

UNIVERSITY OF LONDON
No. 45 of 1947. W.C.1

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INSTITUTE OF ADVANCED
LEGAL STUDIES

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In the Privy Council.

ON APPEAL FROM THE HIGH COURT OF
AUSTRALIA.

In the Will and Codicil of Ernest Robert de Little, deceased, Grazier.

BETWEEN : THE UNION TRUSTEE COMPANY OF
AUSTRALIA LIMITED

Appellant

AND

LENA ETHEL BARTLAM JOHN
ERNEST DE LITTLE AND ETHEL
LUDLOW DE LITTLE

Respondents.

Case for the Appellant.

1. This is an appeal (brought by special leave of His Majesty the King in Council by Order dated the 2nd April 1947) by The Union Trustee Company of Australia Limited the plaintiff in these proceedings from a decision dated the 2nd April 1946 of the High Court of Australia so far as it reversed a majority decision of the Full Court of the Supreme Court of the State of Victoria dated the 25th May 1945 in relation to the construction of Section 17 of the Victorian Trustee Companies Act 1928. The facts were not in dispute and the only question in issue in these proceedings was whether according to
10 the true construction of the Section the commission on income thereby allowed to the Appellant as Executor and Trustee under the Will and Codicil of the late Ernest Robert de Little so far as such income was derived from the working and managing of the Testator's station properties after his death ought to be based upon the amount of such

income ascertained from the proper accounts of the Appellant before or after deducting the costs and expenses incurred for the working and managing of such station properties. The Appellant submits that the Judgment of the High Court adopting the latter alternative is erroneous and that upon the true construction of the Section the former alternative is correct.

2. The actual sum involved in the proceedings in respect of the commission accrued over the period of 17 years from the Testator's death to the 1st October 1943 is the difference between £3,792 and £808 (being respectively the total amount of the commission claimed by the 10 Appellant and the amount contended for by the Respondents) but the importance of the case depends upon the fact that its decision will either directly or indirectly under corresponding provisions in statutes in other States govern the remuneration of the Appellant and other Companies in a very large number of Trust Estates throughout the Commonwealth of Australia. Having regard to this position it was made a condition of the order granting special leave to appeal that the Appellant should in any event pay the Respondents' costs of the appeal as between Solicitor and client.

3. Section 17 of the Victorian Trustee Companies Act 1928 is in 20 the following terms :—

“ 17. A trustee company shall be entitled to receive, in
 “ addition to all moneys properly expended by it and chargeable
 “ against the estates placed under the administration and manage-
 “ ment of such trustee company, a commission to be fixed from
 “ time to time by the directors of the said company, but not to
 “ exceed in any case Two Pounds ten shillings for every One
 “ hundred pounds of the capital value of any estate committed to
 “ the management of such trustee company as executor adminis-
 “ trator trustee receiver committee or guardian of the estate under 30
 “ the Lunacy Act 1928 or as sole guarantee or surety or guardian
 “ of any infant or lunatic, and Five pounds for every One hundred
 “ pounds of income received by such trustee company as executor
 “ administrator trustee receiver committee or guardian of the
 “ estate under the Lunacy Act 1928 or as such sole guarantor or
 “ surety as aforesaid or guardian of any infant or lunatic or of
 “ capital or income received by such trustee company as an
 “ attorney acting under power of attorney, and such commission

“ shall be payable out of the moneys or property committed to the
 “ management of such trustee company and shall be received and
 “ accepted by it as a full recompense and remuneration to it for
 “ acting as such executor and administrator trustee receiver
 “ committee or guardian or as such sole guarantor or surety as
 “ aforesaid or attorney, and no other charges beyond the said
 “ commission and the moneys so expended by the said company
 “ shall be made by such trustee company. But if in any case the
 10 “ Supreme Court or a judge thereof is of opinion that such
 “ commission is excessive it shall be competent for such court or
 “ judge to review and reduce the rate of such commission :
 “ Provided that the commission to be charged by a trustee company
 “ shall not exceed in any estate the amount of the published scale
 “ of charges of the said company at the time when such estate was
 “ committed to it. Nor shall this enactment prevent the payment
 “ of any commission directed by a testator in his will in lieu of the
 “ commission hereinbefore mentioned.”

