

H. Woolf for the petitioner, Elsie Myrtle Rouse.
Mugennis for the respondent, Thomas Joseph Rouse.

MANN, J.—In this suit I have to deal with a plea of nullity which has been raised by petitioner as preliminary to the hearing of the suit in which she asks for divorce. The nullity alleged arises by reason of the absence of the preliminary declarations on oath or affirmation required by sec. 24 of the "Marriage Act." It seems clear that a declaration is a *sine qua non* to the validity of the marriage. The marriage relied upon by respondent and which it is now sought to have declared null, consisted of a religious ceremony conducted according to the rites of the Roman Catholic Church. On the conclusion of the ceremony the parties received a certificate of marriage which, upon its face, would indicate full compliance with the requirements of the Act. It appears that that certificate was not a true certificate. The manner in which it was given has been fully explained by the two clergymen who had something to do with the marriage, and it appears that either the parties or their relatives had given the priest to understand that they had already gone through the civil ceremony of marriage, and it was involved in that statement that they had already made the necessary declarations that enabled them to go through the civil ceremony. Father McGrath conducted the religious ceremony in the belief that he was merely conducting a ceremony intended to indicate the confirmation by the Church of the civil marriage believed to have been already performed, and no preliminary declaration was asked for. Unfortunately, on being asked by the respondent for some document or some certificate which he would be able to use to show that they had been through the religious ceremony, Father McGrath made out and delivered to him the form of certificate prescribed by schedule to the Act. The certificate includes the statement that the officiating clergyman has, after due notice, celebrated marriage between the parties, after declarations duly made as by law required. The granting of such a certificate can only be described as a grave irregularity, and it is satisfactory to note that it was not given in conformity with any practice, but was used apparently through inadvertence and upon a belief in a state of facts which did not exist. I may say that this ceremony took place in 1914, and consequently the parties holding this certificate have been under the belief for many years that they were lawfully married, whereas they were not. That is not a matter for much regret as far as the parties themselves are concerned. It seems to have been brought about in part by their own untruthful statements, but they are now both in Court supporting cross-petitions for divorce on the ground of adultery. Those petitions having stood over pending the decision of this plea of nullity, the result is that they turn out to be unnecessary. I make the decree of nullity asked for in the amended petition. I will not make it absolute

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 in the first instance. I will make a decree nisi, with costs.

Decree nisi.

[Solicitors—For the petitioner, Elsie Myrtle Rouse, J. Woolf; for the respondent, J. J. Carroll.]

S. K. H.

[See "Tyson v. Logan," 12 N.S.W. L.R. (D.) 10, 29; "Marriage Act 1899" (N.S.W.), sec. 15.]

High Court of Australia.

FULL COURT — (Knox, C.J., Sept. 4, 18, 20,
 Isaacs, Higgins, Rich and 1922; Aug. 6,
 Starke, JJ.) 24, 1925.
 (Sydney.)

ADELONG GOLD ESTATES NO LIABILITY, Appellant v. COMMISSIONER OF TAXATION (N.S.W.), Respondent.

Income tax—Company—Business of gold dredging in New South Wales—Embargo on export of gold—Permission to export sovereigns in lieu of gold produced—Sale abroad—Profits received through agent in Victoria—Taxable income—Whether income derived from source in New South Wales—"Income Tax (Management) Act 1912" (N.S.W.), secs. 4, 9, 10 (g), 19 (2), 32.

A company registered in Victoria carried on the business of gold dredging in New South Wales. During the European war the Commonwealth Government prohibited the export of gold from Australia, and thus debarred producers from the advantages of the high prices ruling for gold in other countries. The gold producers formed and registered an association, and the association arranged with the Commonwealth Government that its members might dispose of their gold to a branch of the Royal Mint, receiving from the Mint a memorandum indicating the assay value of the gold at the price prevailing in Australia. Members had the right to produce this memorandum to the Commonwealth Treasurer through the association, whereupon a permit was issued for the export of sovereigns equivalent in amount to the value indicated by the various memoranda. The sovereigns, being exported by the Bank, were sold abroad by representatives of the association, and the purchase money remitted to the Bank, the Bank paying to the association the balance of such purchase money, after deducting the cost of the sovereigns and the expenses.

The above-named dredging Company, having produced gold in New South Wales and supplied it to the Mint at Melbourne, and sovereigns having been exported from Melbourne and sold, and the net proceeds received by the association in Melbourne in accordance with the scheme, the Company, during the year ending 31st October, 1919, received from the association £1916 as its share of the balance available for distribution amongst its members.

Held, per Knox, C.J., Isaacs, Rich and Starke, JJ. (Higgins, J., dissenting), that, in assessing the dredging company for income tax, the sum of £1916 could not be regarded as income entirely derived from a source in New South Wales or earned in that State within the meaning of the "Income Tax (Management) Acts 1912-1918," section 4.

