APP. 9. ALR. 76.
DICTUM pp. 447, 454. APP. 15 ALR. 324.

FOLL. 16 ALR. 681.
FOLL 31. FLR. 336.
DIST. 53. ALJR. 321.
DIST. 142. CLR. 142.

[HIGH COURT OF AUSTRALIA.]

THE COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LIMITED . . . } APPELLANT;

AND

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

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MELBOURNE, *June* 9, 10; *Oct.* 13.

Williams A.C.J., Webb, Fullagar, Kitto and Taylor JJ.

Income Tax (Cth.)—Assessment—Capital or income—Deduction—Outgoings (not being of capital or of capital nature) incurred in gaining or producing assessable income or necessarily incurred in carrying on business for the purpose of gaining or producing such income—Transfer of land—Consideration—Payment to transferor for period of years of percentage of rents actually received by transferee from building erected on transferred land and other land—Outgoing of capital nature—Income Tax Assessment Act 1936-1943 (*No.* 27 *of* 1936—*No.* 10 *of* 1943), *s.* 51 (1).

J. Brothers agreed to transfer to a life assurance company a piece of land adjoining land owned by the company, in consideration of a promise by the company to pay to them, for a period of fifty years, an amount equal to ninety per cent of all rents, as and when received, from lessees or tenants of three shops and a basement in a new building to be erected on both the blocks of land. The building having been erected, ninety-three per cent of it was let to tenants and the remaining seven per cent was occupied by the company itself. In the accounting period ended 31st December 1942, the rents received by the company in respect of the three shops and basement amounted to £1,314 and the company duly paid to J. Brothers ninety per cent of this sum, viz., £1,183. In its income tax return for the year ended 31st December 1942 the company included the sum of £1,314 in its assessable income, and claimed as an allowable deduction under s. 51 (1) of the *Income Tax Assessment Act* 1936-1943 ninety-three per cent of the sum of £1,183, viz., £1,100. The Commissioner of Taxation disallowed the claim.

Held, that the sum of £1,100 was an outgoing of a capital nature, and, accordingly, was not deductible under s. 51 (1) of the *Income Tax Assessment Act* 1936-1943.

Egerton-Warburton v. *Deputy Federal Commissioner of Taxation* (1934) 51 C.L.R. 568 explained and distinguished.

CASE STATED.

Upon an appeal by the Colonial Mutual Life Assurance Society Limited from a decision of a board of review confirming an amended assessment by the Commissioner of Taxation under the *Income Tax Assessment Act* 1936-1943 for the income year ended 31st December 1942, *Fullagar* J. at the request of the parties and pursuant to s. 18 of the *Judiciary Act* 1903-1950, stated for the opinion of a Full Court of the High Court a case which was substantially as follows:—(1) Prior to 16th February 1934 William Just and Herbert Fritz Just (hereinafter referred to as Just Brothers) were the registered proprietors under the *Real Property Acts* of South Australia of certain land having a frontage of nineteen feet eight and one-half inches to King William Street, Adelaide, the northern boundary of which adjoined certain land already owned by the appellant, also having a frontage to King William Street, Adelaide. A company named Turners Limited was in occupation of a shop on the appellant's land under a lease from the appellant. (2) The appellant was desirous of acquiring the said land of Just Brothers to enable it to erect a modern city building on land comprising both that already owned by it and that to be acquired from Just Brothers. The building would thus have a frontage of one hundred and one feet one inch to King William Street, and was to provide the appellant with office accommodation for the carrying on of its business and a substantial part of the building was to provide, for renting to tenants, basement space, shops and approximately 120 offices or professional rooms. (3) By an agreement dated 16th February 1934 made between the appellant (thereinafter called the company) of the first part Just Brothers (thereinafter called the vendors) of the second part and Turners Limited of the third part the parties covenanted each with the other to the following effect: (i) In consideration of the premises the vendors will forthwith execute to the company free from all encumbrances a transfer registrable under the provisions of the *Real Property Act* 1886-1929 (S.A.) of the whole of the land comprised and described in Certificate of Title Register Book Volume 1266 Folio 196 being part Town Acre 78 together with a right of way and the use of the northern half of the party wall as set out in the said certificate of title subject to the right to the proprietor of the land adjoining on the north to the use of the southern half of the said party wall. (ii) The said transfer together with the said certificate of title shall be deposited with the English Scottish and Australian Bank Limited King William Street Adelaide to be held in escrow until the completion of the three shops and basement hereinafter

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mentioned in the manner hereinafter provided and upon the certificate of the respective architects of the company and the vendor that the said three shops and basement have been so completed or in the event of any dispute or difference upon the award of the arbitrator as hereinafter provided the said transfer and certificate of title shall be delivered to the company which shall then be at liberty to register the said transfer and become the registered proprietor of the land comprised in and described in the said certificate of title. Contemporaneously with the delivery to the company of the said transfer and certificate of title the company shall deliver to the vendors a rent charge over the rents of the said shops and basement in the form hereunto annexed subject to any alterations required to make the said rent charge registrable under the provisions of the *Real Property Act* 1886. (iii) All rates and taxes and other outgoings whatever payable in respect of the said land shall be adjusted to 30th June 1934. (iv) Possession of the said land and premises shall be given forthwith by the vendors to the company and the company shall be at liberty at any time hereafter to enter upon the said land and premises with workmen and others and to pull down and remove all existing buildings and erections now on the said land and the material and debris thereof and to proceed with the erection of the building and premises hereinafter mentioned and for that purpose the company shall be deemed to be the absolute owners of an estate in fee simple in the said land and the company will indemnify and save harmless the vendors from all actions claims proceedings and demands in respect of anything done by the company pursuant to the provisions of this paragraph hereof. (v) The company shall forthwith commence and at its own cost with all reasonable speed erect and complete upon that piece of land comprising the land hereinbefore described and all that piece of land situated at the corner of Hindley and King William Streets being portion of Town Acre 78 and being the whole of the land comprised and described in Certificate of Title Register Book Volume 1266 Folio 197 the building depicted and described in the plans elevations sections and specifications approved by the company and deposited with the City Engineer of the Corporation of the City of Adelaide and in conformity in every respect with such plans elevations sections and specifications subject however to such alterations modifications and additions thereto which shall be made or approved by the company's architect. (vi) Notwithstanding the provisions of the last preceding paragraph hereof no alterations or modifications shall be made to the plans or specifications of that portion of the said building which comprises the three shops and

basement hereinafter mentioned or the fittings and equipment thereof or the arcade surrounding the said three shops without the consent of the vendors or their architect and the said three shops and basement shall be built constructed and fitted and completed in all respects as provided in the plan and specifications annexed hereto subject however to such alterations as may be required by the City Engineer or other competent authority and if any dispute or difference shall arise between the company or its architect and the vendors or their architect as to whether the said shop and basement are so built constructed fitted and completed such dispute or difference shall be referred to the arbitration of the President for the time being of the Institute of Architects in Adelaide whose award shall be final and binding on all parties hereto. These presents shall be deemed a submission under the provisions of the *Arbitration Act* 1891-1921 (S.A.) and the provisions of these Acts shall apply. (vii) The said three shops and basement beneath the same shall be situated on the corner of King William and Hindley Streets and the said shops shall have a frontage to King William Street Adelaide aforesaid of thirty-seven feet or thereabouts and a frontage to Hindley Street Adelaide aforesaid of eighteen feet six inches or thereabouts. (viii) The company will use its best endeavours to lease or let the said shops and basement to reputable tenants from 1st January 1935 at the best rental obtainable provided however that the company may refuse to let or lease any of the said shops or the said basement to any tenant whose business would be in conflict or competition with any other tenant on the ground floor or basement of the same building or in conflict or in the opinion of the company in any way detrimental to its interest or reputation. (ix) The company will use its best endeavours to collect all rents of the said shops and basement but shall not be responsible for non-payment of rent by any tenant or lessee. (x) The company shall during the period of fifty years from 1st January 1935 or such extended term as set out in par. (xi) hereof pay to the vendors an amount equal to ninety per centum of all rents as and when received from lessees or tenants of the said three shops and basement. (xi) If the said shops and basement shall not be completed by 1st January 1935 the said term of fifty years shall be extended for a period equal to a period from 1st January 1935 to the date of completion of the said shops and basement in accordance with par. (ii) hereof. (xii) The company shall as from 1st January 1935 render to the vendors true and correct accounts at the end of each calendar month of all rents collected and shall at the same time pay to the vendors the amount shown to be due on such accounts