4. The facts shortly stated were as follows :—

20 The Testator Robert Ernest de Little who was domiciled in the
 State of Victoria died on the 1st October 1926 having by the joint
 effect of his Will dated the 30th July 1924 and a Codicil thereto
 dated the 17th December 1925 appointed the Respondents Ethel
 Ludlow de Little (his wife) and John Ernest de Little (his son)
 and the Appellant (who are hereinafter referred to as “ the
 Trustees ”) to be executors and trustees thereof who duly proved
 the same on the 24th February 1927 in the State of Victoria.

30 5. By his said Will after making pecuniary and specific bequests
 and a specific devise which have been duly satisfied the Testator devised
 and bequeathed his residuary estate upon trusts (through the medium
 of a trust for sale with power to postpone the sale) in the events which
 happened as to two third parts for the Respondent John Ernest de
 Little absolutely and as to one third part thereof for the benefit of his
 daughter the Respondent Lena Ethel Bartlam during her life and after
 her death for the benefit of her issue with an ultimate trust upon failure
 of her issue for the said John Ernest de Little or if he should be then
 dead his issue. The said Will contains an express power for the
 Trustees to carry on at their discretion any business or pursuit in which
 he should be engaged at his decease and to retain occupy and manage

any stations that he might own or occupy at his death with all or any sheep cattle horses and chattels and effects thereon with wide incidental powers in relation thereto.

6. The Respondent John Ernest de Little has one child and the Respondent Lena Ethel Bartlam two children all of whom are infants.

7. The Testator was at his death the owner of two farming stations in Western Victoria known respectively as Caramut South and Aringa North of a value of about £50,000 where he carried on the business of grazing, and personal estate of a value of about £26,000 including sheep valued at £13,599 11s. 6d. cattle valued at £3,012 and 10 horses valued at £403, subject to mortgages and other liabilities amounting to upwards of £27,000.

8. The Trustees exercised the discretion conferred upon them by the Testator's Will to postpone the sale of the Testator's farming stations and the live and dead stocks thereon and they carried on therewith the business of grazing in continuation of that previously carried on by the Testator as regards Aringa North until the year 1931 and as regards Caramut South until the 29th June 1944 when Caramut South and the live and dead stock thereon were sold to the Respondent John Ernest de Little pursuant to a provision contained in the 20 Testator's Will.

9. The rate of commission fixed by the Appellant pursuant to Section 17 of the 1928 Statute on Income received by it as Executor or Trustee where the annual total exceeds £400 has been $2\frac{1}{2}$ per centum. Before the commencement of the 1928 Statute a like commission was authorised pursuant to a private Act of the Appellant containing a provision in terms differing in no material respect from the terms of Section 17 of the 1928 Statute.

10. The method of accounting pursued by the Trustees (upon the figures of which the commission on income which the Appellant has 30 charged has been calculated) was as follows :—

In respect of each Station, a separate livestock account was kept for sheep, cattle and horses. These accounts recorded the livestock on hand at the beginning of each year and the purchases,

natural increases and reductions by sale or slaughter during the year; they preserved as capital flocks and herds equivalent in number to those existing at the Testator's death and shewed as a profit or loss the surplus or deficit resulting at the end of the year from the figures recorded for the year. The addition to livestock in each year arose substantially from breeding, and purchases were a small item. The balance each year of these accounts (which on a few occasions was a deficit) was carried into the revenue accounts which took the form of, first, a working account for each station and, secondly, a combined trust income account. In the working accounts the proceeds of sales of wool and other station produce were combined with the balance from the livestock accounts and from the aggregate thus obtained was deducted outgoings including the costs and expenses of and incidental to working and managing the Station properties. The balance thus arrived at of the working accounts was carried to the trust income account where the other revenues of the Trustees, such as rents and dividends, were added and general expenses and outgoings, including interest on borrowed moneys and Appellant's commission on income, were deducted and the balance being the amount available for beneficiaries was transferred to the beneficiaries accounts.