Per Knox, C.J.—No part of that sum was taxable income so derived or earned in New South Wales.

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Per Isaacs, Rich and Starke, JJ.—The sum should be apportioned for the purpose of ascertaining what part of it was so derived or earned in that State.

APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

The Adelong Gold Estates No Liability was incorporated in Victoria, and carried on gold dredging at Tumut, New South Wales. On the 14th July, 1915, the Commonwealth Government issued a proclamation under the "Customs Act" prohibiting the export of gold specie or bullion from Australia except with the consent of the Treasurer, thus practically confining the market of Australian gold producers to the Royal Mint, and the gold was thereafter sold to the Mint at £3 17s. 10½d. per ounce. The market price of gold in other parts of the world having greatly advanced, the gold producers sought to obtain the benefit of this advance; and, as the result of negotiations with the Commonwealth Government, a scheme was arranged for the purpose of enabling gold producers to export in sovereigns the equivalent in local value of the gold produced by them. A Company called the Gold Producers' Association Limited was registered in Victoria to represent producers in the disposal of their gold. In accordance with the scheme arranged, the gold of the Adelong Gold Estates No Liability, as a member of the Association, was sent by it to the Mint in Melbourne, a memorandum being forwarded by the Mint to the mine indicating the assayed value, and a sum corresponding to that value being paid into the producer's credit in a Melbourne bank. Through the Gold Producers' Association the memorandum was afterwards forwarded to the Commonwealth Treasury, with other similar memoranda relating to the gold sold by other members, and the Association received from the Treasury a permit for the export of sovereigns equivalent in value to that of the gold received by the Mint. The sovereigns were shipped abroad by the Commonwealth Bank, a sale being effected by a representative of the Association, and the purchase money being received by the Commonwealth Bank and credited to the Association in Melbourne, less the local value of the sovereigns exported and expenses. The members of the Association participated in the distribution by it of the balance so received.

During the year ending 31st October, 1919, the Adelong Gold Estates No Liability received from the Association £1916 as its proportion of such balance. The Adelong Company having been assessed by the Commissioner of Taxation for New South Wales for income tax in respect of the sum of £1916 so received, and the Company having appealed, the appeal came before Judge Cohen, District Court Judge, as a Court of Review under the Income Tax (Management) Acts 1912-1918. Judge Cohen dismissed the appeal, being of opinion that the sum of £1916 was taxable income within sec. 4 of the Act, which provides as follows:—"Income means income derived "from any source in the State or earned in the State."

A case was thereupon stated for the Supreme Court, setting out (*inter alia*) the above facts.

The questions set out for determination were—

1. Whether the decision of Cohen, D.C.J., is correct in law.

2. Whether any part of the said sum of £1916 is taxable income of the appellant Company within the meaning of the Income Tax (Management) Acts 1912-1918.

3. Whether Cohen, D.C.J., was in error in holding that the whole of the said sum of £1916 is taxable income of the appellant Company within the meaning of the said Acts.

The Special Case was heard before the Full Court (Gordon, Ferguson and Wade, JJ.), and on 29th March, 1922, the appeal was dismissed, with costs, and the questions answered—1. Yes. 2. Yes. 3. No. Judgment reported 22 S.R. (N.S.W.) 197.

The Company appealed to the High Court.

Leverrier, K.C., and *Harrington* for the appellant Company.

Brissenden, K.C., and *McMinn* for the Commissioner.

The following were referred to:—*Lovell and Christmas Ltd. v. Commissioner of Taxes*, (1908) A.C. 46; *Commissioners of Taxation v. Mceeks*, 21 A.L.R. 244; *Commissioners of Taxation v. Kirk*, (1900) A.C. 588; *Nathan v. Federal Commissioner of Taxation*, 24 A.L.R. 286; *Studebaker v. Commissioner of Taxation*, 27 A.L.R. 506; *The Earl of Zetland v. The Lord Advocate*, 3 A.C. 505; *Mount Morgan Gold Mining Co. v. Commissioner of Taxation*, 30 A.L.R. 159.

Cur. adv. vult.

The following judgments were given:—

KNOX, C.J.—The first question raised by this appeal is whether the decision of Cohen, D.C.J., that the sum of £1916 received by the Company—the Adelong Gold Estates No Liability—in the year ending on the 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.

