[HIGH COURT OF AUSTRALIA.]

DE LITTLE & OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

BYRNE & OTHERS . . . . . RESPONDENTS.
PLAINTIFFS & DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1951.

MELBOURNE, *Oct.* 2-4, 22.

Dixon, Williams, Webb, Fullagar and Kitto JJ.

Will—Construction—Trust for conversion—Power to postpone—Rule in Howe v. Lord Dartmouth—Ascertainment of income of estate—Testator's share in partnership retained by trustees—Losses incurred in carrying on business—Annuity, whether charged on corpus.

A testator gave his estate to his trustees on trust to convert the same and invest the proceeds in authorized investments "and out of the net annual income thereof (which shall mean and include the net annual income of my estate pending the sale and getting in thereof)" to pay an annuity to his wife during her widowhood. Subject to the provision for the widow, he directed the trustees to hold the estate for his children in equal shares, the share of each daughter to be settled on her for life with remainder to her children. He gave the trustees "full discretionary power" to postpone the conversion of the whole or any part of the estate and to continue for such period as they should think fit any pastoral or other business in which he might be engaged at the time of his death. He also empowered them to purchase the share of any partner of his in any business, to form or join in forming any business in which he might be interested into a limited company and to retain and hold for any length of time as portion of his estate the whole or any part of the shares or debentures held by him in any companies at the time of his death. He directed that "my trustees shall once in every year cause to be made an annual account or balance sheet showing the income or expenditure in respect of my estate and ascertaining and determining the net income thereof and for the purpose of such account they shall be at liberty to apportion blended trust funds and also determine what moneys

or matters are to be treated as income and what as capital and what payment or matters shall be chargeable against and payable out of the capital of my estate." The testator left surviving him his widow and four daughters each of whom had issue. His assets included a share in a partnership carrying on a pastoral business under a deed which provided that the death of a partner should not determine the partnership, that the capital of the partnership should comprise the live stock, plant, chattels and effects on the lands of the partners (but not the lands themselves) and any sums of money they might mutually agree to advance and provide, and that " all debts moneys and outgoings which shall be incurred or become payable in or about the business of the partnership and all losses which may happen in the same and all other the liabilities of the partnership shall be borne and paid out of the gains and profits of the partnership if sufficient but if insufficient then out of the capital of the partnership and in case the same shall be deficient then by the partners or their respective executors or administrators according to their shares." This business was continued after the death of the testator, and during the greater part of the relevant period it was carried on at a loss.

Held :—

(1) For the purposes of ascertaining the income of the estate, both profits made and losses incurred by the partnership were to be disregarded save that amounts which the trustees were entitled to receive as partnership drawings on account of profits in accordance with the partnership deed should be treated as income of the estate and, subject to the rights of the annuitant, distributable among the life tenants.

(2) The rule in *Howe* v. *Earl of Dartmouth*, (1802) 7 Ves. 137 [32 E.R. 56], was excluded by the provisions of the will.

(3) The widow's annuity was payable out of the net annual income of the estate and the arrears (if any) of any year were payable out of future income derived prior to the death or remarriage of the widow (whichever first happened) but were not charged on subsequent income or on corpus.

Decision of the Supreme Court of Victoria (*Dean* J.) varied.

APPEAL from the Supreme Court of Victoria.

William Irving Winter-Irving made his last will on 18th December 1942. He subsequently made five codicils thereto. The first codicil was revoked by the third. Probate of the will and four codicils was granted by the Supreme Court of Victoria to William James Byrne, Stanley William Byrne and Geoffrey Beresford Walker, who were appointed by the will and codicils executors thereof and trustees of the estate. So far as is here material, the testator provided by the will (as amended by the codicils) as follows :—By clause 3 he devised all his real estate and bequeathed the residue of his personal estate to his trustees upon trust for conversion. By clause 4 he directed his trustees to stand possessed

H. C. OF A. 1951. DE LITTLE v. BYRNE.

of the net moneys to rise from such conversion upon trust to pay debts, expenses, duty and legacies "and upon further trust to invest the net residue of the moneys to arise as aforesaid and of any moneys of which I may die possessed in their names or under their legal control in any of the securities or investments hereinafter authorized and out of the net annual income thereof (which shall mean and include the net annual income of my estate pending the sale and getting in thereof) to pay to my said wife during her widowhood an annuity of one thousand pounds (£1,000) per annum clear of all deductions . . . and in addition" (this addition being provided by the fourth codicil) "to such annuity such amount or amounts as they in their absolute discretion may deem fit not exceeding in all in any one year the sum of five hundred pounds (£500)". Clause 5 (as substituted by the fifth codicil) provided: "Subject to the provision hereinbefore made for my said wife I direct my trustees to stand possessed of the said trust premises and the income thereof in trust to retain thereout the sum of two thousand pounds (£2,000) and pay the income from such sum to Drayton Taylor . . . during his life and subject to such payment to hold the said trust premises and the income thereof for all or any my children or child living at my death and the children or child then living of any then deceased child of mine who being male attain the age of twenty-one years or being female attain that age or marry and if more than one in equal shares as tenants in common but so that the children of any deceased child of mine shall take equally between them as tenants in common only the share which their parent would have taken had he or she survived me and attained a vested interest subject nevertheless as to the share of each of my daughters to the provisions hereinafter contained." Clause 6 settled the shares of daughters upon them for their lives with remainders to their children or remoter issue as they should appoint and in default of appointment for their children equally, with gifts over to which it is unnecessary to refer. Clause 8 gave the trustees "full discretionary power to postpone for such period or periods as they shall judge expedient the sale collection and conversion of the whole or any part or parts of my said real and residuary personal estate and to retain any part or parts thereof in the state of investments in which the same may be at the time of my death for so long as they may think proper and during such interval of postponement to manage and order all the affairs thereof as regards letting occupation management cultivation repairs . . . and in all other matters as if my trustees were in all respects the absolute

