Discd Squatting Investment Co Ltd v FCT (1953) 86 CLR 570

DiscdNational Trustees Executors & Agency Co v FCT (Cain's case) (1954) 91 CLR 540

Explained & approved PC. 88 CLR 413

Expl/Appr FCT v Squatting Investment Co Ltd (1954) 88 CLR 413

[HIGH COURT OF AUSTRALIA.]

RITCHIE . . . . . APPELLANT;
DEFENDANT,

AND

TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED AND OTHERS . } RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 23-25; *July* 6.

Dixon, McTiernan, Webb, Fullagar and Kitto JJ.

Tenant for life and remainderman—Gratuitous statutory payment to suppliers of wool acquired under National Security (Wool) Regulations (S.R. 1939 *No.* 108 *—S.R.* 1940 *No.* 227)*—*Trustees of settled estate carrying on pastoral business for purposes of estate—Wool supplied by them in course of business—Gratuitous payment received by them—Income of estate of income year in which received —Wool Realization Act* 1945-1950 (*No.* 49 *of* 1945—*No.* 10 *of* 1950)*—*Wool Realization (Distribution of Profits) Act* 1948 (*No.* 87 *of* 1948).*

While the *National Security (Wool) Regulations* were in operation the trustees of a settled estate from time to time submitted for appraisement under the regulations wool produced on a pastoral property carried on by them under a power given by the trust instrument.

Held that moneys received, pursuant to the *Wool Realization (Distribution of Profits) Act* 1948, by the trustees as the suppliers of the wool were income of the settled estate and should be treated as a receipt of the pastoral business belonging to the profit and loss account of the year in which they were received.

Decision of the Supreme Court of Victoria (Full Court) affirmed.

APPEAL from the Supreme Court of Victoria.

This was an appeal from a decision of the Full Court of the Supreme Court of Victoria (*Lowe* A.C.J., *Barry* and *Sholl* JJ.) on

* The material provisions of these regulations and Acts are described in the judgment of the Court, *post*.

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an originating summons which, at the request of the plaintiffs and by the consent of all the defendants, *Dean* J. referred to the Full Court.

The following statement of the facts is taken from the judgment of *Sholl* J. :—

" The original testator, Charles Campbell, died on 13th December 1905 leaving a will dated 30th May 1905 by which he disposed of a very large estate in Victoria and New South Wales. Included therein were two station properties, ' Murray Downs,' in New South Wales, and ' Langi Kal Kal,' in Victoria. The testator was survived by his widow, who died in 1911, and eight children. Of these, one son, George, was excluded from the will as having been already sufficiently provided for. The remaining seven children were all named in the will as sharing both in the dispositions of the station properties above mentioned and in those of residue. All the children are now dead except one, the defendant Edith Margaret Hoysted. Another son, Charles William Campbell, who died in 1936, married Emma Campbell, who died in April 1948, and whose estate is represented in these proceedings by the defendant Pond. Their children are the defendants Charles Gordon Campbell, Violet Campbell, Marguerite James, Jessie Ritchie, and Kathleen Kibby. The grandchildren of Charles William Campbell (great grandchildren of the original testator) include, and are represented by, the defendant Thomas Ritchie, a son of Jessie Ritchie. Testator's children, other than Charles William Campbell, also had children, and the defendant Mabel Andrews represents the grandchildren of testator, excluding, presumably—though the representative order made by *Dean* J., by consent of the parties, does not so provide—the defendants who are children of Charles William Campbell.

The will contained separate trusts as to the station properties and the residue, respectively. The station properties, with the stock and effects thereon, were given to the trustees on trust, in the first place, to carry on and work them for twenty-one years from testator's death. For that purpose, the trustees were given wide powers, including power to sell and purchase sheep and other live stock, and to leave the conduct of the station business or businesses to a manager or managers. The trustees were directed to operate a separate banking account for the station properties. They were to hold the ' net annual income ' to arise from the carrying on of the properties in trust for such of the seven named children of testator as should be living at the end of each such annual period and the children then living of any child then dead. Testator

then defined ' net annual income ' as meaning income after deduction of (*inter alia*) instalments of interest and principal payable under mortgages given by him over the station properties, rents of leasehold land, and all such payments for the purchase of sheep and other outgoings as the trustees in their absolute discretion might think proper to charge against income. He gave the trustees power to determine by such means as they deemed best the amount of the net annual income, save that no valuation was for that purpose to be placed on (*inter alia*) wool on sheep's back, which was only to be taken into account for the period during which it was actually shorn and ' notwithstanding that the same shall have been partially growing during the preceding annual period '. By this I think testator meant merely to preclude a calculation of net annual income of the station properties dependent in whole or in part on a valuation of growing wool. I do not understand him to have meant to insist that wool must necessarily be taken finally into account in the year in which shorn, even if then unsold. That would involve another valuation and a final one at that. What I think he meant to forbid was the taking into account of wool before it was shorn, but not to forbid the valuation of shorn wool and a subsequent adjustment on sale. On that view, any increase or decrease on the sale of wool shorn in one year and sold in another would go to the debit of the profit and loss account, and therefore affect the income account of the year or years in which it was ascertained.

At the expiration of the period of twenty-one years, the trustees were to sell and convert the station properties and all stock and effects thereon, and to stand possessed of the net proceeds of sale on trust to divide them among such of the seven children as should then be living, and such of the children of any then deceased child as should then be living (*per stirpes*). At the end of the twenty-one years, on 13th September 1926, one of the seven children, Mrs. Johnston, had in fact died (in 1912), and her two children, the defendant Mrs. Mabel Helen Andrews, and Mrs. Florence McKechnie (who died in May 1950) survived both her and the period of distribution. Each of the six then living children thus became entitled to a one-seventh share in the corpus of the proceeds of conversion of the station properties (which I shall call the station-property fund), and Mrs. Andrews and Mrs. McKechnie each to one-fourteenth.

But the will went on to provide that, notwithstanding the direction for sale and conversion, the trustees should have full discretionary power to postpone the same; that during any such

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postponement, notwithstanding the expiration of the twenty-one-year period, the trustees should have the same powers of carrying on, managing, and working the station properties as they had during that period; that it was testator's wish and desire (but as a guide to the trustees only) that the station properties should not be sold until the trustees should be requested in writing so to do by a majority in number and interest of the persons entitled to the proceeds; and that notwithstanding any postponement the station properties and stock, etc., thereon, should for the purpose of transmission be considered as converted at the end of the twenty-one-year period.

The residue of the estate was given to the trustees on trust for conversion, with power to postpone, and with a provision that income pending conversion should be treated as if it were income of the converted fund; upon trust, in the next place, to pay certain annuities; and subject thereto, upon trust to stand possessed of the residue and the income thereof for testator's sons (other than George) attaining twenty-five and daughters attaining twenty-one or marrying, equally as tenants in common, but subject to the settlement of the daughter's shares. Each of the latter shares was to be held on trust for the particular daughter for life; on her death for her children as she might appoint; and in default of appointment, for her sons attaining twenty-one and daughters attaining twenty-one or marrying. There were further limitations which in the result were not material. Each of testator's sons attained twenty-five and each of his daughters attained twenty-one or married. Mrs. Johnston made no appointment. Some of the other daughters made appointments. Mrs. Andrews, who has been ordered to represent all other the grandchildren of the testator, or other persons, entitled to share in the corpus of residue, gets one-fourteenth of the income and corpus of the station property fund and one-fourteenth of the income and corpus of residue, so that to her personally it makes no difference whether the money here in question goes to corpus or income, or to the one corpus or the other. But, having been joined to represent corpus of residue, she submitted by her counsel an argument that that was its destination. Mrs. Hoysted, testator's surviving child, is entitled to the income for life of a one-seventh share of residue, but entitled to a one-seventh share absolutely of the income and corpus of the station-property fund. One would gather from the arrangement of defendants that she was joined in the hope or expectation that a complete and symmetrical representation of interests would be produced by her submitting an argument that the moneys in ques-

tion here go to income of residue. Not unnaturally, however, she submitted that the moneys went to the station-property fund. But she put the other view as an alternative, and as no representative order was made in regard to her, no one was entitled to complain of the view she took. Indeed, the case having been brought as a test case, counsel for the trustees declined to display any enthusiasm for the discussion of such problems of theoretical representation, and was disposed to deprecate references to such inconvenient deviations from the desired pattern of a test case. But having regard to the very full discussion before us of the arguments submitted, I do not think there is, in the result, any relevant view which has not been brought to our notice.

