the facts ultimately to be found on such appeals, require, so to speak, a " direction " in law. If a Judge were trying such cases with a jury, he would be bound to direct them as to the law. The High Court or the Supreme Court would necessarily " direct " itself in such case, and the Board of Appeal could not possibly in the majority of instances arrive at a final conclusion without previously forming an opinion as to the intention of the Legislature respecting some disputed item or items. The observations of Collins L.J. in *Maude* v. *Brook* (4) are illustrative,

(1) (1896) A.C. 245.
(2) (1914) 18 C.L.R. 54, at p. 72.
(3) (1911) A.C., at p. 471.
(4) (1900) 1 Q.B. 575, at p. 581.

and the numerous workmen's compensation cases in the House of Lords show how difficult it is in a disputed case to get all the issues of pure fact. But even the issues of pure fact to be determined by the Board on *appeals* are determinations—not to create a standard of liability, but to ascertain and authoritatively pronounce upon the standard already created. That is judicial power, and, having regard to the mode of its investment, is Commonwealth judicial power. And none the less is it so because of the provision relied on in sub-sec. 1 of sec. 53. Not merely does the case of *Moses* v. *Parker* (1) not sustain the argument against judicial power, but there are clear authorities which show that such a provision is perfectly consistent, not merely with true judicial power in the first instance, but also with the coexistence of true appellate jurisdiction from the primary decision. *Barlow* v. *Orde* (2) was a case where the law provided that in such a case the Judge was to act "according to justice, equity, and good conscience." That was part of what Lord Westbury there termed "the Regulations . . . for defining the jurisdiction of the Courts of the Province" (3). And those words require the application by the Court of "the principle of natural justice." The Privy Council itself considered the case by that standard and reversed the primary judgment. In 1913 in *Skinner* v. *Naunihal Singh* (4) Lord Shaw for the Judicial Committee said:—"From the case of *Barlow* v. *Orde* . . . it is plain that English rules of interpretation—in so far at least as these are artificial rules of construction which have arisen in the administration of English Courts of equity—must not be allowed to govern the interpretation of Thomas Skinner's will. Questions affecting the construction of such a settlement as the present, or the regulation of a succession under it, must be determined by the principles of natural justice, or, to use the familiar language, according to 'justice, equity and good conscience.'" Their Lordships then proceeded as an appellate tribunal to review the decision of the appeals from the High Court of Judicature at Allahabad, which had itself reversed judgments and decrees of a subordinate

(1) (1896) A.C. 245.
(2) (1870) L.R. 3 P.C. 164.
(3) (1870) L.R. 3 P.C., at p. 186.
(4) (1913) 35 All. 211, at p. 224; 40 Ind App. 105, at p. 114.

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Court. The Judicial Committee reversed the judgments of the High Court. It is therefore certain that the argument, so far as it rests on the provision referred to in sec. 53, cannot avail to alter the conclusion otherwise arrived at and already stated.

Strictly speaking, then, since in law there is no Board of Appeal, neither is there, in law, any case stated upon which we can deliver any binding opinion except so far as to declare the invalidity of Part V. so far as it relates to Boards of Appeal; and this subject occupies by far the greater portion of the Part. But, having said so much, it would be very undesirable to leave certain matters that have been dealt with in argument, and are of great public importance, wholly untouched, however difficult it may be completely to resolve them. The effect on sec. 28 itself of what has been said is that sub-sec. 3 when it is read, as it must be, as referring to a Board of Appeal within the meaning of Part V., is itself invalid. Does that make the whole of sec. 28 invalid? That section, as already stated, is for the purpose of ascertaining a fact—namely, a just percentage of receipts. That is ascertained in the first instance by the opinion of the Commissioner. If the taxpayer is satisfied, that is final, and the law applies automatically. But, says the Legislature, if the taxpayer is dissatisfied it is not final, and, although the method attempted of obtaining finality is not lawful, it is clear that the Commissioner's decision cannot be regarded as final where the taxpayer is dissatisfied. But, on the principle that the Court will preserve the intention of Parliament wherever possible, I hold, as sub-sec. 3 is intended to apply only where there is dissatisfaction, that sub-sec. 1 is intended to be the only operative provision in the absence of dissatisfaction and for that purpose it still operates effectively. In those cases where there is no dissatisfaction the Commissioner's decision stands, and in those cases only.