owners thereof "—and there was a power to continue for such period as they should think fit any grazing or other business in which the testator might be engaged at his death; and detailed powers of management were included. Clause 10 empowered the trustees to exercise their powers and discretions in respect of any partnership in which the testator was interested. Clause 11 authorized and empowered the trustees "at any time to purchase or otherwise acquire the whole or part of the share and interest of any partner of mine in any business at any price and on any terms my trustees may think proper and to lay out and expend any portion of the capital of my estate in so doing and on any such purchase the share so purchased shall be deemed to be and form part of my trust estate and be subject to all the trusts thereof herein declared". Clause 14 declared that the trustees "may apportion blended trust funds and decide what expenses are to be charged to capital and what to income and generally to determine all questions and matters of doubt or difficulty however arising under this my will or in the administration of the trusts and provisions thereof". Clause 15 empowered the trustees "to form or join in forming any business in which I may be interested into a limited company (proprietary or otherwise) and for such purpose to fix the consideration and terms and conditions of sale and accept shares in such company (whether fully or partly paid up and whether preference or ordinary) or debentures as the whole or part of such consideration and generally to do and perform all such things and acts and enter into and execute all such agreements and documents as they may consider necessary in the formation and carrying on of such company and for the purposes aforesaid to use such part or parts of my estate as they may think fit without being responsible for any loss". Clause 18 authorized and empowered the trustees "to retain and hold for any length of time as portion of my estate the whole or any part of the shares or debentures held by me at the time of my death in any company wherein I may then be interested with power to take or subscribe for any new or other shares or stock in any such company and to advance money or capital to any such company upon the security of debentures mortgages or otherwise or without security and generally to do any act deed matter or thing that my trustees may in their absolute discretion think fit to further and extend the business and property of any such company and to conserve and protect my interests therein". Clause 20 provided: "I direct that my trustees shall once in every year cause to be made

H. C. OF A. 1951.

DE LITTLE v. BYRNE.

an annual account or balance sheet showing the income or expenditure in respect of my estate and ascertaining and determining the net income thereof and for the purpose of such account they shall be at liberty to apportion blended trust funds and also determine what moneys or matters are to be treated as income and what as capital and what payment or matters shall be chargeable against and payable out of the capital of my estate ". Clause 21 specified authorized investments for the trust funds.

The testator died on 14th December 1946 leaving surviving him his widow, Eleanor Mary Winter-Irving, and his four daughters, Quentin Flora Amy de Little, Meriedie Janet Tolhurst, Mary Irving Johnson and June Irving Barlow, each of whom had issue.

The testator's estate included shares in public companies, moneys invested in Commonwealth inscribed stock and bonds, a share in the estate of his deceased father and a share in a partnership named Robertson Brothers and Winter-Irving Brothers. This partnership, at the material times, carried on a pastoral business, pursuant to a deed dated 1st July 1929, on properties belonging to the partners, and provided the deed for the carrying on of the business on such other properties as might be mutually determined. The partnership, which commenced on 1st July 1929, was to continue from year to year unless otherwise determined. The death of a partner was not to determine the partnership. The capital of the partnership was to comprise the live stock, plant, chattels and effects on the lands of the partners and any sums of money they might mutually agree to advance and provide. The lands of the partners were to remain their separate property. The interest of each partner in the capital was defined. Clause 17 provided: " All debts moneys and outgoings which shall be incurred or become payable in or about the business of the partnership and all losses which may happen in the same and all other the liabilities of the partnership shall be borne and paid out of the gains and profits of the partnership if sufficient but if insufficient then out of the capital of the partnership and in case the same shall be deficient then by the partners or their respective executors or administrators according to their shares ". Clause 28 provided that on 30th June in every year a full and general account should be made and taken of all moneys, debts, stock, produce and effects due or belonging to the partnership. Clause 29 provided: " The partners shall be entitled to the net profits of the partnership in the proportions in which they are interested in the capital of the partnership and the share of each of the partners in the profits of the business shall be carried to his or her credit in the books of the partnership

immediately after such annual account shall have been taken and may be drawn out at pleasure". Clause 33 provided: "Notwithstanding anything hereinbefore contained in case of the death of any of the partners before the termination of the partnership by effluxion of time the surviving partners may nevertheless if they so desire carry on the partnership to the expiration of the said term for the benefit of the surviving partners and the estate of the deceased partner". The trustees continued to participate in the partnership business. During the greater part of the relevant period it was conducted at a loss, particulars of which appear in the judgment hereunder.

The executors proceeded by originating summons in the Supreme Court of Victoria for the determination of questions arising out of the will and codicils. They joined as defendants the testator's widow, his four daughters and his grand-daughter, Camilla Quentin de Little (who was sued as representing all the grandchildren and remoter issue and in respect of whom a representative order was made accordingly).

