[HIGH COURT OF AUSTRALIA.]

SUN NEWSPAPERS LIMITED . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

ASSOCIATED NEWSPAPERS LIMITED . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

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SYDNEY, *April* 27; *Sept.* 5-7, 17.

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SYDNEY, *Nov.* 24, 25, 28.

MELBOURNE, *Dec.* 23.

Latham C.J., Dixon and McTiernan JJ.

Income Tax (Cth.)—Assessable income—Deduction—Expenditure for purpose of eliminating competition—"Outgoings (. . . not being in the nature of . . . outgoings of capital) incurred in gaining or producing assessable income"—Income Tax Assessment Act 1922-1934 (*No.* 37 *of* 1922—*No.* 18 *of* 1934), *sec.* 23 (1) (*a*).

Sun Newspapers Ltd. published in Sydney the *Sun*, an evening newspaper which was sold at one penny halfpenny per copy. The optionees over a competitive evening newspaper, which was also sold at one penny halfpenny per copy, proposed to replace that newspaper with another newspaper to be sold at one penny per copy. In order to prevent the publication of the proposed newspaper an agreement was entered into whereby Associated Newspapers Ltd., a company which held nearly all the shares in Sun Newspapers Ltd., agreed to pay £86,500 to those interested in the production of the new newspaper for the interest of the latter in the old competitive newspaper and further in consideration that those persons should not during a period of three years be associated in the publication of a newspaper in Sydney or within three hundred miles thereof. The agreement also provided that certain plant controlled by the other parties to the agreement should be made available for use

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by Associated Newspapers Ltd. if required, and arrangements were made to take over or provide for certain employees. Moneys due under the agreement were paid by Sun Newspapers Ltd.

Held that the moneys paid under the agreement were in the nature of an outgoing of capital within the meaning of sec. 23 (1) (*a*) of the *Income Tax Assessment Act* 1922-1934 and were therefore not deductible from assessable income.

Decision of *Rich* J. affirmed.

APPEAL from *Rich* J.

Sun Newspapers Ltd. and Associated Newspapers Ltd. each appealed to the High Court from a decision of the Federal Commissioner of Taxation whereby he disallowed objections made by those companies to assessments made upon them respectively in respect of income tax based upon income derived during the year ended 30th June 1933.

So far as material to this report the grounds of objection (i) by Sun Newspapers Ltd. were : (*a*) that the commissioner in assessing the income liable to tax had not allowed certain deductions to which the taxpayer claimed to be entitled by law, the deductions not so allowed being payments made to Sydney Newspapers Ltd. under and in pursuance of an agreement made on 9th November 1932, the terms of which agreement were set out in two letters bearing that date; (*b*) that the payments, or, alternatively, a portion thereof, were moneys wholly and exclusively laid out or expended for the production of assessable income ; and (*c*) that the payments, or, alternatively, a portion thereof, were losses and outgoings (not being in the nature of losses and outgoings of capital) actually incurred in gaining and producing assessable income; and (ii) by Associated Newspapers Ltd., was that in pursuance of an agreement made on 9th November 1932, the terms of which agreement were set out in two letters bearing that date, payments amounting to £47,369 3s. 6d. had been made which amount or, in the alternative, portion thereof, the taxpayer claimed it was entitled to deduct from its assessable income, as being losses and outgoings (not being in the nature of capital) actually incurred in gaining or producing assessable income.

The letters referred to by the appellants were as follows :—

" November 9, 1932. Sydney Newspapers Ltd. & Messrs. E. G. Theodore & D. F. H. Packer, The *World*, Sydney. Dear Sirs,—On

behalf of Sir Hugh Denison, chairman of this company and the board of Associated Newspapers Ltd., I am authorized to offer you £86,500 for 'your interest in The *World* newspaper' and also to inform you that it is not the desire of Sir Hugh Denison that the paper shall be carried on any longer. We will not be responsible for any expenses beyond the amount referred to except in so far as the details hereunder set forth are concerned and which will be incorporated in the conditions of sale; and in regard to the interpretation of which, in the event of any misunderstanding, the writer of this letter is to be the sole arbitrator. 1. Messrs. Theodore & Packer and Sydney Newspapers Ltd. undertake for a period of three years they will not be associated directly or indirectly in the production or publication of a morning or evening daily newspaper or a Sunday newspaper in the city of Sydney or within an area of 300 miles thereof. 2. Sydney Newspapers Ltd. will undertake to continue their lease for a period of three years of the premises at Macdonell House demised to them under contracts between E. G. Theodore and Labor Papers Ltd. and will keep control for three years of the newspaper plant and machinery now used in the production of the *World* newspaper. 3. Sydney Newspapers Ltd. will during the said three years period, as and when required by Associated Newspapers Ltd., produce a morning or evening daily newspaper or a Sunday newspaper from the said plant and premises at Macdonell House. All expenses connected with the production of such paper will be met by Associated Newspapers Ltd. 4. Associated Newspapers Ltd. to have the right, in the event of a breakdown of their plant or machinery or through any other necessity, to have produced at the plant and on the premises under the control of Sydney Newspapers Ltd. any of the publications under the control of the said Associated Newspapers Ltd. upon the payment therefor of all costs involved in such production. 5. Sir Hugh Denison (or his company) undertakes to pay Sydney Newspapers Ltd. or its nominee £86,500 (eighty-six thousand and five hundred pounds) as follows:—On completion of this agreement, £12,000. On 30th November 1932, £17,500. And thereafter £365 per week until £86,500 in all (inclusive of the first payments of £12,000 and £17,500 respectively) shall have been paid. 6. To take over Sydney Newspapers Ltd.'s liability under its agreement with Labor

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Papers Ltd. in respect to: (*a*) Newsprint stocks and on order; (*b*) Lino. metal and other stocks; (*c*) Motor vehicles; (*d*) Cable and wireless contracts; (*e*) Trunk line contracts; (*f*) Advertising contracts with Railway Commissioners for hoardings on railway stations. 7. To procure three years' engagement at £25 per week with Associated Newspapers Ltd. for George Warnecke, the engagement to take effect as from 8th December 1932. 8. To publish, subject to editorial control, regular articles in the *Daily Telegraph* newspaper from E. G. Theodore and to provide journalistic assistance to the said E. G. Theodore for the preparation of such articles, remuneration to E. G. Theodore for such articles to be left to the decision of the managing editor. 9. Associated Newspapers Ltd. will offer to Mr. Frank Packer within one month of the signing of this agreement, a position in the office of Associated Newspapers Ltd. in Sydney in keeping with his general status, or as an alternative Mr. Frank Packer may proceed to London as the sole advertising representative for Associated Newspapers Ltd. in London. Yours faithfully, (Sgd.) R. C. Packer, Managing Editor." "Sydney Newspapers Ltd., 9th November 1932. Robert C. Packer, Esq. Dear Sir,—Your letter of the 9th inst., addressed to Sydney Newspapers Ltd. and Messrs. E. G. Theodore and D. F. H. Packer, has been considered by them, and upon the understanding that the words 'your interest' in the *World* newspaper mean the interests and obligations set out in clauses one, two, three and four of your letter, we accept your offer as set out in that letter. Within 72 hours of the receipt of the first payment of £12,000 we will cease the publication of the *World* newspaper. As this letter with your letter forms a complete agreement, the said sum of £12,000 must be paid to-morrow, the 10th instant. Yours faithfully, (Sgd.) Edward G. Theodore, Frank Packer, Directors."