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and no deduction on such accounts shall be made by the company in respect of any contra account or set off claimed by any tenant or lessee against the company and the term "rents collected" shall be deemed to include the amount of any such contra account or set off. (xiii) The company shall have full control of the leasing and letting of the said shops and basement provided that no lease for a longer term than five years shall be granted without the consent in writing of the vendors. (xiv) In the event of the total or partial destruction by fire of the said shops and basement the company will rebuild or reinstate or cause to be rebuilt or reinstated the same within a reasonable time after such destruction and restored to the like good order and condition as at the time of such destruction. (xv) Turners Limited hereby agree to vacate within three weeks from the date hereof the butchers' or meat purveyors' shop now occupied by that company in King William Street, Adelaide aforesaid and give possession thereof to the company and upon such possession being given the lease under which the premises are now occupied shall thereupon be determined and Turners Limited shall be released from all obligations thereunder except payment of rent to the date of vacation of the said shop. (xvi) It is agreed that the agreement or alleged agreement the terms or some of the terms of which are contained in a letter dated 17th October 1933 addressed to Messrs. Turners Limited and signed "C. B. Hearn Acting Manager" is hereby rescinded and cancelled. (xvii) The plaintiffs will forthwith wholly discontinue action in the Supreme Court of South Australia No. 20 of 1934 wherein the parties hereto of the second and third parts are plaintiffs and the company is the defendant on the terms that no further action shall be brought in respect of the matters contained in the indorsement of the writ in the said action and that each party shall bear and pay its own costs. (xviii) The parties hereto shall execute such assurances as may be necessary to give full effect to this agreement. (4) In pursuance of the said agreement the appellant on 16th February 1934 executed in favour of the Just Brothers an instrument in the following terms: Whereas by memorandum of agreement bearing date 16th February 1934 and made between The Colonial Mutual Life Assurance Society Limited of the first part William Just and Herbert Fritz Just of the second part and Turners Limited of the third part the parties thereto of the second part have agreed to transfer to the party thereto of the first part the whole of the land comprised and described in Certificate of Title Register Book Volume 1266 Folio 196 in consideration of the payment by the party hereto of the first part to the parties hereto

of the second part of a sum equal to ninety per cent of the whole amount of the rents received by the party of the first part during the period of fifty years from 1st January 1935 in respect of three shops and basement erected on portion of the land (land described by reference to plan) and being portion of the land comprised and described in Certificate of Title Register Book Volume 1266 Folio 197 and whereas it was agreed by and between the parties to the said recited agreement that the payment of the said consideration should be secured by the Colonial Mutual Life Assurance Society Limited granting to William Just and Herbert Fritz Just a rent charge over the said land (land described by reference to plan). Now know ye therefore that the Colonial Mutual Life Assurance Society Limited whose registered office is at 316 Collins Street Melbourne in the State of Victoria which with its successors and assigns is hereinafter referred to as the grantor being registered as the proprietor of an estate in fee simple in the whole of the land (land described by reference to plan) being portion of the land comprised and described in Certificate of Title Register Book Volume 1266 Folio 197 which said piece of land is hereinafter referred to as " the said land " in consideration of the transfer by William Just and Herbert Fritz Just of Adelaide Master Butchers to the Colonial Mutual Life Assurance Society Limited of the whole of the land comprised in Certificate of Title Register Book Volume 1266 Folio 196 and the grantor desiring to render the said land available for the purpose of securing to and for the benefit of William Just and Herbert Fritz Just who with their respective successors administrators and assigns are hereinafter referred to as " the chargees " the rent charge hereinafter mentioned doth hereby encumber the said land for the benefit of the chargees as tenants in common with a rent charge to be issuing and payable out of the three shops and basement on the said land which said rent charge is to be for the amount and shall be raised and paid in the manner and be subject to the terms and conditions hereinafter set out that is to say :—(i) The said rent charge shall be for a period of fifty years from 1st January 1935 and shall be for an amount equal to ninety per centum of the whole of the amount of rent to be received by or on behalf of the said grantor in each year during the said period of fifty years in respect of the three shops and basement erected on the said land free and clear from all deductions and abatements whatsoever. Any contra account or set off claimed by a tenant or lessee and allowed by the grantor shall be deemed to be included in the term " rents received " and be included in the amount payable to the chargees. (ii) The

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said amount shall be paid to the chargees on the first day of every month during the continuance of this security the first of such payments if any rents have then been received to be made on 1st February 1935 and the receipt of one of the chargees for the amount payable hereunder shall be a complete discharge to the grantor. (iii) The grantor will at all times keep the premises erected on the said land in good order and condition fair wear and tear excepted and will not make any alteration or addition thereto which may result in a diminution of the rental receivable therefrom without first obtaining the written consent of the chargees. (iv) The grantor will during the continuance of this security punctually pay as and when they have respectively become due all rates and taxes charges and impositions which shall be or become payable in respect of the whole or any part of the said land and premises provided that in default of payment of the whole or any part of such rates taxes charges and impositions by the grantor it shall be lawful for but not obligatory upon the chargees to pay such rates taxes charges and impositions and the grantor will on demand repay to the chargees all moneys which shall be so paid by the chargees with interest at the rate of five per cent per annum computed from the respective date or dates of payment until the respective days of repayment thereof. (v) The grantor will at all times use its best endeavours to lease or let the said shops and basement to reputable tenants from 1st January 1935 at the best rent obtainable provided however that the company may refuse to let or lease any of the said shops or the said basement to any tenant whose business would be in conflict or competition with any other tenant on the ground floor or basement of the said building or in the opinion of the company in any way detrimental to its interest or reputation. (vi) The grantor shall have full control of the leasing and letting of the said shops and basement provided that no lease for a longer term than five years shall be granted without the consent in writing of the chargees. (vii) The said grantor in the event of the premises on the said land being destroyed or damaged by fire will rebuild or reinstate within reasonable time after such destruction or damage the said premises in like good order and condition as at the time of the said destruction or damage or in such manner as the parties may then agree upon and subject as aforesaid the said chargees shall be entitled to all powers and remedies given to an encumbrance by the *Real Property Act* 1886. (5) The land referred to in the agreement mentioned in par. (3) hereof was duly transferred by Just Brothers to the appellant. On the instrument of transfer of the said land stamp duty under the *Stamp Duties Acts* (S.A.)

was paid as upon a consideration of £17,500. (6) The building referred to in the said agreement was duly erected by the appellant on the said land, and the shops and basement therein referred to were let by the appellant to tenants. Other parts of the said building were let to other tenants who paid rents in respect thereof. The appellant from time to time in accordance with the agreement paid to Just Brothers amounts equal to ninety per cent of the rents received by it in respect of the said shops and basement. (7) The accounting period of the appellant for the purposes of the *Income Tax Assessment Act* is the calendar year. In the accounting period ended 31st December 1942 the rents received by the appellant in respect of the said shops and basement amounted to £1,314. In the same period the appellant paid to Just Brothers the sum of £1,183, being an amount equal to ninety per cent of £1,314. (8) The appellant lodged with the Commissioner of Taxation a return of income derived by it in the accounting period ended 31st December 1942. The said return accurately set forth such particulars of income as were required by the *Income Tax Assessment Act* 1936-1943. (9) In its said return the appellant (a) included in the total amount of rents received by it the sum of £1,314, being the amount of rent received by it in respect of the said shops and basement, and (b) included, as a deduction, under the head of "property expenditure" in respect of the property in King William Street, Adelaide, a sum of £1,100, being an amount equal to ninety-three per cent of the sum of £1,183, which had been paid to Just Brothers. The reason why no more than ninety-three per cent of the total amount paid to Just Brothers was so included was that ninety-three per cent of the building erected on the said land was let to tenants, the remaining seven per cent being occupied by the appellant itself. The balance of £83 was brought into account for the purpose of ascertaining the amount of the deduction allowable to the appellant under s. 113 of the *Income Tax Assessment Act*. (10) By notice of assessment dated 2nd May 1944 the commissioner assessed the appellant to income tax upon a taxable income of £367,212. In this assessment a sum of £57,807, which included the said sum of £1,100, was allowed as a deduction under the head of "property expenditure". (11) By notice of amended assessment dated 11th August 1949 the commissioner assessed the appellant to income tax upon a taxable income of £354,918. By the said notice of amended assessment the commissioner disallowed as a deduction the said sum of £1,100 paid by the appellant to Just Brothers in the relevant year, reducing by that amount the sum of £57,807 mentioned in par. (10) hereof. (12) By notice of objection

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dated 7th October 1949 the appellant objected to the said assessment upon the following grounds :—" The amount of £1,100, representing ninety-three per cent of the amount of £1,182 13s. 6d., paid to W. & H. F. Just during the year ended 31st December, 1942 represents moneys received by the Society as trustee for Just Bros. and should not be assessed as gross rents received by the Society, or alternatively, should be allowed as a deduction from the assessable income ". (13) By notice dated 1st August 1950 the commissioner disallowed the said objections. (14) By notice dated 18th August 1950 the appellant requested that the commissioner's decision be referred to a board of review. The said decision was so referred. By a majority decision given on 4th April 1952 the board of review decided not to uphold the appellant's claim and confirmed the amended assessment.

