[HIGH COURT OF AUSTRALIA.]

MOFFATT . . . . . APPELLANT;

AND

WEBB (COMMISSIONER OF TAXES) . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 28; *Mar.* 3, 11, 12, 13.

Griffith C.J., Barton, Isaacs and Gavan Duffy JJ.

Income tax—Assessment—Deduction—Outgoings incurred in production of income—Disbursements or expenses wholly and exclusively laid out or expended for purposes of trade—Commonwealth land tax—Income Tax Act 1895 (*Vict.*) (*No.* 1374), *sec.* 9.

Sec. 9 of the *Income Tax Act* 1895 (Vict.) provides that "(1) All losses and outgoings actually incurred in Victoria by any taxpayer in production of income . . . shall be deducted from the gross amount of such taxpayer's income. (2) In estimating the balance of the income liable to tax no sum shall be deducted therefrom for . . . (*g*) Any disbursements or expenses whatever not being money wholly and exclusively laid out or expended for the purposes of such trade."

Held, that land tax paid under the Land Tax Acts of the Commonwealth by a person who carries on the business of a grazier, in respect of land in Victoria on which he carries on that business, is an "outgoing actually incurred by" him "in production of income," and is also a "disbursement" of "money wholly and exclusively laid out or expended for the purposes of such trade," within the meaning of sec. 9; and therefore that, for the purpose of assessing the income tax payable by him, he is entitled to deduct the sum paid for such land tax from his gross income. In assessing such income tax, no distinction can be drawn between land acquired for the purpose of carrying on the business of grazing thereon, and land already in possession which is applied to that purpose.

Decision of the Supreme Court of Victoria: *In re Income Tax Acts* (*No.* 1), (1913) V.L.R., 20; 34 A.L.T., 110, reversed.

APPEAL from the Supreme Court of Victoria.

A special case was stated by a Judge of the County Court at Melbourne pursuant to sec. 27 (3) of the *Income Tax Act* 1895, which was as follows:—

1. The taxpayer is a grazier, and during the year 1911 carried on business and is still carrying on business as such in Victoria upon lands of the fee simple of which he was during the said year and still is the owner. The said lands comprise 17,970 acres or thereabouts, and their unimproved value has for the purposes of the *Land Tax Assessment Act* 1910 of the Commonwealth of Australia been assessed at £44,924.

2. The Commonwealth land tax for the financial year ending on the 30th June 1911 upon the unimproved value of the said lands amounted to £387 and became due on 21st May 1911, and was duly paid by the taxpayer on or prior to 21st June, 1911. Except as aforesaid the taxpayer was not liable for any Commonwealth land tax in respect of the said financial year.

3. The taxpayer contends that, in order to arrive at the income earned, derived or received by him during the year 1911 upon which the assessment of the income tax payable by him for the year 1912 pursuant to the State Income Tax Acts is to be based, there should be deducted from the gross income derived from the business carried on by him during the year 1911 as aforesaid the said sum of £387 paid by him for Commonwealth land tax; but the Commissioner of Taxes contends that the said sum of £387 should not be deducted, and he has accordingly assessed the income of the taxpayer as follows:—

	Taxable Amount of income.	Amount of tax.
From personal exertion ...	£4209	£92 14 6
From produce of property ...	344	8 12 0
		£101 6 6

4. The taxpayer duly gave notice of objection to the assessment, upon the ground that the taxable amount of income consisting of produce of property should be £344, and that the taxable amount of income from personal income should be £3,822, and that the amount of the tax fixed by the assessment was therefore £9 13s.

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6d. more than it ought to be, and he required the assessment to be altered accordingly.

5. The Commissioner disallowed the said objection, and transmitted it to be heard and determined by a Judge of County Courts. The said objection coming on for hearing before me on 28th June 1912, the taxpayer applied that a special case should be stated, and pursuant to the said application I state this case for the opinion of the Supreme Court.

6. The question for the opinion of the Supreme Court is:—

Having regard to the facts hereinbefore set forth, should the said sum of £387, or any and what part thereof, paid as aforesaid by the taxpayer for Commonwealth land tax, be deducted from the gross income of the taxpayer for the year 1911 from personal exertion, in order to ascertain the income earned, derived or received by him during the year 1911 upon which the assessment of the income tax payable by him for the year 1912 pursuant to the Income Tax Acts of the State of Victoria should be based?

