

Michael *v.* Callil (1945) — 523 (3), 524 (1)
 Millner *v.* Raith (1942) — — 60 (5)
 Mitchell *v.* B. W. Noble Ltd. (1927) 106 (2)
 Mitford *v.* Reynolds (1842) — — 459 (5)
 Monahan *v.* Monahan (1949) — — 386 (3)
 Monds *v.* Stackhouse (1948) — — 459 (9)
 Montreal Trust Co. *v.* Canadian
 National Railway (1939) — — 219 (4)
 Moodie *v.* Hosegood (1952) 232 (2), 237 (3),
 245 (4), 255 (2)
 Moreau *v.* Federal Commissioner of
 Taxation (1926) — — 201 (2)
 Mullin *v.* Mullin (1901) — — 194 (1)

N.

Nash *v.* Rochford Rural District
 Council (1917) — — 70 (1)
 National Association of Local
 Government Officers *v.* Bolton
 Corporation (1943) — 546 (3), 557 (1)
 National Bank of Australasia Ltd.
v. Scottish Union and National
 Insurance Co. (1951) — — 118 (1)
 National Revenue, Minister of *v.*
 Wrights' Canadian Ropes Ltd.
 (1947) — — 511 (2)
 New Brunswick Railway Co. *v.*
 British and French Trust Corpora-
 tion Ltd. (1939) — — 56 (1), 60 (2)
 Newell *v.* The King (1936) — 83 (1), 95 (1)
 O'Flaherty *v.* McBride (1920) 7 (1), 10 (1)
 Owen, *In re*; Slater *v.* Owen (1912) 527 (3)

P.

Performing Right Society Ltd. *v.*
 Bray Urban District Council
 (1930) — — 60 (3)
 Perpetual Executors Trustees &
 Agency Co. (W.A.) Ltd. *v.* Maslen
 (Maslen's Case) (1952) — — 597 (4),
 611 (5), 612 (1), 624 (3), 625 (1),
 634 (3), 635 (1), 636 (1), 637 (1)
 Perpetual Trustee Co. (Ltd.) *v.*
 Federal Commissioner of Taxation
 (1942) — — 476 (3)
 Peto *v.* Pemberton (1628) — — 252 (1)
 Phene *v.* Popplewell (1862) — — 252 (2)
 Phillips *v.* Federal Commissioner of
 Taxation (Phillips' Case) (1947) 391 (5),
 397 (1)
 Phillips's Case *see* Taxes (Vict.),
 Commissioner of *v.* Phillips.
 Pianotist Co. Ltd. for the Registra-
 tion of a Trade Mark, *In the*
 Matter of an Application by the
 (1906) — — 538 (1)
 Pinson *v.* Lloyds and National
 Provincial Foreign Bank Ltd.
 (1941) — — 190 (1)
 Pleasant *v.* Benson (1811) — — 233 (2)
 Plummer and John *v.* David (1920) 248 (3)
 Pomfret's Settlement, *Re* (1952) — 611 (2)

Poole *v.* Wah Min Chan (1947) — 58 (2)
 Potter *v.* Commissioners of Inland
 Revenue (1854) — — 398 (1)
 Power *v.* Power (1944) — — 168 (3)
 Preston *v.* Luck (1884) — — 279 (1)
 Printers and Transferrers' Amal-
 gamated Trades Protection
 Society, *Re* (1899) — — 649 (3)
 Proudman *v.* Dayman (1941) — 149 (2),
 150 (1)
 Public Trustee, *Ex p.*; *Re* Birch
 (1951) — — 231 (1)
 — *v.* Scarr (1939) — — 528 (6)
 Pye *v.* Metropolitan Coal Co. Ltd.
 (1934) — — 140 (2)

R.

