H. C. OF A. 1952.

FEDERAL COMMISSIONER OF TAXATION v. BAYLY.

Williams J.

*and Social Services Contribution Assessment Act* 1936-1952 and other Tax Assessment Acts which give the taxpayer an option either to have the commissioner's decision on his objection referred to a board of review or to appeal to this Court or the Supreme Court. In the absence of a full right of appeal on fact and law from such a decision to this or some other court in which the judicial power of the Commonwealth is vested under Chapter III. of the Constitution, a grave constitutional question may arise whether the Commonwealth Parliament can, without infringing the judicial power, provide that a controversy between the Crown and the subject as to whether the latter is liable to pay a tax imposed by an Act depending upon disputed facts can be conclusively determined by an administrative body.

Alternatively the plaintiff relied on a certificate in writing signed by the Deputy Commissioner of Taxation for the State of New South Wales certifying that the defendant owed the sum of £1,018 17s. 5d. (the total amount claimed in the writ) as prima-facie evidence that the amount was due. I held that this certificate was sufficient prima-facie evidence to prove the plaintiff's case and that the plaintiff must succeed unless the defendant went into evidence: *Entertainments Tax Regulations*, S.R. 1942 No. 421, reg. 57.

There is no dispute that in all eleven instances the whole of the proceeds of the entertainment were devoted to a public &c. purpose. The dispute is as to whether the whole of the expenses of the entertainment did not exceed 50 per cent of the receipts. The commissioner was satisfied that in each instance the whole of the expenses exceeded 50 per cent of the receipts. The right to a refund under s. 18 depends upon the satisfaction of the commissioner. But the satisfaction is not an arbitrary satisfaction. It must be exercised according to law and not humour. The taxpayer must place before the commissioner facts which should be sufficient in law to satisfy him that the whole of the net proceeds will be devoted to public &c. purposes and that the whole of the expenses do not exceed 50 per cent of the receipts. The Court can examine the facts proved by the evidence to have been placed before the commissioner. If it is proved that the commissioner has not applied his mind to the real question for his determination but has acted capriciously or arbitrarily or upon irrelevant considerations the Court can order the commissioner to reconsider the matter according to law. It may be that the Court can go further and, if it is of opinion that on the facts the commissioner was bound in law to be satisfied, the Court can order the commissioner

to refund the tax. The section provides that the commissioner upon satisfaction *shall* repay the tax and in a case where the commissioner was bound to be satisfied such an order would do no more than require the commissioner to perform the duty imposed upon him by the section: see the orders in *R.* v. *Blakeley*; *Ex parte Association of Architects, Engineers, Surveyors and Draughtsmen of Australia* (1); *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.* (2). Either form of order would be an order appropriate to be made on an application for a writ of mandamus. But it may be open to this Court, having regard to ss. 32 and 33 of the *Judiciary Act* 1903-1950, to make the order in an action.

In the present case I am of opinion that no such order should be made. Section 18 clearly intends, I think, that the public &c. purpose shall benefit, that is shall be better off than it was before, as a result of the entertainment, by a sum equal to more than 50 per cent of the true receipts. In the case of the entertainments in the first category the net proceeds were paid to the Wellington District Hospital and Commercial Travellers Cot Fund, to the C.W.A. Baby Health Centre Building Fund, and to the Boy Scouts Building Fund. They were paid sums which appeared to be more than 50 per cent of the receipts, but included in these sums were amounts equal to the amounts of simultaneous contra payments which the charities made to the defendant as alleged donations to the entertainments. These contra payments were not true receipts. Charities do not make donations to entertainments held for their particular benefit. The purpose of these payments was to make it appear that the charities had received more than 50 per cent of the receipts. But they really only benefited to the extent of the balance remaining after deducting these donations from the cheques paid to them by the defendant. They did not benefit to the extent intended by the section. They did not receive more than 50 per cent of the true receipts of the entertainment. As the plaintiff said in his letter of 7th July 1948, "these payments cannot for entertainments tax purposes be regarded as forming part of the proceeds of the race meeting in question and by their exclusion from the receipts the expenses of each of the three entertainments exceeded 50 per cent of the receipts involving the payment of entertainments tax".

