A REVIEW OF JUDICIAL REFERENCES TO THE DICTUM OF JORDAN CJ, EXPRESSED IN *SCOTT V COMMISSIONER OF TAXATION*,* IN ELABORATING THE MEANING OF 'INCOME' FOR THE PURPOSES OF THE AUSTRALIAN INCOME TAX

MARK BURTON†

ABSTRACT

Judicial consideration of the meaning of 'income' (ITAA1936) and 'ordinary income' (ITAA1997) includes reference to a dictum of Jordan CJ describing a process for discovering the meaning of 'income' for the purposes of the then New South Wales income tax. Over the past eighty years the import of this dictum has been described in various ways in case decisions. This paper identifies these different judicial descriptions of the dictum's meaning and considers the significance of this diversity when describing the process by which the meaning of 'ordinary income' ought to be ascertained.

* *Scott v Commissioner of Taxation* (1935) 35 S.R. (NSW) 215 at 219.

† Melbourne Law School, The University of Melbourne. I am, as always, very grateful for the comments, suggestions, criticisms and encouragement received from colleagues, students and also the reviewers of this paper. Although this paper has been improved as a result of these contributions, any fault is solely mine.

I. INTRODUCTION

For the purposes of the Australian Constitution, a criterion of 'tax' legislation is that it cannot operate arbitrarily.[1] In *Truhold*, the High Court of Australia stated that the exclusion from arbitrariness means that:

> *Liability can only be imposed by reference to ascertainable criteria with a sufficiently general application and that the tax cannot lawfully be imposed as a result of some administrative decision based upon individual preference unrelated to any test laid down by the legislation. (emphasis added)*[2]

Having regard to legislation imposing a tax upon 'income',[3] the words that have been emphasised in this extract from *Truhold* are taken to mean that the subject of the tax - the set of amounts that satisfy the rules governing their respective classification as 'income' - must be ascertainable by reference to legislative rules that have a determinate meaning. Further, that determinate meaning is identified by applying a process of interpretation in accordance with the law. Discovering this determinate meaning and applying that meaning to the facts of a particular case may be difficult, but these difficulties do not negate the fact that a determinate meaning exists.[4] Thus, it is accepted, identifying the meaning of 'income' for the purposes of income tax law is a 'question of law' because there is a correct 'meaning … which has been established by legal decisions'.[5] Both the process for discovering the meaning of income and also the rules and/or principles comprising that meaning do not authorise arbitrary decisions.

Many Australian case decisions have referred to the dictum of Jordan CJ in *Scott* in accepting a description of an objective, non-arbitrary process adopted for the purpose of identifying the principles comprising the meaning of 'income':

> *The word 'Income' is not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as the statute states or indicates an intention that receipts which are*

---

1 *MacCormick v Commissioner of Taxation* (Cth) (1984) 158 CLR 22 at 639–640; *Deputy Commissioner of Taxation (Cth) v Truhold Benefit Pty Ltd* (1985) 158 CLR 678 at 684; *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (Cth) (2011) 244 CLR 97, 111 [38]–[39].

2 *Truhold*, above n 1, at 684.

3 Section 25 of the *Income Tax Assessment Act 1936* (Cth) referred to 'income' without defining that term. Section 25(1) was replaced by section 6-5 of the *Income Tax Assessment Act 1997* (Cth), which refers to 'ordinary income'. Section 6-5(1) defines 'ordinary income' as 'income according to ordinary concepts'. In this paper 'income' is used to refer to the general concept of income under both Acts, and 'ordinary income' is used in particular contexts where section 6-5 is being referred to specifically.

4 See the discussion of this point at first instance in the recent Chevron litigation: *Chevron Australia Pty Ltd v FCT* 2015 ATC 20-535 at 17901 [551] per Robertson J.

5 *Sharp Corporation Pty Ltd v Collector of Customs* [1995] FCA 707; 59 FCR 6 at 13 per Davies and Beazley JJ, Hill J agreeing; cited with approval in the unanimous joint judgment of the Full Federal Court in *Haritos v FCT* (2015) ATC 20–513 at 17291 per Allsop CJ, Kenny, Besanko, Robertson and Mortimer JJ.

> *not income in ordinary parlance are to be treated as income, or that special rules are to [be applied].*[6]

Subsequent case decisions exhibit various approaches to the significance of this dictum. Authoritative decisions of the High Court of Australia have stated that elements of this dictum 'identify the essential nature of the inquiry' into the meaning of income.[7] These authoritative decisions appear to be consistent with the principle that taxation cannot be imposed arbitrarily. This is because these decisions identify the non-arbitrary process described by Jordan CJ for the purpose of discovering the meaning of 'income'. This emphasis upon the one correct interpretative procedure therefore appears to exclude the possibility that discovering the meaning of income is arbitrary.

However, notwithstanding these authoritative statements of legal principle, these statements may not reflect the judicial practice in interpreting the meaning of 'income'. Other High Court decisions regarding the meaning of 'income' make no reference to the dictum of Jordan CJ at all.[8] This omission does not necessarily mean that these High Court decisions have proceeded upon the basis that the dictum of Jordan CJ does not describe the process by which the meaning of income ought to be discovered. It is possible, for example, for a judge to apply the approach described by Jordan CJ without expressly referring to the dictum of Jordan CJ. However, it would be peculiar if a fundamental dictum, identified in earlier authoritative High Court decisions, were to be overlooked by a judge when setting out the process they followed when interpreting references to 'income'.

The need to examine the status of the dictum of Jordan CJ is only accentuated when one considers commentators' stances with respect to the status of this dictum. Several representative examples will suffice for present purposes. Hannan extracted the dictum in full when identifying what he considered to be the principles regarding the meaning of income to be found in case decisions.[9] By contrast, Ross Parsons' influential text on Australian income tax law ignored the statement altogether, although the decision in *Scott* is cited on several occasions throughout that text.[10] Lehmann and Coleman observed that 'the homespun appeal to 'ordinary concepts' and to 'ordinary parlance', may be seen as unconvincing and disingenuous.'[11]

There are, then, a range of practices and views regarding the application and usefulness of the dictum of Jordan CJ as a guide to a non-arbitrary process of identifying the meaning of

---

6 *Scott v FCT* (1966) 117 CLR 514 1, 219.

7 *FCT v Montgomery* (1999) 198 CLR 639, 661 [64]; *FCT v Anstis* (2010) 241 CLR 443, 448 [4].

8 For example, *FCT v McNeil* (2007) 229 CLR 656.

9 J.P. Hannan, *Principles of Income Taxation*, Law Book Co, Sydney, 1946, 5. In the recent High Court of Australia decision in *Blank v FCT* (2016) 258 CLR 439, Hannan's treatment of income was referred to with approval, although no direct reference to the dictum in *Scott* appears in the judgment (at CLR 458 [56]).