There are other sections into which the Appeal Board is introduced, and it is necessary to differentiate. Secs. 17, 21 and 23 are of similar character to sec. 28 in that so far as concerns the Board they provide for the reconsideration of a constitutive fact of liability. Where the taxpayer is not "dissatisfied" the rest of the section operates, but where the taxpayer is "dissatisfied" and has acted

under the relevant sub-section the liability does not attach. Sec. 50 is more difficult. Notwithstanding the great portion of space in Part V. occupied by the provisions as to the Board, the history of the legislation relating to "objections and appeals" shows that Parliament intended the appeal to this Court and the Supreme Court to exist whether the Board existed or not. The two are not bound up so that the appeal to the Court is dependent on the appeal to the Board and that the first would not have been enacted without the second. Part V. as it stood in the Assessment Act 1915-1918 indicates this quite clearly. Therefore all references to the Appeal Board may be elimated from Part V. of the present Act without difficulty so far as future objections are concerned.

But a difficulty certainly occurs in the application of sec. 50, sub-sec. 4, where a dissatisfied taxpayer has not within the thirty days elected either Court as the tribunal for his appeal but has chosen the Board. This is a difficulty which may need early parliamentary adjustment. Sec. 51 continues the difficulty.

In the result, the Court can only formally declare that the case stated is struck out as incompetent.

POWERS J. In this case stated by the Board of Appeal for the opinion of the High Court under the *Income Tax Assessment Act* 1922, several questions of law were submitted to this Court for its opinion; but the Court decided, after hearing the appellant's counsel, to decide first the question: Is sec. 28 of the *Income Tax Assessment Act* 1922 invalid as a whole, on the ground that it includes sub-sec. 3 and that the Boards of Appeal referred to in that sub-section and as constituted by the Act have conferred upon them judicial power, they not being Courts properly appointed to exercise judicial power within the meaning of the Constitution?

The following is a copy of sec. 28, sub-secs. 1, 2 and 3:—

"28. (1) When any business which is carried on in Australia is controlled principally by persons resident outside Australia, and it appears to the Commissioner that the business produces either no taxable income or less than the ordinary taxable income which might be expected to arise from that business, the person carrying on the business in Australia shall be assessable and chargeable with

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income tax on such percentage of the total receipts (whether cash or credit) of the business, as the Commissioner in his judgment thinks proper. (2) The provisions of section twenty of this Act shall not apply in any case in which the person assessed under this section is a company. (3) A taxpayer who is dissatisfied with the decision of the Commissioner under this section may require the Commissioner to refer his case to a Board of Appeal, and the Commissioner shall refer the case accordingly."

The answer to the question depends on the answer to one of three other questions:—(1) Is judicial power conferred on the Boards of Appeal so far as "references" to the Board are concerned, or only as to appeals? (2) Is sub-sec. 3 severable? (3) Can sub-sec. 3 without the judicial power the Boards are invested with be held to be valid?

So far as this question is concerned, assuming Parliament had the power to enact sec. 28, sub-secs. 1 and 2, it has not been seriously contended that sec. 28 as it stands could not have been passed by Parliament—if the Boards of Appeal referred to in sub-sec. 3 of the section had been invested only with the power to decide questions of fact, but not with authority to exercise judicial power. Sub-sec. 1 authorizes the Commissioner to decide in his judgment, in certain cases set out in the sub-section, what percentage of the total receipts, whether cash or credits of the business, the person chargeable with the income tax shall be assessed and chargeable with. Sub-sec. 2 protects the person assessable, when a company, from extra taxation provided for in sec. 20. Sub-sec. 3 of the Act, the one in question, gives the right to a taxpayer, dissatisfied with the decision referred to, to require the Commissioner to refer his case to a Board of Appeal. The Board of Appeal referred to was invested with judicial and non-judicial functions. The other sections of the Act referred to—secs. 17, 21, 23—giving somewhat similar powers to the Commissioner to act on his opinion, judgment or discretion as to certain facts to be found by him, support the view that sec. 28, with the two sub-sections mentioned, would have been passed without sub-sec. 3, which was only added, at the request of taxpayers, to enable a taxpayer to question the fairness