The public &c. purpose to which the net proceeds of the entertainments in the second and third categories were devoted was to benefit the improvement fund of the Wellington Show and Sports Ground. Facts were placed before the plaintiff tending to prove

(1) (1950) 82 C.L.R. 54. (2) (1947) A.C. 109

H. C. OF A. 1952. FEDERAL COMMISSIONER OF TAXATION v. BAYLY. Williams J.

an agreement between the defendant and the trustees of the ground that if the race club devoted the net proceeds of these entertainments to this purpose the trustees would pay for certain specific items of expenditure, namely prize money, wages and rebates. This was in effect an agreement that the beneficiary should make a donation equal to the total amount of these items. In the case of the meeting of 29th March 1947 the trustees contributed an amount equal to the expenditure on prize money and rebates. In the case of the meeting of 21st February 1948, the trustees contributed an amount equal to the expenditure on prize money, wages and rebates. All these items, prize money, wages and rebates were expenses of the race meeting which should have been borne by the club. Again the beneficiary only benefited to the extent of the balance remaining after deducting the amount which it had contributed to the expenses from the cheque it received from the defendant and this balance was less than 50 per cent of the true receipts. In the case of the entertainments in category 2, no payments were in fact made by the trustees towards prize money or wages or rebates. The net proceeds in each of these cases were less than 50 per cent of the total receipts and the defendant in the end did not contend that he could claim a refund in respect of these entertainments.

The defendant has failed to make a case for the court interfering with the decision of the commissioner in respect of any of the eleven cases, even assuming that an order in the nature of a mandamus can be made in an action. If it were relevant for me to express an opinion I would say that I agree with his decision.

For these reasons I must give judgment for the plaintiff for the whole of the amounts claimed except the last amount of £148 4s. 5d. that is to say I must give judgment for £870 13s. 0d. with costs.

*Judgment for the plaintiff for* £870 13s. 0d. *with costs.*

Solicitor for the plaintiff, *D. D. Bell*, Crown Solicitor for the Commonwealth.

Solicitors for the defendant, *Kelly & McCormack*, Wellington, by *Maurice J. McGrath.*

J. B.

[HIGH COURT OF AUSTRALIA.]

HASSELL . . . . . APPELLANT;
DEFENDANT,

AND

PERPETUAL EXECUTORS TRUSTEES & AGENCY COMPANY (W.A.) LIMITED AND BALL . . . . . RESPONDENTS.
PLAINTIFF AND REPRESENTATIVE DEFENDANT,

*Settlement—Life tenant and remainderman—Capital and income—Station property—Growth of wool—Proceeds of sale of wool shorn after death of testator—Apportionment—Rule in Howe v. Lord Dartmouth.*

*Settlement—Life tenant and remainderman—Incidence of outgoings—Annuities charged on land—Rule in Allhusen v. Whittell.*

H. C. OF A. 1952.

PERTH, *Sept.* 2, 4, 5.

SYDNEY, *Dec.* 11.

Dixon C.J., Webb, Fullagar and Kitto JJ.

The testator, until his death, carried on business as a grazier upon three station properties. By his will he devised and bequeathed the whole of his real and personal property to his trustees upon an express trust for conversion with power in their absolute discretion to postpone the conversion for such period as they might think fit. After providing for the payment of debts, funeral and testamentary expenses and duties and for the investment of residuary moneys in investments authorised by law, he prescribed trusts upon which the trustees should hold such moneys and the investments for the time being representing the same and all such parts of his residuary estate as might for the time being remain unconverted, "all of which property" was thereinafter "referred to as 'the trust estate'". The declared trusts included a trust to pay "the nett income of the trust estate" to H. during her life. In addition to the general power to postpone conversion the trustees were empowered "during the lifetime of my wife and for so long thereafter as they may think expedient with a view to realising a beneficial sale to postpone the sale and conversion" of the three grazing properties and the livestock plant, &c., used in connection therewith and to carry on the business as graziers thereon. The trustees were also given, *inter alia*, powers of leasing the properties and of investment, and a power to determine

H. C. OF A. 1952. HASSELL v. PERPETUAL EXECUTORS TRUSTEES & AGENCY CO. (W.A.) LTD. AND BALL.

in all cases of doubt whether moneys coming to their hands were capital or income. At the date of his death the testator was negotiating for the sale of the three properties together with plant and livestock thereon. The sheep were almost ready for shearing, and were to be sold " off shears ". Upon the testator's death the executors took up these negotiations, and a sale was quickly effected. The executors had the sheep shorn, and disposed of the wool.