The appeals were heard together before *Rich* J.

Further facts are set forth in the judgments hereunder.

Abrahams K.C. and *Kitto*, for the appellants.

Weston K.C. and *Hooton*, for the respondent.

Cur. adv. vult.

RICH J. delivered the following written judgment :—

These are two appeals, heard together, from assessments to income tax for the financial year beginning 1st July 1933.

The assessments are based upon returns by the respective appellants for an accounting period of twelve months ending 24th September 1933 accepted by the commissioner under sec. 32 (3) of the *Income Tax Assessment Act* 1922-1933. The appellant, Sun Newspapers Ltd., was incorporated on 29th March 1920. For some years it conducted the Sydney evening newspaper called the *Sun* and the *Sunday Sun*. It also conducted the *Newcastle Sun* and, as part owner, the *Daily Pictorial* and *Sunday Pictorial*. It was conducting these newspapers in the year 1929. Rival newspapers called the *Evening News* and the *Sunday News*, as well as a weekly paper called the *Women's Budget*, were at that time conducted by a company called S. Bennett Ltd. The two companies resolved upon an amalgamation of their interests. On 9th August 1929 they entered into an agreement with a trustee for an intended company to be called Associated Newspapers Ltd. This company, which was registered on 9th September 1929, is the other appellant. Under the agreement it was to issue a large part of its nominal capital to the shareholders of the two constituent companies in exchange for their shares in those respective companies. The number and proportions are set out in the agreement, but they are not material to the questions raised for determination. What is material is the fact that at that time 56,000 shares in Sun Newspapers Ltd. of the face value of 10s., half the face value of the remaining shares, but bearing twice the rate of dividend, were held by employees in that company and upon special terms. These shares were dealt with specially under the agreement and under a supplemental deed dated 31st July 1930. It is sufficient to say that as a result 22,600 of these employees' shares were outstanding at the beginning of the accounting period upon which the assessments were based and were not held by the appellant Associated Newspapers Ltd. In the agreement for the merger that company was described as a holding company but it did not rigidly adhere to that character. On 24th December 1929 it entered into an agreement for the acquisition of two further existing newspapers,

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the *Daily Guardian* and the *Sunday Guardian*, which under the agreement passed to it on 31st January 1930. In consequence of this transaction Associated Newspapers Ltd. took over an overdraft which was maintained in its name for various purposes. The *Daily Guardian* and the *Sunday Guardian* were for a time printed and published at the office of the vendors, and then they were transferred to the offices of S. Bennett Ltd. On 19th August 1931 an agreement was executed between Associated Newspapers Ltd. and Sun Newspapers Ltd., the purpose of which was to end the publication by the former of the *Daily Guardian* and by the latter of the *Daily Pictorial* and *Sunday Pictorial* and to provide for the publication at the *Sun* offices of a daily paper to be named the *Daily Telegraph* and for the printing and publishing of the *Sunday Guardian* by Sun Newspapers Ltd. on behalf of Associated Newspapers Ltd. This was quickly followed by an agreement of 14th October 1931, the purpose of which was to provide for the cessation of the *Sunday Guardian* and the publication of the *Sunday Sun and Guardian* in continuation of the *Sunday Sun*. Shortly afterwards, namely, on 10th November 1931, the two companies entered into a further agreement by which Sun Newspapers Ltd. undertook to print and publish the *Daily Telegraph* on certain terms, which included a division of profits with Associated Newspapers Ltd. In the meantime, under the authority of Associated Newspapers Ltd., the publication of the *Evening News* by S. Bennett Ltd. had ceased. Its last issue was published on 21st March 1931. But another evening paper came into the field, the *World*. This was published by a company called Labor Papers Ltd. By an agreement dated 1st November 1932 this company granted an option to an "investor" until 9th November 1932 for a "lease" of the newspaper, including its premises, machinery and plant, at a rent. The optionee was to form a company. This he did under the name of Sydney Newspapers Ltd., and with the co-operation of a journalist who was a son of the managing editor of the appellants' newspapers he made preparations for launching a new evening paper in succession to the *World*, to be called the *Star*. It was announced that this paper would be sold for one penny. The existing morning and evening papers sold for a penny halfpenny. The appellants took alarm and their managing

editor was entrusted with the task of preventing the sale at one penny of the threatened evening newspaper. Some doubt is cast on the extent of his authority, but, however that may be, he made an agreement with Sydney Newspapers Ltd. and its two sponsors by which in consideration of a sum of £86,500 they undertook for three years not to be associated with the production or publication of a daily newspaper within three hundred miles of Sydney, and to control for three years the plant, machinery and premises used in the production of the *World*. The agreement contained other stipulations of minor importance. If during the three years Associated Newspapers Ltd. required it, Sydney Newspapers Ltd. were to produce a daily or a Sunday paper by means of the plant, and if the plant of the former broke down, the latter company was to produce any of its publications. A place was to be found by Associated Newspapers Ltd. on its staff for the son of its managing editor and the same thing was to be done for another journalist who had been employed for the *World*. That newspaper went out of existence on the same day as the agreement was made, 9th November 1932. The agreement was honoured by the appellant companies' boards. During the course of the accounting period with which these appeals are concerned, payments amounting to £44,830 were made under the agreement in respect of the £86,500. Under the provisions of the agreement for taking over the various responsibilities connected with the *World*, a further sum was paid during the period amounting to £2,831, which with the former sum made £47,661. Although the agreement was made in the name of Associated Newspapers Ltd., these payments were all made by Sun Newspapers Ltd. In the profit and loss account of that company the burden of the £86,500 was spread over three years and for the accounting period under consideration a debit of £24,363 0s. 8d. was made. In the return of the company for income tax it was shown as a deduction. The Commissioner of Taxation disallowed the deduction, and one of the grounds of appeal from the assessment is that a deduction either of £47,661, of £44,830 or of £24,363 0s. 8d. should be allowed from the assessable incomes either of Associated Newspapers Ltd. or of Sun Newspapers Ltd.

