

GDI. G. 6

70, 1948

No. 45 of 1947.

# In the Privy Council.

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**ON APPEAL**  
*FROM THE HIGH COURT OF AUSTRALIA.*

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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.*

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# RECORD OF PROCEEDINGS.

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COWARD, CHANCE & CO.,  
STEVINSON HOUSE,  
155 FENCHURCH STREET, E.C.3,  
*Solicitors for the Appellant.*

BLYTH, DUTTON, WRIGHT & BENNETT,  
112 GRESHAM HOUSE,  
OLD BROAD STREET, E.C.2,  
*Solicitors for the Respondents.*

In the Privy Council.

No. 45 of 1947.  
UNIVERSITY OF LONDON  
V.C.1  
-3 OCT 1956  
INSTITUTIONAL USE ONLY  
1957

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.

RECORD OF PROCEEDINGS

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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 Grazier  
deceased.

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.*

# RECORD OF PROCEEDINGS

No. 1.

## ORIGINATING SUMMONS.

*In the  
Supreme  
Court of  
Victoria.*

LET the above-named Defendants attend the Judge in Chambers at the  
time and place specified in the margin hereof UPON THE HEARING  
of an application on behalf of the above-named Plaintiff who sues as one of  
the Executors and Trustees appointed under the aforesaid Will and Codicil  
of Ernest Robert de Little deceased for the following directions and orders  
in relation to the administration of the said estate :—

No. 1.  
Originating  
Summons,  
17th  
January  
1945.

(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—What is the income received by the Plaintiff as  
Executor and Trustee as aforesaid within the meaning of Section 17  
of the Trustee Company Act 1928 or corresponding previous enact-  
ments 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 said income be calculated and in  
particular—

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

(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

*In the  
Supreme  
Court of  
Victoria.*

No. 1.  
Originating  
Summons,  
17th  
January  
1945,  
*continued.*

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 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 land 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 ;

(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 South Caramut Settlement and the Trustees of the Aringa North Settlement ?

(2) An Order that the Defendant Lena Ethel Bartlam be appointed for the purpose of this matter to represent all persons entitled as beneficiaries to share in the said estate other than the Defendants John Ernest de Little and Ethel Ludlow de Little.

(3) An Order providing for the cost of this Summons.

Cancelled Duty Stamp

15/-

Seal

No. 2.

Affidavit of  
Samuel  
Cooke,  
16th  
January  
1945.

No. 2.

**AFFIDAVIT of Samuel Cooke.**

I SAMUEL COOKE of 333 Collins Street Melbourne in the State of Victoria General Manager of The Union Trustee Company of Australia Limited make oath and say as follows :

1. I am the General Manager of the above-named Plaintiff The Union Trustee Company of Australia Limited of 333 Collins Street Melbourne and I am duly authorised by that Company to make this Affidavit on its behalf.

2. The above-named Testator Ernest Robert de Little died on the 1st day of October 1926. By his Will dated the 30th day of July 1924

the said Testator appointed his wife the Defendant Ethel Ludlow de Little his brother-in-law Roy Carstairs Simson and his son the Defendant John Ernest de Little to be Trustees Executrix and Executors thereof. By Codicil dated the 17th day of December 1925 the said Testator appointed the Plaintiff The Union Trustee Company of Australia Limited as Executor and Trustee of his Will in place of the said Roy Carstairs Simson then deceased. Probate of the said Will and Codicil was granted by this Honourable Court on the 24th day of February 1927 to the Plaintiff the said Defendant Ethel Ludlow de Little and the said Defendant John Ernest de Little as the Executors and Executrix thereof and the said Plaintiff and Defendants are the present Executors Executrix and Trustees of the said Will and Estate and are hereinafter referred to as "the Trustees". Now produced and shown to me and marked respectively "A" and "B" are true copies of the aforesaid Will and Codicil.

*In the  
Supreme  
Court of  
Victoria.*

No. 2.  
Affidavit of  
Samuel  
Cooke,  
16th  
January  
1945,  
*continued.*

3. The said Testator was survived by his widow the said Defendant Ethel Ludlow de Little a son the said Defendant John Ernest de Little and a daughter the said defendant Lena Ethel Bartlam all of whom are alive and over the age of 21 years. The said son John Ernest de Little is married and has one daughter who is a minor. The said daughter Lena Ethel Bartlam is married and has two children both of whom are minors. The pecuniary legacies bequeathed by clause 2 of the aforesaid Will to Thomas Dixon and Jack Smith have been paid and the personal property specifically bequeathed by clause 3 of the said Will to the testator's widow the said Defendant Ethel Ludlow de Little has been handed over to her.

4. Since the death of the Testator the Defendant Ethel Ludlow de Little has had the use and enjoyment of the Testator's homestead and residence at Caramut Victoria and the grounds and 100 acres of land adjoining the same pursuant to the trust in that behalf contained in Clause 4 (A) of the said Will. The Trustees pursuant to the said clause 4 (A) have from time to time paid certain rates taxes assessments insurance premiums and outgoings affecting the said homestead and lands out of the income of the said estate.

5. The Estate of the said Testator at the time of his death comprised the following assets as set out in the Statement for Probate Duty :

All those pieces of land described in Conveyance No. 372

Book 295 being Allotment Nos. 18 to 24 on Section 6, Allotment Nos. 1, 2, 36 to 38 of Section 1, Section A, Portion B part Allotments 3 to 7 of Section 19 Parish of Caramut County Villiers and all those pieces of land described in Certificate of Title Volume 2607 Folio 286 being Allotments 2, 3 Subsections A and B of Section 16 and Allotments 2 to 5 Subsections A and B of Section 17 Parish of Minja North, Allotment 6, Part Allotments 1, 2, 3, 4, 5, 7, 9, 10, 11, subsections A and B of Section 18 and Allotments 3 to 5 Subsections A and B of Section 19 Parish of Caramut South and Part Allotment 8 Section 19 Parish of Caramut County of Villiers and all those pieces of land described in Certificate of Title Volume 2410 Folio 874 being Allotments 1 to 10

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*In the  
Supreme  
Court of  
Victoria.*

No. 2.  
Affidavit of  
Samuel  
Cooke,  
16th  
January  
1945,  
*continued.*

of Section 15 Allotments A, B, C, Allotments 1 to 8 and Allotment 9 and Part 8 of Section 19, Parish of Caramut, Allotment 8 and part 7 of Section 18 Parish of Caramut South, County of Villiers, and all those pieces of land described in Certificate of Title Volume 2634 Folio 780 being Allotment 4 Subsections A and B of Section 20 Parish of Caramut South, Allotments 1 to 5 of Section 2 Allotments 1 and 2 Subsections A and B of Section 1, Parish of Quamby North, County of Villiers and all that piece of land described in Certificate of Title Volume 3171 Folio 058 being Allotments 1 and 2 Subsections A and B of Section 4 Parish of Quamby North County of Villiers and all that piece of land described in Certificate of Title Volume 2634 Folio 779 being Allotments 3 and 4 of Section 4 Parish of Quamby North County of Villiers containing in all 6154 acres 1 rood 23 7/10ths perches on which are erected a stone dwelling of 10 rooms kitchen 2 maids' rooms and conveniences, 2 weatherboard dwellings, stone gardener's house, stone hut, 2 weatherboard huts, stone stables and store, weatherboard buggy shed, weatherboard chaff house, iron wool shed, hay shed, 6 loose boxes, weatherboard motor house and iron engine shed (Valued by McDonald & Bros. Mortlake) at ..	£49235	3	0	10
All that piece of land described in Certificate of Title Volume 1255 Folio 250808 being Allotments 1 and 2 of Section 5 Town and Parish of Caramut County of Villiers, containing 1 acre vacant land (valued by McDonald Bros. Mortlake) at ..	236	10	0	20
<b>PERSONAL ESTATE</b>				
Cash in hand .. .. .	..	..	..	nil
Life Policy No. 312613 with National Mutual Life Association .. .. .	2500	0	0	
Bonuses thereon .. .. .	510	0	0	
Life Policy No. 314753 with National Mutual Life Association .. .. .	2500	0	0	
Bonuses thereon .. .. .	465	0	0	40
£100 Debentures Athenæum Club 5% due 1/4/64 at £85 .. .. .	85	0	0	
2582 shares B.A.W.R.A. at 11s. 8d. .. .. .	1506	3	4	
20 Shares Victorian Producers Ltd. at £1 .. .. .	20	0	0	
60 Shares Phosphate Co-op. Ltd. at £5 .. .. .	300	0	0	
50 Shares Ballarat & District Co-op. Freezing Co. at 10s. .. .. .	25	0	0	
75 Shares Warrnambool Woollen Mills Ltd. at £1 .. .. .	75	0	0	
1 Share Melbourne Tennis Court Ltd. Valueless.				
Plant as per Valuation of McDonald Bros. Mortlake ..	712	10	0	50
Forward .. .. .	58170	6	4	

	Forward .. .. .	£58170	6	4	<i>In the</i>
	Furniture as per Valuation of McDonald Bros. Mortlake .. .. .	324	10	0	<i>Supreme</i>
	Sheep as per Valuation of McDonald Bros. Mortlake ..	13599	15	6	<i>Court of</i>
	Cattle as per Valuation of McDonald Bros. Mortlake	3012	0	0	<i>Victoria.</i>
	Horses as per Valuation of McDonald Bros. Mortlake	403	0	0	No. 2.
	DEBTS DUE TO THE ESTATE				Affidavit of
	Trustees, Caramut South Settlement—				Samuel
	Balance owing on current account	£704	0	0	Cooke,
10	Refund moneys expenses .. .. .	141	14	6	16th
					January
	Refund Federal Income Tax 1925/26 .. .. .				1945,
					<i>continued.</i>
			845	14	6
			7	3	4
			<hr/>		
			£76362	9	8
			<hr/>		

The liabilities of the said Estate as set out in the said Statement consisted of the following :

	National Bank of A/asia Ltd. Warrnambool Station Account—overdraft at date of death .. .. .	£2151	15	0	
	National Bank of A/asia Ltd., Warrnambool Private Account—overdraft at date of death .. .. .	5766	16	11	
20	R. O. Blackwood and others—principal moneys secured by Mortgage ..£16000 0 0				
	Accrued interest 30/6/26 to 1/10/26				
	93 days at 6½% .. .. .	254	15	10	
			16254	15	10
	Wages owing to employees .. .. .		611	6	2
	Miscellaneous creditors .. .. .		2344	13	3
			<hr/>		
			£27129	7	2
			<hr/>		

30 Statement of particulars of assets comprised in a Deed of Settlement dated the 26th day of June 1926 made between Ernest Robert de Little of the one part and The Union Trustee Company of Australia Limited and John Ernest de Little of the other part :—

	All that piece of land being Lots 37, 38, 51 to 55, 67 and 58 on Plan of Subdivision No. 4537 Parish of Quamby North County of Villiers containing 3528 acres 1 rood 0 6/10ths perches on which is erected a weatherboard dwelling of 4 rooms and conveniences and iron stables—Valued by McDonald Bros. Mortlake at .. .. .	£31754	5	0	
40	All those pieces of land described in Certificate of Title Volume 3164 Folio 632718 Certificate of Title Volume 3164 Folio 632717 being Lots 49, 50, 56 on Plan of Subdivision No. 4537 Parish of Bootshpool County of Villiers containing 935 acres 0 roods 37 perches—vacant land. Valued by McDonald Bros. Mortlake at .. .. .				
			9351	13	9
			<hr/>		
	Forward .. .. .	£41105	18	9	



*In the  
Supreme  
Court of  
Victoria.*  
  
No. 2.  
Affidavit of  
Samuel  
Cooke,  
16th  
January  
1945,  
*continued.*

	Forward	..	..	£41105	18	9	
<b>LIABILITIES</b>							
J. C. Ritchie principal money due under							
Mortgage	..	..	..	£12125	0	0	
Accrued interest 26/6/26 to date of							
death 97 days at 6¼%	..	..	..	201	7	9	
P. O. Gibson principal money due under							
Mortgage	..	..	..	5350	0	0	
Accrued interest 1/7/26 to date of death							
92 days at 6%	..	..	..	80	18	2	10
W. Lindsay principal money due under							
Mortgage	..	..	..	2000	0	0	
Accrued interest 1/7/26 to date of death							
92 days at 5½%	..	..	..	27	14	5	
				<hr/>			
					19785	0	4
				<hr/>			
					£21320	18	5
				<hr/>			
				<hr/>			

The net value of the said estate as passed for duty including the net value of the assets comprised in the above-mentioned Deed of Settlement was £70818 5s. 11d.

6. The principal assets of the estate at the death of the Testator 20 consisted of the freehold grazing property known as Caramut South and the livestock and plant and chattels used in connection therewith together with the livestock depasturing on another property known as Aringa North held under lease. Both the aforesaid properties are situated in the Western District of Victoria.

7. The Trustees exercised the power and discretion conferred upon them by clause 6 of the said Will to postpone the sale and conversion of the Testator's said freehold property Caramut South and of the said livestock at Caramut South and Aringa North and of the said plant and chattels and to retain and carry on, use, occupy and manage the same and to carry 30 on the Testator's business of grazing on the said properties of Caramut South and Aringa North. The Trustees continued to do so as regards Aringa North until the year 1931 and as regards Caramut South until the 19th day of June 1944 when the said property Caramut South and all the livestock and the plant and chattels used in connection therewith belonging to the estate were sold by the Trustees to the Defendant John Ernest de Little pursuant to the last proviso to clause 4 of the said Will.

8. The Plaintiff on behalf of the Trustees kept the books of account of the said estate and at the end of the first year from the date of the testator's death namely the 1st day of October 1927 prepared statements 40 of account, including separate livestock accounts for sheep, cattle and horses and a working account and a general income account for the twelve months. Each of the said livestock accounts showed the stock on hand at the beginning of the year, the purchases and natural increase during the year on the one hand and the sales and deaths and stock on hand at the end of the year on the other hand, stock on hand being brought into account at a standard figure. The difference between the two sides of the account was treated as the profit (or loss) from such livestock for the year. Thereafter as at each succeeding October the Plaintiff prepared similar accounts

for the current year. Now produced and shown to me and marked "C" and "D" respectively are copies of the said accounts for the year ended 1st October 1943 which is typical of all the said accounts, and summaries of the said accounts for each of the years ended 1st October 1927 to 1943 inclusive.

*In the  
Supreme  
Court of  
Victoria.*

No. 2.  
Affidavit of  
Samuel  
Cooke,  
16th  
January  
1945,  
*continued.*

9. At all material times the rate of commission fixed by the Plaintiff Company pursuant to the Union Trustee Executors and Administrators Companies Act No. 839 and the Trustee Company Act 1928 on income received by it as Executor and Trustee has been and is in cases where such  
10 income exceeds £400 per annum  $2\frac{1}{2}$  per centum.

10. The Plaintiff has charged in the said accounts commission on income received by it as such Executor and Trustee at the rate of  $2\frac{1}{2}$  per centum calculated on the income of the said Estate made up of—

- (A) the gross profit shown on the said Livestock Accounts ;
- (B) the gross amount received from the sale of wool and miscellaneous sales as shown on the said Working Accounts ;
- (C) the gross amount of other amounts received as shown on the General Income Accounts ;

but excluding amounts credited in such accounts for interest on advances  
20 made to beneficiaries such amounts not having been actually received by the Trustees.

11. Doubts have arisen as to whether the Plaintiff has been and is entitled to charge such commission on such amounts as aforesaid and if such is not the case as to what is and has been since the death of the said Testator the income received by the Plaintiff as such Executor and Trustee upon which it is entitled to charge commission. It is claimed by the Defendant Lena Ethel Bartlam that such commission should be charged on the amount of the net income of the Estate only and that for the  
30 seventeen years ending the 1st day of October 1943 the aggregate amount of such commission should be £808 instead of £3,792 13s. 8d. charged in the said accounts.

