income was insufficient to pay the same. In the event of the income of the property charged proving insufficient, the inference is that the burden would fall upon the corpus without any right of reimbursement out of future income; for the corpus would be the source to which in the circumstances the annuitant would be entitled to look for payment.

So far as appears from the evidence contained in the only affidavit which was before *Virtue* J. in the present case, the annuities were not personal liabilities of the testator; they were payable primarily out of the income of the Jarramongup land and, in so far as that income was insufficient, out of that land itself. The income which the Jarramongup land, as distinguished from the grazing business conducted thereon, produced in the period covered by the annuity payments in question was obviously insufficient to meet those payments. In fact there was no such income, unless there should be attributed to Jarramongup some part of a sum of £500 which the executors received from the Government as for agistment of stock. According to the strict rights of the annuitants, therefore, the annuity payments fell to be made wholly, or almost wholly, out of the capital of Jarramongup; and if there is no countervailing consideration the reasoning of *In re Darby*; *Russell* v. *MacGregor*, (1), would lead to the conclusion that the testator should be taken to have intended that fact to determine the ultimate incidence of the payments as between his beneficiaries.

Counsel for the remaindermen supported a contrary contention by reference to the cases of *Honywood* v. *Honywood* (2); *In re Owen*; *Slater* v. *Owen* (3), and *In re Shee*; *Taylor* v. *Stoger* (4). These cases show that where the life tenant under a residuary estate accepts his life tenancy, and amongst the assets there is property involving the estate in a liability for current outgoings such as interest or rent, the life tenant is bound, as between himself and the remainderman, to keep down those outgoings out of the whole of the income produced by the entire residue throughout the period of his life tenancy. The principle gives effect to the presumed intention of the settlor as to the manner of ascertaining from time to time what the gift of income entitles the life tenant to receive; it depends for its application upon the fact that the interests given are interests in the entirety of an aggregation of assets and must be accepted as a whole or rejected as a whole. It has to do with outgoings which the estate as a whole is liable to meet, but against which, by reason of their nature, the settlor must be taken to have intended

(1) (1939) Ch. 905.
(2) (1902) 1 Ch. 347.
(3) (1912) 1 Ch. 519.
(4) (1934) Ch. 345.

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that the corpus shall be exonerated by the income. It cannot apply in a case like the present. Since an inference arises from the will that the testator intended the annuity to be borne in accordance with the right of the annuitants as to the source from which the annuities are to be paid, the relative positions of life tenant and remainderman must be the same as if the annuities had been given by the will itself, and had been charged thereby upon the income and corpus of the property. On that basis in such a case the proper method of dealing with the matter is to treat the annuities as payable annually, and, as at the end of each annuity year, to treat the available income (if any) of the Jarramongup property (as distinguished from the business) as applied in paying the annuity due in respect of that year, and to make good any deficiency out of corpus. The deficiency thus taken out of corpus cannot be recouped out of the income of a subsequent year: *In re Croxon*; *Ferrers* v. *Croxon* (1); *In re Lord Westbury's Settlement*; *Westmacott* v. *Bethell* (2).

So far the question has been considered on the evidence contained in the only affidavit filed. We were informed by counsel, however, that facts are provable which would place a different complexion on this part of the case. It was said that the trustees of the estate of the testator's father transferred to the testator the land comprised in the Jarramongup property, and that he executed and caused to be registered memoranda of charge pursuant to ss. 105 and 106 of the *Transfer of Land Act* 1893-1950 (W.A.), to secure the payment of the annuities. If this be so, the annuities may well have become personal liabilities of the testator. For one thing, the registration of the memoranda of charge may have given the annuities the effect of rent-charges at common law (see per *Griffith* C.J. in *Mahoney* v. *Hosken* (3); and, if so, the testator in his lifetime and his executors after his death would no doubt be liable to an action for each annuity payment as it fell due: *Thomas* v. *Sylvester* (4); *Searle* v. *Cooke* (5); *Public Trustee* v. *Scarr* (6). Again, the memoranda of charge may have contained express covenants for payment of the annuities. If, for either of these reasons, personal liability existed, the rule in *Allhusen* v. *Whittell* (7) would require an apportionment of the amounts paid as between income and capital: *Halsbury, Laws of England*, 2nd ed., vol. 28, p. 222, par. 399. But the evidence before the Supreme Court did not include the facts necessary to raise these considerations, and