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But a more sweeping claim is made in respect of taxation of the income derived from the newspaper undertakings. It is claimed that Sun Newspapers Ltd., which is now in liquidation, was a mere agent of Associated Newspapers Ltd. for the purpose of conducting the publications and that all the taxable income derived therefrom during the accounting period ended 24th September 1933 should be included in the assessment of Associated Newspapers Ltd. and none of it in the assessment of Sun Newspapers Ltd. One consequence which it is sought to attribute to this view is that none of the income reached Associated Newspapers Ltd. as dividends or in any other guise or form than as income from personal exertion. Under sec. 5 (1) of the *Income Tax Act* 1933 (No. 41 of 1933) a further tax of six per cent has been imposed upon a portion of the taxable income of Associated Newspapers Ltd. as income from property, amounting to £137,842, that is, a tax of £8,270 10s. 5d. This income from property represents after the allowance of deductions the amount paid as dividends by Sun Newspapers Ltd. to Associated Newspapers Ltd. The objection that it is not liable to the further or special tax of six per cent constitutes the third question for determination in the appeals. The contention that the business is conducted by Sun Newspapers Ltd. on behalf of Associated Newspapers Ltd. in such a sense that all the profits are assessable as income of the latter company only is based on certain authorities decided under the British Income Tax Acts or at any rate the citation of those decisions was the commencing point of the argument. They are conveniently set out in a note in the article on income tax in *Halsbury's Laws of England*, 2nd ed., vol. 17, p. 91, note (*b*), under a part of the text which explains the principle on which they rest. The text is as follows:—"There are certain examples of English companies holding all or practically all the shares in foreign companies which may appear to be exceptions to the rule that mere shareholding control is not sufficient to establish control of a business. The explanation of the decisions is that in each case there is more than mere shareholding control. The foreign company has been found not to own or carry on a business, but the business has been owned and carried on by the English company, and the foreign company has merely existed to hold land, &c., to conform to local law in that

respect. The question to be decided is, Does the foreign company carry on its own business or is the business in fact carried on by the English company? Where a company whose shares are thus held in their entirety, or practically so, by another company is merely acting as a trustee or agent for the shareholding company, or where the company is a mere sham, *simulacrum*, or cloak, or is kept in being for the purpose of presenting the fiction that property is owned by it, it is competent for the commissioners to look at the reality of the situation, and find that the business is carried on by the shareholding company." To the cases cited in the note, which I shall refrain from setting out, it is necessary to add a reference to the discussion of the same authorities by *Phillimore* J., as he then was, in *Kodak Ltd.* v. *Clark* (1), affirmed in the Court of Appeal (2). The recent decision of the Privy Council in *E.B. M. Co. Ltd.* v. *Dominion Bank* (3) marks the limits of the principle invoked by the appellants. There, after remarking that one of the judges below had been misled by some remarks of *Cozens-Hardy* M.R. in *Gramophone and Typewriter Ltd.* v. *Stanley* (4), which he quotes, Lord *Russell of Killowen* proceeds (5) :—" But this can mean only that, on the facts of a case, it may appear that the legal entity has not become the owner of a business, but is merely carrying on, as agent for another person, a business which is the property of that other person ; just as, on the facts of a case, it might appear that an individual who was carrying on a business was not the owner thereof, but was carrying it on as agent for another person who was the owner thereof. Sir *H. H. Cozens-Hardy* M.R., did not mean, and, in the face of the *Salomon Case* (6), could not mean, that, notwithstanding that a business is in fact and in law the property of a separate legal entity, a limited company, it could be held, for taxation purposes, that the business was the property of some other person, and that the company was carrying on the business as agent for that other person." In the present case the great degree of control exercisable and exercised by the board of Associated Newspapers Ltd. over the conduct of the newspaper business is relied upon. The managing editor was appointed by an agreement of 9th September 1931 made with

(1) (1902) 2 K.B. 450.
(2) (1903) 1 K.B. 505.
(3) (1937) 3 All E.R. 555.
(4) (1908) 2 K.B. 89.
(5) (1937) 3 All E.R., at p. 564.
(6) (1897) A.C. 22.

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Associated Newspapers Ltd. and under it he was given wide powers of managing the editing, production and distribution of newspapers controlled through other companies as well as newspapers owned by it. During the accounting period, the *Sun*, the *Sunday Sun* and the *Daily Telegraph* were published at the *Sun* office and also the *Women's Budget*. S. Bennett Ltd. remained in existence until 1936, but at that time it did not operate. About 98½ per cent of the shares of Sun Newspapers Ltd. were held by Associated Newspapers Ltd., the rest being in effect employees' shares. In the proceedings of the boards of directors, excepting perhaps the matter of remuneration, no practical distinction was made between the separate individualities of the two companies. The personnel of the two boards was not however quite identical. But as against all this, Sun Newspapers Ltd. acted in every way as the proprietor of the newspapers and the publishing business, kept separate accounts, made separate returns for taxation purposes, declared dividends on its shares and was treated in every way as continuing to be, as it originally was, the company conducting on its own behalf, that is, in the interests of its shareholders, its own extensive enterprise. In the accounts of both companies a moiety of the *Sunday Sun* profits, amounting to £15,084 15s. 1d., was shown as a credit of Associated Newspapers Ltd. against Sun Newspapers Ltd. I am clearly of opinion that there was no relation of principal and agent but that the property in the whole undertaking conducted by Sun Newspapers Ltd. was vested in it and vested in it beneficially, that is, for its shareholders whoever they might be. In fact the employees' shares would have made it difficult to ignore the separate personality of that company even if there had been any resolve to do so. Mr. *Weston* for the commissioner contended that, even if there had been an agency, yet, as Sun Newspapers Ltd. had declared dividends and Associated Newspapers Ltd. received the income under that guise, sec. 16 (*b*) (i) of the *Income Tax Assessment Act* and sec. 5 (1) (*b*) of the *Income Tax Act* would apply, and this may well be so. But on the facts I think that it is clear that these provisions apply to the sum brought under tax as net dividends, namely, £137,842 (£147,015 gross).

It remains to deal with the claim to a deduction on account of the moneys paid by Sun Newspapers Ltd. to the optionees over the *World*. It was shown that this transaction or rather the extinguishment of the *World* and the removal of the immediate fear of a penny paper led to some substantial improvement in the net profits of the *Sun* and was the occasion of the making of some economies. But the obligation to make the payment was that of Associated Newspapers Ltd., and I am not prepared to find that within the meaning of sec. 25 (*e*) the money so far as it was concerned was wholly and exclusively laid out or expended for the production of assessable income. So far as Sun Newspapers Ltd. is concerned the commissioner contended that the moneys, although actually paid by it, were no more than a voluntary payment made to meet an unfortunate transaction to which the holding company had committed itself. However this may be, I think that the expenditure could not be deducted by either company because it is in the nature of an outgoing of capital: See sec. 23 (1) (*a*). It is not expenditure of a recurrent nature. It is not an incident, whether normal or unusual, of the regular conduct of the organization for earning profits. The purpose was to buy out opposition and secure so far as possible a monopoly. The fact that the benefit was not perpetual does not deprive it of its capital attributes. If physical assets of a terminating or wasting description were bought, no one would say on that account that the money was a revenue expenditure. The case may not be so striking as *Ward & Co. Ltd.* v. *Commissioner of Taxes* (1), but it is more like that case and those mentioned in Lord *McMillan's* opinion in *Van Den Berghs, Ltd.* v. *Clark* (2) than such a case as *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (3), upon which the appellants rely: See, further, *Glenboig Union Fireclay Co. Ltd.* v. *Inland Revenue Commissioners* (4), *Dott* v. *Brown* (5) and *Collins* v. *Joseph Adamson & Co.* (6), a case similar to the present case of the elimination of competition.

I think the appeals should be dismissed with costs.

(1) (1923) A.C. 145.
(2) (1935) A.C. 431, at p. 440.
(3) (1937) 56 C.L.R. 290.
(4) (1922) 12 Tax Cas. 427; affirmed, (1922) S.C. (H.L.) 112.
(5) (1936) 154 L.T. 484.
(6) (1937) 54 T.L.R. 64. [Since reported, (1938) 1 K.B. 477.]

