

[HIGH COURT OF AUSTRALIA.]

BARTLAM APPELLANT;
 DEFENDANT,

AND

UNION TRUSTEE COMPANY OF AUSTRALIA }
 LIMITED AND OTHERS } RESPONDENTS.
 PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF
 VICTORIA.

*Executors—Trustees—Trustee company—Commission—"Income"—Proceeds of business—Trustee Companies Act 1928 (Nos. 3793-4963) (Vict.), s. 17.**

The respondent company was a trustee company within the meaning of the *Trustee Companies Act 1928* (Vict.) and, therefore, entitled, under s. 17 of the Act, to commission at rates specified in respect of "the capital value of any estate committed to the management" of the company as executor and "income received by such . . . company as executor." Pursuant to powers conferred by a will of which it was an executor the company carried on a pastoral business on properties forming part of the testator's estate. It kept books of account in respect of annual accounting periods, including live-stock accounts for sheep, cattle and horses, and a working account for each of the accounting periods. The live-stock accounts showed the stock on hand at the beginning of the year of account, the purchases and natural increase, and the sales and deaths, of stock during the year, and stock on hand at the end of the year. The stock on hand respectively at the beginning, and at the end, of the year were brought into account at standard values, and the balance was carried to the working account; proceeds of the sale of wool were also credited to the working account. Debited in the working account were various items of expenditure immediately connected with the carrying on of the business, such as salaries, wages and shearing expenses.

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MELBOURNE,
 1945,

Oct. 18, 19,
 22.

SYDNEY,
 1946,
 April 2.

Latham C.J.,
 Rich, Starke,
 Dixon and
 McTernan JJ.

aff'd
 196 C.L.R. 492

* The provisions of this section are set out in the judgment of Latham C.J., *post*.

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Held that the income derived from carrying on the business upon which the plaintiff as executor was entitled to receive commission should be ascertained, over annual accounting periods, upon ordinary accounting principles; the amount of profit appearing from 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 for the working and managing of the station properties, but not such expenses as interest paid on mortgages of land forming part of the estate or other expenses referable to the ownership and general administration of the estate.

Decision of the Supreme Court of Victoria (Full Court): *Re de Little; Union Trustee Co. of Australia Ltd. v. de Little*, (1945) V.L.R. 198; varied.

APPEAL from the Supreme Court of Victoria.

The Union Trustee Co. of Australia Ltd., which was a trustee company within the meaning of the *Trustee Companies Act* 1928 (Vic.), was one of three executors of the will of a testator who died on 1st October 1926. Pursuant to a power in the will the executors for some years carried on the testator's business of a grazier and pastoralist. For the greater part of the period the business produced a profit, though in some years there was a loss. The company claimed to be entitled under s. 17 of the Act to commission on income calculated on a basis with which the beneficiaries did not agree, and it applied to the Supreme Court of Victoria by originating summons for the determination of questions which were substantially as follows:—

(1) What is the income received by the plaintiff as executor and trustee within the meaning of s. 17 of the Act or corresponding previous enactments, upon which the plaintiff has been since the death of the testator and is now entitled to receive commission as such executor and trustee and how should the said income be calculated and in particular—(a) Should the income be calculated in yearly rests from 1st October to 30th September next following? (b) Should the income be calculated by adding together the amount of the profit shown on live-stock accounts [the nature of which, so far as could be ascertained from the material before the court, sufficiently appears from the reasons for judgment hereunder], 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 estate, but without deducting therefrom any amount for expenses or outgoings paid by the plaintiff out of the estate? (c) Should the 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 but none of the costs and expenses referred to in (d) ? (d) Should the 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 estate ; (ii) rates, taxes, assessments, insurance premiums and outgoings affecting the home-
stead and land held upon trust for the use of one of the beneficiaries and paid by the plaintiff out of the income of the estate pursuant to the will ; (iii) the costs and expenses of administering the 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 certain settlements ?

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The defendants to the summons were Lena Ethel Bartlam (representing the beneficiaries) and the company's co-executors.

The summons was referred to the Full Court of the Supreme Court, which (*Macfarlan* and *Lowe JJ.*, *Martin J.* dissenting) answered the questions by declaring that the income received by the company upon which it was entitled to commission was "all amounts other than capital receipts received by" it "from any part of the estate of the . . . testator without deducting therefrom any amount for expenses or outgoings paid by" it out of the estate and that it was unnecessary to answer the questions further.