R. *v.* Arnold (1724) — — 368 (4)
 — *v.* Blakeley; *Ex p.* Association of
 Architects, Engineers, Surveyors
 and Draughtsmen of Australia
 (1950) — — 511 (1)
 — *v.* Codere (1916) — — 374 (1)
 — *v.* Commonwealth Court of Con-
 ciliation and Arbitration; *Ex p.*
 Jones (Builders' Labourers' Case)
 (1914) — — 296 (1), 297 (1), 299 (1),
 307 (1), 316 (5), 317 (1)
 — *v.* —; *Ex p.* Victorian
 Railways Commissioners (Aus-
 tralian Railways Union's Case)
 (1935) — — 321 (3)
 — *v.* Copestake (1927) — — 71 (2)
 — *v.* Davies (1858) — — 373 (2)
 — *v.* Davis (1881) — — 367 (1)
 — *v.* Haynes (1859) — — 373 (4)
 — *v.* Higginson (1843) — — 372 (1)
 — *v.* Kay (1904) — — 367 (2)
 — *v.* Kelly (1950) — — 377 (2)
 — *v.* —; *Ex p.* State of
 Victoria (1950) — — 305 (1), 329 (1)
 — *v.* Law (1862) — — 373 (5)
 — *v.* Lee (1950) — — 8 (1), 376 (2)
 — *v.* M'Naghten (M'Naghten's Case)
 (1843) — — 368 (2), 369 (5), 370 (3)
 — *v.* Metal Trades Employers'
 Association; *Ex p.* Amalgamated
 Engineering Union, Australian
 Section (1951) — — 45 (2)
 — *v.* Offord (1831) — — 370 (1)
 — *v.* Oxford (1840) — — 369 (4), 370 (2)
 — *v.* Porter (1933) — — 367 (3)
 — *v.* Richards (1858) — — 373 (3)
 — *v.* Rivett (1950) — — 375 (2)
 — *v.* Steane (1947) — — 365 (1)
 — *v.* Stokes (1848) — — 373 (1)
 — *v.* Sutton (1828) — — 377 (1)
 — *v.* Vaughan (1844) — — 372 (2)
 — *v.* Wilkinson; *Ex p.* Brazell
 Garlick and Coy (1952) — — 221 (2)
 — *v.* Windle (1952) — — 368 (1), 375 (1)
 Radio Corporation Pty. Ltd. *v.*
 Commonwealth (1938) — 58 (1), 62 (1)

Railways (N.S.W.), Commissioner for <i>v. McCulloch</i> (1946)	—	—	555 (1)
Rathbone <i>v. Munn</i> (1868)	—	—	95 (4)
Rayner <i>v. Rayner</i> (1919)	—	—	385 (6)
Reckitt & Colman (Aust.) Ltd. <i>v. Boden</i> (1945)	—	—	538 (3)
Rhodesia Railways Ltd. <i>v. Income Tax Collector, Bechuanaland</i> (1933)	—	—	107 (2)
Richmond <i>v. Richmond</i> (1952)	—	—	386 (2)
Ritchie <i>v. Trustees Executors & Agency Co. Ltd. (Ritchie's Case)</i> (1951)	—	—	597 (1), 610 (3), 611 (3), 612 (3), 614 (1), 615 (1), 616 (2), 618 (1), 620 (2), 622 (1), 623 (1), 624 (1), 625 (3), 627 (1), 629 (1)
Roberts <i>v. Humphries</i> (1873)	—	—	145 (2)
Roe <i>v. Wiggs</i> (1806)	—	—	233 (1), 257 (1)
Rose <i>v. Rose</i> (1883)	—	—	385 (1)
Ryall <i>v. Hoare</i> (1923)	—	—	606 (2), 607 (1)

S.

Sagar's Case *see* Taxation, Commissioner of *v. Sagar*.

Sanders <i>v. Sanders</i> (1881)	—	—	70 (3)
Scott <i>v. Commissioner of Taxation</i> (N.S.W.) (Scott's Case) (1935)	—	—	564 (2), 565 (1)

Seamen's Union of Australasia <i>v. Commonwealth Steamship Owners' Association</i> (Seamen's Union Case) (1936)	—	—	42 (1), 43 (1), 44 (1), 45 (1)
Searle <i>v. Cooke</i> (1890)	—	—	528 (5)
Seymour <i>v. Reed</i> (1927)	—	—	561 (5), 562 (3), 568 (1), 595 (5), 612 (6), 613 (2), 633 (5)
Shedden <i>v. Patrick</i> (1869)	—	—	70 (2)
Shee, <i>In re</i> ; Taylor <i>v. Stoger</i> (1934)	—	—	527 (4)
Sherras <i>v. De Rutzen</i> (1895)	—	—	149 (1)
Shillinglaw <i>v. Roberts</i> (1891)	—	—	145 (7), 146 (1)