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The appellants appealed to the Full Court against so much of the judgment of *Rich* J. as determined that payments made pursuant to the agreement made on 9th November 1932 were not deductible under sec. 23 (1) (*a*) or sec. 25 (*e*) of the *Income Tax Assessment Act* 1922-1934.

Dudley Williams K.C. (with him *Kitto*), for the appellants. Sun Newspapers Ltd. is the real appellant in this appeal. The arrangement was made to secure a temporary absence from competition. The benefits thus obtained were revenue benefits. The payments are not rendered non-deductible by reason of the fact that they were voluntary payments on the part of Sun Newspapers Ltd. (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (1)). The expenditure was a proper debit in determining the amount of the balance of profit (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (2)) ; it was incurred for the purpose of earning more profits (*Maryborough Newspaper Co. Ltd.* v. *Federal Commissioner of Taxation* (3)) ; it was not a capital expenditure (*Anglo-Persian Oil Co. Ltd.* v. *Dale* (4)). The ultimate result rests on questions of fact.

[DIXON J. referred to *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (5) and *Commissioner of Taxes* (*Vict.*) v. *Phillips* (6).]

The question of "income" and "capital" expenditure was discussed in the *Egerton-Warburton Case* (7). Although, so far as a payee is concerned, a particular payment may be capital, it does not follow that the payment is a capital expenditure on the part of the payer (*W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (8)). This is not a case where a business was purchased outright and closed down, thus acquiring a capital asset, as in *Collins* v. *Joseph Adamson & Co.* (9). Here neither the business carried on, nor the goodwill, nor the lease of the land, nor the plant, was purchased. At most an intangible asset was involved. The expenditure was an outgoing incurred in the course of the production of assessable income. The expenditure

(1) (1915) A.C. 433.
(2) (1915) A.C., at p. 468.
(3) (1929) 43 C.L.R. 450, at p. 454.
(4) (1932) 1 K.B. 124.
(5) (1934) 51 C.L.R. 568, at pp. 572 et seq.
(6) (1936) 55 C.L.R. 144, at pp. 155, 156.
(7) (1934) 51 C.L.R., at pp. 575-580.
(8) (1937) 56 C.L.R. at pp. 306, 308.
(9) (1938) 1 K.B. 477.

was made in order to enable the business to continue on the same course as before and to remove a difficulty in the way of so carrying on the business; therefore it was an income expenditure (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (1); *Mitchell* v. *B. W. Noble Ltd.* (2); *Anglo-Persian Oil Co. Ltd.* v. *Dale* (3); *Inland Revenue Commissioners* v. *Falkirk Iron Co. Ltd.* (4)).

[LATHAM C.J. referred to *Strachan* on *The Law of Trust Accounts* (1911), p. 3, "Capital value".]

The *ratio decidendi* in *Mallett* v. *Staveley Coal and Iron Co. Ltd.* (5) was that the payment was made in respect of the company's fixed capital and not for the purposes of its trade of winning and selling coal.

[DIXON J. referred to *Countess Warwick Steamship Co. Ltd.* v. *Ogg* (6).]

In *Morley* v. *Lawford & Co.* (7) although no profits were made by the expenditure, nevertheless it was held to be deductible. The arrangement was for a period of three years only and, therefore, was not of an enduring nature as in *Collins* v. *Joseph Adamson & Co.* (8).

[DIXON J. referred to *Anglo-Persian Oil Co. Ltd.* v. *Dale* (9).]

An application of the various tests laid down or approved in the cases above referred to and in *Maryborough Newspaper Co. Ltd.* v. *Federal Commissioner of Taxation* (10), *Federal Commissioner of Taxation* v. *Gordon* (11) and *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (12) shows that this was an income expenditure and not a capital expenditure. It was an expenditure made out of circulating capital and not out of fixed capital.

[DIXON J. referred to *Inland Revenue Commissioners* v. *Ramsay* (13).]

That case was referred to in *Dott* v. *Brown* (14). The expenditure was incurred for the purpose of safeguarding and increasing the revenue of Sun Newspapers Ltd.; thus it was not an expenditure

(1) (1915) A.C., at pp. 467, 468.
(2) (1927) 1 K.B. 719, at p. 737.
(3) (1932) 1 K.B., at pp. 136, 137, 140, 141.
(4) (1933) 17 Tax Cas. 625.
(5) (1928) 2 K.B. 405.
(6) (1924) 2 K.B. 292, at pp. 296, 298, 299.
(7) (1928) 14 Tax Cas. 229.
(8) (1938) 1 K.B. 477.
(9) (1931) 145 L.T. 529, at p. 532.
(10) (1929) 43 C.L.R. 450.
(11) (1930) 43 C.L.R. 456, at pp. 464, 471.
(12) (1937) 56 C.L.R. 290.
(13) (1935) 154 L.T. 141; 20 Tax Cas. 79.
(14) (1936) 1 All E.R. 543; 154 L.T. 484.

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of a capital nature as in *Glenboig Union Fireclay Co. Ltd.* v. *Inland Revenue Commissioners* (1), *Ward & Co. Ltd.* v. *Commissioner of Taxes* (2) and *Van Den Berghs Ltd.* v. *Clark* (3).

Hooton, for the respondent. The agreement was not limited to a period of three years. Although under the agreement the appellant Associated Newspapers Ltd. may have incurred the liability, it did not incur the loss or outgoing; therefore, having regard to the terms of sec. 23 (1) (*a*) of the *Income Tax Assessment Act* 1922-1934, it is not entitled to the deduction claimed. "Outgoing actually incurred" means "outgoing actually paid."

[DIXON J. referred to *Commissioner of Taxes* (*Q.*) v. *Burke* (4).]

The money paid by Sun Newspapers Ltd. was not wholly and exclusively laid out or expended for the production of assessable income within the meaning of sec. 25 (*e*). It was not a liability enforceable against Sun Newspapers Ltd. The payment was in the nature of a gift from Sun Newspapers Ltd. to Associated Newspapers Ltd. It was a gratuitous payment by Sun Newspapers Ltd. and was not made in furtherance of a process of producing income (*Robert G. Nall Ltd.* v. *Federal Commissioner of Taxation* (5)). The payment was in the nature of an outgoing or expenditure of capital as being a payment which was made for the benefit of the business considered as a whole, as against a payment which was made for the better internal working or organization of the business as in *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (6), *Mitchell* v. *B. W. Noble Ltd.* (7) and *Anglo-Persian Oil Co. Ltd.* v. *Dale* (8). The nature of the expenditure now under consideration is similar to that under consideration in *Ward & Co. Ltd.* v. *Commissioner of Taxes* (9), *Mallett* v. *Staveley Coal and Iron Co. Ltd.* (10) and *Ounsworth* v. *Vickers Ltd.* (11). Here the expenditure was for the purpose of excluding, even though temporarily, a competitor from the field of operations of the business, and by reason of the expenditure the value of the whole business was enhanced (*Collins* v. *Joseph Adamson*

(1) (1922) 12 Tax Cas. 427.
(2) (1923) A.C. 145.
(3) (1935) A.C. 431.
(4) (1926) 38 C.L.R. 314.
(5) (1936) 4 A.T.D. 147.
(6) (1937) 56 C.L.R. 290.
(7) (1927) 1 K.B. 719.
(8) (1932) 1 K.B. 124.
(9) (1923) A.C. 145.
(10) (1928) 2 K.B. 405.
(11) (1915) 3 K.B. 267.

