[HIGH COURT OF AUSTRALIA.]

EGERTON-WARBURTON AND OTHERS . APPELLANTS;

AND

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

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PERTH, *Sept.* 12, 17.

Latham C.J., Dixon and McTiernan JJ.

*Income Tax (Cth.)—Assessment—Family arrangement—Transfer of land—Consideration—Payment by way of annuity to father and mother and survivor of them—Lump sum to daughters—Annuity taxable—Deduction by persons paying annuity—Outgoings incurred producing income—Income Tax Assessment Act* 1922-1933 (*No.* 37 *of* 1922—*No.* 40 *of* 1933), *secs.* 4, 23 (1) (*a*), 25 (*e*).

By an agreement made by W. with his two sons, he sold certain lands to them, part of the consideration being that they should pay to him during his life an annuity of £1,200. During the year ending 30th June 1933 the sons paid W. £659 in equal shares in pursuance of the agreement. The Deputy Commissioner assessed W. for income tax in respect of the £659, and disallowed as a deduction from assessable income the sum of £329 10s. paid by each son. On appeal from this decision,

*Held*, that the sum of £659 was income of the father, not an instalment of a capital amount, and was therefore taxable, and that each sum of £329 10s. was an allowable deduction in the sons' assessments, as representing money laid out for the production of assessable income.

CASE STATED.

The appellants, Randle Egerton-Warburton, Piers Edward Egerton-Warburton and George Gray Egerton-Warburton, each appealed from a decision of the respondent, whereby he disallowed objections made by the appellants to assessments in respect of income tax. The appeals coming on for hearing before *Dixon* J., he consolidated the appeals and agreed to state a special case for the opinion of the Full Court, under sec. 51A (8) of the *Income Tax Assessment Act* 1922-1933.

The special case was substantially as follows :—

1. In pursuance of an agreement for sale dated 28th May 1929 the property therein referred to was transferred by the appellant R. Egerton-Warburton to the appellants P. E. Egerton-Warburton and G. G. Egerton-Warburton, and to secure the annuity of £1,200 therein referred to a charge dated 26th August 1929 was given over the land the subject of such agreement and registered. 2. The appellants P. E. Egerton-Warburton and G. G. Egerton-Warburton in partnership carried on farming operations upon the said land during the twelve months ending 30th June 1933 for the purpose of producing the assessable income, and they did in fact derive from such operations part of the assessable income included in their respective individual assessments. 3. During the twelve months ending 30th June 1933 the said two appellants paid on the partnership account the sum of £659 to the appellant R. Egerton-Warburton in respect of the said annuity. Under the terms of the partnership they bore this outgoing in equal shares, viz., £329 10s. each. 4. As appears from the respective assessments of the appellants the sum of £659 has been included in the assessable income of the appellant R. Egerton-Warburton as gross income from property, and the sums of £329 10s. have not been allowed as deductions from the assessable income of the appellants P. E. Egerton-Warburton and G. G. Egerton-Warburton. 5. No deduction has been allowed in any assessment of the appellant R. Egerton-Warburton in respect of any sum representing any part of the purchase price or other the consideration for the said annuity.

The questions for the opinion of the Court are :—

1. Ought the sum of £659 shown as gross income from property or any part thereof to be included in the assessable income of R. Egerton-Warburton ?
2. Is any, and if so what part of the sum of £659 excluded from the assessable income of R. Egerton-Warburton by par. (*d*) of the definition of income in sec. 4 of the *Income Tax Assessment Act* 1922-1933 ?
3. Are (*a*) the appellant P. E. Egerton-Warburton and (*b*) the appellant G. G. Egerton-Warburton entitled to a deduction from their respective assessable incomes of the sum of £329 10s. or any other and if so what sum ?