11. By this method of accounting, the value of the livestock existing at the Testator's death (upon which the Petitioner charged and received corpus commission in accordance with Section 17) has been treated as capital and no part of such value whether realised by sales or otherwise was brought into the revenue accounts of the Trustees.

12. The Appellant's commission charged annually in the said accounts was always based upon the aggregate of the items brought into the working account and the trust income account and was calculated before deducting any of the costs and expenses which were deducted in those accounts for the purpose of ascertaining the net distributable income.

13. Over the whole of the seventeen years the total amount of the income upon which the commission was charged and retained was £151,706 10s. 0d. providing a total commission of £3,792 13s. 8d. which is an average of £223 per annum.

14. On the 17th January 1945 (a question having been raised as to the propriety of the said charge for commission) the Appellant instituted proceedings against the present Respondents by Originating Summons whereby (as amended in the Supreme Court of the State of Victoria) the following questions were submitted for decision to the Court viz. :—

(1) In the events which have happened and in the circumstances set out in the Affidavit of Samuel Cooke sworn herein the 16th day of January 1945 (being an Affidavit setting out in effect the facts and verifying the documents hereinbefore stated). What 10 is the income received by the Plaintiff (the present Appellant) as executor and trustee within the meaning of Section 17 of the Trustee Company Act 1928 or corresponding previous enactments, upon which the Plaintiff has been since the death of the said Testator and is now entitled to receive commission as such Executor and Trustee and how should the income be calculated and in particular

(a) Should the said income be calculated in yearly rests from the 1st day of October to the 30th day of September next following? 20

(b) Should the said income be calculated by adding together the amount of the profit shown on the Livestock Accounts referred to in the said Affidavit, the gross amount received by the Plaintiff from the sale of wool, and all amounts other than capital receipts received by the Plaintiff from any part of the said estate, but without deducting therefrom any amount for expenses or outgoings paid by the Plaintiff out of the said estate?

(c) Should the said income be calculated by deducting from the gross amount calculated as in (b) the costs and 30 expenses paid by the Plaintiff in working and managing the Station properties referred to in the said Affidavit but none of the costs and expenses referred to in (d)?

(d) Should the said income be calculated by deducting from the amount calculated as in (c) all or any and which of the following costs and expenses paid by the Plaintiff out of the estate

(i) interest paid on mortgages of and forming part of the said estate

(ii) rates taxes assessments insurance premiums and outgoings affecting the homestead and land held upon trust for the use of the Defendant Ethel Ludlow de Little and paid by the Plaintiff out of the income of the said estate pursuant to Clause 4 (a) of the said Will

(iii) the costs and expenses of administering the said estate and of collecting and distributing the income thereof

10 (iv) any income tax assessed to the Plaintiff as such Executor and Trustee

(v) the commission payable to the Plaintiff on income received by it as such Executor and Trustee

(vi) interest paid to the Trustees of the Caramut South Settlement and the Trustees of the Aringa North Settlement.

15. The Summons was heard before the Full Court of the Supreme Court of the State of Victoria on the 1st 2nd and 7th of May 1945 and on the 25th May an Order was made (MacFarlan and Lowe JJ. Martin J. dissenting) declaring that the income received by the
 20 Appellant as Executor and Trustee appointed by the Will and Codicil of the said Testator within the meaning of Section 17 of the Trustee Companies Act 1928 and corresponding previous enactments upon which the Appellant had been since the death of the said Testator and was then entitled to receive commission was all amounts other than capital receipts received by the Appellant from any part of the estate of the Testator without deducting therefrom any amount for expenses or outgoings paid by the Appellant out of the said estate and that it was unnecessary to answer further the questions raised by the Originating Summons and by the same Order the Respondent Lena
 30 Ethel Bartlam was appointed for the purpose of the said proceedings to represent all persons entitled as beneficiaries to share in the said estate other than the Respondents John Ernest de Little and Ethel Ludlow de Little.

