

70,1948

No. 45 of 1947.

In the Privy Council.**ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA.**UNIVERSITY OF LONDON
W.C.1

-3 OCT 1956

INSTITUTE OF ADVANCED
LEGAL STUDIESIN THE WILL and CODICIL of ERNEST ROBERT DE LITTLE
Grazier deceased.

11229

BETWEEN

THE UNION TRUSTEE COMPANY OF AUSTRALIA
LIMITED (Plaintiff) *Appellant*

10

AND

LENA ETHEL BARTLAM, JOHN ERNEST de LITTLE
and ETHEL LUDLOW de LITTLE (Defendants) *Respondents.***Case for the Respondent**

LENA ETHEL BARTLAM.

RECORD.

1. This is an appeal from the Judgment of the Full Court of the High Court of Australia dated 2nd April 1946 reversing a majority Judgment and Order of the Full Court of the Supreme Court of Victoria dated 25th May 1945. The case in the High Court of Australia is reported in the Argus Law Reports for the year 1946 at page 162.

pp. 42-58.

pp. 33-39.

20 2. The present suit was instituted in the Supreme Court of Victoria by Originating Summons dated 17th January 1945 taken out by the Appellant as one of the Executors and Trustees of the Will of the above-named testator Ernest Robert de Little (hereinafter called "the Testator") for the determination of the question what is the income of the Testator's estate received by the Appellant as executor and trustee of the said Will within the meaning of Section 17 of the Trustee Companies Act 1928 of Victoria or corresponding previous enactments upon which the Appellant has since the death of the Testator and is now entitled to receive commission as such Executor and Trustee and how should the said income be calculated.

pp. 1 and 2

30 3. There followed four specific questions lettered (A) to (D) of which only (B) and (C) are the subject-matter of this appeal. Questions (B) and (C) as amended by the Full Court of the Supreme Court of Victoria are in the following terms:—

(B) Should the said income be calculated by adding together the amount of the profit shown on the Lifestock Accounts referred to in the said Affidavit (being that of Samuel Cooke sworn herein on the 16th January 1945) the gross amount received by the Plaintiff

p. 1, l. 33.

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.

p. 2, l. 5.

(c) Should the said income be calculated by deducting from the gross amount calculated as in (B) the costs and 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).

p. 2, l. 44.

pp. 7-12.

p. 3, ll. 1-10.

4. The Testator died on the 1st October 1926 and his Will dated the 30th July 1924 and a Codicil thereto dated 17th December 1925 were proved on the 24th February 1927 in the State of Victoria by the Respondents Ethel Ludlow de Little and John Ernest de Little and the Appellant the executors and trustees therein named.

pp. 10-12.

5. The said Will contained power to the trustees to carry on at their discretion any business in which the Testator should be engaged at his death 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 and the residuary estate of the Testator is in the events which happened now held upon trust as to two third parts for his son the Respondent John Ernest de Little absolutely and as to the remaining one third part thereof upon trust to pay the income thereof to his daughter this Respondent during her life and after her death upon trust for the benefit of her children or issue with an ultimate trust upon failure of any child or issue taking a vested interest in her share for the Respondent John Ernest de Little or if he should be then dead his issue.

p. 3, l. 19.

p. 3, l. 20.

6. The Respondent John Ernest de Little has one infant child and this Respondent has two infant children.

7. Section 17 of the Trustee Companies Act 1928 of Victoria is in 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 management 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 administrator trustee receiver committee or guardian of the estate under the Mental Hygiene Act 1928, or as sole guarantor 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 Mental Hygiene 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

10 “ payable out of the moneys or property committed to the manage-
 “ ment 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 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 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.”

8. The Originating Summons was supported by the Affidavits of Samuel Cooke dated 16th January 1945 and John Larritt dated 4th May 1945 filed on behalf of the Appellant from which and the Exhibits thereto the following facts appear :—

(A) 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 2½ per centum.