From this decision, the defendant Bartlam appealed to the High Court, joining as respondents the company and its co-executors.

Dean K.C. (with him *Morrison*), for the appellant. "Income," as ordinarily understood, is net income ; that is its "popular" meaning, and it is the meaning that should be given to the word in a statute unless there is a context which suggests otherwise. There is no such context in s. 17 of the *Trustee Companies Act*, in which, therefore, income must be taken to mean net income (*In re Edments ; Trustees, Executors & Agency Co. Ltd. v. James* (1) ; *Lawless v. Sullivan* (2)). The word has been so construed in an Act which is *in pari materia* (*In the Will of Matheson* (3)). To interpret "income" as gross income could result in great hardship to beneficiaries. The outgoings must be deducted before there is any income to distribute, and these plus commission on the gross income might well, in some circumstances, leave nothing for the beneficiaries. The only significance of the word "received," attached to the word "income," is to

(1) (1936) V.L.R. 272. (3) (1887) 13 V.L.R. 587.
(2) (1881) 6 App. Cas. 373, at p. 378.

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make it clear that commission is to be allowed only on moneys which are got in ; if there is a debt owing to the estate, but not paid, no commission is allowable in respect of it. The section says nothing about accounting periods, and it affords no guide which would enable the court to say that annual, rather than any other, periods should be taken. Capital does not have to be ascertained by relation to points of time, and the position is the same as to income ; the commission is allowable in respect of the period of administration as a whole, on what comes in, less the outgoings, over the whole period.

Tait K.C. (with him *Adam*), for the respondent company. The appellant asserts that the ordinary popular meaning of "income" is net income, but the argument in reality seeks to attach to the word a meaning which is neither that of net nor of gross income as commonly understood. The fact is that in popular usage the word "income" is used indiscriminately to describe either gross or net income, and one cannot tell which is intended unless the context makes it clear. In considering net income, as ordinarily understood, one cannot leave out of account the conventional methods of accounting whereby the net income is ascertained in relation to set periods, usually yearly. In rejecting the conception of accounting periods the appellant rejects the conventional meaning of "net income." If the appellant is right in contending that no commission is payable on income until the estate is fully administered, then no commission will ever be payable in the case of a trust in perpetuity. In the present context "income" is used in contradistinction to "capital" ; in that setting it means all that comes in which is not capital. This is emphasized by the use of the word "received" in the phrase "income received," which points to the time when the money comes in, that is to say, to gross income. It has been held under a similar statute that capital means the gross value without any deduction of debts (*In re McIntosh ; Perpetual Trustee Co. Ltd. v. McIntosh* (No. 3) (1) ; *In the Will of Muir* (2) ; see also *In re McIntosh ; Perpetual Trustee Co. Ltd. v. McIntosh* (No. 2) (3)), and the same view should be taken of income. The commission is remuneration for work done, and net amounts, whether of capital or income, are not the measure of the work done. The executor has to deal with, and account for, the gross amounts. To say that income is "derived from carrying on a business" does not put it in a special category for the purpose of the section ; all income is on the same footing ; indeed, it is all the result of something in the nature of a business enterprise. As to the

(1) (1903) 4 S.R. (N.S.W.) 59.

(2) (1906) 6 S.R. (N.S.W.) 124.

(3) (1902) 2 S.R. (N.S.W.) Eq. 247.

meaning of "income," see *R. v. Commissioners of Port of Southampton* (1); *Jones v. Ogle* (2); *St. Lucia Usines & Estates Co. v. St. Lucia* (3); *Lambe v. Inland Revenue Commissioners* (4); *In re Income Tax Acts* (No. 2) (5); *In re Income Tax Acts* (No. 3) (6); *Resch v. Federal Commissioner of Taxation* (7); *Ex parte Huggins*; *Re Huggins* (8). [He also referred to *Tilt v. Tilt's Cafes Ltd.* (9); *In re Killicoat* (10); and, as to the history of the legislation in question, to the Victorian Acts, Nos. 644, 839, 840, 842; *Trustees, Executors & Agency Co. Ltd. v. Hicks* (11).]

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The other respondents did not appear.

Dean K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered:—

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

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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 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 seventeen 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.