The questions asked by the summons and the respective answers made by *Dean* J., before whom the matter came for hearing, were as follows:—

Question 1: Upon the true construction of the will and four codicils of the said deceased and in the events which have happened, how is the estate's share of the losses incurred by the partnership Robertson Bros. & Winter-Irving Bros. in the years ending the thirtieth day of June one thousand nine hundred and forty-seven and the thirtieth day of June one thousand nine hundred and forty-nine to be borne as between capital and income?

Question 2: Upon the true construction of the will and four codicils of the said William Irving Winter-Irving and in the events which have happened to what amounts of income (if any) are the four daughters of the said William Irving Winter-Irving deceased, namely, the above-named defendants, Quentin Flora Amy de Little, Meriedie Janet Tolhurst, Mary Irving Johnson and June Irving Barlow the life tenants referred to in the said will and codicils entitled for each of the following periods:—

(*a*) The fourteenth day of December one thousand nine hundred and forty-six to the thirtieth day of June one thousand nine hundred and forty-seven.

(*b*) The year ended the thirtieth day of June one thousand nine hundred and forty-eight.

(*c*) The year ended the thirtieth day of June one thousand nine hundred and forty-nine.

H. C. OF A. 1951. DE LITTLE v. BYRNE.

Answer : The life tenants are (subject to the answer to question 7) entitled each year to receive between them an amount equal to the income which would have been received if the interest of the estate in the partnership Robertson Bros. & Winter-Irving Bros. had been realized at the date of the death of the testator and the proceeds invested in authorized securities.

Question 3 : Upon the true construction of the will and four codicils of the said deceased is the annuity of one thousand pounds (£1,000 0s. 0d.) per annum given to the defendant Eleanor Mary Winter-Irving payable out of the income of each successive year only or are deficiencies to be made up out of (*a*) capital or (*b*) income of future years ?

Answer : The annuity is payable out of the net annual income of the estate and is a continuing charge upon such income but is not payable out of corpus.

Question 4 : How is the annual income of the estate to be ascertained for the purpose of paying the said annuity ?

Answer : The net annual income of the estate includes the profits available for distribution ascertained and carried to the credit of the estate in the books of the partnership in accordance with the provisions of the partnership deed but any losses shown in such books in respect of any year should be borne by the capital of the estate in such partnership and not by the income of the estate from other sources or by the profits of the partnership in any other year.

Question 5 : Are the defendants Quentin Flora Amy de Little, Meriedie Janet Tolhurst, Mary Irving Johnson and June Irving Barlow entitled (subject to the answer to question 7) to receive between them in each year the actual income produced in that year by the following assets in the testator's estate or to an amount equal to the annual income which would have been received if the said assets had been realized at the date of the death of the testator and the proceeds invested in authorized securities :—

(*a*) Shares in companies held by the testator at the date of his death and still held by the plaintiffs as trustees of his estate.

(*b*) The testator's share and interest in the estate of the late the Honourable William Irving Winter-Irving Senior.

Answer : (*a*) As to the shares—the defendants are entitled subject to the answer to question 7 hereunder to receive between them in each year an amount equal to the annual income which would have been received if the said shares had been realized at the date of death of the testator and

the proceeds invested in authorized securities. (*b*) As to the interest in the estate of the Honourable W. I. Winter-Irving deceased—the said defendants are entitled subject to the answer to question 7 hereunder to receive between them in each year an amount equal to the annual income which would have been received if the said interest had been realized at the date of death of the testator and the proceeds invested in authorized securities.

Question 6 : What rate of interest should be used by the plaintiffs in calculating the amount of income which would have been received in respect of such of the assets of the estate as are, pursuant to the answers to questions 1, 2 and 5 hereof, to be deemed to have been realised at the date of the death of the testator and the proceeds of which are to be deemed to have been invested in authorized securities ?

Answer : The rate of interest to be used is four per cent per annum.

Question 7 : In calculating the amount of income to which the defendants Quentin Flora Amy de Little, Meriedie Janet Tolhurst, Mary Irving Johnson and June Irving Barlow are between them entitled in accordance with the answers to questions 1, 2, 5 and 6 hereof, to what extent and in what manner should the plaintiffs bring into account the amount of the annuity payable to the defendant Eleanor Mary Winter-Irving in accordance with the answers to questions 3 and 4 hereof ?

Answer : The amount of the annuity payable to the defendant Eleanor Mary Winter-Irving in accordance with the answers to questions 3 and 4 hereof is to be charged upon and payable out of the income of the second, third, fourth and fifth named defendants as ascertained in accordance with the answers to questions 1, 2, 5 and 6 hereof and is not charged upon or payable out of corpus.

From the decision of *Dean* J. the testator's daughters appealed to the High Court.

A. D. G. Adam K.C. (with him *H. R. Newton*), for the appellants. The whole tenor of the will is opposed to the application of the rule in *Howe* v. *Earl of Dartmouth* (1). Clause 8 contains an independent power to retain indefinitely the investments in the same state as at the death. It is a power to retain them *as investments*. It is not merely machinery directed to postponing conversion with a view to achieving a favourable sale but is a full discretionary power to

(1) (1802) 7 Ves. 137 [32 E.R. 56].