12. The Plaintiff therefore desires directions from this Honourable Court in terms of the questions raised in the Originating Summons herein.

No. 3.

**EXHIBIT "A" to Affidavit of Samuel Cooke.  
Will of Ernest Robert de Little, deceased.**

No. 3.  
Exhibit  
"A" to  
Affidavit of  
Samuel  
Cooke.

THIS IS THE LAST WILL of me ERNEST ROBERT DE LITTLE of  
"Caramut" Victoria Grazier.

1. I APPOINT my wife Ethel Ludlow de Little my brother-in-law  
40 Roy Carstairs Simson and my son John Ernest de Little to be the Trustees and Executrix and Executors of my Will AND I DECLARE that the expression "my Trustees" used herein shall be deemed to refer not only to them as Trustees but to whomsoever shall for the time being be the Trustees or Trustee of my Will.

Will of  
Ernest  
Robert  
de Little,  
deceased,  
30th July  
1924.

2. I GIVE the following pecuniary legacies in each case free of all duty in the nature of Probate or Estate Duty :—

(A) To Thomas Dickson Manager at Caramut Station Two hundred pounds.

(B) To Jack Smith Manager at Aringa North Yambuk Two  
50 hundred pounds

*In the  
Supreme  
Court of  
Victoria.*

No. 3.  
Exhibit  
" A " to  
Affidavit of  
Samuel  
Cooke.

Will of  
Ernest  
Robert  
de Little,  
deceased,  
30th July  
1924,  
*continued.*

AND I DECLARE that the above legacies are to be paid in each case when and as my Trustees shall think fit and shall not bear any interest whatever during the time of non-payment thereof or any part thereof.

3. I GIVE free of all such duty as aforesaid all my household furniture and articles of domestic use or ornament stores provisions and my articles of personal use or adornment in my residence at Caramut aforesaid to my said wife Ethel Ludlow de Little absolutely. This legacy is not to include motor cars or carriages or vehicles but my wife shall have the right in addition to the articles by this Clause given to her to select one of my buggies and one pair of my horses and appurtenant harness and retain the 10 same as her own property absolutely.

4. I GIVE DEVISE AND BEQUEATH all the residue of my property whatsoever and wheresoever unto my Trustees :—

(A) UPON TRUST as to my homestead and residence at Caramut aforesaid and the grounds belonging thereto and also One hundred acres of my land adjoining the same to be selected and appropriated for the purposes of this Clause by my Trustees during the life and widowhood of my said wife to permit her to have the use and enjoyment thereof during such period or periods as she shall desire to reside there without impeachment of waste my 20 Trustees paying all rates taxes assessments insurance premiums and outgoings affecting the same during the time or times of my wife's residence there out of my general estate or the income thereof with power to my Trustees whilst my wife shall not during such life and widowhood desire to have such use and enjoyment to let the said homestead residence grounds and land to any person or persons upon such terms and conditions and at such rent as my Trustees shall think fit paying the net rent derived therefrom after deducting all rates taxes assessments insurance premiums and outgoings to my said wife during her life and widowhood And upon the death 30 or re-marriage of my said wife my Trustees shall hold the said homestead and residence grounds and the said One hundred acres of land UPON TRUST for my said son John Ernest de Little absolutely.

(B) My Trustees shall hold all the remainder of the said residue of my property UPON TRUST (subject to sub-clause (A) of Clause 6 hereof and to the proviso lastly in this sub-clause contained) to sell and convert into money the same or such part thereof as shall not consist of money as my Trustees shall think fit and hold the proceeds of such last-mentioned sale and conversion and all capital 40 moneys forming part of my estate UPON TRUST to invest the same or such part thereof as shall not be immediately distributable in any manner hereby authorised and to hold the same and all investments for the time being representing the same and all my property for the time being remaining unsold and unconverted UPON TRUST for my child or children living at my death and who being male attain the age of twenty-one years or being female attain that age or previously marry in equal shares if more than one except that each son of mine entitled under this trust shall take a share double the amount of the share of each daughter of 50 mine so entitled the share of every daughter attaining a vested interest in this trust to be retained and held by my Trustees upon

and subject to the trusts and provisions hereinafter declared concerning the same PROVIDED ALWAYS that if any child of mine shall die in my lifetime or shall die after my death before attaining a vested interest under this trust and there shall be issue of such child living at my death or at the death of such child whichever shall last happen and being male attaining the age of twenty-one years or being female attaining that age or previously marrying then and in every such case such issue shall take absolutely equally between them per stirpes if more than one the share or interest to which the child so dying would have become entitled if he or she had lived to attain a vested interest issue more remote than a child of my child so dying to take only equally between them if more than one the share or interest which his her or their parent would have taken if such parent had not died before attaining and had lived to attain a vested interest PROVIDED LASTLY that in the exercise of the trust for sale in this clause contained my Trustees shall before selling the remainder of my Caramut estate and the stock and plant thereon in writing offer such remainder and such stock and plant to my said son at the price of Seven pounds per acre for the freehold land and current market values for the stock and plant and if my said son shall accept in writing such offer within six months after the making thereof then my Trustees shall sell the same to him accordingly upon such terms and conditions as they shall think fit. Any dispute as to such current market values to be decided by my Trustees whose decision shall be final.

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5. MY Trustees shall hold the share or interest in the said residue of my property proceeds of sale and conversion thereof moneys investments and in my unsold or unconverted property (hereinafter referred to as "the daughter's share") of each daughter of mine (hereinafter referred to as "the daughter") attaining a vested interest under the last preceding clause UPON AND SUBJECT to the trusts and provisions following :—

(1) UPON TRUST to pay to or apply for the daughter during her life the net income of the daughter's share accruing during her life for her separate use without power of anticipation.

(2) After the death of the daughter to stand possessed of the daughter's share both as to capital and income IN TRUST for such one or more of the issue of the daughter born in her lifetime or within twenty-one years after her death for such interests (successive or otherwise) at such time or times and in such manner (consistent with the rule against perpetuities) as the daughter may by deed or deeds with or without power of revocation or new appointment or by Will appoint and in default of such appointment and subject to any partial appointment UPON TRUST for all the children or any the child of the daughter being male attaining the age of twenty-one years or being female attaining that age or previously marrying in equal shares if more than one.

(3) PROVIDED ALWAYS that no child or issue of the daughter shall take whether originally or by derivation any part share or interest in the daughter's share and/or the income thereof in default of complete appointment thereof without bringing into hotchpot any part or share therein which may have been appointed to him or her or his or her issue.

*In the Supreme Court of Victoria.*

No. 3. Exhibit "A" to Affidavit of Samuel Cooke.

Will of Ernest Robert de Little, deceased, 30th July 1924, continued.

*In the  
Supreme  
Court of  
Victoria.*

No. 3.  
Exhibit  
" A " to  
Affidavit of  
Samuel  
Cooke,

Will of  
Ernest  
Robert  
de Little,  
deceased,  
30th July  
1924,  
*continued.*

(4) PROVIDED ALSO that notwithstanding and in derogation of the preceding trusts it shall be lawful for the daughter by deed or deeds with or without power of revocation and new appointment or by Will to appoint that the whole or any part or parts of the income of the daughter's share shall be paid to any husband of the daughter who may survive her during his life or for any less period or determinable upon the happening of any event PROVIDED that if there shall be any issue of the daughter living at her death then such husband shall not be entitled to receive more than one-half of such income whilst any such issue shall be living and any appointment under this power shall be so construed and take effect. 10

(5) SUBJECT to the preceding trusts and provisions contained in sub-clauses (1) (2) (3) and (4) of this clause and in case of any failure or determination thereof my Trustees shall stand possessed of the daughter's share or the unappointed part thereof UPON TRUST for my said son if he shall then be living absolutely but if he shall not be then living UPON TRUST for such of his issue as shall be then living and being male attaining the age of twenty-one years or being female attaining that age or previously marrying in equal shares per stirpes if more than one issue more remote than 20 a child of such son to take only equally between them if more than one the share or interest which his her or their parent would have taken if such parent had not died before attaining and had lived to attain a vested interest but if there shall not be any person capable of taking under this trust then UPON TRUST for the person or persons who would be the next of kin of the daughter at her death under the Statutes for the distribution of the effects of Intestates if she had died intestate and a spinster and domiciled in Victoria and if there shall be more than one of such persons then in the same shares in which in such case they would be entitled 30 under the said Statutes.

6. In the administration of my estate and the execution of the trusts of my Will my Trustees shall have the following powers and discretions which my Trustees may exercise either alone or jointly with any other person or persons :

(A) To postpone the sale and conversion of all or any part or parts of my estate during such period as they shall think advisable.

(B) To retain carry on use occupy let and manage all or any part of my estate either pending the sale and conversion thereof 40 or as an investment whether such as is hereinafter authorised or not and for such purpose effect any repairs make any improvements erect any buildings accept surrenders of leases make arrangements with tenants and others and generally deal with the same as if they were the beneficial owners thereof.

(c) To carry on or concur in carrying on at the discretion of my Trustees for such period or periods as my Trustees shall think fit at the risk of my general estate any business or pursuit in which I may be engaged at my death either alone or jointly or in partnership with any other person or persons (whether such person 50

or persons be or be not a Trustee or Trustees of this my Will) AND for that purpose to retain and/or increase the capital or my share of the capital thereof and to retain and occupy and manage any lands or stations which I may own or occupy at my death either alone or with any other person or persons with all or any of the sheep cattle horses and chattels and effects thereon with full power without impairing the generality of the powers of management hereby given to purchase sell deal in and dispose of stock and progeny purchase rent take up or otherwise acquire lands or runs for any tenure or on licence to be worked or used with or in connection with any lands stations or runs of which I may be possessed or for the grazing or feeding of any stock and to commit such carrying on and management and the exercise of such powers or any of them to others (including beneficiaries under this my Will) and to employ such Managers servants and other persons in and about the management thereof and to do such acts and things and enter into such contracts and arrangements as may be incident to such carrying on as and which my Trustees shall think proper and to employ any money belonging to or raised out of my estate for all or any of the purposes of this sub-clause with power to carry out all existing arrangements (partnership or otherwise) and make new arrangements and adjust accounts with partners accept an agreed or estimated amount (whether in money shares stock or other property) for my share in any such partnership or for my interest in any such business and acquire the share of any partner upon such terms and for such consideration as my Trustees shall think fit.

(D) To pay calls on shares accept new issues of shares and make or assent to any arrangements schemes reductions or increases of capital in reference to shares in any public Company or Companies forming part of my estate.

(E) To decide all questions of doubt or difficulty arising in connection with my estate or the provisions of my Will any and every such decision to be final.

(F) To invest all moneys capable of being invested under my Will in the names of my Trustees or under their legal control in or upon first Mortgages (whether contributory or otherwise) of real estate including lands conditionally purchased from the Crown and lands leased from the Crown and of which the Lessee is entitled to acquire the fee simple in any British country or Dominion or in Parliamentary stocks or funds or debentures or Government or Municipal securities thereof or in the stocks or debentures issued by the Melbourne and Metropolitan Board of Works or on deposit in any Bank in any such country or in or upon any securities in which my Trustees might according to the law of any part of Australasia or Great Britain for the time being legally invest trust funds or in or upon any of such securities at the discretion of my Trustees with liberty to change such investments at my Trustees' discretion for any other or others of the kinds prescribed.

7. I DESIRE that my funeral shall be of a strictly private nature.

*In the  
Supreme  
Court of  
Victoria.*

No. 3.  
Exhibit  
"A" to  
Affidavit of  
Samuel  
Cooke.

Will of  
Ernest  
Robert  
de Little,  
deceased,  
30th July  
1924,  
*continued.*

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*In the  
Supreme  
Court of  
Victoria.*

8. I REVOKE all former Wills.

IN WITNESS whereof I have hereunto set my hand this Thirtieth day of July One thousand nine hundred and twenty four.

No. 3.  
Exhibit  
" A " to  
Affidavit of  
Samuel  
Cooke.

SIGNED by the said ERNEST ROBERT DE LITTLE the Testator as his last Will in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as Witnesses. } E. R. DE LITTLE

Will of  
Ernest  
Robert  
de Little,  
deceased,  
30th July  
1924,  
*continued.*

J. WILLIAMSON, Law Clerk, Warrnambool.

10

J. S. TAIT, Solicitor, Warrnambool.

**No. 4.**

**EXHIBIT " B " to Affidavit of Samuel Cooke.**

**Codicil to Will of Ernest Robert de Little, deceased.**

No. 4.  
Exhibit  
" B " to  
Affidavit of  
Samuel  
Cooke.

THIS IS A CODICIL to the Will of me ERNEST ROBERT DE LITTLE of " Caramut House " Caramut dated the Thirtieth day of July One thousand nine hundred and twenty four.

Codicil to  
Will of  
Ernest  
Robert  
de Little,  
deceased,  
17th  
December  
1925.

I APPOINT THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED as an Executor and Trustee of my Will in place of my brother-in-law Roy Carstairs Simson now deceased.

20

I DIRECT that the share of my daughter in my estate shall be held UPON TRUST to pay her the net income thereof during her life or until she shall assign or mortgage the same or do or suffer anything whereby she may lose the personal enjoyment thereof (except by a settlement on her marriage) and on the happening of any such event I DIRECT that my Trustees shall in their discretion accumulate such income or part thereof or pay or apply the same or part thereof to or for the benefit of my said daughter and her children and at her death any accumulations shall be added to and form part of the capital of her share.

IN WITNESS whereof I have hereunto set my hand this Seventeenth 30 day of December One thousand nine hundred and twenty five.

SIGNED by the Testator ERNEST ROBERT DE LITTLE as a Codicil to his last Will in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses } E. R. DE LITTLE

F. P. BRETT, Solicitor, Melbourne.

REGINALD F. COX, his Clerk.

40

*In the  
Supreme  
Court of  
Victoria.*

No.

**EXHIBIT "C" to Affi  
Accounts for the year**

**THE ESTATE OF THE**

**CARAMUT SOUTH SHEEP ACCOUNT**

No. 5.  
Exhibit  
"C" to  
Affidavit of  
Samuel  
Cooke.

Accounts  
for year  
ended  
1st  
October  
1943.

1942.	Oct. 1	To Stock on hand	5851 at Probate Value ..	£7032 7 0	
			7049 at 10/- .. ..	3524 10 0	
				<hr/>	£10556 17 0
1943.	Oct. 1	„ Purchases	12 .. .. .		183 10 10
		„ Increase	2803 .. .. .		
		„ Transfer to Working Account	.. . . .		2134 13 5
			<hr/>		<hr/>
			15715		£12875 1 3
			<hr/>		<hr/>
1943.	Oct. 1	To Stock on Hand	5851 at Probate Value ..	£7032 7 0	
			7027 at 10/- .. ..	3513 10 0	
				<hr/>	£10545 17 0

**CARAMUT SOUTH CATTLE ACCOUNT**

1942.	Oct. 1	To Stock on Hand	267 at Probate Value ..	£1701 7 6	
			183 at £5 .. .. .	925 0 0	
				<hr/>	£2626 7 6
1943.	Oct. 1	„ Increase	251 .. .. .		
		„ Transfer to Working Account	.. .. .		2269 1 3
			<hr/>		<hr/>
			705		£4895 8 9
			<hr/>		<hr/>
1943.	Oct. 1	To Stock on Hand	267 at Probate Value ..	£1701 7 6	
			310 at £5 .. .. .	1550 0 0	
				<hr/>	£3251 7 6

**CARAMUT SOUTH HORSE ACCOUNT**

1942.	Oct. 1	To Stock on Hand	25 at Probate Value ..		£103 1 3
1943.	Oct. 1	To Stock on Hand	25 at Probate Value ..		£103 1 3
				<hr/>	<hr/>
					<hr/>







LATE E. R. DE LITTLE.  
FOR THE YEAR ENDED 1ST OCTOBER, 1943.