At the request of the parties and pursuant to s. 18 of the *Judiciary Act* 1903-1950, I state this case for the opinion of a Full Court upon the following question of law arising in the appeal :—"Whether the said sum of £1,100 is an allowable deduction from the assessable income derived by the appellant in the accounting period ended 31st December 1942 ".

Dr. *E. G. Coppel* Q.C. (with him *A. H. Mann*), for the appellant. The instrument in question here is governed by the *Real Property Act* 1886-1945 (S.A.). The relevant sections of that Act are ss. 130a, 132, 133, 137, 138. In the present case the argument which would make the charge an outgoing of a capital nature is that it is the consideration for the purchase of land which is a capital asset. But some types of expenditure are deductible under s. 51 (1), even though they are made to secure a capital asset. [He referred to *Texas Co. (Australasia) Ltd.* v. *Federal Commissioner of Taxation*, per *Dixon* J. (1) ; *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation*, per *Dixon* J. (2) ; *Ogden (H.M. Inspector of Taxes)* v. *Medway Cinemas Ltd.* (3).] The agreement between Just Brothers and the appellant contains no purchase price. Just Brothers bargained to have, not a capital sum, but an income for fifty years. See *Just* v. *Commissioner of Taxation* (4). The present case is governed by the decision in *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (5). The only difference between that case and the present is that there the annuity was charged on the whole of the land in question whereas here the security is

(1) (1940) 63 C.L.R. 382, at p. 468.
(2) (1938) 61 C.L.R. 337, at p. 361.
(3) (1934) 18 Tax Cas. 691.
(4) (1949) A.L.R. 438, at p. 440.
(5) (1934) 51 C.L.R. 568, at pp. 575, et seq.

not the land in question but a portion of the adjoining land. But, on its reasoning, that case cannot be distinguished from the present.

J. B. Tait Q.C. (with him *B. J. Dunn*), for the respondent. The payment was not a loss or outgoing incurred in gaining assessable income. The purpose of the payments was to gain the use or rents of the land formerly belonging to Just Brothers. The amount of the payment was determined by the rents produced by three shops and a basement, none of which had belonged to the Just Brothers. In no sense was the expenditure incurred in producing the rents of the three shops and basement. And it was not incurred in producing assessable income from the land formerly owned by the Just Brothers. The payments were for the freehold of the land, and they do not lose their capital nature merely because they are not paid in one lump sum. There is a distinction between acquiring an income-producing asset, which is the case here, and outgoings incurred in the course of using that asset to produce income. [He referred to *Tata Hydro-Electric Agencies Ltd., Bombay* v. *Commissioner of Income Tax, Bombay Presidency and Aden* (1); *Hallstroms Pty. Ltd.* v. *Federal Commissioner of Taxation*, per *Dixon* J. (2); *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation*, per *Latham* C.J. (3), per *Dixon* J. (4).] The payments were not for the use of the premises but for the freehold. The criterion to be applied is the purpose of the payment. [He referred to *Ronpibon Tin (N.L.)* v. *Federal Commissioner of Taxation* (5); *Robert Addie & Sons' Collieries Ltd.* v. *Commissioners of Inland Revenue*, per *Lord Clyde* (6); *British Insulated & Helsby Cables Ltd.* v. *Atherton*, per *Viscount Cave* L.C. (7); *Anglo-Persian Oil Co. Ltd.* v. *Dale (Inspector of Taxes)*, per *Lawrence* L.J. (8); *Broken Hill Theatres Pty. Ltd.* v. *Federal Commissioner of Taxation*, per *Williams* J. (9).] The fact that there is no sum fixed as the purchase price of the land is immaterial. It was formerly thought that payment of instalments over a period could only be treated as capital if there was a fixed sum payable by instalments. [He referred to *Chadwick* v. *Pearl Life Insurance Co.* (10).] But it is now well established that the fact that a total sum is not fixed cannot alter what is otherwise the characterization of the payment.

(1) (1937) A.C. 685, at p. 694.
(2) (1946) 72 C.L.R. 634, at pp. 646, et seq.
(3) (1938) 61 C.L.R., at pp. 354-355.
(4) (1938) 61 C.L.R., at pp. 459, et seq.
(5) (1949) 78 C.L.R. 47, at pp. 56, et seq.
(6) (1924) S.C. 231, at p. 235.
(7) (1926) A.C. 205, at p. 213.
(8) (1932) 1 K.B. 124, at p. 141.
(9) (1952) 85 C.L.R. 423, at p. 430.
(10) (1905) 2 K.B. 507, at p. 514.

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See *Dott* v. *Brown* (1); *Inland Revenue Commissioners* v. *Ramsay* (2); *Inland Revenue Commissioners* v. *Ledgard* (3). *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (4) is distinguishable from the present case for the following reasons: (a) The annuity was charged on the very property transferred. In the present case the Just Brothers were only entitled to a sum determined by the rent actually received by the appellant from property other than the property transferred. Under the document of "rent charge", on default by the appellant, Just Brothers could not enter into possession of future rents, because, unless the rents had been actually received by the appellant, nothing was owing to them. (b) On the evidence, there was no connection between the value of the property actually transferred and the amount of the annuity. In the present case, the payments to the Just Brothers, really amount to the purchase price of the land. We do not contend that *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (4) is other than rightly decided but, having regard to *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (5) and *Tata Hydro-Electric Agencies Ltd., Bombay* v. *Commissioner of Income Tax, Bombay Presidency and Aden* (6), it should be strictly confined to its own facts, which are not those of the present case. [He referred to *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (7); *Federal Commissioner of Taxation* v. *Munro* (8); *O'Shea* v. *Commissioner of Taxes for Victoria* (9); *Calvert* v. *Commissioner of Taxes for Victoria* (10); *Moffatt* v. *Webb* (*Commissioner of Taxes*) (11).] *Just* v. *Commissioner of Taxation* (12) is of no help either way in deciding the question raised by this case. *Texas Co.* (*Australasia*) *Ltd.* v. *Federal Commissioner of Taxation*; *Federal Commissioner of Taxation* v. *Texas Co.* (*Australasia*) *Ltd.* (13) was not on its facts a case of expenditure being deductible under s. 51 (1) to secure a capital asset. On the distinction between payments of a capital nature and payments of an income nature in this regard see *Legge* v. *Flettons Ltd.* (14); *Grant* v. *Commissioner of Taxes* (15); *Bern* v. *Commissioner of Taxes* (16).

Dr. *E. G. Coppel* Q.C., in reply. *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (4) is correctly decided and cannot

(1) (1936) 1 All E.R. 543.
(2) (1936) 154 L.T. 141.
(3) (1937) 2 All E.R. 492.
(4) (1934) 51 C.L.R. 568.
(5) (1938) 61 C.L.R. 337.
(6) (1937) A.C. 685.
(7) (1934) 51 C.L.R., at pp. 572, 573, 574, 576.
(8) (1926) 38 C.L.R. 153.
(9) (1927) 39 C.L.R. 313.
(10) (1927) 40 C.L.R. 142.
(11) (1913) 16 C.L.R. 120.
(12) (1949) A.L.R. 438.
(13) (1940) 63 C.L.R. 382.
(14) (1939) 3 All E.R. 220.
(15) (1948) N.Z.L.R. 871, at p. 878.
(16) (1950) N.Z.L.R. 632, at p. 634.

be distinguished from the present case. [He referred to *Amalgamated Zinc (De Bavay's) Ltd.* v. *Federal Commissioner of Taxation* (1); *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (2); In *Re Income Tax Acts* (3); *Calvert* v. *Commissioner of Taxes for Victoria* (4).]

Cur. adv. vult.