*Held*: (1) That all money received by the executors as proceeds of the sale of wool shorn after the death of the testator was income of the testator's estate.

*Re Angas* (1906) S.A.L.R. 140; *Bradley* v. *Denne* (1911) 29 W.N. (N.S.W.) 2; *In re MacPherson* (1913) S.A.L.R. 207; and *Thomas* v. *Thomas* (1939) Q.S.R. 301, explained.

(2) That the rule in *Howe* v. *Lord Dartmouth* (1802) 7 Ves. 137 [32 E.R. 56] was excluded by the provisions of the will; and, accordingly H. as tenant for life was entitled to the whole of the net proceeds of the wool.

Decision of the Supreme Court of Western Australia (*Virtue* J.) reversed.

The three grazing properties came to the testator under a provision in the will of his father and he took one of them subject to and charged with the payment of three annuities. The annuitants survived the testator.

*Held*, that on the basis that the annuities were not personal liabilities of the testator they should as between the tenant for life and the remainderman be paid primarily out of the income of the land on which they were charged (as distinguished from the grazing business conducted thereon) and in so far as that income was insufficient, out of the land itself. If, on the other hand, personal liability existed then the amount so paid should be apportioned as between the capital and income in accordance with the rule in *Allhusen* v. *Whittell* (1867) L.R. 4 Eq. 295.

*Re Darby*; *Russell* v. *MacGregor* (1939) Ch. 905, applied. *Honywood* v. *Honywood* (1902) 1 Ch. 347; *Re Owen*; *Slater* v. *Owen* (1912) 1 Ch. 519, and *Re Shee*; *Taylor* v. *Stoger* (1934) Ch. 345, distinguished.

Decision of the Supreme Court of Western Australia (*Virtue* J.) in part reversed and in part affirmed.

APPEAL from the Supreme Court of Western Australia.

Edmund Arthur Hassell made his last will and testament on 8th January 1947. Probate of the will was granted by the Supreme Court of Western Australia to Albra Marjory Hassell and to the Perpetual Executors Trustees & Agency Co. (W.A.) Ltd. who were appointed by the will executors thereof and trustees of the estate.

The material provisions of the will are as follows:—

By cl. 2 he devised and bequeathed all his real and personal property unto his trustees upon trust for conversion (with power

in their discretion to postpone conversion for such period as they might think fit) and he directed his trustees to stand possessed of the net moneys to arise from such conversion and also all such parts of his estate as should for the time being remain unconverted (all of which property in the will being referred to as " the trust estate ") upon trust to pay to a named daughter free of all duties an annuity of £104 and subject thereto upon trust " to pay the nett income of the trust estate to my wife during her life . . . ". The will then set out certain trusts of both capital and income to take effect after the death of the wife. By cl. 3 of the will the testator empowered his trustees " during the lifetime of my wife and for so long thereafter as they may think expedient with a view to realising a beneficial sale to postpone the sale and conversion of my grazing properties known as ' Jarramongup ', ' Doubtful Island ' and ' Qualup ' and the livestock plant machinery stores chattels and effects used in connection therewith and to work and manage the said grazing properties and to carry on the business of graziers thereon with power to employ pay and dismiss managers agents and workmen to buy and sell live and dead stock wool and all plant machinery goods chattels and effects requisite in carrying on any such business to effect insurances to effect repairs and make improvements and generally to act in relation to such properties and business as if they were the sole and absolute owners thereof without being liable or responsible for any loss arising therefrom AND in case any of the said properties shall at any time be carried on or worked at a loss my Trustees shall be reimbursed in respect of such loss out of the assets of my estate and for any of the purposes aforesaid I empower my Trustees to raise money by mortgaging or charging the said properties or other the assets of the said business present or after acquired or any part thereof and whether on current account or otherwise and for such purpose to sign and execute all such mortgages charges bills of sale and other instruments as may be necessary and any person lending money to my Trustees shall not be concerned to see or enquire as to the proper application thereof and I further declare that pending realisation and in lieu of working and managing the said properties or any of them my Trustees may from time to time lease the said properties or any of them with or without livestock plant and chattels for such terms and at such rentals and upon such conditions as they may think fit ".