10 Ross Parsons, *Income Taxation in Australia*, Law Book Co, Sydney, 1985.

11 Geoffrey Lehmann and Cynthia Coleman, *Income Taxation in Australia*, Law Book Co, Sydney, 1998, 78.

'income' or 'ordinary income'. The purpose of this paper is to review references to this dictum in Australian income tax case decisions that have directly referred to the dictum.[12] Such a review has not been undertaken beforehand. Part B of the paper sets out the context of the dictum within the decision in *Scott* and considers the role that the dictum played in that case. The conclusion of this Part is that the dictum describes a process to be applied in identifying the 'ordinary' or 'natural' meaning of the term 'income', but does not specify the respective meanings of the components of that process identified in the dictum. Part C of this paper identifies the various verbal formulations regarding the meaning of the dictum that have been adopted in subsequent Australian case decisions. Informed by this review of Australian case law, Part D identifies several unresolved matters arising from the plurality of interpretations of the dictum identified in Part C.

II. THE DECISION IN *SCOTT*

A. *The facts and the statutory reference to 'income'*

In *Scott* the taxpayer was appointed to a statutory Board and that Board was subsequently dissolved by the *Meat Industry (Amendment) Act* 1932. That Act also stated that members of the Board should be compensated in the amount that they would have received had their services been terminated otherwise than according to law. The taxpayer's services were terminated and he received a lump sum of £7,000. By way of case stated, the New South Wales Court of Appeal was asked to determine whether the compensation received by Mr Scott was 'income' for the purpose of the state income tax legislation in New South Wales.[13] That legislation imposed tax upon 'taxable income'[14] which was defined to be the amount of 'assessable income' left after taking away allowable deductions.[15] 'Assessable income' was defined to be the gross income after excluding amounts of income specifically exempted.[16] In effect, the concept of income was left undefined because 'income' was defined to mean 'income derived … directly or indirectly'.[17]

---

12 The decision has been cited, for example, in *New Zealand: C of T (NZ) v McFarlane* (1952) 9 ATD 454 per F.B. Adams J and also Gresson J.

13 *Income Tax (Management) Act 1928* (NSW).

14 *Income Tax (Management) Act 1928* (NSW) s 8(1).

15 *Income Tax (Management) Act 1928* (NSW) s 4.

16 *Income Tax (Management) Act 1928* (NSW) s 4.

17 Note the definitions of 'income from personal exertion' and 'income from property', which generally have been regarded as providing little guidance regarding the concept of income because they refer to income on both sides of the definition: per Windeyer J in *Scott v FCT* (1966) 117 CLR 514 at 524 (citing Jordan CJ in *Scott v Commissioner of Taxation*); note, however, the apparent reliance upon the definition of income from personal exertion in *Stone*, without reference to the earlier case law and without close analysis of the limitations of the statutory definition: *FCT v Stone* (2005) 222 CLR 289, at 296–7 [17].

B. *Earlier case decisions referred to by Jordan CJ*

In dealing with the meaning of 'income', Jordan CJ set out the dictum extracted in the introduction to this paper.[18] His Honour cited two decisions at the end of this dictum. The first is the decision of Finlay J in *Lambe v Commissioners of Inland Revenue.*[19] In that case the taxpayer was owed an amount of interest that had accrued in the relevant income year. However, the circumstances of the debtor were such that there was little prospect that the taxpayer would receive the amount owing. At the passage specifically referred to by Jordan CJ, Finlay J stated that '[i]ncome may be of various sorts, income under Schedule A and various schedules, but none the less the tax is a tax on income. It is a tax on what in one form or another goes into a man's pocket.'[20] Finlay J referred to earlier authorities, including the decision in *Commissioners of Inland Revenue v Blott*[21] and the discussion of *Eisner v Macomber*[22] therein.

The decision of Pitney J in *Eisner* is commonly referred to in Australian case decisions.[23] For present purposes it is significant that Pitney J approached the meaning of 'income' upon the basis of the usage of the term 'in common speech'[24] before then considering definitions provided by dictionaries 'in common use'.[25] In particular, Pitney J drew a distinction between income according to economists and income according to common usage, the implication being that an economist's concept of income is uncommon or extraordinary. Applying this approach, Pitney J concluded that the common usage of income incorporated a requirement that a gain be realised. Upon this basis, Pitney J concluded that the stock dividend was not income because there had been no realisation of a gain at the time that the stock dividend was issued.

Adopting a similar interpretative approach, Finlay J concluded that no statutory rule dictated that the general principle regarding the nature of income should be overturned,[26] and therefore concluded that the amount owing to Lambe was not assessable to tax.

The second case decision cited by Jordan CJ in *Scott* was *Attorney-General of British Columbia v Ostrum.*[27] In that case the Privy Council decided that the fluctuating payments made to

---

18 See extract accompanying n 6 above.

19 (1934) 1 KB 178.

20 Lambe, above n 19, 182–183.

21 *Commissioners of Inland Revenue v Blott* (1921) 2 AC 171.

22 (1920) 252 US 189.

23 Rick Krever, 'The Ironic Australian Legacy of *Eisner v Macomber*' (1990) 7 *Australian Tax Forum* 191.

24 Eisner, above n 23, 206.

25 Eisner, above n 23, 207.

26 Lambe, above n 19 185–186.

27 [1904] AC 144.

railway locomotive engineers, who were paid according to the number of miles that they drove their respective locomotives, were 'income' notwithstanding the fluctuation of the respective driver's receipts. According to the case report, at first instance, Irving J decided in favour of the Crown that 'income' 'must be given its ordinary popular and natural meaning in the same way as people in ordinary life would use it.'[28] Deciding that the engineers' payments were 'income', the Privy Council stated that '[t]heir Lordships are of opinion that there is no ground for cutting down the plain and ordinary meaning of the word "income"'.[29]

The common element of the statements in these two case decisions, specifically referred to by Jordan CJ, is that 'income' should be taken to refer to the usage of the term in the general community unless a specific statutory rule overturns that meaning. Neither of these decisions elaborated upon the process of identifying the ordinary meaning of income in the terms expressed in the dictum of Jordan CJ. Thus, neither decision is of much assistance in shedding light on the elements of that dictum. Further, in the course of his judgment, Jordan CJ did not elaborate upon the meanings of the elements incorporated within his dictum: 'forms', 'principles', 'ordinary concepts and usages' and 'ordinary parlance'. However, his Honour did proceed to a consideration of Mr Scott's circumstances and concluded that the £7,000 in question was not 'income' according to the 'ordinary meaning of "income"'.[30] His Honour also stated that the £7,000 was not income 'according to the natural meaning of the word'.[31]

C. *Understanding the dictum of Jordan CJ in the context of the contemporary approach to statutory interpretation*

One question arising from the decision in *Scott* is whether the dictum of Jordan CJ should be taken to mean nothing more than that, for the purposes of the income tax, 'income' is not a term of art and therefore is given its 'ordinary' and/or 'natural' meaning. If this were the case, then the emphasis placed upon specific elements of the dictum in subsequent High Court decisions[32] does not add to or alter the general approach to statutory interpretation. This general approach to statutory interpretation examines whether the ordinary, natural, literal or grammatical meaning of statutory text is displaced by a 'legal meaning' of that text.[33] It is therefore necessary to consider whether the dictum of Jordan CJ was consistent

---

28 Ostrum, above n 27 at 144–145.

29 Ostrum, above n 27 at 147.

30 Scott, above n 6, 219.

31 Id.

32 See, for example, the authorities noted in n 7 above.

33 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78]. This decision has been routinely cited by Australian courts as authority for the general approach to statutory interpretation described here. See, for example: *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19, [10], per French CJ, Kiefel, Nettle and Gordon JJ.

with the contemporary approach to statutory interpretation while also adding to that approach.