The following written judgments were delivered :—

WILLIAMS A.C.J. This is a case stated by *Fullagar* J. in an appeal from a decision of a board of review under the provisions of the *Income Tax Assessment Act* 1936-1943. The case submits a single question, whether a sum of £1,100 is an allowable deduction from the assessable income derived by the appellant in the accounting period ended 31st December 1942.

The sum referred to was part of an amount of £1,183 paid by the appellant in the accounting period to William Just and Herbert Fritz Just, called in the case the Just Brothers. The payment was made in accordance with the terms of two documents, an agreement entered into on 16th February 1934 between the appellant, the Just Brothers and a company called Turners Limited, and an instrument of encumbrance executed by the appellant in pursuance of the agreement. The appellant bases its claim to have the £1,100 treated as an allowable deduction upon s. 51 (1) of the *Income Tax Assessment Act*, contending that that is the proportion of the £1,183 which should be held to have been incurred in gaining or producing the appellant's assessable income and not to have been an outgoing of capital or of a capital nature, or incurred in relation to the gaining or production of exempt income.

The appellant is a life assurance company. At the time of the agreement of 16th February 1934 it owned a block of land in Adelaide, situated at the corner of King William Street which bounded it on the east, and Hindley Street which bounded it on the north. It desired to erect a modern building occupying not only its own block but also a block owned by the Just Brothers which adjoined it on the south. The new building was intended to provide the appellant with office accommodation for the carrying on of its business, and also, as to a substantial part of it, to provide, for renting to tenants, basement space, shops and approximately 120 offices or professional rooms. Turners Limited was in occupation of a shop on the appellant's land under a lease, and of course that lease had to be got rid of before the

(1) (1935) 54 C.L.R. 295.
(2) (1937) 56 C.L.R. 290.
(3) (1927) V.L.R. 475.
(4) (1927) 40 C.L.R. 142.

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building project could be proceeded with. Turners Limited were apparently alleging that there was an agreement of some sort existing between the appellants and themselves, and, in addition, litigation was pending in the Supreme Court of South Australia between the Just Brothers and Turners Limited as plaintiffs and the appellant as defendant.

To deal with this situation the agreement of 16th February 1934 was made. It provided for the four essential matters, the purchase of the Just Brothers' land by the appellant, the termination of Turners Limited's lease, the rescission of the agreement alleged by that company to exist, and the discontinuance of the pending litigation. Its provisions are material in so far only as they deal with the first of these matters. The vendors were to execute forthwith a registrable transfer of their land to the appellant and deposit it with a bank to be held in escrow until the completion of three shops, with a basement beneath them, on the corner of King William and Hindley Streets, being part of the proposed new building. Upon such completion, the transfer and certificate of the title were to be delivered to the appellant for registration, and the appellant was to deliver to the vendors contemporaneously "a rent charge over the rents of the said shops and basement" in an agreed form. The appellant was to commence forthwith and complete with all reasonable speed the new building, which was referred to as being depicted and described in certain plans, elevations, sections and specifications. It was to use its best endeavours to let the three shops and basement and to collect the rents of them, and during the period of fifty years from 1st January 1935 it was to pay to the vendors an amount equal to ninety per centum of all the rents "as and when received" from tenants of these shops and basement. It was to have full control of the letting of the shops and basement, but no lease for longer than five years should be granted without the consent in writing of the vendors.

These provisions were duly carried into effect, and in due course the appellant gave the so-called rent charge to the vendors. It was in the form of a registered encumbrance under the *Real Property Act* 1886-1929 (S.A.), and it was expressed as encumbering the land occupied by the three shops and basement with a rent charge for the amount, and to be raised and paid, as therein set forth. It provided that "the said rent charge" should be for a period of fifty years from 1st January 1935 and should be for an amount equal to ninety per centum of the whole of the amount of rent to be received by or on behalf of the appellant in each year during the said period in respect of the three shops and basement. The

amount was to be paid to the chargees on the first day of every month, the first of such payments "if any rents have then been received" to be made on 1st February 1935. Other provisions corresponded substantially with the agreement of sale.

The building having been erected, a proportion of it, which has been agreed at ninety-three per centum of the whole, was let to tenants during the accounting period now in question, and the remaining seven per centum was occupied by the appellant itself. In that period the rents received by the appellant in respect of the three shops and basement amounted to £1,314 and the appellant duly paid to the vendors ninety per centum of that sum, viz., £1,183. In its income tax return, the appellant included the £1,314 in its assessable income, and claimed as an allowable deduction ninety-three per centum of the £1,183, viz., £1,100. It is the last-mentioned sum which is the subject of the question asked in the case.

It is incontestable on the facts before us that the appellant acquired the Just Brothers' land for the purpose of retaining it as part of a fixed capital asset, producing rents and providing facilities for the conduct of its life assurance business. The court was invited by counsel for the commissioner to hold that this is enough to impart a capital nature to every payment made by the appellant to the Just Brothers in performance of the obligation which formed the consideration for the purchase. A payment for the purchase of an asset acquired for a capital purpose, it was said, must necessarily be an outgoing on capital account. It is unnecessary to decide whether this proposition is universally true for I am satisfied that on the facts of this particular case the payment under appeal is an outgoing of a capital nature within the meaning of s. 51 (1) of the *Income Tax Assessment Act*. The payment represents one of a series of annual payments which the appellant agreed to make to the Just Brothers for the acquisition of their land. In *Just* v. *Commissioner of Taxation* (1), *Webb* J. held that the sums received by the Just Brothers from the appellant each year formed part of their assessable income. No doubt this decision was correct.

That the sale of a capital asset may result in the seller receiving either capital or income has long been clearly established. The classic statement on the subject in the judgment of *Rowlatt* J. in *Jones* v. *Commissioners of Inland Revenue* (2), need not be repeated here; it was quoted with approval and applied by this

(1) (1949) A.L.R. 438.

(2) (1920) 1 K.B. 711, at pp. 714-715.

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Court in *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (1). In the simple case of a sale of an asset for a lump sum price, the character of the asset naturally determines the character of the receipt; but where the sale produces a series of payments it is a question to be decided upon an examination of the particular transaction whether those amounts come to the seller as instalments of an agreed principal sum constituting the price, or as income the right to which has been acquired by the sale. In the former case, the character of the asset sold must again be the decisive consideration, for parts of a principal sum must have the same nature as the sum itself would possess if paid in one amount. In the latter case, however, the payments received have the intrinsic character of income notwithstanding that the right to receive them has been acquired as the consideration for the disposal of a capital asset. *Romer* L.J. put the matter in these words in *Inland Revenue Commissioners* v. *Ramsay* (2):—"If a man has some property which he wishes to sell on terms which will result in his receiving for the next twenty years an annual sum of £500, he can do it in either of two methods. He can either sell his property in consideration of a payment by the purchaser to him of an annuity of £500 for the next twenty years, or he can sell his property to the purchaser for £10,000, the £10,000 to be paid by equal instalments of £500 over the next twenty years. If he adopts the former of the two methods, then the sums of £500 received by him each year are exigible to income tax. If he adopts the second method, then the sums of £500 received by him in each year are not liable to income tax, and they do not become liable to income tax by it being said that in substance the transaction is the same as though he had sold for an annuity. The vendor has the power of choosing which of the two methods he will adopt, and he can adopt the second method if he thinks fit, for the purpose of avoiding having to pay income tax on the £500 a year. The question which method has been adopted must be a question of the proper construction to be placed upon the documents by which the transaction is carried out" (3).

But it does not follow that the converse proposition is also true —that is to say it does not follow that, because the payments are assessable income of the seller, they are outgoings which qualify as allowable deductions for the purposes of s. 51 (1). This subsection has two limbs the meaning of which has been discussed in *Ronpibon Tin (N.L.)* v. *Federal Commissioner of Taxation* (4);

(1) (1934) 51 C.L.R. 568, at p. 572.
(2) (1936) 154 L.T. 141.
(3) (1936) 154 L.T., at p. 147.
(4) (1949) 78 C.L.R. 47, at pp. 55-57.