H. C. OF A. 1951. DE LITTLE v. BYRNE.

continue the investments as such. The reference in clause 4 to net annual income shows that the testator contemplated that what was to be dealt with as income was the income in fact, not some such notional income as would result from the rule of equity. That the testator did not contemplate the application of any such rule is supported by clauses 11, 15 and 18. Clause 11, in particular, shows that he had in mind the possibility, not only of the continuance, but of the extension of his interest in the grazing partnership. In this regard clause 29 of the deed of partnership is important because of its special provisions as to the ascertainment of the income of the partnership and as to the manner in which losses should be borne. This provision would prevent any losses from becoming a charge against the income of the general estate of the testator. The appellants' views are supported by *Michael* v. *Callil* (1). In *Re Chaytor*; *Chaytor* v. *Horn* (2) there was no gift except of income from the property as converted. [He referred to *Re Parry*; *Brown* v. *Parry* (3); *Gow* v. *Forster* (4); *Upton* v. *Brown* (5).]

C. I. Menhennitt and *K. A. Aickin*, for the respondent executors.

J. S. Bloomfield, for the respondent E. M. Winter-Irving. Words which, for administrative purposes, direct payment of an annuity out of income are not inconsistent with the annuity being charged on corpus. In this case the words which refer to the payment of the widow's annuity out of income are simply an administrative direction. They merely refer to the source to which one would primarily look for payment of an annuity and do not exclude the possibility of a charge on corpus. The words of the amended clause 5, " Subject to the provision hereinbefore made for my said wife ", show that the succeeding dispositions were intended to be subject to payment of the annuity; that is to say, it was, so far as necessary, intended to be charged on corpus. This view is reinforced by the fact that the benefit to the widow was the subject of further attention in the fourth codicil. If the annuity is not charged on corpus, it is, at all events, charged on the income of succeeding years. [He referred to *Queensland Trustees Ltd.* v. *Deputy Federal Commissioner of Land Tax* (Q.) (6).]

(1) (1945) 72 C.L.R. 509, particularly at pp. 527, 529, 533.
(2) (1905) 1 Ch. 233, particularly at p. 237.
(3) (1947) Ch. 23, at p. 45.
(4) (1884) 26 Ch. D. 672.
(5) (1884) 26 Ch. D. 588.
(6) (1919) 26 C.L.R. 485, at p. 491.

R. M. Eggleston K.C. (with him *J. McI. Young*), for the respondent C. Q. de Little. Prima facie the rule in *Howe* v. *Earl of Dartmouth* (1) is applicable to a settlement such as that in question here. There is nothing in the will which is sufficient to exclude the application of the rule. Clauses such as clause 8, on which the appellants chiefly rely, create the very situation to which the rule is directed. It certainly cannot be said that the clause was intended particularly to benefit the life tenants. This applies especially to the testator's interest in the grazing partnership. The powers relating to the retention of this interest do not differ from those relating to any other investment of a kind not authorized for trustees. They cannot be treated as showing an intention to give the life tenants all the benefits without any of the burden of the grazing business. The provision of the partnership deed as to how losses are to be borne throws no light on the present question ; it is merely a matter between the partners. In the ultimate result, if the partnership assets prove insufficient to meet the losses, the testator's liability must fall on his general estate. [He referred to *Re Inman* ; *Inman* v. *Inman* (2).]

A. D. G. Adam K.C., in reply, referred to *Re Coller's Deed Trusts* ; *Coller* v. *Coller* (3) ; *Re Watkins' Settlement* ; *Wells* v. *Spence* (4) ; *Re Boden* ; *Boden* v. *Boden* (5) ; *Johnson* v. *Moore* (6) ; *Halsbury's Laws of England*, 2nd ed., vol. 13, p. 181.

Cur. adv. vult.

Oct. 22.

THE COURT delivered the following written judgment :—

This is an appeal by the life tenants of the residuary estate of William Irving Winter-Irving deceased from the answers to certain questions contained in an order made by the Supreme Court of Victoria (*Dean* J.) in an originating summons brought by the trustees of the will and four codicils of the deceased to determine a number of questions arising in the administration of his estate. The testator died on 14th December 1946 having duly made his last will dated 18th December 1942 and four codicils thereto dated respectively 12th January 1945, 31st January 1945, 10th October 1946 and 17th October 1946. It will be necessary to set out some portions of the will and codicils in more detail later but it will be convenient at this stage to refer to their beneficial provisions. The

(1) (1802) 7 Ves. 137 [32 E.R. 56].
(2) (1915) 1 Ch. 187, at p. 189.
(3) (1939) Ch. 277, at p. 282.
(4) (1911) 1 Ch. 1.
(5) (1907) 1 Ch. 132, at p. 157.
(6) (1857) 27 L.J. Ch. 453, at p. 455.

H. C. OF A. 1951.

DE LITTLE v. BYRNE.