Clearly, the dictum of Jordan CJ does not specify a meaning of 'income'. Rather, the statement sets out a process to be followed in identifying the meaning of 'income' in the context of income tax legislation.

There is nothing in the judgment of Jordan CJ which could be taken to suggest that income tax legislation was a 'special case' that required its own approach to statutory interpretation. That view may have been adopted from time to time by some judges who constructed tax legislation as 'penal' and hence deserving of a narrow interpretation.[34] However, this narrow reading of tax legislation was not universally followed. In the High Court decision of *Adams v Rau*[35] the joint judgment emphasised the importance of interpreting tax legislation 'according to the natural and ordinary meaning of its terms'.[36] Shortly after the decision in *Adams v Rau*, in the Supreme Court of New South Wales Harvey CJ treated this approach as a reference to the meaning of statutory terms 'in ordinary parlance'.[37] Read in the context of these earlier decisions, the dictum of Jordan CJ can be understood to reflect the general statement of interpretative approach applicable to all legislation rather than the dictum expressing a particular principle that only applied to interpreting tax legislation.

Arguably, the dictum of Jordan CJ is consistent with the general approach to interpreting legislation expressed in *Adams v Rau*. Jordan CJ applied the terminology of 'ordinary meaning' and 'natural meaning', adopted in *Adams v Rau*, in deciding that Scott's receipt was not income.[38] However, the dictum of Jordan CJ reaches beyond the statements made in *Adams v Rau* and *In re Searls Ltd* by setting out the specific process by which the natural, ordinary meaning of a statutory term such as 'income' might be identified. According to this process, those interpreting 'income' should first identify and then analyse ordinary concepts and usages so as to identify the forms of receipt and the principles applied in determining how much of such receipts ought to be taken to be income. This framework indicates that the ordinary/natural meaning of 'income' must be discovered by identifying and analysing the usage of language rather than merely identifying the ordinary meaning of a term without the need for any analysis.[39] The dictum is significant because it describes the basis upon

---

34 For early expressions of the strict construction of penal legislation, including taxation law, see: *Ramsden v Gibbs* (1823) 1 B & C 319; 107 ER 119; Denn v Diamond (1825) 4 B & C 243, 245; 107 ER 1049, 1050.

35 (1931) 46 CLR 572.

36 Adams, above n 35, at CLR 578 per Gavan Duffy CJ, Starke, Dixon and McTiernan JJ.

37 *In re Searls Ltd* (1932) 33 SR(NSW) 7 at 10.

38 See nn 30 and 31, above.

39 Without express consideration of the matter, it is a matter of speculation whether this analytical approach to language was influence by developments in the philosophy of language during the early part of the twentieth century, which exhibited vibrant debate regarding the nature of linguistic analysis and also the subject of that analysis: P.M.S. Hacker, 'The Linguistic Turn in Analytic Philosophy' in Michael Beaney (ed), *The Oxford Handbook of the History of Analytic Philosophy*, Oxford University Press, Oxford, 2013, 926–947.

which the ordinary and natural meaning should be identified, rather than taking that process for granted.

Thus, to answer the question posed at the beginning of this section, the dictum of Jordan CJ was consistent with the contemporary approach to statutory interpretation and also added to the understanding of that approach by describing the process by which the ordinary or natural meaning of a statutory term should be identified. What is not clear from the text of the decision of Jordan CJ is how this interpretative process was applied in the circumstances of the particular case. The dictum of Jordan CJ describes a process, in general terms, by which the ordinary and/or natural meaning of 'income' is identified. The inner workings of this process were not closely specified by Jordan CJ in *Scott* and nor were these elements elaborated in the case decisions to which Jordan CJ referred. This left room for different interpretations of the dictum, and different assessments of its significance, in subsequent case decisions, which will be considered in Part C.

III. AUSTRALIAN[40] CASE DECISIONS REFERRING TO THE DICTUM IN *SCOTT*

A. *'Ordinary concepts and usages of mankind'*

The statement of Jordan CJ is commonly referred to as authority for the proposition that the meaning of 'income' for the purposes of Australian income tax legislation is 'income, according to ordinary concepts and usages of mankind'. The joint judgment of Latham CJ, Starke, Dixon and Williams JJ in *Colonial Mutual Life Assurance Society Ltd v Federal Commissioner of Taxation*[41] was the first clear and authoritative decision that adopted this interpretation of the dictum. In that case the joint judgment decided, in the alternative,[42] that the profits on investments in securities realised by the taxpayer were a 'profit' according to 'the ordinary usages and concepts of mankind'.[43]

This conclusion was no doubt a reference to the mention of the dictum of Jordan CJ at an earlier point in the joint judgment:

> *[I]t is common ground that, as Jordan C.J. held in Scott v. Commissioner of Taxation in relation to a similar provision in the Income Tax (Management) Act 1934 (N.S.W.), the definition only refers to proceeds which would be held to be income in accordance with the ordinary usages and*

---

40 The dictum of Jordan CJ has been referred to in New Zealand: for example, *Dawson v CIR* 78 ATC 6012, 6015 per McMullin J. It is beyond the scope of this paper to consider those case decisions, consideration of which would need to take account of the statutory scheme in the relevant jurisdiction.

41 (1946) 73 CLR 604.

42 Under the statutory scheme of the income tax at the time, the more specific provision of ITAA36 s 26(a) took priority over the general income provision found in ITAA36 s 25.

43 *Colonial Mutual Life Assurance*, above n 41, 621.

> *concepts of mankind, except in so far as the Act states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income.*[44]

A number of later decisions have referred to the dictum of Jordan CJ in similar terms. In *Scottish Australian Mining Co Ltd v FCT*[45] Williams J adopted the passage from *Colonial Mutual* extracted above. In *Case A21*[46] Member Thompson adopted this formulation of the dictum of Jordan CJ in concluding that profits from subdivision of land were 'income'.[47] In *Case A19*[48] members of the Board of Review referred to the dictum of Jordan CJ in observing that the amounts received by a former employee from his former employer were income according to 'ordinary concepts and usages,'[49] 'income according to ordinary concepts'[50] or income 'in the normal concept of that expression.'[51] In *Cooke & Sherden v FCT*[52] the Full Federal Court referred to the dictum of Jordan CJ in stating that the meaning of 'income' was to be determined according to the ordinary concepts and usages of mankind. A similar approach was expressed by Bowen CJ in *FCT v Harris.*[53]

In the 1980s similar statements were made in Allied Pastoral Holdings Pty Ltd v FCT,[54] Keily v FCT,[55] Blake v FCT,[56] Case M96,[57]Case P76,[58] Case Q11,[59]Case R26,[60] Case R51,[61] FCT v Myer

---

44 *Colonial Mutual Life Assurance*, above n 41, 615.

45 (1950) 81 CLR 188, 194.

46 69 ATC 124.

47 At 69 ATC 131; Chairman Dubout referred to this statement of Member Thompson when commenting that the profits would be income 'according to the ordinary usage of that word'; at ATC 130 [29].

48 69 ATC 116.