Shipley Urban District Council <i>v. Bradford Corporation</i> (Shipley's Case) (1936)	—	—	280 (3), 281 (3)
Short <i>v. Treasury Commissioners</i> (1948)	—	—	479 (6)
Simons <i>v. Simons</i> (1898)	—	—	168 (2)
Slayney <i>v. Starkey</i> (1931)	—	—	556 (4)
Smith, <i>Re</i> ; Public Trustee <i>v. Smith</i> (1932)	—	—	460 (2)
— <i>v. Mather</i> (1948)	—	—	237 (2), 239 (1), 241 (1), 245 (1)
— <i>v. Sleep</i> (1844)	—	—	354 (5)
Snowden <i>v. Davis</i> (1808)	—	—	354 (4)
Sovfracht (V/O) <i>v. Van Udens Scheepvaart en Agentuur Maatschappij</i> (N. V. Gebr.) (1943)	—	—	132 (2)
Spain <i>v. Union Steamship Co. of New Zealand Ltd.</i> (1923)	—	—	316 (4)
Stamp Duties (N.S.W.), Commissioner of <i>v. Perpetual Trustee Co. Ltd. (Watts' Case)</i> (1926)	—	—	610 (2)
Stedeford <i>v. Beloe</i> (1932)	—	—	561 (7), 562 (1), 567 (4), 608 (5), 609 (1), 633 (9)

Stemp <i>v. Australian Glass Manufacturers Co. Ltd.</i> (1917)	—	—	31 (1)
Stephens <i>v. Badcock</i> (1832)	—	—	354 (1)
Stone <i>v. Federal Commissioner of Taxation</i> (1918)	—	—	201 (1)
Strakosch, <i>Re</i> ; Temperley <i>v. Attorney-General</i> (1949)	—	—	460 (1), 461 (1)
Stuchbery <i>v. General Accident Fire and Life Assurance Corp. Ltd.</i> (1949)	—	—	398 (4)
Studdy <i>v. Studdy</i> (1858)	—	—	385 (2)
Succession Duties (S.A.), Commissioner of <i>v. Executor Trustee and Agency Co. of South Australia Ltd.</i> (1947)	—	—	476 (4)
Summers Brown's Patent, <i>In re</i> (1922)	—	—	159 (1)
Sun Newspapers Ltd. <i>v. Federal Commissioner of Taxation</i> (1938)	—	—	106 (1)
Sydney Municipal Council <i>v. Hayek</i> (1930)	—	—	250 (1)

T.

T. Conway Ltd. <i>v. Henwood</i> (1934)	—	—	95 (3)
Tamplin <i>v. James</i> (1879)	—	—	278 (3)
Taxation, Federal Commissioner of <i>v. Blakeley</i> (1951)	—	—	412 (2)
— <i>v. British Australian Wool Realization Association Ltd.</i> (1931)	—	—	609 (3), 625 (5), 626 (1)
— <i>v. Clarke</i> (1927)	—	—	201 (3)
— <i>v. Dixon</i> (1953)	—	—	608 (1), 613 (3)
— <i>v. Happ</i> (1952)	—	—	607 (4)
— <i>v. Midland Railway Co. of Western Australia Ltd.</i> (1952)	—	—	546 (4)
— (Vict.) <i>v. Phillips</i> (Phillips's Case) (1936)	—	—	568 (3), 569 (1)
— <i>v. Sagar</i> (Sagar's Case) (1946)	—	—	471 (4), 476 (5), 492 (1)
— <i>v. Shaw</i> (1950)	—	—	471 (5)
— <i>v. Union Trustee Co. of Australia Ltd.</i> (1931)	—	—	609 (4), 626 (2)
— <i>v. Wade</i> (Wade's Case) (1951)	—	—	594 (6), 633 (2)
— <i>v. Watson</i> (Watson's Case) (1952)	—	—	391 (6)
— <i>v. Williamson</i> (1943)	—	—	398 (2)
Thomas <i>v. Sylvester</i> (1873)	—	—	528 (4)
— <i>v. Thomas</i> (1939)	—	—	522 (5)
Thompson <i>v. Easterbrook</i> (1951)	—	—	265 (1)
Thynne <i>v. Salmon</i> (1948)	—	—	245 (3)
Townsend <i>v. Jarman</i> (1900)	—	—	394 (3)
Tramway Employees' Case <i>see</i> Australian Tramway and Motor Omnibus Employees' Association <i>v. Commissioner for Road Transport and Tramways</i> (N.S.W.).	—	—	—
Trautwein <i>v. Federal Commissioner of Taxation</i> (1936)	—	—	201 (4)
Trego <i>v. Hunt</i> (1896)	—	—	396 (2)
Triggs <i>v. Byron</i> (1950)	—	—	250 (4), 251 (3), 255 (3)
Turner <i>v. Cuxon</i> (1888)	—	—	561 (3)

U.