(1) (1915) 2 Ch. 290.
(2) (1944) Ch. 4.
(3) (1912) 14 C.L.R. 379, at p. 384.
(4) (1873) L.R. 8 Q.B. 368.
(5) (1890) 43 Ch. D. 519, at p. 532.
(6) (1939) 1 All E.R. 188.
(7) (1867) L.R. 4 Eq. 295.

fresh evidence cannot be admitted on this appeal. It was suggested at the hearing that, in the event of the appellant succeeding on Question 1, Question 2 might become academic. The answer given to Question 2 in the order appealed from must be set aside, but it is desirable in the circumstances, instead of answering that question at the present stage, to remit the action to the Supreme Court for further consideration of the question upon such evidence as may be adduced.

The costs of all parties of this appeal, as between solicitor and client, will be paid out of the testator's estate.

Appeal allowed.

So much of the order of the Supreme Court as answers the first and second questions in the originating summons discharged.

In lieu of the answer to the first question order that such question be answered as to part (a) yes, subject to all proper deductions and as to part (b) that the same does not arise.

Remit the originating summons to the Supreme Court for further consideration of the second question on such evidence as may be adduced.

Costs of all parties of this appeal, as between solicitor and client, to be paid out of the testator's estate.

Solicitors for the appellant, *Robinson, Cox & Co.*

Solicitors for the respondents, *Lavan & Walsh*; *Boultbee Godfrey & Virtue.*

F. T. P. B.

[HIGH COURT OF AUSTRALIA.]

ARDMONA FRUIT PRODUCTS CO-OPERATIVE COMPANY LIMITED . . } APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

H. C. OF A. 1952.

MELBOURNE, *June* 5, 6.

SYDNEY, *Aug.* 1.

Dixon C.J., McTiernan, Williams, Webb and Kitto JJ.

Income Tax (Cth.)—Co-operative company—Deduction—Assessable income applied for or towards repayment of government loan—"Applied"—Income Tax Assessment Act 1936-1947 (*No.* 27 *of* 1936—*No.* 63 *of* 1947), *s.* 120 (1) (*c*).

A. was a co-operative company which, by virtue of s. 120 (1) (*c*) of the *Income Tax Assessment Act* 1936-1947, was entitled to a deduction of so much of its assessable income as was "applied by the company for or towards the repayment of any moneys loaned by the Commonwealth or a State" for the purpose of enabling the company to acquire assets required for carrying on its business. It had obtained a loan of £60,000 from the Government of Victoria for this purpose. At a meeting of directors of the company on 25th November 1947 it was resolved "that £38,000 be applied from profits towards repayment of existing loan". The directors' report and the balance sheet of the company for the year ending 31st October 1947, which was the accounting period adopted by the company, both for taxation and other purposes, were submitted to shareholders on 5th January 1948, and stated that the sum of £38,000 had been so applied. The balance sheet was duly adopted. In fact, only £22,000 had been actually paid during the year ending 31st October 1947. The balance of £16,000 was paid in the following year of income.

Held, that assessable income is not "applied" within the meaning of s. 120 (1) (*c*) unless the debt is in some way discharged or reduced; and, accordingly, the sum of £16,000 was not deductible from the assessable income for the year ending 31st October 1947.

CASE STATED.

Ardmona Fruit Products Co-operative Company Limited, a company incorporated in the State of Victoria, was at all relevant times a co-operative company within the terms of ss. 117 and 118 of the *Income Tax Assessment Act* 1936-1947. Between the months

of July 1944 and January 1945 the sum of £60,000 secured by an indenture dated 21st November 1944, was lent to the company by the Government of the State of Victoria to enable the company to acquire assets for the purpose of carrying on its business. At the beginning of the year 1947 the balance owing under this loan was £38,000. A further payment of £22,000 was made on 29th September 1947, and the remaining £16,000 was paid in September and October 1948.

