[HIGH COURT OF AUSTRALIA.]

THE HERALD AND WEEKLY TIMES LIMITED APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 29, 30.

SYDNEY, *Nov* 21.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Income Tax (Cth.)—Assessment—Deductions—Damages paid in respect of defamatory publications—Costs of contesting claims—Loss or outgoing "actually incurred in gaining or producing the assessable income"—"Money not wholly and exclusively laid out or expended for the production of assessable income"—Income Tax Assessment Act 1922-1929 (*No.* 37 *of* 1922—*No.* 11 *of* 1929), *secs.* 23 (1) (*a*)*, 25 (*e*)*.

The appellant, which was the proprietor and publisher of an evening newspaper, claimed to deduct from its assessable income moneys paid by way of compensation, either before or after judgment, for damages in respect of defamatory matter published in that paper, and amounts incurred by way of costs in contesting the claims of persons defamed and in obtaining advice in regard thereto.

Held, by *Gavan Duffy* C.J., *Rich*, *Dixon* and *McTiernan* JJ. (*Starke* and *Evatt* JJ. dissenting), that the moneys so disbursed were "wholly and exclusively laid out or expended for the production of assessable income" within the meaning of sec. 25 (*e*) of the *Income Tax Assessment Act* 1922-1929, and under sec. 23 (1) (*a*) of the Act the appellant was entitled to the deduction claimed.

Decision of the Supreme Court of Victoria (*Mann* J.): *Herald and Weekly Times Ltd.* v. *Federal Commissioner of Taxation*, (1932) V.L.R. 317, reversed.

* The *Income Tax Assessment Act* 1922-1929 provides by sec. 23 (1): "In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer from all sources in Australia shall be taken as a basis, and from it there shall be deducted—(*a*) all losses and outgoings (including commission, discount, travelling expenses, interest and expenses, and not being in the nature of losses and outgoings of capital) actually incurred in gaining or producing the assessable income." Sec. 25 provides that "a deduction shall not, in any case, be made in respect of . . . (*e*) money not wholly and exclusively laid out or expended for the production of assessable income."

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APPEAL from the Supreme Court of Victoria.

The appellant, The Herald and Weekly Times Ltd., claimed to deduct from its income for the purposes of the Federal *Income Tax Assessment Act* certain disbursements arising out of the conduct of its business as the proprietor and publisher of an evening newspaper. The disbursements claimed represented sums paid by way of compensation, either before or after judgment, to persons claiming damages in respect of libels said to have been published in the appellant's newspaper, and some other sums representing the costs of contesting those claims or of obtaining advice in relation to the best course to be followed with regard to claims of a similar kind. The Commissioner disallowed these sums as deductions upon the ground that they were not wholly and exclusively laid out or expended for the production of assessable income. The appellant claimed that these legal expenses were incurred as a result of the Company's methods of obtaining information; that the printing of news had to be made in many cases without the opportunity of corroboration, and that this method of conducting the Company's business had been largely responsible for the great increase in the Company's turnover, and consequently that the fees and expenses paid and incurred in connection with claims and libels should be regarded as fees of a recurring nature which necessarily had to be incurred by such a class of business. The appellant's objection to its assessment was disallowed by the Commissioner, and the appellant appealed to the Supreme Court of Victoria.

Mann J., before whom the matter was heard in the Supreme Court, held that the expenditure was not in any sense productive expenditure directly or indirectly, and that the sums in question were not "wholly and exclusively laid out or expended for the production of assessable income" within the meaning of those words in sec. 25 (*e*) of the Act, and dismissed the appeal: *Herald and Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (1).

From this decision the appellant now appealed to the High Court.

Wilbur Ham K.C. and *C. Gavan Duffy*, for the appellant. The whole question is whether the words in sec. 25 (*e*) of the Act exclude

(1) (1932) V.L.R. 317.

this deduction or not. The proper interpretation of sec. 25 (*e*) is that, if legal expenses are necessarily incurred from a business point of view in order that the profits of the business may be earned, then the money so expended may be deducted as a loss or outgoing "actually incurred in gaining or producing the assessable income" within the meaning of sec. 23 (1) (*a*). The publishing of the articles was for the purpose of earning the assessable income (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (1)). Where the whole of the expense incurred is for the purpose of the expender's trade it can be deducted (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (2)). The expenditure that was incurred did not bring in money but was incurred for the purpose of making the returns of the business larger (*British Insulated and Helsby Cables* v. *Atherton* (3); *Federal Commissioner of Taxation* v. *Gordon* (4)).