- Union Steamship Co. of New Zealand Ltd. *v.* Commonwealth (1925) — — — — 318 (2)
 Uxbridge Permanent Benefit Building Society *v.* Pickard (1939) — 357 (2)

V.

- Vancouver Malt and Sake Brewing Co. Ltd. *v.* Vancouver Breweries Ltd. (1934) — — — — 394 (2)
 Victorian Chamber of Manufactures *v.* Commonwealth (1943) — — 217 (1)
 Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes *v.* Dignan (1931) — 60 (4), 63 (3)

W.

- W. O. Watt (Dec'd.), In the Estate of (1925) — — — — 609 (2), 610 (1)
 Waddington *v.* O'Callaghan (1931) — 607 (3)
 Wade's Case *see* Taxation, Federal Commissioner of *v.* Wade.
 Wakefield *v.* Newbon (1844) — — 354 (3)
 Walker *v.* Walker (1952) — — 168 (6)
 Waterside Workers' Federation of Australia *v.* Commonwealth Steamship Owners' Association (Waterside Workers' Case) (1920) 16 (2), 320 (1), 321 (1)

- Watson *v.* J. & A. G. Johnson Ltd. (1936) — — — — 649 (1)
 ——— *v.* Winch (1916) — — 63 (2)
 Watson's Case *see* Taxation, Commissioner of *v.* Watson.
 Watts' Case *see* Stamp Duties (N.S.W.), Commissioner of *v.* Perpetual Trustee Co. Ltd.
 Wauchope *v.* Trefle (1942) — — 503 (3)
 Weatherley *v.* Weatherley (1947) — 425 (1), 426 (2)
 Weinberger *v.* Inglis (1918) — — 190 (3)
 Welton *v.* Saffery (1897) — — 479 (2)
 Westbury (Lord), *In re* Settlement of; Westmacott *v.* Bethell (1944) 528 (2)
 Western Electric Co. Ltd.'s Patent, *In re* (1931) — — — — 157 (2)
 West Rand Central Gold Mining Co. Ltd. *v.* The King (1905) — 132 (1)
 Williams' Trustees *v.* Inland Revenue Commissioners (1947) — 460 (4)
 Wilson *v.* Jolly (1948) — — — 230 (1)
 Wood *v.* Scarth (1855) — — — 274 (1), 277 (1), 278 (1)
 Woodbury *v.* Woodbury (1949) — 383 (4)
 Wrexham Corporation *v.* Tamplin (1873) — — — — 459 (4)

Y.

- York Motors Pty. Ltd. *v.* Turner (1951) — — — — 264 (1)
 Young *v.* Curran (1909) — — 649 (5)

Cons R v Padman [1979] TasR 37	Appl Aust In- stitute of Marine & Power En- gineers v Dept of Transport 13 FCR 124	Appl Saunders v Commissioner of Taxation 15 ALD 353	Appl Comr of Taxation v Nestle Aust Ltd 12 FCR 257	Appl Aust In- stitute of Marine & Power En- gineers v Dept of Transport 12 ALD 138	Foll Pooraka Holdings v Participation Nominees 20 ATR 1425	Appl Aust In- stitute of Marine & Power En- gineers v Dept of Transport 71 ALR 73	Cons Matson v Official Trustee 73 ALR 309	Foll Pooraka Holdings v Participation Nominees 98 FLR 21
Appl R v Yates (1991) 56 ACrimR 29	Appl R v Yates (1991) 22 ATR 424	Appl Northern Land Council v Common- wealth (1990) 102 ALR 110	Foll R v Herscu (1991) 56 ACrimR 270	Appl R v Yates (1991) 102 ALR 673	Appl Herscu v R (1991) 65 ALJR 677	Dist Community Services & Health, Minister for v Carter (1990) 55 SASR 289	Appl Herscu v R (1991) 173 CLR 276	Appl R v Murphy (1992) 23 ATR 422
Appl Sanko Steamship Co Ltd v Sumitomo Australia Ltd (1992) 37 FCR 353	Appl Simionato Holdings Pty Ltd v FCT (No2) (1995) 32 ATR 298	Foll Simionato Holdings Pty Ltd v FCT (No2) (1995) 60 FCR 375	Appl Kizon v Palmer (1997) 43 ALD 527	Appl Kizon v Palmer (1997) 142 ALR 488	Foll Kizon v Palmer (1997) 72 FCR 409	Cons Confitt Constructions Pty Ltd (in liq), Re [1999] 2 QdR 490	Appl Donnelly v Davison (2000) 105 FCR 1	