49 Per Member Thompson, at ATC 120.

50 Per Chairman Dubout, at ATC 118, referring to the decisions of members Thompson and Dempsey collectively.

51 Per Member Dempsey, at ATC 122.

52 80 ATC 4140, 4147.

53 80 ATC 4238, 4240.

54 83 ATC 4015; (1983) 1 NSWLR 1; (1983) 13 ATR 825; at ATC 4041 per Hunt J.

55 83 ATC 4248, 4249.

56 84 ATC 4661.

57 80 ATC 683.

58 82 ATC 362, 371.

59 83 ATC 570, 575 [13].

60 84 ATC 235, 240 [10].

61 84 ATC 392 per Chairman Brady and members Stewart and Trowse at ATC 396

Emporium Ltd,[62]Cyclone Scaffolding Pty Ltd v FCT,[63] Case U99,[64] and Case V6.[65] In the early 1990's the incidence of reference to the 'ordinary concepts and usages' formula was referred to in Case Z16,[66] FCT v Cooperative Motors Pty Ltd[67] and in McLean and Anor v the Commissioner of Taxation.[68]

After the enactment of the *Income Tax Assessment Act* 1997, in which 'ordinary income' was defined to be 'income according to ordinary concepts', the dictum of Jordan CJ was taken to mean 'income according to ordinary concepts' at one point in *FCT v Stone*[69] and also, in *obiter*, in *Spriggs & Riddell v FCT*.[70]

B. *The relevance of ordinary business principles*

The decision in *Colonial Mutual Life Assurance Society* also indicates that 'ordinary business principles' were relevant to determining the meaning of income according to ordinary concepts and usages. The joint judgment in *Colonial Mutual* adopted the statement of Lord Parker in *Liverpool and London and Globe Insurance Co. v Bennett*[71] where his Lordship held that the question under consideration ought to be 'determined on ordinary business principles, having regard to the circumstances under which, and the purposes for which, the investments were made and are held by the appellant company'.[72]

This accommodation of business and commercial usages in the context of income taxation has attracted considerable support.[73] Just three years after the decision in *Scott,* a majority of the High Court in *The Commissioner of Taxes (South Australia) v The Executor Trustee and*

---

62 (1987) 163 CLR 199, 215 per Mason ACJ, Wilson, Brennan, Deane and Dawson JJ. The joint judgment did not specifically refer to the decision in Scott, although the judgment did refer to 'income according to ordinary concepts and usages' when discussing the general concept of income.

63 87 ATC 4021, 4026 per David Hunt J.

64 89 ATC 603, 612 [31].

65 88 ATC 140, 141 per AAT Member Trowse.

66 92 ATC 183 at 185.

67 95 ATC 4411, 4414 per Northrop J.

68 [1996] FCA 1459 (10 May 1996); 96 ATC 4443, 4446 per Northrop J.

69 (2005) 222 CLR 289 at 296 [16].

70 (2009) 239 CLR 1 [54] Per French CJ, Gummow, Heydon, Kiefel, Crennan and Bell JJ.; Similarly, in *Walter v FCT* 98 ATC 2148, Senior Member Beddoe observed that Scott stood for the proposition that the meaning of income required consideration of 'ordinary concepts and usages', before citing the full dictum of Jordan CJ and also the statement of Windeyer J in *Scott v FCT* regarding the circumstances in which a gratuity may be found to be 'income' (at 2,153, [23]).

71 (1913) AC 610, 622.

72 *Colonial Mutual Life Assurance*, above n 41, 615.

73 This aspect of 'income' is considered by Slater: AH Slater, 'The nature of income: The intersection of tax, legal and accounting concepts' (2007) 36 AT Rev 138.

Agency Company of South Australia Limited (Carden's Case)[74] considered, by way of case stated, the question of when a sole medical practitioner had 'derived' payments for services rendered to his patients. In considering that question, Dixon J (Rich and McTiernan JJ agreeing) expressed a principle which runs parallel to the principle expressed by Jordan CJ in *Scott*, focusing upon business principles. Dixon J stated that

> *The courts have always regarded the ascertainment of income as governed by the principles recognized or followed in business and commerce, unless the legislature has itself made some specific provision affecting a particular matter or question.*[75]

The basis for this approach, Dixon J observed, is that conceptions of income, profit and gains are conceptions of the 'world of affairs and particularly of business'.[76]

In *FCT v Citibank Ltd*[77] Hill J (Jenkinson and Einfeld JJ agreeing) joined these threads when observing that '[t]he acceptance that concepts of business, which may be elucidated by accounting evidence, are relevant to the question of determining whether a particular item is income is inherent in the well-known passage from the judgment of Jordan CJ in *Scott'*.[78]

C. *Ordinary concepts and usages and ordinary parlance*

In *Colonial Mutual* the High Court included reference to 'ordinary parlance' when expressly referring to the dictum in *Scott*, but only referred to ordinary concepts and usages when deciding that the taxpayer's profits were 'income'.

This composite reference to 'ordinary concepts and usages' and 'ordinary parlance' was decisively adopted in *FCT v Montgomery*.[79] In *Montgomery* the taxpayer was a partner in a large law firm that received a lump sum 'lease incentive payment' upon entering into a lease with respect to new business premises for the firm. In deciding that the lease incentive payment was 'income', the joint judgment of a majority of the High Court noted that counsels' submissions had been framed upon analogies to decided cases and continued:

> *That approach is often helpful, but resort to analogy should not be permitted to obscure the essential nature of the inquiry which is to determine whether 'in ordinary parlance' the receipt in question is to be treated as income. As Jordan CJ made plain, the references to 'ordinary parlance' and to the 'ordinary concepts and usages of mankind' are no mere matters of ritual incantation; they identify the essential nature of the inquiry.*[80]

---

74 (1938) 63 CLR 108.

75 *Carden's Case*, above n 74, at CLR 152.

76 Id. See also the discussion in *Arthur Murray (NSW) Pty Ltd v FC of T* (1965) 14 ATD 98 at 101; (195) 114 CLR 314 at 320: 'the sense which it has in the vocabulary of business affairs.'

77 (1993) 116 ALR 443; 93 ATC 4691.

78 At ATC 4700.

79 (1999) 198 CLR 639.

80 *Montgomery*, above n 79, 661 [64].

In *Montgomery* the majority did not elaborate upon the meanings of the elements comprising the essential nature of the inquiry into the meaning of income. Closer elaboration of these elements, 'ordinary parlance' and 'ordinary concepts and usages', would have been of considerable assistance in establishing the import of the majority's statement. Moreover, the majority in *Montgomery* omitted reference to the forms and principles elements of Sir Frederick Jordan's statement. The reason for doing so is not apparent in the judgment.

After the introduction of the ITAA97 the relevance of the principle expressed in *Montgomery* was not examined in *FCT v Stone,*[81] although the dictum of Jordan CJ was considered in that case. In *Stone* the High Court considered whether various receipts of a sportsperson, appearance fees, government sports scholarship amounts and prizemoney, were 'ordinary income' for the purposes of section 6-5 of the ITAA97. The ITAA36 merely referred to 'income' while the ITAA97 defined the new statutory concept of 'ordinary income' to be 'income according to ordinary concepts'. There was no comparable 'old law' definition of income and the definition of 'ordinary income' clearly did not duplicate all of the dictum of Jordan CJ.