Dixon J. Williams J. Webb J. Fullagar J. Kitto J.

testator bequeathed a number of general pecuniary legacies. He bequeathed to his wife during widowhood an annuity of £1,000 payable out of the net annual income of his estate and in addition to such annuity such amount or amounts as the trustees should in their absolute discretion deem fit not exceeding in all in any year the sum of £500. Subject to this provision for his wife, the testator directed his trustees to stand possessed of the trust premises and the income thereof in trust to retain thereout the sum of £2,000 and pay the income from such sum to Drayton Taylor during his life and subject to such payment to hold the trust premises and the income thereof for his children living at his death and the children then living of any deceased child of his who being male attained the age of twenty-one or being female attained that age or married and if more than one in equal shares as tenants in common, but so that the children of any deceased child should take equally between them as tenants in common only the share which their parent would have taken had he or she survived him and attained a vested interest subject nevertheless as to the share of each of his daughters to the provisions thereinafter contained. The testator declared that the share of each daughter in the trust premises should not vest in her but should be retained by his trustees upon trust to pay the income thereof to her for life for her separate use during coverture with restraint on anticipation and from and after her death as to as well the capital of the trust premises as the future income thereof upon trust for her children or remoter issue as therein mentioned.

The testator left him surviving his widow and four daughters but had no sons, so that in the events which have happened the residuary estate is divisible into four settled shares of which the daughters, the appellants, are the life tenants. The assets in the estate of the testator at the date of his death comprised a four-fourteenth share in the partnership of the Robertson Bros. and Winter-Irving Bros. carrying on the business of raising and selling cattle in the Clermont district in western Queensland, a share in the estate of his father, the late Honourable William Irving Winter-Irving, shares in a large number of public companies, and moneys invested in Commonwealth inscribed stock and bonds. Apart from the share in the above-mentioned partnership the estate produces an income of about £3,500 per annum. The relations of the partners are governed by a deed of partnership entered into on 1st July 1929. The testator's brother Oliver Irving Winter-Irving, one of the partners, predeceased him but the partnership deed provided that the death of any partner

should not determine the partnership and that in the case of the death of any of the partners before the termination of the partnership by effluxion of time the surviving partners might, nevertheless, if they so desired, carry on the partnership to the expiration of the term for the benefit of the surviving partners and the estate of the deceased partner. The provision that the death of a partner shall not determine the partnership means that it shall not determine the partnership between the surviving partners and the partnership has in fact been carried on since the death of Oliver Winter-Irving by the three surviving partners and since the death of the testator by the Robertson Brothers. The leasehold lands on which the business is carried on are not the property of the partnership. They remain the property of the individual partners or their estates so that the assets of the partnership are substantially the cattle depasturing on the selections from time to time. The selections are situated in a part of Queensland which is subject to serious periodical droughts and the climatic conditions since the death of the testator have generally been unfavourable to profitable working. As a result (a) for the six months ended 31st day of December 1946 a loss of £8,714 13s. 9d. was made in which the share of the estate of the testator was £2,489 18s. 2d.; (b) for the six months ended 30th day of June 1947 a loss of £1,574 2s. 11d. was made in which the share of the estate of the testator was £449 15s. 2d.; (c) for the year ended 30th day of June 1948 a profit of £20,884 18s. 4d. was made in which the share of the estate of the testator was £5,967 2s. 4d.; (d) for the year ended 30th day of June 1949 a loss of £27,867 15s. 4d. was made in which the share of the estate of the testator was £7,962 4s. 4d. The profit shown for the year ended 30th June 1948 was largely the result of dry conditions which compelled the partners to oversell and deplete the number of cattle normally carried on the run. This created a shortage in subsequent years.

The notice of appeal asks that the answers of his Honour to questions 1, 2, 5, 6 and 7 should be set aside and answered in the manner stated in the notice of appeal. It is unnecessary at this stage to set out these questions and answers in full. The questions will be set out in full at the end of these reasons, together with the answers which appear to us to be correct. Broadly stated his Honour's answers were based on the view that the interest of the testator in the partnership of Robertson Bros. and Winter-Irving Bros., in the estate of his deceased father, and his shares in public companies should have been notionally converted in accordance

H. C. OF A. 1951. DE LITTLE v. BYRNE. Dixon J. Williams J. Webb J. Fullagar J. Kitto J.

with the rule in *Howe* v. *Earl of Dartmouth* (1) and that the life tenants were not entitled to the actual income of these assets pending conversion but only to the income which would have been received if they had been converted at the date of death and invested in authorized investments; that the annuity to the widow was payable out of the net annual income of the estate and was a continuing charge upon such income but was not payable out of corpus; and that the net annual income of the estate included the profits available for distribution ascertained and carried to the credit of the estate in the books of the partnership in accordance with the provisions of the partnership deed but any losses shown in such books in respect of any year should be borne by the capital of the estate in such partnership and not by the income of the estate from other sources or by the profits of the partnership in any other year.