[STARKE J. referred to *Ward & Co.* v. *Commissioner of Taxes* (5).]

The present case is distinguishable from *Ward's Case*, because in that case the expenditure was incurred to create the income-making machine and was not for the purpose of creating the assessable income; but in the present case it is by the publication of this very matter that the income is produced and the loss caused (*Inland Revenue Commissioners* v. *Von Glehn* (6)). The losses in this case were a commercial loss and were almost inevitable in earning the assessable income. The purpose of sec. 25 (*e*) is not to make a purely artificial distinction between outgoings which have no relation to business purposes and those which have (*Strong & Co.* v. *Woodifield* (7)). In the present case the publication of the article at the one time creates the liability and creates the income (*Stockvis* v. *Federal Commissioner of Taxation* (8)). If expenses of this description were not allowed people would be taxed greatly in excess of the profits earned by the business. The intention of the Legislature is to tax a person substantially on the true net profit of the business, and if any sum of money is paid out in the immediate expectation of profit it is allowable as a deduction (*Toohey's Ltd.* v. *Commissioner of Taxation* (*N.S.W.*) (9)).

(1) (1914) 2 K.B. 891, at p. 901; (1915) A.C. 433, at pp. 445, 469, 473.
(2) (1915) A.C., at p. 469.
(3) (1926) A.C. 205, at pp. 211, 212.
(4) (1930) 43 C.L.R. 456, at pp. 462, 470, 471.
(5) (1923) A.C. 145.
(6) (1920) 12 Tax Cas. 232; (1920) 2 K.B. 553.
(7) (1906) A.C. 448.
(8) (1930) 1 A.T.D. 9.
(9) (1922) S.R. (N.S.W.) 432, at p. 452.

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Eager (with him *Minogue*), for the respondent. This loss was not incurred for the purpose of creating income within sec. 23 (1) (*a*) (compare *Alliance Insurance Co.* v. *Federal Commissioner of Taxation* (1)). Sec. 25 (*e*) extends to this payment and limits the meaning otherwise to be put on sec. 23 (1) (*a*) (*Jeffery* v. *Federal Commissioner of Taxation* (2); *Federal Commissioner of Taxation* v. *Munro* (3)). This payment is not wholly and exclusively laid out in the production of income. This is a mixed capital and income expenditure, and is made for the purpose of protecting the capital of the Company, which has to pay these damages out of its assets, not out of its profits (*Webster* v. *Deputy Federal Commissioner of Taxation* (*W.A.*) (4); *Federal Commissioner of Taxation* v. *Gordon* (5)). The English decisions are of little use to the appellant as the English legislation is in different terms which exclude any reference to the production of income (*British Insulated and Helsby Cables* v. *Atherton* (6)). The expression used in the English Act is " expended wholly and exclusively for the purpose of trade," which is quite a different expression from that contained in the Australian Act (*Ward & Co.* v. *Commissioner of Taxes* (7); *Commissioner of Taxation* v. *Kirk* (8)). It cannot be said that this expenditure is either exclusively capital or exclusively income. The liability to pay damages does not arise until after the publication of the libel. The damages may be in the nature of a punishment for the publication of the libel, and for these reasons it cannot be said that the expenditure of this money was expenditure for the production of income.

C. Gavan Duffy, in reply, referred to *Von Glehn's Case* (9); *Moffatt* v. *Webb* (10); *Quinn* v. *Leathem* (11).

Eager, by leave, referred to *Minister of Finance* v. *Smith* (12).

Cur. adv. vult.