The trustees in fact carried on both the station properties till the year 1933, when 'Langi Kal Kal' was sold, and since then they have carried on, and are still carrying on, 'Murray Downs'.

Testator's son Charles William Campbell . . . executed in his lifetime, but after the end of the twenty-one-year period, a number of settlements, whereby he settled three-twentieths of his one-seventh share in the income and corpus of the station-property fund. Another son, Colin H. Campbell, made a somewhat similar settlement. One only of these settlements has been taken as typical. Since all the original beneficiaries of the station-property fund became entitled to a share in income and corpus absolutely, it is only as between life tenants and remaindermen under these derivative settlements that there arises the question whether the moneys, to which these proceedings relate, go, if they go to the station-property fund, as income or as corpus. By the relevant settlement, Charles William Campbell on 4th October 1926 settled three-twentieths of his one-seventh interest in the station-property fund (which three-twentieths he called the 'settled fund'), and the income to become due in respect of the same, on trust to pay the income thereof to his wife Emma Campbell for life; and then upon trust as to capital and income for settlor's children attaining twenty-one or if female marrying, but subject to the settlement of each such share, so that the child should receive the income of such share for life, and on that child's death, the capital and income of the share should be held for that child's children attaining twenty-one or if female marrying, in equal shares; and failing any such children of a child, for such child's next of kin. Emma Campbell received the income under this settlement till her death in April 1948, and the second group of defendants, who are her children, are now life tenants of that income. The defendant Ritchie, representing grandchildren of

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Charles William Campbell, and the class he so represents, are entitled to shares in the corpus of the settled fund.

By the will of Charles William Campbell, which applies to, *inter alia*, the unsettled seven-twentieths of his share in the station-property fund, as well as to his whole one-seventh interest in income and corpus of the residue of the original testator's estate, Charles William Campbell disposed of his estate in a manner so substantially similar to the manner in which he disposed of the settled fund by the settlement above mentioned, that nothing turns upon any differences there may be.

In the course of carrying on 'Murray Downs', the trustees there grew and shore wool which in the seven wool seasons 1939-1940 to 1945-1946, inclusive, became subject to the war-time wool acquisition scheme of the Commonwealth. This scheme was introduced by the *National Security* (*Wool*) *Regulations* made under the *National Security Act* 1939. They set up a Central Wool Committee and State Wool Committees. Regulation 2 stated that the purpose of the regulations was to provide for the carrying out of an arrangement made between the Government of Great Britain and the Government of the Commonwealth for acquiring, in connection with the then present war between His Majesty the King and Germany, all wool produced in Australia, with certain exemptions, and to provide for matters arising thereout and incidental thereto. Regulation 13 avoided contracts or agreements for the sale of wool or wool tops in force at the commencement of the regulations, unless delivery had been made. Regulation 14 provided that no person should sell or buy or contract to sell or buy any wool or wool tops, except in accordance with the regulations. Regulation 15 provided that the 'sale' of wool should be by appraisement under the regulations and that the property in every parcel of wool submitted for appraisement should pass to the Commonwealth when the final appraisement thereof was completed in the manner prescribed by the instructions of the Central Wool Committee. Regulations 16 and 17 provided for the preparation of a 'table of limits' so calculated 'as to ensure that the price per pound payable by the Government of Great Britain for the wool of any wool year will not be exceeded by the average price per pound of the total payments made pursuant to the appraisements of that wool'—i.e., that the Commonwealth Government would not pay to the growers a greater price over all than the United Kingdom Government paid to the Commonwealth. Regulation 19 (1) provided that all wool should be submitted for appraisement, and the method of appraisement was

dealt with by regs. 20 et seq. Regulation 30 provided—'(1) All moneys payable by the Government of Great Britain under the arrangement made by that Government with the Commonwealth for acquiring Australian Wool shall be received by the Central Wool Committee and out of such moneys the Central Wool Committee shall defray all costs, charges and expenses of administering these regulations, and make payments for wool to the suppliers. (2) Any moneys which may be received by the Central Wool Committee from the Government of Great Britain under or in consequence of such arrangement over and above the purchase price payable by such Government thereunder for the wool and any surplus which may arise shall be dealt with as the Central Wool Committee shall in its absolute discretion determine.'

These regulations were amended from time to time, in a manner not here material, but the provisions I have quoted applied to Australian wool up to and including the 1945-1946 season." [His Honour then proceeded to discuss the relevant Acts.]

The plaintiffs were the Trustees Executors and Agency Co. Ltd., Alexander Stewart and George Stanley Colman as trustees of the estate of Charles Campbell deceased and the company alone as trustee of the settlement above mentioned and of the estate of Charles William Campbell deceased. The defendants were the persons mentioned in the foregoing statement of facts as having or representing interests under the will and the settlement. When making his order referring the summons to the Full Court *Dean* J. also made representative orders by consent as follows:—Order "that the defendant Samuel Austin Frank Pond be and he is hereby appointed pursuant to the provisions of Order XVI., rule 46, of the *Rules of the Supreme Court* (Vict.) to represent for the purposes of this originating summons the estate of Emma Campbell deceased a person who was interested in the matters in question in this summons, there being no personal representative of the said Emma Campbell deceased and . . . that the defendant Thomas Paton Ritchie be and he is hereby appointed to represent all other the grandchildren of the abovenamed Charles William Campbell deceased who are or may hereafter be entitled to share in the corpus of the fund settled by the said Charles William Campbell deceased under a settlement made by him on the 4th day of October 1946 (being the settlement referred to in paragraph 3 of the originating summons herein) or in the corpus of his Estate and . . . that the defendant Mabel Helen Andrews be appointed to represent all other the grandchildren of the abovenamed Charles Campbell deceased or other the persons who are

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or may hereafter be entitled to share in the corpus of the residuary estate of the said Charles Campbell deceased."

The questions (so far as here material) submitted by the summons and the answers thereto of the Full Court of the Supreme Court were as follows :—

Question 1. To what persons and in what shares or proportions should the plaintiffs as trustees of the estate of the said Charles Campbell deceased pay the sum of £4,746 2s. 1d. received by them on 3rd December 1949 from the Australian Wool Realization Commission under the *Wool Realization (Distribution of Profits) Act* 1948 and what are their duties in respect of the said sum ?

Answer. The plaintiffs should apply the moneys in accordance with the answers to the succeeding questions.

Question 2. Should the plaintiffs as trustees of the will and estate of Charles Campbell deceased treat the said sum of £4,746 2s. 1d. as moneys—

(*a*) to be dealt with in accordance with the trusts of the will of the said Charles Campbell deceased in relation to the station properties known as "Murray Downs" and "Langi Kal Kal," or

(*b*) as moneys forming part of the residuary estate of the said Charles Campbell deceased ?

Answer. The plaintiffs should hold and deal with the moneys as a receipt of an income nature in relation to the "Murray Downs" station-property business, to be brought into account accordingly and dealt with in accordance with the trusts of the will of Charles Campbell deceased relating to the station properties herein referred to.

Question 3. If the answer to question 2 (*a*) be in the affirmative, was the settlement made by Charles William Campbell deceased in favour of the Trustees Executors and Agency Company Limited as trustee on 4th October 1926 operative and effective to vest in the trustee of the said settlement a sum equal to three-twentieths of one-seventh of the said sum of £4,746 2s. 1d., notwithstanding the provisions of s. 29 of the *Wool Realization (Distribution of Profits) Act* 1948 or did the provisions of the said section invalidate the assignment by way of settlement of the said sum ?

Answer. Section 29 of the Act referred to did not in any way affect the operation of the said settlement.

Question 4. If the answer to question 2 (*a*) be in the affirmative, should the said three-twentieths of one-seventh of the said sum of £4,746 2s. 1d. be dealt with as corpus or as income under the said settlement or under the trusts of the will of Charles William Campbell deceased ?

Answer. Since the trustees of the will of Charles Campbell deceased, in accordance with the answer to question 2, will deal with the said moneys in that estate as therein directed, the payments of income of the station-property fund from that estate to the trustee of the settlement made by Charles William Campbell will necessarily reflect the effect of such dealing by the trustees of the said will with the said sum. It is not necessary otherwise to answer this question.