16. The Respondent Lena Ethel Bartlam appealed from the said Order to the High Court of Australia and the appeal was heard on the 18th 19th and 22nd October 1945 before Latham C. J. and Rich Starke Dixon and McTiernan J.J. who on the 2nd April 1946 ordered that the appeal be allowed and discharged so much of the said Order of the Full

Court of the Supreme Court of the State of Victoria as is set out above (except the appointment of the Respondent Lena Ethel Bartlam as a representative party) and in lieu thereof declared that the first question submitted for decision by the said Originating Summons be answered as follows :—

“ In so far as the question relates to income derived from carrying on the Testator’s business mentioned in the seventh paragraph of the Affidavit of Samuel Cooke sworn and filed in the said Originating Summons the income therefrom upon which the Plaintiff as Executor and Trustee is entitled to receive commission 10 should be ascertained upon ordinary accounting principles but in accordance with the following declarations or directions made or given in respect of the particular sub-questions to the said question namely :—

(a) The income should be calculated in respect of yearly periods from the first day of October to the thirteenth day of September next following

(b) and (c) for the purpose of ascertaining the income in respect of which the Plaintiff is entitled to charge commission the amount of profit appearing from the Livestock Accounts 20 the gross amount arising from the sale of wool and any other proceeds of sale of produce of the business should be credited and there should be debited the costs and expenses incurred for the working and managing of the station properties

(d) none of the items of costs and expenses enquired about in sub-paragraphs (i) (ii) (iii) (iv) (v) and (vi) of paragraph (d) of the first question should be debited or deducted.”

AND the Court further declared that otherwise the first question in the said Originating Summons should not then be answered.

17. The reasons given by the High Court have regard to the fact 30 that they were dealing with two opposing contentions both of which were rejected by them viz. :—the contention of the Beneficiaries that all charges and outgoings (including interest on borrowed moneys and the Appellant’s commission on income and the other items debited in the trust income account) should be deducted before charging the commission and the contention of the Appellant that none of the outgoings or expenses shown in the working account and the trust income account respectively should be so deducted.

18. The Chief Justice in giving his reasons accepted the view that the commission on capital provided for by the Statute related to the gross capital value of the estate without any deduction for charges thereon but held that this had no bearing upon the question of commission in the case of income. He then rejected the contention of the Beneficiaries pointing out that a Trustee Company's commission was by the Statute expressed to be receivable by it in addition to the moneys properly expended by it and chargeable against the estate placed under its administration and management from which he inferred that the
 10 commission should be a charge against the assets of the estate capital or income as the case may be and not against a net balance of receipts over expenditure in the same manner as moneys properly expended by the Company. Continuing his reasons for rejecting the contention of the Beneficiaries be added :—

“ The income received by an Executor is all that he receives
 “ and must account for as income. If he receives a sum of £1,000
 “ the whole of which is trading income and expends on his own
 “ showing £800 in order to get the income it is not the case that he
 “ is bound to account only for £200. He must account for the whole
 20 “ £1,000 by showing that what was expended was properly
 “ expended so that he has in hand the proper balance. It was
 “ urged by the Appellant ‘ (now a Respondent) ’ that the Court
 “ should regard the matter from the point of view of the admini-
 “ stration of the estate. I agree with this but from that point of
 “ view it must in my opinion be held that whatever the Executor
 “ receives which is not capital must be regarded as income received
 “ by him. Income so received whether or not it is distributable to
 “ the beneficiaries. There is no reason in principle why income
 “ used in making payments to beneficiaries should bear commission
 30 “ whereas if income is used in paying debts it should not bear
 “ commission.”

19. The Chief Justice then (after referring to the case of *Lawless v. Sullivan* 6 A.C. 373 where it was said that the natural meaning of “ income ” of a business was the balance of profit over losses and *R. v. The Commissioner of the Port of Southampton* L.R. 4 H.L. 449 where it was said that “ income is what comes in, not that which comes in less an outgoing ”), concluded that the word was an ambiguous one meaning either net income or gross income according to the context and adding

“ there will then sometimes be room for argument as to how net income
 “ or gross income is to be ascertained. . . . In the present case the words
 “ of the section show that ‘ income received ’ means all receipts other
 “ than receipts on account of capital.” He then proceeded to deal with
 the case of a business included in a trust estate and expressed the view
 that “ the gross amount received over the counter for stock sold cannot
 “ be regarded as income. Part of it represents a replacement of
 “ capital. If the Company in such a case ” (he continued) “ drew
 “ commission upon recurring receipts then so far as they represented
 “ replacement of circulating capital the result would be that the 10
 “ Company would first be paid commission (as on capital) on the
 “ assets consisting of the stock in trade as at the death of the Testator
 “ and then would repeatedly receive commission (as on income) upon
 “ further receipts as these assets were sold and again upon further
 “ receipts when the assets which replaced them were sold and so on
 “ indefinitely. The result would be that the Company would receive in
 “ the form of commission on income what was in fact a repeating
 “ commission on capital and would receive it as often as the circulating
 “ capital was turned over.”