The special case was heard before the Full Court, which answered the question as follows:—Neither the said sum of £387, nor any part thereof, paid by the taxpayer for Commonwealth land tax should be deducted from the gross income of the taxpayer for the year 1911 from personal exertion, in order to ascertain the income earned, derived or received by him during the year 1911 upon which the assessment of the income tax payable by him for the year 1912 pursuant to the Income Tax Acts of the State of Victoria should be based: *In re Income Tax Acts* (No. 1) (1).

From this decision the taxpayer, John Moffatt, now, by special leave, appealed to the High Court.

Schutt (with him *Arthur*), for the appellant. Apart from sec. 9 of the *Income Tax Act* 1895, the appellant is entitled to deduct the sum he has paid for Commonwealth land tax from his gross receipts in order to ascertain his income. "Income" is not defined in the Act, and, that being so, it must be taken to mean

(1) (1913) V.L.R., 20; 34 A.L.T., 110.

the balance of gains over losses: *Lawless* v. *Sullivan* (1); *In re Redding*; *Thompson* v. *Redding* (2); *Levinson's Income Tax Acts*, p. 283. The intention of the Act is that a man should be taxed on the net profits which he makes from his trade. He is entitled to deduct any payment without which his income could not be earned. If the only deductions allowed are those mentioned in sec. 9, then the Commonwealth land tax is an outgoing incurred in Victoria by the appellant in the production of his income. The Act intended that the income of a man which is taxable should be the same thing which is taxable in the case of a company, namely, his profits: *Webb* v. *Australian Deposit and Mortgage Bank Ltd.* (3). Sec. 9 (2) (*h*) assumes that rent paid for land on which the taxpayer carries on his trade may be deducted. But rent is paid for land whether a man carries on business on it or not, just as land tax is paid. Therefore, if the land is used for carrying on a trade upon it, just as the rent may be deducted so may Commonwealth land tax be deducted. Both are part of the cost of production. So long as the taxpayer carries on his trade of grazier on the land, the Commonwealth land tax is a disbursement wholly and exclusively laid out for the purposes of that trade within the meaning of sec. 9 (2) (*g*). [He also referred to *Pixley's Duties of Auditors*, 10th ed., p. 410; *Russell* v. *Town and County Bank* (4); *Dicksee on Auditing*, 9th ed., p. 400.]

[ISAACS J. referred to *Smith* v. *Lion Brewery Co. Ltd.* (5); *Strong & Co. Ltd.* v. *Woodifield* (6).]

Pigott, for the respondent. The only deductions that are permissible are those mentioned in sec. 9. Money paid for Commonwealth land tax is not money wholly or exclusively laid out for the purpose of the taxpayer's trade. The land tax is paid in respect of the ownership and not of the use of land. The Commonwealth land tax is not an outgoing incurred in Victoria. The taxpayer may have to pay a tax in respect of his land in Victoria, which is increased by reason of his ownership of other land elsewhere. It is not admitted by the respondent that the appellant's

(1) 6 App. Cas., 373, at p. 378.
(2) (1897) 1 Ch. 876, at p. 879.
(3) 11 C.L.R., 223, at pp. 227, 237.
(4) 13 App. Cas., 418.
(5) (1911) A.C., 150; (1909) 2 K.B., 912.
(6) (1906) A.C., 448.

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land was held or acquired by him for the purpose of his business, and the Court cannot draw any inference that it was: *Scottish Provident Institution* v. *Allan* (1). The payment of Commonwealth land tax is to be regarded as a capital expenditure. It is either a sum used or intended to be used as capital, or it is a diminution of capital: *Dillon* v. *Corporation of Haverfordwest* (2); *Webb* v. *Australian Deposit and Mortgage Bank Ltd.* (3); *Royal Insurance Co.* v. *Watson* (4); *Alianza Co. Ltd.* v. *Bell* (5); *Southwell* v. *Savill Brothers Ltd.* (6); *English Crown Spelter Co. Ltd.* v. *Baker* (7).

Schutt, in reply.

Cur. adv. vult.

March 13.

GRIFFITH C.J. This is an appeal from a decision of the Supreme Court of Victoria upon a special case stated under the *Income Tax Act*, the question raised being whether the appellant is entitled in the assessment of the income of his business of a grazier to deduct the Commonwealth land tax paid by him in respect of the land on which he carries on that business. As I understand the case, it is found as a fact that the appellant used the land—which is large, but not very large for Australia, comprising about 18,000 acres—solely for the purpose of grazing. The question is whether he is entitled to deduct that land tax from his income.