					CR.				<i>In the Supreme Court of Victoria.</i>
1943.									No. 5.
Oct. 1	By Profit Sheep Account	..	..	..	£2134 13 5				Exhibit
	„ Profit Cattle Account	..	..	..	2269 1 3				“ C ” to
					<hr/>				Affidavit of
	„ Proceeds Sale of Wool—						£4403 14 8		Samuel
	355 bales	..	..	..	8037 11 4				Cooke
	16 Bales Crutchings	..	..	..	173 19 6				<hr/>
							8211 10 10		Accounts
	„ Proceeds sale of skins and hides	..	..				44 3 6		for year
	„ Proceeds sale of seed oats	..	..				7 4 0		ended
									1st
									October
									1925,
									<i>continued.</i>

Forward £12666 13 0

<i>In the Supreme Court of Victoria.</i> <hr/> No. 5. Exhibit "C" to Affidavit of Samuel Cooke. <hr/> Accounts for year ended 1st October 1943, <i>continued.</i>	To Federal Pay Roll Tax for year to 30/6/43 .. „ Subscriptions— Graziers Association of Victoria .. .. Pastoral Review .. .. . Stock & Land .. .. . „ Depreciation Plant—10% .. .. . „ Balance transferred to Income Account ..	Forward  11 16 0 1 4 6 12 6 <hr/> 13 13 0 87 12 6 7959 0 3 <hr/> £12666 13 0 <hr/>
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THE ESTATE OF THE  
INCOME ACCOUNT FOR THE

1943.

Oct. 1 To Interest— Trustees South Caramut Settlement— On £1146 1 10 at 5% to 1/10/43 .. £3050 0 0 at 5% to 1/10/43 .. Trustees Aringa North Settlement— On £4500 at 4% to 1/10/43 .. .. £2900 at 4¼% to 1/10/43 .. .. £1000 at 4¼% to 1/10/43 .. .. Executors G. T. Chirnside Mortgage— On £15000 (reduced to £13000) at 4¼% to 1/10/43 .. .. . „ Blake & Riggall, fee preparing Land Tax Returns .. .. . „ Bank fees, exchange and petty expenses .. „ Union Trustee Co. of Australia Ltd. 2½% Commission on— £27 11 2 income as per this Statement .. £12666 13 0 Working Account .. .. „ Balance transferred to Beneficiaries' Accounts— J. E. de Little 2/3rds .. .. . Mrs. L. Bartlam 1/3rd .. .. .	 £57 6 0 152 10 0 180 0 0 123 5 0 42 10 0 599 5 9 <hr/> 1154 16 9 3 3 0 13 16 5 13 9 316 13 4 <hr/> 317 7 1 4331 12 1 2165 16 1 <hr/> 6497 8 2 <hr/> £7986 11 5 <hr/>
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Forward	£12666 13 0	<i>In the Supreme Court of Victoria.</i>
		<i>No. 5. Exhibit "C" to Affidavit of Samuel Cooke.</i>
	<u>£12666 13 0</u>	<i>Accounts for year ended 1st October 1943, continued.</i>

(Sgd.) C. A. HOLMES, F.C.A. (Aust.), Auditor,  
Melbourne, 27th January, 1944.

LATE E. R. DE LITTLE.

YEAR ENDED 1ST OCTOBER, 1943.

1943.

Oct. 1	By Profit Caramut South Working Account	..	..	..	£7959 0 3
	„ Dividend—Warrnambool Woollen Mills Co. Ltd.	..	..	..	6 10 0
	„ Interest on money on temporary deposit	..	..	..	21 1 2

£7986 11 5

(Sgd.) C. A. HOLMES, F.C.A. (Aust.), Auditor,  
Melbourne, 27th January, 1944.

*In the  
Supreme  
Court of  
Victoria.*

No. 6.  
Exhibit  
"D" to  
Affidavit of  
Samuel  
Cooke.

No.

**EXHIBIT "D" to Affi  
Summaries of Accounts for ea**

**ESTATE OF THE LATE  
SUMMARY OF SHEEP ACCOUNTS**

Summaries of Accounts for each of the years from 1927 to 1943.	Credits			Non-Cash Items (inc. Transfers)	Stock on Hand at end of period
	12 Months ended 1st October	Sales and Rations			
	CARAMUT				
1927 .. ..	£1141 14 1		£2991 12 0	£11530 11 0	
1928 .. ..	1177 10 6		4117 4 0	10915 12 6	
1929 .. ..	1508 13 7		3745 4 0	11344 18 6	
1930 .. ..	1459 0 2		4874 8 0	12179 4 6	
1931 .. ..	1618 19 4		5264 16 0	10576 2 0	
1932 .. ..	1413 16 2		—	9268 7 0	
1933 .. ..	922 14 9		—	9832 7 0	
1934 .. ..	1296 12 6		—	10349 17 0	
1935 .. ..	1055 9 6		—	10604 17 0	
1936 .. ..	2296 6 11		—	10792 17 0	
1937 .. ..	2048 17 10		—	10752 7 0	
1938 .. ..	1998 14 7		—	10866 17 0	
1939 .. ..	1904 18 0		—	10554 17 0	
1940 .. ..	1977 3 5		—	11249 17 0	
1941 .. ..	2534 17 4		—	10659 7 0	
1942 .. ..	2042 7 1		—	10556 17 0	
1943 .. ..	2329 4 3		—	10545 17 0	
	ARINGA				
1927 .. ..	1447 14 8		4262 18 0	6880 5 0	
1928 .. ..	1867 16 7		3255 19 0	6226 13 0	
1929 .. ..	1332 10 1		2950 8 6	7557 13 0	
1930 .. ..	3250 6 10				
			Transfers		
			£5663 10 0		
			Capital A/c		
			£1668 18 9	7332 8 9	
1931 .. ..	1547 8 10		Transfers	2393 0 0	
			£2955 19 0		
			Capital A/c		
			£1513 12 0	4467 11 0	

6.  
 Affidavit of Samuel Cooke.  
 for the years 1927 to 1943.

E. R. DE LITTLE.  
 FROM 1927 TO 1943.

*In the  
 Supreme  
 Court of  
 Victoria.*

No. 6.  
 Exhibit  
 "D" to  
 Affidavit of  
 Samuel  
 Cooke.

Stock on Hand at commencement of period	Debits		Non-Cash Items (inc. Transfers)	Net Profit	Net Loss
	Purchases				
<b>SOUTH.</b>					
£7032 7 0	£3193 10 0		£4262 18 0	£1175 2 1	
11530 11 0	300 0 0		3235 19 0	1143 17 0	
10915 12 6	—		2950 8 6	2732 15 1	
11344 18 6	222 18 0		5663 10 0	1281 6 2	
12179 4 6	621 5 8		2953 19 0	1705 8 2	
10576 2 0	102 18 0		—	3 3 2	
9268 7 0	120 15 0		—	1365 19 9	
9832 7 0	488 7 8		—	1325 14 10	
10349 17 0	254 6 9		—	1056 2 9	
10604 17 0	622 19 2		—	1861 7 9	
10792 17 0	207 0 4		—	1801 7 6	
10752 7 0	204 2 6		—	1909 2 1	
10866 17 0	119 15 6		—	1473 2 6	
10554 17 0	175 10 0		—	2496 13 5	
11249 17 0	362 5 0		—	1582 2 4	
10659 7 0	151 4 0		—	1788 13 1	
10556 17 0	183 10 10		—	2134 13 5	
<b>NORTH.</b>					
6794 4 6	1375 17 9		2991 12 0	1429 3 5	
6880 5 0	94 11 0		4117 4 0	238 8 7	
6226 13 0	1436 3 0		3745 4 0	432 11 7	
7557 13 0	—		4874 8 0	543 14 7	
2393 0 0	—		5264 16 0		

Summaries  
 of Accounts  
 for each of  
 the years  
 from 1927  
 to 1943,  
*continued.*

SUMMARY OF  
CARAMUT

			Credits			Stock on Hand at end of period		
			12 Months ended 1st October	Sales and Rations	Non-Cash Items (inc. Transfers)			
In the Supreme Court of Victoria.  No. 6. Exhibit " D " to Affidavit of Samuel Cooke.  Summaries of Accounts for each of the years from 1927 to 1943, <i>continued.</i>	1927	.. ..	£1432 3 10	£25 10 0	£1883 7 6			
	1928	.. ..	2283 13 4	—	1471 11 0			
	1929	.. ..	1143 5 5	—	1554 16 3			
	1930	.. ..	1026 17 4	312 7 6	1593 15 0			
	1931	.. ..	858 19 2	12 15 0	2441 7 6			
	1932	.. ..	818 3 8	—	1901 7 6			
	1933	.. ..	628 8 0	—	1637 6 3			
	1934	.. ..	299 1 2	—	2166 7 6			
	1935	.. ..	285 8 10	—	2256 7 6			
	1936	.. ..	916 2 0	—	2316 7 6			
	1937	.. ..	634 11 2	—	2631 7 6			
	1938	.. ..	1368 5 9	—	1731 7 6			
	1939	.. ..	688 5 9	—	1223 9 2			
	1940	.. ..	1218 18 1	—	2986 7 6			
	1941	.. ..	1164 3 1	—	2961 7 6			
	1942	.. ..	2229 1 10	—	2626 7 6			
	1943	.. ..	1644 1 3	—	3251 7 6			
	ARINGA							
	1927	.. ..	867 14 5		1832 7 0			
1928	.. ..	718 10 6	348 0 0	1698 15 0				
1929	.. ..	827 14 7	510 0 0	1280 14 3				
1930	.. ..	872 3 2	527 5 0	1414 16 0				
1931	.. ..	899 5 0	1036 0 0	—				

ESTATE OF THE LATE  
SUMMARY OF HORSE

			CARAMUT		
1927	.. ..	£180 17 6	—	£165 0 0	
1928	.. ..	67 0 0	—	136 2 6	
1929	.. ..	87 0 0	£8 5 0	103 1 3	
1930	.. ..	127 4 0	—	82 9 0	
1931	.. ..	—	—	94 17 6	
1932	.. ..	31 1 6	—	70 14 9	
1933	.. ..	—	—	74 18 0	
1934	.. ..	—	—	79 1 3	
1935	.. ..	—	—	79 1 3	
1936	.. ..	5 0 0	12 0 0	79 1 3	
1937	.. ..	—	—	87 7 8	
1938	.. ..	10 4 3	—	95 14 1	
1939	.. ..	—	—	91 10 10	
1940	.. ..	—	—	95 14 1	
1941	.. ..	—	—	103 1 3	
1942	.. ..	—	—	103 1 3	
1943	.. ..	—	—	103 1 3	



## ACCOUNTS FROM 1927 TO 1943.

## SOUTH.

Stock on Hand at commencement of period	Debits		Non-Cash Items (inc. Transfers)	Net Profit	Net Loss
	Purchases				
£1701 7 6	£993 3 0	—	—	£646 10 10	
1883 7 6	408 10 0	£348 0 0	—	1115 6 10	
1471 11 0	9 15 0	510 0 0	—	706 15 8	
1554 16 3	34 4 6	527 5 0	—	816 14 1	
1593 15 0	23 12 0	1036 0 0	—	659 14 8	
2441 7 6	—	—	—	278 3 8	
1901 7 6	19 10 0	—	—	344 16 9	
1637 6 3	675 10 6	—	—	152 11 11	
2166 7 6	5 10 0	—	—	369 18 10	
2256 7 6	279 16 0	—	—	696 6 0	
2316 7 6	550 12 6	—	—	398 18 8	
2631 7 6	—	—	—	468 5 9	
1731 7 6	—	—	—	180 7 5	
1223 9 2	3132 9 6	—	—		£150 13 1
2986 7 6	—	—	—	1139 3 1	
2961 7 6	507 10 0	—	—	1386 11 10	
2626 7 6	—	—	—	2269 1 3	

*In the  
Supreme  
Court of  
Victoria.*

No. 6.  
Exhibit  
"D" to  
Affidavit of  
Samuel  
Cooke.  
  
Summaries  
of Accounts  
for each of  
the years  
from 1927  
to 1943  
*continued.*

## NORTH.

1572 0 0	472 10 0	25 10 0	—	630 1 5	
1832 7 0	269 10 0	—	—	663 8 6	
1698 15 0	15 15 0	—	—	903 18 10	
1280 14 3	1164 12 3	312 7 6	—	56 10 2	
1414 16 0	20 0 0	Capital A/c	—		
		307 5 0	—	180 9 0	
		Transfer	—		
		£12 15 0	—		
		320 0 0	—		

## E. R. DE LITTLE.

## ACCOUNTS FROM 1927 TO 1943.

## SOUTH.

£202 0 0	£41 0 0	—	—	£102 17 6	—
165 0 0	—	—	—	38 2 6	—
136 2 6	—	—	—	62 3 9	—
103 1 3	—	£18 14 0	—	87 17 9	—
82 9 0	29 0 0	14 0 6	—	—	£30 12 0
94 17 6	24 0 0	—	—	—	17 1 3
70 14 9	—	—	—	4 3 3	—
74 18 0	12 0 0	—	—	—	7 16 9
79 1 3	—	—	—	—	—
79 1 3	52 10 0	—	—	—	35 10 0
79 1 3	26 15 0	—	—	—	18 8 7
87 7 8	30 0 0	—	—	—	11 9 4
95 14 1	—	—	—	—	4 3 3
91 10 10	20 0 0	—	—	—	15 16 9
95 14 1	6 10 0	—	—	17 2	—
103 1 3	—	—	—	—	—
103 1 3	—	—	—	—	—

ESTATE OF THE  
SUMMARY OF HORSE

*In the  
Supreme  
Court of  
Victoria.*

No. 6.  
Exhibit  
"D" to  
Affidavit of  
Samuel  
Cooke.