In the course of deciding that all of Stone's receipts connected with her sporting activities were ordinary income, the joint judgment noted the ITAA97 s 6-5(1) definition of 'ordinary income' and proceeded:

> *This reference to 'income according to ordinary concepts' is an evident reference to Sir Frederick Jordan's often quoted statement in Scott v Federal Commissioner of Taxation:*
>
> *[quoting the statement of Jordan CJ, quoted in the text of this paper at n 6]*
>
> *The various provisions of the 1997 Act to which reference has been made must be understood in the light of its stated relationship with the Income Tax Assessment Act 1936 (Cth) … Section 1-3(1) of the 1997 Act provides that the 1997 Act contains provisions of the 1936 Act 'in a rewritten form'.*[82]
>
> *The joint judgment then extracted ITAA97 s 1-3(2) without further analysis of that subsection at this point.*

The plurality in *Stone* did not elaborate upon the significance of its 'evident reference' comment. In particular, it is not clear whether the plurality accepted that the statutory definition should be interpreted to have adopted the entire statement of Jordan CJ by the shorthand reference to 'income according to ordinary concepts'. The force of 'evident reference' could be taken to imply that the plurality intended to accord Sir Frederick Jordan's statement considerable weight or even that the statement should be adopted as authoritative. This conclusion could also be supported by the immediately following reference to ITAA97 s 1-3(1), which could be understood to have implied that the ITAA97 concept of ordinary income was the same as the ITAA36 concept of 'income'.

---

81 (2005) 222 CLR 289.

82 Id, 222 CLR 289 at 294 [8].

However, it is also possible that the majority in *Stone* was merely noting Sir Frederick Jordan's statement without accepting it as authoritative. The plurality did not refer directly to Sir Frederick Jordan's entire statement elsewhere in the joint judgment. This could be taken to mean that the plurality did not consider that the entire statement had been incorporated by reference with the enactment of ITAA97 s 6-5(1) even though that subsection evidently referred to part of the statement of Jordan CJ. It is, however, reasonable to infer that the text of ITAA97 s 6-5(1) was influenced by Sir Frederick Jordan's statement and also by later adoptions of that statement. However, one plausible reading of the statutory text is that it should only be taken to directly refer to the part of Sir Frederick Jordan's statement comprising the same words. After all, the statutory definition does not refer to Sir Frederick's forms/principles analysis, to 'usages' and to 'ordinary parlance'.

The preceding discussion of the 'evident reference' comment suggests that the plurality in *Stone* did not unequivocally accept that ITAA97 s 6-5(1) incorporated the entire statement of Jordan CJ for the purpose of defining 'ordinary income'. Nevertheless, some statements in *Stone* indicate that the plurality treated ITAA97 s 6-5(1) as having incorporated some elements of Sir Frederick Jordan's statement that go beyond the statutory text. Having considered several aspects of the case before them, the plurality returned to the construction of ITAA97 s 6-5(1) in light of ITAA97 s 1-3(2). The plurality noted that the proceeds of a business on revenue account fall within the understanding of income 'according to ordinary concepts'.[83] In this sentence the plurality appeared to adopt a test that was restricted to the statutory text specifying the basis upon which 'income', and hence 'ordinary income', was to be identified. However, in the same paragraph, the plurality elaborated upon this sentence by apparently adopting a phrase from Sir Frederick Jordan's statement which goes beyond the text of ITAA97 s 6-5(1) by incorporating 'and usages':

> *But the inquiry about 'business' must not be permitted to distract attention from the question presented by both the 1936 Act and the 1997 Act. That question seeks to identify whether a receipt is, or receipts are, 'income' As s 6-5 makes plain, that requires consideration of whether the receipt in question is income in accordance with 'the ordinary concepts and usages of mankind'.*[84]

D. *Reference to all elements of the dictum of Jordan CJ: ordinary concepts and usages, ordinary parlance, forms and principles*

The majority in *Stone* clearly adopted some elements of the dictum of Jordan CJ in interpreting the definition of ordinary income in s 6-5(1). However, the majority in *Stone* did not expressly refer to the principles extracted from the dictum of Jordan CJ by the majority in *Montgomery*, notwithstanding that the decision in *Montgomery* was expressly referred to by the majority in *Stone*.[85] After *Stone*, the significance of *Montgomery* to the interpretation

---

83 Id, at CLR 296 [16].

84 Id.

85 *Stone*, above n 17 at 297 [18] and 306 [60].

of ITAA97 s 6-5(1) was open to question. This matter was expressly addressed by the Full High Court in *FCT v Anstis.*[86]

Anstis raised the question of whether a university student receiving Australian government support payments was receiving 'ordinary income'. This issue had not been argued in earlier stages of the litigation because the case raised the question of whether Anstis' expenditure upon her studies was deductible. However, the question of whether Anstis' support payments were received as income by her was fully argued before the Full High Court, upon the basis that the status of these receipts was central to the resolution of the deduction question.[87]

The Commissioner argued that the payments were ordinary income upon the basis that their regularity was a formal aspect that supported their assessment as ordinary income and that there were no other matters of form which negated this conclusion.[88] After noting ITAA97 s 6-5(1), the joint judgment in *Anstis* emphasised the importance of the dictum of Jordan CJ:

> *As has been said [citing Stone], that is an evident reference to the statement by Jordan CJ that the forms of receipt falling within the term 'income', and the principles to be applied to ascertain how much of those receipts ought to be treated as income, 'must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as the statute states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income' [citing Jordan CJ in Scott]. The reference to 'ordinary parlance' and to the 'ordinary concepts and usages of mankind' are 'no mere matters of ritual incantation; they identify the essential nature of the inquiry' [citing Montgomery].*

Notwithstanding this forthright reference to Sir Frederick Jordan's dictum, and apparent adoption of at least some elements of that statement, the judgment did not undertake a close analysis of its central elements: forms/principles, 'ordinary concepts and usages' and 'ordinary parlance'. However, the judgment appears to proceed upon the basis of identifying the form of the receipt, followed by analysis of the principles to be applied in determining whether receipts in that form are 'income'.

Passing reference was made to the Commissioner's argument regarding the regular form of the receipt.[89] More significantly, the joint judgment accepted that regularity of receipt is a hallmark of ordinary income while also accepting that it is not a sufficient condition for characterisation of an amount as income.

Turning to the elaboration of principle in the High Court decision of *FCT v Dixon*,[90] the joint judgment noted that a taxpayer's 'actual reliance' upon receipt of a regular payment to meet

---

86 (2010) 241 CLR 443.

87 *Anstis*, above n 7, at CLR 448 [4].

