[HIGH COURT OF AUSTRALIA.]

LUNNEY . . APPELLANT;

AND

COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA . } RESPONDENT.

HAYLEY . . . . . APPELLANT;

AND

COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA . } RESPONDENT.

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1957, SYDNEY, *Nov.* 26-28;

1958, MELBOURNE, *Mar.* 11.

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

Income Tax (Cth.)—Allowable deductions—" Losses and outgoings . . . incurred in gaining or producing assessable income or . . . necessarily incurred in carrying on a business for the purpose of gaining or producing such income "—Employee in receipt of wages—Professional man carrying on practice—Claim by each to deduct fares paid in journeys to and from place of work from and to place of residence—Whether deductible—Income Tax and Social Services Contribution Assessment Act 1936-1956 (*No.* 27 *of* 1936—*No.* 101 *of* 1956), *s.* 51 (1).

Fares paid by taxpayers, whether employed or carrying on business on their own account, in travelling day by day from their homes to their places of employment or business and back again are not deductible expenses pursuant to s. 51 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 allowable against the assessable income earned in the employment or business.

So *held* by *Dixon* C.J., *Williams*, *Kitto* and *Taylor* JJ., *McTiernan* J. dissenting.

CASES STATED.

Lunney v. *Commissioner of Taxation of the Commonwealth of Australia.*

In an appeal to the High Court of Australia by Kenneth Edmond Lunney against an assessment to income tax made by the Commissioner of Taxation in respect of the year ended 30th June 1957,

Kitto J. on 21st October 1957 stated a case for the opinion of the Full Court of the High Court substantially as follows:—1. The appellant is a ship's joiner by occupation and was employed in that capacity by the Union Steamship Company of New Zealand (hereinafter called "the company") for the whole of the period 1st July 1956 to 30th June 1957. 2. The appellant's hours of employment were from 7.45 a.m. to 4.30 p.m. daily Mondays to Fridays. He was required to report at the office of the company at no. 11 Darling Harbour, both at the commencement and at the completion of each day's work. From the said office he travelled at the expense of the company to various parts of the Port of Sydney to carry out his work. 3. At all material times the appellant resided at 64 Parr Parade, Narraweena, near Dee Why, an almost entirely residential suburb of Sydney, a large proportion of the working population of which travels to and from the city daily for the purpose of getting from their respective residences to their places of employment and returning therefrom to their respective residences. The approximate distance between Narraweena and no. 11 Darling Harbour is fourteen miles. 4. Throughout the period from 1st July 1956 to 30th June 1957 on days on which the appellant worked at his employment as aforesaid, he travelled from his said residence at Narraweena to the office of the company at Darling Harbour before 7.45 a.m. and travelled from the said office to his said residence after 4.30 p.m. During the said period he travelled daily by omnibus operated by the New South Wales Government Transport Department on the Narraweena-Wynyard station route at a total cost to him of sixty-two pounds (£62). The distance between his residence and the point where he boarded or alighted from the omnibus and the distance between the office of the company and Wynyard station he covered on foot. The sole purpose of the appellant's morning journey as aforesaid is to get from his residence at Narraweena to the said office of the company at no. 11 Darling Harbour, and to enable him to fulfil the requirement of reporting at the said office of the company at the commencement of each day's work, and the sole purpose of the appellant's afternoon journey as aforesaid is to get from the said office of the company to his residence at Narraweena. 5. In his return of income for the year ended 30th June 1957 the appellant claimed the said sum of sixty-two pounds (£62) as a deduction from his assessable income. 6. By notice of assessment dated 29th July 1957 the respondent assessed the appellant to income tax and disallowed the claim for deduction from assessable income of the sum of sixty-two pounds (£62). 7. On 29th July 1957 the appellant lodged an objection in writing against

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the said assessment and claimed the deduction of the said sum of sixty-two pounds (£62) on the grounds :—" (i) that such expenditure is an outgoing incurred in gaining and producing my assessable income or necessarily incurred in carrying on my business for the purpose of gaining and producing such income. (ii) that such expenditure is not a loss or outgoing of a capital, private or domestic nature nor was it incurred in relation to the gaining or production of exempt income. (iii) that without limiting the generality of the foregoing grounds, such expenditure is deductible either wholly or in part from the assessable income under the terms of s. 51 (1), s. 53 and/or s. 54 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 ". 8. On 30th July 1957 the respondent served the appellant with written notice that he had disallowed the said objection. 9. On 30th July 1957 the appellant in writing requested the respondent to treat the objection as an appeal and to forward it to this Court, and the respondent on 1st August 1957 forwarded it to this Court accordingly. 10. The said appeal coming on to be heard before me and the facts hereinbefore stated being agreed between the parties, I state the following question of law for the opinion of the Full Court of the High Court of Australia. (a) Is the said sum of sixty-two pounds (£62) deductible either wholly or in part from the assessable income of the appellant under the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 ?

Hayley v. *Commissioner of Taxation of the Commonwealth of Australia.*

In an appeal to the High Court of Australia by Nigel Ralfe Hayley against an assessment to income tax made by the Commissioner of Taxation in respect of the year ended 30th June 1957, *Kitto* J. on 21st October 1957 stated a case for the opinion of the Full Court of the High Court substantially as follows :—1. The appellant is a dentist by profession and has carried on his profession on his own account throughout the period 1st July 1956 to 30th June 1957 at his rooms at 183 Macquarie Street Sydney. 2. The appellant attended at his rooms daily Mondays to Fridays between the hours of 8.30 a.m. and 5.00 p.m. for the purpose of carrying on his profession. 3. At all material times the appellant resided at 34 Woodside Avenue Strathfield. Strathfield is an almost entirely residential suburb of Sydney, and a large proportion of the working population living there travels to and from the city daily for the purpose of getting from their respective residences to the place of their employment and returning therefrom to their respective