Sec. 9 of the *Income Tax Act* 1895 provides that "(1) All losses and outgoings actually incurred in Victoria by any taxpayer in production of income . . . . shall be deducted from the gross amount of such taxpayer's income." The second paragraph of that section provides that "In estimating the balance of the income liable to tax no sum shall be deducted therefrom for" several matters enumerated, nine altogether, two of which only it is necessary to mention, namely:—"(*g*) Any disbursements or expenses whatever not being money wholly and exclusively laid out or expended for the purposes of such trade;" and "(*h*) The

(1) (1903) A.C., 129.
(2) (1891) 1 Q.B., 575.
(3) 11 C.L.R., 223, at p. 227.
(4) (1897) A.C., 1.
(5) (1906) A.C., 18; (1905) 1 K.B., 184.
(6) (1901) 2 K.B., 349.
(7) 5 Tax Cas., 327; 99 L.T., 353.

rent or annual value of any dwelling-house or domestic offices or any part of such dwelling-house or domestic offices except such part thereof as may be used for the purposes of such trade not exceeding such proportion of the said rent or annual value as may be allowed by the Commissioner."

The first point taken for the appellant is that land tax is an outgoing incurred in production of income under the circumstances I have stated. Nothing turns upon the succeeding words of the section, "all taxes payable by him under any Act of the Parliament of Victoria except this Act," because that deduction is not limited to taxes in respect of the land used, but includes any taxes imposed upon the taxpayer under any law of Victoria in respect of any matter whatever.

In considering whether the land tax is an outgoing I am greatly assisted by the decision of the House of Lords in the case of *Russell* v. *Town and County Bank* (1). In that case the deduction claimed was in respect of the annual value of premises occupied by the respondents, and claimed to be occupied solely for the purposes of their business of bankers. The question there arose under 5 & 6 Vict. c. 35, sec. 100 and Schedule D. Lord *Herschell* in his speech said (2):—"The case is a case under Schedule D, and to be dealt with according to the rules provided in relation to that schedule. It is asserted on behalf of the appellant that the rules prohibit all deductions except those which are expressly authorized by the Act, and that this deduction not being a deduction allowed, the respondents are not entitled to insist upon it.

"The duty is to be charged upon 'a sum not less than the full amount of the balance of the profits or gains of the trade manufacture, adventure, or concern;' and it appears to me that that language implies that for the purpose of arriving at the balance of profits all that expenditure which is necessary for the purpose of earning the receipts must be deducted, otherwise you do not arrive at the balance of profits, indeed, you do not ascertain, and cannot ascertain, whether there is such a thing as profit or not. The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure neces-

(1) 13 App. Cas., 418.

(2) 13 App. Cas., 418, at p. 424.

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sary for the purpose of earning those receipts. That seems to me to be the meaning of the word 'profits' in relation to any trade or business. Unless and until you have ascertained that there is such a balance, nothing exists to which the name 'profits' can properly be applied."

It appears to me that the words of sec. 9 (1) which I have read, simply embody that principle in express language. The tax in England is upon the profits or gains. To ascertain the profits you must deduct all expenditure necessary for the purpose of earning the receipts. This is substantially the same thing as deducting the "outgoings incurred in production of income."

In the same case to which I have already referred, Lord *Herschell* went on to say (1):—"My Lords, it is quite true that the section provides that 'the duty shall be assessed, charged and paid without other deduction than is hereinafter allowed;' and I will assume, for the purposes of this case, that that does prohibit (although the words certainly appear to be applicable to the duty) the making of any deductions from the balance except those allowed by the subsequent provisions of the Act. It is to be observed that, properly speaking, there is nothing to which those words are applicable. The provisions of the Act do not expressly allow any deductions. What they do is to prohibit certain deductions with certain exceptions, and therefore it may perhaps, in a sense, be said that having prohibited certain deductions with certain exceptions, the excepted things are allowed.