88 Above, n 86, at CLR 451 [16].

89 Id.

90 (1952) 86 CLR 540.

living expenses was not a necessary condition for an amount to be of an income nature.[91] However, the joint judgment did accept the reasoning of White J in *Keily v FCT,*[92] observing:

> *Youth allowance payments enable recipients to rely upon them for regular expenditure, and recipients can expect to receive those payments but only so long as they satisfy the various requirements of the social security legislation. It follows that such amounts are income according to ordinary concepts.*[93]

Without saying as much expressly, the decision in *Anstis* appeared to accept that the regularity of the receipt can give rise to a sufficient degree of dependence upon the receipts and this supports the inference that the recipient relies upon receipt of the amounts in order to meet regular expenditure. Thus, *actual* reliance need not be established[94] as reliance can be inferred 'objectively' from a regularity of receipts.[95] This reasoning, however, does not explain why regularity of receipt in itself is not a sufficient condition for characterisation of the amount as income according to ordinary concepts. Perhaps it is the purpose of the legislation under which Anstis' support allowance was paid, but the joint judgment also noted that the payor's purpose is not determinative of the characterisation issue because it is the nature of the receipt in the hands of the recipient that must be examined.[96]

In any case, the reasoning in *Anstis* appears to have followed the forms/principles analysis contemplated by the dictum of Jordan CJ, even though the High Court did not expressly analyse ordinary concepts and usages and ordinary parlance in identifying the forms of receipt and applicable principles.

E. *Income according to ordinary concepts*

Some case decisions have proceeded upon the basis that the dictum of Jordan CJ required the identification of 'income according to ordinary concepts'. Although none of these decisions refer to the decision of Jordan CJ in *C. of T. (N.S.W.)* v. *Cam & Sons Ltd,*[97] the formulation of 'income according to ordinary concepts' is somewhat similar to the statement of Jordan CJ regarding the meaning of 'source' for the purposes of the New South Wales income tax legislation. In *Cam & Sons* Jordan CJ observed that '[e]xcept in so far as the Statute otherwise provides, the matter is to be determined by the concepts of ordinary people.[98]

Case decisions that interpret the dictum of Jordan CJ to mean 'income according to ordinary concepts'

---

91 *Anstis*, above n 7, at 453 [22].

92 *Keily v Federal Commissioner of Taxation* (1983) 32 SASR 494.

93 *Anstis*, above n 7, at 453 [23].

94 *Anstis*, above n 7, at 453 [22].

95 *Anstis*, above n 7, at 454 [23].

96 *Anstis*, above n 7, at 454 [23].

97 (1936) 36 SR(NSW) 544.

98 (1936) 36 SR(NSW) 544, 547.

could be expected to attract close attention, given that the same phrase is adopted in ITAA97 s 6-5(1). However, none of these cases exhibits close analysis of the dictum and so none of the decisions sheds light upon the reasons for preferring this particular interpretation of that dictum.

In *Reseck v FCT*[99] the taxpayer received a lump sum upon termination of his employment. In deciding that a specific assessing rule (ITAA36 s 26(d)) applied to this amount, Gibbs J agreed with Jacobs J but gave his own reasons. Gibbs J cited the dictum of Jordan CJ and observed that s 26(d) applies to some amounts that would not be 'income according to ordinary concepts'[100] while also applying to amounts that would be income 'according to ordinary usages and concepts'.[101] Jacobs J also discussed the scope of s 26(d), referring to the 'ordinary sense' and 'ordinary meaning' of 'income'.[102]

In *Federal Commissioner of Taxation v. Reynolds*[103] Neasey J considered whether the owner of a log haulage business received 'income' assessable under s 25(1). The taxpayer leased a truck but before the expiry of the lease decided to obtain a different truck. By agreement with the lessor, the taxpayer acted as the lessor's agent in disposing of his truck for more than he paid for it. The taxpayer was allowed to keep the amount by which the sale price exceeded the lease payout amount. In concluding that the amount was 'income', Neasey J observed, '[t]here is no definition of "income" in the Act. The question is whether the receipt is "income" according to ordinary concepts [citing the dictum of Jordan CJ]'.[104] This statement was cited with approval by the full Board of Review in *Case T54,*[105] by Spender J at first instance in *Cooling v FCT,*[106] by three members of the AAT in *AAT Case 6945*[107] and also by Member Gerber in *AAT Case 9678*.[108]

After the ITAA97 was enacted, in *FCT v La Rosa*[109] the Full Federal Court accepted that income should be identified 'according to ordinary concepts'. However this approach was adopted without referring to the dictum of Jordan CJ and while referring to the 'income according to ordinary usage' formulation expressed by Professor Parsons in *Income Taxation*

99 (1975) 5 ATR 538.

100 Above n 99, 540.

101 Above n 99, 540.

102 Above n 99, 546.

103 81 ATC 4,131.

104 Above n 103, 4,141.

105 86 ATC 419, 422.

106 89 ATC 4731, 4739.

107 [1991] AATA 452; (1991) 22 ATR 3214; 91 ATC 277.

108 *QT93/38 and Commissioner of Taxation* [1994] AATA 244; 94 ATC 400; (1994) 29 ATR 1064.

109 [2003] FCAFC 125; 53 ATR 1; 2003 ATC 4510, 4515 [23] per Hely J, Carr and Merkel JJ agreeing.

in Australia.[110] As Professor Parsons did not expressly refer to the dictum of Jordan CJ, it is not clear whether the decision in *La Rosa* should be taken to refer to that dictum.

F. *The ordinary meaning of 'income'*

In *Norman Alfred Coleman v FCT*[111] McTiernan J decided that a profit received on the sale of farming land was not 'income' 'in the ordinary sense' and cited the dictum of Jordan CJ.[112] In *Briers v Atlas Tiles*[113] McInerney focused upon Chief Justice Jordan's statement that Mr Scott's £7000 did not fall within the ordinary meaning of income'.[114] McInerney J did not refer to the dictum of Jordan CJ and so it is not possible to determine whether McInerney J took the reference to 'ordinary meaning' to be the meaning derived by applying the process described in the dictum or whether the ordinary meaning is identified by other means.

In *Case Z35*[115] (4 September 1992) Member Beddoe observed that 'income' was not defined in the ITAA36 and so must be given its ordinary meaning,[116] followed by quotation of the full dictum of Jordan CJ.[117]

G. *The meaning of 'income' in ordinary parlance/speech*

In *Case H54*[118] a full bench of the AAT referred to the dictum of Jordan CJ but observed that it should be taken to require consideration of 'ordinary parlance, according to ordinary concepts and usages'.[119] *In Reuter v FCT*[120] Hill J cited the dictum of Jordan CJ in observing that 'income' is to be identified according to ordinary concepts and usages. His Honour continued by noting '[p]erhaps the most usual usage of the word "income" in ordinary speech is to describe that which comes in as a reward for services. Amounts such as salary, wages, commission, tips and the like, are universally regarded as income'.[121] This statement was cited with approval by the Full Federal Court in *MIM Holdings v FCT*[122] and also in *Sent*

---

110 Parsons, above n 10, 26 [1.30].

111 (1967) 15 ATD 536.

112 Above n 111, 539.

113 (1978) 78 ATC 4017.

114 Above n 113, 4026.

115 *Re Taxation Appeals* [1992] AATA 270; (1992) 92 ATC 326 (1992) 24 ATR 1040.

116 *Case Z35*, above n 115, at ATC 329.

117 In Cortis v FCT 99 ATC 2105 at 2126 a similar approach was adopted by Deputy President Forgie.

118 76 ATC 458.

119 *Case H54*, per Member Todd, with Chairman Donovan and Member Thompson agreeing at ATC 467 [20].

120 93 ATC 4037.