residences. The approximate distance between Strathfield and Macquarie Street Sydney is eight miles. 4. Throughout the period from 1st July 1956 to 30th June 1957 on days on which the appellant carried on his profession at his rooms at 183 Macquarie Street Sydney, he travelled from his said residence at Strathfield to his said rooms in Macquarie Street before 8.30 a.m. and travelled from his said rooms to his said residence after 5.00 p.m. During the said period he travelled daily by electric train between Strathfield and St. James railway stations at a total cost to him of twenty-eight pounds (£28). The distance between his residence and Strathfield railway station and his rooms and St. James railway station he covered on foot. The sole purpose of the appellant's morning journey as aforesaid is to get from his residence at Strathfield to his rooms at 183 Macquarie Street Sydney, and to be available at the said rooms to carry on his professional practice, and the sole purpose of the appellant's afternoon journey as aforesaid is to get from his rooms at 183 Macquarie Street Sydney, to his residence at Strathfield. 5. In his income tax return for the year ended 30th June 1957 the appellant claimed the said sum of twenty-eight pounds (£28) as a deduction from his assessable income. 6. By notice of assessment dated 29th July 1957 the respondent assessed the appellant to income tax and disallowed the claim for deduction from assessable income of twenty-eight pounds (£28). 7. On 29th July 1957 the appellant lodged an objection in writing against the said assessment and claimed the deduction of the said sum of twenty-eight pounds (£28) on the grounds :—" (i) that such expenditure is an outgoing incurred in gaining and producing my assessable income or necessarily incurred in carrying on my business for the purpose of gaining and producing such income. (ii) that such expenditure is not a loss or outgoing of a capital, private or domestic nature nor was it incurred in relation to the gaining or producing of exempt income ". 8. On 30th July 1957 the respondent served the appellant with written notice that he had disallowed the said objection. 9. On 30th July 1957 the appellant in writing requested the respondent to treat the objection as an appeal and to forward it to this Court, and the respondent on 1st August 1957 forwarded it to this Court accordingly. 10. The said appeal coming on to be heard before me and the facts hereinbefore stated being agreed between the parties, I state the following question of law for the opinion of the Full Court of the High Court of Australia :—(a) Is the said sum of twenty-eight pounds (£28) deductible either wholly or in part from the assessable income of the appellant under the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 ?

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Dr. *F. Louat* Q.C. (with him *A. J. Rogers*), for the appellant in each case stated. In the light of the tests enunciated in *Ronpibon Tin N.L. and Tongkah Compound N.L.* v. *Federal Commissioner of Taxation* (1); *Amalgamated Zinc (De Bavay's) Ltd.* v. *Federal Commissioner of Taxation* (2); *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (3), and *Charles Moore & Co. (W.A.) Pty. Ltd.* v. *Federal Commissioner of Taxation* (4) as to what expenditure constitutes an allowable deduction within s. 51 (1) of the *Income Tax and Social Services Contribution Assessment Act* it is not possible to exclude travelling expenses from the first part of s. 51 (1), leaving aside for the moment whether they in fact fall within the exemptive portion of the sub-section. Such expenses are both incidental and relevant because they are a circumstance in the condition of employment; the worker or professional man must present himself at the place where the work is to be performed in order to earn the income. In the second test enunciated in the *Ronpibon Case* (5) the word " occasion " does not mean " cause "; the occasion of the outgoing means the facts or circumstances giving rise to the outgoing. If that be a correct paraphrase of the word " occasion " then it would seem to be a little less precise logically than the word " cause ". So read this test precisely describes the nature of these particular outgoings. The facts or circumstances giving rise to the outgoing are the facts or circumstances of the income-producing operation; the operation has to be carried on and the taxpayer has to be there to carry it on. It is the employment or business which necessitates the outgoing—it is a condition of being able to earn. On the discrimen laid down by the Court it must be irrelevant to say that the journey takes place before the work commences and after it ceases. It is equally irrelevant to say that the journey from home to work and from work to home is not in itself one of the immediate and direct income-earning operations. There is no necessary temporal connection between the outgoing and the income-producing activity. [He referred to *Federal Commissioner of Taxation* v. *Gordon* (6); *Herald & Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (7).] In matters of this nature the board of review formerly disallowed expenditure such as this on the basis of *Ricketts* v. *Colquhoun* (8) and similar authorities, but in more recent times it has tended towards disallowance on the basis that this kind of

(1) (1949) 78 C.L.R. 47, at pp. 55-57.
(2) (1935) 54 C.L.R. 295, at pp. 307, 309.
(3) (1937) 56 C.L.R. 290, at p. 305.
(4) (1956) 95 C.L.R. 344, at pp. 349-351.
(5) (1949) 78 C.L.R. 47.
(6) (1930) 43 C.L.R. 456, at p. 462.
(7) (1932) 48 C.L.R. 113, at pp. 118, 121.
(8) (1925) 1 K.B. 725, at pp. 731, 732, 733; (1926) A.C. 1, at p. 7.

expenditure is excluded as private expenditure by the exception to s. 51 (1). The travelling expenses here in question are not of a domestic nature within the meaning of the exception to s. 51 (1). To be of such a nature the expenditure must pertain or relate to the home. Nor are they of a private nature within the exception. An expenditure normally private which finds its occasion in the income-producing activity and which is incidental and relevant thereto is not in that setting a private outgoing. [He referred to *Federal Commissioner of Taxation* v. *Green* (1); *Yarra Glen and Lilydale Hunt Club* v. *Federal Commissioner of Taxation* (2); *In re The Income Tax Acts* (3); *Re Adair* (4), and *Shorter Oxford English Dictionary*, 3rd ed. reprint. (1950)—" private ".] That is the meaning to be attributed to the word " private " in s. 51 (1), and the expenses here cannot be considered " private ".

Sir *Garfield Barwick* Q.C. (with him *E. N. Dawes*), for the respondent in each case stated. Amounts spent on fares whether to an employment for a master or to a business amounting to self-employment are not outgoings incurred in gaining an assessable income or necessarily incurred in carrying on a business. Further they are in fact of a private or domestic nature within the exception to s. 51 (1). The activity of gaining the assessable income in each case is working, and it cannot be said that the outgoings for fares were incurred in working. Despite the various tests referred to by the appellants in the cases cited one comes back ultimately to the words of the section which require that the expenditure be made in gaining or in carrying on. On any proper analysis there is nothing in the duties, or anything incidental to the duties, of the employment or the self-employment which is the occasion for the expenditure. The necessity to go to the employment from some place is not dictated by the employment or its nature or duties but by the place of living. The employment is unconcerned and unconnected with the place of dwelling which is entirely a matter for the employee. The employee travels really to give himself employability; it is part of his capacity to work and the expenditure is to give him that capacity. The present expenditure does not fall within any of the tests enunciated by this Court in the various cases cited by the appellants. [He referred to *In re The Income Tax Acts* (5); *Cook* v. *Knott* (6); *Revell* v. *Directors of Elworthy Bros. & Co. Ltd.* (7);

(1) (1950) 81 C.L.R. 313, at pp. 317, 318, 319.
(2) (1954) 90 C.L.R. 348, at p. 352.
(3) (1903) 29 V.L.R. 298, at pp. 304, 306, 307.
(4) (1898) 4 A.L.R. (C.N.) 42.
(5) (1903) 29 V.L.R. 298, at pp. 303, 304.
(6) (1887) 2 Tax Cas. 246, at p. 248; (1887) 4 T.L.R. 164.
(7) (1890) 3 Tax Cas. 12.