"Now it is not disputed that the annual value of premises exclusively used for business purposes is properly to be deducted in arriving at the balance of profits and gains. I am, of course, speaking, for the moment, of premises which are not used in any way as a place of dwelling, but are exclusively business premises. But there may be a question where the right to make that deduction is to be found. I am myself disposed to think that it is allowed because it is an essential element to be taken into account in ascertaining the amount of the balance of profits. If not it can only be included by a very broad extension of the terms actually used, as being a disbursement or expense which is

(1) 13 App. Cas., 418, at p. 424.

money wholly and exclusively laid out or expended for the purposes of the trade. It is quite true that, strictly speaking, the annual value where the premises are owned and not rented, is not money laid out or expended for the purposes of the trade, but it is admitted, and must, I think, have been admitted, that in either the one way or the other that deduction is to be made, because inasmuch as it is clear that even in the case of a dwelling-house a part of which is used for purposes wholly unconnected with the trade, the annual value of the portion which is used for the purposes of the trade is to be deducted, it is evident that it can never be contended that in the case of premises used, not for the purpose of a dwelling at all, but exclusively for trade purposes, the annual value is not to be deducted. The annual value is, therefore, to be deducted somehow. It is to be deducted either by taking it as an element before arriving at the balance of profits and gains, or as included in a very broad construction of the provision relating to disbursements and expenses."

No question arises in this case as to deduction for annual value, but I am strongly disposed to think a compulsory payment such as land tax would fall within the words "annual value," if it were not otherwise deductible as an outgoing. No one would dispute that rent would be a deductible outgoing. The deduction of annual value is apparently intended to put the freeholder on the same footing as a lessee.

The argument may be summed up thus: The possession of land is necessarily incident to carrying on the business of a grazier; the payment of land tax is a necessary consequence of the possession of land of taxable value, whether the land is freehold or leasehold; the payment of land tax is therefore a necessary incident of carrying on the business of grazing. The case therefore seems to me to come within the exact words of the first paragraph of sec. 9.

It is contended by the respondent that, even if that is so, the payment of land tax is not a payment made wholly and exclusively for the purpose of the trade. It is said: "True, the grazier could not carry on his trade without paying it, but he would have

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to pay it whether he carried on his trade or not, and therefore it is not an expenditure for the purpose of his trade."

A good deal of light is thrown upon that contention by the case of *Smith* v. *Lion Brewery Co. Ltd.* (1). In that case the respondents, who were brewers, had acquired certain licensed houses, commonly called "tied houses," by means of which they earned profits which they could not have earned without them, but which did not form part of the trade premises in which the business of brewing was carried on. Certain payments having become due in respect of the ownership of those houses, the question was whether the respondents were entitled to deduct those payments as being wholly and exclusively laid out or expended for the purposes of their trade of brewers. The Court of Appeal, by a majority, had decided that they were so entitled (2). On appeal to the House of Lords, the House was equally divided in opinion. Under those circumstances the opinion of the Law Lords who agreed with the decision of the Court of Appeal is to be taken to be the law. But, on reading the speeches of the learned Lords who were of a different opinion, it seems to me that all the House was of one mind as to the principle which governed the case, and which, I think, governs this case also. I will refer to two or three passages from the speeches.

Lord *Halsbury* quoted the language of the special case which had been stated by the Commissioners of Income Tax as follows (3):—"'The Lion Brewery Company are as part of their business and as a necessary incident of the profitable exploitation of such business the owners of' these premises which 'have been acquired' by them 'in the course of and solely for the purposes of their said business.'" He thought that that was sufficient to dispose of the matter. After referring to a suggestion which had been made that the deduction claimed was in the nature of a premium of insurance, he said (4):—"He must if he carries on that business or that trade pay this tax; it is the act of the legislature which makes him pay it, and it is not a thing that is open to his own will or option.

"Under these circumstances it appears to me that it would land

(1) (1911) A.C., 150.
(2) (1909) 2 K.B., 912.
(3) (1911) A.C., 150, at p. 156.
(4) (1911) A.C., 150, at p. 157.

us in a very serious difficulty if in any question like this we were called upon ourselves to do that which is the action of a business man, to find out what exactly he may or may not treat as part of the adventure, part of that which is necessary to be carried on."