(1) (1921) 29 C.L.R. 424.
(2) (1918) 24 C.L.R. 456.
(3) (1926) 38 C.L.R. 153.
(4) (1926) 39 C.L.R. 130.
(5) (1930) 43 C.L.R. 456.
(6) (1926) A.C., at p. 211.
(7) (1923) A.C., at p. 150.
(8) (1900) A.C. 588, at p. 592.
(9) (1920) 2 K.B., at p. 565.
(10) (1913) 16 C.L.R. 120, at p. 127.
(11) (1901) A.C. 495.
(12) (1927) A.C. 193, at p. 197.

The following written judgments were delivered :—

GAVAN DUFFY C.J. AND DIXON J. The appellant publishes an evening newspaper from which it derives much of its assessable income. In the course of doing so, it is exposed to claims for defamation, some of which it settles upon terms which include a payment by way of compensation, others of which it litigates successfully or unsuccessfully, and most of which involve it in law costs. During the twelve months ended 30th September 1929, upon which its assessment for income tax was based for the financial year 1929-1930, it expended £3,131 in this way. Included in the amount were large sums recovered from the appellant as damages in actions for libel, sums recovered from it for costs, and sums paid by it to its own solicitors for costs of its defence. The publication of the libels took place before the year of income. For the purpose of calculating its taxable income, the appellant claimed that this expenditure should be deducted from the assessable income derived from the conduct of its evening newspaper. To establish the right to such a deduction, it is necessary for the taxpayer to show that the expenditure is a loss or outgoing (not being in the nature of a loss or outgoing of capital) actually incurred in gaining or producing the assessable income, so that it falls within sec. 23 (1) (*a*) of the *Income Tax Assessment Act* 1922-1929, and to negative the application of sec. 25 (*e*), which forbids the deduction of money not wholly and exclusively laid out or expended for the production of assessable income. These provisions have recently been considered in *Federal Commissioner of Taxation* v. *Gordon* (1), where the use of decisions upon the somewhat different English enactment is discussed.

The Commissioner disallowed the claim to the deductions, and, upon an appeal to the Supreme Court against the assessment, *Mann* J. confirmed the Commissioner's decision. His Honor, for the purpose of his decision, assumed that to a greater or less degree it is an inevitable consequence of the conduct of an evening newspaper that actionable wrongs should at times be committed, and that in other cases claims will be made based upon allegations that such wrongs have been committed, sometimes without foundation. He described the payments as incurred as one of the consequences of

(1) (1930) 43 C.L.R. 456.

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gaining or producing the assessable income and in that sense as incidental to the carrying on of the business. But he regarded the expenditure as in no sense productive expenditure, directly or indirectly. He said it was an unavoidable loss arising as one of the consequences of carrying on the business of newspaper production, a loss which is not in any sense productive of anything, or tending to the production of anything, by preserving the business, the business connection, or the assets from depletion.

None of the libels or supposed libels was published with any other object in view than the sale of the newspaper. The liability to damages was incurred, or the claim was encountered, because of the very act of publishing the newspaper. The thing which produced the assessable income was the thing which exposed the taxpayer to the liability or claim discharged by the expenditure. It is true that when the sums were paid the taxpayer was actuated in paying them, not by any desire to produce income, but, in the case of damages or compensation, by the necessity of satisfying a claim or liability to which it had become subject, and, in the case of law costs, by the desirability or urgency of defeating or diminishing such a claim. But this expenditure flows as a necessary or a natural consequence from the inclusion of the alleged defamatory matter in the newspaper and its publication. Expenditure in which the taxpayer is repeatedly or recurrently involved in an enterprise or exertion undertaken in order to gain assessable income cannot be excluded by sec. 25 (*e*) simply because the obligation to make it is an unintended consequence which the taxpayer desired to avoid. No point is made of the fact that the publication took place in a former year, and properly so. The continuity of the enterprise requires that the expenditure should be attributed to the year in which it was actually defrayed.