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Friedson v. *Glyn-Thomas* (1); *Andrews* v. *Astley* (2); *Ricketts* v. *Colquhoun* (3); *Nolder* v. *Walters* (4); *Blackwell* v. *Mills* (5); *Newsom* v. *Robertson* (6); *Burton* v. *Rednall* (7).] The authorities of other Commonwealth countries and the United States are to the like effect. [He referred to *Cunningham* on *Taxation Laws of New Zealand* 3rd ed. (1956) p. 493; *Land and Income Tax Act* (1954) (N.Z.), s. 111.]

[DIXON C. J. referred to *A.* v. *Commissioner for Inland Revenue* (*N.Z.*) (8).]

[He referred to *Income Tax Act* 1948 (Can.), ss. 11, 12; *de Wolf* v. *Ministry of National Revenue* (9); *Leigh* v. *Ministry of National Revenue* (10) and *Burt* v. *Ministry of National Revenue* (11); *Income Tax Act* 1941 (Sth Africa), s. 11, 12, *B. E. J. Blann on Principles of South African Income Tax* (1955), p. 114; *Phillips* v. *Keane* (12); *Standard Federal Tax Reporter* (*U.S.*), (1956), vol. 1, pars. 1350.07-1350.0722.] There is a certain universality in this problem. The English authorities show that the travelling to the place of employment or of labour arises out of and is occasioned by the place of residence, whether one of choice or dictated by circumstances, and the travelling is not causally related to the place of employment or labour at all. The other authorities also identify the expenditure with the place of residence rather than the place of employment or of labour. On general considerations the expenditure in travelling to the place of employment is not in any relevant sense occasioned by or determined by the employment, but arises basically from the fact of residence at a place remote from the employment. If that be wrong, then this expenditure is no more than of a private or domestic nature. [He referred to *Metropolitan Water Board* v. *Colley's Patents Ltd.* (13).] The reasoning which would support the view that the outgoing was incurred otherwise than in gaining the assessable income would also tend to show that it was of a private or domestic nature. [He referred to *Federal Commissioner of Taxation* v. *Green* (14).] In the passage cited the Court was not saying that the outgoing in that case was necessarily within the first limb of s. 51 (1) and only taken out by virtue of the exception.

(1) (1922) 8 Tax Cas. 302, at pp. 304, 305; (1922) 128 L.T. 24, at p. 25.
(2) (1924) 8 Tax Cas. 589, at p. 591.
(3) (1925) 1 K.B., at pp. 734, 737; (1926) A.C., at pp. 5, 6, 8, 9.
(4) (1930) 15 Tax Cas. 380, at p. 387; (1930) 46 T.L.R. 397, at p. 398.
(5) (1945) 26 Tax Cas. 468, at p. 470; (1945) 2 All E.R. 655, at pp. 656, 657.
(6) (1953) Ch. 7, at pp. 15, 16, 17.
(7) (1954) 35 Tax Cas. 435, at p. 439.
(8) (1953) 10 A.T.D. 333.
(9) (1950) 2 Tax A.B.C. 199.
(10) (1953) 8 Tax A.B.C. 43.
(11) (1953) 8 Tax A.B.C. 157.
(12) (1925) 2 I.R. 48.
(13) (1911) 2 K.B. 38, at p. 40.
(14) (1950) 81 C.L.R., at pp. 317, 318.

It was because of the closeness of the two ideas that the judgment took the form it did. *Re Adair* (1) was based upon the *Land and Income Tax Assessment Act* (1895) (N.S.W.), s. 28.

Dr. *F. Louat* Q.C., in reply.

Cur. adv. vult.

Mar. 11, 1958.

DIXON C.J. delivered one judgment relative to both cases stated as follows :—

These two cases stated raise a question of income tax law which has been accepted as settled for the last two generations. It is whether the fares paid by ordinary people to enable them to go day by day to their regular place of employment or business and back to their homes are deductible expenses allowable against the assessable income earned by the employment or business.

Both in Australia and in England the view has always prevailed that expenses of travelling from home to work or business and back again are not deductible. An explanation of how this came about in England is given by *Denning* L.J. in *Newsom* v. *Robertson* (2).

The position as it has been understood to be is stated in the work of the late Dr. *Hannan*, "*Principles of Income Taxation*" (1946) pp. 306, 433. His statement, no doubt, is brief but really there is nothing substantial to add to it whether by way of reasoning or authority.

Times have changed ; the incidence of income tax greatly differs now in scope and weight from its incidence in the days when the law was settled ; possibly, the justice of the traditional legal view is a little more open to question and certainly its financial significance supplies a motive for questioning it. Moreover s. 51 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 is not quite in the same terms as the corresponding previous enactments. The Court has explained the differences in *Ronpibon Tin N.L. & Tongkah Compound N.L.* v. *Federal Commissioner of Taxation* (3) but the differences are hardly material to the question.

The question having been agitated it became necessary to turn to the Australian authorities by which it was settled long ago. It was surprising to find how few they were and that they depended rather upon their persuasive authority than their imperative character. But the judgment of Judge *Murray* in *Re Adair* (1) was pronounced sixty years ago and the dicta of *a'Beckett* and *Hodges* JJ. in the Victorian Supreme Court in *Re Income Tax Acts* (4) implied

(1) (1898) 4 A.L.R. (C.N.) 42.
(2) (1953) Ch. 7, at pp. 15, 16 ; (1953) 33 Tax Cas. 452, at pp. 463, 464.
(3) (1949) 78 C.L.R. 47, at pp. 55-57.
(4) (1903) 29 V.L.R. 298 ; 25 A.L.T. 110.

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the same view over fifty years ago. These views have remained unquestioned up till this case. The relevant provisions of the English *Income Tax Acts* are not in the same terms as those of the Australian law, but the whole course of English authority involves a like conclusion. To escape from the course of reasoning on which the decisions proceed requires the taking of refined and rather insubstantial distinctions. I confess for myself, however, that if the matter were to be worked out all over again on bare reason, I should have misgivings about the conclusion. But this is just what I think the Court ought not to do. It is a question of how an undisputed principle applies. Its application was settled by old authority long accepted and always acted upon. If the whole subject is to be ripped up now it is for the legislature and not the Court to do it. I therefore would answer the questions in the special cases that the sums respectively mentioned are not deductible either wholly or in part.

McTIERNAN J. The question which is stated for the Court's opinion concerns fares incurred by the taxpayer for transport by bus from Narraweena, a suburb of Sydney, at which he resided, to the waterfront at which his employment as a ship's joiner was carried on. The distance from Narraweena to the city is fourteen miles. It is a residential suburb. The fares were paid to enable him to go from his home to the city to report for work in accordance with a duty appertaining to his employment, and include the expense of coming back to his home after leaving off work for the day. The total amount of fares which he paid on all those occasions in the financial year was £62. The question for the Court is whether this sum is an allowable deduction under the *Income Tax and Social Services Contribution Assessment Act* 1936-1956. If it is, s. 48 requires that a deduction of £62 should be made from the taxpayer's assessable income in calculating his taxable income.