Federal Commissioner of Taxation v. *Green* (1); *Broken Hill Theatres Pty. Ltd.* v. *Federal Commissioner of Taxation* (2), and particularly in the first of these cases. There can be no doubt that the payments which the appellant agreed to make to the Just Brothers for fifty years are payments which fall within both limbs of s. 51 (1) if they are not of a capital nature. The rents which the appellant receives from the portion of the building which is let are part of its assessable income from property and the appellant was only able to erect the building and let this portion because it was able to acquire the land on which part of the building stands from the Just Brothers. The payments it has agreed to make to the Just Brothers can therefore be said to be incurred in gaining or producing the assessable income in the sense that the occasion of the outgoing is to be found in what is productive of the assessable income. The payments are also outgoings within the second limb because they are in this sense appropriate or adapted for producing assessable income. But all this could be said of many payments which are clearly of a capital nature. It could be said of all instalments of purchase money paid for the purchase of a fixed capital asset which the purchaser acquired and used to produce assessable income. No assistance in solving the present problem is really derived from the English cases which were cited to us relating to the right of a payer of an annuity or other annual payment to deduct income tax from the annuity or annual payment before making the payment to the payee and retain the deduction for himself, or to deduct such payment from his total income for the purposes of super-tax or surtax. This is because the annuities or other annual payments are in effect the profits of the recipient who bears the tax, and they are not also to be treated as profits of the person paying them. If no tax can be deducted on behalf of the recipient, the payments cannot be treated as profits of the recipient and must be treated as paid out of the profits of the person paying them who is therefore to be taxed thereon: *Sugden* v. *Leeds Corporation* (3); *Earl Howe* v. *Commissioners of Inland Revenue* (4); *Allchin* v. *Coulthard* (5). Under Schedule D Case 1 the tax is computed on the full amount of the balance of the profits or gains. Rule 1 provides that the tax shall be charged without any other deduction than is by the Act allowed. Rule 3 provides that in computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of (a) any disbursements or expenses, not being money

(1) (1950) 81 C.L.R. 313.
(2) (1952) 85 C.L.R. 423, at pp. 428-429.
(3) (1914) A.C. 483, at pp. 490-491.
(4) (1919) 2 K.B. 336, at p. 352.
(5) (1943) A.C. 607, at p. 619.

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wholly and exclusively laid out or expended for the purposes of the trade, profession, employment, or vocation; or (l) any annual interest, or any annuity, or other annual payment payable out of the profits or gains. In *Delage* v. *Nugget Polish Co. Ltd.* (1), by an agreement between the plaintiffs and the defendants, the defendants acquired the exclusive right of selling and manufacturing articles by a secret process and agreed to pay to the plaintiffs for forty years a sum equal to eight per cent of the amount of the gross receipts received by them on the sale of these articles. The question at issue was whether the defendants could deduct income tax from the sums payable to the plaintiffs under the agreement. *Phillimore* J., as he then was, decided that they could. He held that these payments were annuities or annual sums payable out of the profits or gains brought into charge and were income in the hands of the recipients. Accordingly the defendants could deduct the income tax payable on these sums. But his Lordship also considered the character of the payments as outgoings and held they were of a capital nature. He said: "In the year 1903, which is the year in question in this case, the defendants made a very large sum of money in the form of gross takings, and they made also, as is agreed between the parties, a considerable sum of money in the form of net profits larger than 8 per cent. of the gross takings. They were compelled by the Crown, and as it seems to me rightly compelled by the Crown, to pay on their net profits without deducting the sum of money which they had to pay away as the 8 per cent. Rightly were they so compelled because that sum of money was at any rate as between the Crown and the taxpayer to be viewed as no deduction from profits, but as part payment in the way of capital expenditure for the article originally bought, out of which they made their profit" (2).

A similar point arose in *Tata Hydro-Electric Agencies Ltd., Bombay* v. *Commissioner of Income Tax, Bombay Presidency and Aden* (3). There the appellant company, which carried on the business of managing agents of A. company, had acquired the agency from B. company under an assignment whereby B. company transferred to the appellants their whole rights and interest as agents of A. company, subject, however, to the obligations of B. company to pay to both D. and E. companies twelve and one-half per cent of the commission earned by B. company under their agency agreement with A. company. The question at issue was whether this twenty-five per cent commission was expenditure

(1) (1905) 92 L.T. 682.
(2) (1905) 92 L.T., at p. 683.
(3) (1937) A.C. 685.

incurred " solely for the purpose of earning . . . profits or gains " within the meaning of s. 10 (2) (ix) of the *Income-tax Act*, 1922 (India), so as to entitle them to deduct it in computing their profits or gains for tax purposes. It was contended by counsel for the Crown that the obligation to make the payments in question was taken over by the appellants as part of the transaction whereby they acquired the agency business and the payments were therefore made not for the purpose of earning profits in the conduct of the agency business but in fulfilment of the terms on which they purchased the business. Their Lordships upheld this contention. They said : " In short, the obligation to make these payments was undertaken by the appellants in consideration of their acquisition of the right and opportunity to earn profits, that is, of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business " (1).

This is, it would seem, another way of saying that the expenditure was of a capital nature. It is impossible to distinguish the facts of the present case from those in *Delage's Case* (2) and the *Tata Case* (3). The application of the principles laid down in these decisions indicates that the present expenditure is of a capital nature. If we apply the principles stated by *Dixon* J., as he then was, in *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* ; *Associated Newspapers Ltd.* v. *Federal Commissioner of Taxation* (4), the same result follows. He said :—" 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 " (5).

The only authority cited to us that may appear at first sight to support the appellant's case is *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (6). There the appellants were a father and two sons. The father had been the owner of land upon which farming and orcharding were carried on. His two sons formed a partnership to take over 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. In the joint judgment of *Rich*, *Dixon* and *McTiernan* JJ. it is said :—" He (the

(1) (1937) A.C., at p. 695.
(2) (1905) 92 L.T. 682.
(3) (1937) A.C. 685.
(4) (1938) 61 C.L.R. 337.
(5) (1938) 61 C.L.R., at p. 359.
(6) (1934) 51 C.L.R. 568.

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father) 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" (1).

It was held that the annuity paid by the sons to the father formed part of his assessable income. It was also held that the sons were entitled to deduct the payment from their assessable income as representing money laid out in the production of that income. It is with the views expressed in the joint reasons with respect to this deduction that we are here concerned. The question arose under ss. 23 (1) (*a*) and 25 (*e*) of the *Income Tax Assessment Act* 1922-1933. The first of these provisions authorized 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. Section 25 (*e*) forbad the deduction of money not wholly or exclusively laid out for the production of assessable income. Their Honours said:—"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 thing to hold that the sums paid are expended wholly or exclusively for the production of assessable income" (2).

Their Honours then proceeded to discuss at some length the question whether the payments were expended wholly or exclusively for the production of assessable income. They said:—"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" (3).

(1) (1934) 51 C.L.R., at p. 571.
(2) (1934) 51 C.L.R., at pp. 575-576.
(3) (1934) 51 C.L.R., at p. 580.

The only portion of this reasoning which applies to the present problem is the statement (1) that the annual payments made by the sons might properly be considered as made by them on revenue account. After that the whole of the reasoning is directed to the question whether the expenditure was actually incurred in gaining or producing the assessable income. As I have already said, if this was the only question, the payments which the appellant agreed to make to the Just Brothers would qualify as deductions. But the crucial question is whether the payments are of a capital nature. On this question the opinion expressed in the *Egerton-Warburton Case* (2) that the payments made by the sons to the father were made on revenue account would seem to depend on the particular facts of the case. Weight must be given to the statement (3) that the transaction bore all the marks of a family settlement. Under the agreement the father reserved the right to use and occupy a dwelling house upon the land. The sons agreed upon the 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. So the annuities and the sum of £10,000 were charged on the land which it was necessary for the sons to occupy in order to carry on their business. They could not complete the payment of the purchase money until their father and mother had died and the post mortem distribution of the £10,000 had been made. In these circumstances their Honours evidently considered that the annuities, being charged on the land and payable during the lives of the father and mother, were in the nature of rents which the sons had to pay during this period in order to occupy the land and carry on their business. So considered the payments were not outgoings of capital and qualified as deductions under ss. 23 (1) (*a*) and 25 (*e*) of the *Income Tax Assessment Act* 1922-1933.

In the present case the payments to the Just Brothers are dependent upon the appellant receiving rent for the three shops and basement. The Just Brothers are to receive amounts equal to ninety per cent of the whole amount of this rent. It may be that, as a matter of accountancy, the appellant would debit these payments to revenue account. But this does not necessarily make the outgoings of a revenue nature. In *Associated Portland Cement Manufacturers Ltd.* v. *Inland Revenue Commissioners*; *Associated Portland Cement Manufacturers Ltd.* v. *Kerr* (4), Lord *Greene* M.R. said: "it must never be forgotten than an asset which may properly, and quite correctly, appear, and only appear, in the

(1) (1934) 51 C.L.R., at p. 575.
(2) (1934) 51 C.L.R. 568.
(3) (1934) 51 C.L.R., at p. 574.
(4) (1946) 1 All E.R. 68.