(B) The Testator's estate at his death comprised two farming stations in Victoria known as Caramut South and Aringa North of the value of about £50,000, upon which he carried on the business of a Grazier. The Appellant in the exercise of the discretion conferred upon it by the testator's said Will carried on his business at Aringa North until the year 1931 and that at Caramut South until the 19th June 1944.

(C) The method of accounting pursued by the Appellant upon which the commission upon income due to the Appellant was calculated was as follows :—

40 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 ; this preserved as capital flocks and herds equivalent to those existing at the Testator's death and shewed as a profit the surplus 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 debit balance) was carried into a working account for each station. In the working accounts the proceeds of sales of wool and other station produce were added to 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 trustees' commission on income, were deducted and the balance, being the amount available for beneficiaries, was transferred to the beneficiaries accounts.

9. The Appellant contends that it is entitled to commission upon the gross sum brought into account being the balance of the livestock account together with the proceeds of sale of wool and other station produce without deducting outgoings not even the costs and expenses of and incidental to the working and managing of the said businesses. This Respondent contends that commission is chargeable only upon the net sum namely after deducting the costs and expenses incurred for the working and managing of the station properties. This Respondent no longer contends that any of the costs and expenses set out in Question 1 (D) of the Originating Summons should be deducted. 10

p. 39, l. 40. 10. The said Originating Summons came on for hearing before Mr. Justice O'Bryan on the 27th February 1945 who ordered that the application should be referred to the full Court of the Supreme Court of the State of Victoria. 20

p. 39, l. 42.
p. 39, ll. 44-46.
p. 40, l. 1.
p. 40, l. 27. 11. The said Summons was heard by the full Court on the 1st, 2nd and 7th May 1945. The evidence adduced consisted of the said Affidavits of Samuel Cooke and John Larritt. The Respondents John Ernest de Little and Ethel Ludlow de Little were not represented at the hearing and have taken no part in these proceedings save for entering an appearance. Judgment was given on the 25th May 1945 when the Court (MacFarlan and Lowe JJ. Martin J. dissenting) did order and declare that the income received by the Appellant as Executor and Trustee appointed under the Will and Codicil of the Testator within the meaning of Section 17 of the Trustee Companies Act 1928 and corresponding previous enactments upon which the Appellant has since the death of the Testator and is now entitled to receive commission is 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 the Court did further Order that this Respondent be appointed for the purpose of this matter 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. 30 40

pp. 33-36. 12. The combined judgment of MacFarlan and Lowe JJ. proceeded on the ground that the legislature must have considered the estate committed to the Appellant under the Act and to be administered and managed by it as consisting only of either capital or income and they decided that the word "income" as used in Section 17 meant "that which comes in not being capital." p. 35, ll. 3-6.

13. Martin J. in the course of his dissenting judgment said as follows :— p. 38, l. 9.

10 “ The Defendant asserting that income in Section 17 should be
 “ construed as equivalent to net income relied in the first place
 “ on the pronouncement of the Judicial Committee of the Privy
 “ Council in *Lawless v. Sullivan* (1881) 6 A.C. 373 at p. 378 ‘ There
 “ ‘ can be no doubt that in the natural and ordinary meaning of
 “ ‘ language the income of a bank or trade for any given year
 “ ‘ would be understood to be the gain, if any, resulting from the
 “ ‘ balance of the profits and losses of the business in that year . . . ’
 “ The Judicial Committee pointed out that the Act did not impose
 “ a tax on each individual earning or gain but on the income for
 “ a fiscal year which could only be ascertained by taking an account
 “ for the whole year and it did not agree that trading losses were
 “ losses of capital. The opinion of the Judicial Committee is
 “ only useful here in that it contains the statement of what is the
 “ natural and ordinary meaning of the word ‘ income ’ as applied
 “ to a trading business.