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*Keall* and *Hatfield*, for the appellants. The sum received by the father is capital. To call it an annuity does not alter its character as part of the purchase price. The payment of purchase money by instalments does not render it liable to income tax (*Minister of National Revenue* v. *Spooner* (1); *Perrin* v. *Dickson* (2)). Annuities are taxed in England because they are taxable *eo nomine* under the Imperial Acts, but in the absence of any such provision it must be shown that the annuity is in fact profit or interest as distinguished from capital (*Jones* v. *Commissioners of Inland Revenue* (3); *Secretary of State in Council of India* v. *Scoble* (4)). If the Court holds that the sum received by the father is income, the sons are entitled to deduct it from their gross income as an outgoing on the grounds that they were not entitled to occupy the property without paying the annuity, and that the annuity was in fact paid out of the receipts of the property during the year in question. It was an amount necessarily paid to enable them to earn the income. *Calvert* v. *Commissioner of Taxes* (*Vict.*) (5) is distinguishable, as in that case it was not shown that the annuity was in fact paid out of the earnings of the property charged, nor were there any covenants in the charge compelling the taxpayer to work the property.

*Sir Walter James* K.C. and *Gibson*, for the respondent. The amount received by the father is taxable on the ground that no price was fixed by the contract. Alternatively, the amount should be apportioned as on the purchase of an annuity, and tax paid on the part representing interest (*Foley* v. *Fletcher* (6); *Chadwick* v. *Pearl Life Insurance Co.* (7)). Counsel also referred to *Milne* v. *Deputy Commissioner of Taxation for the State of South Australia* (8); *Australian Temperance and General Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (9), and as regards the sons, to *Calvert* v. *Commissioner of Taxes* (*Vict.*) (5).

*Cur. adv. vult.*

(1) (1933) A.C. 684.
(2) (1930) 1 K.B. 107.
(3) (1920) 1 K.B. 711.
(4) (1903) A.C. 299.
(5) (1927) 40 C.L.R. 142.
(6) (1858) 3 H. & N. 769; 157 E.R. 678.
(7) (1905) 2 K.B. 507.
(8) (1931) S.A.S.R. 234.
(9) (1933) 48 C.L.R. 452.

The following written judgment was delivered :—

RICH, DIXON AND MCTIERNAN JJ. This is a case stated in three appeals under sec. 51A of the *Income Tax Assessment Act* 1922-1933. The appeals have been consolidated.

The appellants are a father and two sons. The controversy relates to a sum of £659, which during the year of income was paid by the sons to the father. The father claims that the sum ought not to be included in his assessable income, because it is a receipt of a capital nature. The sons, who bore the payment in equal shares, claim that, if their father's contention is wrong, the payments by them should be deducted in their respective assessments from their assessable income as outgoings incurred in gaining assessable income. The father makes an alternative claim based upon par. (*d*) of the definition of income in sec. 4 of the *Income Tax Assessment Act* 1922-1933. On the hypothesis, which he disputes, that the payment was on account of an annuity, he claims under that paragraph that some part or all of it represents the purchase price of the annuity, and is therefore excluded from the definition of income.

It appears that, until the transaction presently to be mentioned, the father was the proprietor of an estate in fee simple in land upon which farming and orcharding was carried on. His two sons formed a partnership for the purpose of carrying on the enterprise. The father entered into an agreement with them in which he was described as the vendor, and they were described as the purchasers. He agreed to sell to them, on a walk-in walk-out basis, the land together with all stock, chattels and effects thereon. Briefly stated, the consideration for the sale was as follows. The sons were required to pay (*a*) an annuity to the father during his life of £1,200 by quarterly payments ; (*b*) after his death an annuity to his widow of £1,000 by quarterly payments ; (*c*) after the death of both the father and his widow, the sum of £10,000 to his three daughters and the children of a deceased daughter in such shares and upon such terms as he might by deed or will appoint, and, in default of appointment, in shares of one quarter to each of the three daughters, and one quarter to the children of the deceased daughter.

The father reserved under the agreement the right to use and occupy a dwelling-house upon the land. The sons agreed upon the

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completion of the purchase to execute a mortgage over the land to secure the payment of the annuity and of the sum of £10,000. In part performance of this obligation, the sons secured the annuity to the father by a registered instrument of charge over the land.