The ground upon which *Mann* J. disallowed the deduction appears to disregard the purpose of producing income that inspired the publication which made unavoidable the expenditure. The question whether money is expended in and for the production of assessable income cannot be determined by considering only the immediate reason for making a payment and ignoring the purpose with which the liability was incurred. In other respects his Honor's conclusions operate

in favour of the deduction. The inclusion of the alleged defamatory matter is the cause of the expenditure. There is no reason to suppose that, in dealing with claims made upon it, the taxpayer took any course which was not in its judgment best calculated to avert or alleviate the pecuniary consequences ensuing from publication. An exercise of judgment upon the wisdom of resisting, compounding, or capitulating to, a claim, at any rate if unaffected by any considerations except those of profit and loss, may determine the amount but cannot alter the reason of the expenditure. The money was spent to answer the claims, and whether it was expended wholly and exclusively for the production of income, must depend upon the manner in which the claims were incurred. When it appears that the inclusion in the newspaper of matter alleged by claimants to be defamatory is a regular and almost unavoidable incident of publishing it, so that the claims directly flow from acts done for no other purpose than earning revenue, acts forming the essence of the business, no valid reason remains for denying that the money was wholly and exclusively expended for the production of assessable income.

The distinction between such a case as the present and *Strong & Co.* v. *Woodifield* (1), apart from any differences in the English and Commonwealth provisions, lies in the degree of connection between the trade or business carried on and the cause of the liability for damages. Lord *Loreburn* L.C. said (2) :—"I think only such losses can be deducted as are connected with it in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered. To give an illustration, losses sustained by a railway company in compensating passengers for accidents in travelling might be deducted. On the other hand, if a man kept a grocer's shop, for keeping which a house is necessary, and one of the window shutters fell upon and injured a man walking in the street, the loss arising thereby to the grocer ought not to be deducted. Many cases might be put near the line, and no degree of ingenuity can frame a formula so precise and comprehensive as to

(1) (1906) A.C. 448 ; 5 Tax Cas. 215.

(2) (1906) A.C. at p. 452.

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solve at sight all the cases that may arise. In the present case I think that the loss sustained by the appellants was not really incidental to their trade as innkeepers, and fell upon them in their character, not of traders, but of householders." The findings of *Mann* J. show that claims for libel are an ordinary incident of the business of conducting a newspaper.

The cases of *Inland Revenue Commissioners* v. *Von Glehn* (1) and *Inland Revenue Commissioners* v. *Warnes & Co.* (2), which decide that penalties imposed for breaches of the law committed in the course of exercising a trade cannot be deducted, are distinguishable for a somewhat similar reason. The penalty is imposed as a punishment of the offender considered as a responsible person owing obedience to the law. Its nature severs it from the expenses of trading. It is inflicted on the offender as a personal deterrent, and it is not incurred by him in his character of trader. Lord *Sterndale* M.R. in *Von Glehn's Case* (3) said: "It is perhaps a little difficult to put the distinction into very exact language, but there seems to me to be a difference between a commercial loss in trading and a penalty imposed upon a person or a company for a breach of the law which they have committed in that trading."

In our opinion the appeal should be allowed and the assessment of taxable income reduced by £3,131.

RICH J. This is an appeal to this Court in its appellate jurisdiction, under sub-sec. 10 of sec. 51A of the *Income Tax Assessment Act* 1922-1930, from a decision of *Mann* J., who disallowed as deductions certain disbursements made during the financial year ending 30th June 1930 arising out of the conduct of the appellant's business as the proprietor and publisher of an evening newspaper. In the judgment under appeal the disbursements are described as representing sums paid by way of compensation, either before or after judgment, to persons claiming damages in respect of libels said to have been published in the appellant's newspaper, and some other sums representing the costs of contesting those claims or of obtaining advice in relation to the best course to be followed with regard to claims of

(1) (1920) 2 K.B. 553; 12 Tax Cas. 232. (2) (1919) 2 K.B. 444; 12 Tax Cas. 227.
(3) (1920) 2 K.B. at p. 566.