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balance sheet as an asset may be acquired out of revenue " (1). The payments to the Just Brothers are recurring payments but recurrence of a payment does not mean that it is necessarily of a revenue and not of a capital nature: the *Sun Newspapers Case* (2); *Grant* v. *Commissioner of Taxes* (3). In *Southwell* v. *Savill Brothers Ltd.* (4) and *Oswald* v. *Magistrates of Kirkcaldy* (5), the payments were of indefinite amounts and for indefinite periods but they were held to be of a capital nature. The present case seems to be one in which it is proper to apply the test laid down by Lord *Clyde* in *Robert Addie & Sons' Collieries Ltd.* v. *Commissioners of Inland Revenue* (6): Are the sums in question part of the trader's working expenses, are they expenditure laid out as part of the process of profit-earning; or, on the other hand, are they capital outlays, are they expenditure necessary for the acquisition of property or of rights of a permanent character the possession of which is a condition of carrying on the trade at all? (7). The acquisition of land is an acquisition of property of the most permanent character and the acquisition of the Just Brothers' land was a condition of erecting the new building and carrying on there the business of letting shops and offices and other space.

For these reasons the question asked in the case stated should be answered in the negative.

WEBB J. The payments made by the appellant taxpayer to the Justs are required by their agreement to be measured by the rents from the three shops and basement situate on land of the appellant not acquired from the Justs, but still part of a building erected on both the appellant's and the Justs' land. These payments represent the consideration for the land acquired from the Justs, and the only purpose of the payments is to provide that consideration. They are not to any extent designed and they do not tend to make the shops and basement rent-producing. They have, and can have, no effect on the amount of rent from the shops and basement, or indeed from any other part of the building, as would, say, expenditure on repairs to the building. They cannot then be said to be " outgoings actually incurred in gaining or producing the assessable income ". Taking the most favourable view for the appellant the payments are in substance part of the revenue from the building; but they are also expenditure for the acquisition of a capital asset, i.e. the Justs' land,

(1) (1946) 1 All E.R., at p. 70.
(2) (1938) 61 C.L.R. 337, at p. 362.
(3) (1948) N.Z.L.R. 871, at p. 880.
(4) (1901) 2 K.B. 349.
(5) (1919) S.C. 147.
(6) (1924) S.C. 231.
(7) (1924) S.C., at p. 235.

and not expenditure in the working of that or any other asset with a view to making it income-producing, although this asset is to be used for rent-production.

But deductions under s. 51 (1) of the *Income Tax Assessment Act* 1936-1943 also include "outgoings . . . necessarily incurred in carrying on a business for the purpose of gaining or producing such income". I confess I cannot see how this expenditure could be an outgoing under this part of s. 51 (1) and not also be at the same time an outgoing actually incurred in gaining or producing the assessable income. But in any case s. 51 (1) excepts all outgoings of a capital nature, and it seems to me that the payments to the Justs are necessarily that. It is beyond question expenditure to acquire a capital asset, and, in my opinion, it is nothing else. It would be remarkable if the payments could at the same time be the consideration for the purchase of a capital asset and expenditure for the working of that or any other capital asset. *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (1), is not, I think, a decision that the same payments might serve both purposes. Although the written arrangement in that case referred to the arrangement as a *purchase*, the court pointed out that the transaction bore "all the marks of a family settlement" (2), and that there was nothing inconsistent with the supposition that the transaction might have resulted in an immediate benefit to the sons in the nature of a *gift*. The Court thought then that it was impossible to treat the annuity payable to the sons as mere instalments of purchase money. It will be observed that the court appreciated the difficulty of treating the annuity as purchase money and at the same time as outgoings in producing income.

The fact that these payments to the Justs represented assessable income to them, as I held in *Just* v. *Commissioner of Taxation* (3) has, I think, no bearing on the question whether such payments are outgoings of the appellant within s. 51 (1). The scope of s. 51 (1) was not considered in that case, and, in my opinion, was not relevant in any event.

I would answer the question in the case: "No".

FULLAGAR J. This is a case stated for the Full Court in an appeal by the taxpayer company from a decision of the board of review. The question raised is whether the company is entitled to deduct from its assessable income of the accounting period ended 31st December 1942 a sum of £1,100 paid by it during the accounting

(1) (1934) 51 C.L.R. 568.
(2) (1934) 51 C.L.R., at p. 574.
(3) (1949) A.L.R. 438.

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period to William Just and Herbert Fritz Just, whom it will be convenient to refer to as Just Brothers. The commissioner by an amended assessment disallowed the deduction, and the board of review by a majority upheld the amended assessment.

The sum of £1,100 in question was paid in pursuance of a contract dated 16th February 1934, the parties to which were the appellant company, Just Brothers, and a company named Turners Ltd. The circumstances in which this contract was made may be very briefly stated. The appellant company was the owner of a piece of land, on which buildings were erected, at the corner of King William Street and Hindley Street in the city of Adelaide. Just Brothers were the owners of a block of land, on which also a building stood, having a frontage to King William Street and adjoining the company's land. The company desired to acquire the land of Just Brothers, and to erect on the land already owned by it and on that land a large modern building which would include office accommodation for itself and a large number of shops and offices which it proposed to let to tenants carrying on businesses or professions. Turners Ltd. was in occupation of a shop on the company's land under a lease from the company, and the company desired to obtain possession of that shop. The contract provided that the lease should be surrendered and possession of the shop given by Turners Ltd. to the company. The position of Turners Ltd. does not affect in any way the question which now arises, and it need not be further considered.

It would appear from a letter written in January 1945 by the public officer of the company to the commissioner that in October 1933 Just Brothers had expressed their willingness to transfer their land to the company, the proposal at that time being that the company should grant to Just Brothers a lease for fifty years of certain shops and a basement in the proposed new building at a nominal rent of £1 per annum. This proposal was abandoned because Just Brothers decided to discontinue their business, and the terms ultimately agreed upon were embodied in the contract of 16th February 1934.

The essence of the contract of 16th February 1934, so far as the company and Just Brothers are concerned, is that Just Brothers agree to transfer their land to the company in consideration of a promise by the company to pay to them for a period of fifty years from 1st January 1935 or from the completion of the building, whichever is the later, *an amount equal to* ninety per cent of all rents as and when received from lessees or tenants of three shops and a basement in the new building. The document, of necessity,

contains a number of subsidiary provisions. It provides for the execution by Just Brothers forthwith of a transfer of their land to the company. The transfer is to be held in escrow with the certificate of title until the completion of the building, when it is to be delivered to the company for registration. Possession is to be given forthwith, outgoings being adjusted as at 30th June 1934. The company undertakes to commence forthwith, and to complete with all reasonable speed, the erection of a building in accordance with certain plans and specifications, which are identified. The building is to contain (*inter alia*) three shops and a basement situated on the corner of King William Street and Hindley Street, the shops having a frontage of thirty-seven feet to the former street and eighteen feet six inches to the latter street. The company is to use its best endeavours to let the shops and basement to reputable tenants at the best rental obtainable, and to collect all rents of the shops and basement, but it is not to be responsible for non-payment of rent by any tenant. It is to render to Just Brothers at the end of each month an account of all rents collected, and at the same time to pay to Just Brothers the amount shown to be due to them without any deduction. There are one or two other stipulations of minor importance, including a provision for prompt restoration in the event of total or partial destruction by fire of the shops or basement. The provisions which I have mentioned were, of course, designed to ensure that the premises whose rental was to provide the measure of the company's obligation should come into existence and be let as advantageously as possible, and to prescribe the time and manner of the performance of the company's obligation. But the whole essence and substance of the contract is, as I have said, that the company is to acquire the land of Just Brothers in consideration of a series of payments to Just Brothers extending over a period of fifty years. Two points may be noticed at this stage, though I do not know that I attach vital importance to either. In the first place, the shops and basement mentioned in the contract were to be erected not on the land to be purchased from Just Brothers but on part of the land originally owned by the company. In the second place, there is no assignment of the rentals of the shops and basement or of any part thereof, or even a promise to pay those rentals or a part thereof to Just Brothers. The position is simply that the rents actually received by the company in respect of the shops and basement provide the measure of the amounts which are to be paid monthly by the company.