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

CANADIAN PACIFIC TOBACCO COMPANY } APPELLANTS ;
LIMITED AND ANOTHER . . . }

AND

STAPLETON RESPONDENT.

Evidence—Contempt of court—Company—Managing director—Unpaid income tax—Sequestration of estate—Stay of proceedings—Disposal of company’s assets only in ordinary course of business—Undertaking to Court by company and another director—Disposal of assets—Breach by company and the director—Evidence—Confessional statements obtained from director by departmental officer—Admissibility of evidence—Information—Acquired in course of employment—Divulged in course of duty—Income Tax and Social Services Contribution Assessment Act 1936-1952 (No. 27 of 1936—No. 4 of 1952), ss. 16 (1), (2), (3), 232, 263.

Section 16 (1) (2) and (3) of the *Income Tax and Social Services Contribution Act 1936-1952* is as follows :—“(1.) For the purposes of this section, ‘ officer ’ means a person who is or has been appointed or employed by the Commonwealth or by a State, and who by reason of that appointment or employment, or in the course of that employment, may acquire or has acquired information respecting the affairs of any other person, disclosed or obtained under the provisions of this Act or of any previous law of the Commonwealth relating to Income Tax. (2.) Subject to this section, an officer shall not either directly or indirectly, except in the performance of any duty as an officer, and either while he is, or after he ceases to be an officer, make a record of, or divulge or communicate to any person any such information so acquired by him. (3.) An officer shall not be required to produce in Court any return, assessment or notice of assessment, or to divulge or communicate to any Court any matter or thing coming under his notice in the performance of his duties as an officer,

H. C. OF A.
1952.
BRISBANE,
June 24, 27.
Dixon C.J.
SYDNEY
July 29.
McTiernan,
Williams and
Kitto JJ,

H. C. OF A.
1952.

CANADIAN
PACIFIC
TOBACCO
CO. LTD.
v.
STAPLETON.

except when it is necessary to do so for the purpose of carrying into effect the provisions of this Act or of any previous law of the Commonwealth relating to Income Tax.”

Held by *Dixon* C.J., and on appeal, by *McTiernan*, *Williams* and *Kitto* JJ. (1) that where an officer is acting under an authority conferred pursuant to s. 263 and where the object of a particular question is the vindication of the revenue and the collection of money owing, information so obtained is “obtained under the provisions of this Act”, (2) that the phrase “except in the performance of his duty” in sub-s. (2) refers to the functions and proper actions which the employment of an officer authorizes, and includes the making of an affidavit in a proceeding for the ultimate obtaining of revenue, and (3) that sub-s. (3) protects an officer from being required to divulge or communicate information to the court, but does not prevent him from doing so when authorized by the commissioner.

Decision of *Dixon* C.J. affirmed.

APPEAL from *Dixon* C.J.

Upon the application of *Leslie Thomas Stapleton*, the trustee of the property of *Charles Coward*, whose estate was sequestrated on 18th January 1950 for non-payment of income tax and additional tax amounting to a very large sum, the Federal Court of Bankruptcy, *Clyne* J., declared and ordered that *Peter Michael Brady*, *Eileen Isobel Coward* (wife of the bankrupt), *Georgina May Beer*, *Thomas Mack*, and *Dino Rodighiero* (also known as *Dick Roder* and *Frederick Roder*) be trustees for the bankrupt of specified property standing in their various names; set aside various dealings by the bankrupt, including dealings between the bankrupt and *Canadian Pacific Tobacco Co. Ltd.* (of which company he had been managing director) and made various other declarations and orders. All the declarations and orders were embodied in one formal order dated 21st December 1951. A number of such declarations and orders related to transfers of property by the bankrupt to *Canadian Pacific Tobacco Co. Ltd.*

The various respondents to that application, by notice of motion dated 7th January 1952, appealed to the High Court against the order so made.