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 follow:—

"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 pur-

chased 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. Realising 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 Limited (hereinafter called 'the Association') was registered in Victoria on the 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 outturn, 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 outturn 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 only export 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 the 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 Article 98 of the Articles of Association. The sum of £1916

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Section 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 £1916, 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 outturn, 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 a source in New South Wales," it must, I think, be taken that "derived" means "directly derived"—see *Lovell and Christmas Ltd. v. Commissioner of Taxes*, (1908) A.C. 46 at p. 52; *Nathan v. Federal Commissioner of Taxation*, 24 A.L.R. 286 at p. 287; and that the source of the income must be its real source as a hard practical matter of fact—*Nathan's Case (supra)*; *Studebaker Co. v. Commissioner of Taxation*, 27 A.L.R. 306.

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

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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 *The Mount Morgan Gold Mining Company v. Commissioner of Income Tax*, 30 A.L.R., 159, I think the decision in *Commissioners of Taxation v. Kirk*, (1900) A.C. 588, 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 follow:—(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 correction cannot go beyond the limits set to those of the Supreme Court. Section 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 Gold Mining Company v. Commissioner of Taxation*, 30 A.L.R. 159, 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—*The Merchant Service Guild v. Newcastle Co.* (No. 1), (1913) 19 A.L.R. 422; *Schumacher Mill Works Ltd. v. Smail*, 22 A.L.R. 65; *Boese v. Farleigh Co.*, 26 C.L.R. p. 477; *Mack v. Commissioner of Stamps*, 27 A.L.R. 146; *Alexander v. McNary*, 29 C.L.R. p. 371. In the absence of explicit statements of facts, including in-

ferences, 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 Limited v. Bruce*, (1915) A.C. 433, at pp. 449 and 450. Beyond that the Court cannot go, unless specially authorised. 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 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 paragraph 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 paragraph 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—"Realising 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"—p. 13. Again (p. 15)—"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 (same page)—"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 pass, 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* (*supra*). 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 follow:—(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 Company v. Commissioner of Taxation (Queensland)*, 30 A.L.R. 159. 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 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

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There is, indeed, a provision—sec. 19 (2)—as to a taxpayer who "carries on business both in and out 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 bear to the total amount of such sales effected both in and outside of 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 v. Gough*, (1896) App. Cas. 325, 335—"Many merchants and manufacturers export their goods to all parts of the world, yet I do not suppose any one 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 and 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 paragraph 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 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

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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 from this mine in New South Wales, neither of these profits would be enjoyed. So 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 (Regulation 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; (c) to transport or ship to any place in Australia or elsewhere, and to sell there, any metal or other products; (d) to establish and form or assist in establishing and forming any association calculated in any way to benefit the Company; (e) 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; (f) 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; (g) 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 are willing to give you not only that price, but also the difference between that price and the net sum to be realised 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 the *Commissioners of Taxation v. Kirk*, (1900) A.C. 588, 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 Company Limited, 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 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 the *Commissioners of Taxation v. Meeks*, 21 A.L.R. 244, the Sulphide Corporation was incorporated and had its head office 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*, 24 A.L.R. 286, the subject of discussion was the Federal Income Tax 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 (p. 288) 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, viz., 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 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 and Christmas Ltd. v. Commissioner of Taxes*, (1908) A.C. 46, 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 business of a commission agent, by the sale of New Zealand produce in London, was not 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;" 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* (*ubi supra*) 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

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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 used in the sense of "immediately," but as contra-distinguished 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. Commissioner of Taxation* (*ubi supra*) 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 £1916 is taxable income of the "appellant company"—as answered in *Kirk's Case* (*ubi supra*). 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.

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 "£1916 was taxable income of the appellant company within the meaning of the Income Tax " (Management) Act 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 £1916 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* (*ubi supra*), the Judicial Committee confined itself strictly to answering the precise ques-

tion 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* (*ubi supra*), 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 19 C.L.R. 592. We 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. Section 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, 30 A.L.R. at page 105, and Order XXXVIII., Rule 1, Queensland Rules of 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 follow:—(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*, 19 A.L.R. 422, 435. The Court of review has in this case set forth, in my opinion, both the evidentiary facts, and (in para-

graph 6) the ultimate conclusions in fact and in law. Now, the facts so stated may be thus summarised. The Adelong Gold Estates No Liability is a mining Company incorporated in the State of Victoria under the "Companies Act 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 the 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 the *Mount Morgan Gold Mining Co. v. Commissioner of Taxes*, 30 A.L.R. 159, 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 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 realisation 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 £1916. The Company was, through its public officer, Dickson, assessed to income tax in respect of this sum, under the Income Tax Acts 1912-