The taxpayer's employers made him no allowance to cover fares and he was not paid for time occupied by travelling from his home to the employment. It does not appear that the rate of wages paid to workmen in his trade is influenced by the consideration that they may incur the expense of travelling to their work. The taxpayer did not carry on at home or in its vicinity any pursuit for gaining or producing assessable income. The income he earned by his employment was assessed to tax.

His employment was not a business for the purposes of s. 51 (1). This is shown by the definition enacted in s. 6 (1). Section 51 (1) is not, however, limited to deductions from income derived from

carrying on a " business " : *Federal Commissioner of Taxation* v. *Green* (1). The question for decision depends on the words of s. 51 (1) pointing to " all losses or outgoings to the extent to which they are incurred in gaining or producing the assessable income " as being allowable deductions. The only exception which has become material for present purposes is that applying to outgoings " of a . . . private or domestic nature ".

In the case of *Ronpibon Tin N.L. and Tongkah Compound N.L.* v. *Federal Commissioner of Taxation* (2) the Court said in reference to s. 51 (1) :—" For expenditure to form an allowable deduction as an outgoing incurred in gaining or producing the assessable income it must be incidental and relevant to that end. The words ' incurred in gaining or producing the assessable income ' mean in the course of gaining or producing such income— . . . In brief substance, to come within the initial part of the sub-section it is both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or, if none be produced, would be expected to produce assessable income . . . (3). These tests were cited in the judgment in *Federal Commissioner of Taxation* v. *Green* (4) and governed the decision of that case.

In that case the Court decided that the words, " incurred in gaining or producing the assessable income " applied to an amount paid by the taxpayer for train fares. The payment of this amount was occasioned by travelling done before and after the time in which the assessable income was actually earned. The decision is important because in the present case the taxpayer has to meet an argument that all his assessable income was derived from the employment in question and the fares which he claims as a deduction were paid going to that employment and returning home from it. This argument proceeds upon the view that the word " in " in s. 51 (1) requires to be narrowed by construction to mean only a relation of time or place and that it cannot be extended to aim, object or purpose. To read the word as signifying such a relation as aim, object or purpose would not be contrary to usage (see *Shorter Oxford English Dictionary*, vol. 1, p. 573). In *Ward & Co. Ltd.* v. *Commissioner of Taxes* (5) the word " in " was read as meaning " for " in a context similar to that which is now being considered. For my part, I cannot explain the construction of the words " incurred in gaining or producing the assessable income " which is

(1) (1950) 81 C.L.R., at p. 319.
(2) (1949) 78 C.L.R. 47.
(3) (1949) 78 C.L.R., at pp. 56, 57.
(4) (1950) 81 C.L.R. 313.
(5) (1923) A.C. 145, at p. 149.

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set out in *Ronpibon Tin N.L. and Tongkah Compound N.L.* v. *Federal Commissioner of Taxation* (1) on the basis that the Court wholly dissociated the relation signified by " in " from any element of purpose. Indeed the Court spoke of the words " in gaining or producing the assessable income " as expressive of an " end ". The Court said the operation of those words is " very wide " (2) and approximates to the meaning of " incurred in carrying on a business for the purpose of gaining or producing such income " (3).

Returning to the case of *Federal Commissioner of Taxation* v. *Green* (4). The taxpayer claimed as a deduction, among other expenses, a proportion of the train fares which he paid on an occasion he went from his home in Brisbane to North Queensland to inspect and supervise his shop properties in that part of the State. He had also income-producing interests in Brisbane, and managed all his own affairs, maintaining for that purpose " a properly equipped office at his residence ". The Court decided that the proportion of the train fares which he claimed as a deduction " was incurred in relation to the management of the income-producing enterprises of the taxpayer " (5). The management of the properties in North Queensland involved inspecting and supervising them. These were the purposes of the journey northward. It is obvious that the taxpayer was not managing, inspecting or supervising the properties while travelling on the train. The Court took the view that a part of the train fares was " incurred in gaining or producing " the assessable income of the taxpayer. He claimed only a part because, as he conceded, the journey was made also for purposes outside the gaining of assessable income. The Court said : " . . . it is immaterial that there might be a difficulty in holding that the taxpayer was carrying on in a continuous manner an identifiable business " (5). Hence that case is one in which expenses of travelling from the taxpayer's residence to a place where he had other income-producing activities were held to have been incurred " in gaining or producing the assessable income ". Case No. 59 (6) is analogous.

Case No. B107 (7) is one where the taxpayer travelled between two places of employment. These were an accountant's office and the University. The board of review decided that the expenses of travelling from one place of employment to the other were " incurred in gaining or producing the assessable income " and that they formed an allowable deduction under s. 51 (1). The taxpayer was not performing a duty of either employment while

(1) (1949) 78 C.L.R. 47.
(2) (1949) 78 C.L.R., at p. 56.
(3) (1949) 78 C.L.R., at p. 57.
(4) (1950) 81 C.L.R. 313.
(5) (1950) 81 C.L.R., at p. 319.
(6) (1950) T.B.R.D., 218.
(7) (1952) T.B.R.D., 536.

he was travelling. He had in that period ceased performing any duties of his employment as an accountant and had not entered upon the performance of any of his duties as a lecturer.

The decision of the Supreme Court of Victoria in the case *In re Income Tax Acts* (1) was given on different wording but, in my view, it assists the taxpayer to maintain that the cost of travelling to his employment was " incurred in gaining " the assessable income thereof. The Court said in *Federal Commissioner of Taxation* v. *Green* (2) as to private or domestic outgoings that " such expenditure is expressly excluded from deductibility by the final words of the first sub-section of s. 51 " (3). This express exception would seem to imply that the words " all losses or outgoings to the extent to which they are incurred in gaining or producing the assessable income " were contemplated as having a wide operation and capable of including certain expenditure of a private or domestic nature, if there were no express exception of such expenditure.