20 “ It was also contended on behalf of the Defendant that as
 “ since 1887 it has been the recognised rule that an executor
 “ claiming such commission for his pains and trouble as is just and
 “ reasonable under the provisions of what is now section 59 of the
 “ Administration and Probate Act for carrying on a current business
 “ is allowed commission on the net and not the gross proceeds
 “ (*In the Will of Matthews* (1887) 13 V.L.R. 587)—it is unlikely
 “ that the Legislature when it enacted the first General Trustee
 “ Companies Act 1928 intended to put such a Company in a more
 “ favourable position than an individual acting as executor . . .

30 “ In my view there is nothing in section 17 which suggests that p. 39, l. 27.
 “ either gross or net income was intended to be the sum on which
 “ commission should be charged and the popular meaning of income
 “ in the connection in which it is used in that section is net income
 “ that is all the moneys received on income account after deducting
 “ therefrom all expenses properly incurred in gaining or receiving
 “ the same.”

14. From the judgment of the Supreme Court of Victoria this p. 41.
 Respondent appealed to the full Court of the High Court of Australia and
 that Court (Latham C.J. and Rich, Starke, Dixon and McTiernan JJ.)
 after hearing the appeal on the 18th, 19th and 22nd October 1945 reserved
 40 their judgment.

15. On the 2nd April 1946 the High Court ordered that the appeal be p. 58, l. 17.
 allowed and discharged so much of the said Order of the Full Court of the p. 58, l. 18.
 Supreme Court of Victoria as is set out in paragraph 11 hereof (except the
 appointment of this Respondent 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 p. 59, ll. 29 49.
 “ 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 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 Thirtieth day of
 “ September next following 10

“ (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,
 “ the gross amount arising from the sale of wool and any other
 “ proceeds of the 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. 20

p. 60, l. 1.

“ And this Court doth further declare that otherwise the first
 “ question in the said Originating Summons should not now be
 “ answered.”

p. 42.
 pp. 44, 45.

16. The Chief Justice in giving his reasons stated that the fact
 that the gross value of the capital assets without deducting any charges
 thereon was the measure of commission in respect of capital had no direct
 bearing upon the question of commission receivable in the case of income.
 He referred to *Lawless v. Sullivan* (1881 6 A.C. 373) and *R. v. Commissioners*
of the Port of Southampton (1870 L.R. 4 H.L. 449) as showing that the
 meaning of the word “ income ” was ambiguous meaning gross or net 30
 income according to the context with room for argument as to how net
 or gross income was to be ascertained. He considered that decisions under
 Section 59 of the Victorian Administration and Probate Act 1928 did not
 in his opinion afford any assistance in interpreting the terms of Section 17
 of the Trustee Companies Act. He stated that in his opinion “ income
 received ” in the words of the Section meant all receipts other than receipts
 on account of capital, that the position was not self explanatory and it was
 a question of fact in each particular case whether an amount had been
 received.

p. 46, l. 27.

17. Illustrating the position by reference to the account of the 40
 Testator’s business for the year 1943, the Chief Justice referred to the figure
 of £2,134 which was transferred to the credit of the working account as
 being gross profit representing an increase in the value of sheep during the
 year taking the sheep at conventional values, and he pointed out that the
 cattle account was an account of the same character and that this sum must
 in part be applied in replacement of the working expenses and the fund
 which supplied those expenses was part of the circulating capital of the
 Station. The Chief Justice proceeded to state that so far as the amount
 of £2,134 made such a replacement it was not an income receipt and that

p. 46, l. 40.

“ Income received ” did not include money received by an executor which represented either a replacement of fixed capital or a replacement of circulating capital and that this proposition was simply a statement of an ordinary accountancy principle. He added that receipts from the sale of wool provided an even clearer case. The amount received from such sales in 1943 was £8,211 and it was impossible to regard the whole of that sum as income : part of it represented the replacement of the working expenses of the Station. p. 46, l. 45.