Question 5. If the answer to question 4 hereof be that such moneys are to be dealt with as income, is the legal personal representative of Emma Campbell deceased (the first-named defendant) who was the life tenant under the said deed of settlement and who had a right to income under the trusts of the said will of Charles William Campbell deceased at the times when the wool in respect of which the said sum of £4,746 2s. 1d. was paid was grown, appraised and supplied to the Commonwealth under the *National Security* (*Wool*) *Regulations* entitled to such income, or are the second-named defendants Charles Gordon Campbell, Violet Florence Connell, Marguerite Helen James, Jessie Doreen Ritchie and Kathleen Louise Kibby as the tenants for life when the said sum was received entitled to such income ?

Answer. The trustees of the will of Charles Campbell deceased should deal with the said moneys as being a receipt of the nature described in the answer to question 2, coming into their hands in the year in which actually received. It is unnecessary otherwise to answer this question.

From this decision the defendant Thomas Paton Ritchie appealed to the High Court, and the defendant Samuel Austin Frank Pond cross-appealed from the answer to question 5 in the summons.

J. G. Norris K.C. (with him *H. R. Newton*), for the appellant, referred to the *Wool Realization Act* 1945-1950 ; *National Security* (*Wool*) *Regulations*, regs. 15-17, 21 (2), 23, 30 ; *Wool Realization* (*Distribution of Profits*) *Act* 1948, ss. 4 (definitions of " participating wool " and " the wool disposals profit "), 6 (2), 7, 9-13, Part IV., ss. 18, 19, 28. The moneys paid to the trustees under the 1948 Act were merely a gift (*Maslen* v. *Perpetual Executors Trustees & Agency Co.* (*W.A.*) *Ltd.* (1), per *Latham* C.J.). They did not become subject to an express trust as was held in the Full Court of the Supreme Court. The payment did not partially replace the appraised value of the wool acquired from the trustees. The property in that wool passed on appraisement, which was the final

(1) (1950) 82 C.L.R. 101.

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determination of its value. The transaction of acquisition and payment was concluded long before the enactment of the 1948 Act. The payment under the 1948 Act was not out of the sale of the appraised wool. The trustees received the money as trustees, subject to a constructive trust: see *Halsbury's Laws of England*, 2nd ed., vol. 33, p. 138. Prima facie it was a corpus receipt in respect of the station property (*In re Francis* (1); *In re Sharp* (2)). In so far as the donor's intention or presumed intention determines whether such payments are capital or income (see *Law Quarterly Review*, vol. 28 (1912), p. 175), it may be observed that there is not here any intention of the donor expressed in favour of the life tenant. Provisions of the Act such as ss. 9, 10 (3), 11 (*b*) and 13, which in the special circumstances specified therein provide in effect that moneys paid under the Act are to be assimilated with the actual proceeds of the appraised wool, are not opposed to the appellant's view; on the contrary, they strongly support it. They negative any general intention to that effect in the Act; if there was such a general intention, they would be unnecessary. Equity is concerned—primarily, at least—to see that trustees do not retain for themselves moneys which ought to go into the trust estate; it is not especially concerned as to any particular class of beneficiaries.

[DIXON J. referred to *Union Trustee Co. of Australia Ltd.* v. *Commissioner of Taxes* (3).]

[Counsel referred to the same case on appeal (4).] None of the cases relied on as affording a parallel with this case and as showing that the amount in question is income goes far enough to support that view. [He referred to *Seymour* v. *Reed* (5); *Pole* v. *Pole* (6) *Halsbury*, vol. 33, p. 157; *Beynon* v. *Thorpe* (7); *McIntyre* v. *McIntyre* (8); *In re Reynolds*; *Everist* v. *Colclough* (9); *Todd* v. *Moorhouse* (10); *Rowley* v. *Unwin* (11).]

K. A. Aickin, for the respondent Pond. It would be a mistake to try to apply accepted principles for the distinction between capital and income. The payment here in question is *sui generis*, and equity must look to the surrounding circumstances to decide its destination. The circumstances show that the payment is of an income nature and that such part of it as is ascribable to the

(1) (1905) 92 L.T. 77, at p. 78.
(2) (1945) V.L.R. 31.
(3) (1929) Q.S.R. 145, at p. 164.
(4) (1931) A.C. 258.
(5) (1927) A.C. 554, at pp. 559, 560.
(6) (1865) 2 Dr. & Sm. 420 [62 E.R. 680].
(7) (1928) 14 Tax Cas. 1.
(8) (1915) 15 S.R. (N.S.W.) 45, at p. 48; 31 W.N. 132, at p. 134.
(9) (1942) V.L.R. 158.
(10) (1874) L.R. 19 Eq. 69.
(11) (1855) 2 K. & J. 138 [69 E.R. 726].

settlement now under consideration should go to the estate of the life tenant. It is submitted, however, as an alternative that, if the accepted principles are to be applied, the payment will still appear to be of an income nature. The answer to the question whether it is capital or income leads to a single concept, namely, income of the year of appraisement. It is unnecessary to decide whether the trust on which the trustees receive the money is express or constructive. The real question is: For whom do the trustees hold the money? The source of the payment enables equity to supply the answer. The formal source is the 1948 Act; the material source is the fund with which the Act deals. In considering the nature of the fund regard must be had to the *National Security* (*Wool*) *Regulations* (see regs. 2, 14, 15, 19, 30 (2)) and generally to the circumstances of the acquisition of the wool. [He also referred to the *Wool Realization Act* 1945-1950, Preamble and Schedule.] The 1948 Act treats the payment thereunder as if it were part of the price of the appraised wool. It is equated to the price, not in the sense that the original supplier could have sued for it as part of the price, but in the sense that on payment it becomes equivalent to price. It is a supplementary benefit to the suppliers of the wool; it should go to those with the beneficial interest in the prior payment. The Act goes out of its way—so to speak—to ensure that the benefit goes to the supplier of the wool. In particular, s. 7 insists on the connection between the appraised wool and the moneys, with the disposal of which the Act is concerned. The same policy is illustrated by ss. 10 (3), 11 (*b*), 13, 18 (1) (*b*), 19, 20. A life tenant actually in possession (or his estate, if he had died) would have received the money. So, too, in the case of an infant life tenant and a trustee in possession. The argument of the appellant would produce a capricious result in other cases. To ascertain the appraised price, it is necessary to refer back to the individual parcels of wool sent in. The amount paid under the 1948 Act must be apportioned accordingly, treated notionally as having been received with the appraised price, and ascribed to the same income year. Cf. *Commissioners of Inland Revenue* v. *Newcastle Breweries Ltd.* (1), in which compensation received in 1922 was treated as a profit earned in 1917. The alternative argument is that the payment under the 1948 Act is "casual profit", which is income of the same year as that to which the appraised price is attributed (*Re Barrington*; *Gamlen* v. *Lyon* (2); *Re Williams' Settlement* (3); *Re Lindsay's Settle-*

(1) (1927) 12 Tax Cas. 927.
(2) (1886) 33 Ch. D. 523.
(3) (1922) 2 Ch. 750.

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ment (1)). There is no presumption that a casual profit is corpus (*Brigstocke* v. *Brigstocke* (2) : see also *Executor Trustee & Agency Co. of S.A. Ltd.* v. *Federal Commissioner of Taxation* (3) ; *Commissioner of Taxes (S.A.)* v. *Executor Trustee & Agency Co. of S.A. Ltd.* (4).)

J. X. O'Driscoll K.C. (with him *R. K. Fullagar*), for the respondents C. G. Campbell, V. F. Connell, M. H. James, I. D. Ritchie and K. L. Kibby. We adopt the argument of Mr. *Aickin* to the extent to which it treats the moneys here in question as " casual profits " and, therefore, income, but we do not accept it as to the date of distribution, nor do we accept the view that the payment is *sui generis*. The scheme of the Act is to equate the payment to further price. On this notional basis, the case is comparable with one in which there are interim payments and ultimately the balance is ascertained and a final payment made. Support is to be found in the cases for the view that casual profits may be capital or income according to the intention of the payer. It is clearly the intention of the Act that the payments should be assimilated with the earnings of the business in the course of which the appraised wool was supplied. This case is indistinguishable in principle from the following cases which *Sholl* J. cited : *Pretoria-Pietersburg Railway Co. Ltd.* v. *Elwood* (5) ; *Lincolnshire Sugar Co. Ltd. (In Liquidation)* v. *Smart* (6) ; *Higgs* v. *Wrightson* (7) ; *Pontypridd & Rhondda Joint Water Board* v. *Ostime* (8). *Re Francis* (9) and *Re Sharp* (10) are distinguishable. The moneys in question there were clearly referable to capital assets. Here the payment is as clearly referable to the trading activities of the business and the resultant earnings which were of an income nature. It is not, however, income of any of the years of appraisement. It is true that one must refer to those years to determine the legal owner of the moneys paid under the 1948 Act, but one has regard to the Act, the will and the nature of the business to determine the income year to which the payment is to be ascribed. There being nothing in the 1948 Act or the circumstances generally to produce a contrary result, the position is—as it was expressed by *Lowe* A.C.J.—that the general rule applies, namely, that the moneys are to be treated as receipts of the year in which they were paid. This case does not