By cl. 8 of the will the testator gave his trustees, *inter alia*, the following power, namely, " to determine in all cases of doubt whether any moneys coming to their hands are capital or income

H. C. OF A. 1952. HASSELL v. PERPETUAL EXECUTORS TRUSTEES & AGENCY CO. (W.A.) LTD. AND BALL.

and to apportion blended funds and every such determination or apportionment shall be final and binding on all persons beneficially interested under this my Will ".

The testator died on 26th September 1950, leaving surviving him his widow Albra Marjory Hassell and his daughter Phyllis Mildred Hassell who was the annuitant. The testator's estate included the three grazing properties mentioned in his will, namely, Jarramongup, Doubtful Island and Qualup. The property known as Jarramongup was devised to the deceased by his father and was charged with an annuity of £150 per annum to each of the deceased's sisters. This property was transferred to the deceased by the executor of his late father's will in June 1934, and before the transfer was made the executor registered a charge against the land to secure the annuities. The Jarramongup lands were under the provisions of the *Transfer of Land Act* 1893-1950 (W.A.) and the charge so registered was registered under the provisions of that Act.

Before his death the testator had been in treaty with the Western Australian Government for the sale of his three named grazing properties. On the eve of his death he made a written offer to sell these properties for £60,000 bare together with the stock and plant at valuation the sheep to be off shears and delivery to be made at the end of shearing. Shearing commenced in October. On 10th November 1950, the executors formally contracted to sell the properties on the terms as set out in the testator's offer. Shearing was completed on 20th November 1950 and thereupon the Crown went into possession and took delivery of the stock and plant. The executors sold the wool for £20,095 of which they received £15,682, the balance being retained by the Commonwealth Government pursuant to the provisions of the *Wool Sales (Deduction) Administration Act (No.* 1) 1950 (Cth.). The transfer of the lands to the State of Western Australia was not registered until January 1952, and the purchase price was not paid until this date.

On the date of the testator's death three annuitants were still alive and the three annuities were still charged on Jarramongup. In order to make title to Jarramongup the executors secured the annuitants to discharge their annuities in consideration of the purchase of annuities from the Australian Mutual Provident Society in the names of the father's executors. In the interval between the death of the testator and the discharge of the annuities the following moneys were paid to the annuitants :—In October 1950, the sum of £385 10s. 0d. paid in respect of the annuity year ending on 29th October 1950, the sum of £385 10s. 0d. paid in

respect of the annuity year expiring on 29th October 1951 and the sum of £32 2s. 6d. paid in February 1952, this being a quarterly instalment of one of the annuities which quarterly instalment fell due on 29th January 1952.

The Perpetual Executors Trustees & Agency Co. (W.A.) Ltd., as one of the executors of the will of the testator, proceeded on originating summons in the Supreme Court of Western Australia for the determination of questions arising out of the will. The questions asked by the summons and the respective answers made by *Virtue* J., before whom the matter came on for hearing, were as follows:—

Question 1. (*a*) Does the sum of £20,096 19s. 8d. received by the executors as proceeds of the sale of wool shorn subsequent to the date of death constitute income of the "trust estate" and income to which the said Albra Marjory Hassell is entitled within the meaning of the testator's will?

Answer. No.

(*b*) If the answer to question 1 (*a*) is "no"—(i) Is the said sum or any part thereof to be treated as corpus of the estate?

Answer. The whole of the said sum should be treated as corpus of the estate.

(ii) Should the plaintiffs apportion the said moneys between corpus and income?

Answer. No.

(iii) If "yes" to question 1 (*b*) (ii) upon what principle should apportionment be made?

Answer. Does not fall to be answered.

Question 2. Are the following sums payable from corpus or income—

(*a*) The sum of £385 10s. 0d. paid by Elder Smith & Co. Ltd. to the West Australian Trustee Executor and Agency Co. Ltd. on 25th October 1950 and due by way of annuities for the benefit of the daughters of Albert Young Hassell deceased in respect of the year ending 29th October 1950?

Answer. The sum is payable from the corpus of the estate to the extent that the share contributed by operations on Jarrmongup Station during the year prior to 29th October 1950, towards the net profit of the testator's grazing business during that period is sufficient for the purpose. Any deficiency is to be met from the income of the residuary estate of the testator.