The provisions of " Schedule E r. 9 " (8 & 9 Geo. 5 c. 40) are very different from s. 51 (1). The decisions on the former do not assist in deciding the present problem. The Court did not have recourse to those decisions when explaining the operation of s. 51 (1) in the case of *Ronpibon Tin N.L. and Tongkah Compound N.L.* v. *Federal Commissioner of Taxation* (4). With the comment made by the Court that the distinctive words of s. 51 (1) " have a very wide operation " (5) there ought to be noticed the observation made by Lord *Blanesburgh* in *Ricketts* v. *Colquhoun* (6) on r. 9 : " Undoubtedly its most striking characteristic is its jealously restricted phraseology, some of it repeated to heighten the effect " (7). *Vaisey* J. spoke to the same effect in *Lomax* v. *Newton* (8). I think that the view which *Warrington* L.J. took of the scheme of r. 9 in his dissenting judgment in *Ricketts* v. *Colquhoun* (9) approximates to the meaning of the provisions of s. 51 (1), whereas the same thing could not possibly be true of the explanation made by Lord *Blanesburgh*. *Warrington* L.J. said in reference to r. 9 : " Now I think, and I understand on this the Attorney-General agrees, that the words 'necessarily' and 'necessary' in the rule do not mean necessary and necessarily in the abstract, but that they mean necessary in regard to the circumstances of the individual concerned, the holder of the office, and in regard to the ordinary usages of mankind at this time in the history of the world. If that is so, and if he is unable

(1) (1903) 29 V.L.R. 298.
(2) (1950) 81 C.L.R. 313.
(3) (1950) 81 C.L.R., at p. 318.
(4) (1949) 78 C.L.R. 47.
(5) (1949) 78 C.L.R., at p. 56.
(6) (1926) A.C. 1.
(7) (1926) A.C., at p. 7.
(8) (1953) 1 W.L.R. 1123, at p. 1125.
(9) (1925) 1 K.B. 725.

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to enter upon the performance of his duties without incurring, under the circumstances in which he is properly situated, the expense of travelling from his home to the borough, and if in the same way there is cast upon him, in order efficiently to perform his duties, extra expense by going to a hotel in Portsmouth, it seems to me that those are expenses incurred in the performance of his duties. He cannot perform his duty without incurring them, and in principle I cannot see the difference between an expense incurred while he is actually performing his duties, and one incurred for the purpose of enabling him to perform his duties" (1).

In my opinion it is an unduly narrow construction of the initial part of s. 51 (1), in the case of an employment, to confine its operation to expenditure made by the taxpayer within the bare physical or temporal limits within which he performs his work or labour and to disregard any expenditure made outside those limits even though it has a necessary relation to the purpose of earning income for which the taxpayer carries on the employment. It is shown by the stated case that the taxpayer could not in the circumstances under which he was situated earn any assessable income by his employment without incurring the cost of travelling which he claims to be an allowable deduction. I cannot see the difference in principle between an expense incurred in gaining income and one incurred necessarily for the purpose of gaining it.

If the facts found in the stated case prove that the expenses of travelling from the taxpayer's home to his employment were incurred in gaining the income of such employment, it would follow that the expenses of travelling back to his home were similarly related to the earning of that income. *Somervell* L.J., as he then was, in *Newsom* v. *Robertson* (2) said: "I doubt if it is helpful to consider the journeys separately. It is the expenses of going to and fro which have to be considered. It would be an impossible result to hold that one journey was 'wholly and exclusively' and the other not" (3). The principle underlying that statement is the right one to apply here.

Holroyd J. said in the case *In re The Income Tax Acts* (4): "I may say I do not understand the difference between the going and the returning in such cases. If he goes to Melbourne, he comes back to where he lives; and in my opinion the expenses of going and returning are both necessary for the purpose of earning the money. I do not suppose that it is expected that, when a man goes up to Melbourne to earn money, he should remain there; that

(1) (1925) 1 K.B., at pp. 735, 736.
(2) (1953) 1 Ch. 7.
(3) (1953) 1 Ch., at p. 13.
(4) (1903) 29 V.L.R. 298.

he is never to go back to his residence ; that he is to be permanently there because he earns a few pounds as a director there " (1). In that case, as in *Federal Commissioner of Taxation* v. *Green* (2) the taxpayer carried on business at his residence. In the present case the taxpayer did not. That is the fine distinction on which the present case turns. Conceding even that the travelling expenses in question were incurred by the taxpayer in gaining or producing the income from his employment, it is said against him that they are not allowable deductions because they are expenses " of a private or domestic nature." This argument is founded entirely upon the circumstances that the expenses were the cost of travelling from the taxpayer's home and returning to it. It disregards the importance of the purpose of the travelling. The point which is in dispute is similar to that which *a'Beckett* J. reserved in the above-mentioned Victorian case. He said : " I am not saying what the difference would be if he were a mere suburban resident coming and going from the place where he resided, and which he occupied without any reference to his carrying on business there ". (3) Why should expenses of travelling between home and a place where assessable income is earned be " private " or " domestic ", if no business is carried on at home, but allowable as a deduction if some business is carried on at the place which is the taxpayer's home and it does not cease to be his home ? *a'Beckett* J. took as a point of distinction that in the latter case the taxpayer's " presence is requisite for the purpose of his carrying on of the businesses from which his taxable income is produced " (3). In regard to the same point Mr. *R. R. Gibson* said in case No. 27 (4) : " Where the assessable income is produced or earned by activities carried on by the taxpayer in several places the taxpayer's expenses of travelling from any one to any other of those places for the purpose of engaging in those activities are surely just as much incurred in gaining the assessable income as, and no more of a private nature than, are the expenses directly arising out of those activities. And, in my opinion, it does not matter whether the activities in any of those places do or do not amount to the carrying on of a business : if the taxpayer were a director of two companies carrying on business in different States, or if he were an employee in one place and the proprietor of a business in another, it would still be prima facie necessary for him to go from one State or place to the other for the purpose of gaining or producing his assessable income. Nor, in my opinion, would it be a material

(1) (1903) 29 V.L.R., at p. 304.
(2) (1950) 81 C.L.R. 313.
(3) (1903) 29 V.L.R., at p. 306.
(4) (1945) 12 T.B.R.D. 259.

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circumstance that the taxpayer was living at one of several places in which he was carrying on income-producing activities. In normal circumstances it would be advantageous to the gaining or producing of his assessable income for such a taxpayer to live at one of those places, one obvious advantage being that he would save the expenses, which he would have otherwise incurred, of travelling between his home and that place. This leads me to the view that if a taxpayer lives at a place where his presence is required from time to time for the purpose of engaging in income-producing activities, his expenses of travelling between that and any other place where his presence is required for similar purposes not only are incurred in gaining or producing his income but also should not be held to be of a private nature merely because it suits his private convenience to live where he does or even because the selected place of residence is, for private purposes, the most suitable of the several places at which he carries on income-producing activities " (1). However, in that case, Mr. *Gibson* dissented. It appears that he relied on the Victorian case cited above. But the majority of the board, Mr. *J. P. Hannan* and Mr. *E. F. Hamilton*, thought that having regard to the decision of the majority in *Ricketts* v. *Colquhoun* (2) the right view to take of the expenses allowed as deductions in the Victorian case was that they were " private " or " personal " outgoings.