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

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| (1) (1870) L.R. 4 H.L. 449, at p. 472. | (7) (1942) 66 C.L.R. 198, at p. 213. |
| (2) (1872) 8 Ch. App. 192, at p. 196. | (8) (1882) 21 Ch. D. 85. |
| (3) (1924) A.C. 508. | (9) (1930) V.L.R. 31. |
| (4) (1934) 1 K.B. 178, at p. 182. | (10) (1914) S.A.L.R. 141. |
| (5) (1901) 27 V.L.R. 39, at p. 41. | (11) (1894) 20 V.L.R. 325. |
| (6) (1904) 29 V.L.R. 735, at p. 740. | |

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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; Trustees, Executors & Agency Co. Ltd. v. James* (1), 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 as executors is only that which is properly distributable as income by them.

The relevant statutory provision is contained in the *Trustee Companies Act* 1928, s. 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 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 the *Public Trustee Act* 1939 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 the *Public Trustee Act* 1939 or as such sole guarantor or surety as aforesaid or guardian of any infant or lunatic or of capital or income received by such trustee company as an attorney acting under power of attorney, and such commission shall be payable out of the moneys or property committed to the management of such trustee company and shall be received and accepted by it as a full recompense and remuneration to it for acting as such executor administrator trustee receiver committee or guardian or as such sole guarantor or surety as aforesaid or attorney, and no other charges beyond the said commission and the moneys so expended by the said

company shall be made by such trustee company. But if in any case the Supreme Court or a judge thereof is of opinion that such commission is excessive it shall be competent for such court or judge to review and reduce the rate of such commission: Provided that the commission to be charged by a trustee company shall not exceed in any estate the amount of the published scale of charges of the said company at the time when such estate was committed to it. Nor shall this enactment prevent the payment of any commission directed by a testator in his will in lieu of the commission hereinbefore mentioned."

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 therefrom a mortgage debt charged upon it: *In re McIntosh; Perpetual Trustee Co. Ltd. v. McIntosh* (No. 3) (1).

"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

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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* (1), 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 Port of Southampton* (2), 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 income and more went in meeting expenses and losses. Another man might describe the same

(1) (1881) 6 App. Cas. 373.

(2) (1870) L.R. 4 H.L. 449.

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 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, s. 59) under which such commission may be allowed, not exceeding five per centum, to an executor 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 the Will of Matheson* (1). 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 s. 17 of the *Trustee Companies Act*.

Thus I agree with the majority of the Full Court in not accepting the proposition approved by *Gavan Duffy J.* in *In re Edments* (2) 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* (2) a retail business had receipts from sales during a year of over £450,000, with a gross profit (arrived at by deducting the cost of goods sold, but not the other expenses of

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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 this matter I agree with what *Gavan Duffy J.* said in *Edments' Case* (1) 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 the Will of Matheson* (2).

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 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 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 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

(1) (1936) V.L.R., at p. 276.

(2) (1887) 13 V.L.R. 587, at pp. 589, 590.

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 replacement it is not an income receipt. "Income received" does not include money received by the executor which represents either a realization 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 &c. shown in the working account were "amounts other than capital receipts."

Questions (1) (b) and (c) asked in the originating summons inquire whether the income should be calculated by dealing in a manner particularly stated with amounts shown on live-stock accounts referred to in the affidavit filed in support of the summons. Those accounts are referred to in the affidavit and are summarized 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 (1) (b), and (c) in the originating summons in the precise form in which they there appear.

In my opinion, in answer to questions (1) (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 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 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—

- (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

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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 ? ”

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 &c. 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.

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.

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.

RICH J. The question which arises for our determination in this appeal is as to the basis upon which the Union Trustee Co. 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 s. 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 s. 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* (1). 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 S.A. Ltd.* (2), "the courts have always regarded the ascertainment of income as governed by the principles recognized or followed in business and commerce, unless the legislature has itself made some specific provision affecting a particular matter or question." Principles recognized 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;

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(1) (1934) 1 K.B. 178, at p. 182.

(2) (1938) 63 C.L.R. 108, at p. 152.

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it is not used in relation to the exaction of a tax or the payment of a bonus in respect of profits won.

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 five per cent "for every hundred pounds of income received by such trustee company"? The purpose of s. 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 s. 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.

STARKE J. 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 two and a half per centum of the capital value of any estate committed to its management and five 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 two and a half 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 for ascertaining the income received by it. All the Act does is to differentiate between the commission payable in respect of the value of 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 live stock, 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 live-stock accounts for sheep, cattle and horses, and a working account for each yearly period. Each of the live-stock 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 &c. 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 &c. 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

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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.