Lord *Atkinson*, who agreed with Lord *Halsbury*, remarked (1):—"Now what is the nature of the levy for compensation" (that is, the deduction which was sought to be made) "under the *Licensing Act* 1904? First it is a compulsory levy. Though paid in the first instance in full by the publican in possession, it is, in the ultimate result, paid in part by him, and in part by every person having an interest in the premises. No doubt it is paid by those persons interested simply because they have the particular interest, irrespective of who or what they are, or what their position or avocation in life may be; but a portion of the contribution levy is by the legislature imposed and charged upon every interest in the premises, which portion the owner of that interest must pay. And it certainly would appear to me that where a trader deliberately acquires any particular interest in the licensed premises wholly and exclusively for the purpose of using that interest to secure a market for the commodities he manufactures, the money he must expend to satisfy the charge thus imposed is necessarily disbursed wholly and exclusively for the purposes of this his trade."

It was suggested faintly in this case that there may be a difference between a case where land is acquired for the purpose of carrying on the business of grazing, and where land already in possession is applied to that purpose. I mention the point, but I think it is impossible to make any distinction of that sort. Otherwise the principle applicable to the liability to income tax would depend upon the motive which was present in the mind of the taxpayer some years before the tax was assessable. As Lord *Shaw* said in the *Lion Brewery Case* (2):—"In my opinion, the words 'purposes of such trade' do not mean the motives animating the minds of the traders, but do mean the purposes to and for which the money is applied and expended." The dissenting Lords in that case did not think that there was so close a

(1) (1911) A.C., 150, at p. 159.

(2) (1911) A.C., 150, at p. 168.

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connection between the business of brewing and the ownership of the houses in respect of which the compensation levy was made, that it could be said that the expenditure was wholly for the purpose of the brewing business. Here no question of *nexus* arises. The land taxed is the very land on which the business is carried on; and, as I have already pointed out, it is impossible to carry on the business of grazing on that land without paying the tax. It seems to me, therefore, that the tax falls within the words "a payment made wholly and exclusively for the purpose of the trade," as construed in that case.

A third point made for the Commissioner was that land tax is capital expenditure. I confess that I am unable properly to appreciate that argument. The cases relied on in support of it were cases in which money or money's-worth was paid or given as the price of something to be used in order to earn income. It is impossible to say that land tax is paid for the purpose of acquiring anything. It may secure the taxpayer against being disturbed in his possession, but it certainly adds nothing to his capital—some people might think it diminishes it.

For these reasons I come to the conclusion that the deduction ought to be allowed. *à Beckett* J. inclined to that view, although he did not formally dissent from the judgment of the Court. On reading the judgments of the other learned Judges, it seems to me that the matter was not presented to them in the way which leads me to the conclusion I have formed.

I think that the appeal should be allowed.

BARTON J. read the following judgment:—The question is whether the taxpayer, an owner in fee of lands on which he carries on the business of a grazier, is entitled to deduct from his gross income for 1911 from personal exertion, in order to arrive at his income taxable under the Victorian Income Tax Acts, a sum of £387 paid to the Commonwealth under the Federal Acts of 1910 as land tax in respect of the lands upon which he carries on his grazing business. The Supreme Court of this State has held, *à Beckett* J. *dubitante*, that the taxpayer is not entitled to the deduction, and he appeals to this Court.

The Principal Act, No. 1374, passed in 1895, six years before

the establishment of the federal legislature, provides in sec. 9 that "(1) All losses and outgoings actually incurred in Victoria by any taxpayer in production of income and all taxes payable by him under any Act of the Parliament of Victoria except this Act shall be deducted from the gross amount of such taxpayer's income." Sub-sec. (2) of the same section forbids (*inter alia*) the deduction, in estimating the income liable to tax, of (*b*) any sum "used or intended to be used as capital" in the taxpayer's "trade," or of (*g*) any disbursements or expenses whatever, "not being money wholly and exclusively laid out or expended for the purposes of such trade."

The Act No. 1467 amends sec. 9 of the Act No. 1374, but not so as to affect the present question.

As *Hodges* J. said in his judgment, the amounts fixed by the Federal Land Tax Acts are to be paid by the owner, whether he earns income from the land or not.

The appellant's contention is put in three ways.

First, he says that there is nothing in the Victorian Income Tax Acts to prevent the application of the case of *Lawless* v. *Sullivan* (1). There it was held by the Judicial Committee that the word "income" in a provincial rating Act, which did not define it, must, when applied to the taxable income of a trade or business, be understood in its natural and ordinary sense, as the balance of gain over loss in any year. The appellant contends that if the word income is so understood in this case, there being no definition of it nor any context to alter its meaning, one of the allowances to be made in his favour in arriving at the balance of his gain over his loss is this sum which he has paid as federal land tax proper to the year.