Summaries  
of  
Accounts  
for each of  
the years  
from 1927  
to 1943,  
*continued.*

		Credits				
12 Months ended 1st October		Sales	Non-Cash Items (inc. Transfers)	Stock on Hand at end of period		
		ARINGA				
1927	.. ..	290 5 0	—	140 5 0		
1928	.. ..	285 0 0	—	126 4 6		
1929	.. ..	—	—	126 4 6		
1930	.. ..	—	18 14 0	93 9 9		
1931	.. ..	93 0 0	14 0 6	—		
SUMMARY OF WORKING ACCOUNTS &						
		1927		1928		
		Credits				
Working Account	Receipts (Excluding Stock Accounts) ..	£7056 18 4		£11178 10 3		
	Profit on Stock Accounts .. ..	4213 5 3		3470 2 11		
		—————	£11270 3 7	—————	£14648 13 2	
	Debits					
	Working Expenses (Excluding Interest)					
Cash Items ..	8992 1 1		10430 7 8			
Non Cash Items	105 16 2		108 17 9			
	—————		—————	9097 17 3	10539 5 5	
Loss on Stock Accounts.						
Profit or Loss on Working Account						
			2172 6 4		4109 7 9	
Credits						
Receipts—						
Sundry .. ..	4 1 5		4 0 0			
Interest .. ..	77 5 4		127 4 5			
	—————		—————	81 6 9	131 4 5	
Total .. ..				—————	2253 13 1	
Debits						
Interest—						
Overdraft .. ..	478 19 6		181 12 0			
Mortgage .. ..	745 4 2		1439 19 7			
Sth. Caramut Settlement ..	—		200 15 4			
Aringa Settlement	34 7 8		—			
Other Outstandings..	184 9 6		35 15 3			
	—————		—————	1443 0 10	1858 2 2	
Net Income or Deficiency before taking into account Commission .. ..						
			810 12 3		2382 10 0	

## LATE E. R. DE LITTLE.

## ACCOUNTS FROM 1927 TO 1943—(continued).

			Debits		Net Profit		Net Loss		In the Supreme Court of Victoria.  No. 6. Exhibit "D" to Affidavit of Samuel Cooke.  Summaries of Accounts for each of the years from 1927 to 1943, continued.
Stock on Hand at commencement of period	Purchases	Non-Cash Items (inc. Transfers)							
NORTH.									
201 0 0	—	—			229 10 0			—	
140 5 0	—	—			270 19 6			—	
126 4 6	—	8 5 0			—			8 5 0	
126 4 6	—	—			—			14 0 9	
93 9 9	—	—			13 10 9			—	
INCOME ACCOUNTS FROM 1927 TO 1943.									
1929			1930			1931			
£9998 14 4			£6410 6 2			£3388 5 1			
4838 4 11			2786 2 9			2559 2 7			
<u>£14836 19 3</u>			<u>                    </u>			<u>£9196 8 11</u>			
10241 3 11			8845 4 3			7542 19 9			
98 14 0			88 16 7			79 19 0			
8 5 0			14 0 9			1673 8 2			
<u>10348 2 11</u>			<u>                    </u>			<u>8948 1 7</u>			
						<u>9296 6 11</u>			
4488 16 4						248 7 4			
						— 3348 19 3			
20 8 6			25 7 0						
95 19 1			71 5 8			76 4 2			
<u>116 7 7</u>			<u>                    </u>			<u>96 12 8</u>			
						76 4 2			
4605 3 11						+ 345 0 0			
						— 3272 15 1			
176 17 0			281 5 0			137 9 0			
1562 10 0			1562 10 0			1562 10 0			
246 10 6			251 15 4			251 15 4			
—			17 4 11			275 15 11			
49 19 5			16 12 9			13 10 8			
<u>2035 16 11</u>			<u>                    </u>			<u>2129 8 0</u>			
						<u>2241 0 11</u>			
2569 7 0			— 1784 8 0			— 5513 16 0			

*In the  
Supreme  
Court of  
Victoria.*

## ESTATE OF THE LATE

## SUMMARY OF WORKING ACCOUNTS &amp;

		1932	1933		
No. 6. Exhibit "D" to Affidavit of Samuel Cooke.  Summaries of Accounts for each of the years from 1927 to 1943, <i>continued.</i>	Working Account	Credits			
		Receipts (Excluding Stock Accounts) ..	£3539 15 11	£3537 0 9	
		Profit on Stock Accounts .. ..	281 6 10	1714 19 9	
			£3821 2 9	£5252 0 6	
		Debits			
		Working Expenses (Excluding Interest)			
		Cash Items ..	3617 5 1	3235 5 8	
		Non Cash Items ..	83 4 9	75 5 4	
		Loss on Stock A/es	17 1 3	—	
			3717 11 1	3310 11 0	
		+103 11 8	+1941 9 6		
Income Account	Income Account	Profit or Loss on Working Account			
		Credits			
		Receipts			
		Sundry and In- terest on Tem- porary Deposit	5 0 0		
		Interest Advances to Beneficiaries			
			+103 11 8		
		Debits			
		Interest—			
		Overdraft .. ..	134 6 0	316 4 0	
		Mortgage .. ..	1383 6 1	1409 4 11	
Sth. Caramut Settlement .	217 14 0	209 16 0			
Aringa Settlement	207 4 0	6 18 6			
Other Outgoings ..	16 3 5	20 12 11			
	-1958 13 6	1962 16 4			
		-1855 1 10	- 16 6 10		

E. R. DE LITTLE.

INCOME ACCOUNTS FROM 1927 TO 1943 (*continued*).*In the  
Supreme  
Court of  
Victoria.*No. 6.  
Exhibit  
"D" to  
Affidavit of  
Samuel  
Cooke.Summaries  
of  
Accounts  
for each of  
the years  
from 1927  
to 1943,  
*continued.*

1934		1935		1936	
£6356 18 4		£3745 1 9		£6503 3 11	
1478 6 9		1426 1 7		2557 13 9	
<hr/>	£7835 5 1	<hr/>	£5171 3 4	<hr/>	£9060 17 8
3524 9 6		3954 1 11		4375 4 4	
67 13 8		58 5 0		94 6 5	
7 16 9		—		35 10 0	
<hr/>	3599 19 11	<hr/>	4012 6 11	<hr/>	4505 0 9
<hr/>					
	+4235 5 2		+1158 16 5		4555 16 11
	5 10 0		5 0 0	6 0 0	
				26 17 5	32 17 5
<hr/>					
	+4240 15 2		+1163 16 5		4588 14 4
209 6 0		141 5 0		62 7 0	
1475 1 8		1119 18 11		1062 10 0	
249 18 3		209 16 0		209 16 0	
—		81 14 6		180 0 0	
—		291 17 0		32 19 11	
60 8 4					
<hr/>	1994 14 3	<hr/>	-1844 11 5	<hr/>	1547 12 11
<hr/>					
	+2246 0 11		- 680 15 0		3041 1 5
<hr/>					

*In the  
Supreme  
Court of  
Victoria.*

## ESTATE OF THE LATE

## SUMMARY OF WORKING ACCOUNTS &amp;

		1937		1938		
No. 6. Exhibit "D" to Affidavit of Samuel Cooke.	Working Account	Credits				
		Receipts (Excluding Stock Accounts) ..	£7796 13 11		£5006 2 5	
Summaries of Accounts for each of the years from 1927 to 1943, <i>continued.</i>	Working Account	Profit on Stock Accounts .. ..	2200 6 2		2377 7 10	
			<u>          </u>	£9997 0 1	<u>          </u>	£7383 10 3
		Debits				
		Working Expenses (Excluding Interest)				
		Cash Items ..	4995 7 7		4940 18 5	
		Non Cash Items	112 9 4		151 4 4	
		Loss on Stock Accounts ..	18 8 7		11 9 4	
			<u>          </u>	5126 5 6	<u>          </u>	5103 12 1
		<hr/>				
		Profit or Loss on Working Account Credits .. ..		+4870 14 7		2279 18 2
		Receipts—				
		Sundry and Inter- est on Tem- porary Deposit..	23 10 10		4 15 0	
					63 3 3	
		Interest Advances to Beneficiaries ..	29 11 3		28 1 2	
			<u>          </u>	53 2 1	<u>          </u>	95 19 5
		<hr/>				
		Total ..		4923 16 8		2375 17 7
		Debits				
		Interest—				
		Overdraft ..	25 0 0		15 0	
		Mortgage ..	1017 9 2		958 18 4	
		South Caramut Settlement ..	209 16 0		209 16 0	
		Aringa Settlement	222 10 0		282 1 7	
		Other Outgoings ..	21 13 1		22 9 1	
			<u>          </u>	1496 8 3	<u>          </u>	1474 0 0
		<hr/>				
		Net Income or Defici- ency before taking into account Com- mission .. ..		+3427 8 5		+ 901 17 7
		<hr/>				

E. R. DE LITTLE.

INCOME ACCOUNTS FROM 1927 TO 1943 (*continued*).*In the  
Supreme  
Court of  
Victoria.*

1939		1940		1941	
£4991 14 9		£6376 18 1		£7419 8 6	
<u>1653 9 11</u>	£6645 4 8	<u>2496 13 5</u>	£8873 11 6	<u>2722 2 7</u>	£10141 11 1
4903 5 0		5230 4 11		5069 2 3	
141 0 10		134 10 6		127 15 10	
<u>4 3 3</u>	5048 9 1	<u>166 9 10</u>	5531 5 3	<u>—</u>	5196 18 1
<hr/>					
	1596 15 7		3342 6 3		4944 13 0
3 0 0		4 10 0		16 10 0	
31 9 9		43 19 11		34 12 6	
<u>49 5 3</u>	83 15 0	<u>57 7 11</u>	105 17 10	<u>90 0 5</u>	141 2 10
<hr/>					
	1680 10 7		3448 4 1		5085 15 10
—		12 6		7 6	
935 0 0		922 4 8		892 10 0	
209 16 0		209 16 0		209 16 0	
303 5 0		316 3 6		345 15 0	
<u>17 18 10</u>	1465 19 10	<u>15 0 10</u>	1463 17 6	<u>28 16 1</u>	1477 4 7
<hr/>					
	+ 214 10 9		1984 6 7		+3608 11 3
<hr/>					

No. 6.  
Exhibit  
" D " to  
Affidavit of  
Samuel  
Cooke.  
—  
Summaries  
of  
Accounts  
for each of  
the years  
from 1927  
to 1943,  
*continued.*

## ESTATE OF THE LATE E. R. DE LITTLE

## SUMMARY OF WORKING ACCOUNTS AND INCOME ACCOUNTS FROM 1927 TO 1943

(continued)

In the  
Supreme  
Court of  
Victoria.  
—  
No. 6.  
Exhibit  
"D" to  
Affidavit of  
Samuel  
Cooke.  
—  
Summaries  
of  
Accounts  
for each of  
the years  
from 1927  
to 1943,  
*continued.*

		1942		1943							
Working Account	(Credits										
	Receipts (Excluding Stock Accounts) ..	£8112	7	2	£8262	18	4				
	Profit on Stock Accounts .. ..	3175	4	11	4403	14	8				
		<hr/>		£11287	12	1	<hr/>	£12666	13	0	
	(Debits										
	Working Expenses (Excluding Interest)										
	Cash Items ..	5043	16	11	4602	0	3				
	Non Cash Items	112	7	0	105	12	6				
	Loss on Stock Accounts	<hr/>		<hr/>		<hr/>		<hr/>			
				5156	3	11	4707		12	9	
Profit or Loss on Working Account		6131		8	2	7959		0	3		
Income Account	(Credits										
	Receipts—										
	Sundry .. ..	6	10	0	6	10	0				
	Interest on Tem- porary Deposit..	106	0	7	21	1	2				
	Interest on Ad- vances to Bene- ficiaries .. ..	68	5	9	<hr/>		<hr/>				
		<hr/>		180	16	4	<hr/>		27	11	2
				6312	4	6	7986		11	5	
	(Debits										
	Interest—										
	Overdraft .. .	19	0	<hr/>		<hr/>					
	Mortgage ..	782	7	10	599	5	9				
	Sth. Caramut Settlement ..	209	16	0	209	16	0				
	Aringa North Settlement ..	345	15	0	345	15	0				
	Other Outgoings ..	22	8	10	16	19	5				
		<hr/>		1361	6	8	<hr/>		1171	16	2
Net Income or Deficiency before taking into account Commission ..		4950		17	10	6814		15	5		



No. 7.  
AFFIDAVIT of John Larritt.

*In the  
Supreme  
Court of  
Victoria.*

I JOHN LARRITT of 333 Collins Street Melbourne in the State of Victoria General Manager of The Union Trustee Company of Australia Limited make oath and say as follows:—

No. 7.  
Affidavit of  
John  
Larritt,  
sworn  
4th May  
1945.

1. I am the General Manager of the above-named Plaintiff The Union Trustee Company of Australia Limited of 333 Collins Street Melbourne aforesaid having succeeded Samuel Cooke in such position on the 28th day of February 1945 and I am duly authorised by the aforesaid Company to make this Affidavit on its behalf. I crave leave to refer to the Affidavit of the aforesaid Samuel Cooke sworn on the 16th day of January 1945 and filed herein.

2. At the date of death of the above-named Testator namely the 1st day of October 1926 the debts set forth in paragraph 5 of the Affidavit of the said Samuel Cooke were due in respect of the Estate. As regards the Mortgage set forth in such paragraph 5 the liability to R. O. Blackwood and others mentioned therein was secured by First Mortgage over the Caramut South property including the homestead thereof and the 100 acres mentioned in Clause 4 (A) of the Will of the said Testator.

3. On the 28th day of September 1927 a further advance of £9,000 was obtained from the aforesaid Mortgagees for the purpose of defraying duties and testamentary expenses in connection with the Estate. On the 1st day of August 1935 the aforesaid Mortgage was taken over by one George Chirnside now deceased which Mortgage was subsequently renewed to terminate on the 1st day of August 1945.

4. The following amounts were paid off from time to time in respect of the debts secured by the aforesaid Mortgage—

	31st March 1937	..	..	£2,000
	14th April 1938	..	..	1,000
30	21st June 1940	..	..	1,000
	1st April 1942	..	..	2,000
	5th May 1942	..	..	4,000
	21st April 1943	..	..	2,000
				£12,000
				£12,000

5. In addition to the foregoing a Second Mortgage over portion of the aforesaid Caramut South lands was executed by the above-named Testator to secure advances from the National Bank of Australasia Limited. The said Mortgage was discharged on the 2nd day of August 1935 and a further Second Mortgage was executed by the Trustees of the said Estate over the whole of the Caramut South lands to secure an advance of £6,000 being the then overdraft due from the said Trustees to the said National Bank of Australasia Limited. The aforesaid overdraft resulted from losses incurred in the working of the Estate lands during the years 1930 to 1934.

6. The following sums were from time to time borrowed from the Trustees of the Caramut South Settlement—

	31st March 1927	..	..	£1,146	1	10
	30th June 1927	..	..	2,200	0	0
	4th August 1928	..	..	850	0	0
				£4,196	1	10
				£4,196	1	10

*In the  
Supreme  
Court of  
Victoria.*

No. 7.  
Affidavit of  
John  
Larritt,  
sworn  
4th May  
1945,  
*continued.*

The purposes for which the above borrowings were made are as follows :—

re £1,146 1 10 : This amount was in respect of livestock purchased by the Estate Trustees from the Trustees of the said Caramut South Settlement.

re £2,200 0 0 : This amount was borrowed for the purpose of defraying probate duties and debts of the Estate due at date of death.

re £850 0 0 : This amount was borrowed to reduce the Bank overdraft with consequent saving of interest.

No security was given in respect of any of the aforesaid loans.

10

7. The following amounts were borrowed from time to time from the Trustees of the Aringa North Settlement—

30th March 1935	..	..	..	£2,590
10th May 1935	..	..	..	1,910
31st March 1937	..	..	..	2,000
21st April 1938	..	..	..	900
21st June 1940	..	..	..	1,000
				£8,400

The purposes for which the aforesaid sums were borrowed were as follows :—

re £2,590 0 0 : To reduce Bank overdraft at the request of the 20 Bank.

re £1,910 0 0 : to reduce Bank overdraft at the request of the Bank.

re £2,000 0 0 : To reduce the amount due in respect of the Mortgage to the said George Chirnside.

re £900 0 0 : To reduce the amount due in respect of the Mortgage to the said George Chirnside.

re £1,000 0 0 : To reduce the amount due in respect of the Mortgage to the said George Chirnside.

8. The following taxes were assessed to the Trustees in respect 30 of the year ended the 30th day of September 1934 :—

Victorian Income Tax..	..	..	£181	16	5
Special Tax	..	..	11	7	8
Unemployment Relief Tax	..	..	73	9	2
			£266	13	3

The income of the Estate for the year ended the 30th day of September 1934 was retained by the Trustees to offset losses in the previous four income years and I verily believe such retained income was taxable in the hands of the said Trustees as being income to which no beneficiary was then presently entitled.

40

**No. 8.**  
**JUDGMENTS.**

*In the  
Full Court  
of the  
Supreme  
Court of  
Victoria.*

No. 8A.  
Judgments,  
25th May  
1945.

Macfarlan  
and Lowe,  
J.J.

The questions asked by this originating summons depend for their answer on the proper meaning of the words "income received" in sec. 17 of the Trustee Companies Act 1928. We read the section to indicate the context in which these words occur—"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

10 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

20 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 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

30 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."

On the argument before us the history of the section—and indeed of the legislation of which the section is but a part—was brought to our attention, but we think it is of little use in the primary task of construing and interpreting the language used in the section itself. The history

40 of the legislation may help in determining which of two constructions, equally open on the language used, should be adopted, but may mislead if used to suggest that the later legislation merely intends to preserve the *status quo*. Nor in the first instance do we think that decisions which do not put a meaning on the language in question really help except in suggesting what is the etymological or popular meaning of that language.