& Co. (1)). Where assets of a wasting character are acquired it is not allowable, if they are in the nature of fixed assets, to write off anything against profits (*MacTaggart* v. *B. & E. Strump* (2)). The benefit obtained by the expenditure constituted an addition to the goodwill (*Anglo-Persian Oil Co. Ltd.* v. *Dale* (3) ; *Jacoby* v. *Whitmore* (4)). The expenditure was a monopoly price paid for a capital asset ; it was not an expenditure which was in the nature of working expenses.

Dudley Williams K.C., in reply. Bonuses on leases and premiums are income (*Brigstocke* v. *Brigstocke* (5) ; *Begg* v. *Brown* (6)).

[DIXON J. referred to *Executor Trustee & Agency Co. of South Australia* v. *Federal Commissioner of Taxation* (7).]

The transaction was entered into for the benefit of Sun Newspapers Ltd. That company incurred the expenditure solely for the purpose of producing assessable income. It was an income payment.

Cur. adv. vult.

Dec. 23.

The following written judgments were delivered :—

LATHAM C.J. These are appeals from decisions of *Rich* J. dismissing appeals against assessments of the appellants to Federal income tax for the financial year 1933-1934.

Each of the appellants claimed a deduction from its assessable income of money paid by reason of an agreement made between the appellant Associated Newspapers Ltd. on the one hand and Messrs. E. G. Theodore and D. F. H. Packer and Sydney Newspapers Ltd. on the other. The amount of the deduction claimed was, upon one basis, £44,830, or, if certain other payments were included, £47,671, or, if the deduction were limited to such portion of a total liability of £86,500 as was discharged during the relevant accounting period, a sum of £24,363. Both companies claimed the deduction, but the payment in question was actually made by Sun Newspapers Ltd., and the appeals have been argued upon the basis (which appears to

(1) (1938) 1 K.B., at pp. 486-489.
(2) (1925) S.C. 599, at p. 603 ; 10 Tax Cas. 17, at p. 21.
(3) (1932) 1 K.B., at pp. 139, 141.
(4) (1883) 49 L.T. 335, at p. 337.
(5) (1878) 8 Ch. D. 357.
(6) (1902) 2 S.R. (N.S.W.) (Eq.) 87 ; 19 W.N. (N.S.W.) 121.
(7) (1932) 48 C.L.R. 26, at p. 35.

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me to be a correct basis) that if a deduction is allowable it is allowable to Sun Newspapers Ltd., and not to Associated Newspapers Ltd. It is true that the agreement under which the payment was made was an agreement which bound Associated Newspapers Ltd. and which did not bind Sun Newspapers Ltd. But the payment was plainly made by Sun Newspapers Ltd. as a payment which was expedient for business purposes, and the fact that it was made voluntarily does not exclude the possibility of it being an allowable deduction (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (1) and *British Insulated and Helsby Cables Ltd.* v. *Atherton* (2)).

The deduction is claimed under sec. 23 (1) (*a*) of the *Income Tax Assessment Act* 1922-1934. That section provides : " In calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer . . . 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." The question for decision is whether or not the payments made were in the nature of outgoings of capital. It has not been contended that they were losses. If this question is answered in the affirmative the appeal must fail.

The reasons for judgment of my brother *Rich* contain a history of the appearance and disappearance of newspapers in Sydney out of which the transaction arose which is the basis of the claim for a deduction. It is not necessary to repeat the statement of facts made by the learned judge. There is no dispute as to any of the facts in the case. The two appellant companies were engaged in the production of newspapers in Sydney. Associated Newspapers Ltd. was largely, though not entirely, a holding company, and owned nearly all the shares in Sun Newspapers Ltd., which was an active operating company. One of the most important properties of Sun Newspapers Ltd. was the *Sun* newspaper, published in the evening. It was sold at 1½d. per copy. The *World* was a competitive evening newspaper, also sold at 1½d. per copy. In September 1931 it became known that proposals were on foot for publishing in place of the

(1) (1915) A.C. 433. (2) (1926) A.C. 205, at p. 212.

World an evening newspaper to be known as the *Star* at a price of 1d. The directors of the two companies took the matter into consideration, and as a result Sir Hugh Denison, the chairman of directors, authorized Mr. R. C. Packer, the managing editor of the *Sun*, to see what he could do to prevent the publication of a competitive evening newspaper at the lower price proposed. On 9th November 1932 Mr. R. C. Packer, on behalf of Associated Newspapers Ltd. and Sir Hugh Denison, made the agreement mentioned with the persons interested in the proposed newspaper. As agent as aforesaid he agreed to pay them £86,500 as the purchase price of their interest in the *World* newspaper and further in consideration of those persons withdrawing their arrangements to start the new newspaper and binding themselves for three years not to produce a morning or evening daily paper or a Sunday newspaper in Sydney or within an area of three hundred miles thereof. The agreement also provided that certain plant controlled by the other parties to the agreement should be available for use by Associated Newspapers Ltd. if required. Arrangements were made to take over or provide for certain employees. The nature of the agreement was accurately expressed in part of the phrase used in the profit and loss account of Sun Newspapers Ltd. submitted to the income tax commissioner, where the payments in question were described as payments "to prevent the publication of competitive journals." On 10th November 1932, that is, immediately after the making of the agreement, the publication of the *World* ceased, by direction of the chairman of directors of the appellant company. The agreement made by Mr. R. C. Packer was approved and adopted, though not without some reluctance, by Associated Newspapers Ltd.

The evidence shows that the disappearance of the *World* and the prevention of the threatened competition was advantageous to the appellant companies. They were saved from the risk of losing circulation and of being forced to reduce the price of the *Sun* and their advertising rates. It became possible to effect certain economies, and it is clear that the agreement proved profitable to the enterprises carried on by the respondents. As already stated, moneys due under the agreement were in fact paid by Sun Newspapers Ltd., though

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the deduction has been formally claimed also by Associated Newspapers Ltd. Evidence was given by an accountant that in his opinion payments of instalments of the £86,500 were payments of a revenue nature, that they should be charged against revenue in instalments over the term of the agreement, and that they should not be charged against capital. It is a matter of some uncertainty whether the inquiry whether a payment is of a capital nature raises a question of law or a question of fact (*Morley* v. *Lauford & Co.* (1)). This question is unimportant in the present case, for upon an appeal to the Full Court from a justice of the court, the Full Court may determine all questions of fact and of law. There is no dispute as to facts, whatever room for difference of opinion there may be as to the interpretation of or colour to be put upon the facts.

The question which arises upon these appeals has often been described as one of peculiar difficulty : See, for example, per *Rowlatt* J. in *Countess Warwick Steamship Co. Ltd.* v. *Ogg* (2), where it was said : " It is very difficult, as I have observed in previous cases of this kind, following the highest possible authority, to lay down any general rule which is both sufficiently accurate and sufficiently exhaustive to cover all or even a great number of the possible cases, and I shall not attempt to lay down any such rule." The cases which have dealt with the question are conveniently collected in *Anglo-Persian Oil Co. Ltd.* v. *Dale* (3) and in *Collins* v. *Joseph Adamson & Co.* (4).