In case No. 59 (3), a board of review said that the decision in the case of *Federal Commissioner of Taxation* v. *Green* (4) shows that the dissenting view of Mr. *Gibson* was right and they approved of what he said in the passage cited above. It would seem that if a case with facts similar to *Cook* v. *Knott* (5) or *Ricketts* v. *Colquhoun* (2) arose for decision under s. 51 (1), the taxpayer would find the decision in *Federal Commissioner of Taxation* v. *Green* (4) regarding the train fares of much assistance to him.

The view that the expenses of travelling from home to employment are " of a private or domestic nature " goes back to *Cook* v. *Knott* (5) which was decided in 1887. *Hawkins* J. said in that case: " I cannot see any difference in this case and the case of a man having an office in London, who chooses for his own convenience or pleasure or domestic necessity, as the case may be, to live and occupy a house at Brighton, and pay his ticket up to town every day. It was never contemplated that they should be called expenses necessarily incurred in the transaction of his business. I do not see if he is staying 300 miles off, and comes up specially to attend to his

(1) (1945) T.B.R.D., at pp. 266, 267.
(2) (1926) A.C. 1.
(3) (1951) 1 T.B.R.D. (N.S.) 218.
(4) (1950) 81 C.L.R. 313.
(5) (1887) 2 Tax. Cas. 246.

duties once a week, why he should not charge that, if his contention be correct" (1) These remarks have no relevance to the modern usage of residing in a suburb and working in the city or in another suburb. In *Ricketts* v. *Colquhoun* (2) all that was said in reference to *Cook* v. *Knott* (3) was an observation by the Lord Chancellor that it had stood for thirty-eight years and the rule on which it was decided had been re-enacted. Lord *Blanesburgh* said regarding the expenses in question in *Ricketts* v. *Colquhoun* (2): "Rather are they expenses incurred by him" (the taxpayer) "because, for his own purposes, he chose to live in London; in other words they are purely personal to himself" (4). It is a mistake to regard this as a reaffirmation of what *Hawkins* J. said in *Cook* v. *Knott* (3). I think that the explanation which Mr. *R. R. Gibson* gave in case No. 27 (5) of Lord *Blanesburgh's* observation is correct. It is important to quote what Mr. *Gibson* said. "In that case (*Ricketts* v. *Colquhoun* (2)) it was held that the appellant's expenses of travelling from London, where he was practising as a barrister and residing, to Portsmouth in order to attend to his duties as Recorder of Portsmouth, and of afterwards travelling back to London, were not incurred in the performance of his duties as Recorder and were therefore not deductible. The opinion was not expressed that the travelling expenses were of a private nature. I think it would be wrong to read that opinion into Lord *Blanesburgh's* remark (4) . . . that 'the expenses were incurred by him' (the appellant) 'because for his own purposes, he chose to live in London: in other words they are purely personal to himself'. If this remark is read with its context (I refer to the reasoning which ends with the statement that the appellant 'was . . . under no obligation . . . to continue so to practise while holding his office') it will be seen that what his Lordship meant was that the expenses were purely personal to the appellant because, for his own purposes, he chose to practise in London where he lived: they were personal in the sense that his practice was personal" (6).

Another judicial pronouncement relied upon to support the view that expenses of travelling from home to work are "private or domestic" is that of *Murray* D.C.J. in *Re Adair* (7). His Honour's pronouncement was obviously based upon what *Hawkins* J. said in *Cook* v. *Knott* (3). It might have been a fair presumption for *Hawkins* J. to make in 1887 about the London business man that he lived at Brighton for his own convenience or pleasure

(1) (1887) 2 Tax. Cas., at p. 248.
(2) (1926) A.C. 1.
(3) (1887) 2 Tax. Cas. 246.
(4) (1926) A.C., at p. 9.
(5) (1945) 12 T.B.R.D. 259.
(6) (1945) 12 T.B.R.D., at p. 265.
(7) (1898) 4 A.L.R. (C.N.) 42.

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or domestic necessity; perhaps, a fair presumption for *Murray* D.C.J. to make in 1898 that an accountant practising in Sydney had decided to live at the suburb of Burwood for similar private of domestic reasons. But there is no ground for any such presumption in the facts set out in this stated case. If modern housing conditions and the ordinary usages of the working population are taken into account, it would be wrong to presume or infer without evidence that an employee who lives at a distance from his employment has simply chosen to do so in preference to living in the vicinity of his employment.

Narraweena is according to the facts a residential suburb with a working population most of whom are employed in the city. When, as under modern conditions, homes are not generally available to employees near their employment it is, in my opinion, wrong to presume that an employee who resides in an ordinary residential suburb is actuated by some reason such as *Hawkins* J. mentioned. The truth is rather that the employee is concerned with having a place of abode, which necessarily becomes the base from which he goes and to which he returns in the course of earning his livelihood. It is not a correct construction of the situation in which he is placed to say that he lives there to get far away from his employment, because, if he is unable to reside near it, he needs to reside somewhere from which it is possible to get to his employment. The less time he spends travelling to and from his employment the more he is pleased. I do not take the view that the expense of such travelling belongs necessarily to the sphere of private or domestic expenditure. It is rather business expenditure chargeable to the earnings of the employment—his earnings—to and from which the taxpayer goes and comes. The expenditure does not provide for any private or domestic need. The expenditure is not in the category of ordinary living expenses. Its purpose is rather to earn income to meet such expenses. I do not take the view that the result of s. 51 (1) is that the expenses of travelling between a home and employment may not be private or domestic expenditure because a feature of the home is a room where the taxpayer earns other assessable income, whereas similar travelling expenses of a taxpayer who derives all his assessable income from the employment to and from which he travels are of an essentially different nature and cannot be regarded as incurred in gaining or producing the assessable income, but as expenses of a private or domestic nature, even though the latter taxpayer resides within a reasonable distance of his employment, or not so far away that it could not be expected that normally a person in his circumstances

would live where he resides. The fact that the expenses in the case of either taxpayer are incurred solely and necessarily for the purpose of travelling to the taxpayer's employment may in all the circumstances of the case be sufficient to justify the conclusion that such expenses are incurred in gaining the taxpayer's income and are not " of a private or domestic nature ". In this case that conclusion is in my opinion amply justified by the facts which are set out in the stated case.

I am of the opinion that the sum in question, £62, was wholly incurred in gaining the taxpayer's assessable income and was not to any extent of a private or domestic nature. It was, therefore, an allowable deduction under s. 51 (1) of the Act. I would answer the question by saying that the sum of £62 is wholly deductible.

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The dental practice which this taxpayer carried on was a business within the meaning of s. 51 (1). He was therefore entitled to rely upon the alternative words of the sub-section as well as upon those in its initial part. The reasons which I have given in the former case apply here. I would, therefore, answer the question stated for the Court's opinion in the same way.