We go then at once to sec. 17. It provides, in the first place, for recoupment to the Company of moneys properly expended and chargeable against estates placed under its administration and management and in the second place, for a commission in addition to such recoupment of moneys

50 expended which is to be a full recompense and remuneration for its services. And this is a vital provision for a corporation whose financial standing

*In the  
Full Court  
of the  
Supreme  
Court of  
Victoria.*

No. 8A.  
Judgments,  
25th May  
1945,  
*continued.*

Macfarlan  
and Lowe,  
JJ.

will be determined by receipts from this source. The commission is in respect of both capital and income though the limit is different in each case. The Company must publish a scale of charges within these limits and its charge for commission must not exceed the rate so applicable at the time an estate was committed to it. And there is a proviso empowering the Supreme Court or a judge thereof to reduce the rate of commission in any case where it thinks the charge made is excessive.

The first thing that strikes us is that the Legislature considers the estate committed to the executor and to be administered and managed by it as either capital or income. There is no *tertium quid*. What is not capital is income and what is not income is capital. The capital value of the estate has been held by the Full Court of New South Wales reversing the primary Judge to be the capital without deducting from its value a debt to which it was subject. In *re McIntosh* 4 S.R. (N.S.W.) 59. The language of the Act there passed upon is in material respects identical with that in our own Act. We think that decision is right and applies to our Act. But in relation to capital our Act speaks of "any estate committed to the management" &c., while in relation to income the words are "income received by" &c. Does the same reasoning apply and is "income received" to be free of deduction as is "estate committed" when used as a basis of commission? Mr. Tait strenuously contended that "received" was the emphatic word, and it was the receipt which gave the characteristic of income at the moment of receipt to what came to the executor's hands. Mr. Dean with equal emphasis insisted that the office of the word "received" was merely to exclude what had not been actually received though it might be owing. To our minds the critical word is "income." There is nothing in the Act to suggest any restricted or artificial meaning to the word and both sides agreed that this word must be given its natural or popular meaning, but differed much as to what that meaning was. We think that the resolution of this difference provides the key to what we have to decide.

Decisions on the meaning of "income" for special purposes, e.g., Income Tax Acts, or in special contexts are not, we think, of any real help and we refer to decisions only so far as they throw light on the natural and popular meaning of the word. In *R. v. Commissioners of the Port of Southampton* (1870), L.R. 4, H.L. 449, at p. 472, Bramwell, B., in advice to the House of Lords, says: "'Income' is that which comes in, not that which comes in less an outgoing." And Lord Chelmsford (*supra*), p. 484, speaks of this meaning of the word as its ordinary sense. In *The People v. The Supervisors of Niagara* (1842), 4 Hill (N.Y.), at p. 23, Bronson, J., for the Court says, in a passage cited in "Stroud's Judicial Dictionary": "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 expenditures while 'profits' generally mean the gain which is made upon any business or investment when both receipts and payments are taken into account. 'Income' when applied to the affairs of individuals 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 any revenue because the expenditure for a given period may exceed the amount of receipts." To the same effect as to the primary meaning of "income" are the statements of Hood, J. (1901),

27 V.L.R. 39, at p. 41 (7 A.L.R. 94) and of Madden, C.J., for the Full Court ; (1904), 29 V.L.R. 735, at p. 740 (10 A.L.R. 105), and of Starke, J. (1942), 66 C.L.R. 198, at p. 213 ((1942), A.L.R. 77). And it is this meaning which we think should be given to the word "income" in section 17 of the Trustee Companies Act, modified only by its association with the word "capital." It is "that which comes in not being capital."

*In the  
Full Court  
of the  
Supreme  
Court of  
Victoria.*

This view gives a parallel construction to "income" with that given to "capital" in *McIntosh's* case (1903), 4 S.R. (N.S.W.) 59. There are, too, we think, some indications in the section itself that this is the  
10 Legislature's meaning. Towards the middle of the section the language is "of capital or income received by such trustee company as an attorney" which treats capital and income on the same footing while the commission is to "be payable out of the moneys or property committed to the management of such trustee company." When one is faced with an argument based on the difference of language the section uses in relation to "capital" and "income" we think the language quoted indicates that the Legislature was making no nice distinction between "capital committed to" and "income received by" but was signifying its meaning by the ordinary use of the words "capital" and "income."

No. 8A.  
Judgments,  
25th May  
1945,  
*continued.*

Macfarlan  
and Lowe,  
JJ.

20 It was insisted before us that this interpretation of "income" would impose a great hardship on beneficiaries by authorising a charge by the Trustee Company which might in some cases leave little or nothing to the beneficiaries. But this Court in *Trustees Executors and Agency Co., Ltd. v. Hicks* (1894), 20 V.L.R. 325, at p. 328 (1 A.L.R. 96) and the Full Court of New South Wales in *McIntosh's* Case (1903), 4 S.R. (N.S.W.) 59, have pointed out that the safeguard if the executor's charge for commission is too great, is to apply to the Court to reduce it. Nor is the argument from hardship all one way. If the contrary view were taken there might well be injustice. As recent years have illustrated, there may be  
30 a succession of drought years. At such a period the work of the executor may be extraordinarily heavy and anxious. The business operations of a grazing property might well result in a loss and if only net income is to be considered the executor would be entitled to no commission. And there is no provision as there is in the case of hardship to the beneficiaries of rectifying the result. If the history of the legislation is looked at it is at least not contrary to the conclusion arrived at but as we have said we do not rely on the history of the legislation.

Cases were cited to us deciding that under the Administration and Probate Act or similar provisions in other States, it had been held that an  
40 executor claiming commission on an estate consisting of or including a business was only entitled to commission on the net income of the business. They do not affect our view of the construction of this Act. The reward authorised in those cases is what is just and reasonable for the executor's pains and trouble. If the basis is made smaller the rate allowed must be larger. The result must be what the statute prescribes. The Court which in such a case allows a rate of commission on the net income must have arrived at the conclusion that the result would be just and reasonable. Under such a provision the decision to make the basis the net income is  
50 no more than a matter of discretion and of convenience as to the best way of fixing a just and reasonable reward for pains and trouble incurred.

There remains to consider the decision of our brother Gavan Duffy in *In re Edments (The Trustees Executors and Agency Co., Ltd. v. James)*

*In the  
Full Court  
of the  
Supreme  
Court of  
Victoria.*

No. 8A.  
Judgments,  
25th May  
1945,  
*continued.*

Macfarlan  
and Lowe,  
JJ.

(1936), V.L.R. 272 ((1936), A.L.R. 286), where he held that a trustee company claiming commission under the section now in question in respect of the testator's business, which it had continued to conduct, was only entitled to commission on the net income of the business after making all proper deductions for expenses. We are not able to agree with that decision. It rests on two bases both of which are, we think, ill-founded. It treats as indistinguishable the income paid to the testator's estate of a business conducted by a stranger in which case what is paid is the net income and a business carried on by the executors; but the difference in fact seems to us to make all the difference in result. In the former case only the net income comes to the hands of the executor whereas in the latter it is the whole income. His Honour thought that the income which was to be taken as a basis for assessing commission was that available for distribution among beneficiaries. This with respect is not the basis required by the Act which speaks of "income received" by the executor and a decision which fails to bring about this result is in our opinion wrong. In the second place His Honour relied on decisions upon the Administration and Probate Act or corresponding provisions, and we have given reasons for thinking these decisions inapplicable. 10

There are two final observations we desire to make. The first is that English decisions are of little use to show in what sense "income" is to be understood when considered as a basis for awarding remuneration to an executor. The English general rule was not to award any remuneration to an executor. The history of the way in which exceptions were allowed in the case of West Indian and Indian estates and how a different rule grew up in the colonies may be found in *Winter-Irving v. Winter* (1907), V.L.R. 546, at pp. 554 *et seq.* (13 A.L.R. 298) and "Walker on Executors" (6th ed.), pp. 335 *et seq.* Secondly, in jurisdictions where commission is allowed to executors we can find no common agreement as to the basis of assessment which the Legislature might be presumed to know and to have had in mind using in the word "income." Cases cited in Volume XXIV of the English and Empire Digest, at pp. 597 *et seq.*, show that in particular cases commission has been allowed on "net proceeds" on "receipts and expenditure" "on all moneys received and paid over or properly expended," on "the receipt and application of rents and profits," on "the total sum come to the hands of executors," on the "amount passing through the hands" of executors, on "all moneys received and expended" by executors though in some of the cases the basis adopted is to be found in the testator's will. These cases afford no ground for doubting the conclusion arrived at on the mere construction of the Act. The various questions raised in the originating summons seem to us only to arise if the reading of the section which we have adopted were held to be wrong, taking the view we have we think particular answers are not called for and we do not further consider them, except question 3, which asks for a representative order which we think should be made. 30 40

No. 8B.  
Martin, J.

The most important question asked in this originating summons is whether the word "income" in the phrase "five pounds for every one hundred pounds of income received by such trustee company as executor administrator trustee" contained in Section 17 of the Trustee Companies Act 1928 means "all moneys other than capital received" or "the residue 50

of moneys received after deducting all proper and necessary expenditure in gaining or earning the same.”

10 For the Plaintiff it is said that the phrase necessarily connotes all receipts, subject to the fact that as the section draws a distinction between “ capital value ” and “ income ” and permits commission to be charged on each of them, the word “ income ” must be construed as moneys received other than such as are properly attributable to capital value. On the other hand, that Defendant who has argued the question contends that income should be given what she alleges is its popular meaning of net  
 10 income and that the word “ received ” has no effect other than a limiting one on the meaning to be attached to “ income ” being inserted to ensure that no moneys earned or credited to the estate or fund being administered by the trustee shall be subject to commission until they have actually come into its hands.

The Act is a consolidation of various Acts passed from time to time, each of which enabled a particular trustee company to act as executor, administrator or trustee for a commission. Its policy is to enable citizens to obtain a skilled manager of estates and trusts at a rate of remuneration fair both to the trustees and *cestuis que trust*. On behalf of the Plaintiff  
 20 it was urged that the provision in Section 17 for a review of the rate of commission, if such were deemed to be excessive, is strong evidence that all receipts other than return of capital were to be regarded as income, since there is no corresponding provision in case such rate is deemed to be inadequate. I do not consider any such inference can be drawn from the provision in question. The Act fixes maximum rates of commission and within the limits so set the directors of a company can fix whatever they wish. The provision for review is just as explicable as being necessary to ensure that the directors shall in no case be the final judges in their own  
 30 cause as for the reason put forward by the Plaintiff. There is no obligation cast on any trustee company to accept appointment as executor or trustee, and in any case, like any other business, that of managing estates for reward will almost necessarily result in some of its ventures being profitable and others not. Whilst it is obvious that in periods of drought or depression a trustee company may get little or nothing for managing a business if income means net income, in years of plenty it may receive very large sums indeed. Accordingly the fact that there can be a review of the rate fixed by the directors of a trustee company at the instance of a beneficiary, but not of the company itself, seems to me to have no effect  
 40 on the meaning to be attributed to the word “ income.”

40 By the first of all Trustee Company Acts (No. 644 of 1879), it was provided that a company acting as there empowered should receive a commission to be fixed from time to time by its directors, but not to exceed £5 for every £100 received by it as executor, etc., as a full recompense and remuneration for acting as such executor, etc. The Plaintiff here asserts that it is clear that all moneys received on any account whilst that Act was in force were subject to the fixed rate of commission ; and that the repealing of that section and the substitution of the words now found in Section 17 of the Trustee Companies Act 1928 merely made a distinction  
 50 between the maximum rates authorised to be charged on capital receipts and income receipts, and was not intended to vary the law that all moneys received were subject to some commission.

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of the  
Supreme  
Court of  
Victoria.*

—  
No. 8B.  
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—  
Martin, J.

*In the  
Full Court  
of the  
Supreme  
Court of  
Victoria.*

—  
No. 8B.  
Judgments,  
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1945,  
*continued.*

—  
Martin, J.

I do not consider the fact that the Act of 1879 provided that the trustee company there dealt with was entitled to commission for £100 received by it as executor affects the meaning of "income" in the general Act of 1928. The alteration may have been made, as the Plaintiff contends, merely to prescribe differential rates for capital and income receipts or it may have been due to the Legislature considering that a provision for commission on all moneys received was too favourable to the trustee companies and too onerous to the beneficiaries.

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 App. Cas. 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 case cited was an appeal upon a Canadian Income Tax Act, which provided for the agent of any foreign company or person being assessed to tax "upon the amount of income received by him . . . as such agent"—during the fiscal year preceding the making of the annual assessment. The Courts of Canada had held that all earnings when received were income and that any bad debts incurred on any transaction amounted to a loss, *pro tanto*, of capital. 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. 10 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 Mathews* (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

Finally, it was urged by Mr. Dean that the reasoning of Gavan Duffy, J., in *In re Edments* (1936), V.L.R. 272 ((1936) A.L.R. 286) was correct and income in Section 17 means such moneys received by the company as executor as are properly distributable among the beneficiaries after making allowance for expenses. This decision was attacked by the Plaintiff as giving commission on income distributable and not on income received as provided by Section 17 and it was stressed that an executor receives income on behalf of creditors as well as beneficiaries of an estate. 40

The capital value of an estate committed to a trustee company as executor comprises the whole of the property of which the testator in his lifetime had the management and administration as owner irrespective of what encumbrances in the nature of mortgages, debts and such like are secured upon it—*In re McIntosh* (No. 3) (1903), 4 S.R. (N.S.W.) 59, at p. 71. 50 As was said in that case—"On his death the executor merely succeeds him in the management and administration of that property." What



was capital value of his is capital value of the executor. And if there be nothing to the contrary in the language of Section 17 I think the word "income" therein should be construed as meaning what was income of the testator is income of his executor who carries on.

I do not consider that the use of the word "received" in the phrase "income received by such trustee company as executor" has any effect on the meaning of "income" other than to exclude from consideration revenue which has not actually reached the hands of the executor nor that there is anything else in the Act which gives any indication of the sense in which the word is used.

It is a rule of construction if there be no indication to the contrary in the Act that the words of a statute should be construed in their popular sense, meaning that sense which people concerned with the subject-matter with which the statute is dealing would attribute to it—*Grenfell v. Inland Revenue Commissioners* (1876), 1 Ex. D. 242, at p. 248—and in my view the question before us depends on what is the sense in which people conversant with the subject-matter of Section 17 would construe the phrase "income received by such trustee company as executor." It has often been said that "income" is a word of wide import which in some cases comprises everything that comes in. That it has not always that meaning is clear from the opinion delivered in *Lawless v. Sullivan* (1881), 6 App. Cas. 373. I think the popular sense of the word, in speaking not only of the income of a business but also of that of an individual, is net income. So of one who was credited with £1,000 annually from an estate or stocks, bonds or shares, but who had to pay £100 therefrom for collection and exchange charges, it would be said popularly that he received an income of £900.

In my view there is nothing in Section 17 which suggests that 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.

As the other members of the Court think otherwise I do not consider it useful or desirable to deal with the further questions raised by the Summons except to agree that the representative order asked for in question 3 should be made.

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No. 9.

**ORDER.**

THIS MATTER being an Originating Summons having come on for hearing in Chambers on the 27th day of February 1945 and having by the Order of His Honour Mr. Justice O'Bryan been referred to the Full Court of this Court coming on for hearing on the 1st, 2nd and 7th days of May 1945 UPON READING the said Summons the said Order and the Affidavit of Samuel Cooke sworn the 16th day of January 1945 and filed herein and the Exhibits therein referred to and the Affidavit of John Larritt sworn the 4th day of May 1945 and filed herein AND UPON HEARING Mr. Tait one of His Majesty's Counsel and Mr. Adam of Counsel for the Plaintiff and Mr. Dean one of His Majesty's Counsel and Mr. Morrison of Counsel for the Defendant Lena Ethel Bartlam no one

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No. 9.  
Order,  
25th May  
1945.