The trustee company charged commission on income received by it as executor and trustee at the rate of two and a half per centum calculated on the income of the estate made up of—

- (a) the gross profit shown on the live-stock accounts ;
- (b) the gross amount 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.

Thus for the year ended 1st October 1943 the live-stock accounts disclosed a profit of £4,403 14s. 8d. and proceeds of sale of wool &c. £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 two and a half 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 outgoings 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.

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 beneficiaries that is the subject of commission. Some of the items of expenditure shown in the working account for the year which ended on 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 of plant. A pastoral property was committed to the management 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 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. 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 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 two and a half 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 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 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

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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 live-stock 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.
- (3) None of the items set forth in par. (1), sub-par. (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.

DIXON J. The proposition may be conceded that in s. 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 ?

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.

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.

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.

The Full Court answered the question by saying that the income received by the company as trustee within the meaning of s. 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 realization 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 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.

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 s. 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 merchandizing 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 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

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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. 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 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-in-trade of a merchandizing 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 s. 17 calls "the capital value of the estate committed to the management of the company," upon which the section allows a commission not exceeding two and a half per centum. 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.

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 of 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 realized 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 philosophical 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 than they are income "from" the business.

The foregoing observations appear to me to be applicable not only to merchandizing 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.

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 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

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productive industry. Does this mean that the gross proceeds of the sale of wool do not form part of the 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.

I think that the gross returns from the pastoral business forming part of the estate cannot properly be described as income and it is only the net balance ascertained according to the usual and recognized principles of accounting that answers the description.

The point was made that s. 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 amount is detachable as income from the proceeds of a business, accounting periods are necessary. They are necessary, not because s. 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 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 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 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 s. 17 meant net income.

The views which I have expressed are in accordance with the judgment of *Gavan Duffy J.* in *In re Edments* (1), 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 *Anson v. Commissioner of Taxes* (2), *Salmond J.*; *Webster v. Deputy Federal Commissioner of Taxation* (3), including *Gavan Duffy* and *Starke JJ.* dissenting (4); *Thornley v. Boyd* (5), per *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 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 estate (see *Rishton v. Grissell* (6) and *Sleigh v. Watt* (7));
- (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;

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(1) (1936) V.L.R. 272, at p. 276.

(2) (1922) N.Z.L.R. 330, at pp. 334-337.

(3) (1926) 39 C.L.R. 130.

(4) (1926) 39 C.L.R., at pp. 136, 137.

(5) (1925) 36 C.L.R. 526, at pp. 531-533.

(6) (1868) L.R. 5 Eq. 326.

(7) (1930) V.L.R. 1.

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(iv) income tax ;

(v) commission chargeable by the company ;

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

In my opinion, the appeal should be allowed.

McTIERNAN J. The question in this appeal arises upon s. 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 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 authorizes 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 is centred, 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 £5 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* (1), the former construction

of the word "income" was adopted; and in the case of *Lawless v. Sullivan* (1), 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 s. 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 two and a half per cent of the capital value; if the amount, on the other hand, is income, the commission cannot exceed five per cent 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* (2). 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.

Appeal allowed.

Discharge so much of the order of the Supreme Court as orders and declares that the income received by the plaintiff, as executor and trustee appointed under the will and codicil of the testator, Ernest Robert de Little, within the meaning of s. 17 of the Trustee Companies Act 1928 and corresponding previous enactments upon which the plaintiff has 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

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(1) (1881) 6 App. Cas. 373.

(2) (1936) V.L.R. 272, at pp. 276, 277.

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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.

In lieu thereof declare in answer to the first question in the originating summons that 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, viz. :—

- (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 ;*
- (b) and (c) for the purpose of ascertaining the income in respect of which the company is entitled to charge commission the amount of profit appearing from 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 for the working and managing of the station properties ;*
- (d) none of the items of costs and expenses inquired about in sub-pars. (i), (ii), (iii), (iv), (v) and (vi) of par. (b) of the first question should be debited or deducted.*

Declare that otherwise the first question should not now be answered. Adjourn further consideration of the summons in the Supreme Court. Remit the cause to the Supreme Court.

Order that the costs of all parties of and incidental to this appeal be paid out of the estate, those of the plaintiff respondent the Union Trustee Company of Australia Ltd. as between solicitor and client.

Solicitors for the appellant, *Cameron & Lowenstern*, Hamilton, by *Henderson & Ball*.

Solicitors for the respondent company, *Blake & Riggall*.