(1) (1941) Ch. 170.
(2) (1878) 8 Ch. D. 357, at pp. 362, 363.
(3) (1932) 48 C.L.R. 26.
(4) (1938) 63 C.L.R. 108, at p. 155.
(5) (1908) 6 Tax Cas. 508.
(6) (1937) 156 L.T. 215.
(7) (1944) 1 All E.R. 488.
(8) (1946) A.C. 477.
(9) (1905) 92 L.T. 77.
(10) (1945) V.L.R. 31.

contain the elements on which the decision was founded in the *Newcastle Breweries Case* (1), in which compensation assessed in respect of goods acquired some years earlier from a trader was treated as earnings of the year of acquisition. [He referred to *Straker* v. *Wilson* (2); *Gow* v. *Forster* (3); *Halsbury*, vol. 29, p. 651.]

A. D. G. Adam K.C. (with him *M. V. McInerney*), for the respondent trustees. It is submitted that, unless the parties concerned to do so can show the contrary, the money paid must be regarded as held on a trust requiring them to be dealt with as corpus. [He referred to *Bartlam* v. *Union Trustee Co. of Australia Ltd.* (4) and, as to the continuance of the trustees' powers after the vesting of the beneficial interests, to *Re Cotton's Trustees & School Board for London* (5); *Re Lord Sudeley and Baines & Co.* (6); *Re Horsnaill*; *Womersley* v. *Horsnaill* (7); *Re Marshall*; *Marshall* v. *Marshall* (8).]

The respondents E. M. Hoysted and M. H. Andrews did not appear.

H. R. Newton, in reply. We adopt Mr. *Adam's* submission that the payment is corpus unless reasons to the contrary are shown, and we contend that no such reasons have been shown here. [He referred to *Re Taylor*; *Howitt* v. *Union Trustee Co. of Australia Ltd.* (9).] There are five considerations here which show that the money is corpus:—(1) The money was clearly a gift; the supplier of the wool had no legal right to it. (2) The trustees who supplied the wool have long since been paid for it in full. (3) The source of the money is not the trustees' trading. (4) The fact that the payment is calculated by reference to the appraised value of the wool shows, at the most, that the payment was a gift in recognition of the supply of wool some years before (*Seymour* v. *Reed* (10)). (5) The trustees received the money because they were trustees, and they should hold it as corpus so as to benefit all persons having an interest in the station property. As to *Re Barrington*; *Gamlen* v. *Lyon* (11) and the other cases relied on by Mr. *Aickin* together with it, it is submitted that—as was suggested by *Sholl* J.—they

(1) (1927) 12 Tax Cas. 927.
(2) (1871) 6 Ch. App. 503.
(3) (1884) 26 Ch. D. 672.
(4) (1946) 72 C.L.R. 549, at p. 570.
(5) (1882) 19 Ch. D. 624.
(6) (1894) 1 Ch. 334.
(7) (1909) 1 Ch. 631.
(8) (1914) 1 Ch. 192.
(9) (1950) V.L.R. 476.
(10) (1927) A.C. 554.
(11) (1886) 33 Ch. D. 523.

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turned on the fact that the life tenant was without impeachment for waste, and that they have no application here. As to the suggestion that our argument would produce capricious results and the example given of a life tenant in possession, the answer is that such a life tenant, if the moneys came to him, would hold them on the same constructive trust as we suggest in the case of the trustees here.

Cur. adv. vult.

July 6.

THE COURT delivered the following written judgment:—

We are called upon by the appeal and cross-appeal in this case to determine some questions concerning the manner in which a payment made under the *Wool Realization (Distribution of Profits) Act* 1948 (Cth.) should be applied under certain trusts. The trusts arise under the will of Charles Campbell deceased and a settlement of portion of an interest under that will made by one of his children, Charles William Campbell, now deceased.

The order from which the appeal and the cross-appeal are brought was made by the Full Court of the Supreme Court of Victoria upon an originating summons submitting for determination a number of questions arising in the administration of the trusts in consequence of the payment.

The testator, Charles Campbell deceased, died as long ago as 1905. His will was made not long before his death. He owned among other things two pastoral stations, one of which, called Murray Downs, is still carried on by the trustees under the trusts of the will. The other was sold by the trustees at a date too early for it to have any relevance in this appeal. During the seven wool seasons or years from 1st July 1939 to 30th June 1946, while the *National Security (Wool) Regulations* were in operation, large clips of wool grown upon Murray Downs were submitted by the trustees for appraisement in pursuance of the regulations. The aggregate of the appraised values for all seven seasons was £76,319. The payment received under the *Wool Realization (Distribution of Profits) Act* 1948 was made to the trustees in relation to this wool, being six and a-quarter per cent of the appraised value of the wool. It amounted to £4,770.

By his will the testator devised and bequeathed his two station properties and the live stock and the effects thereon to his trustees and directed them to carry on, manage and work the station properties until the expiration of twenty-one years from his death and for that purpose the will gave them a number of express powers and authorities. The testator directed them that they

should stand possessed of the income to arise from carrying on the two station properties upon trust for such of seven of his children whom he named as should be living at the end of each annual period, a period closing on 31st January of each year.

Upon the expiration of the period of twenty-one years a trust for conversion arose under the will subject to a power of postponement, a power of postponement extending to both or either or any part of the station properties. The trust of the proceeds of conversion was to divide the same equally among such of the seven children as were then living with a substitution *per stirpes* of the children of those who had died.

The will declared that during the suspense of conversion under the power of postponement the trustees should have the same powers and authorities for the carrying on, working and management of the station properties and each of them as were exercisable during the twenty-one years. Only one of the children, a married daughter who left children, died before the expiration of the period of twenty-one years from the death of the testator, but all except one are dead now. The survivor is a defendant to the summons. Within a few weeks from the expiration of the period one of them, Charles William Campbell, made a settlement of three-twentieths of his equal seventh part or share in the two station properties and the net proceeds of sale thereof. The instrument described the three-twentieths of the settlor's share as the settled fund and directed the trustees of the settlement to stand possessed of the settled fund upon trust to pay the income thereof to his wife for life and after her death upon trust as well as to the capital as to the future income thereof for the children of the settlor who being male attained twenty-one years of age or being female attained that age or married. The instrument went on to settle the shares of such children.

When the settlor died in 1936 he left him surviving a widow and five children all of whom had attained the age of twenty-one years. In the clause settling the shares of such children the settlement provided that the share of a child in the settled fund should not vest absolutely but should be held by the trustees of the settlement upon trust to pay the income to such child for life and after such child's death upon trust for his or her children who being male attained twenty-one years of age or being female attained that age or married, and in default for next of kin. The settlor's children all have children and many of the latter have attained twenty-one years. One of these is the appellant, who was

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appointed as a defendant to the originating summons to represent all other grandchildren of the settlor.

The widow of the settlor died on 9th April 1948, that is to say, after the close of the seven wool years in which wool had been submitted for appraisement under the Wool Regulations and before the payment to the trustees was made under the *Wool Realization (Distribution of Profits) Act* 1948, which indeed was not passed until 21st December 1948. Her estate was represented upon the originating summons by a defendant who is a respondent to this appeal. It will be seen that the wool grown upon Murray Downs in her lifetime forms the basis of the payment to the trustees of the will under the Act but the payment forms a receipt by the trustees during an accounting period after her death. If, therefore the payment is to be considered a receipt on account of income a question must arise for the purposes of the settlement whether in so far as it is reflected in the income of the three-twentieths of the settlor's one-seventh share under the trusts of the will with reference to the station properties it should enure for the benefit of the estate of the deceased life tenant, the widow of the settlor, or for the benefit of the remaindermen, the children of the settlor. The question is the subject of the cross-appeal. But two antecedent questions must exist. One of them is whether the payment is a receipt on account of income and that question is the subject of the appeal. Anterior to that, however, is the question whether the payment is to be treated by the trustees of the will as a receipt to be dealt with under the trusts relating to the station properties or as a receipt of such a casual or accidental nature that it fell into residue. This question was decided by the Supreme Court whose order answered the question whether the payment was to be treated as moneys—(a) to be dealt with in accordance with the trusts of the will in relation to the station properties, or (b) as moneys forming part of the residuary estate by saying that the trustees of the will should deal with the moneys as a receipt of an income nature in relation to the Murray Downs station property business to be brought into account accordingly and dealt with according to the trusts of the will in relation to the station properties. The defendants representing interests in residue have not appealed from this decision.