The accounting period adopted by the company for the purpose of taxation was the year ending on 31st October. The company, in its return of income for the year ending 31st October 1947, claimed as a deduction the sum of £38,000, as being money applied by it for or towards the repayment of moneys loaned to it by the Government of the State of Victoria, within the meaning of s. 120 (1) (*c*) of the *Income Tax Assessment Act* 1936-1947. In assessing the income tax payable by the company in respect of income derived during this year, the Commissioner of Taxation treated only £22,000 as a proper deduction, disallowing the £16,000.

On 18th May 1948 the company lodged an objection, and, this having been disallowed, requested the Commissioner of Taxation to treat its objection as an appeal and to forward it to the High Court of Australia.

The appeal was heard before *Dixon* J., who, on 22nd March 1952, stated a case for the opinion of the Full Court of the High Court of Australia.

The relevant portions of the case, which should be read with the facts outlined above, are as follows :—

8. At a meeting of directors of the appellant company on 25th November 1947, it was resolved " that £38,000 be applied from profits towards repayment of existing loan ".

9. At the annual meeting of the appellant company held on 5th January 1948 the balance sheet and the directors' report for the financial year ending 31st October 1947 were submitted to the shareholders of the appellant company, and the balance sheet was duly adopted.

10. The balance sheet contained the following item of account on the liabilities side :—" Profits applied in repayment of Government Loan expended on Fixed Assets and which accordingly are in the nature of a reserve of the book value of such assets . . . £60,000 ".

11. The directors' report stated :—" Of the amount earned for the year, viz., £51,617 the sum of £38,000 has been applied towards

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repayment of the Victorian Government Loan granted in 1944. This amount has been charged in the Appropriation Account ".

12. The profit and loss appropriation account attached to the balance sheet shows a deduction from the net profit for the year ending 31st October 1947 of the sum of £38,000 being " Amount applied for and towards repayment of Government Loan ".

22. The following questions of law which have arisen on this appeal are submitted for the opinion of the Full Court, viz :— (a) Whether the matters referred to in pars. 8-12 inclusive of this case constituted, in respect of the sum of £16,000, an application for or towards the re-payment of moneys loaned to the company within the meaning of s. 120 (1) (*c*) of the *Income Tax Assessment Act* 1936-1947. (b) Whether the said sum of £16,000 or any part thereof should have been allowed as a deduction in the said assessment of the appellant company's liability to income tax in respect of its income for the year ending 31st October 1947.

The argument sufficiently appears from the judgment hereunder.

R. M. Eggleston Q.C. and *S. T. Frost*, for the appellant.

A. D. G. Adam Q.C. and *C. I. Menhennitt*, for the respondent.

Cur. adv. vult.

Aug. 1.

THE COURT delivered the following written judgment :—

The appellant is a co-operative company which is entitled to claim as an allowable deduction under s. 120 (1) (*c*) of the *Income Tax Assessment Act* 1936-1947 so much of its assessable income as is applied for or towards the repayment of any moneys loaned to the company by the Government of the Commonwealth or a State to enable the company to acquire assets which are required for the purpose of carrying on its business. It obtained a loan from the Government of Victoria for this purpose.

Pursuant to s. 18 of the Act the appellant, with the leave of the respondent, has adopted as an accounting period a year of income ending on 31st October instead of 30th June in each year. On 25th November 1947 its board of directors resolved that £38,000 be applied from profits towards repayment of this loan. At the annual meeting held on 5th January 1948, the balance sheet and directors' report for the year ending 31st October 1947 were submitted to the shareholders and adopted. The report stated that of the amount earned for the year, £51,617, the sum of £38,000 had been applied towards repayment of the loan. The profit and