WILLIAMS, KITTO and TAYLOR JJ. delivered one joint judgment in both cases stated as follows :—

The questions posed by these two cases stated raise for our consideration a matter of general interest in relation to s. 51 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956. What we are called upon to decide is whether the expenditure incurred by each of two taxpayers in travelling to and fro between their respective residences and places of work are " losses or outgoings " of the description specified in the section and, therefore, allowable deductions for the purpose of the Act. The first of the appellants, it may be assumed, was an employee in receipt of wages payable for services rendered at his place of employment, or elsewhere as directed by his employer, whilst the other carried on in Sydney the professional practice of a dentist, and each has claimed in his return of income to deduct fares paid during the relevant period for conveyance by public transport from his residence to his place of work and from his place of work to his residence.

The fact that s. 51 was intended to deal with a great variety of items of expenditure made it inevitable that it should be couched in general terms and both that section and its immediate predecessor

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have been the subject of judicial consideration on a number of occasions. In terms, the section provides that 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, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital, private, or domestic nature. The language is simple enough and, in the main, little difficulty is encountered in recognising those items of business expenditure which qualify as deductions. But in the nature of things it has been impossible to devise, as a substitute for the words of the section, a simple formula which will readily and precisely mark the limits of the operation of the section. Yet, in the course of dealing with individual cases, it has been necessary to devote particular attention to the words " in gaining or producing the assessable income " and " incurred in carrying on a business for the purpose of gaining or producing such income " and to attempt to express precisely what those words mean.

For the purpose of advancing the appellants' cases counsel, naturally enough, seized upon observations which have been used from time to time in attempts to elucidate the meaning of these expressions. In particular, it was said, expenditure is invested with the requisite character if it may properly be regarded as " incidental or relevant " to the derivation of assessable income. This expression has been used in a variety of cases where it has been necessary to deal with problems arising under the section. For instance in dealing with the immediate predecessor of s. 51 in *Amalgamated Zinc (De Bavay's) Ltd.* v. *Federal Commissioner of Taxation* (1), it was said : " The expression ' in gaining or producing ' has the force of ' in the course of gaining or producing ' and looks rather to the scope of the operations or activities and the *relevance* thereto of the expenditure than to purpose in itself " (2). In dealing with the same section in *W. Nevill & Co. Ltd.* v. *Federal Commissioner of Taxation* (3) it was said that " it is necessary that the expenditure should have been incurred in gaining or producing the assessable income, that is the assessable income of the given financial year or accounting period. This means that it must have been incurred in the course of gaining or producing the assessable income. It does not require that the purpose of the expenditure shall be the gaining or production of the income of that year. The condition the provision expresses

(1) (1935) 54 C.L.R. 295.
(2) (1935) 54 C.L.R., at p. 309.
(3) (1937) 56 C.L.R. 290.

is satisfied if the expenditure was made in the given year or accounting period and is *incidental* and *relevant* to the operations or activities regularly carried on for the production of income" (1). The same expression was again used in *Ronpibon Tin N.L. and Tongkah Compound N.L.* v. *Federal Commissioner of Taxation* (2) when it became necessary to solve a problem arising under s. 51. In that case it was said that "For expenditure to form an allowable deduction as an outgoing incurred in gaining or producing the assessable income it must be *incidental* and *relevant* to that end" (3). This passage was repeated in *Charles Moore and Co. (W.A.) Pty. Ltd.* v. *Federal Commissioner of Taxation* (4). Examination of these cases, however, readily shows that the expression "incidental and relevant" was not used in an attempt to formulate an exclusive and exhaustive test for ascertaining the extent of the operation of the section; the words were merely used in stating an attribute without which an item of expenditure cannot be regarded as deductible under the section. That this is so appears from some of the brief passages already quoted and is made quite clear by consideration of the reasons in the cases referred to. In *Ronpibon Tin N.L. and Tongkah Compound N.L.* v. *Federal Commissioner of Taxation* (2) the passage quoted above (3) was immediately followed by the observation "The words 'incurred in gaining or producing the assessable income' mean in the course of gaining or producing such income" (5). Thereafter, it was said: "In brief substance, to come within the initial part of the sub-section it is both sufficient and necessary that the occasion of the loss or outgoing should be found in whatever is productive of the assessable income or, if none be produced, would be expected to produce assessable income" (6). In the context in which they have been used the expressions relied upon by the appellants have been intended as a reference, not necessarily to the purpose for which an item of expenditure has been incurred, but, rather, to the essential character of the expenditure itself. In each of the cases except the last the expenditure in question was essentially expenditure of a business character but the question was whether it was e penditure "incurred in gaining or producing the assessable inco ıe" or necessarily "incurred in carrying on a business for the p rpose of gaining or producing such income" whilst in the last-men oned case the occasion of the loss in question was properly regarded as an "incident" of the carrying on of the business which produced the taxpayer's assessable income.

(1) (1937) 56 C.L.R., at p. 305.
(2) (1949) 78 C.L.R. 47.
(3) (1949) 78 C.L.R., at p. 56.
(4) (1956) 95 C.L.R. 6, at p. 350.
(5) (1949) 78 C.L.R., at pp. 56, 57.
(6) (1949) 78 C.L.R., at p. 57.

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The sense in which the appellants suggest that the expenditure in question in this case was incidental and relevant to the derivation of assessable income is well illustrated by the observations of *Holroyd* J. in *In re The Income Tax Acts* (1). In that case the learned judge was concerned, *inter alia*, with the question whether a taxpayer was entitled to claim as a deduction expenditure incurred in travelling to and fro between his private residence and the city of Melbourne where he performed duties which enabled him to earn fees as a director of a company. His Honour said: "These fees, like the profits of his business, are part of his income, and the money which he employs in travelling up to Melbourne in order to earn them is expended for the purpose of enabling him to earn his income and without paying those expenses, apparently, he could not earn it. I may say I do not understand the difference between the going and returning in such cases. If he goes to Melbourne, he comes back to where he lives; and in my opinion the expenses of going and returning are both necessary for the purpose of earning the money" (2). The question in that case was whether expenditure so incurred by the taxpayer was "wholly and exclusively expended for the *purposes* of his trade" and may, perhaps, be said to differ substantially from that which arises in the present case. Possibly, if the learned judge had been required to apply the provisions of a section similar in terms to s. 51 he would have found great difficulty in saying that the expenditure had been "incurred in gaining or producing" the taxpayer's assessable income. The grounds for his Honour's decision on the point did not, however, commend themselves entirely to the other two members of the court in that case and do not appear to have found acceptance on any other occasion on which not dissimilar problems have arisen for consideration.