Thus the questions which this Court is called upon to decide are whether the payment is to be considered as income or capital and if income whether the portion paid to or reflected in the payments to the trustees of the settlement is to be applied for the benefit of the estate of the deceased widow of the settlor or for the

benefit of the remaindermen. It is evident that these questions arise in the administration of the trusts of the settlement, though the answer perhaps may depend on considerations relating to the trusts of the will. It is not the only settlement made by the late Charles William Campbell affecting his interest under his father's will, but the questions in the originating summons are confined to this particular settlement and the will. We are informed that the distribution under the *Wool Realization (Distribution of Profits) Act* 1948 has given rise to analogous questions in many trusts and that this case was chosen because it was thought that the form in which the trust instruments and the facts raised the questions might lead to a decision having some general application. It is probably true that the determination of the questions depends much more on the character of the payments than upon the terms of the trust instrument, which perhaps may be regarded rather as providing the problem than its solution, by the general nature of the limitations of the beneficial interests, by the subject to which the limitations relate, viz., station properties, and by the character of the trusts, viz., trusts for the active carrying on, management and working of the station properties.

To understand the nature of the payments it is necessary to begin with the Wool Purchase Arrangement made between the Government of the United Kingdom and the Commonwealth in September 1939 as a war measure. By means of this arrangement the United Kingdom was not only assured of supplies of wool which it would need during the war both for military purposes and for the civilian population of Great Britain, but also obtained control over a commodity of strategic financial and even diplomatic importance. Under the terms of the arrangement the United Kingdom Government was to acquire from the Commonwealth the wool clips (using that term to include skin wool) for the period of the war and for one full wool year thereafter. The price to be paid by the United Kingdom was calculated at a flat rate per pound on a greasy basis and was tenpence three farthings sterling or 13.4375 pence Australian, and in addition the United Kingdom was to pay a sum not exceeding three farthings a pound to cover the expenses in Australia of administering the Arrangement and handling the wool from the wool store to shipment f.o.b. The Wool Purchase Arrangement provided for the acquisition by the United Kingdom not of the whole of each Australian wool clip during the currency of the Arrangement but of the whole after the deduction therefrom of the wool required for local manufacture.

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The United Kingdom herself, of course, contemplated selling to other countries, at export issue prices, wool obtained under the Wool Purchase Arrangement which was not required for military purposes or to meet her own needs. The Arrangement included a term that the profit resulting over the whole period from the sale of such wool should be divided equally between the United Kingdom Government and the Commonwealth.

To carry out the Wool Purchase Arrangement the Commonwealth Government on 28th September 1939 adopted the *National Security (Wool) Regulations*. By these regulations the Central Wool Committee and the State Wool Committees were established. The Central Wool Committee was charged with the administration of the regulations and of all matters arising out of the arrangement with the Government of Great Britain for the acquisition of wool, and the State Wool Committees were required to comply with the general instructions and particular directions of the Central Wool Committee. The plan upon which the regulations proceeded was to substitute appraisement for auction as the mode of selling wool and otherwise to adhere as closely as possible to the procedures for the handling and disposal of wool customary in peace-time. Wool was catalogued by the wool-selling broker to whom the grower had sent it and the appraisement was conducted upon the floors of the wool-selling broker's store by three appraisers, one representing the wool-selling broker and the other two (wool buyers in peace-time) representing the Commonwealth. Every appraisement was made according to a table of limits which for each wool season or year the Central Wool Committee caused to be prepared. The table of limits was constructed by a Technical Advisory Committee with the purpose of assigning to the various types of wool and sub-types, values or prices (limits) appropriate to their character, condition and quality in such a way that if the anticipated quantity of the various types came forward for appraisement the total of the appraised values throughout Australia of the wool of the season would approximate as nearly as might be to the total payments from the United Kingdom at the flat rate of 13.4375 pence per pound for the whole clip, a price afterwards raised to 15.45 pence per pound for the wool year beginning 1st July 1942 and the following seasons. The purpose of spreading the aggregate flat-rate price over the entire clip according to the relative values of the lots of which it was made up could not of course be accomplished without an ultimate adjustment each year of appraised values to parity with flat-rate price. It would have been a miracle if the aggregate of appraised values for any season

had in the result worked out so as to be exactly equal to the aggregate of the flat-rate price.

The regulations directed that in the preparation of the table of limits regard should be had to the price payable by the Government of Great Britain to the Commonwealth and the limits should be so fixed as to ensure that the price per pound so payable for the wool of any wool year would not be exceeded by the average price per pound of the total payments made pursuant to the appraisement of that wool. Within fourteen days of the appraisement ninety per cent in the first wool year and in later years ninety-five per cent of the appraised value of the shorn wool was paid to the suppliers by the Central Wool Committee " pursuant to the appraisement of that wool ". A distinction was observed between shorn wool coming as it did from the grower and skin wool. In the case of the latter it was considered sufficient and found no doubt convenient to make one final payment of the full appraised value. Had it turned out that the total of the appraised values exceeded the total of the flat-rate payments an adjustment downwards would have been necessary to obtain flat-rate parity and the wool-grower would not have received the full balance of the appraised values. But it never did so turn out. On the contrary the total of the appraised values always was less than the total of the flat-rate payments so that the adjustment to obtain flat-rate parity was always upwards. The ten or five per cent of the appraised value, which was spoken of as " retention moneys " and the percentage found necessary to bring up the appraised values to flat-rate parity, called " flat-rate adjustment " moneys were paid to the wool-brokers on behalf of the wool-grower by the Central Wool Committee shortly after the close of every wool year. All these payments, the ninety or ninety-five per cent of the appraised value, the retention moneys and the flat-rate adjustment were in respect of the whole clip, but the United Kingdom acquired only the wool remaining after the requirements for local manufacture had been satisfied. The source of these payments was therefore in part the moneys received by the Central Wool Committee from the United Kingdom Government and in part the moneys received in respect of the wool taken for local manufactures. Woollen manufacturers were authorized by the Central Committee pursuant to the regulations to purchase wool after appraisement, at prices which at first were fixed by reg. 23 at appraised value and afterwards, under amendments of that regulation, by the Central Wool Committee and later by that body in accordance with a determination of the Prices Commissioner.

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The funds to arise under or in connection with the Wool Purchase Arrangement were not treated as part of the Consolidated Revenue but were made immediately receivable by the Central Wool Committee. The funds so arising in connection with the Arrangement were not confined to the flat-rate price, handling charges and contingent share of profits payable by the Government of the United Kingdom. They included moneys referable to the wool that did not pass to the United Kingdom Government but was taken for local manufacturing requirements, moneys representing the surplus price of wool tops and woollen goods exported. These moneys arose under regulations adopted after the Wool Regulations, viz., the *National Security* (*Wool Tops*) *Regulations* and the *National Security* (*Price of Wool for Manufacture for Export*) *Regulations*, but it was necessarily apparent from the beginning that moneys having that general character might or must arise.

Regulation 30 of the Wool Regulations dealt with the funds by the two following sub-regulations :—" (1) All moneys payable by the Government of Great Britain under the arrangement made by that Government with the Commonwealth for acquiring Australian Wool shall be received by the Central Wool Committee and out of such moneys the Central Wool Committee shall defray all costs, charges and expenses of administering these Regulations, and make the payments for wool to the suppliers. (2) Any moneys which may be received by the Central Wool Committee from the Government of Great Britain under or in consequence of such arrangement over and above the purchase price payable by such Government thereunder for the wool and any surplus which may arise shall be dealt with as the Central Wool Committee shall in its absolute discretion determine." It will be seen that sub-reg. (1) covers the flat-rate price payable by the United Kingdom and the amount not exceeding three farthings a pound for expenses. Sub-regulation (2) conferred upon the Central Wool Committee a discretion to determine how the half share of profits payable by the United Kingdom under the Wool Purchase Arrangement should be dealt with and profits or moneys arising otherwise, as, for instance, from wool tops or wool for manufacture for export.