*In the  
Full Court  
of the  
Supreme  
Court of  
Victoria*

No. 9.  
Order,  
25th May  
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*continued.*

appearing for the Defendants John Ernest de Little and Ethel Ludlow de Little although an Appearance had been entered on their behalf THIS COURT DID ORDER that this matter should stand for Judgment AND this matter standing for Judgment this day in the presence of Counsel for the Plaintiff and the Defendant Lena Ethel Bartlam respectively THIS COURT DOTH ORDER that the Originating Summons herein be amended in manner following that is to say—

(1) By deleting in Question 1 (B) thereof the words “ all other amounts received by the Plaintiff as income ” and by substituting therefor the words “ all amounts other than capital receipts received 10 by the Plaintiff ” and

(2) By deleting in Question 1 (C) thereof the words “ but no other costs or expenses paid by the Plaintiff out of the said Estate ” and by substituting therefor the words “ but none of the costs and expenses referred to in (D) ” and

(3) By deleting in Question 1 (D) thereof the words “ Should the said income be calculated by deducting from the amount calculated as in (C) all or any and which of the other costs and expenses paid by the Plaintiff out of the said Estate including ” 20 and by substituting therefor the words “ 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 ” and

(4) By adding to Question 1 (D) thereof the following—  
“ (vi) Interest paid to the Trustees of the South Caramut Settlement and the Trustees of the Aringa North Settlement.”

AND THIS COURT DOTH ORDER AND DECLARE that the income received by the Plaintiff as Executor and Trustee appointed under the Will and Codicil of the above-named Testator Ernest Robert de Little within the meaning of Section 17 of the Trustee Companies Act 1928 30 and corresponding previous enactments upon which the Plaintiff has been since the death of the said Testator and is now entitled to receive commission is all amounts other than capital receipts received by the Plaintiff from any part of the Estate of the said Testator without deducting therefrom any amount for expenses or outgoings paid by the Plaintiff out of the said Estate AND THAT it is unnecessary to answer further the questions raised by the Originating Summons AND THIS COURT DOTH FURTHER ORDER that the Defendant Lena Ethel Bartlam be appointed for the purpose of this matter to represent all persons entitled as beneficiaries to share in the said Estate other than the Defendants 40 John Ernest de Little and Ethel Ludlow de Little AND THAT any party be at liberty to apply to this Court as there may be occasion.

By the Court

ERIC S. VANCE,

Chief Clerk.

Entered the 16th day of July 1945.

T. A. KEELY,  
Prothonotary.

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No. 10.

## NOTICE OF APPEAL.

*In the  
High Court  
of  
Australia.*

No. 10.  
Notice of  
Appeal,  
13th June  
1945.

TAKE NOTICE that the Full Court of the High Court of Australia will be moved by way of appeal at the first sittings of the said Court for hearing appeals appointed to be held at Melbourne after the expiration of one month from the due institution of this appeal (unless the Respondents consent to its being set down for an earlier sittings) on behalf of the above-named Appellant for an order—

10 (A) That that part of the judgment or order given or made herein on originating summons on the 25th day of May 1945 by the Full Court of the Supreme Court of Victoria by which it was adjudged and declared that the income received by the above-named Respondent Company as executor and trustee appointed under the said Will and Codicil of the above-named testator Ernest Robert de Little within the meaning of Section 17 of the Trustee Companies Act 1928 and corresponding previous enactments upon which the Respondent Company has been since the death of the said Testator and is now entitled to receive commission in all amounts other than capital receipts received by the Respondent Company from any part of the estate of the said Testator without deducting therefrom any amount for expenses or outgoings paid by the Respondent Company out of the said estate and that it is unnecessary to answer further the questions raised by the originating summons.

20

(B) That in lieu thereof it be adjudged ordered and declared :

(1) that the Respondent Company be entitled since the death of the said testator to charge commission on the residue of income received after deduction of all proper expenses and outgoings paid by the Respondent Company out of the said Estate.

30

(2) that question 1 (A) of the said originating summons as amended be answered No.

(3) that question 1 (B) thereof be answered No.

(4) that question 1 (C) thereof be answered No.

(5) that the several questions contained in 1 (D) be answered Yes.

(6) that the Appellant's costs be taxed as between Solicitor and client and be paid by the Respondent Company or out of the estate of the said deceased or that such further and other order be made in the premises as to the Court shall seem proper.

40

AND FURTHER TAKE NOTICE that the grounds upon which the Appellant intends to rely in support of such appeal are as follows :

1. That the said judgment was wrong in law.

2. That upon the true construction of Section 17 of the Trustee Companies Act 1928 income referred to therein upon which the Respondent Company is entitled to receive commission is the amount (other than capital receipts) received by the Respondent Company after deducting therefrom expenses and outgoings paid by the Respondent out of the said Estate.

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3. That upon the proper construction of Section 17 of the Trustee Companies Act 1928 the Full Court of the Supreme Court of Victoria was wrong in holding

(i) that the Respondent Company was entitled to receive commission upon all amounts which come in or are received by it as executor and trustee in the management and carrying on of the deceased's business of grazing without reference to the outgoings and expenditures incurred in the conduct of such business ;

(ii) that the Respondent Company was entitled to receive 10 commission on all income received into their hands irrespective of loss or profit in the carrying on and management of the said grazing business.

4. That the Full Court should have held

(i) that the Respondent Company was entitled to charge commission upon the net income only ;

(ii) that the Respondent Company was entitled to payment of commission on that part of the income remaining after deduction of all expenses and outgoings paid by the Respondent Company out of the estate or incurred by such Respondent in 20 the carrying on and management of the said grazing business.

No. 11A.  
Judgments,  
2nd April,  
1946.

Latham,  
C.J.

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**No. 11.**  
**JUDGMENTS.**

This appeal raises a question as to the basis upon which a trustee company is entitled to charge commission under the Trustee Companies Act (Vic.) 1928 in respect of income received by it as executor or trustee under a will.

The Respondent company was one of the executors and trustees of the will and codicil of the late Ernest Robert de Little, who died on 1st October 1926. An interest in the income of the testator's estate was given to his 30 daughters. The testator was a pastoralist and under a power in the will the executors and trustees carried on the business of his sheep station in the western district of Victoria for 17 years. In some years the station property was carried on at a loss, in most years, however, at a profit. The Supreme Court has upheld by a majority (Macfarlan and Lowe, JJ., Martin, J., dissenting) the claim of the company that it is entitled to receive commission on all amounts other than capital receipts received by the company from any part of the estate of the testator without deducting therefrom any amount for expenses or outgoings paid by the Plaintiff out of the estate. 40

The Appellant contends that the company is entitled to commission only upon net profits, that is, upon gross receipts on income account less expenditure attributable to that account. Thus, in a period when there were no profits, no commission would be payable. The Appellant further contends, however, that there is no reason for calculating commission in relation to annual or other periods, and that the commission of a trustee company can be calculated with accuracy only when the net receipts in the whole administration of the estate (however long the period of

administration may be) can be accurately ascertained. It was also argued that, as the commission was payable in respect of the administration of an estate under a will, the income upon which commission should be calculated should be taken to consist only of such sums as were distributable as income to beneficiaries under the will. In *In re Edments* (1936), V.L.R. 272, Gavan Duffy, J., held that commission was chargeable in respect not of gross income, but of net income, and also stated his opinion that where the executors carried on a business under an authority contained in a will the income received by the executors from the business in their character  
 10 as executors is only that which is properly distributable as income by them.

*In the High Court of Australia.*  
 —  
 No. 11A.  
 Judgments,  
 2nd April  
 1946,  
*continued.*  
 —  
 Latham,  
 C.J.

The relevant statutory provision is contained in the Trustee Companies Act 1928, Section 17, which is as follows:—

“ 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  
 20 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  
 30 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 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  
 40 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.”

Commission in respect of capital is chargeable upon the capital value of the estate committed to the management of the company. Under a corresponding provision in New South Wales legislation it has been held that the capital value of the estate is the capital value without deducting  
 50 therefrom a mortgage debt charged upon it: *In re McIntosh* (No. 3), 4 S.R. (N.S.W.), 59.

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“Value of estate committed” is a different phrase from “income received,” and the fact that the gross value of capital assets without deducting any charges thereon is the measure of commission in respect of capital has no direct bearing upon the question of commission receivable in the case of income.

The section provides that “A trustee company shall be entitled to receive, in addition to all moneys properly expended by it and chargeable against the estates placed under its administration and management . . . commission . . .” These words contemplate an account which would record the financial dealings of the company with the property (whether capital or income) which constitutes the estate which it is administering. Such an account would show the capital in the hands of the company and the income received by the company as executor or trustee. The account would also show the “moneys properly expended by the company and chargeable against the estate.” Moneys received by an executor may be applied in paying the debts of the testator, or in meeting costs of administration (including perhaps, as in this case, the costs of carrying on a business) or in paying legacies. All the moneys received by the executor must be accounted for. The moneys properly expended are, in the words of the section, “chargeable against the estate,” that is, they are chargeable against the assets of the estate, capital or income, as the case may be. They are not chargeable against a net balance of receipts over expenditure. Such expenses must be taken into account before any such net balance can be ascertained. Thus the section contemplates the company as being entitled to receive from the estate, not only moneys properly expended and chargeable against the estate, but also, “in addition to” such moneys, a commission. In my opinion these words show that it is intended that the company’s commission shall be a charge against the assets of the estate in the same manner as the moneys properly expended by the company.

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 truly 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 £1,000 by showing that what was expended was properly expended and that he has in hand the proper balance. It was urged for the Appellant that the Court should regard the matter from the point of view of the administration of an estate. I agree with this proposition, 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 is so received whether or not it is distributable to beneficiaries. There is no reason in principle why income used in making payments to beneficiaries should bear commission, whereas if income is used in paying debts it should not bear commission. The income coming to the hands of an executor as such may be directed to be accumulated and may never go as income to any person. It does not follow that the executor has therefore received no income. The identification of moneys in respect of which commission may be charged is not affected by the terms of a will relating to the distribution of moneys received by the executor.

The Court was referred on the one hand to *Lawless v. Sullivan*, 6 A.C., 373, where it was said that the natural meaning of the word “income” was the gain, if any, resulting from the balance of profits and losses of the

business in a year, and on the other hand to *R. v. Commissioners of the Port of Southampton*, L.R. 4, H.L. 449, where it was said that "income is that which comes in, not that which comes in less an outgoing." These cases, taken together, show that the word "income" is ambiguous. It may mean either net income or gross income, according to the context—and there will then sometimes be room for argument as to how net income (or gross income) is to be ascertained. Two men referring to the same state of facts might use the word in quite different senses. One man might say that he had a large income in a given year, but that all his

10 income and more went in meeting expenses and losses. Another man might describe the same facts by saying that he had no income at all in that year because he made a loss on the year's transactions. In each case the context shows in what sense the word "income" is used. In the present case the words of the section show, in my opinion, that "income received" means all receipts other than receipts on account of capital.

It will depend upon the facts of each particular case whether a particular amount has been received by the company. If the company carries on a business as executor, then the moneys received in the business are really receipts of the executor and, so far as they consist of receipts

20 which are not capital receipts, commission is payable as on income received. But if the testator had been entitled to a share in the income of a business owned and carried on by other persons, the receipts in that business would not be receipts of his company-executor. What the executor received would only be the income paid to it. The company would have no concern with the moneys received by the proprietors of the business in carrying on the business itself.

Reference was made to statutory provisions (such as the Victorian Administration and Probate Act, 1928, section 59) under which such commission may be allowed, not exceeding 5 per cent., to an executor

30 for his pains and trouble as is just and reasonable. In practice commission has been calculated under such provisions on what have been called net receipts—see *In re Matheson*, 13 V.L.R. 586. But the question which arises under such provisions is simply one of what amount is fair and reasonable within the statutory limit. The amount might be calculated at a low rate upon gross receipts or at a higher rate upon net receipts and the result would be the same. Decisions upon such provisions do not, in my opinion, afford any assistance in interpreting the specific terms of section 17 of the Trustee Companies Act.

Thus, I agree with the majority of the Full Court in not accepting the

40 proposition approved by Gavan Duffy, J., in *Re Edments* (*supra*), that income commission is payable to a trustee company under the Act only upon the amount distributable by the company as income. But I agree with what Gavan Duffy, J., said in that case with respect to an executor carrying on the business of a testator. It was argued in the present case that the result of the view adopted by the Full Court would be that a quite extravagant amount of commission might be chargeable when a trustee company carries on a business under an authority in a will or for the purpose of winding up. For example, in *Edments' case* (*supra*) a retail business had receipts from sales during a year of over £450,000 with a gross

50 profit (arrived at by deducting the cost of goods sold but not the expenses of the business) of over £100,000 but a net profit of only £4,300. It was held that commission on turnover could not properly be charged. As to

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this matter I agree with what Gavan Duffy, J., said in *Edments'* case, at p. 276, as to the sale of stock in a trading business. The gross amount received over the counter for stock sold cannot be regarded as income. Part of it represents a replacement of capital; see the comment on such a case in *In re Matheson*, 13 V.L.R. 586, at pp. 589-590.

If the company in such a case drew commission upon the recurring receipts then so far as they represented replacement of circulating capital, the result would be that the company would first be paid commission (as on capital) on the assets consisting of the stock-in-trade as at the death of its testator, and then would repeatedly receive commission (as on 10 income) upon further receipts as those 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.

Thus, though I agree with the Supreme Court that the company is entitled to commission on all receipts other than capital receipts without deduction for expenses or outgoings, I think it necessary to say that (as appeared in the argument upon the appeal) this proposition is not entirely 20 self-explanatory. I illustrate the problem by reference to the year 1943. In respect of that year the company claims commission on an amount of £12,666 representing the total of receipts shown on the credit side of the working account of the station. These receipts are made up of *profits* on the sheep account and the cattle account and the *proceeds* of the sale of wool, skins, hides and seed oats. The profit on the sheep account is shown at £2,134. But the whole of this amount cannot be regarded as an income receipt. It represents the credit balance shown in the sheep account. That balance is ascertained by taking the value of stock on hand at the end of the year at specified values, adding the proceeds of sales and value 30 of sheep killed for rations and deducting from the amount so reached the value of stock at the beginning of the year, and also debiting purchases. This account takes the sheep at conventional values and shows upon this basis a gross profit representing an increase in the value of sheep during the year of £2,134, which was transferred to the credit of the working account. (The cattle account is an account of the same character.) This sum of £2,134 must, in part, be applied in replacement of the working expenses and the fund which supplies those working expenses, being spent and recovered and re-spent from time to time, is part of the circulating capital of the station. So far as the amount of £2,134 makes such a 40 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. This proposition is simply a statement of an ordinary accountancy principle.

Receipts from the sale of wool provide an even clearer case. The amount received from the sale of wool in 1943 was £8,211. It is impossible to regard the whole of this sum as income. Part of it represents the replacement of the working expenses of the station.

Thus the working expenses of the station should be deducted in order to ascertain how much of the receipts from sheep and wool, etc., shown in 50 the working account were "amounts other than capital receipts."



Questions (1) (B) and (C) asked in the originating summons enquire whether the income should be calculated by dealing in a manner particularly stated with amounts shown on livestock accounts referred to in the affidavit filed in support of the summons. Those accounts are referred to in the affidavit and are summarised in exhibits, but they are not except in respect of the year 1942-1943 fully before the Court. There are therefore objections to answering questions (B) (C) and (D) in the originating summons in the precise form in which they there appear.

10 In my opinion, in answer to questions (B) and (C), it should be declared that for the purpose of ascertaining the income in respect of which the company is 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.

Question 1 (D) is as follows :—

“ (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 :—

- 20 (i) interest paid on mortgages of land 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 ;
- 30 (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 South Caramut Settlement and the Trustees of the Aringa North Settlement ? ”

40 These expenditures are dispositions of income received ; they are not deductions to be made in ascertaining the amount of income received by the executor. If, for example, the executor had, in a particular year, money in hand on income account (in addition to the sum required for meeting working expenses) he would, in a due course of administration, apply the money in paying the interest, the rates and taxes, etc., mentioned in the question. The ultimate *application* of the money (so far as it was not required to replace capital) would, in my opinion, have no bearing upon the question whether he had *received* the money as income. Thus, in my opinion, question 1 (D) should be answered by declaring that none of the items (i) to (vi) should be deducted in calculating income in respect of which the company is entitled to charge commission.