In the year of income upon which the assessments are based, the sons paid on account of the father's annuity the sum of £659 already mentioned.

Upon these facts the first question which arises for consideration is whether the annual payments to the father are income in his hands. It is contended that they are part of the consideration for a sale of the capital assets constituted by his farm and the chattels used in connection therewith. "But there is no law of nature or any invariable principle that because it can be said that a certain payment is consideration for the transfer of property it must be looked upon as price in the character of principal. In each case regard must be had to what the sum is. A man may sell his property for a sum which is to be paid in instalments, and when that is the case the payments to him are not income (*Foley* v. *Fletcher* (1) ). Or a man may sell his property for an annuity. In that case the *Income Tax Act* applies. Again, a man may sell his property for what looks like an annuity, but which can be seen to be not a transmutation of a principal sum into an annuity but is in fact a principal sum payment of which is being spread over a period and is being paid with interest calculated in a way familiar to actuaries—in such a case income tax is not payable on what is really capital (*Secretary of State in Council of India* v. *Scoble* (2) ). On the other hand, a man may sell his property nakedly for a share of the profits of the business. In that case the share of the profits of the business would be the price, but it would bear the character of income in the vendor's hands. *Chadwick* v. *Pearl Life Insurance Co.* (3) was a case of that kind. In such a case the man bargains to have, not a capital sum but an income secured to him, namely, an income corresponding to the rent which he had before" (per *Rowlatt* J., *Jones* v. *Commissioners of Inland Revenue* (4) ).

(1) (1858) 3 H. & N. 769; 157 E.R. 678.
(2) (1903) A.C. 299.
(3) (1905) 2 K.B. 507.
(4) (1920) 1 K.B., at pp. 714, 715.

A transaction by which an owner of capital assets disposes of them for a consideration which includes annual payments may serve the double purpose of converting a capital asset into money and of converting the money, which otherwise would be capital, into income. In other words, the annual payments are not necessarily deferred payments of principal, they may be income the right to which has been purchased by an outlay of capital. In the ordinary case of the purchase of a life annuity for cash, the annuity is income into which the capital laid out has been transformed. " An annuity means where an income is purchased with a sum of money, and the capital has gone and ceased to exist, the principal having been converted into an annuity " (per *Watson* B., *Foley* v. *Fletcher* (1) ). " An annuity means generally the purchase of an income and usually involves a change of capital into income, payable annually over a number of years " (per *Mathew* L.J., *Scoble* v. *Secretary of State in Council for India* (2) ).

On the other hand, where the purchase price of property sold is payable by instalments spread over a long period of time, the instalments, but not the interest on the unpaid balance, are capital. " In the one case there is an agreement for good consideration to pay a fixed gross amount and to pay it by instalments ; in the other there is an agreement for good consideration not to pay any fixed gross amount, but to make a certain, or it may be an uncertain, number of annual payments. The distinction is a fine one, and seems to depend on whether the agreement between the parties involves an obligation to pay a fixed gross sum " (per *Walton* J., *Chadwick* v. *Pearl Life Insurance Co.* (3) ).

The Commonwealth *Income Tax Assessment Act* 1922-1933 contains no explicit provision which includes annuities in the assessable income. But par. (*d*) of the definition of " income " in sec. 4 necessarily implies what indeed would follow from the character of an annuity, that the annual payments are income ; for it expressly excludes so much of the annual payments as represent the purchase price of an annuity that is purchased.

In the present case the sons, in consideration of the transfer of the property, agreed to pay, not a fixed gross sum, but two life

(1) (1858) 3 H. & N. 769, at pp. 784, 785 ; 157 E.R., at pp. 684, 685.

(2) (1903) 1 K.B. 494, at p. 504.

(3) (1905) 2 K.B., at p. 514.