The phrase " any surplus which may arise " covered profits or moneys of the second kind. The profits arising under the Wool Purchase Arrangement made during the war of 1914-1918 had been the subject of unsuccessful claims for participation by fellmongers who had supplied skin wool and who by the decision of the Central Wool Committee had been excluded from the distribution of the moneys and securities representing such profit

(*John Cooke & Co. Pty. Ltd.* v. *Commonwealth* (1)). The regulations for the administration of that Arrangement did not contain any provision analogous to reg. 30, nor did they deal with the passing of the property in the wool and impose an immediate legal obligation to submit all wool for appraisement: see Second Schedule of the *Commercial Activities Act* 1919 (Cth.). The *National Security* (*Wool*) *Regulations*, however, provided by reg. 19 (1) that all wool should be submitted for appraisement and by reg. 15 that the sale of wool should be by appraisement under the regulations and the property in every parcel of wool submitted for appraisement should pass to the Commonwealth when the final appraisement thereof was completed.

The Central Wool Committee consisted, except for the chairman and executive member, of members representative of various sections of the wool industry and in confiding a discretion to them to determine how what might turn out to be an extremely large fund should be dealt with it is difficult to imagine that anyone contemplated any disposal of any part of it foreign to the purposes of the industry and, in view of what had occurred under the previous Wool Purchase Arrangement, it may well have been taken for granted that whatever was not applied for some purpose for the advancement of the industry would be distributed among wool-growers who had submitted wool for appraisement. At all events from the beginning the Central Wool Committee required that all wool should be catalogued as participating or non-participating, that is as participating or non-participating in a distribution of surplus moneys, if one were made. Skin wool, that is to say, wool obtained from sheepskins in the course of fellmongering or otherwise, was excluded from participation and catalogued as non-participating. Shorn wool was appraised as participating and shown in the appraisement catalogue under that heading. The supplier of non-participating wool suffered no deduction of retention moneys, but did not receive the benefit of flat-rate adjustment and was to be excluded from participation in any surplus over and above the appraised price. As a measure incidental or ancillary to the United Kingdom Wool Purchase Arrangement, a further arrangement was made between the Government of the United Kingdom and the Commonwealth for acquiring in connection with the war wool sheepskins in Australia available for export. For carrying out this arrangement the *National Security* (*Sheepskins*) *Regulations* were adopted. It is enough to say that the arrangements concerning sheepskins, though not of the same nature as

(1) (1922) 31 C.L.R. 394; (1924) 34 C.L.R. 269.

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the Wool Purchase Arrangement, did result in a profit which, under the terms arranged by the two Governments was divisible between the United Kingdom and the Commonwealth.

During the course of the seven wool years covered by the United Kingdom Wool Purchase Arrangement a very large volume of wool acquired by the Government of the United Kingdom was sold at export issue prices outside Great Britain and the surplus upon these was held upon profits account. But as the period drew to a close there was a large quantity of unsold wool to be carried over that had been acquired by the United Kingdom under the Arrangement.

Similar wool purchase arrangements subsisted between the Dominion of New Zealand and the United Kingdom and the Union of South Africa and the United Kingdom. All four Governments agreed on a plan for the disposal of the surplus stocks of wool and for that purpose set up a Joint Organization. The agreement was ratified by the *Wool Realization Act* 1945-1950 (Cth.), which set up the Australian Wool Realization Commission to act as the subsidiary in Australia of the Joint Organization: s. 9. It is unnecessary to enter into the details of this agreement, the text of which forms the Schedule of the *Wool Realization Act* 1945. For the purposes of this appeal it is enough to speak in terms of its application to Australia and to say that it involved the transfer by the United Kingdom to the Joint Organization of the carry-over stocks of wool at original cost less the amount accumulated in the divisible profits account. The consequence of this was that the carry-over wool taken over by the Joint Organization contained, so to speak, the divisible profits. The financial scheme was to take effect as from 1st August 1945 and it contained provisions as to the then oncoming clip of the wool year 1945-1946 producing on this point the same practical result. Part of the task of the Joint Organization was to realize the carry-over stocks of wool on the footing that the ultimate profit or loss would be equally shared or borne by the Governments concerned. If, as clearly enough has turned out to be the case, the result of the operations of the Joint Organization meant that the net amount realized by the wool exceeded the figures at which it was taken in (viz., cost less the accumulated amount in the divisible profits account), then the surplus would represent *pro tanto* the amount which had been so accumulated in divisible profits account. Of course other transactions in wool by the Joint Organization might increase or reduce such surplus, but there is nothing to suggest that any cause arose for apprehension on this score.

The long title to the *Wool Realization (Distribution of Profits) Act* 1948 is an Act to provide for the distribution of any ultimate profit accruing to the Commonwealth under the Wool Disposals Plan and for other purposes. It will be seen that, although the amount of this ultimate profit might be affected by operations of the Joint Organization in lifting from the auction market any new wool which could not be sold at the reserve prices, a matter which may be safely neglected in the events that have happened, " the ultimate profit " represents the Australian share of profit arising under the United Kingdom Wool Purchase Arrangement. The *Wool Realization (Distribution of Profits) Act* 1948 provides for the distribution among, in effect, wool-growers of what it calls the wool disposals profit. The expression is defined by s. 4 (1) to mean the credit balance, if any, found to have accrued to the Commonwealth upon the taking of an account of (*a*) the Commonwealth's share in the ultimate balance of profit (or loss) arising from the transactions of the Joint Organization; and (*b*) the moneys received by the Commonwealth from the Government of the United Kingdom in pursuance of the arrangement between the Commonwealth and that Government for the sharing of profits arising from the disposal of sheepskins acquired under the Sheepskin Regulations. The profits in connection with sheepskins, a comparatively minor matter, are thus treated, as might be expected, as an accession to the wool profits and they may be neglected. But the Commonwealth's share in the ultimate profit of the Joint Organization covers the divisible profit under the United Kingdom Wool Purchase Arrangement, or, in other words, the moneys which in reg. 30 (2) of the Wool Regulations were referred to, in anticipation, by the description " any moneys which may be received by the Central Wool Committee from the Government of Great Britain under or in consequence of such arrangement over and above the purchase price payable by such Government thereunder for the wool ". The adoption of the Joint Organization Disposals Plan made the description inappropriate, at all events so far as it describes the moneys as moneys received from the United Kingdom under the Wool Purchase Arrangement. Perhaps the words " in consequence " remain apt. But in any case substantially it is the fund contemplated by that part of reg. 30 (2). The moneys covered by the next description in the sub-regulation, viz., " and any surplus which may arise " are not included in the definition of " the wool disposal profit ". Presumably they formed the subject of the *Wool Industry Fund Act* 1946 (Cth.): see s. 4. That Act, however, is not material except that it shows that the

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legislature felt itself free to authorize the use of moneys falling within reg. 30 (2) for purposes likely to advance the wool industry, and towards the recoupment of any loss the Commonwealth might incur as a result of the Joint Organizations Disposals Plan, and so free to withhold them from actual distribution among wool-growers. But the *Wool Realization (Distribution of Profits) Act* 1948 provides for the distribution among them of "the wool disposals profit" altogether. When it is ascertained the treasurer must notify the amount in the *Gazette*: s. 5. Before it is ascertained a declaration may be published that an amount is available out of the expected net profit, but for that purpose the sheepskin profits are not to be taken into account: s. 6 (1) and (2). The distribution of six and a-quarter per cent upon appraised value which has given rise to this case was made under this provision. A final amount must be declared available for distribution when the profit and the charges and expenses of the commission in carrying out the Act and making the distributions are ascertained and the interim amounts have been deducted: s. 6 (3). Each declared amount of profit is to be distributed by the Wool Realization Commission by paying in relation to any participating wool an amount which bears to the amount distributed the same proportion as the appraised value of that wool bears to the total of the appraised values of all participating wool. In other words, like the retention money and the flat-rate adjustment, the distribution is a percentage of the appraised price of participating wool. The Act provides for devolutions, transmissions and the like, but subject thereto it is the person who supplied the wool who is to be paid: see s. 7. Following the distinction the Central Wool Committee had made in case profits should arise for distribution, the Act excludes skin wool and restricts participation to shorn wool, that is, in effect, to the wool-grower. Participating wool is defined to mean wool appraised under the Wool Regulations, being wool listed as participating wool in the appraisement catalogue used by the appraisers for the purpose of the appraisement: s. 4 (1).