a similar kind. The Commissioner disallowed these sums as deductions upon the ground that they were not wholly and exclusively laid out or expended for the production of assessable income, and his Honor upheld that decision. The question whether the sums claimed should be deducted in ascertaining the appellant's taxable income depends upon sec. 23 (1) (*a*) and sec. 25 (*e*) of the *Income Tax Assessment Act* 1922-1929. The evidence in the case and the findings of *Mann* J. lead to the conclusion that the expenditure in question is practically inevitable in the publication of an evening newspaper, but he considered it was not productive expenditure. Matter set up in a newspaper is published for the purpose of increasing its circulation and attracting advertisements. Income is gained or produced and liability is sometimes incurred. Publication is at once the source of income and the cause of liability. Payments subsequently made by way of compensation in respect of this liability or for costs to escape such liability relate back to publication. As publication is the common source of income and liability, the necessary connection between the carrying on of the business of the newspaper and the liability which causes the expenditure is complete. In my opinion the disbursements in question fall within sec. 23 (1) (*a*) and are not prohibited by sec. 25 (*e*).

The appeal should be allowed.

STARKE J. The appellant is the proprietor and publisher of several newspapers, and claims to deduct from its assessable income for the year 1929-1930 certain disbursements representing moneys paid by way of compensation, either before or after judgment, for damages in respect of defamatory matter published in its papers, and amounts incurred by way of costs in contesting the claims of the persons defamed and in obtaining advice in regard thereto. *Mann* J. refused to allow the deductions claimed: hence this appeal.

The question turns upon the following sections of the *Income Tax Assessment Acts* 1922-1929:—Sec. 23: "(1) In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer *from all sources in Australia* shall be taken as a basis, and from it there shall be deducted—(*a*) all losses and outgoings (including commission, discount, travelling expenses, interest and

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expenses, and not being in the nature of losses and outgoings of capital) actually incurred in gaining or producing the assessable income." Sec. 25: "A deduction shall not, in any case, be made in respect of any of the following matters: . . . (*e*) money not wholly and exclusively laid out or expended for the production of assessable income."

The disbursements here claimed as deductions were, no doubt, an expense of the business, and might properly find their place in the profit and loss account of the Company. And possibly they might be deducted under the English *Income Tax Act* 1918 as moneys wholly and exclusively laid out for the purposes of trade. (But see *Strong & Co.* v. *Woodifield* (1); *Smith* v. *Lion Brewery Ltd.* (2); *Inland Revenue Commissioners* v. *Von Glehn* (3).) But that is not decisive, for the question under the Australian Act is: Were the disbursements under consideration incurred in gaining or producing the assessable income? Any deduction is prohibited unless the disbursement is wholly and exclusively laid out or expended for the production of assessable income (*Ward & Co.* v. *Commissioner of Taxes* (4)). "It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the" business. (Cf. *Strong & Co.* v. *Woodifield* (5).) It must be incurred in gaining or producing the assessable income; it must be wholly and exclusively laid out or expended for the production of assessable income. No doubt, if the whole and exclusive purpose of the disbursement were to gain or produce assessable income, then the mere fact that to some extent the disbursement enures for other purposes would not in law defeat the right to the deduction (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (6)). Beyond this, the question whether disbursements have been incurred in gaining or producing the assessable income, or wholly and exclusively laid out or expended for the production of assessable income, is a question of fact. The expenditure in the present case was not for the production of income, but was rather a depletion of income: it was incurred to pay compensation for civil

(1) (1906) A C. 448.
(2) (1911) A.C. 150.
(3) (1920) 2 K.B. 553.
(4) (1923) A.C. 145.
(5) (1906) A.C., at p. 453.
(6) (1915) A.C., at p. 469.

wrongs that had been committed, and costs merely incident to it. The case of the *Federal Commissioner of Taxation* v. *Gordon* (1) is not in point. There a disbursement was made for services rendered in connection with the carrying on of the business of a grazier. In my opinion, *Mann* J. properly resolved the question of fact against the appellant and this appeal should be dismissed.

Evatt J.

Evatt J. Moneys were paid by the appellant Company for the purpose of meeting (*a*) damages awarded against it or agreed to be paid by it and (*b*) law costs, in respect of the publication in its newspapers of actual or alleged defamatory matter. The question for decision is whether these moneys were "wholly and exclusively laid out or expended for the production of assessable income" (*Income Tax Assessment Act* 1922-1929, sec. 25 (*e*)).