The most authoritative decision upon the question is *British Insulated and Helsby Cables Ltd.* v. *Atherton* (5), where Viscount *Cave* said : " But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital." In my opinion the expenditure in this case falls within this principle. The expenditure in question is a large non-recurrent unusual expenditure made for the purpose of obtaining an advantage for the enduring benefit of the appellants'

(1) (1928) 14 Tax Cas. 229 ; 140 L.T. 125.
(2) (1924) 2 K.B., at p. 298.
(3) (1932) 1 K.B., at pp. 136 et seq.
(4) (1938) 1 K.B., at pp. 485 et seq.
(5) (1926) A.C., at pp. 213, 214.

trade by conserving and increasing the value of the goodwill of the newspaper enterprise. Apart perhaps from "enduring benefit," no single one of the characteristics mentioned in the last sentence can be regarded as in itself decisive, but they all represent elements which are material in the consideration of the question. In *Mitchell* v. *B. W. Noble Ltd.* (1) the magnitude and non-recurrent nature of the payment was regarded by *Sargant* L.J. as a circumstance which should be considered. In *Collins* v. *Joseph Adamson & Co.* (2) the unusual nature of a payment, as referred to in *Mitchell* v. *B. W. Noble Ltd.* (1), was regarded as material by *Lawrence* J. In *Ounsworth* v. *Vickers Ltd.* (3) it was said by *Rowlatt* J. that "the real test is between expenditure which is made to meet a continuous demand, as opposed to an expenditure which is made once for all" and the learned judge said that the question to be answered was "whether" (expenditure) "is to be regarded as enduring expenditure and serving the business as a whole" (4). In applying this test *Rowlatt* J. anticipated the judgment of Viscount *Cave* in *British Insulated and Helsby Cables Ltd.* v. *Atherton* (5).

It is true that the payments did not result in obtaining a new capital asset of a material nature, but they did obtain a very real benefit or advantage for the companies, namely, the exclusion of what might have been serious competition. When the words "permanent" or "enduring" are used in this connection it is not meant that the advantage which will be obtained will last forever. The distinction which is drawn is that between more or less recurrent expenses involved in running a business and an expenditure for the benefit of the business as a whole: See per *Rowlatt* J. in *Anglo-Persian Oil Co. Ltd.* v. *Dale* (6), where consideration is given to the significance of the word "enduring" in this connection. The effect of the payment was to enlarge the goodwill of the enterprise, which was one of its most valuable assets. There is no doubt that the goodwill of the *Sun* newspaper became worth very much more as the result of the agreement which prevented the publication of a competitive newspaper within the same area, possibly at a lower price, by persons who had the control of a press and the necessary

(1) (1927) 1 K.B., at p. 739.
(2) (1938) 1 K.B., at p. 487.
(3) (1915) 3 K.B., at p. 273.
(4) (1915) 3 K.B., at p. 274.
(5) (1926) A.C., at pp. 213, 214.
(6) (1932) 145 L.T., at p. 532.

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plant, together with a newspaper organization in being. In the case of *Anglo-Persian Oil Co. Ltd.* v. *Dale* (1) reference was made by *Lawrence* L.J. to the fact that in that case the company by making the payment in question did not improve its goodwill. So also in *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (2) reference is made to the increasing of the value of the goodwill of a company as a relevant circumstance—" enlargement of the goodwill of a company " (3), and—" permanent improvement in the material or immaterial assets of the concern" (4). The goodwill of a business is an asset of the business, and is plainly a capital asset. It is radically different from assets which are turned over and bought and sold in the course of trading operations. It may be sold by a trustee in bankruptcy (*Walker* v. *Mottram* (5)), and it includes the benefit of agreements in restraint of trade (*Jacoby* v. *Whitmore* (6); *Smith* v. *Hauthorn* (7)).

If Associated Newspapers Ltd. had bought outright the goodwill of a competing newspaper (for example, the *World*) and had continued the publication of that newspaper under its current name, there would have been no doubt that the payment of the purchase price would have been an expenditure of a capital nature. The company in fact, after buying the right to publish the *World*, closed down that newspaper. The payment made to enable the company to do this must be regarded as a payment of a capital nature (*Collins* v. *Joseph Adamson & Co.* (8)). As a direct consequence of the agreement, the publication of the *World* ceased immediately, and immunity from a threatened competition within a large area was also obtained for a period of three years. Such a transaction must, in my opinion be regarded as a transaction which added to the goodwill of the enterprise. In substance it amounted to the addition of a capital asset, immaterial in character but substantial in value and significance, to the general equipment of the business enterprise of the appellant companies.

Accordingly I agree with *Rich* J. that the expenditure in question cannot be deducted : it was in the nature of an outgoing of capital.

In my opinion the appeals should be dismissed.

(1) (1932) 1 K.B., at p. 141.
(2) (1937) 56 C.L.R. 290.
(3) (1937) 56 C.L.R., at p. 303.
(4) (1937) 56 C.L.R., at p. 306.
(5) (1881) 19 Ch. D. 355; 51 L.J. Ch. 108.
(6) (1883) 49 L.T., at pp. 337, 338.
(7) (1897) 13 T.L.R. 477.
(8) (1938) 1 K.B. 477.

DIXON J. By the order under appeal *Rich* J. dismissed appeals by the respective taxpayers from assessments to income tax for the financial year beginning 1st July 1933.

The first taxpayer, Sun Newspapers Ltd., a company which is now being wound up, was at the material time the proprietor of the evening *Sun* and the *Sunday Sun and Guardian* and other journals published in New South Wales. The second taxpayer, Associated Newspapers Ltd., held nearly all the share capital of the first company. The object of the appeals to the Full Court from the order of *Rich* J. is to obtain the allowance, in one or other of the assessments of the respective companies, of a deduction from the assessable income of such company in respect of expenditure incurred for the purpose of preventing the publication of a rival evening newspaper. Some doubt is felt whether the deduction should be claimed by Sun Newspapers Ltd. as the operating company or by Associated Newspapers Ltd. as the holding company, because although the actual payment was made by the former, the latter made the agreement or arrangement by which the obligation to make the payments was undertaken. The appeals are therefore brought, as it were, in the alternative.

The accounting period by reference to which the income of each company has been assessed consists of the twelve months ending 24th September 1933. During that period the publications of the companies were under the charge of a managing editor whose contract of service was actually made with Associated Newspapers Ltd. That company, although primarily a holding company, had not drawn a very precise line in the activities it had undertaken or the purposes it fulfilled. Except for one member, the boards of directors of the two companies were composed of the same persons, and the board meetings were always held one after the other on the same days. It was not unnatural that some confusion of function should arise, unless care were taken to maintain a rigid distinction between the work and responsibilities of the two companies.

The managing editor had a son who was also a journalist. The son entered into some business arrangement or association with the holder of an option for what was called a " lease " of the premises, plant and business as a going concern of a newspaper called the

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World, which had been established for some time as an evening journal. The option was expressed in a written instrument bearing date 1st November 1932 and had a currency until 9th November. The holder of the option appears to have formed a company called Sydney Newspapers Ltd. with a view to its exercise.