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annuities of different amounts, one in succession to the other, and a specified capital payment upon the dropping of both lives. The first annuity is for the life of the transferor, a period of uncertain duration; the second annuity, that payable to his widow, is not only for a period of uncertain duration, but depends upon the uncertainty of her surviving him. There is nothing in the document or the facts in the stated case to show that the full value of the property transferred is represented by the consideration constituted by these various payments. The sum of £10,000 to be paid among the daughters and the children of the deceased daughter, as the father may appoint, evidently amounts to a *post mortem* distribution to these children as beneficiaries of the father's property. There is nothing inconsistent with the supposition that the transaction may have resulted in an immediate benefit to the sons in the nature of a gift. It may be that the effect is to invest the sons with a substantial interest, the value of which is not exhausted by the payment of the charges upon it. But, whether this be so or not, the transaction bears all the marks of a family settlement. We think it is impossible to treat the annuity of £1,200 a year as mere instalments of purchase money. It is a true life annuity of an income character. Subject, therefore, to the operation of the exclusory provision of par. (*d*) of the definition of "income," the annual payments made on account of the annuity constitute, in our opinion, assessable income of the father. That paragraph provides that income shall not include "in the case of an annuity which has been purchased —that part of the annuity which represents the purchase price to the extent to which that price has not been allowed or is not allowable as a deduction under the provisions of this Act or of any Act repealed by this Act." The expression "that part of the annuity which represents the purchase price" is vague. But it appears to refer to the fact that every annual payment on account of an annuity may be considered to be composed of a proportion of the principal invested in the annuity and an amount of interest borne by the principal. Unless the price is allowable or has been allowed as a deduction in calculating taxable income, that proportion, which is considered to represent the capital invested, is excluded by the

paragraph from the assessable income of the year in which the payment is made to the annuitant. The present case may be regarded notionally, perhaps, as if the father had stipulated for a capital payment from the sons sufficient to purchase an annuity for his life of £1,200, and had then reinvested it with them as the purchase price of an annuity which they undertook to pay him. If the price were ascertained, the transaction, so regarded, might come within the provision which would authorize the exclusion of so much of the annual payment as represented principal expressed in the price. The difficulty is that no definite or ascertainable capital sum is agreed upon between the parties. The purchase price of an annuity depends upon the annuitant's expectation of life, which is not solely a question of age, and upon the adoption of a rate of interest which is not rigidly determined by law or custom. With no fixed price expressed by the parties, with no expectation of life fixed when the annuity was stipulated for, and no rate of interest adopted by the parties for its calculation, it is, we think, impossible to find in the transaction a purchase price for the annuity. The statutory provision gives an advantage in cases which conform to conditions established *positivi juris*. One of the conditions is that there must be an ascertained or ascertainable price. In our opinion the conditions cannot be satisfied in the present case.

For these reasons we think that the payment received by the father forms part of his assessable income for the year under consideration.

We turn to the question, whether this payment made to him by the sons forms a deduction of which they may avail themselves in equal shares in their respective assessments. This question depends upon sec. 23 (1) (*a*) and sec. 25 (*e*) of the *Income Tax Assessment Act* 1922-1933. The first of these provisions authorizes the deduction from the assessable income of all outgoings (not being in the nature of outgoings of capital) actually incurred in gaining or producing the assessable income. Sec. 25 (*e*) forbids the deduction of money not wholly or exclusively laid out for the production of assessable income. We do not think the annual payments made by the sons are outgoings of their capital. The payments may properly be considered as made by them on revenue account. But it is another