It will be convenient at this stage to consider whether the rule in *Howe* v. *Earl of Dartmouth* (1) applies to the present will. Subject to a legacy of £500 to his widow, the testator devised all his real estate and the residue of his personal estate upon trust subject to the provisions of his will to sell and convert the same into money and to stand possessed of the proceeds of sale "UPON TRUST in the first place to pay thereout my funeral and testamentary expenses and debts and all probate estate legacy and other duties payable in respect of my estate and the legacy and bequests under this my Will or any Codicil hereto and the costs and expenses of and incidental to the execution of the several trusts and powers of this my Will AND upon further trust to invest the net residue of the moneys to arise as aforesaid and of any moneys of which I may die possessed in their names or under their legal control in any of the securities or investments hereinafter authorised". The beneficial trusts already referred to then follow. The meaning and application of the rule in *Howe* v. *Earl of Dartmouth* (1) was recently discussed by this Court in *Michael* v. *Callil* (2), and these principles need not be restated. The present will is one which would attract the rule in the case of the settled shares of the daughters unless it contains a sufficient indication of intention that the rule is to be excluded. The first beneficial trust in the will is the trust in favour of the widow and, as altered by the fourth codicil, it is a trust to invest the net proceeds of sale in any of the securities or investments thereinafter authorized "and out of the net annual income thereof (which shall mean and include

(1) (1802) 7 Ves. 137 [32 E.R. 56]. (2) (1945) 72 C.L.R. 509.

the net annual income of my estate pending the sale and getting in thereof) to pay to my said wife during her widowhood an annuity of £1,000 per annum clear of all deductions by quarterly payments, the first payment to be made three months after my death ", and in addition in the discretion of the trustees to pay to her the annual sum not exceeding £500 already mentioned. The words in brackets " mean and include " are not as grammatical as they might be. If " mean " stood alone the net annual income referred to would be confined to the income of the unconverted assets. If " include " stood alone the annual income would include the income of the unconverted assets pending conversion and the income of authorized investments after conversion. Taking the phrase as a whole it is evident that the testator intended both classes of income to be available for payment of the annuity and that the phrase is intended to mean " shall include in its meaning ". Accordingly there is on the threshold of the will a direction that the net annual income of the estate out of which the annuity is to be paid is to be the actual net annual income of the estate from time to time whether the assets are invested in authorized or unauthorized investments.

Subject to the provision thereinbefore made for his wife, the testator then directed his trustees, subject to the bequest to Drayton Taylor, to hold the trust premises and the income thereof in trust for his children. The natural grammatical meaning of " and the income thereof " in such a context is that the income referred to is the residue of the income remaining after making the previous payments and therefore the residue of the actual net annual income of the estate from time to time. The sons, if any, would have been entitled to their share of the balance of the actual net income and it would appear to be capricious to impute to the testator an intention that the annuity and the shares of the sons should be paid out of the actual net annual income of the estate from time to time but that the income of the daughters' shares should be calculated on a notional basis. The natural grammatical construction of the will is that the income referred to in all these gifts is the income already defined as the net annual income of the estate out of which the annuity is payable to the widow and the balance of which, subject to the bequest to Drayton Taylor, is payable to the children of either sex.

Other provisions of the will were relied on by the appellants as indications that the rule was intended to be excluded ; particularly the power to postpone and retain contained in clause 8, the power to purchase the share of another partner (clause 11), the power to form or join in forming any business into a limited company

H. C. OF A. 1951.

DE LITTLE v. BYRNE.

Dixon J. Williams J. Webb J. Fullagar J. Kitto J.

(clause 15), and the power to retain and hold for any length of time as portion of the estate the whole or any part of the shares or debentures held by the testator in any companies at the time of his death (clause 18). None of these provisions would be sufficient to exclude the rule except the power to retain shares or debentures in companies which is wide enough to make such shares and debentures authorized investments, but that power does not include power to retain a share in the partnership or in the estate of the testator's father. There is, however, clause 20, the text of which is as follows :—" I DIRECT that my Trustees shall once in every year cause to be made an annual account or balance sheet showing the income or expenditure in respect of my estate and ascertaining and determining the net income thereof and for the purpose of such account they shall be at liberty to apportion blended trust funds and also determine what moneys or matters are to be treated as income and what as capital and what payment or matters shall be chargeable against and payable out of the capital of my estate ". The trustees are directed by this clause to ascertain and determine the net income of the estate. They are directed to determine what moneys are to be treated as income and what as capital and what payments are chargeable against capital. The moneys to be treated as income are the gross income of the estate. From these moneys the expenditure chargeable against income is to be deducted and the balance is the net income of the estate. This clause must intend to refer to the actual gross income and expenditure of the estate and the net income must be the actual net income. This is the income which is to be ascertained and determined and included in the annual accounts. The annual account is required to enable the trustees to determine the amount of income available for distribution among the beneficiaries and indicates an intention that this income is the actual income of the estate from time to time.

For the above reasons in our opinion the application of the rule to the present will is excluded and the actual net annual income of the estate howsoever derived should be applied in the first instance in payment of the widow's claims, secondly in payment of interest on the bequest to Drayton Taylor if he is still alive, and subject thereto should be divided between the four appellants in equal shares.

This leads us to consider what is the net annual income of the estate. No difficulty arises with respect to the income derived from the assets other than the share of the deceased in the partnership. But with respect to this income two questions arise—