An announcement was made that the machinery and plant of the *World*, over which the option was held, would be employed by Sydney Newspapers Ltd. in publishing a new evening paper to be called the *Star*, which would be sold at a penny. The *Sun*, in common with other daily papers published in Sydney, sold at a penny halfpenny. The managing editor acquainted his board or boards of directors with the news of this threatened competition. He received some sort of authority to take measures by treaty or otherwise to avert the danger. In the result he made an agreement with Sydney Newspapers Ltd. and its two promoters. The agreement took the form of letters exchanged between the parties bearing date 9th November 1932, the day on which, as the option was expressed, it would have expired.

The letter of the managing editor was written on behalf of the chairman and board of directors of Associated Newspapers Ltd. It offered £86,500 for "your interest in the *World* newspaper" and made it clear that the purpose was to put an end to the publication and for three years to ensure that the plant was not used in publishing an evening newspaper in competition with the *Sun*.

The terms of the agreement required that during a period of three years Sydney Newspapers Ltd. and its two promoters should not take any part in the publication of a newspaper in Sydney or within three hundred miles of that city but should continue their lease of the premises and keep control of the machinery and plant used in the publication of the *World*.

The subsidiary conditions of the agreement included an obligation on the part of Sydney Newspapers Ltd. during the three years to produce a newspaper if required and in case of breakdown of machinery or the like to use the plant for the purpose of producing any of the publications of Associated Newspapers Ltd. They included obligations on the part of Associated Newspapers Ltd. to

assume certain liabilities of Sydney Newspapers Ltd. to the proprietors of the *World* in respect to newsprint, stocks of linotype metal, motor vehicles and contracts for cable, wireless and telephone services and for railway advertising. Associated Newspapers Ltd. also undertook to find positions for two journalists.

The agreement stipulated for payment of the £86,500 in instalments, £12,000 down, £17,500 on 30th November 1932, and thereafter £365 every week.

When the managing editor reported the transaction to his chairman of directors the latter appears to have shown some disposition to disclaim it but after consultation with their solicitor the board of directors agreed to abide by the agreement.

It is clear that Associated Newspapers Ltd. and not Sun Newspapers Ltd. was the contracting party. But Sun Newspapers Ltd. actually met the payments. They were shown in its profit and loss account and claimed in its income tax returns. During the accounting period in question that company paid £44,830 on account of the £86,500, but it also paid £2,831 on account of the additional obligations undertaken under the agreement, making in all £47,661. In its return Sun Newspapers Ltd. claimed a deduction on the footing that the expenditure should be spread over the three years mentioned in the agreement, which meant that for the year in question the deduction contended for would amount to £24,363. *Rich* J. decided that the deduction claimed was in the nature of a loss or outgoing of capital and was therefore not allowable.

In this conclusion I agree.

The distinction between expenditure and outgoings on revenue account and on capital account corresponds with the distinction between the business entity, structure, or organization set up or established for the earning of profit and the process by which such an organization operates to obtain regular returns by means of regular outlay, the difference between the outlay and returns representing profit or loss. The business structure or entity or organization may assume any of an almost infinite variety of shapes and it may be difficult to comprehend under one description all the forms in which it may be manifested. In a trade or pursuit where little or no plant is required, it may be represented by no more than the intangible

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elements constituting what is commonly called goodwill, that is, widespread or general reputation, habitual patronage by clients or customers and an organized method of serving their needs. At the other extreme it may consist in a great aggregate of buildings, machinery and plant all assembled and systematized as the material means by which an organized body of men produce and distribute commodities or perform services. But in spite of the entirely different forms, material and immaterial, in which it may be expressed, such sources of income contain or consist in what has been called a "profit-yielding subject," the phrase of Lord *Blackburn* in *United Collieries Ltd.* v. *Inland Revenue Commissioners* (1). As general conceptions it may not be difficult to distinguish between the profit-yielding subject and the process of operating it. In the same way expenditure and outlay upon establishing, replacing and enlarging the profit-yielding subject may in a general way appear to be of a nature entirely different from the continual flow of working expenses which are or ought to be supplied continually out of the returns or revenue. The latter can be considered, estimated and determined only in relation to a period or interval of time, the former as at a point of time. For the one concerns the instrument for earning profits and the other the continuous process of its use or employment for that purpose. But the practical application of such general notions is another matter. The basal difficulty in applying them lies in the fact that the extent, condition and efficiency of the profit-yielding subject is often as much the product of the course of operations as it is of a clear and definable outlay of work or money by way of establishment, replacement or enlargement. In the case of machinery, plant and other material objects, this is illustrated by the commonplace difficulty of saying what is maintenance and what are renewals to be referred to capital. But for the same or a like reason it is even harder to maintain the distinction in relation to the intangible elements forming so important a part of many profit-yielding subjects. For example, a profitable enterprise such as the sale of a patent medicine may depend almost entirely on advertisement. In the beginning the goodwill may have been established by a great initial outlay upon a widespread advertising campaign

(1) (1930) S.C. 215, at p. 220; (1929) 12 Tax Cas. 1248, at p. 1254.

carried out upon a scale which it was not intended to maintain or repeat. The outlay might properly be considered to be of a capital nature. On the other hand the goodwill may have been gradually established by continual advertisement over a period of years growing in extent as it proved successful. In that case the expenditure upon advertising might be regarded as an ordinary business outgoing on account of revenue. More often than not an outlay of capital in establishing an organization or obtaining an asset of an intangible nature does not produce a permanent condition or advantage. Its effects are exhausted over a period of time. In such cases the commercial practice of writing off the expenditure against revenue over a term of years or making a reserve to replace exhausted capital lessens the importance of the contrast. But in the assessment of income for taxation purposes severe limitations are placed upon the application of such a practice, the allowance of which is exceptional.

In the attempt, by no means successful, to find some test or standard by the application of which expenditure or outgoings may be referred to capital account or to revenue account the courts have relied to some extent upon the difference between an outlay which is recurrent, repeated or continual and that which is final or made "once for all", and to a still greater extent upon a distinction to be discovered in the nature of the asset or advantage obtained by the outlay. If what is commonly understood as a fixed capital asset is acquired the question answers itself. But the distinction goes further. The result or purpose of the expenditure may be to bring into existence or procure some asset or advantage of a lasting character which will enure for the benefit of the organization or system or "profit-earning subject." It will thus be distinguished from the expenditure which should be recouped by circulating capital or by working capital.

"An asset or an advantage for the enduring benefit of a trade" is the phrase of Viscount *Cave*, a phrase which by constant use has become almost a formula. The elastic application which the expression should receive is illustrated from the facts in reference to which it was first used. For it was held to include the "lasting advantage of being in a position throughout its business life to secure and retain

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the services of a contented and efficient staff," which advantage a taxpayer company obtained by contributing the nucleus of a fund to pension its employees (*British Insulated and Helsby Cables Ltd.* v. *Atherton* (1)).

But the idea of recurrence and the idea of endurance or continuance over a duration of time both depend on degree and comparison. As to the first it has been said it is not a question of recurring every year or every accounting period ; but " the real test is between expenditure which is made to meet a continuous demand, as opposed to an expenditure which is made once for all " (per *Rowlatt* J., *Ounsworth* v. *Vickers Ltd.* (2)). By this I understand that the expenditure is to be considered of a revenue nature if its purpose brings it within the very wide class of things which in the aggregate form the constant demand which must be answered out of the returns of a trade or its circulating capital and that actual recurrence of the specific thing need not take place or be expected as likely. Thus, in *Anglo-Persian Oil Co. Ltd.* v. *Dale* (3) the establishment and reorganization of agencies formed part of the class of things making the continuous or constant demand for expenditure, but the given transaction was of a magnitude and precise description unlikely again to be encountered. Recurrence is not a test, it is no more than a consideration the weight of which depends upon the nature of the expenditure.