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thing to hold that the sums paid are expended wholly or exclusively for the production of assessable income. The contention that they are so expended is founded upon the circumstances that the annuity is charged upon the land used to earn the assessable income, that the charge was incurred as a condition attending the acquisition of the land, and that various provisions of the charge resulted in its being virtually compulsory to use the land for farming or orcharding. Any default in the payment of the annuity or in the observance of the conditions of the charge would entitle the father to enter into possession of the land, to receive the rents thereof, and to assume and to continue the management thereof to the exclusion of the sons. These circumstances are relied upon as showing that the annuity is a charge incurred in order to enable the sons to obtain possession of the land for the purpose of earning assessable income therefrom, and paid in order to enable them to retain such possession for that purpose. In *Moffatt* v. *Webb* (1), this Court held that the liability of a grazier to Federal land tax gave rise to an outgoing wholly and exclusively laid out and expended for his trade as a grazier. The reason for this decision is expressed in the judgment of *Isaacs* J., as he then was, in the statement that the use of the land involved the use of an instrument to which is attached by law a compulsory payment. "It seems to me," he said, "to 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" (2). In the present case, the obligation to pay the annuity is not attached to the land by the general law, but by the convention of the parties. It is a condition of the acquisition of the land upon which the business is carried on. The nature of the business demands the use of land, but payment of an annuity is not a necessary incident of carrying on the business. Without the land, however, the taxpayers could not carry on the business, and to acquire the land they found it necessary to submit to the liability to pay the annuity. Unlike the British *Income Tax Act*, the Commonwealth *Income Tax Assessment Act* includes in the assessable income arising from personal exertion the entire

(1) (1913) 16 C.L.R. 120.

(2) (1913) 16 C.L.R., at pp. 135, 136.

revenue derived from the operations conducted upon the land, without deducting or excluding therefrom any amount to represent the annual value of the land considered as the notional income from the property forming part of the undertaking. Under the British *Income Tax Act* 1918, except in the case of a farmer who elects to be taxed under Schedule B upon the annual value of lands occupied solely or mainly for husbandry, a clear distinction is drawn in the case of a business conducted upon land by the owner between the profits and gains in the trade or business and the taxable enjoyment of the land. Under Schedule A he is taxed on the annual value of the land. Under Schedule D, by which he is taxed on the balance of profits or gains of the trade or business, in ascertaining those profits a deduction is made of the annual value of the land. Rule 3 of the Rules applicable to Schedule D provides that, in computing the amount of profits or gains to be charged, no sum shall be deducted in respect of any disbursements or expenses not being money wholly and exclusively laid out or expended for the purposes of the trade. Sec. 25 (*e*) of the Commonwealth Act is derived from this provision. Under such a scheme it is evident that in considering whether an outgoing is deductible, it is important to distinguish between expenses incurred because the trade is carried on, and expenses that are incurred as a result of the ownership or occupation of the land upon which it is carried on. An expense arising out of the occupation of the land used in the business may be attributable, not to the use of the land in the business, but to its character as property or to the nature of the owner's title. However necessary the land may be for the business, such an expense could not be deducted from the profits of the business in addition to the annual value of the land. It is an expense which the owner must incur in order to provide the land for the purpose of his business, and thus obtain the deduction of its annual value from his trade profits. It has, so to speak, been already deducted in the annual value which may be regarded as containing it. In *O'Shea* v. *Commissioner of Taxes (Vict.)* (1), it was held that under the Victorian *Income Tax Act* 1915, in consequence of the special provisions of sec. 19 (2) (*h*), the owner of land who derived profits from a business which he conducted thereon was

(1) (1927) 39 C.L.R. 313.

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entitled to a deduction of the annual value of the land from the profits of the business in ascertaining his taxable income, notwithstanding that the Victorian Act contained no provision for the separate taxation of that annual value. If under the British Act or the Victorian Act, so construed, the present case fell to be determined, it is plain that the deduction ought not to be allowed, because to allow it would concede to the taxpayer, not only an allowance on account of the annual value of the capital contained in the land which he devoted to the business, but an outgoing which he incurred in order to be in a position to provide that capital for the business.

It was under the Victorian Act as interpreted in *O'Shea's Case* that the decision was given in *Calvert* v. *Commissioner of Taxes* (*Vict.*) (1), and this fact, we think, altogether distinguishes that decision. The facts were similar to those in the present case, except that there had been a substitution of other lands for those which the taxpayer had originally acquired upon terms that he paid the annuity, and he was under no obligation to make any particular use of the land. The Court, without giving reasons, decided that sec. 19 (2) (*g*) of the Victorian *Income Tax Act* 1915 excluded the deduction. That provision enacts that, in estimating the balance of the income liable to tax, no sum shall be deducted for any disbursement or expense not wholly laid out or expended for the purpose of the trade. Similarly, in *Dow* v. *Merchiston Castle School Ltd.* (2), a sum recurrently payable in respect of land subject to a feu duty was held not to be deductible in ascertaining the profits and gains of an undertaking carried on upon the land, because it was an expense in connection with the title of the land and not of the trade, the annual value of the land being allowable as a debit to the trade profits. Lord *Clyde* said that it was paid as a condition of the ownership which the title conferred, and not as an expense of carrying on the business, that it was a payment as owner because it was a condition imposed upon the ownership, and not a payment made to enable the owner to carry on a business on those premises; that in other words it was a payment referable to the taxpayer's assessability under Schedule A, and not to that under Schedule D, and that it