of the decision of the Commissioner on facts before him to the extent that Parliament could give that right.

In *Owners of s.s. Kalibia* v. *Wilson* (1) *Barton* J. said :—" There can be no severance of the valid from the invalid where a collective expression such as ' coasting trade ' is used. To recall a suggestion made during the argument, it is not as if Parliament had enacted that certain specified things, say A, B, and so on down to Z, might lawfully be done, the first half-dozen being within its legislative power and the remainder outside it. There the bad can be separated from the good and excised, and if there be left a law not substantially or radically different, dealing effectively with so much of the subject matter as is within the legislative power, the Act will be good, minus the invalid provisions eliminated." In *Alexander's Case* (2) this Court held that the Arbitration Act was valid *as to part*, but the judicial powers the Court was expressly invested with by many sections of the Act were held to be *ultra vires* and severable.

I hold, on the cases *Owners of s.s. Kalibia* v. *Wilson* (3), *Proprietors of the Daily News Ltd.* v. *Australian Journalists' Association* (4), *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (2), and other cases of a similar nature decided in this Court, that the judicial powers given to the Board of Appeal are *ultra vires* and severable from the powers not judicial given to the Board. I also hold that sub-secs. 1 and 2 of sec. 28 are severable from the rest of the section, and that sub-sec. 3 does not in any case invalidate the whole section.

RICH J. This is a case stated for the opinion of this Court by the *de facto* Board of Appeal under the Federal *Income Tax Assessment Act*.

Several questions are put, but ultimately the taxpayer rests his case on the alleged invalidity of sec. 28 of the Act before referred to. Two distinct grounds are alleged for this invalidity. One is that it purports to create a tax which is not an income tax. In doing this it is said to violate sec. 55 of the Constitution because there would be two different subjects of taxation in the same Act. I do

(1) (1910) 11 C.L.R., at p. 701.
(2) (1918) 25 C.L.R. 434.
(3) (1910) 11 C.L.R. 689.
(4) (1920) 27 C.L.R. 532.

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not agree with this contention. The section is only protecting the revenue from the escape by ingenious business methods from liability to the ordinary income tax.

The second ground of attack upon the section is that the Appeal Board referred to in sub-sec. 3 is not lawfully constituted. Reading the Act as a whole, any Appeal Board under the Act is invested with powers that are clearly judicial, that is to say, are part of the judicial power which the Constitution preserves for Courts. But the Constitution also provides that Federal Courts must be composed of Judges having a life tenure. The attempt by the Act, therefore, to erect Appeal Boards with the powers stated is ineffectual and the *de facto* Board, which is contemplated by sec. 28 (3) and which has stated this case, has no legal existence.

To allay any doubts as to the effect of the introduction of an Appeal Board into any section, I am of opinion that so far as possible the various provisions of the sections should be regarded as separable. "The offending provisions" are not "so interwoven into the scheme that they are not severable" (*In re Initiative and Referendum Act* (1)). The test of severability is stated in *Alexander's Case* (2). Applying this test, sub-secs 1 and 2 of sec. 28 stand untouched, though of course dissatisfaction or its absence would still be material in determining a taxpayer's liability. In my opinion also, the Board may be disregarded in relation to objections and appeals (secs. 50-53) leaving the jurisdiction of the Courts unimpaired.

The result is that the case stated by the *de facto* Board of Appeal is not a proceeding which the law recognizes. It should, therefore, be struck out.