Again, the lasting character of the advantage is not necessarily a determining factor. In *John Smith & Son* v. *Moore* (4) the coal contracts which Lord *Haldane* and Lord *Sumner* thought were acquired at the expense of capital had a very short term. By reselling coal bought under the contracts the taxpayer made his profit. " But," said Lord *Haldane*, " he was able to do this simply because he had acquired, among other assets of his business, including the goodwill, the contracts in question. It was not by selling these contracts, of limited duration though they were, it was not by parting with them to other " (coal) " masters, but by retaining them, that he was able to employ his circulating capital in buying under them.

(1) (1926) A.C., at pp. 213, 214 ; 10 Tax Cas. 155, at pp. 192, 193.
(2) (1915) 3 K.B., at p. 273 ; 6 Tax Cas. 671, at p. 675.
(3) (1932) 1 K.B. 124 ; 16 Tax Cas. 253.
(4) (1921) 2 A.C. 13, at p. 20 ; 12 Tax Cas. 266, at pp. 282, 283.

I am accordingly of opinion that, although they may have been of short duration, they were none the less part of his fixed capital."

Again, the cases which distinguish between capital sums payable by instalments and periodical payments analogous to rent payable on revenue account illustrate the fact that rights and advantages of the same duration and nature may be the subject of recurrent payments which are referable to capital expenditure or income expenditure according to the true character of the consideration given, that is, whether on the one hand it is a capitalized sum payable by deferred instalments or on the other hire or rent accruing *de die in diem*, or at other intervals, for the use of the thing: Compare *Ogden* v. *Medway Cinemas Ltd.* (1) with *Inland Revenue Commissioners* v. *Adam* (2) and *Green* v. *Favourite Cinemas Ltd.* (3).

There are, I think, three matters to be considered, (*a*) the character of the advantage sought, and in this its lasting qualities may play a part, (*b*) the manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (*c*) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment.

The facts of the diversified but not very numerous cases collected in the notes to par. 325 of *Halbury's Laws of England*, 2nd ed., vol. 17, pp. 158-160, under income tax supply illustrations of the application of these considerations. A comparison is perhaps necessary with the cases or some of them collected under pars. 312 to 316.

The facts of the present case show the following features:— (i) The expenditure was of a large sum incurred to remove finally the competition feared from the *Star* and actually experienced from the *World*. (ii) It could be regarded as recurrent only in the sense that the risk of a competitor arising must always be theoretically present and that the reality or imminence of the risk depends upon circumstances which can never clearly be foreseen. (iii) The chief object of the expenditure was to preserve from immediate impairment and dislocation the existing business organization of the taxpayers.

(1) (1934) 18 Tax Cas. 691. (2) (1928) S.C. 738; 14 Tax Cas. 34.
(3) (1930) 15 Tax Cas. 390.

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(iv) The impairment or dislocation feared involved a lowering of selling price, a loss of circulation, a change in advertising rates and a reorganization of selling and production arrangements all of a lasting character; that is, the changes would be of indefinite duration and their effects would continue until they disappeared under influences brought by the future the exact nature of which could not be foreseen. (v) The transaction involved the acquisition for a cash consideration of the right to enjoy for three years all the property tangible and intangible of an existing undertaking, that is, the acquisition of a going concern for a period, a thing recognized as a capital asset. The advantage in terms of profit was not to be obtained by the use of the undertaking but by putting it out of use; but in itself it remained a capital asset.

In these circumstances I think that in principle the transaction must be regarded as strengthening and preserving the business organization or entity, the profit-yielding subject, and affecting the capital structure.

In point of authority the case nearest to it appears to me to be *Collins* v. *Joseph Adamson & Co.* (1). There the deduction claimed was a contribution paid to a fund for the purpose of purchasing a boilermaker's business in order to ensure that it was not carried on in contravention of the price-fixing arrangements of a trade association. The business was acquired by the association and closed up, and a covenant was obtained from the owner of the premises that they would not be used during the next twenty years for any similar business. *Lawrence* J. decided that the deduction ought not to be allowed, because it was a payment of a capital nature. He remarked that the test was not whether the payment could be shown to be productive, nor was a payment to be treated as a revenue item because what it produced was impalpable, intangible or incalculable, but the advantages obtained were sufficiently enduring because the competitive business ceased to exist and the premises were sterilized for twenty years.

In my opinion the expenditure, whether considered as an outgoing incurred by Sun Newspapers Ltd. or by Associated Newspapers Ltd., was of a capital nature.

(1) (1938) 1 K.B. 477; 21 Tax Cas. 400.

This conclusion makes it unnecessary to consider the contention that the obligation contracted by Associated Newspapers Ltd. could not be regarded as incurred in or for the production of its assessable income because its business was in effect to receive dividends; and that the payments made by Sun Newspapers Ltd. could not be regarded as incurred, laid out or expended in or for the production of the assessable income of that company because they were no more than disbursements conveniently made to discharge an unfortunate liability incurred by the company holding its shares.

It may be desirable to add that in the present case we are concerned with an intended outlay to secure a contemplated advantage or to prevent a known disadvantage accruing. It is not a case of a loss of money or of assets which spells no more than a bare depletion of wealth without the actual potential or speculative accrual of advantage. In allocating such losses to capital or income special difficulties arise.

In my opinion the appeals should be dismissed with costs.

McTiernan J. I agree that the appeal should be dismissed.

In my opinion the judgment of *Rich* J. was right and I agree with his reasons. I have had the opportunity of reading the reasons for judgment of the Chief Justice and *Dixon* J., and I agree with them. There is nothing which I wish to add except to quote a passage from the judgment of *Lawrence* J. in *Collins* v. *Joseph Adamson & Co.* (1), a case cited by *Rich* J. from the report in the *Times Law Reports* (2):—"From that case" (*Southwell* v. *Savill Brothers Ltd.* (3)) "I think it may be deduced that you cannot test the question whether the payment is properly a capital or a revenue payment by seeing whether it can be shown to be productive. Nor do I think that the argument of Mr. *King*, that what was produced by the expenditure in the present cases was impalpable or intangible or incalculable, is a sound argument for holding that it must be treated as of a revenue nature. In fact . . . the payments which were made had as a result the removal or the prevention of a trade competitor." In my opinion it may be

(1) (1938) 1 K.B., at p. 488. (2) (1937) 54 T.L.R. 64.
(3) (1901) 2 K.B. 349.

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said of the payment now in question, as *Lawrence* J. said of the payments in question in *Collins* v. *Joseph Adamson & Co.* (1), that it created for the taxpayer " advantages of an enduring nature, and, I think, of such an enduring nature as properly to be treated as capital, and not to be treated as revenue."

Appeals dismissed with costs.

Solicitors for the appellants, *Minter, Simpson & Co.*

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J. B.

(1) (1938) 1 K.B., at p. 488.