There not being any stay of proceedings under the rules of court relating to appeals from the Federal Court of Bankruptcy, *Dixon* J., in Chambers, on 18th January 1952, upon a summons issued by those appellants, made an order staying until further order proceedings on the order of the Federal Court of Bankruptcy upon various conditions including the giving of an undertaking by each of the said appellants severally that until the hearing and determination of the appeal or until further order of the Court they would

not, without the leave of the Court or a Justice, or of a Justice of the Supreme Court of Queensland obtained pursuant to s. 17 of the *Judiciary Act* 1903-1950, deal with, dispose of or give security or further security over any of the assets of them respectively, except in the ordinary course of carrying on the business, if any, of each appellant or for the purpose of discharging money obligations, whether accrued or accruing, already incurred or, except in the case of the Canadian Pacific Tobacco Co. Ltd., for the purpose of meeting or defraying ordinary living expenses or for the purpose of carrying on the appeal.

An undertaking under the seal of that company was filed on 29th January 1952. The affixation of the seal was authenticated by the hands of two directors, E. R. Moran and T. H. A. Pooley.

By notice dated 27th May 1952 Stapleton, the trustee of the bankrupt's estate, gave notice of his intention to move to seek to have the company adjudged guilty of contempt for a breach of the undertaking and punished accordingly, and to have the director T. H. A. Pooley adjudged guilty of contempt for his complicity in the company's breach of the undertaking and punished accordingly, and further, that the stay of proceedings imposed by the order made on 18th January 1952 be removed.

Upon the matter coming on for hearing before *Dixon* C.J., counsel for the appellants objected to any evidence being given by Alfred Edward Tobin, a senior investigation officer of the Taxation Branch of the Treasury and an officer under the *Income Tax and Social Services Contribution Assessment Act* 1936-1952, of a conversation had by him with T. H. A. Pooley, during the course of which Pooley, in answer to questions put to him by Tobin, was alleged to have made certain admissions. It was submitted that, by virtue of the provisions of sub-s. (2) of s. 16 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952, it was not competent for Tobin to give any evidence of that conversation, and, alternatively, that having regard to the provisions of sub-s. (3) of s. 16 his Honour should, in the exercise of his discretion, exclude the confession.

Further facts and relevant statutory provisions appear in the judgment hereunder.

E. J. Moynahan, for the applicant.

H. T. Gibbs, for the respondents—the appellants in the appeal.

DIXON C.J. The question which is raised appears to be very important in the ultimate decision of the case, so far as I can judge at the present stage, and for that reason I do not propose to pro-

H. C. OF A.
1952.

CANADIAN
PACIFIC
TOBACCO
CO. LTD.

v.
STAPLETON.

H. C. OF A.
1952.

CANADIAN
PACIFIC
TOBACCO
CO. LTD.
v.
STAPLETON.

Dixon C.J.

nounce a definite opinion upon it which would exclude Mr. *Gibbs* from raising the question again at a final stage of the proceedings. My present view is that the evidence is admissible.

The question arises in this way. An officer, Mr. Tobin, armed with a customary authority, interviewed one of the respondents to this motion, Mr. Pooley, and obtained from him statements amounting to admissions, that is to say, confessional statements, by questioning him. At the beginning of the interview he handed him his authority. It does not appear whether Mr. Pooley read the authority or not, and owing to the fact that a typiste has typed across two material parts of the authority, after the words "Under the Income Tax" the words "and Social Services Contribution Act", he perhaps would have some difficulty in reading it.

But at all events it says: "The bearer, Alfred Edward Tobin, whose signature appears below, being an officer under the Income Tax and Social Services Contribution Assessment Act 1936-1951, is hereby authorised to have at all times a full and free access to all buildings, places, books, documents and other papers for any purpose of the said Act and as provided by the said Act for that purpose to make extracts from or copies of any such books, documents or papers. Any person who obstructs or hinders any officer acting in the discharge of his duty under the Income Tax and Social Services Contribution Assessment Act 1936-1951 is guilty of an offence, for which the Act provides a penalty not less than £1 or more than £50".

That is signed by the Deputy Commissioner of Taxation, and a copy of s. 263 of the Act is given under his signature. Section 232 of the Act says: "Any person who obstructs or hinders any officer acting in the discharge of his duty under this Act or the regulations shall be guilty of an offence. Penalty: Not less than One pound or more than Fifty pounds".