(*b*) The sum of £385 10s. 0d. paid by the Perpetual Executors Trustees and Agency Co. (W.A.) Ltd. to the West Australian Trustee Executor and Agency Co. Ltd. on 1st November 1951

H. C. OF A. 1952. HASSELL v. PERPETUAL EXECUTORS TRUSTEES & AGENCY CO. (W.A.) LTD. AND BALL.

and due by way of annuities for the benefit of the said daughters of Albert Young Hassell deceased in respect of the year ending 29th October 1951 ?

Answer. The sum is payable from the income of the residuary estate.

(*c*) The sum of £32 2s. 6d. paid by the Perpetual Executors Trustees and Agency Co. (W.A.) Ltd. to the West Australian Trustee Executor and Agency Co. Ltd. on behalf of Ellen Clarke on 12th February 1952, and due by way of a quarterly instalment due on 29th January 1952, on account of her annuity ?

Answer. The sum is payable from the income of the residuary estate.

From the decision of *Virtue* J., the widow appealed to the High Court.

*T. S. Louch* Q.C. (with him *I. G. Medcalf*), for the appellant. In the ordinary way proceeds of the sale of wool form part of the income of a wool grazing business. [He referred to the decision in *Bartlam* v. *Union Trustee Co. of Australia Ltd.* (1) which was affirmed by the Privy Council (2).] Such proceeds are income for the period in which payment is actually received: *Ritchie* v. *Trustees Executors and Agency Co. Ltd.* (3). Where there is a settlement with a life tenant and remainderman, the terms of the particular will or trust instrument may require the trustee to treat as income what is really corpus or vice versa: see *Hill* v. *Permanent Trustee Co. of N.S.W. Ltd.* (4). There is no such specific direction in this will. On the contrary this will empowers the trustees to determine in case of doubt whether moneys coming to their hands are capital or income. There is no reported case where the proceeds of wool shorn after death have been held to be corpus. There are a number of cases where such wool proceeds have been held to be income. [He referred to *Beit* v. *Beit* (5); *Re Angas* (6); *Bradley* v. *Denne* (7); *In re MacPherson* (8); *Thomas* v. *Thomas* (9).] It is submitted that the date of the testator's death marks the commencement of a new accounting period. The proceeds of all wool shorn after this date is income of the general estate. Unless the payment falls precisely within the terms of *The Apportionment Act* 1891 (W.A.) there can be no apportionment: *Gover* on *Capital and Income*, 3rd ed. (1933), p. 30; *In re Cox's*

(1) (1946) 72 C.L.R. 549.
(2) (1948) A.C. 495; 76 C.L.R. 492.
(3) (1951) 84 C.L.R. 553.
(4) (1930) A.C. 720.
(5) (1874) 4 Q.S.C.R. 70.
(6) (1906) S.A.L.R. 140.
(7) (1911) 29 W.N. (N.S.W.) 2.
(8) (1913) S.A.L.R. 207.
(9) (1939) Q.S.R. 301.

*Trusts* (1); *Browne* v. *Collins* (2); *In re Robbins*; *Midland Bank Executor and Trustee Co. Ltd.* v. *Melville* (3).

Apart from the remedies provided by the *Transfer of Land Act* 1893-1950 (W.A.) the annuitant could sue the registered proprietor for arrears of dividend: *Thomas* v. *Sylvester* (4). The testator by accepting a transfer of the land subject to the registered charge became personally liable to pay the annuities. The lump sum payment made to the Australian Mutual Provident Society was properly made out of corpus and the life tenant's income thereafter was reduced by the interest which would otherwise have been earned. So far as the lump sum payment is concerned, this is a just apportionment as between the capital and income: *In re Henry*; *Gordon* v. *Gordon* (5). The three payments made by the executors in respect of the annuities should be treated on the same basis. It has been said that this course although the most convenient is not technically correct: *Halsbury's Laws of England*, 2nd ed., vol. 14, p. 639. If this statement is correct then the payments should be apportioned between the capital and income in accordance with the rule in *Allhusen* v. *Whittell* (6); *In re Darby*; *Russell* v. *MacGregor* (7) can be distinguished because in that case there was an annuity directed to be paid out of residue and furthermore there was no personal liability to pay the annuity.