If the matter had rested with the contract which has just been considered, the company's obligation to pay money would have

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been unsecured, though not, one would suppose, in any serious peril of non-performance. But on the same day the company executed a document, which is described as a "rent charge", and which purported to give to Just Brothers security over the land on which the shops and basement were to be constructed for due payment of the moneys which the company was contracting to pay. This document recites (what is, I think, clearly correct) that Just Brothers have agreed to transfer their land to the company in consideration of the payment by the company to them of a sum equal to ninety per cent of the whole amount of the rents received by the company during the period of fifty years in respect of the three shops and the basement. The document then declares that the company "doth hereby encumber the said land" (i.e. the land on which the shops and basement are to be constructed) "for the benefit of the chargees" (i.e. Just Brothers) "as tenants in common with a rent charge to be issuing and payable out of the three shops and basement on the said land". The "said rent charge" is to be "for a period of fifty years from the 1st January 1935" and is to be "for an amount equal to ninety per cent of the whole amount of the rent to be received . . . in each year during the said period of fifty years in respect of the three shops and basement".

Nothing turns, so far as I can see, on the precise effect at law or in equity of the so-called rent charge. The building contemplated, including the three shops and basement, was in due course erected by the company, and the transfer of Just Brothers' land to the company and the "rent charge" over the land on which the shops and basement stood were registered under the *Real Property Act* 1886-1929 (S.A.). Presumably the remedies given by that Act to a "mortgagee or encumbrancee" would be available to Just Brothers in the event of default by the company. But all that seems to me to matter for present purposes is that the moneys which the company has undertaken to pay are simply the price of the land which the company is purchasing from Just Brothers. This is made very clear by both documents, and whether the indebetdness of the company, as it accrues from time to time, is secured or unsecured seems irrelevant for present purposes.

For the purposes of income taxation, such payments as the company engaged to make in this case have commonly a double aspect. In Australia the form which the questions take is conditioned by the fact that the tax is imposed on assessable income less specific categories of allowable deductions. The first question which is raised is whether the amounts paid constitute, as and when

received, assessable income in the hands of the payee. The second is whether, for the purpose of ascertaining the taxable income of the payor, the amounts paid are allowable deductions from assessable income. Although it will not seldom happen that payments which are assessable income of the payee will be allowable deductions from the assessable income of the payor, this is by no means necessarily so, and the truth is that different considerations govern the two questions. In the first case, the question will generally be simply whether the receipt in question is of an income nature or of a capital nature—a constantly recurring and often very difficult question, which depends on general principles which have been laid down by the courts. In the second case, the question will generally be whether the case falls within s. 51 of the Act, which, so far as material, allows the deduction of all losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income except to the extent to which they are losses or outgoings of capital or of a capital nature. The issue of the "capital nature" of the payments is seen to be possibly relevant to both questions, but the considerations which must guide one to an answer are themselves different in the two cases.

The transaction between the company and Just Brothers came in its first aspect before *Webb* J. on appeals by Just Brothers against the inclusion in their respective assessable incomes of amounts received from the company. *Webb* J. held that those amounts constituted assessable income in their hands: *Just* v. *Commissioner of Taxation* (1). The correctness of this decision is in no way in issue in the present case. The principles applicable in such a case as *Just's Case* (1) have been considered notably in *Foley* v. *Fletcher* (2); *Secretary of State in Council of India* v. *Scoble* (3); *Chadwick* v. *Pearl Life Insurance Co.* (4); *Jones* v. *Commissioners of Inland Revenue* (5) and *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (6): see also *Dott* v. *Brown* (7) (noting the observations of *Scott* L.J. on what was said by *Walton* J. in *Chadwick's Case* (4)) and cf. *Atkinson* v. *Federal Commissioner of Taxation* (8). The considerations which led *Webb* J. to his conclusion may perhaps be summarized as follows. The

(1) (1949) A.L.R. 438.
(2) (1858) 3 H. & N. 769 [157 E.R. 678].
(3) (1903) A.C. 299.
(4) (1905) 2 K.B. 507.
(5) (1920) 1 K.B. 711.
(6) (1934) 51 C.L.R. 568.
(7) (1936) 1 All E.R. 543.
(8) (1951) 84 C.L.R. 298.

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payments were periodical and extended over a long period of years. They were uncertain in amount; they depended on the amounts received by the company from time to time by way of rent of certain premises: those rents would almost certainly vary to some extent over the years, there being no rent-controlling legislation in 1934: it was not impossible that the premises or a part thereof might be unoccupied for periods: in the case of damage by fire, no rent or a reduced rent might be receivable by the company. From the point of view of Just Brothers, the recipients, the analogy is to a sale of land for an annuity (which is income in the hands of the payee), not to a sale of land for a fixed sum payable by instalments (which are capital).

It is, however, the second aspect of the transaction of 1934 that is material for present purposes, and the present question is whether the monthly payments to Just Brothers are allowable deductions from the assessable income of the company. Considerations which are relevant on the other aspect of that transaction appear to me to be irrelevant here. For it is incontestable here that the moneys are paid in order to acquire a capital asset. The documents make it quite clear that these payments constitute *the price* payable on a purchase of land, and that appears to me to be the end of the matter. It does not matter how they are calculated, or how they are payable, or when they are payable, or whether they may for a period cease to be payable. If they are paid as parts of the purchase price of an asset forming part of the fixed capital of the company, they are outgoings of capital or of a capital nature. It does not indeed seem to me to be possible to say that they are incurred in the relevant sense in gaining or producing assessable income or in carrying on a business—any more than payment of a lump sum would have been so incurred if the purchase price had been a lump sum payable on transfer. The questions which commonly arise in this type of case are (1) What is the money really paid *for?*—and (2) Is what it is really paid for, in truth and in substance, a capital asset? Examples could, of course, be multiplied. One example of a case which turned on the answer to the first of these questions is a case on which the appellant company relied in this case, *Ogden* v. *Medway Cinemas Ltd.* (1). Whatever may be thought of the decision in that case, it seems to me to have no bearing on the present case. Contrast *Commissioners of Inland Revenue* v. *Adam* (2) and *Green* v. *Favourite Cinemas Ltd.* (3).

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

Another example is *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (1), but I will refer specially to this case a little later. An example of a case which turned on the answer to the second of these questions is the recent case in this Court of *Broken Hill Theatres Pty. Ltd.* v. *Federal Commissioner of Taxation* (2). The nature of the problem which often presents itself is analysed by *Dixon* J. in *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (3). In the present case the first question is readily answered by reference to the documents. The money is paid *for* the land. And, as for the second question, it is obvious that the land is a capital asset. In essence the case is very like *Tata Hydro-Electric Agencies Ltd., Bombay* v. *Commissioner of Income Tax, Bombay Presidency and Aden* (4). In that case the relevant enactment authorized the deduction of expenditure " incurred solely for the purpose of earning profits or gains ", but there is nothing in the judgment of Lord *Macmillan* to suggest that anything turned on the word " solely ". Their Lordships were of opinion that the proper question to ask was that propounded by the Lord President (*Clyde*) in *Robert Addie & Sons' Collieries Ltd.* v. *Commissioners of Inland Revenue* (5), " Is it a part of the Company's working expenses; is it expenditure laid out as part of the process of profit earning ? " That question is not less appropriate to s. 51 of the Commonwealth Act, and in this case it must clearly, in my opinion, be answered in the negative.

There are certain English and Scottish cases which do, at first sight, suggest that the same considerations are appropriate whether the question be as to the income character of payments in the hands of the payee or as to the deductibility of those payments from the gross income of the payor. In other words, they suggest that the very considerations which support the decision of *Webb* J. in *Just* v. *Commissioner of Taxation* (6), compel an answer in favour of the taxpayer company in the present case. Those cases are, or include, *Inland Revenue Commissioners* v. *Ramsay* (7); *Inland Revenue Commissioners* v. *Ledgard* (8); *Commissioners of Inland Revenue* v. *Hogarth* (9); *Inland Revenue Commissioners* v. *Mallaby-Deeley*; *Personal Representatives of Mallaby-Deeley v. Inland Revenue Commissioners* (10) and *Executors of Peters, deceased* v. *Inland Revenue Commissioners* (11). But, when those

(1) (1934) 51 C.L.R. 568.
(2) (1952) 85 C.L.R. 423.
(3) (1938) 61 C.L.R. 337, at pp. 359-361.
(4) (1937) A.C. 685.
(5) (1924) S.C. 231, at p. 235.
(6) (1949) A.L.R. 438.
(7) (1936) 154 L.T. 141.
(8) (1937) 2 All E.R. 492.
(9) (1941) S.C. 1.
(10) (1938) 4 All E.R. 818.
(11) (1941) 2 All E.R. 620.