For the purpose of determining whether the payment received by the trustees of the will from the Wool Realization Commission should be regarded as capital or income and if income to what period of enjoyment it is attributable it has been thought important to trace from the beginning the relevant steps in the extensive and complex governmental transaction which the distribution of profit in question brings almost to an end. If this were not done it would be easy to misconceive the relation of the supply of wool for appraisement to the wool disposals profit and to the right

conferred by the Act to share in its distribution in accordance with the appraisement value of the wool submitted. It is clear that from the beginning the distribution, in whole or in part, of the Australian share of any surplus arising on divisible profits account was contemplated. The decision was taken administratively that skin wool should be excluded and wool was accordingly submitted for appraisement and appraised as participating and non-participating. That of course implied that the basis of distribution would be appraised value of the wool submitted. But it was equally clear that no legal right to participate in a distribution of profits was conferred upon suppliers of participating wool, that is, until the enactment of the *Wool Realization (Distribution of Profits) Act* 1948. In the beginning it was made to depend wholly on the discretion of the Central Wool Committee. It is conceivable that a court interpreting the regulations might have implied limitations upon the manner in which the discretion was exercisable, but even so no right to participate could possibly have been imputed, particularly having regard to the reasons upon which were based the decisions in *John Cooke & Co. Pty. Ltd.* v. *Commonwealth* (1). No payment to the supplier of wool, beyond, at all events, appraised value (whether appraised value *simpliciter* or adjusted to flat rate is not material) was required by the regulations; all else remained a matter of administration. But courts should not be unmindful of the fact that administrative measures and understandings may, according to circumstances, raise an expectation almost as assured of realization as if it rested upon a foundation of legal right. Section 9 (3) of the *Wool Realization Act* 1945-1950 transferred the powers of the Central Wool Committee to the Wool Realization Commission and the *Wool Realization (Distribution of Profits) Act* 1948 removed the whole matter of the disposal of profits from the province of administrative discretion and placed the distribution upon a defined statutory basis. Not only did it convert the expectations which existed into claims which though not actionable (see s. 28) became claims with a legal foundation; it also provided an appropriate and definitive rule for a number of situations of difficulty arising from death, bankruptcy, change of persons acting in a representative capacity and dissolution of partnerships and of companies, it invalidated assignments and it prescribed the machinery of distribution. The rule which the legislature adopted for cases in which one of the events mentioned occurred between the supply of participating wool for appraisement and the distribution varied in expression,

(1) (1922) 31 C.L.R. 394; (1924) 34 C.L.R. 269.

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but in effect it was to require the moneys to be dealt with as if the supply of wool for appraisement had been a sale made at the time of such supply and the amount payable out of the distributable profits were part of the proceeds of sale. This of course does not mean that there should be any notional change in the date of receipt, only that, treating the payment as received on the actual date of receipt it should for the specified purposes be regarded as though it were a payment, that is, a delayed or deferred payment of part of the proceeds of a sale of the wool made at the time of appraisement. None of these provisions applies to the facts of the present case. The trustees themselves submitted the wool for appraisement acting under trusts established long before the Wool Purchase Arrangement, the settlement preceded it and there is no question of an assignment within s. 29.

The contention of the appellant that the payments belong to corpus is based upon the argument that they form an unsought and fortuitous accretion to the estate the source of which lies in the bounty of the Commonwealth, an accretion forming part of the trust estate only because a constructive trust attached to the payment in the hands of the trustees since they had received the payments in their fiduciary character. What, in other words, made the amount distributed trust moneys was that the Act made it "payable . . . in relation to . . . participating wool" (s. 7 (2)) and "payable to the person who supplied the wool for appraisement" (s. 7 (3)) and the wool was trust property; otherwise, so the argument ran, the amount would have belonged to the trustees beneficially. The appellant invoked a supposed presumption that a payment or accretion to the trust property or fund of a fortuitous character accrues to capital failing some positive ground for treating it as income, placing reliance upon *Re Francis*; *Barrett* v. *Fisher* (1).

In denying that any ground existed for regarding the amount paid under the *Wool Realization (Distribution of Profits) Act* 1948 as income and asserting that, on the contrary, it bore the complexion of corpus the appellant placed importance upon the considerations that until the Act was passed wool-growers who submitted wool for appraisement possessed no legal right to share in any part of the amount which might arise on divisible profits account between the two Governments under the Wool Purchase Arrangement, that the amount paid to a grower upon the distribution did not represent the proceeds of his wool and that the submission for appraisement of the wool "in relation to" which the payment was made was a

(1) (1905) 92 L.T. 77.

transaction long since passed and closed, a transfer of property long since acquired and paid for, or a service rendered and completely performed. He denied that any general inference could be drawn, as was suggested on the other side, from ss. 9, 10 (3), 11 (*b*) and 13, which, though variously framed, all in effect place the payments in the same position as money derived from the disposal of wool, for the respective purposes of the bankruptcy of a person, the dissolution of a company or a partnership, the death of a supplier, the change in identity of trustees and the application of the money by a supplier who held the wool only by way of security when such an event took place before the distribution of the wool disposals profit, but after, of course, the supply of the wool. The appellant maintained that so far from these provisions supporting an inference that the statutory character of the moneys received in the distribution was that of moneys representing the wool submitted for appraisement, they served to show that that was not the character of the moneys. For, had it been their character, it would have been unnecessary to give it to them for the specific and limited purposes of the sections mentioned and wrong to use the expression, as ss. 10 (3) and 11 (*b*) do, " as if it were part of the proceeds of a sale of the wool ", an expression appropriate only to a false hypothesis.

These contentions cannot be sustained. They are based upon isolated points in the transaction ending with the distribution of the wool disposals profit. The course pursued to give effect to the Wool Purchase Arrangement by the acquisition of wool from the grower must be considered as an entirety. The receipt of the payments is an actual consequence of the submission of wool for appraisement. It is a consequence which from the beginning was contemplated as a contingent result of submitting the wool for appraisement. Legally it was left for the time being to the discretion of the Central Wool Committee. But administrative arrangements were made from the beginning by that body in readiness for the contingency becoming actual, by determining what wool should share and what should be excluded and by expressly appraising on that footing the wool submitted.

The two statutes, the *Wool Industry Fund Act* 1946 and the *Wool Realization (Distribution of Profits) Act* 1948, are not disconnected. Together they take up the discretion which reg. 30 (2) vested in the Central Wool Committee, a body superseded under the *Wool Realization Act* 1945-1950, and proceed to deal with the subject legislatively instead of administratively. The one statute says what part of the funds governed by that sub-regulation

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should be applied in the language of the Act for purposes associated with the wool industry. The other statute gives legislative effect to the expectation that the amounts arising upon divisible profits account under the Wool Purchase Arrangement with the United Kingdom should be distributed among growers as a percentage of the appraised value of the participating wool submitted and it provides the machinery for the purpose.

It is, of course, true that the Parliament, in the exercise of its legislative power, could have dealt in any manner it chose with the fund. But that legal fact does not determine the character or the consequences of the course which the Parliament actually took or the nature, as between capital and income, in trusts for successive interests, of the amounts distributed. They constitute receipts resulting from the operations of wool-growing. As possible or contingent receipts they were in contemplation when the appraisements were made. The title to receive them when in the end it is placed on a legal basis consists in the submission of shorn wool for appraisement for the purposes of the Wool Purchase Arrangement. The amount is a percentage of the appraised value of the wool so submitted. The source of the distribution is in effect the fund arising under the divisible profits clause in the Arrangement. When the *Wool Realization (Distribution of Profits) Act* 1948 speaks of the rights, duties and liabilities of a person made a payee in respect of wool submitted by a defunct company, a dissolved partnership or a deceased person being the same as if the amount were part of the proceeds of a sale of the wool by the company, partnership or deceased person at the time of the supply of the wool for appraisement, the purpose is not to require an assumption entirely departing from the truth but simply to bring the situation within an express definition which would remove all doubts of its character. It may possibly be true that the compulsory submission of wool for appraisement did not amount to a " sale " and that whatever the transaction be called the word " proceeds " could properly be used only of the appraised value or the appraised value adjusted to flat-rate parity, because all else depended entirely on administrative or legislative discretion. But, apart from questions of legal right and legal definition, there is no closer practical analogy than that which ss. 10 (3) and 11 (*b*) adopt, viz., the proceeds of a sale of the wool. They are receipts resulting from the operations of growing wool. The trustees of the will are therefore not bound to treat them as capital and may properly treat them as income. Since the expiration of the period of twenty-one years from the testator's death the same persons are

absolutely entitled under that will to corpus and income and the importance of the distinction as affecting beneficial rights is in the administration of the trusts of the settlement and not directly in the administration of the trusts of the will. But what the trustees of the will properly pay to the trustees of the settlement as and for income on account of the settled part of the late Charles William Campbell's share under the will is to be treated as income under the settlement and not corpus.