*J. Hale* Q.C. with him *C. H. Smith*, for the respondent, the representative defendant. The first inquiry is to ascertain the true nature of the receipt. Unless the will carries it elsewhere capital will belong to corpus and income to the tenant for life: *Michael* v. *Callil* (8); *Hill* v. *Permanent Trustee Co. of N.S.W. Ltd.* (9). A court will lean against a construction which will confer on the tenant for life capital benefits at the expense of the inheritance: *In re Sears dec'd.*; *Perpetual Executors Trustees & Agency Co. Ltd.* v. *Chisholm* (10). In determining the character of a receipt it is essential to see what in fact happened. Proceeds from the sale of wool may be capital or income according to the circumstances. In this case the executor dealt with the farming assets only for the purpose of completing the negotiations entered into by the testator. The executor did not exercise his power to carry on the business. The sheep together with the grown but then unshorn wool came to the executor as capital. The act of severance cannot change the

(1) (1878) 9 Ch.D. 159.
(2) (1871) L.R. 12 Eq. 586.
(3) (1941) Ch 434, at p. 439.
(4) (1873) L.R. 8 Q.B. 368.
(5) (1907) 1 Ch. 30.
(6) (1867) L.R. 4 Eq. 295.
(7) (1939) Ch. 905.
(8) (1945) 72 C.L.R. 509, at p. 532.
(9) (1930) A.C. 720, at p. 731.
(10) (1951) 53 W.A.L.R. 57, at p. 61.

H. C. OF A. 1952. HASSELL v. PERPETUAL EXECUTORS TRUSTEES & AGENCY CO. (W.A.) LTD. AND BALL.

nature of the receipt. If received as capital it remains capital: *In re Duff's Settlements*; *National Provincial Bank Ltd.* v. *Gregson* (1). There is nothing in the will to carry to the tenant for life a receipt of a capital nature. The expression "nett income" cannot carry any part of corpus. [He distinguished *In re Angas* (2) *In re Cox's Trusts* (3); *Thomas* v. *Thomas* (4); and *In re MacPherson* (5), as being cases relating only to the proceeds of sale of wool or lambs made in the course of carrying on a business.]

The rule in *Howe* v. *Lord Dartmouth* (6) is not confined to investments which the executor is under a duty to sell but extends to those lawfully retained: *Re Parry*; *Brown* v. *Parry* (7). If the wool proceeds are held to be income then the widow is entitled to 4 per cent of the value of the estate as at the date of death. Any surplus falls into corpus. The annuities were not debts of the testator. They should not be paid out of income. [He referred to *Patching* v. *Barnett* (8); *Re Muffett* (9); *Re Popham*; *Butler* v. *Popham* (10); and *Re Darby* (11).]

*J. B. Ilbery*, for the respondent, the Perpetual Executors Trustees & Agency Co. (W.A.) Ltd.

Dec. 11.

THE COURT delivered the following written judgment:—

The respondent company, as an executor of the will of Edmund Arthur Hassell deceased, applied to the Supreme Court of Western Australia by originating summons for the determination of certain questions which had arisen in the administration of the testator's estate. The matter came before *Virtue* J., and it is from the answers he gave to the questions submitted that this appeal is brought.

The first question related to a sum of £20,096 19s. 8d., the proceeds of the sale of wool which was shorn shortly after the testator's death from sheep belonging to the estate. The court was asked to decide whether that sum was income to which the appellant was entitled as life tenant under the will, and, if not, whether the sum should be treated as corpus or should be apportioned between corpus and income. The answer given by the learned judge was that the whole of the sum should be treated as corpus, and that there should be no apportionment.

(1) (1951) Ch. 923.
(2) (1906) S.A.L.R. 140.
(3) (1878) 9 Ch. D. 159.
(4) (1939) Q.S.R. 301.
(5) (1913) S.A.L.R. 207.
(6) (1802) 7 Ves. 137 [32 E.R. 56].
(7) (1947) Ch. 23.
(8) (1881) 51 L.J. Ch. 74.
(9) (1888) 39 Ch. D. 534.
(10) (1914) 111 L.T. 524.
(11) (1939) Ch. 905.