20. Turning to the 1943 accounts of the estate he considered that 20
 (for example) “ the whole of the sum of £2,134 shewn as the profit of
 “ the sheep account could not be regarded as an income receipt. This
 “ sum of £2,134 must in part, be applied in replacement of the working
 “ expenses, being spent and recovered and spent from time to time as
 “ part of the circulating capital of the station. So far as the amount
 “ £2,134 makes such a replacement it is not an income receipt.
 “ Income received does not include money received by the Executor
 “ which represents either a realisation of fixed capital or a replacement
 “ of circulating capital.” Receipts from the sale of wool he thought
 provided an even clearer case. The amount received from the sale of 30
 wool in 1943 was £8,211 but it was impossible to regard this sum as
 income since part of it represented the replacement of the working
 expenses of the station. His ultimate conclusion therefore was “ that
 “ for the purpose of ascertaining the income in respect of which the
 “ Company is entitled to charge commission the amount of the profit
 “ shown on Livestock Accounts the gross amount arising from the sale
 “ of wool and any proceeds of sale of the business should be credited
 “ and there should be deducted the costs and expenses incurred in
 “ working and managing the station properties.”

21. The judgment of Rich J. very shortly expressed substantially the same conclusions as the Chief Justice but he would exclude from deductible outgoings in an ordinary case “ such overheads as interest “ on capital.”

22. The judgment of Starke J. was somewhat more favourable to the Appellant. He would only deduct from the gross receipts of a business “ the various items of expenditure directly and immediately connected with gaining or producing the amounts received by the Company.” Some of the items of expenditure shewn in the working
 10 account for the year which ended on the 1st October 1943 should not he thought be debited against the receipts for that period in ascertaining the income received by the Appellant. He instanced items such as insurance premiums insurance on wool war damage contributions on wool plants and buildings Government tax on wool rent rates land tax subscriptions depreciation of plant. Such charges were connected with the ownership occupation or protection of the trust property or its produce and not with gaining or preserving the moneys received by the Appellant.

23. Mr. Justice Dixon’s Opinion was expressed in the words “ The
 20 “ gross returns from the pastoral business forming part of the estate “ cannot properly be described as income and it is only the net balance “ ascertained according to the usual and recognised principles of account- “ ing that answers this description.” He considers that “ except for any “ ascertainable profit which they contain the funds represented by stock “ in trade are as much capital as those represented by fixed capital “ assets. What is recovered by the sale of stock in trade in the ordinary “ course of business cannot in a contrast between capital and income “ be described as income. Its constantly recurring character leads to “ its being often called revenue but revenue is not always income. What
 30 “ is recovered by sales of stock in trade is that part of the income “ producing corpus that moves. It is distinguished from that corpus “ that is fixed only by its movement and perhaps by the circumstances “ that it contains any ascertainable profit or income there may be.” He put his view in other words as follows. “ The meaning of the section “ is that corpus commission shall be payable once for all on the value “ of the assets independently of their subsequent value or disposal “ increase or diminution or quantity or value or change of form and “ the section has been so construed. It means that the income produced

“ by those assets whether increased or not or changed in form or not
 “ shall bear another commission in the case of a trading business
 “ it does not appear to me to be a tenable view that the section should
 “ first be applied to give a corpus commission on the value of the stock
 “ in trade as at death and then to give an income commission in the
 “ realised value every time the stock in trade is turned over.”