From what has been said it follows that the payment must be considered income. There remains the more difficult question of the period of enjoyment to which the trustees of the settlement should attribute so much of the income received by them from the trustees of the will as reflects the payment by the Wool Realization Commission to the latter on account of the wool disposals profit. This is the question raised by the cross-appeal brought by the defendant appointed to represent the estate of Emma Campbell deceased, who, under the trusts of the settlement, was the tenant for life and whose death took place after the wool had been acquired. By the cross-appeal it is claimed that the benefit of the payments to the extent of the settled portion of the share of the late Charles William Campbell belongs to her estate. The argument in support of this conclusion treats the beneficial or equitable interest in the distributable amount of the wool disposals profit paid in relation to the wool submitted for appraisement by the trustees of the will as determined by the character of the payment as ascertained from the *Wool Realization (Distribution of Profits) Act* 1948, from the nature of the wool disposals profit, from the provisions of the Wool Regulations and from the circumstances of the acquisition of the wool. The considerations so arising, it was said, showed that it was a payment equated with the price of the wool, taking on the same character, forming part of the funds replacing the wool and enuring for the benefit of the persons in whose interests the operations were carried on so as to produce the wool and turn it into money. It was a mistake, so it was contended, to divide the question, as has been done in this judgment, into two and inquire first whether the payment is capital or income and then to what period it is attributable. There is the single question to whom does equity ascribe the beneficial interest of a payment of this nature, a payment falling under no recognized category and possessing characteristics ascertained in the manner stated. To this question the argument gave the answer that equity ascribed the beneficial interest to the persons entitled to the benefit of the earlier wool moneys representing appraised

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value adjusted to flat-rate parity because the statutory instruments and the history of the transaction alike showed that these further wool moneys were distributed as and for a supplementary benefit to the same persons in respect of the same thing. Reliance was placed upon the effect of the provision making the share in the distribution inalienable (s. 29) and upon ss. 9, 10 (3), 11 (*b*), 12 and 13 relating to bankruptcy, dissolved companies and partnerships, deceased persons, changes in fiduciary owners and holders of securities, as well as upon the basis of distribution prescribed by s. 7. Reliance was placed upon them as giving to the payments which the Act authorized the character of a benefit conferred upon the very persons in whose interest participating wool was submitted for appraisement, a benefit by way of enhancing or enlarging the amount receivable as a result of the acquisition of the wool under the regulations.

This argument presses a step too far the inferences and consequences flowing from the considerations upon which the argument fixes and it does not give sufficient effect to the nature and subject matter of the limitations contained in the trust instruments. The step which is not warranted is that which goes beyond giving the distributive payment the character of an amount received in respect of the wool and in consequence of the submission of the wool for appraisement, and gives it the further quality of a profit attaching to the same equitable estates and interests as those benefiting at the time of the submission of the wool for appraisement and so enuring for the advantage of exactly the same *cestuis que trust*. What it does not give sufficient effect to is, first, the fact that the basal consideration in any question of income and corpus as between life tenant and remainderman is the intention which the trust instrument contains or is presumed to contain and, secondly, the nature of the income-producing property or asset which forms the subject of the primary trust.

The subject matter of the trust is a station property and it is held upon active trusts for management. In other words, the trustees are required by the trust to carry on the operations of wool-producing systematically as a business. The will contains elaborate provisions for ascertaining during the period of twenty-one years from the death of the testator the net annual income and gives a number of directions as to the provisions the trustees should or might make before arriving at the net amount of such income. After the expiration of that period the will gives the same powers and authorities for or in connection with the carrying on, management and working of the station properties as during

the period of twenty-one years. It is perhaps not certain that the directions as to the ascertainment of the net annual income continued to apply once the whole estate became absolutely vested in the children living at the end of the twenty-one year period and the trust ceased for the division of the net annual income as such. In any case, since this is a test case, it is not desirable to place our decision upon special features of the trust instruments unless that be found necessary. Putting aside these special provisions, however, the trusts involve the conduct of a business and the ascertainment of the income arising therefrom over accounting periods by reference to the comparative position of stock on hand at the beginning and end of the period and receipts and expenditure. When a fractional part of the share of Charles William Campbell was settled upon trusts for life tenant and remaindermen, the income to be taken by the former under the settlement was necessarily made to depend upon the income properly receivable by the trustees of the settlement from the trustees of the will. The basal intention to be presumed in the case of the settlement is that the life tenant should take the net balance of the fractional part of the income as ascertained in conformity with trusts of the will and paid over as such to the trustees of the settlement. That means, in the case of the trusts of the will, the net income which the trustees, acting in a proper and recognized course of management and employing a system of accounting usual in or appropriate to the business of station properties, determine to be the divisible income of the accounting period. We are not here concerned with the scope of the discretion which may belong to trustees in so determining. What does concern us is the general understanding of the manner in which a trust is executed when the income-producing trust property is a business: see *Re Thornley*; *Boyd* v. *Thornley* (1); *Thornley* v. *Boyd* (2); *McIntyre* v. *McIntyre* (3); *Re Porter*; *Porter* v. *Porter* (4); *Re Mallen*; *Executor Trustee & Agency Co. of S.A. Ltd.* v. *Wooldridge* (5).

The basis upon which the trustees ascertain what from time to time is the distributable income derived from the operations of the station business consists in an account of the gains of the business over a period. How far the accounting is based on actual receipts and actual outgoings and how far upon " earnings " consisting of debts owing and owed is doubtless a matter depending

(1) (1925) V.L.R. 569.
(2) (1925) 36 C.L.R. 526.
(3) (1914) 15 S.R. (N.S.W.) 45; 31 W.N. 132.
(4) (1930) 31 S.R. (N.S.W.) 115; 48 W.N. 17.
(5) (1929) S.A.S.R. 154.

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upon practice and upon what is conceived by the trustees to be an appropriate basis of accounting. But whatever may be done in that respect, the income is to be determined on the basis of the periodically ascertained result of the system, assuming it to be a proper one. Receipts or earnings, as the case may be, falling outside the period do not go into the account. Now, whatever else may be said of the payment of the distributable share of wool disposals profit, it does not represent anything which at the time of ascertaining the current income should or even could be taken in as an earning, and of course it could not be taken into account as a receipt. It was said that the accounts of the respective periods in which the wool was submitted for appraisement can be re-opened; and *Commissioners of Inland Revenue* v. *Newcastle Breweries Ltd.* (1), was cited. There it was decided that a sum received in the year ending 30th April 1922 was referable to the year ending 30th April 1918 for the purpose of an assessment to excess profits duty because it represented portion of the compensation moneys payable by the Admiralty for goods forming part of the taxpayer's trading stock requisitioned during the earlier year. The Admiralty had paid a smaller sum in respect of the goods and it had been taken into that assessment, but the taxpayer had maintained a claim for the larger sum which was not decided until the later year. The ground for saying the amount of the increase belonged to the earlier year was that it "arose" in the earlier year within the meaning of the *Finance (No. 2) Act* 1915 (Imp.) (5 & 6 Geo. 5, c. 89). Here the criterion is quite different. If there were reasons for saying that in point of law the payment of the wool disposals profit was for the benefit of the *cestuis que trust* of the years covered by the Wool Purchase Arrangement then it would follow as a matter of course that the accounts must be re-opened. But the very criterion by which the question of beneficial right must be tested is to be found in the conceptions governing the ascertainment of the income of a pastoral business for a given year. For that is the basis upon which the settlor must be taken to have proceeded in settling the fund upon life tenant and remainderman.

The characteristics of the payment now in question have been fully described and it is enough to say that, notwithstanding the relation the payment bears to the wool shorn during the life of the tenant for life, it could not be treated as anything but a receipt of the business belonging to the profit and loss account of the year in which it was received.

(1) (1927) 12 Tax. Cas. 927.

It follows from the foregoing reasons that the appeal and the cross-appeal should be dismissed.

Counsel informed the court that the parties do not desire that any order providing for the costs of the appeal or cross-appeal should be made.

Appeal and cross-appeal dismissed.

Solicitors for the appellant, *Hedderwick, Fookes & Alston.*

Solicitors for the respondents, *Whiting & Byrne; Malleson, Stewart & Co.; Gillott, Moir & Ahern.*

E. F. H.