(1) what is distributable income under the deed of partnership; and (2) whether the share of the estate of the testator in a partnership loss in any year should be charged against the income of the estate. The answer to the first question depends upon the partnership deed. The trustees of the will of the testator are entitled to receive and apply as income their share of whatever profits are distributed as income amongst the partners and the estates of deceased partners in accordance with its terms. The losses incurred in carrying on the business must be paid out of the capital of the partnership or charged against future profits as the partnership deed provides. The surviving partners are not parties to the originating summons so that any opinions that we express on these points will not be binding on them. But they will be binding upon the beneficiaries under the will. Clause 17 of the deed provides that "the cost and expenses of all repairs additions and alterations of in to or about the premises where the business of the partnership shall be carried on and all rents rates taxes Government assessments insurances against loss by fire, partners' salaries, the salaries of all overseers workmen and servants who shall be employed in or about the business of the partnership, and all debts moneys and outgoings which shall be incurred or become payable in or about the business of the partnership and all losses which may happen in the same and all other the liabilities of the partnership shall be borne and paid out of the gains and profits of the partnership if sufficient but if insufficient then out of the capital of the partnership and in case the same shall be deficient then by the partners or their respective executors or administrators according to their shares". Clause 28 provides that "on the thirtieth day of June in every year a full and general account shall be made and taken of all moneys debts stock produce and effects due or belonging to the partnership of all the liabilities thereof and of all the transactions of the partnership and of all other things usually comprehended in accounts of the like nature taken by persons engaged in a like business to that carried on by the partners and a just valuation shall be made of all the particulars included in such accounts which are capable of valuation and the partnership books shall be balanced and shall show the state of the partnership at the expiration of the year then ended and a balance sheet showing the result of such yearly account and the state of the partners' accounts shall be forthwith drawn out and each such yearly account and balance sheet shall be submitted for the examination of the partners and shall from time to time be written in a book to be kept for that purpose and be signed by the

H. C. OF A. 1951.

DE LITTLE v. BYRNE.

Dixon J. Williams J. Webb J. Fullagar J Kitto J.

partners and if within three calendar months after every such general account shall have been submitted for inspection it shall not be objected to by any of the partners such account and balance sheet shall whether signed or not be binding and conclusive on all the partners". Clause 29 provides that "the partners shall be entitled to the net profits of the partnership in the proportions in which they are interested in the capital of the partnership and the share of each of the partners in the profits of the business shall be carried to his or her credit in the books of the partnership immediately after such annual account shall have been taken and may be drawn out at pleasure". The inquiry is whether under these clauses a loss in one year should be carried forward and debited against the profits of subsequent years before a distributable net profit within the meaning of clause 29 is reached or whether each year should be treated as self contained and the loss in any year debited against capital. As we have already said, the capital of the partnership consists almost entirely of the cattle on the selections or, in other words, of working or circulating capital. The profit or loss on the cattle account is first ascertained. The general expenditure is then deducted from this profit if there be one and the balance represents the net profit for the year. If a loss in any year is not made good out of the profits of subsequent years, but is made good out of capital, the capital of the partnership would be gradually depleted. Clause 17 specifically provides that all losses shall be borne and paid out of the gains and profits of the partnership if sufficient, but if insufficient then out of the capital of the partnership. This provision is quite general and quite wide enough to include future gains and profits so that where a loss cannot be made good out of the gains and profits of the year in which it occurs it must be made good out of the gains and profits of future years before there is a net profit which can be carried to the credit of a partner or his estate in the books of the partnership and become distributable income which can be drawn out at pleasure within the meaning of clause 29.

The answer to the first question really supplies the answer to the second. The share of the testator in the partnership, whilst the business continues to be carried on, is a self-contained asset. The partnership deed provides how profits are to be distributed and losses are to be borne. The trustees of the will should draw any income which becomes distributable in accordance with clause 29 and that income will be part of the actual income of the estate in the year in which it is received. But the trustees are not required to pay any income of the estate to the partnership to make

good partnership losses. Those losses must be borne and made good in accordance with the partnership deed. No moneys forming part of the estate would have to be paid to the partnership unless the capital of the partnership became insufficient to discharge its liabilities. If any such moneys had to be paid, they would be payable out of the capital of the estate. No partnership losses should be charged against the income of the estate. Accordingly, the distributable income of the estate in any year includes the whole of the income derived from the rest of the estate irrespective of whether the partnership makes a profit or loss in that year.

The remaining question is whether the widow's annuity is payable only out of the net annual income of each year or arrears, if there should be such in any year, are charged upon future income or corpus. The gift is to pay the annuity out of the net annual income of the estate. The gift of the trust premises and the income thereof to the children is made subject to the provision already made for the widow. But this does not necessarily charge the arrears if any of the annuity on the future income or corpus. It is still necessary to ascertain the extent of the gift to the widow. It is not a gift of an annuity with a subsequent direction to pay it out of income which could amount to no more than an administrative direction. The entire gift is comprised in the trust to pay the annuity out of the net annual income. It is therefore a gift payable out of a fund of income and the provision for the widow subject to which the corpus and income of residue is given to the children is a trust for payments out of the net annual income and nothing more. The annuity is not therefore charged upon corpus. But there is nothing to confine the annuity in any one year to the income of that particular year. There are no words in the will similar to the words in the fourth codicil which confine the discretion of the trustees to pay the widow an additional £500 to an amount or amounts not exceeding that amount in any one year. The widow is to receive £1,000 per annum out of the net annual income of the estate. The words of the gift are wide enough to charge the arrears in any year on the net annual income of future years. But the annuity is only payable during widowhood and there is nothing to indicate that any arrears still unpaid at the death or remarriage of the widow are to be charged on income derived after the determining event. The gift is one which is covered by the statement in *Theobald* on *Wills*, 10th ed. (1946), that " A gift over ' subject to the said provisions ' or ' to the trusts aforesaid ' does not make the annuity payable out of corpus. It merely means subject to the trust to pay the annuity out of income

H. C. OF A. 1951.

DE LITTLE v. BYRNE.