121 At ATC 4047.

122 (1997) 36 ATR 108, 117.

v FCT.[123] More recently, in *Senior v FCT*[124] Deputy President Deutsch treated 'ordinary parlance' and 'ordinary concepts and usages' as directly substitutable, proceeding to consider the particular receipt upon the basis of whether it was 'income' in ordinary parlance.[125]

H. *Income according to ordinary principles*

In *Sydney Refractive Surgery Pty Ltd v FCT*[126] at first instance Sackville J referred to the joint judgment in *Stone* and observed that ITAA97 s 6-5(1) was an evident reference to the dictum of Jordan CJ. After extracting that dictum, Sackville J expressed the test as being 'whether a particular receipt is income on ordinary principles'.[127]

I. *Recognition of all elements*

Some decisions referred to the dictum of Jordan CJ in its entirety without analysing the dictum or paraphrasing it. For example, in *Dixon v FCT*[128] Fullagar J referred with approval to the entire dictum of Jordan CJ.[129]

IV. ASSESSING THE SIGNIFICANCE OF THE DICTUM OF JORDAN CJ

A. *Dealing with the diversity of interpretations of the dictum of Jordan CJ*

The introduction to this paper noted the general acceptance of the propositions that identification of the meaning of 'income' is not arbitrary and that inquiry into the meaning of income is a question of law. It is a question of law because it has been accepted that there is one correct meaning, revealed by principles extracted from case decisions regarding the ordinary or natural meaning of 'income'. In Part B it was noted that the dictum of Jordan CJ describes, in general terms, a process by which judges should approach this inquiry into the

---

123 *Sent v FCT* [2012] FCA 382; 2012 ATC 20-318 at ATC 13563-13564 [41]–[44]. This decision was upheld on appeal to the Full Federal Court: *Sent v FCT (No 2)* [2012] FCAFC 187; 2012 ATC 20-364.

124 2015 ATC 10-392 at ATC 6720 [44].

125 The definition of 'parlance' provided in the *Shorter Oxford English Dictionary* emphasises the use of this term to refer to the oral use of language and also a usage of a particular group within a community (eg in 'accounting parlance'). Although Professor Deutsch cited the High Court decision in *Anstis*, he did not discuss the forms/principles elements of the dictum of Jordan CJ although Professor Deutsch did identify several principles regarding the nature of income that he considered had been extracted from ordinary parlance.

126 [2008] FCA 454; 2008 ATC 20-036.

127 *Sydney Refractive Surgery*, above n 126, at ATC 8465.

128 (1952) 86 CLR 540, 565. In Case R107 the full Board of Review extracted the first part of Chief Justice Jordan's dictum, ignoring the reference to ordinary parlance.

129 See also *Gauci v Commissioner of Taxation* 75 ATC 4149, 4152 and Case R107 (1998) ATC 114; [1998] AATA 102; (1998) 38 ATR 1088.

principles comprising the ordinary or natural meaning of 'income'. In Part C eight different verbal formulae summarising or referring to the dictum of Jordan CJ were identified in Australian case decisions.

In the absence of judicial analysis of the terms used in these formulae, it is not possible to definitively determine whether all of these references to the dictum do, or don't, have the same meaning. For example, it is not possible to determine whether 'according to ordinary concepts and usages' has a different meaning to 'according to ordinary concepts'. This is because it is possible that the additional words, 'and usages', could be read in a way that adds nothing to the meaning of the phrase 'according to ordinary concepts'. Alternatively, the additional words 'and usages' could alter the meaning of the phrase.

The possibility that the different formulae referring to the dictum of Jordan CJ have substantively different meanings is significant because it raises the possibility that different judges could adopt different methods of inquiring into the ordinary or natural meaning of income. If this were the case, and if the selection of these different methods of inquiry is not guided by a rule or principle of law and hence is arbitrary, then there is a legitimate question as to whether the meaning of 'income' is, in truth, arbitrarily determined.

Clarification upon this matter would be a valuable addition to authoritative case law upon the process by which the meaning of 'ordinary income' should be determined. Such clarification and analysis would enhance the efficiency of the law as a system of rules because advisors, administrators, taxpayers and judges could at least begin from a common starting point in identifying the subject of the inquiry into the meaning of 'income'.

B. *The status of the statutory text in ITAA97 s 6-5(1): 'income according to ordinary concepts'*

If all of the diverse verbal formulations describing the dictum of Jordan CJ should be taken to have the same meaning, then any one of these formulae would be substitutable for another.[130] Thus, 'income according to ordinary concepts' would be taken to have the same meaning as 'income according to ordinary concepts and usages' just as 'income according to ordinary concepts' would have the same meaning as 'income in ordinary parlance'.

This substitutability presents a difficulty with regard to the interpretation of section 6-5(1) adopted by the High Court. In *Stone* and *Anstis* it was noted that the statutory text is an 'evident reference' to the dictum of Jordan CJ. However, in those decisions the High Court summarised that dictum in different ways. In *Stone* the majority expressly adopted 'ordinary concepts and usages' in classifying Stone's receipts as 'income', while in *Anstis* the High Court unanimously adopted 'ordinary concepts and usages' and 'ordinary parlance'. If these verbal formulations should be taken to have the *same meaning* as the statutory formulation of 'income according to ordinary concepts', why adopt these different formulations? Given the

---

130 The substitutability of equivalent meanings was famously explored by Gottlob Frege, 'On Sense and Reference' (1892) in: P Geach and M Black (eds and translators), *Translations from the Philosophical Writings of Gottlob Frege*, Basil Blackwell, Oxford, 1960 (2nd edn), 57.

importance accorded to the statutory text in the rules and principles of statutory construction,[131] and given that all else is equal if it is accepted that the different formulae have the same meaning, the statutory text ought to prevail as the foundation of the contemporary concept of 'ordinary income'.

If, on the other hand, the different formulations identified in Part C have meanings which differ from the statutory text, 'income according to ordinary concepts', a similar problem arises in reading *Stone* and *Anstis*. Upon what basis can it be said that s 6-5(1) means that the formulae expressed in those decisions, respectively, must be adopted, given that these formulae would now (we assumed) have different meanings to the statutory text? If the judicial formulae have different meanings to the meaning of the statutory description of the inquiry, the basis upon which the judicial formulation took priority over the statutory formulation should have been explained in *Stone* and *Anstis*.

C. *A unifying concept of income or a set of things labelled 'income' according to various, possibly inconsistent, concepts of income?*

In Part II it was noted that the dictum of Jordan CJ describes a process of inquiry into the meaning of income rather than specifying a particular meaning of 'income'. Another aspect of this matter that remains unresolved is the nature of the output of this process. Is it the case that this output can only be a singular meaning of 'income' which must be satisfied for an amount to be classified as 'income'? Or can the inquiry reveal multiple, and possibly inconsistent, concepts of income which are all identified 'according to ordinary concepts' and so an amount could be 'income' if it satisfied any one of these concepts?

The former approach would mean that, to be 'income', an amount must satisfy particular rules and/or principles that define the set of amounts comprising 'income'. Such a singular concept of income could be defined in various ways. For example, Prebble has argued that 'income' should have been interpreted as referring to the singular set of receipts which share the same essential nature.[132] If 'income' has such a singular, correct meaning that must be identified in determining whether an amount is income, clearly the identification of income cannot be arbitrary because classification of an amount as 'income' is constrained by this condition.