Secondly, he says that the sum in question is an "outgoing," within the meaning of sec. 9 (1), "actually incurred in Victoria . . . in production of income," and is therefore to be deducted from the gross amount of his income.

Thirdly, he contends that as sec. 9 (2) (*g*) allows by clear inference the deduction of "any disbursements or expenses . . . being money wholly and exclusively laid out or expended for the purposes of" his "trade," this is such a disbursement or expense, and he is entitled to deduct it.

(1) 6 App. Cas., 373.

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The Commissioner contests all these propositions of the appellant, and further contends that the payment is within sec. 9 (2) (*b*) as a sum "used or intended to be used as capital in such trade," and that its deduction is therefore expressly prohibited.

I am of opinion that the answer to the question before us depends entirely on the construction of sec. 9 of the Act of 1895, so that while the case of *Lawless* v. *Sullivan* (1) is useful as a guide to the meaning of the term "income," as used in sec. 9, it does not give ground for any construction of it which is independent of that section. I have some doubt whether the sum sought to be deducted can fairly be called an "outgoing actually incurred in production of income," within the meaning of the first sub-section, although there is much to be said in favour of that view, as *àBeckett* J. evidently thought, and I do not dissent from it. But the strength of the appellant's case seems to me to rest on paragraph (*g*) of the second sub-section. As I understand the Case Stated, the sole use to which the appellant puts the land is for the purposes of his business as a grazier. He needs a large area of land for that purpose, and this area of about 18,000 acres is applied to his business needs. It seems too much altogether to say that he would have to pay the federal tax on this land if he did not carry on the grazing business. Somebody would be taxed, no doubt, but would it be the appellant? It cannot be predicated that he would own the land at all if he carried on any other business. It is scarcely an inference from the case to say that he holds the land simply as an instrument essential to the proper conduct of his business: I think it is the fair meaning of the first paragraph, at which we can arrive without inserting anything not imported by the words. If I am right there, then is the land tax payment a disbursement or expense wholly and exclusively laid out or expended for the purposes of the business? It may not be so if the criterion is whether the business could be carried on without payment of the tax. But I do not think that is the criterion. Is the payment wholly and exclusively incidental to the carrying on of the business? Well, it is only by reason of the necessity of land for his business that he holds this land, and it is only because of his holding it for his business

(1) 6 App. Cas., 373.

that he necessarily pays the tax, for without the business it cannot be said that he would hold the land at all. In view, then, of the particular facts, I think the payment is incidental to the conduct of his business, and that it is money wholly and exclusively expended for the purposes of his trade.

The reasoning of Lord *Halsbury* and Lord *Atkinson* in the case of *Smith* v. *Lion Brewery Co. Ltd.* (1), and of the majority in the Court of Appeal (2), seems to me to help the appellant's contention. *Strong & Co. Ltd.* v. *Woodifield* (3) was an entirely different case, and affords no basis of comparison with the present one. But the remarks of Lord *Herschell* in *Russell* v. *Town and County Bank* (4) are, I think, a strong support to the appellant's argument.

On the other hand, the cases cited for the Commissioner to show that the land tax payment is "money used or intended to be used as capital" do not apply to the present question. The payment is an annual one, which, as I believe, is truly incidental to the conduct of his business. It is incurred by reason of the ownership of the land to enable that business to be carried on. It is a payment which must be taken into account each year before the taxpayer can ascertain what is the balance of profit in his favour.

In my opinion the appeal should be allowed, and the question answered in the affirmative.

ISAACS J. read the following judgment:—I agree that the appeal should be allowed. Apart from special provisions as to companies the Act taxes "income" as defined. The word "chosen by the legislature for describing . . . . the taxable subjects" (see *per* Lord *Davey* in *London County Council* v. *Attorney-General* (5)) is in Victoria "income" not "profits." It is true that, in the end, profits only bear the burden, but it is the profits as arrived at artificially, and in the mode prescribed by the Statute, and not simply profits as they would appear in a commercial balance sheet. Gross income is primarily liable (sec. 8), and then by sec. 9 liability is reduced to the net

(1) (1911) A.C., 150.
(2) (1909) 2 K.B., 912.
(3) (1906) A.C., 448.
(4) 13 App. Cas., 418, at p. 425.
(5) (1901) A.C., 26, at p. 45.