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cases are properly understood, they have, in my opinion, no relevance to the present case. The key to them is to be found, I think, in the judgment of *Greene* M.R. (as he then was) in the *Mallaby-Deeley Case* (1). Each of them is concerned with liability to surtax under the English statutes.

Surtax in England is charged only upon an individual's " total income from all sources " as diminished by certain kinds of interest, annuities, and annual payments, from which, under the system of collection " at the source ", which is in operation with respect to ordinary income tax (but not with respect to surtax), he is entitled to deduct income tax as against the recipient: *Konstam* on *Law of Income Tax*, 12th ed. (1952), par. 331. Thus in *Earl Howe* v. *Commissioners of Inland Revenue* (2), *Scrutton* L.J. said: " The ' annuities interest and other annual payments ' which can be deducted in order to obtain exemption " (i.e., from super-tax, now surtax) " are those from which the claimant can deduct tax on behalf of the recipient " (3). In each of the cases I have mentioned, an annual payment was alleged by the payor to be deductible in the assessment of his surtax on the ground that it was of such a character that he was entitled to deduct income tax from it as against the payee. Now, the ordinary income tax which a payor is given the right to deduct when making his payment is a tax on the income of the payee, as *Scrutton* L.J. recognized in the passage above quoted. The amount is recovered by the Crown from the payor by charging the payor with income tax on his own income without making any allowance for the payment, but that is only the means of collection: see the explanation of the system by Viscount *Simon* in *Allchin* v. *Coulthard* (4). Consequently a payment from which the payor is entitled to deduct income tax must be a payment which would be subject to income tax in the hands of the payee if it were paid to him in full: see *Earl Howe* v. *Commissioners of Inland Revenue* (5), and cf. *Watkins* v. *Commissioners of Inland Revenue* (6). In other words, such a payment must be in his, the payee's, hands, a receipt of an income and not of a capital nature. The point at issue in each of the cases now being discussed was thus simply whether the payment in question was of an income or a capital nature from the point of view of the payee. If, so regarded, it was of an income nature, it was deductible for the purposes of the payor's surtax: if, so regarded, it was of a capital nature, it was not deductible for the purposes of the payor's surtax. Its

(1) (1938) 4 All E.R. 818, at p. 822.
(2) (1919) 2 K.B. 336.
(3) (1919) 2 K.B., at p. 352.
(4) (1943) A.C. 607, at pp. 618-619.
(5) (1919) 2 K.B., at pp. 344, 347,
(6) (1939) 2 K.B. 420.

nature as an outgoing from the point of view of the payor had no relevance to the question of its deductibility, and none of the judgments was directed to that topic. Such cases deal with a position which has no analogy in this country, and they have no bearing on the question now under consideration. This is well illustrated by the case of *Commissioners of Inland Revenue* v. *Duke of Westminster* (1). The object of the Duke's ingenious plan was to reduce his surtax: in Australia the labours of his legal advisers would have produced no result by way of relief from taxation.

It remains only to refer to the decision of this Court in *Egerton-Warburton* v. *Deputy Federal Commissioner of Taxation* (2) on which counsel for the taxpayer strongly relied. This was a case of a very exceptional character. The appellants were a father and two sons, and the controversy related to a sum of £659, which during the year of income was paid by the sons to the father. The transaction in pursuance of which that payment was made is thus summarized in the joint judgment of *Rich*, *Dixon* and *McTiernan* JJ.: "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 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

(1) (1936) A.C. 1. (2) (1934) 51 C.L.R. 568.

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of £659 already mentioned " (1). The commissioner treated the sum of £659 as assessable income of the father, and refused to allow any part of it as a deduction in the assessments of the sons, who had borne the payment in equal shares and claimed that one half was deductible from the assessable income of each.

The first aspect of the case would appear to create no difficulty. The annuity was held to be income in the hands of the father. The second aspect of the case seems more difficult. The Court decided that one half of the sum in question was deductible from the assessable income of each of the sons. The sum was held, in the first place, not to be an outgoing of capital or of a capital nature, and the Court then went on to hold that it was an expenditure incurred " wholly and exclusively for the production of assessable income ", that being the language of the then existing provision which corresponds to the present s. 51. With regard to the first point all that was said by their Honours was :—" 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 " (2).

It is not to be supposed that in this brief passage their Honours intended to convey that, because the money would normally and naturally be paid out of revenue, it could not be an outgoing of a capital nature. As Lord *Greene* M.R. observed in *Associated Portland Cement Manufacturers Ltd.* v. *Inland Revenue Commissioners*; *Associated Portland Cement Manufacturers Ltd.* v. *Kerr* (3), " Whether or not an item of expenditure is to be regarded as of a revenue or capital nature must in many, and, indeed, in the majority of cases, . . . depend upon the nature of the asset or the right acquired by means of that expenditure. If it is an asset which properly appears as a capital asset in the balance sheet, then that is an end of the matter. But it must never be forgotten that an asset which may properly, and quite correctly, appear, . . . in the balance sheet as an asset may be acquired out of revenue . . . It is, therefore, no sufficient test to say that an asset has been paid for out of revenue " (4). In *Grant* v. *Commissioner of Taxes* (5), *O'Leary* C.J. seems to have been disposed to think that the decision in the *Egerton-Warburton Case* (6) was inconsistent with what was said by the learned Master of the Rolls and also inconsistent with the decisions in the *Tata Hydro-Electric Case* (7), and in a South African case of *Lambson* v. *Commissioner*

(1) (1934) 51 C.L.R., at pp. 571-572.
(2) (1934) 51 C.L.R., at p. 575.
(3) (1946) 1 All E.R. 68.
(4) (1946) 1 All E.R., at p. 70.
(5) (1948) N.Z.L.R. 871, at p. 882.
(6) (1934) 51 C.L.R. 568.
(7) (1937) A.C. 685.

for Inland Revenue (1). See also *Bern* v. *Commissioner of Taxes* (2). But it seems to me reasonably clear that the correct explanation of the *Egerton-Warburton Case* (3) is that which was suggested by my brother *Taylor* in the course of argument in the present case. It is simply that in the particular circumstances the annuity was not regarded as part of a purchase price payable by the sons to the father for the land. The nature of the transaction itself had been closely examined by the Court in the course of considering the first aspect of the case, and it was unnecessary, when the second aspect of the case came to be approached, to repeat what had been said. It had been pointed out (4) that the transaction was not an ordinary business transaction but bore "all the marks of a family settlement". There was nothing to show that the full value of the property transferred was represented by the consideration constituted by the various payments. The sum of £10,000 evidently amounted to a post mortem distribution to children as beneficiaries of the father's property. It may well have been that the effect was to invest the sons with a substantial interest which was not exhausted by the payment of the charges upon it. Seen as being in substance a family settlement, the transaction in spite of its form, could not be treated as meaning that the sons were paying for the land a true *price* which was represented in part by the annuity payable to the father. It resembled rather a gift of the land to the sons charged during the father's lifetime with an outgoing analogous to interest on a mortgage and charged with a capital sum payable at the father's death. So regarded, the case is not out of line with the New Zealand cases or with the authorities cited by *O'Leary* C.J.

No such considerations are present in the case now before us. Here we have a transaction of a purely business nature, in which it may be safely assumed that two parties, bargaining on equal terms, had full regard to the value of the land and the probable value of the consideration. According to the documents the periodical payments are the *price* for which the land is being bought, and no reason can be suggested for not giving to the documents their full literal effect. The transaction might perhaps have taken a form under which parts of the total payments to be made were, or could be, treated as interest on deferred payments of a price. But it did not take any such form. As matters stand, the total of the payments is simply the total price of the land.

In my opinion, the question asked by the case stated should be answered :—"No".

(1) (1945) 14 S.Afr. Tax Cas. 57.
(2) (1950) N.Z.L.R. 632.
(3) (1934) 51 C.L.R. 568.
(4) (1934) 51 C.L.R., at p. 574.

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KITTO J. I am of the same opinion, and I have nothing to add to the reasons stated by my brother *Fullagar*.

TAYLOR J. I also agree with the answer to the question and with the reasons given by *Fullagar* J.

Question in the case stated answered: No.
Costs of the case stated reserved for the judge disposing of the appeal.

Solicitor for the appellant, *Edward H. Hobson*.
Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

R. D. B.