However, it is often accepted that Australian case decisions do not, as a whole, reflect reference to a singular concept of income,[133] although each case may apply a particular concept of income. Thus, some cases have accepted that an amount is income from the

---

131 The dangers of substituting judicial paraphrases of earlier statutory text were discussed in: *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52, 75 [62].

132 Thus Prebble adopts a form of philosophical realism in arguing that taxation law is not equipped to identify what is truly income because the facts of particular cases are viewed through the lens of legal forms: John Prebble, 'Why is Tax Law Incomprehensible?' [1994] *British Tax Review* 380, 388; John Prebble, 'Income Taxation: A Structure Built on Sand' (2001) 24 *Sydney Law Review* 301, 306.

133 See, for example: Ross Parsons, 'Income Tax – An Institution in Decay' (1986) 3(3) *Australian Tax Forum* 233.

perspective of commercial/accounting/business understandings of 'income',[134] other cases have proceeded from a consideration of what is taken to be a consideration of 'income' in ordinary speech[135] while other cases have been seen to reflect a lawyer's concept of income approached from the perspective of the law of trusts.[136]

The second approach to the definition of income, that it is an 'umbrella' concept which includes potentially inconsistent sub-concepts of income, is attractive because it explains how this range of income concepts can be identified and applied in a non-arbitrary way. All of these approaches to the meaning of 'income' can be reconciled if they are seen to be particular instances of 'income according to ordinary concepts', under the one concept of 'ordinary income'. Once again, if this understanding of the statutory definition of ordinary income were adopted, classification of an amount as 'ordinary income' would not occur arbitrarily because the criterion of 'ordinariness' would underpin the identification of different income concepts.

Further elaboration of the meaning of the dictum in *Scott* would clarify the nature of the output that emerges from the process described in the dictum.

D. *The status of 'economic income'*

In the first instance decision of *Cooke & Sherden v FCT* Jenkinson J extracted the dictum of Jordan CJ and then observed that 'ordinary concepts and usages' are mutable.[137] In doing so, Jenkinson J was merely referring to a long-accepted principle of statutory construction.[138] If 'ordinary income' is identified 'according to ordinary concepts', it is possible that what was once considered to be 'extraordinary' has now become 'ordinary'. New inventions – bicycles, motor cars, the internet – were once 'extraordinary' but are now 'ordinary'. Likewise, the economic concept of income may have been extraordinary at the time of the decision in *Eisner* and even at the time of *Scott*, but an argument could be made that the economic concept of income is now no less ordinary than commercial or accounting concepts of income. The ordinariness of the economic concept of income, it could be argued, is reflected in phenomena such as the publication of Simon's work in 1938[139] (just three years after *Scott*), the subsequent development and recognition accorded to the discipline of economics

---

134 For example, see Section IIIB above.

135 See, for example, Section IIIG above.

136 W Strachan, 'The Differentiation of Capital and Income' (1902) 18 *Law Quarterly Review* 274; W Strachan, 'Economic and Legal Differentiation of Capital and Income' (1910) 26 *Law Quarterly Review* 40; W Strachan, 'Capital and Income (Lifeowner and Remainderman)' (1912) 28 *Law Quarterly Review* 175; W Strachan, 'Capital and Income under the Income Tax Acts' (1913) 29 *Law Quarterly Review* 163.

137 78 ATC 4685; (1978) 9 ATR 310 at ATC 4696.

138 See, for example: *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 at 145 per Spigelman CJ; see also the discussion in DC Pearce and RA Geddes, Statutory Interpretation in Australia, LexisNexis Australia, Sydney, 2014 (8th edn), 157–158, paras [4.9]–[4.10].

139 Henry Simons, *Personal Income Taxation*, University of Chicago Press, Chicago, 1938.

and the subsequent widespread adoption of the 'economic' concept of income as a foundation stone of critical appraisals of income taxation.

The exclusion of 'economic income' from the statutory concept of income was noted in *Montgomery.*[140] Counsel had not presented argument upon this matter, but the adoption of *Eisner* by the majority Justices indicated that argument for adoption of the economic concept of income would have been rejected.[141] However, there is nothing in the dictum of Jordan CJ to suggest that economic income can never become 'income' according to the ordinary or natural meaning of that term.

If economic income were found to be 'income' according to ordinary concepts in the general community, then it would be necessary to consider the statutory context of 'ordinary income' to determine whether the legislature should be taken to have intended to adopt this meaning.[142] Thus, reference to the statutory scheme of the income tax legislation might mean that 'ordinary income' should be interpreted to have a distinct 'legal' meaning in the statutory context of the income tax legislation,[143] being a meaning that excluded the 'ordinary' economic concept of income or limited it in some way. As a result, the concept of 'ordinary income' for the purposes of the income tax would become a 'term of art' and therefore fall outside the scope of the dictum of Jordan CJ, in accordance with the terms of that dictum.

V. CONCLUSION

Exaction of an impost by government is only a 'tax' if the imposition is not arbitrary. This means that the meaning of the statutory subject of the impost, and also the application of that meaning to the facts of a particular case, must be constrained by law. Several authoritative High Court decisions have emphasised the importance of the dictum of Jordan CJ when describing the basis upon which the meaning of 'ordinary income' is identified. However, other authoritative High Court decisions upon the meaning of income have not expressly referred to the dictum. Moreover, Part C of this paper indicates that the dictum of Jordan CJ has been interpreted in various ways in case decisions dealing with earlier versions of the Commonwealth income tax as well as the current ITAA97. The secondary commentators have also adopted different approaches regarding the status of the dictum.

Such diversity, Flynn observed, can be contrasted with the routine acceptance of fundamental principles with respect to other taxation concepts such as 'capital'.[144] This diversity of views

---

140 Above, n 7, 662 [66].

141 See the discussion of Eisner in section IIB above.

142 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355.

143 *Project Blue Sky*, above n 142, 384, [78].

144 Flynn, Michael, 'Distinguishing between Income and Capital Receipts – a Search for Principle' (1999) 2(3) *Journal of Australian Taxation* 155.

regarding the process by which the meaning of income is identified does not rest easily with the proposition that that process does not allow for arbitrary decisions. This is because diverse bases for identifying the meaning of income *could* indicate that the basis upon which the meaning of 'income' is identified is arbitrarily selected in each decision. As discussed in Section D1 of this paper, this arbitrariness would arise if the judicial readings of the dictum of Jordan CJ identify different processes for identifying the meaning of income that reveal different meanings *and* if there is no principle governing the selection of the correct judicial reading of the dictum in the circumstances of a particular case. In the absence of express and authoritative consideration of all of the different readings of the dictum of Jordan CJ that were identified in Section D1 of this paper, there is a real possibility that different meanings of 'income' are being adopted in different case decisions simply because there is no way of knowing whether the diverse readings of the dictum of Jordan CJ identified in Section D1 have the same meaning and/or whether there is some principle which guides the non-arbitrary selection of different readings of the dictum in different cases.

An authoritative case decision in which this diversity is acknowledged, and the significance of the dictum of Jordan CJ unequivocally expressed, would make a substantial contribution by securing the non-arbitrary foundations upon which the meaning of income is determined.