10 The Chief Justice referring to questions (B) and (C) stated that in his opinion it should be declared that for the purpose of ascertaining the income in respect of which the Appellant was entitled to charge commission the amount of profit shown on livestock accounts the gross amount arising from the sale of wool and any other proceeds of the sale of produce of the business should be credited and there should be deducted the costs and expenses incurred in working and managing the station properties. p. 47, l. 9.

18. The other Judges (save Mr. Justice Starke) substantially adopted the same reasoning as the Chief Justice and expressed their opinion upon the deductions to be made before arriving at the sum upon which the Appellant could charge its commission. Mr. Justice Rich in his judgment stated that it was obvious that when in Section 17 “ income ” is made the criterion it cannot have been intended that in relation to trading, manufacturing, pastoral, agricultural or dairying businesses, it should be taken to mean simply everything that came in, for that would, in effect, make it include some capital. Remuneration upon any item of capital committed to a Company’s management could be received only once, and repeated commissions, either on a capital or income basis, could not be taken on the same capital or anything representing the same capital. In such connections income must obviously be intended to mean, in general, what is sometimes called gross income as contrasted with net income, that is to say takings after deducting what has been supplied to produce the takings, including working expenses but excluding such overheads as interest on capital invested unless there is something special in the class of trade which makes outgoings such as these necessary and normal expenses of trading. p. 49, l. 15.

19. Mr. Justice Starke based his judgment not upon the distinction between a realisation of fixed or a return of circulating capital and income but adopted the ground that in ascertaining the income it was not correct to leave out of account the various items of expenditure directly and immediately connected with gaining or producing the amounts received. p. 51, ll. 1-8.

40 It was not true either as a matter of law or of commercial practice to describe these receipts as income received by the Appellant from the estate committed to its management until those various items of expenditure had been charged against the receipts. It was the balance only that was properly described as income.

20. The Appellant on the 2nd April 1947 obtained special leave to appeal from the judgment of the High Court to His Majesty in Council upon the condition that the Appellant should pay the costs in any event as between solicitor and client of all parties to the appeal but this pp. 60-61.

Respondent humbly submits that the judgment of the High Court was right and should be affirmed and that the Appellant's appeal therefrom should be dismissed for the following (among other)

REASONS.

- (1) BECAUSE within the meaning of Section 17 of the Trustee Companies Act 1928 of Victoria Trustee Companies carrying on a business are only entitled to commission upon the sum representing the gross receipts after debiting such sum with the costs and expenses incurred in the working and managing of the business. 10
- (2) BECAUSE "Income Received" means only moneys actually received and does not include a mere increase in capital values.
- (3) BECAUSE "Income" must be given its ordinary meaning. "Income" of a business is not the gross receipts of the business but only the balance remaining after deducting from such gross receipts the costs and expenses necessarily incurred to obtain such gross receipts.
- (4) BECAUSE even if gross receipts may be in any sense 20 regarded as income then in this case such income was received by the Appellant as manager carrying on the business and was never received by the Appellant as executor or trustee within the meaning of Section 17 of the Trustee Companies Act 1928 of Victoria.
- (5) BECAUSE the dissenting judgment of Martin J. in the Supreme Court of Victoria was right and the judgment of MacFarlan and Lowe JJ. in that Court was wrong.
- (6) BECAUSE the judgment of the High Court of Australia 30 is right and should be affirmed.

ANDREW CLARK.

WILFRID M. HUNT.

In the Privy Council.

ON APPEAL

from the High Court of Australia.

IN THE WILL and CODICIL of ERNEST
ROBERT DE LITTLE Grazier deceased.

BETWEEN

**THE UNION TRUSTEE
COMPANY OF AUSTRALIA
LIMITED** (Plaintiff) - *Appellant*

AND

**LENA ETHEL BARTLAM,
JOHN ERNEST de LITTLE
and ETHEL LUDLOW de
LITTLE** (Defendants) - *Respondents.*

Case for the Respondent

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