50 In order to ascertain how much of a sum received is income and how much is capital, it is necessary to take an account over a period. In the absence of any arrangement binding the company and the beneficiaries to the contrary, the customary annual period should be adopted for this purpose. Question (1) (A) should be answered accordingly.

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—  
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—  
Latham,  
C.J.

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Latham,  
C.J.

No. 11B.  
Rich, J.

In my opinion the appeal should be allowed and the questions should be answered in the manner stated.

The first question asks : " What is the income received by the trustee within the meaning of the 1928 Act ? " This question cannot be answered upon the present material in respect of the whole period (1926-1944) to which it relates. The parties will probably find no difficulty in agreeing upon an adjustment of the accounts upon the basis of the judgment of this Court, but in case they should desire further relief under the summons, it should be adjourned for further consideration in the Supreme Court and the cause remitted accordingly.

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The question which arises for our determination in this appeal is as to the basis upon which the Union Trustee Company of Australia Ltd. is entitled to receive commission for services rendered by it in carrying on, as executor of the late E. R. de Little, activities consisting mainly of the business of a sheep station. Its rights are in this respect regulated by sec. 17 of the Trustee Companies Act 1928 which provides that it is entitled to receive, in addition to all moneys properly expended by it, a commission fixed by its directors not to exceed £2 10s. for every £100 of the capital value of any estate committed to its management and £5 for every £100 of income received by it (and not exceeding the published scale of charges when the estate was committed to it) such commission being payable out of the moneys or property committed to its management, it being competent, however, for the Supreme Court to review and reduce the rate if of opinion that it is excessive. The exact question is, what is here meant by the word " income " ? It must, of course, be presumed to be used in its ordinary natural meaning as an English word, unless there is something to indicate the contrary. But words take colour from their context and the question is what does it mean in its present context ? The company carries on a commission agency business of a special type, and sec. 17 is concerned with providing for the remuneration of commission agents who do work of this type. It has been said that " Looking at the matter generally one would suppose that income means that which comes in and that it refers to what is actually received," per Finlay, J., *Lambe v. Inland Revenue Commissioners* [1934] 1 K.B. 178 at 182. But a consideration of the word in the abstract gives no aid to the solution of a particular problem. As was pointed out by my brother Dixon in *Commissioner of Taxes (S.A.) v. Executor Trustee & Agency Co. of South Australia Ltd.*, 63 C.L.R. 108 at 152, " The courts have always regarded the ascertainment of income as governed by the principles recognised or followed in business and commerce, unless the legislature has made some specific provision affecting a particular matter or question." Principles recognised and followed as reasonable and prudent in some connections would be repudiated as the height of folly in others. A man, with no dependants, who turned the whole of his capital into a life annuity, would not be regarded as acting otherwise than sensibly if he treated everything that " came in " in respect of the annuity as income. A shopkeeper who started business with goods bought on credit and treated everything that " came in " as income would be on the high road to a fraudulent bankruptcy. In its present context the word is used in relation to the remuneration of an agent for services rendered ; it is not used in relation to the exaction of a tax or the payment of a bonus in respect of profits won.

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Commission agency is of various kinds, and remuneration for it proceeds on various bases. Real estate agents collect rents for a commission on the gross rents collected, and sell property for a commission on the gross price, irrespectively of any profit or loss that the owner may make on the sale. But the carrying on of businesses for clients is not an ordinary form of commission agency, and there are no usages of such a form of agency to assist the Court in arriving at the presumed intention of the Legislature. The problem is, what should the Legislature be taken to have meant when it provided that the agent is to be remunerated by a commission of 5 per cent. "for every hundred pounds of income received by such trustee company"? The purpose of sec. 17 is to provide a reward for the agent for his services; and the making of a profit by the principal, or the amount of the profit does not necessarily give any measure or even indication of the value of the agent's services. Nevertheless it is obvious that when in sec. 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 comes in, for this would, in effect, make it include some capital. Remuneration upon any item of capital committed to a company's management can be received only once, and repeated commissions, either on a capital or income basis cannot 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.

I am of opinion, therefore, that the questions asked in the originating summons should be answered as follows:—

- (1) (A) Yes, unless some other period is agreed on.
- (B) No.
- (C) Yes.
- (D) No.

and that the judgment of the Supreme Court should be varied accordingly.

The Trustee Companies Act 1928 of Victoria provides that a trustee company shall be entitled to receive (in addition to all moneys properly expended by it and chargeable against the estates placed under its administration) a commission to be fixed by the directors, but not to exceed the published scale of charges of the company, and in any case shall not exceed  $2\frac{1}{2}$  per centum of the capital value of any estate committed to its management and 5 per centum of income received by it.

The commission is payable out of the moneys or property committed to the management of the trustee company. But the Supreme Court of the State may review or reduce the rate if it be of opinion that the commission is excessive. The published scale of charges of the Trustee Company in the present case fixed the rate of commission payable to it in respect of income received by it as executor and trustee at  $2\frac{1}{2}$  per centum in cases in which the income exceeded £400 per annum.

The Act prescribes no rule for ascertaining the capital assets of an estate committed to the management of a trustee company nor any rule

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Starke, J.

for ascertaining the income received by it. All the Act does is to differentiate between the commission payable in respect of the capital value of an estate committed to its management and income received by it. And there is no rule of law nor of construction which draws any precise line in all cases between capital and income receipts. The Court must give effect to the Act according to the ordinary business meaning of the words as applied to the subject-matter.

The estate which the Trustee Company was administering consisted in the main of grazing properties in Victoria and the livestock, plant and chattels used in connection therewith. The Company carried on grazing and pastoral pursuits on these properties pursuant to powers contained in the will under which it was administering the estate. The usual books of account were kept including separate livestock accounts for sheep, cattle and horses and a working account for each yearly period. Each of the livestock accounts shows the stock on hand at the beginning of the year, the purchases and natural increase during the year on the one hand and the sales and deaths and stock on hand at the end of the year on the other hand, stock on hand being brought into account at a standard figure. The receipts are gross but they do not represent profit or income because the stock, etc., on hand at the beginning and end of the accounting period— the working capital of the business—must be taken into account. So the value of the stock, etc., on hand at the beginning and at the end of the accounting period at standard values are brought into account and the balances only are carried to the working account, where also are credited the proceeds of the sale of wool; but these amounts do not represent net profit or income of the year for against them must be debited, and there is debited against them in the working account, various items of expenditure immediately connected with the carrying on of the grazing business such as salaries, wages, shearing expenses, and so forth. These balances in the working account are transferred to the income account and there are debited against them various items of expenditure such as interest on mortgages, trustee's commission and the sums transferred to the beneficiaries' accounts. 10 20 30

The Trustee Company charged commission on income received by it as executor and trustee at the rate of  $2\frac{1}{2}$  per centum calculated on the income of the estate made up of:

- (A) the gross profit shown on the livestock accounts;
- (B) the gross amounts received from the sale of wool and miscellaneous sales as shown on the working accounts;
- (C) the gross amount of other amounts received as shown on the general income accounts. 40

Thus for the year ended 1st October 1943 the livestock accounts disclosed a profit of £4,403 14s. 8d. and proceeds of sale of wool, etc., £8,262 18s. 4d., or in all £12,666 13s. The Trustee Company charged commission on this sum of £12,666 13s. at the rate of  $2\frac{1}{2}$  per centum.

The Supreme Court of Victoria declared that the Trustee Company is entitled to receive commission on all amounts (other than capital receipts) received by it without deducting therefrom any amount for expenses or outgoing payments paid by the Trustee Company out of the estate.

From this I gather that the sum of £12,666 13s. is treated as income received by the Trustee Company during the year 1943 from the estate committed to its management. 50

But I am unable to agree with this view.

In my opinion, it is not correct to leave out of account the various items of expenditure directly and immediately connected with gaining or producing the amounts received by the company. It is not true either as a matter of law or of commercial practice to describe those receipts as income received by the Trustee Company from the estate committed to its management until those various items of expenditure have been charged against the receipts. It is the balance and the balance only that is properly described as income and not the income distributable amongst the

10 beneficiaries that is the subject of commission. Some of the items of expenditure shown in the working account for the year which ended on the 1st October 1943 should not, I think, be debited against the receipts for that period in ascertaining the income received by the Trustee Company. They are not directly and immediately connected with the gaining or producing of those receipts. I refer to such items as insurance premiums and insurance on wool, war damage contributions on wool, plant, stock and buildings, Government tax on wool, rent, rates, land tax subscriptions, depreciation plant. A pastoral property was committed to the management

20 of the Trustee Company, and these charges are connected with the ownership, occupation or protection of that property or the produce thereof, and not with gaining or producing the moneys received by the Trustee Company. Doubtless such charges must be debited against the amount distributable amongst the beneficiaries, but not, in my opinion, against the receipts gained or produced by the Trustee Company in managing the pastoral property committed to its care. Otherwise, the debit entries are, I think, rightly charged against the receipts of the year in ascertaining the income received by the Trustee Company. The income account of the estate for the year which ended on 1st October 1943 does not call for detailed examination. The main items are interest charges and commission paid

30 to the Trustee Company. The interest charges are in respect of borrowed capital, and are not directly and immediately connected with gaining or producing the income of the trustee and neither is the commission payable to the trustee directly or immediately connected with gaining or producing its income. In my opinion such expenditures cannot rightly be taken into account in ascertaining the income received by the Trustee Company. The other small items in the income account have nothing to do with the income received by the Trustee Company.

In my opinion, the income of the Trustee Company for the year 1943 from the business carried on by it upon the grazing properties is represented

40 by the sum of £9,394 4s. 2d., if my arithmetic be correct. And it is upon that sum that the Trustee Company is entitled for the year 1943 to charge commission at the rate of  $2\frac{1}{2}$  per centum. The commission chargeable in other years can be ascertained in like manner.

The suggestion that the Trustee Company was only entitled to commission upon the income received by it over the whole period of its management, after allowing for losses during that period, is untenable. Income in a general way represents that which comes in as the periodical result of one's work or business or investments. And in business concerns such a periodical account is necessary to ascertain those results and is in

50 accordance with general usage and practice.

Categorical answers cannot be given to all the questions arising on the originating summons and I have preferred to indicate my opinion upon

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the actual figures for the year 1943. But I would answer the questions raised by the originating summons as follows :—

(1) The income should be ascertained periodically as year by year or other accounting period proper and convenient for the administration of the estate committed to the management of the Trustee Company.

(2) Income should be calculated by adding together the amount of profit shown on the livestock accounts and the gross amount received from the sale of wool, skins, hides, oats and other produce, and deducting therefrom the expenditure directly and immediately connected with the gaining or producing of the profit and gross amount received by the Trustee Company in carrying on the grazing and pastoral pursuits by the Trustee Company pursuant to the will and codicil of the deceased. 10

(3) None of the items set forth in paragraph (1), subparagraph (d), of the originating summons should be deducted in ascertaining the income of the said estate in respect of which the Trustee Company may charge commission.

The result is that the appeal should be allowed.

No. 11D.  
Dixon, J.

The proposition may be conceded that in Section 17 of the Trustee Companies Act 1928, the words "income received by such trustee company as . . . trustee" are not to be qualified by the word "net" or the notion that the word expresses. But the proposition does not appear to me to solve the question in this case. It leaves unanswered the question how do you ascertain the income received by a trustee in respect of a pastoral business carried on by or on behalf of the trustee? 20

In the present case the accounts of the business have been kept in the usual manner. Sheep, cattle and horses on hand at the beginning and end of an accounting period have been taken into account at standard values, or perhaps I should say for accuracy, up to the number on hand at the death of the testator, at probate value and in excess of that number at a standard value. Sales and sheep killed for rations have been credited on the one side and purchases have been debited on the other, and the balance has been transferred to working account. The credits in the working account include these transfers under the heading "profit sheep account," "profit cattle account," and also the proceeds of wool, skins and hides and any produce there might be. 30

On the debit side is shown all the expenditure in the actual conduct of the business, such as salaries and wages, shearing wool packs, manuring, insurance, freight and tax upon wool, repairs, rent, rates, pay roll tax, and so forth. 40

The company answers the question, how the income received by it as trustee in respect of the business should be ascertained, by computing its percentage commission on the total amounts of the credits to the working account without deducting the debits or any of them. This means that the gross proceeds of the sale of wool (forming, as might be expected, the larger part of the credits) is aggregated with a "profit" on stock consisting of the excess amount of the sales plus natural increase at standard value and, perhaps, to some extent probate value. Some of this profit may exceed the amount of the sales and is, therefore, not necessarily covered by actual receipts on account of sheep and cattle. 50

The Full Court answered the question by saying that the income received by the company as trustee within the meaning of Section 17 upon which the company is entitled to receive commission is all amounts, other than capital receipts, received by the company from any part of the estate of the testator. That is the language of the formal order. I suspect that by the expression "capital receipts" is meant receipts from the realisation of fixed capital. But, if this be so, I cannot agree with the order. For I think that the proceeds of the sale of assets representing the circulating capital of the business, whether in the regular course of

10 business or upon a winding up, are not income, at all events except to the extent that they contain what is ascertained to be a detachable profit. If I am mistaken in thinking that the order of the Full Court treats all receipts as income except the proceeds of sale of fixed capital assets, then the order must be understood as excluding from income fixed and floating capital receipts. That, I think, would mean that in a very considerable degree the beneficiaries would have made out their contention that too much commission had been deducted by the company. For the gross receipts gathered together on the credit side of the working account are a recovery of circulating capital, if not altogether, certainly in a large measure.

20 There appear to me to be two matters upon which the decision of this case depends. The first is whether receipts constituting recoveries of funds employed in the business as circulating capital form income for the purpose of Section 17.

The second question arises if they do not form income. It is, how, in that view, the proceeds of the sale of (A) sheep and cattle, and (B) of wool are to be regarded?

In a trading or merchandising business the stock-in-trade "represents" its circulating capital. The proceeds of the sale of stock-in-trade are applied in purchasing more stock-in-trade and in paying the wages and

30 other expenses of conducting the business. The surplus represents profit. For the purpose of ascertaining the surplus at fixed intervals of time the value of the stock-in-trade at the beginning and end of each accounting period must be compared as well as the sales and the purchases. But, 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.

40 What is recovered by sales of stock-in-trade is that part of the "income-producing corpus" that moves. It is distinguished from the corpus that is fixed only by its movement and, perhaps, by the circumstance that it contains any ascertainable profit or income there may be. Further, what is recovered recoups or replaces not merely the moneys directly laid out in the purchase of stock-in-trade. It must also replace the expenditure incurred in the business of buying and selling. The price received for goods sold over the counter is obtainable by reason of this expenditure just as much as by reason of the purchase of the goods, and it is the function of circulating capital to carry the entire recurring expenditure necessary to

50 secure the expected gross returns from sales.