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income only, but the net income as it appears after the statutory deductions. Sub-sec. (1) of sec. 9 allows as the first deduction from "the gross amount of" the "taxpayer's income," what it describes as "all losses and outgoings actually incurred in Victoria by any taxpayer in production of income." So that no outgoing can be allowed as a deduction unless it is incurred in production of the income, from the gross amount of which it is sought to be deducted. And further, even if it is so incurred, it must not fall within any of the prohibitions of sub-sec. (2). The only material portion of that sub-section is paragraph (*g*), namely, "disbursements or expenses . . . . not being money wholly and exclusively laid out or expended for the purposes of such trade."

The Crown claims, and the Supreme Court has decided, that the federal land tax could not be considered as incurred in the production of income, because the taxpayer was bound to pay the tax as owner, and therefore no matter what he did with the land.

Smith v. *Lion Brewery Co. Ltd.* (1) is an important case upon the question. The learned Lords were equally divided, and the opinions of Lord *Loreburn* L.C. and Lord *Shaw*, when closely read, appear to me to support the view put forward by the Crown; the former saying (2), "it is only in the character of owners of a house that the Lion Brewery Company can be called upon to pay this levy at all"; and the latter observing (3), "it is not *qua* trader, but simply *qua* owner, apart from being a trader at all, that the owner makes the payment." On the other hand, Lord *Halsbury* and Lord *Atkinson* are distinct in the other direction; and so, the House being equally divided, the decision appealed from becomes, under the special rule laid down for itself by the House of Lords, the law of England, until altered by Parliament. But, apart from that, by which we are not technically bound, I am, with the most unfeigned respect to the opinions of the other learned Lords in this great divided controversy, more strongly persuaded by the views expressed by Lord *Halsbury* and Lord *Atkinson*.

I want to guard against one possible misconception. There the

(1) (1911) A.C., 150.
(2) (1911) A.C., 150, at p. 155.
(3) (1911) A.C., 150, at p. 170.

special case stated expressly that the property in respect of which the tax was paid was acquired and held solely for the purposes of the business, and not as an investment. Here, as was there also recognized—see *per* Lord *Shaw* (1)—the decision must proceed upon the facts as set forth in the stated case. We have no power, as the Supreme Court had no power, to find further facts, directly or by way of inference—unless, of course, the law itself postulates one inference only—which is not the case here.

There is no statement in the matter before us, corresponding with that to which I have just referred, and so far as any observations of the learned Lords rest upon the facts mentioned, the judgments are irrelevant.

But, after all, it seems to me those facts only raise an *à fortiori* case. Lord *Halsbury* (2) points out the purpose for which the tax was enacted is utterly immaterial. He adds that the taxpayer "must if he carries on that business or that trade pay this tax; it is the act of the legislature which makes him pay it, and it is not a thing that is open to his own will or option."

And Lord *Atkinson* (3) reasons out the position, and shows convincingly, to my mind that, though a tax may in one sense be paid as owner or lessee, in another it is paid as trader. The instances he puts as to licences are undeniable, and I cannot distinguish them from this case.

To carry the matter further: Suppose the Federal Parliament were to lay a tax on the owners of motor cars, and carts, and guns, and dogs and sheep, so that the tax was payable whether these things were employed in trade or not; could it be doubted that the tax would be a real outgoing necessary for the production of the income of a business in which they were all used? The land is as necessary to the business as the personal property. The grass, water, and shelter of that particular land were indispensable to the production of the particular income for the year; with other land the amount would probably be different; and as the actual gross return could not be received without the use of that land, and the use of the land means the use of an instrument to which is attached by law a compulsive payment, it seems to me to

(1) (1911) A.C., 150, at p. 161. (2) (1911) A.C., 150, at p. 157.
(3) (1911) A.C., 150, at pp. 160, 161.

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follow naturally that the payment made under compulsion of law in respect of that necessary element of the business income is an outgoing made in the production of the income, and in the circumstances here it was made wholly and exclusively for the taxpayer's business.

And the fallacy of the contrary doctrine consists in this: it confuses, not so much the meaning, as the application of the word "purpose." The land tax is enacted by the legislature for its own purpose, that is, to tax the owner; and when he pays it to the Crown, he pays it as the owner, it is true, but so far, not for any purpose of his. He simply pays it because he is obliged to by law. But when he uses the property to produce an income, that is, for his business purposes, he pays the tax inseparably connected with the land also for his business purposes, namely, as an outlay necessary in the existing state of the law to obtain that income by means of that land.