Dixon J. Williams J. Webb J. Fullagar J. Kitto J.

accruing during the life of the annuitant". *In re Boden* (1); *Re Boulcott's Settlement*; *Wood* v. *Boulcott* (2).

We are now in a position to answer the questions under appeal. To answer these questions, it is also necessary to answer questions 3 and 4.

Question 1. Upon the true construction of the Will and Four Codicils of the said deceased and in the events which have happened, how is the Estate's share of the losses incurred by the partnership Robertson Bros. and Winter-Irving Bros. in the years ending the thirtieth day of June one thousand nine hundred and forty-seven and the thirtieth day of June one thousand nine hundred and forty-nine to be borne as between capital and income?

Answer. For the purpose of ascertaining the income of the estate, both profits made and losses incurred by the partnership are to be disregarded save that amounts which the trustees are entitled to receive as partnership drawings on account of profits in accordance with clause 29 of the partnership deed should be treated as income of the estate and, subject to the rights of the annuitant, distributable among the life tenants.

Question 2. Upon the true construction of the will and four codicils of the said William Irving Winter-Irving and in the events which have happened to what amounts of income (if any) are the four daughters of the said William Irving Winter-Irving deceased, namely, the above-named defendants Quentin Flora Amy de Little, Meriedie Janet Tolhurst, Mary Irving Johnson and June Irving Barlow, the life tenants referred to in the said will and codicils entitled for each of the following periods:—(a) the fourteenth day of December one thousand nine hundred and forty-six to the thirtieth day of June one thousand nine hundred and forty-seven; (b) the year ended the thirtieth day of June one thousand nine hundred and forty-eight; (c) the year ended the thirtieth day of June one thousand nine hundred and forty-nine?

Answer. An amount calculated in accordance with the answers to questions 1, 3, 4 and 5.

Question 3. Upon the true construction of the will and four codicils of the said deceased is the annuity of one thousand pounds (£1,000 0s. 0d.) per annum given to the defendant Eleanor Mary Winter-Irving payable out of the income of each successive year only or are deficiencies to be made up out of (a) capital or (b) income of future years?

(1) (1907) 1 Ch. 132, at pp. 138, 156, 157.

(2) (1911) 104 L.T. 205.

Answer. The annuity is payable out of the net annual income of the estate and the arrears if any of any year are payable out of future income derived prior to the death or remarriage of the said defendant whichever first happens but are not charged on subsequent income or on corpus.

Question 4. How is the net annual "income" of the estate to be ascertained for the purpose of paying the said annuity ?

Answer. The annual income of the estate includes the amounts received by the trustees from the partnership in accordance with clause 29 of the partnership deed and all other income actually received.

Question 5. Are the defendants Quentin Flora Amy de Little, Meriedie Janet Tolhurst, Mary Irving Johnson and June Irving Barlow entitled (subject to the answer to question 7) to receive between them in each year the actual income produced in that year by the following assets in the testator's estate or to an amount equal to the annual income which would have been received if the said assets had been realized at the date of the death of the testator and the proceeds invested in authorized securities :— (a) shares in companies held by the testator at the date of his death and still held by the plaintiffs as trustees of his estate ; (b) the testator's share and interest in the estate of the late the Honourable William Irving Winter-Irving Senior ?

Answer. The said defendants are entitled, subject to the rights of the annuitant, to receive between them in equal shares in each year the actual income derived from all these assets.

Questions 6 *and* 7. It is unnecessary to set out or answer these questions.

The appeal should be allowed, the answers to the questions 1 to 7 inclusive in the order of the Court below should be set aside and the above answers substituted. The costs of all parties of the appeal as between solicitor and client should be paid out of the residuary estate of the testator.

Appeal allowed. Set aside so much of the order of the Supreme Court as answers questions 1 *to* 7 *in the originating summons. In lieu thereof order that the said questions be answered as follows :—*

Question 1. *For the purpose of ascertaining the income of the estate, both profits made and losses incurred by the partnership are to be disregarded save that amounts which the trustees are entitled to receive as partnership drawings on account of profits in accordance with*

H. C. OF A. 1951. DE LITTLE v. BYRNE.

clause 29 of the partnership deed should be treated as income of the estate and, subject to the rights of the annuitant, distributable among the life tenants.

Question 2. An amount calculated in accordance with the answers to questions 1, 3, 4 and 5.

Question 3. The annuity is payable out of the net annual income of the estate and the arrears if any of any year are payable out of future income derived prior to the death or remarriage of the said defendant whichever first happens but are not charged on subsequent income or on corpus.

Question 4. The annual income of the estate includes the amounts received by the trustees from the partnership in accordance with clause 29 of the partnership deed and all other income actually received.

Question 5. The said defendants are entitled, subject to the rights of the annuitant, to receive between them in equal shares in each year the actual income derived from all these assets.

Questions 6 and 7. Unnecessary to answer.

Order that the costs of all parties of this appeal as between solicitor and client be paid out of the residuary estate of the testator.

Solicitors for the appellants, *Blake & Riggall.*

Solicitors for the respondents, *S. A. F. Pond*; *Hedderwick, Fookes & Alston*; *Moule, Hamilton & Derham.*

E. F. H.