24. The Judgment of McTiernan J. appears to add nothing of substance to the other Judgments in the High Court.

25. In the Supreme Court of the State of Victoria the majority (MacFarlan and Lowe JJ.) delivered a single judgment premising that 10 the key to a decision of the controversy lay in fixing the natural or popular meaning of the word “ Income.” They quoted from Strouds Judicial Dictionary a passage from the Judgment of Bronson J. in the New York case of *The People v. The Supervisors of Niagara* (1842 4 Hill (N.Y.)) at p. 23. “ It is undoubtedly true that profits and
 “ income are sometimes used as synonymous terms, but strictly
 “ speaking income means that which comes in or is received from any
 “ business or investment of capital without reference to the outgoing
 “ expenditure while profits generally means the gain which is made upon
 “ any business or investment when both receipts and payments are 20
 “ taken into account. ‘ Income ’ when applied to the affairs of indivi-
 “ duals expresses the same idea that revenue does when applied to the
 “ affairs of a State or Nation, and no one would think of denying that
 “ our Government has revenue because the expenditure for a given
 “ period may exceed the amount of receipts ” and referring to Australian authorities to the same effect they accepted that meaning for the purpose of Section 17.

26. Martin J. in his dissentient Judgment accepted the contention that “ Income ” in its popular sense comprises only net income and should be so understood in Section 17. 30

27. The Appellant humbly submits that the Order of the High Court so far as it declared that for the purpose of ascertaining the income in respect of which the Appellant is entitled to charge commission the costs and expenses incurred for the working and managing of the Testator’s station properties ought to be debited against the profit appearing by the Appellant’s Livestock Accounts the gross amount arising from the sale of wool and any other proceeds of sale of produce

of the business was erroneous and should be reversed and that the order made by the Full Court of the Supreme Court of the State of Victoria should be restored for the following among other

REASONS.

1. Because the word "income" in Section 17 of the Victorian Trustee Companies Act 1928 includes all receipts properly entered in the revenue accounts of the Trust including the revenue accounts of any business carried on as part of the Trust.
2. Because the word "income" primarily denotes all receipts on
10 revenue account and there is nothing in the Act to attach to the word any other significance.
3. Because the Appellant's income commission is charged upon the income received by the Trustees and not on the income receivable by the beneficiaries.
4. Because the income received by the Trustees includes the whole of the income received at the Testator's stations and not merely so much of it as is ultimately found to constitute net profit.
5. Because the natural increases in the Testator's herds and flocks and the wool produced by the Testator's sheep and the respective
20 proceeds thereof are (like the fruit from a tree) essentially in the nature of income and not of capital.
6. Because the revenue received at the Testator's stations was not chargeable with commission as part of the capital value of the Testator's estate at his decease and on the construction of the Act contended for by the Respondents the greater part of such revenue would yield no commission to the Appellants.
7. Because the capital of the estate in the form of flocks and herds was in fact preserved in the Livestock Accounts and the annual surplus on those accounts that was carried to the working account was
30 ascertained only after making provision for the maintenance of such capital.
8. Because the outgoings charged in the station accounts are not provided out of the capital in respect of which commission had been paid as assumed by the Judgment of the High Court but out of the income which arose at the stations after the Testator's death.

9. Because it is unreasonable to allow the same rate of commission for receiving and distributing income from ordinary investments, and for the work and personal responsibility involved in earning and distributing net profit of equal amount from a sheep and cattle station.

10. Because the capital commission of a Trustee Company under the section relates to the gross capital of the estate and it is illogical not to relate the income commission similarly to the gross income.

11. Because the work of a Trustee Company in carrying on a business is measured rather by the gross return from the business than by the net profit thereof and the remuneration of the Trustee Company should (like the remuneration of a Receiver) relate rather to the former than to the latter. 10

12. Because the judgment appealed from was erroneous and the judgment of the Supreme Court of the State of Victoria was correct and ought to be restored.

CYRIL RADCLIFFE.

S. PASCOE HAYWARD.

J. H. STAMP.

In the Privy Council.

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In the Will and Codicil of Ernest Robert de Little,
deceased, Grazier.

BETWEEN

**THE UNION TRUSTEE COMPANY
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AND

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Case for the Appellant.

**COWARD, CHANCE & CO.,
STEVINSON HOUSE,
155, FENCHURCH STREET,
LONDON, E.C.3.**