ADELONG GOLD ESTATES v. COMMISSIONER OF TAXATION. 18 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 1912-18 of New South Wales, which are substantially the same as the Acts under which *Commissioners of Taxation v. Kirk*, (1900) A.C. 588, and *Commissioners of Taxation v. Meeks*, 21 A.L.R. 244, 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* (*supra*, at p. 593). 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 realisation 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*, at p. 592, all these operations "are necessary "stages which terminate in money, and the income "is the money resulting, less the expenses attendant "on all these stages." Or, to repeat what was said by my brother Isaacs in *Meeks' Case*, and referred to by me in the *Mount Morgan Case*, the essence of the business of the Adelong Company is a "whole "set of operations" from production to realisation. Consequently, the place where one 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*. 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 realisation of the full value 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 £1916 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

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outside New South Wales, and an apportionment is necessary—*Kirk's Case* (*supra*), *Meeks' Case* (*supra*). 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 v. Commissioner of Taxation*, 27 A.L.R. 306, 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 and Christmas Ltd. v. Commissioner of Taxes*, (1908) A.C. 46, you therefore looked no further, back or forward, for the purpose of determining the locality in which the income was derived, than the place where the contract was made.

The appeal ought, in my opinion, to be allowed, and the questions answered as follow:—(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. The questions for the decision of the Court answered as follow:—(1) No. (2) Yes. *The sum of £1916 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. The respondent to pay the appellant his costs in the Supreme Court and this Court.*

Appeal allowed.

[Solicitors—For the appellant Perkins, Stevenson and Co.; for the Commissioner, J. V. Tillett, Crown Solicitor.]

FULL COURT—Isaacs, Higgins and Starke, JJ.) (Sydney.)	{	Dec. 17, 1924;
		April 20, 22,
		23, Aug. 12,
		1925.

**DABBS, Defendant Appellant v. SEAMAN,
Plaintiff Respondent.**

Land—Transfer of—Indefeasibility of title—Description by plan—Boundary of transferred land—Lane on land of transferor—Right of way in transferor—Transfer by transferee—No bargain for right of way—Knowledge of circumstances—Intention of original transferor—Estoppel—"Lane"—"Street"—"Road"—"Real Property Act 1900" (N.S.W.), secs. 3, 37, 39, 40, 41, 46, 47, 51, 103—"Conveyancing Act 1919" (N.S.W.), secs. 57, 67—"Local Government Act 1906" (N.S.W.), secs. 3, 99, Ordinances 32, 70.

Section 40 of the "Real Property Act" (N.S.W.) provides that—"Every certificate of title . . . shall "be conclusive evidence that the person named in "such certificate of title or in any entry thereon as "seised or as taking estate in the land therein "described is seised or possessed of or entitled to "such land for the estate or interest therein "specified."

Where A, a registered proprietor of land under the Act, transfers to B a part of his land described by a plan which indicates that the transferred land is bounded on one side by a "20 feet lane" situated on the other part of the transferor's land, and the transfer is duly registered, then, in the absence of either a provision to the contrary on B's certificate of title, or some subsequent personal legal or equitable relation to the contrary between B and the owner of the adjoining land, B, as long as he remains registered proprietor of the land so transferred and described, is entitled (1) to have the land marked "20 feet lane" preserved as such; and (2) to a right of way over the lane.

Moreover, where B sells and transfers to C the land so described in B's certificate of title by means of a plan as abutting on the lane, C also is entitled to the same right as B, although (1) A originally intended to restrict the lane to use merely as access to other land of his own; and (2) C did not bargain for any right of way when he purchased from B; and (3) C in fact was informed by B that he was not purchasing or obtaining any right to or over the lane.—

So held by Isaacs and Starke, JJ. (Higgins, J., dissenting).

Per Higgins, J.—1. The use of the word "lane" does not show any intention on A's part to grant an easement of way, the word being different in this respect from "street" or "road," each of which implies a right of way public or private.

2. In order to create an easement over land under the "Real Property Act," the transfer should state such intention expressly, as contemplated by the fifth schedule to the Act, and a memorial of the instrument creating the easement should be entered on the existing certificate of title to the dominant tenement.

3. The transfer from B to C not containing any express mention of the alleged right of way, C could obtain no such right.

4. A having made no misrepresentation, and C being the victim of no misrepresentation, but, on the contrary, being aware before purchase that he was not obtaining any right of way, no case of estoppel could be raised by C as against A.

5. Even if A was estopped from denying that there was a "lane 20 feet wide" over his land, this would not create by estoppel any right of way to be enjoyed either by B or his transferees.

Seaman v. Dabbs, 24 S.R. (N.S.W.) 481, reversed.

**APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.**

A suit in equity was brought in the Supreme Court of New South Wales by Robert Thomas Seaman against Emily Dabbs for a declaration that the defendant was not entitled to a right of way over a strip of land twenty feet wide adjoining certain property of hers at Roseville. The suit was heard before Maughan, A.J., who in giving judgment for the plaintiff stated the facts as follow:—

The earliest document of title in evidence in this case is a certificate of title in the name of Maria