The contrast between capital and income is sharply drawn by the provision which we have to apply. It is, of course, clear that the stock-

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in-trade of a merchandising or trading business, considered at any given time, such as the death of the proprietor of the business, must be capital for the purpose of the provision. It would be part of what Section 17 calls "the capital value of the estate committed to the management of the company" upon which the section allows a commission not exceeding  $2\frac{1}{2}$  per cent. Why, when the same stock-in-trade is sold over the counter do the entire proceeds become income? 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 sale or disposal, increase or diminution in quantity or value, or change of form, and the section has been so construed. 10

It means that the income produced by these assets, whether increased or not, or changed in form or not, shall bear another commission. But it does not mean that a commission shall be payable upon the gross proceeds of sale or any of them as well as upon the original value. 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 on the realised value every time the stock-in-trade is turned over. We are only too familiar with the statement that, strictly speaking, income is that which comes in and, therefore, implies no deduction of outgoings. It has passed current in the Courts too long, though a deeper philological inquiry into early uses of "income" and "outcome," particularly in relation to tides, might have produced more helpful figures and similes. But the statement throws no light on any question depending on the distinction between the capital nature and the income nature of what comes in, useful as it may be to show that it may mean gross income and is not confined to net income. As I have said already, there is no reason to deny that the percentage commission is to be calculated on the amount of income receipts, such as rent, interest, dividends, and so on, without deduction of outgoings. In such cases you have a corpus-producing income, the tree and the fruit, to use another hackneyed metaphor. When you apply the analogy to a trading business the "corpus-producing income" includes the stock-in-trade, and the income is, not the gross proceeds of the stock-in-trade, but the ascertainable profit, the tree, in the business, consisting of the fixed and floating assets and the fruit, the periodically detachable surplus. The gross proceeds of stock-in-trade are, to my mind, no more income "in" the business that they are income "from" the business. 30

The foregoing observations appear to me to be applicable not only to merchandising or trading businesses, but also to manufacturing businesses. There the circulating capital is recovered by the sale of goods, but it is laid out in raw materials and manufacturing costs. 40

How then does a productive business differ? In the case in hand the business is broadly that of producing wool for sale, of breeding and buying sheep and cattle and depasturing, maintaining and selling them. Clearly the sheep and cattle are stock-in-trade of the business. If, for example, the business consisted in breeding and buying cattle, depasturing and looking after them and selling them as store and fat cattle, I should feel no doubt that the same course should be taken as in a trading or manufacturing business in order to ascertain the income chargeable with the percentage commission. The proceeds of the sale of cattle would be 50



treated as a return of circulating capital and not as income. No doubt it would, in a profitable year, contain elements or constituents of income, namely, the surplus after the deduction of all expenditure incurred in carrying on the business and after a proper comparison of cattle on hand at the beginning and end of the accounting period. But the special feature of a sheep station is that, while sheep held for sale are in that aspect trading stock, for wool growing they answer rather the purpose that fixed capital serves in other forms of productive industry. Does this mean that the gross proceeds of the sale of wool do not form part of the

10 circulating capital of the business, but are received as income? In my opinion, that is not the true way to regard them. The pastoral business of the estate must be considered as an entirety. Its capital, so far as it is not represented by fixed assets, is employed in the acquisition, production, feeding, care, maintenance and sale of live stock and of the products of live stock. It is recovered by the sale of cattle, sheep, wool, skins and hides and it is not material by the sale of which of these it is replaced. Until it is replaced, it is not possible to say what income has arisen from the business.

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I think that the gross returns from the pastoral business forming

20 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 accounting that answers the description.

The point was made that Section 17 contains nothing to indicate that income was to be ascertained or measured over accounting periods. It was suggested that, on the face of the provision, it sufficiently appeared that divisions of time were ignored. The answer is that, while it is true that once the trustees receive something as and for income divisions of time are neither contemplated nor required for the purpose of calculating the percentage commission, it is yet equally true that, to determine what

30 amount is detachable as income from the proceeds of a business, accounting periods are necessary. They are necessary, not because Section 17 says so, but because, in the case at all events of manufacturing and productive businesses, that is the way profit is ascertained, and the profit of the business is the income of the estate from that source.

Section 17 is expressed in wide general terms and, doubtless, no particular form of income was predominantly in mind. It would be a mistake to construe it as if the special problem of income arising from the carrying on of a business was before the attention of the Legislature. On the contrary, all that the provision does is to express a principle and

40 leave to common practice and common understanding the application of the principle to the widely varying income-producing assets which might be committed to the management of trustee companies.

In ascertaining the profit or income of a business so committed to a company's management, it is important to distinguish between expenditure which properly belongs to the business and that which belongs to the administration of the estate or arises simply from the ownership of the assets. The accountancy task is to ascertain for the purpose of charging commission how much of the proceeds of the sale of stock-in-trade, including wool, can be considered income. It is not necessarily the same problem

50 as finding the profits of, for example, a pastoral company or of any other entire undertaking. The expenditure to be debited may, therefore, be of a more limited description. It must be confined to the carrying on of

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the business and be referable to the sources of gain for which the business is pursued. Upon this matter the contentions of the Appellant travelled beyond any reasonable application of principle and sought to deduct expenditure referable to the administration of the estate. But this was because the Appellant insisted that Section 17 meant net income.

The views which I have expressed are in accordance with the judgment of Gavan Duffy, J., in *re Edments* 1936, V.L.R. 272 at p. 276, a passage in which I agree. Among the authorities which I have found of assistance in throwing some light on the mode of accounting and the conceptions involved in the case of pastoral businesses, I may refer to 10 *Anson v. Commissioner of Taxes* 1922, N.Z.L.R. 330 : 334-337 Salmond, J. ; *Webster v. Commissioner* 1926, 39 C.L.R. 130 including Gavan Duffy and Starke, J.J., diss. at pp. 136-7 ; *Thornley v. Boyd* 1925, 36 C.L.R. 526 : 531-3, Knox, C.J.

The sub-questions in the originating summons are directed to the specific matters which were thought to call for determination. The application of the views I have expressed is shown by the answers I would give to them, which are as follows :—

(A) The income of the pastoral business of the estate should be calculated in yearly rests from 1st October to 30th September 20 next following, or for some other accounting period determined upon.

(B) and (C) For the purpose of ascertaining the income, the amount of profit shown on the live stock 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 in working and managing the station properties.

(D) The following items of expenditure ought not to be debited :—

(i) interest paid on mortgages of land forming part of the 30 estate (see *Rishton v. Grissell* 1866, L.R. 5 Eq. 326 and *Sleigh v. Watt* 1930, V.L.R. 1)

(ii) rates, taxes, assessments, insurance premiums and outgoings affecting the homestead and land subject to the trust in favour of the Defendant Ethel Ludlow de Little

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

(iv) income tax

(v) commission chargeable by the company

(vi) interest paid to the Trustee of the South Caramut 40 Settlement and of the Aringa North Settlement.

In my opinion the appeal should be allowed.

No. 11E.  
McTiernan,  
J.

The question in this appeal arises upon Section 17 of the Trustee Companies Act 1928 of Victoria and upon the meaning of the word "income" contained in that section. The section grants to a trustee company the right to remuneration for acting as executor or trustee of an estate placed under its administration and management. The section also elaborately qualifies that right. The provisions of the section apply to a trustee company acting in other capacities.

The right to remuneration is expressed to be in addition to the 50 Company's right to receive all moneys properly expended by it and chargeable against the estate. The section provides that the remuneration is to be in the form of commission. It authorises the Company to fix its

commission but within limits and subject to a power of review given to the Supreme Court. The limits of the commission are expressed as percentages of capital and income respectively. It is upon the meaning of the word "income" in this context that the controversy in the case centres, the question being whether it means gross income or net income. The section says that the commission is not to exceed in any case £2 10s. for every £100 of "the capital value of any estate committed to the management of the Company as executor or trustee or in any of the other capacities mentioned, and five pounds for every hundred pounds of income received by the Company" in any such capacity. The section goes on to say that the commission shall be payable out of the moneys or property committed to the management of the Company and that the commission shall be received and accepted by the Company as a full recompense and remuneration to it for acting as executor or trustee or in any other relevant capacity. It is not necessary to refer in detail to the remaining part of the section.

The word "income" must be taken in its popular sense. In its popular sense, and read in an ordinary way, the word "income" is capable of two constructions. First, the total amount of the income received by the Trustee Company without regard to any outgoings to which it might be subject; secondly, the profit or gain, if any, represented by the difference between the entire income earned and the expenses incurred in earning it. In the case of *R. v. Commissioners of Port of Southampton*, L.R. 4 H.L. 449, the former construction of the word "income" was adopted; and in the case of *Lawless v. Sullivan*, 6 A.C. 373, the latter construction was adopted. The Court is, I think, bound to select from these two constructions the one which is based upon the more reasonable of two assumptions. These assumptions are that Parliament intended the Company to receive commission for acting as executor or trustee calculated by reference to the income received in the event of there being a surplus or a deficit after all outgoings are paid, or that it merely intended the Company to receive such commission only if there is a surplus.

The former assumption is the more reasonable one upon the provisions of Section 17. It is therein stated that the commission is a recompense and remuneration to the Company for acting as executor or trustee or in the relevant capacity, and that commission is payable out of the moneys or property committed to the management of the trustee company. The object intended by the section could be attained only in part if "income" is interpreted to mean gain or profits.

The distinction between "net income" and "gross income" is irrelevant for the purpose of the section. The distinction which is relevant is whether any amount is capital or income. When that question is decided, if the amount is capital, the commission cannot exceed 2½ per centum of the capital value; if the amount, on the other hand, is income, the commission cannot exceed 5 per centum of the amount received by the Company. The gross receipts of a business placed under the management and administration of a trustee company as an executor or trustee may consist both of income and capital: see *In re Edments*, 1936 V.L.R. 272, at pp. 276, 277. It is a matter of accountancy to determine, having regard to the nature of the business, how much of the receipts is capital and how much is income.

I agree that the appeal should be allowed and with the answers to the questions and the order to be read by the Chief Justice.

*In the  
High Court  
of  
Australia.*

No. 12.  
Order,  
2nd April  
1946.

No. 12.  
**ORDER.**

THIS APPEAL from the order of the Full Court of the Supreme Court of the State of Victoria made on the 25th day of May 1945 on the hearing of an originating summons No. 10 of 1945 coming on for hearing before this Court at Melbourne on the 18th 19th and 22nd days of October 1945 UPON READING the transcript record of the proceedings herein and the affidavit of Joan Valerie Austin sworn the 18th day of October 1945 and filed herein AND UPON HEARING Mr. Dean of King's Counsel and Mr. Morrison of Counsel for the above-named Appellant and Mr. Tait of King's Counsel and Mr. Adam of Counsel for the above-named Respondent The Union Trustee Company of Australia Limited hereinafter referred to as the Plaintiff AND no one appearing for the above-named Respondents John Ernest de Little and Ethel Ludlow de Little THIS COURT DID ORDER on the said 22nd day of October 1945 that this appeal should stand for judgment and the same standing for judgment accordingly this day at Sydney THIS COURT DOTH ORDER that this appeal be and the same is hereby allowed AND THIS COURT DOTH DISCHARGE so much of the said order of the Full Court of the Supreme Court of the State of Victoria as ordered and declares that the income received by the Plaintiff as executor and trustee appointed under the Will and Codicil of the above-named testator Ernest Robert de Little within the meaning of Section 17 of the Trustee Companies Act 1928 and corresponding previous enactments upon which the Plaintiff has been since the death of the said testator and is now entitled to receive commission on all amounts other than capital receipts received by the Plaintiff from any part of the estate of the said testator without deducting therefrom any amount for expenses or outgoings paid by the Plaintiff out of the said estate and that it is unnecessary to answer further the questions raised by the said originating summons AND in lieu thereof THIS COURT DOTH DECLARE that question (1) in the said originating summons namely :—

*Questions :—*

(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—What is the income received by the Plaintiff as Executor and Trustee as aforesaid 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 said 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 ?

(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 ?

*In the  
High Court  
of  
Australia.*

(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) ?

No. 12.  
Order,  
2nd April  
1946,  
*continued.*

10 (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 land 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 ;

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

(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 South Caramut Settlement and the Trustees of the Aringa North Settlement ?

be answered as follows :—

30 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 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,

40 (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.

*In the  
High Court  
of  
Australia.*

No. 12.  
Order,  
2nd April  
1946,  
*continued.*

AND THIS COURT DOTH FURTHER DECLARE that otherwise the first question in the said originating summons should not now be answered AND THIS COURT DOTH FURTHER ORDER that the said originating summons be adjourned for further consideration in the said Supreme Court AND THIS COURT DOTH REMIT the cause to the said Supreme Court AND THIS COURT DOTH ALSO ORDER that the costs of all parties of and incidental to this appeal—those of the Plaintiff as between solicitor and client—be taxed by the proper officer of this Court and when so taxed and allowed be paid out of the estate of the above-named Ernest Robert de Little deceased.

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By the Court.

J. G. HARDMAN,

Principal Registrar.

*In the  
Privy  
Council.*

Order in  
Council  
granting  
special  
leave to  
the  
Appellant  
to appeal  
to His  
Majesty in  
Council,  
2nd April  
1947.

No. 13.

**ORDER IN COUNCIL** granting special leave to the Appellant to appeal to His Majesty in Council.

AT THE COURT OF SAINT JAMES

*The 2nd day of April, 1947*

Present

HIS ROYAL HIGHNESS THE DUKE OF GLOUCESTER  
VISCOUNT LASCELLES

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LORD PRIVY SEAL  
VISCOUNT HALL

MR. SECRETARY WESTWOOD  
SIR HARTLEY SHAWCROSS

WHEREAS His Majesty, in pursuance of the Regency Acts, 1937 and 1943, was pleased, by Letters Patent dated the 24th day of January, 1947, to delegate and grant unto His Royal Highness The Duke of Gloucester, K.G., K.T., K.P., G.M.B., G.C.M.G., G.C.V.O., Her Royal Highness The Princess Royal, G.C.V.O., G.B.E., C.I., and Viscount Lascelles, or any two of them, as Counsellors of State, full power and authority during the period of His Majesty's absence from the United Kingdom to summon and hold on His Majesty's behalf His Privy Council and to signify thereat His Majesty's approval of any matter or thing to which His Majesty's approval in Council is required :

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AND WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 26th day of March 1947, in the words following, viz. :—

“ WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee the matter of an Appeal from the High Court of Australia between the Union Trustee Company of Australia Limited Appellant and (1) Lena Ethel Bartlam (2) John Ernest de Little (3) Ethel Ludlow de Little Respondents setting forth (amongst other matters) : that the Petitioner desires special leave to appeal from a decision dated the 2nd April 1946 of the High Court of Australia so far as it reversed a majority decision of

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L.S.

the Full Court of the Supreme Court of the State of Victoria dated the 25th day of May 1945 in relation to the construction of Section 17 of the Victorian Trustee Companies Act 1928 : that the facts are not in dispute and the only question in issue is whether according to the true construction of that Section the commission on income thereby allowed to the Petitioner as Executor and Trustee under the Will and Codicil of the late Ernest Robert de Little so far as such income is derived by the Petitioner from the working and managing of the Testator's station properties after his death ought to be based upon the amount ascertained from the proper accounts of the Petitioner before deducting the costs and expenses incurred for the working and managing of such station properties or after deducting such costs and expenses : that the Petitioner submits that the Judgment of the High Court is erroneous in that it adopts the latter alternative whereas upon the proper construction of the Section the former alternative is correct : And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment of the High Court dated the 2nd April 1946 or for such other Order as to Your Majesty in Council may seem fit :

“ THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto and upon the Petitioner undertaking through its Counsel to pay the costs of all the Parties to the Appeal in any event Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute its Appeal against the Judgment of the High Court of Australia dated the 2nd day of April 1946 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs and upon the condition that the Petitioner shall pay the costs in any event as between solicitor and client of all Parties to the Appeal :

“ And Their Lordships do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same.”

NOW, THEREFORE, His Royal Highness The Duke of Gloucester and Viscount Lascelles being authorized thereto by the said Letters Patent, have taken the said Report into consideration and do hereby, by and with the advice of His Majesty's Privy Council, on His Majesty's behalf approve thereof and order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

*In the  
Privy  
Council.*

No. 13.  
Order in  
Council  
granting  
special  
leave to  
the  
Appellant  
to appeal  
to His  
Majesty  
in Council,  
2nd April  
1947,  
*continued.*

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# In the Privy Council.

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## ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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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.*

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# RECORD OF PROCEEDINGS.

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COWARD, CHANCE & CO.,  
STEVINSON HOUSE,  
155 FENCHURCH STREET, E.C.3,  
*Solicitors for the Appellant.*

BLYTH, DUTTON, WRIGHT & BENNETT,  
112 GRESHAM HOUSE,  
OLD BROAD STREET, E.C.2,  
*Solicitors for the Respondents.*