(1) (1927) 40 C.L.R. 142.
(2) (1921) 58 Sc.L.R. 585; 8 Tax C. 149.

would not be consistent with the scheme of the *Income Tax Acts* to admit any deduction from the profits of a business higher than that regarded as the fair annual value or cost of the business premises to a person desiring to carry on business upon them. But the annual value of business premises has always been held a proper allowance in the nature of a disbursement or expense which must be deducted in ascertaining the balance of profits of a trade conducted thereon (*Russell* v. *Town and County Bank* (1), per Lord *Herschell*; *Stevens* v. *E. Boustead* (2)). "A trader who utilizes, for the purposes of his trade, something belonging to him, be it chattel or real property, which he could otherwise let for money, seems to me to put himself to an expense for the purposes of his trade. Equally he does so if he hires or rents for that purpose property belonging to another. The amount of his expense is prima facie what he could have got for it by letting it in the one case, and what he pays for it when hiring it in the other. Where he gets something back for it, while employing it in his trade, by receiving rent or hire for it in connection with that trade, the true amount of his expense can only be arrived at by giving credit for such receipt" (per Lord *Sumner*, *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (3)). It is thus fully recognized that revenue loss or expenditure suffered by a taxpayer through appropriating land to the purposes of trade is a proper allowance against trade profits, but that a sum having been allowed as a deduction must be taxed as notional income from property. In the Commonwealth Act this discrimination is not adopted, but somewhat unfortunately, perhaps, the provision forbidding a deduction of sums not wholly laid out or expended for the purpose of the trade has been adopted with no greater modification than the substitution for the reference to trade of the words "for the production of assessable income." This provision must be applied to income from property as well as income from personal exertion. In the case of income from property, it is difficult to suppose that an obligation to pay an annual charge incurred as a necessary condition of acquiring the property does not amount to a deductible expenditure as money laid out for the production of assessable income. Such a case differs from that of

(1) (1888) 13 A.C. 418, at pp. 425, 426.

(2) (1918) 1 K.B. 382.

(3) (1915) A.C. 433, at p. 469.

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*Federal Commissioner of Taxation* v. *Munro* (1), which was decided upon the ground that the obligation to pay the mortgage interest was incurred for a purpose quite unconnected with the income producing character of the land or the production of income at all. *Isaacs* J., as he then was, said (at p. 197):—"The taxpayer had already acquired and held his property as a rent-producing property to the full extent. Nothing more was necessary to gain or produce that income. Then he chose for his own purposes quite alien to that property to borrow money and incur a personal obligation to repay it with interest. So far, also, the property stood complete as a rent-producing instrument. But because he secured his personal debt by means of that complete rent-producing instrument he contends that the discharge of the obligation was 'actually incurred in gaining or producing' the rentals it yielded. The simple position is that the property and its rentals existed before the loan and remained intact and unaltered after the loan. Had the money borrowed been expended on the property so as to increase the rentals or so as to prevent depreciation which would have reduced the rentals, then it could have been properly said that the interest had been a means of gaining or producing the assessable income." The distinction was expressed by him in a sentence, "In short, the interest paid to the bank was not paid to *create* any of the assessable income in question: it was incurred because, among other things, that income was in a manner of speaking already in existence" (Cf. per *Henchman* J., *Re Income Tax Acts* 1924-1926 (*No.* 1) (2)). In such a case as the present, the land is a necessary implement for the production of income, and an expenditure, not being an outgoing of capital, which the taxpayer incurs in order to obtain the implement, seems naturally to fall under the description of money laid out for the production of income. So far as the taxpayer is concerned it is an expenditure incurred to create his assessable income. The caution required in using English authorities in the application of sec. 25 (*e*) has been pointed out more than once (see *Federal Commissioner of Taxation* v. *Gordon* (3); *Herald & Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (4)). But the reasoning which they contain when applied