The sub-section has to be applied to the facts, and they are not really in dispute. The appellant is required to show that there is a definite relation between the moneys expended and "the production" of assessable income. The principal relation is expressed by the word "for," which is indicative of the object or purpose of the taxpayer in incurring the expenses claimed by him as a deduction. Further, the word "exclusively" supposes that the sole purpose of producing assessable income must characterize the expenditure.

I do not think that it is necessary to trace a direct causal relationship between the expenses claimed and any part of the income of the taxpayer. But the statute commands that the moneys claimed must be laid out or expended with a view to securing some addition to the income of the taxpayer, must at least be devoted towards the production of income receipts. As in England, the words of the Legislature lay down a "stern rule," the Court has little discretion and must follow a "narrow path" (per Lord *Hanworth* M.R. in *Thomas Merthyr Colliery Co.* v. *Davis* (2)).

In this case it is not possible to regard the moneys in question as answering the statutory description. It is true that the appellant's business was to publish and sell newspapers, and certain acts of publication and sale gave rise to actual or supposed liability to third persons for defamation. Between those persons and the appellant

(1) (1930) 43 C.L.R. 456.

(2) (1932) 48 T.L.R. 633, at p. 634.

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there existed no business or trade relationship. There is no evidence that the actual or supposed defamatory matters were themselves published for the purpose of increasing the sales, or the advertising revenue, of the appellant. On the contrary, the case presented to the Court is that occasional defamation is nothing more than an inevitable concomitant of evening newspaper production. The publication and sale of the articles did not necessarily carry in their train the payment of any of the moneys. No payment whatever was made until actions had been either threatened or commenced against the appellant. At law, the amount of damages payable in respect of the publication of libels fell to be determined by reference, not merely to the act of publishing and selling the newspaper, but to the appellant's subsequent behaviour towards the person injured. In the end, the appellant paid the moneys either because the Court gave a judgment against it or because the appellant considered it would be very expensive to defend, or further defend, the actions, threatened or commenced. No doubt, in each case, the gravamen of the cause of action consisted in what was contained in a part—a very small part—of the appellant's newspaper; and the systematic sale of its newspapers was the source of the appellant's assessable income. But the authorities show clearly that the statute is not given effect to, merely by showing that the taxpayer has met a liability which results from an act or omission in the course of his carrying on an income-producing business.

Would damages paid in respect of a nuisance caused by a smoking chimney on a taxpayer's factory premises, be regarded as moneys exclusively expended with a view to the production of his assessable income? Judging from the present case, the chain of argument in favour of allowing such deduction would be:—The factory is conducted for the purpose of earning assessable income; the chimney is an integral part of the factory; that they should smoke, is a characteristic of chimneys; and that persons injured by smoke should recover, or attempt to recover, damages for nuisance, is a usual characteristic of persons. Therefore, moneys paid by the factory owner to meet such claims are paid out or expended by him for the purpose of producing income!

The two purposes for which the moneys were expended by the appellant were (i.) that its assets, not its income alone, should be depleted as little as possible, and (ii.) that all liability arising from wrongful or supposedly wrongful publications should be discharged. The evidence shows that at no time did there exist the slightest possibility of the expenses, the moneys in question, being productive of any income.

I think the judgment of *Mann* J. was right, and that it should be affirmed. It is in direct line with the reasoning of the Privy Council in *Ward's Case* (1). The words of the New Zealand statute there considered, bore a close resemblance to those employed in the Federal Act. The judgment appealed from has been subjected to some verbal criticism but his Honor's statement (2) that "this expenditure, in my mind, is not in any sense productive expenditure directly or indirectly" seems to be unanswerable. This statement is borne out by the evidence, and it ought to be fatal to the appellant's success.

In my opinion the appeal should be dismissed.