Section 16 of the Act is directed, according to the marginal note, to the preservation of secrecy or observance of secrecy by officers. The material parts of that section are the first three sub-sections. The first of those sub-sections is concerned with the definition of "officer" for the purpose of the remaining sub-sections.

That expression is made to mean "a person who is or has been appointed or employed by the Commonwealth or by a State, and who by reason of that appointment or employment, or in the course of that employment, may acquire or has acquired information respecting the affairs of any other person, disclosed or obtained under the provisions of this Act or of any previous law of the Commonwealth relating to Income Tax".

The officer in the present case falls, in a general sense, within the definition ; but it is necessary to state the purpose for which he interviewed the respondent Pooley. The purpose arose out of those circumstances. The commissioner proceeded against Coward for income tax and additional tax amounting to a very large sum. The commissioner recovered judgment and proceeded upon that judgment in the Bankruptcy Court, where an order for sequestration was obtained.

He proved in the bankruptcy for the debt upon which he petitioned, and no other proofs were lodged.

In the bankruptcy motions were launched to set aside a great number of transactions and orders were made by the Court of Bankruptcy setting them aside. From the orders so made, an appeal was brought to this Court.

One of the appellants is the company, and an application was made to me sitting in Chambers for an order staying the execution of the decree, which order I made upon terms of an undertaking not to part with assets. The undertaking was given by the company, and it is for breach of that undertaking that these proceedings are brought.

Mr. Tobin, the officer in question, was inquiring into transactions which were in breach of that undertaking and might be supposed, if they had taken place, to endanger in some degree the execution of the order made by the Bankruptcy Court, or its fulfilment, if they were successful.

The first question that arises is whether, in prosecuting that inquiry, he was acting by reason of his employment or in the course of his employment. I am disposed to the view that he was. The result of that view is that he did acquire, or has acquired, information respecting the affairs of another person, namely, the company and possibly Mr. Pooley, in the course of his employment or by reason of his appointment.

The provision then goes on to say, and uses the expression, "disclosed or obtained under the provisions of this Act or of any previous law of the Commonwealth relating to Income Tax".

From the facts I have stated, it would appear that it is doubtful whether the information disclosed can be regarded as "obtained under the provisions of this Act"; that is to say, whether the information could be considered as disclosed or obtained under the provisions of the Act.

On the whole, I am inclined to think that it is. A very wide meaning should be given to those words, because of the policy of s. 16 (1). Having regard to the fact that the authority was pro-

H. C. OF A.
1952.

CANADIAN
PACIFIC
TOBACCO
CO. LTD.

v.
STAPLETON.

Dixon C.J.

H. C. OF A.
1952.

CANADIAN
PACIFIC
TOBACCO
CO. LTD.

v.

STAPLETON.

Dixon C.J.

duced, to the terms of s. 232 which are very wide and to the fact that the end in view, the end result so to speak, of the proceedings is the vindication of the revenue and the collection of the sums owing, I am disposed to think that the definition is sufficiently fulfilled.

That being my view, it is necessary to proceed to sub-s. (2), which says: "An officer shall not either directly or indirectly, except in the performance of any duty as an officer, and either while he is, or after he ceases to be an officer, make a record of, or divulge or communicate to any person any such information so acquired by him".

There is a minor point on the construction of the sub-section, which it is perhaps better to mention before proceeding to apply it; that is, whether the words "to any person" attach themselves to the word "divulge" as well as to the word "communicate".

The point would be of no materiality if it were not for the doubt as to whether the Court could be considered "a person" within the meaning of the provision. It would be of no materiality except for that reason, because it could hardly be information divulged except to a person, that is to say, unless you give a restricted meaning to "person" which excludes bodies such as courts.

I am inclined to think that the words "to any person" do attach themselves to the word "divulge". There is, of course, a presumption that a modifying prepositional phrase of that sort following the verb does attach itself to the last preceding verb and not to preceding verbs separated from it by an alternative. But, when the whole provision is looked at, and the use of the words "make a record of" and then of the words "any such information" is considered, together with the position the intervening words take, it seems to me more probable that the draftsman was using the expression "to any person" in relation to both the words "divulge" and "communicate". If that is so, the section probably cannot apply to courts, which would hardly be called persons.