(1) (1926) 38 C.L.R. 153.
(2) (1931) S.R. (Q.) 304, at pp. 317-319.
(3) (1930) 43 C.L.R. 456.
(4) (1932) 48 C.L.R. 113.

to the differently constructed Commonwealth enactment appears to us greatly to support the conclusion that the deduction is allowable. Under our law the entire income derived from the land is treated like any other income which is obtained by combining labour with capital, and it is taxed as one subject. No attempt is made to ascribe part of the income actual or notional, to the land. Revenue charges incurred on account of the acquisition of the land, or its continued occupation, involved an outlay for the production of this entire sum for the very reasons which under the British Act have contributed to the allowance of the annual value against trade profits. See *Konstam, Law of Income Tax*, 5th ed. (1931), p. 144; 6th ed. (1933), pp. 144, 145.

For these reasons we think the questions in the case stated should be answered as follows :—

(1) The sum of £659 ought to be included in the assessable income of Randle Egerton-Warburton.

(2) No part of the said sum is excluded from the assessable income of Randle Egerton-Warburton by par. (*d*) of the definition of " income " in sec. 4 of the *Income Tax Assessment Act* 1922-1933.

(3) The appellants, Piers Edward Egerton-Warburton and George Egerton-Warburton, are entitled to a deduction in their respective assessments from the assessable income of the sum of £329 10s. each.

We think the sons should receive the costs of the case stated other than the costs thereof exclusively referable to the father's appeal, which should be paid by the father.

*Questions answered as follows :—*

(1) *The sum of* £659 *ought to be included in the assessable income of Randle Egerton-Warburton.*

(2) *No part of the said sum is excluded from the assessable income of Randle Egerton-Warburton by par. (d) of the definition of " income " in sec. 4 of the Income Tax Assessment Act* 1922-1933.

(3) *The appellants, Piers Edward Egerton-Warburton and George Gray Egerton-Warburton, are entitled to a deduction in their respective assessments from the assessable income of the sum of* £329 10*s. each.*

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*Costs of the case stated other than the costs exclusively referable to the appeal of the appellant, Randle Egerton-Warburton, to be paid by the Commissioner to the appellants, Piers Edward Egerton-Warburton and George Gray Egerton-Warburton. Costs of the case stated exclusively referable to the appeal of Randle Egerton-Warburton to be paid by him to the Commissioner.*

Solicitors for the appellants, *Villeneuve Smith & Keall.*

Solicitor for the respondent, *A. A. Wolff*, Assistant Crown Solicitor for Western Australia.

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[HIGH COURT OF AUSTRALIA.]

PARA WIRRA GOLD & BISMUTH MINING SYNDICATE NO LIABILITY AND ANOTHER . . . . . Appellants;
Plaintiffs,

AND

MATHER AND OTHERS . . . . . Respondents.
Defendants,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1934.

ADELAIDE, *Sept.* 27, 28.

MELBOURNE, *Oct.* 15.

Rich, Starke, Dixon and McTiernan JJ.

*Company—Mining company—Contract for option—Consideration—Allotment of shares in company formed for purpose of exercising option—Reconstruction of purchasing company—Exercise of option by reconstructed company—Allotment of shares in reconstructed company—Compliance with contract—No fiduciary relationship.*

A no liability mining company, incorporated with a nominal capital of £4,000 divided into 400 shares of £10 each, entered into a contract which conferred on it an option to purchase certain mineral reef claims. The consideration for the sale to result from an exercise of the option was described in the contract as "the consideration of the payment of a further sum of £500 in cash and of