STARKE J. The *Income Tax Assessment Act* 1922, Part V., provides for the constitution of a Board or Boards of Appeal consisting of a chairman and two other members appointed by the Governor-General, and has enacted that the members of a Board shall hold office for a term of seven years, subject to removal or suspension (see secs. 41, 48). Jurisdiction or authority is conferred upon a Board so constituted to hear such cases as are prescribed, or are referred to it by the Commissioner under the Act (see secs. 44, 50, 51). The

(1) (1919) A.C. 935, at p. 944. (2) (1918) 25 C.L.R., at p. 470.

cases so prescribed are set forth in sec. 50, sub-sec. 4, whilst secs. 17 (5), 21 (5), 23 (3) and 28 (3) are instances of cases which may be referred. A Board is empowered to decide both questions of law and questions of fact in the cases so prescribed or referred. It may make such orders as it thinks fit, and either reduce or increase the assessment of a taxpayer made for the purpose of ascertaining the taxable income upon which income tax is leviable (see secs. 51, 35), and its decisions on questions of fact are final and conclusive, but otherwise are appealable to this Court. The jurisdiction or authority is thus to ascertain and declare the liability of a taxpayer to the tax imposed by the Income Tax Acts. That is a clear exercise of the judicial power of the Commonwealth (cf. *The Constitution*, sec. 71 ; *In re Judiciary and Navigation Acts* (1)). The provisions of sec. 53 do not militate against this view ; for that section, in my opinion, does not alter the standards of liability set up by the Acts, but simply deals with procedure and proof of facts. *Alexander's Case* (2), however, is an authoritative decision of this Court that the Parliament cannot confer upon tribunals constituted as are the Board or Boards of Appeal, the judicial power of the Commonwealth or any part of it. The provisions of the *Income Tax Assessment Act* purporting to authorize a Board or Boards of Appeal to exercise part of the judicial power of the Commonwealth are contrary to the Constitution, and therefore invalid. Consequently, I agree that a case cannot be stated for the opinion of this Court by a Board which has no existence in point of law, and that it must be struck out.

As this view disposes of the whole case, I think it undesirable to express any opinion upon the other questions argued before us. The Parliament, however, may think it right to provide some remedy for parties who, relying upon the Act, have appealed, or have had their cases referred, to an incompetent tribunal. The Courts of law were alternative tribunals as to appeals under sec. 50, and have all the authority and jurisdiction in such appeals that any Board of Appeal could exercise. It may be that a provision enabling the Courts mentioned in sec. 50 to hear appeals and references to any Board of Appeal, if a party so requires, would prevent any hardship and incidentally render unnecessary the expenditure of a sum, not

(1) (1921) 29 C.L.R., at pp. 264, 265. (2) (1918) 25 C.L.R. 434.

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exceeding £10,000 per annum, appropriated for the remuneration and travelling allowances of tribunals established in violation of the Constitution.

Case struck out.

Solicitors for the appellant, *Gillott, Moir & Ahern.*

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

B.L.

[HIGH COURT OF AUSTRALIA.]

ARTHUR DOUGLAS WOODLANDS . . . APPELLANT;
PETITIONER,

AND

CLARA WOODLANDS . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 21.

KNOX C.J. ISAACS and STARKE JJ.

Husband and Wife—Restitution of conjugal rights—Sincerity of petitioner—Matrimonial Causes Act 1899 (N.S.W.) (*No.* 14 *of* 1899), *secs.* 4, 5, 11—*Rules of the Supreme Court of 27th March* 1902 (*N.S.W.*), *r.* 4.

On a petition for restitution of conjugal rights under the *Matrimonial Causes Act* 1899 (N.S.W.) the petitioner must satisfy the Court that he or she has a sincere desire for a real restitution of those rights and a corresponding willingness to render them to the other spouse.

Harnett v. *Harnett*, (1924) P. 126, followed.

Decision of the Supreme Court of New South Wales (Full Court): *Woodlands* v. *Woodlands*, (1924) 42 N.S.W.W.N. 67, affirmed.