The question whether the fares which were paid by the appellants are deductible under s. 51 should not and, indeed, cannot be solved simply by a process of reasoning which asserts that because expenditure on fares from a taxpayer's residence to his place of employment or place of business is necessary if assessable income is to be derived, such expenditure must be regarded as "incidental and relevant" to the derivation of such income. No doubt both of the propositions involved in this contention may, in a limited sense, be conceded but it by no means follows that, in the words of the section, such expenditure is "incurred in gaining or producing the assessable income" or "necessarily incurred in carrying on a business for the purpose of gaining or producing such income". It is, of course,

(1) (1903) 29 V.L.R. 298. (2) (1903) 29 V.L.R., at p. 304.

beyond question that unless an employee attends at his place of employment he will not derive assessable income and, in one sense, he makes the journey to his place of employment in order that he may earn his income. But to say that expenditure on fares is a prerequisite to the earning of a taxpayer's income is not to say that such expenditure is incurred in or in the course of gaining or producing his income. Whether or not it should be so characterised depends upon considerations which are concerned more with the essential character of the expenditure itself than with the fact that unless it is incurred an employee or a person pursuing a professional practice will not even begin to engage in those activities from which their respective incomes are derived.

The problem now before us was to some extent the subject of consideration in the recent case of *Newsom* v. *Robertson* (1) where, pursuant to the *Income Tax Assessment Act* 1918 (Imp.), the question was whether railway fares which had been paid by a professional man in respect of journeys between his home and his professional chambers constituted " money wholly and exclusively laid out or expended for the purposes of his profession ". It should be mentioned that in this case the additional fact appeared that the taxpayer consistently performed some of his professional duties at his home and the case was put as one in which the facts disclosed that the expenditure was incurred, not merely in travelling between his home and place of business, but, rather, in travelling between one place of business and another. Yet the taxpayer's claim to a deduction was rejected both in the first instance and in the Court of Appeal. None of the members of the latter court were prepared to assent to the proposition that the taxpayer's journeys were for the " purpose " of his profession ; in the language of *Romer* L.J. " The object of the journeys, both morning and evening, is not to enable a man to do his work but to live away from it " (2). The fact that few taxpayers are free to choose whether they will live at their place of work or away from it may appear to invest this statement with a degree of artificiality. But, even in these modern times, they still have, within limits, the right to choose where their homes shall be so that a taxpayer's daily journeys between his home and place of work are rendered necessary as much by his choice of a locality for his residence as by his choice of employment or occupation. And indeed the purpose of such journeys is, at least, as much to enable him to reside at his home as to attend his place of work or business. In the course of seeking to ascertain the " purpose " of such daily journeys, *Denning* L.J. in *Newsom's Case* (1) made some obvious,

(1) (1953) 1 Ch. 7. (2) (1953) 1 Ch., at p. 17.

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but nevertheless interesting, observations on this point. He said: "In the days when income tax was introduced, nearly 150 years ago, most people lived and worked in the same place. The tradesman lived over the shop, the doctor over the surgery, and the barrister over his chambers, or, at any rate, close enough to walk to them or ride on his horse to them. There were no travelling expenses of getting to the place of work. Later, as means of transport quickened, those who could afford it began to live at a distance from their work and to travel each day by railway into and out of London. So long as people had a choice in the matter—whether to live over their work or not—those who chose to live out of London did so for the purposes of their home life, because they preferred living in the country to living in London. The cost of travelling to and fro was then obviously not incurred for the purpose of their trade or profession. Nowadays many people have only a very limited choice as to where they shall live. Business men and professional men cannot live over their work, even if they would like to do so. A few may do so, but once those few have occupied the limited accommodation available in Central London, there is no room for the thousands that are left. They must live outside, at distances varying from three miles to 50 miles from London. They have to live where they can find a house. Once they have found it, they must stay there and go to and from it, to their work. They simply cannot go and live over their work. What is the position of people so placed ? Are their travelling expenses incurred wholly and exclusively for the purposes of the trade, profession or occupation ? I think not. A distinction must be drawn between living expenses and business expenses. In order to decide into which category to put the cost of travelling, you must look to see what is the base from which the trade, profession, or occupation is carried on. In the case of a tradesman, the base of his trading operation is his shop. In the case of a barrister, it is his chambers. Once he gets to his chambers the cost of travelling to the various courts is incurred wholly and exclusively for the purposes of his profession. But it is different with the cost of travelling from his home to his chambers and back. That is incurred because he lives at a distance from his base. It is incurred for the purposes of his living there and not for the purposes of his profession, or at any rate not wholly or exclusively ; and this is so, whether he has a choice in the matter or not. It is a living expense as distinct from a business expense " (1).

In the course of the argument we were referred to a number of cases in which, from time to time, much the same problem has been

(1) (1953) 1 Ch., at pp. 15, 16.

discussed. It is unnecessary to review these cases but of them we mention *Cook* v. *Knott* (1); *Friedson* v. *Glyn-Thomas* (2); *Ricketts* v. *Colquhoun* (3); *Nolder* v. *Walters* (4); *Blackwell* v. *Mills* (5), and *Durbidge* v. *Sanderson* (6). No doubt the legislative provisions which required consideration in these cases were not identical with s. 51, but the process of reasoning by which they were decided consistently rejects the notion that expenditure incurred by a taxpayer in order to travel from his home to his place of business is, in any sense, a business expenditure or an expenditure incurred in, or, in the course of, earning assessable income. Indeed they go further and refuse assent to the proposition that such expenditure is, in any relevant sense, incurred for the purpose of earning assessable income and unanimously accept the view that it is properly characterised as a personal or living expense. This view agrees with that which we, ourselves, entertain. Expenditure of this character is not by any process of reasoning a business expense; indeed, it possesses no attribute whatever capable of giving it the colour of a business expense. Nor can it be said to be incurred in gaining or producing a taxpayer's assessable income or incurred in carrying on a business for the purpose of gaining or producing his income; at the most, it may be said to be a necessary consequence of living in one place and working in another. And even if it were possible—and we think it is not—to say that its essential purpose is to enable a taxpayer to derive his assessable income there would still be no warrant for saying, in the language of s. 51, that it was "incurred in gaining or producing the assessable income" or "necessarily incurred in carrying on a business for the purpose of gaining or producing such income". The questions in the cases stated should be answered in the negative.

Order in each case stated:

The question in the case stated answered: Such sum is not deductible. Costs of the case stated to be dealt with by the judge disposing of the appeal.

Solicitors for the appellant in each case stated, *Bartier, Perry & Purcell.*

Solicitor for the respondent in each case stated, *H. E. Renfree,* Crown Solicitor for the Commonwealth.

R. A. H.

(1) (1887) 2 Tax Cas. 246.
(2) (1922) 128 L.T. 24.
(3) (1925) 1 K.B. 725; (1926) A.C. 1.
(4) (1930) 15 Tax Cas. 380; (1930) 46 T.L.R. 397.
(5) (1945) 174 L.T. 217.
(6) (1955) 3 All E.R. 154.