In *Ashton Gas Co.* v. *Attorney-General* (1) Lord *Halsbury* L.C. says of the English Act, "the profit upon which the income tax is charged is what is left after you have paid all the necessary expenses to earn that profit." If a tax paid by the owner of a motor car and paid by him as owner, which would be the Commonwealth purpose, is incurred for his business purposes, then, unless the legislature prohibits it or excepts it, he may deduct it—because it is a necessary expense to earn his profit; and land can stand in no different position. Take the case of rent—which would be a conceded deduction, both on general principles, and by reason of statutory recognition. If the premises were held on a long lease entered into by the trader, years before he commenced his business, and therefore without thought of it, and, perhaps, originally for residential purposes only, it would be quite true to say of him that he paid the rent as lessee, without reference to whether he used it for business purposes or not. Nevertheless no one, I imagine, would deny its deductibility even under sub-sec. 1 as an outgoing in the production of the income. Again, suppose the premises purchased years before the establishment of the business, or derived by descent or will, the annual value is an equally obvious deduction. Yet it is, as Lord

(1) (1906) A.C., 10, at p. 12.

Herschell says in *Russell's Case* (1), not even strictly an outgoing, but is to be treated as such, by deduction somehow, and, if so treated, is in one sense most certainly in the character of owner. No other capacity is possible. But in the material and important sense, it is in the character of trader, because the owner has, for the time being, enlisted that property with all its legal attributes in his trading service, and the Crown in taxing the income produced by it in combination with it, treats it as such.

Indeed, the trader here is owner of everything: he devotes the land to business purposes in the character of owner; he uses it as owner; he is entitled to the income of the business as owner; he is entitled to deduct the annual value of his own land as owner of the land in precisely the same sense as he pays the federal land tax in respect of the same land as owner.

We must remember that so long as he devotes his land to business purposes—his business purposes—he applies the annual value, that is, the appurtenant benefits of the land, and subject to all appurtenant liabilities of the same land, to the business; and if it is borne in mind, as I have said, that the Act in speaking of the purposes of outgoings means the taxpayer's purposes, and not the purposes of the legislature, the difficulty, as it seems to me, disappears.

For these reasons the question should, in my opinion, be answered in favour of the taxpayer.

I desire to add my appreciation of the clear and able argument on both sides.

GAVAN DUFFY J. I agree that the appeal should be allowed. It is admitted that the land in question is used by the taxpayer wholly and exclusively for the purposes of his trade as a grazier. In these circumstances the Commonwealth land tax paid in respect of that land on which he carries on that trade is, in my opinion, an outgoing actually incurred in Victoria in the production of income. I think, therefore, that the taxpayer is entitled to deduct the sum paid for Commonwealth land tax from the gross amount of his income under the provision of sec. 9 (1) of the *Income Tax Act* 1895; and I also think that there is nothing

(1) 13 App. Cas., 418, at p. 425.

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in the other provisions of that section which precludes him from making that deduction.

Appeal allowed. Order appealed from discharged. Question answered that the whole sum mentioned should be deducted from the taxpayer's gross income for the year 1911. *Case remitted to County Court. Respondent to pay the costs of and occasioned by the special case and of this appeal.*

Solicitors, for the appellant, *Whiting & Aitken.*

Solicitor, for the respondent, *Guinness,* Crown Solicitor for Victoria.

B. L.

[HIGH COURT OF AUSTRALIA.]

COMMISSIONER OF PATENTS . . . APPELLANT;

AND

LEE . . . . . RESPONDENT.

ON APPEAL FROM A JUSTICE OF THE HIGH COURT.

H. C. OF A. 1913.

SYDNEY, *March* 31; *April* 7.

Griffith C.J., Barton and Gavan Duffy JJ.

Patent—Application—Want of subject matter—Working direction for use of existing appliances—Patents Act 1903-1909 (*No.* 21 *of* 1903—*No.* 17 *of* 1909), *secs.* 4, 36, 46.

An application was made for a patent for "improvements in the manufacture of charcoal." The claims in the specification were as follow:—1. A process of manufacture of charcoal, wherein wood is packed in a chamber with top and bottom closured vents, is lighted at the bottom and the bottom vents then closed, and the direction and volume of the indraught and of the