The testator was a grazier carrying on grazing business on three station properties, known respectively as "Jarramongup", "Doubtful Island" and "Qualup". By his will, the testator gave devised and bequeathed the whole of his real and personal property to his trustees upon an express trust for conversion, with power in their absolute discretion to postpone conversion for such period as they might think fit. After providing for the payment of debts, funeral and testamentary expenses and duties and for the investment of residuary moneys in investments authorized by law, he prescribed trusts upon which the trustees should hold such moneys and the investments for the time being representing the same and all such parts of his residuary estate as might for the time being remain unconverted—"all of which property", he added, "is hereinafter referred to as 'the trust estate'". The first trust declared was for the payment of a life annuity of £104 to a named daughter out of the income of the trust estate with recourse if necessary to the corpus thereof, with a power to make an appropriation to answer this annuity. Next there was a trust to pay the net income of the trust estate to the testator's wife, the present appellant, during her life. Then followed trusts of capital and income to take effect after the death of the wife.

The will also contained administrative provisions to portions of which reference should be made. Although a general power to postpone conversion had already been conferred, a particular power with respect to the three grazing properties was also given. This was expressed as a power to postpone the sale and conversion of the three properties and the livestock plant machinery stores chattels and effects used in connection therewith, to work and manage the properties and to carry on the business of graziers thereon; and it was made exercisable during the lifetime of the testator's wife and for so long thereafter as the trustees might think expedient with a view to realising a beneficial sale. After adding a number of ancillary powers, the testator proceeded to declare that pending realisation, and in lieu of working and managing the three properties or any of them, the trustees might from time to time lease the properties or any of them, with or without livestock plant and chattels, for such terms and at such rentals and upon such conditions as they might think fit. There was also an investment clause. It provided for investment in any of such investments as might for the time being be authorized by law for the investment of trust funds, and then it added by way of proviso a power to the trustees in their absolute discretion to retain unsold any investments of an unauthorized nature forming part of the testator's

H. C. OF A. 1952. HASSELL v. PERPETUAL EXECUTORS TRUSTEES & AGENCY CO. (W.A.) LTD. AND BALL. Dixon C.J. Webb J. Fullagar J. Kitto J.

estate at his death without liability for any loss occasioned thereby. Finally, the trustees were given a power, amongst others, to determine in all cases of doubt whether any moneys coming to their hands were capital or income.

At the date of his death, which was 26th September, 1950, the testator was in the course of negotiating with the Government of Western Australia for the sale of all three of his properties to the Government with the plant and stock thereon. The sheep were ready or almost ready for shearing, and they were to be sold "off shears". Upon the testator's death, the executors of the will, who were the respondent company and the widow, took up the negotiations in which the testator had been engaged, and a sale was quickly effected. The sheep having been sold "off shears", the executors had them shorn and disposed of the wool. It produced £20,095 19s. 8d. which is the sum now in question. Probate of the will was granted on 7th November, 1950, six weeks after the death, and possession of the sheep was given to the purchaser a few days later, on 20th November, 1950. From these facts it is evident that the executors did not exercise their power to postpone conversion or the power to work and manage the grazing properties and carry on business thereon. They carried out the trust for sale without any delay. They did not carry on a business, and the sum realized for the wool did not constitute the proceeds of a business: cf. *Cohan's Executors* v. *Inland Revenue Commissioners* (1). If this sum was income at all, it was income from the sheep. The view accepted by the learned judge below, however, was that it was not income but was wholly capital, for the reason that the wool, being fully-grown on the sheeps' backs at the date of death, was as surely a capital asset of the estate as the sheep themselves. His Honour distinguished the cases of *In re Angas* (2), *Bradley* v. *Denne* (3), *In re MacPherson* (4), and *Thomas* v. *Thomas* (5), as being cases relating only to the proceeds of sale of wool or lambs made in the course of carrying on a business. The principle of the decisions, however, goes deeper than that. The reason why the proceeds of wool shorn and lambs dropped are brought into the accounts of a business as revenue items is to be found in the character in which wool and the lambs come into existence as independent subjects of property. They come into existence, by severance in the case of wool and by birth in the case of lambs, as produce of the sheep from which they are derived, and, like crops of grain and