McTIERNAN J. The following statement in the judgment of *Mann* J., from which this appeal is brought, precisely describes the matter in contention in this appeal. His Honor said: "The appellant" (The Herald and Weekly Times Ltd.) "in this case claims to deduct from its income for the purposes of the Federal *Income Tax Act* certain disbursements made during the year in question, arising out of the conduct of its business as the proprietor and publisher of an evening newspaper. The disbursements may be generally described as representing sums paid by way of compensation, either before or after judgment, to persons claiming damages in respect of libels said to have been published in the appellant's newspaper, and some other sums representing the costs of contesting those claims or of obtaining advice in relation to the best course to be followed with regard to claims of a similar kind. The Commissioner has disallowed those sums as deductions, upon the ground that the sums in question are not wholly and exclusively laid out or expended for the production of assessable income" (3). The learned Judge added that, in his opinion, that decision was right.

(1) (1923) A.C. 145. (2) (1932) V.L.R., at p. 321.
(3) (1932) V.L.R., at pp. 319, 320.

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The question whether these disbursements should be allowed as deductions in calculating the taxable income of the appellant turns upon sec. 25 (*e*) of the *Income Tax Assessment Act* 1922-1929. It is not necessary that the terms of this provision should be again quoted. *Mann* J. was of the opinion that the deduction was forbidden by sec. 25 (*e*) because the expenditure in question was, as found, a loss not in any sense productive of anything or tending to the production of anything by preserving the business or business connections or business assets of the appellant from depletion. But the learned Judge also found that the expenditure in respect of which the appellant claimed to make a deduction was an unavoidable loss arising as one of the consequences of carrying on the appellant's business of producing a newspaper.

The question propounded by sec. 25 (*e*) must be decided as a matter of fact in each case (*Federal Commissioner of Taxation* v. *Gordon* (1)). There is a material difference between sec. 25 (*e*) and the provisions of the English Act upon which it is based, and care must be exercised in employing the English decisions in solving problems arising under sec. 25 (*e*). In *Gordon's Case Dixon* J., having arrived at the conclusion that the expenditure in that case was made to secure certain advantages to the taxpayer's business by which his assessable income was earned, and for no other purpose, found that it was money wholly and exclusively expended for the production of assessable income. In deciding that the appeal against this decision should be dismissed, *Starke* J. said (2) :—" The question is really one of fact. The money was paid to secure to the taxpayer's business the benefits which flowed from membership of the association. It was from his business that his assessable income was derived, and the contribution was made to protect his interest in and his income from this business, and for no other purpose. My brother *Dixon* concluded that money so expended was wholly and exclusively laid out or expended for the production of the taxpayer's assessable income. Again, I see no reason for disturbing his finding, and concur in it."

(1) (1930) 43 C.L.R., at pp. 462, 469, 470.
(2) (1930) 43 C.L.R., at pp. 470, 471.

In the present case the finding of the learned Judge as to the unproductive character of the expenditure, in the sense in which he described it, did not preclude a finding that the moneys with which this appeal is concerned were wholly and exclusively laid out or expended for the production of assessable income. The finding of the learned Judge may be said to embody one test only, and it may be gravely doubted whether a completely exhaustive test could be constructed by which the application of the section to any expenditure with respect to which the question as to the applicability of sec. 25 (*e*) was raised should be decided (*Strong & Co.* v. *Woodifield* (1)). It should, I think, have been concluded upon the finding that the expenditure was an unavoidable consequence of carrying on the business of printing and publishing the appellant's newspaper that the money in question was wholly and exclusively laid out or expended by the appellant to get its income. Indeed it would follow from his Honor's finding that the only condition that could have freed the appellant from the expenditure in question was that it ceased to carry on the business of printing and publishing a newspaper. The money, it is true, was paid out after publication. But the publication of printed matter was at once the act which produced the income and generated the liability which the moneys were expended to discharge. The amount of the liability was not fixed until after publication, but it was part of the true cost of publication. It was wholly and exclusively expended to print and publish the newspaper. This was the operation by which the Company produced its income.

The appeal should, in my opinion, be allowed, and a deduction of £3,131 made from the taxable income.

Appeal allowed. Assessment of taxable income reduced by £3,131. *Respondent to pay costs of the appeal and of the proceedings in the Supreme Court.*

Solicitor for the appellant, *Robert W. Best.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.

(1) (1906) A.C., at p. 452.