But, in any case, I think that the words "except in the performance of any duty as an officer" ought to receive a very wide interpretation. The word "duty" there is not, I think, used in a sense that is confined to a legal obligation, but really would be better represented by the word "function". The exception governs all that is incidental to the carrying out of what is commonly called "the duties of an officer's employment"; that is to say, the functions and proper actions which his employment authorizes.

In a case of this description I should think that did include the making of an affidavit in this Court, in a proceeding for the ultimate obtaining of revenue, even if the word "divulge" is used in a sense which includes the giving of evidence.

Sub-section (3) provides that "An officer shall not be required to produce in court" [certain documents] "or to divulge or communicate to any court any matter or thing coming under his notice in the performance of his duties as an officer, except when it is necessary to do so for the purpose of carrying into effect the provisions of this Act or of any previous law".

In spite of the word "exclusion" in the passage that was read from *O'Flaherty v. McBride* (1), I think that this provision gives only a protection to the officer against compulsion, and does not make inadmissible evidence which the officer is prepared to give under instructions from his superiors or the commissioner.

For those reasons I am of opinion, as at present advised, that the evidence is not excluded by the provision of s. 16.

But it is then said that, having regard to the manner in which the evidence was obtained, I have a discretion to exclude it, because there is some degree of unfairness, considered from the point of view of Mr. Pooley, having regard to the situation in which he was placed. He was asked to give information and was shown an authority, which on its face would lead him to suppose that he was compelled to answer, and to answer truthfully.

It is not suggested that his statement was involuntary within the meaning of common law rule, and was therefore inadmissible. But it is said that the situation in which he was left was such that the Court in the exercise of its discretion should exclude the evidence.

Whatever Mr. Pooley may have thought about it, I am not disposed to take that view of the unfairness of his position. He was asked reasonably simple questions about a transaction. If he thought that they were liable to incriminate him, he might have refused and stated that ground; and he might have endeavoured to reason with the officer against his persisting in placing him in the position of embarrassment under s. 232.

He did not take that course, and perhaps it may be said that a layman might not be expected to argue the matter out with an officer.

But I see no real reason why in the circumstances of the present case the evidence should be excluded on the exceptional grounds which apply in criminal proceedings to give the court a discretion.

(1) (1920) 28 C.L.R. 283, at p. 288.

H. C. OF A.
1952.

CANADIAN
PACIFIC
TOBACCO
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STAPLETON.

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PACIFIC
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STAPLETON.

Dixon C.J.

I need not go into the questions which were raised both in *R. v. Lee* (1) and in *McDermott v. The King* (2), but the situation which the observations in these cases contemplate is of an entirely different order from that in which, in my opinion, the witness Pooley was placed.

For those reasons, which I have stated somewhat at length, I am at present of opinion that this evidence should be admitted. I have stated my reasons at length because I am not desirous at this stage of the case completely to exclude Mr. *Gibbs* from canvassing the matter again if he thinks fit, and he will have the advantage of knowing what as at present is the view I take as to the admission of the affidavit evidence. The case may proceed on that basis.

After certain further evidence had been tendered, his Honour adjudged the respondent Pooley guilty of contempt and made an order imposing punishment.

From that decision the respondents to the application appealed to the Full Court of the High Court on various grounds, the principal ground being that the affidavit of Alfred Edward Tobin, sworn on 30th May 1952, was wrongly admitted in evidence.

A. R. J. Gilmour, for the appellants. Tobin's affidavit was wrongly admitted in evidence. The Chief Justice placed reliance upon the contents of that affidavit in arriving at his conclusion against these appellants. If that evidence had not been before the Court it may be that his Honour would have arrived at a different conclusion. Tobin was not an officer within the meaning of s. 16 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952 at the time he obtained the information referred to in his affidavit. It was obtained by him in the course of his employment under the Act. The Chief Justice's interpretation of sub-s. (3) of s. 16 was too liberal. His interpretation was that it merely empowered the officer to withhold the evidence under objection and did not absolutely exclude him from giving that evidence. Words of that import, particularly with the penalty imposed, go further than was held to be the case in *O'Flaherty v. McBride* (3) and make the information absolutely privileged and inadmissible. The word "required" should be read as "allowed" or "permitted". The words in sub-s. (3) "an officer shall not be required" are stronger than the words applying the

(1) (1950) 82 C.L.R. 133.
(2) (1948) 76 C.L.R. 501.

(3) (1920) 28 C.L.R. 283, at p. 288.