(1) (1924) 131 L.T. 377.
(2) (1906) S.A.L.R. 140.
(3) (1911) 29 W.N. (N.S.W.) 2.
(4) (1913) S.A.S.R. 207.
(5) (1939) Q.S.R. 301.

fruit, they belong to that class of produce which is periodically detached and periodically recurs: cf. *Campbell* v. *Wardlaw* (1). They are, by their very nature, a profit. If they are sold in the course of a business the proceeds must be brought into account in ascertaining the profits of the business; and if they are sold otherwise than in a business the proceeds must likewise be treated as received on income account. It is true that upon a sale of sheep in lamb or in wool the whole proceeds of the sale go to corpus if the sheep belonged to corpus; but that is because the property sold consists only of capital assets, though capital assets with a probability of early produce. Once the produce comes into being, it cannot by its nature belong to capital. It was because similar considerations applied, with results which were considered to be inequitable, to rents, annuities, dividends and other periodical payments in the nature of income, that the Apportionment Acts were introduced: see *The Apportionment Act* 1891 (W.A.) (54 Vict. No. 8). The Acts are, of course, inapplicable in relation to natural produce.

The whole sum now in question must therefore be regarded as income of the testator's estate, and it only remains to consider whether it is income which passes to the widow as tenant for life under the will. It is income of residuary personalty which is subject to an express trust for conversion. The prima-facie rule in such a case, corresponding to the rule laid down in *Howe* v. *Lord Dartmouth* (2) for the case where a residue includes unauthorized investments not expressly directed to be converted, is that the life tenant is not entitled to the income actually produced by the assets pending conversion and re-investment in authorized securities, but receives only interest on the value of the assets, as the equivalent of the income which would have been available if the conversion had been effected. The rule, of course, yields to a sufficient indication in the will of an intention that while the trust for conversion remains unperformed the tenant for life is to have the actual income. Consideration has been given in recent decisions of this Court to the principles to be applied in ascertaining whether the rule is excluded in a particular case: *Michael* v. *Callil* (3); *de Little* v. *Byrne* (4). The will with which we are here concerned seems clearly to contemplate that there may be an interval between the death of the testator and the conversion of assets such as the stock on the grazing properties, and that in that interval the income actually produced shall belong to the widow. The fact that the

(1) (1883) 8 App. Cas. 641, at p. 645.
(2) (1802) 7 Ves. 137 [32 E.R. 56].
(3) (1945) 72 C.L.R. 509.
(4) (1951) 84 C.L.R. 532.

H. C. OF A. 1952. HASSELL v. PERPETUAL EXECUTORS TRUSTEES & AGENCY CO. (W.A.) LTD. AND BALL. Dixon C.J. Webb J. Fullagar J. Kitto J.

trustees are given a general discretionary power to postpone sale is not of any materiality, for it is plainly ancillary to the imperative trust for conversion. The power of leasing the grazing properties and the power to retain unauthorized investments without liability for loss may be put aside for the same reason. But three provisions of the will combine to make the intention clear. In the first place, the subject matter of the gift to the widow is described as " the nett income of the trust estate ", " the trust estate " having been defined as " all " the property consisting of residuary moneys and the investments for the time being representing the same and such parts of the residuary estate as may for the time being remain unconverted. Next, the testator, in dealing with the grazing properties and the livestock &c., thereon, is not content to rely upon the general power of postponement ; he gives a special power to postpone the sale and conversion of those particular assets. This power is given " during the lifetime of my wife and for so long thereafter as they may think expedient with a view to realising a beneficial sale ". As a matter of construction it seems clear that the words " with a view to realising a beneficial sale " relate only to the period after the wife's lifetime. The power to postpone sale during her lifetime is not ancillary and therefore subordinate to the trust for sale ; it is a substantive power exercisable for the benefit of the tenant for life : cf. *Michael* v. *Callil* (1), and it has the effect of displacing the inference to which the trust for conversion would prima facie give rise, that actual or notional conversion was " the root assumption on which successive interests were limited "(2). Finally, the power given to the trustees to determine whether moneys are capital or income would be otiose unless the income were intended to be disposed of as such : cf. *de Little* v. *Byrne* (3).

The widow as tenant for life should therefore be held entitled to the whole of the net proceeds of the wool shorn after the testator's death. Against the gross proceeds there must be charged expenses of shearing and disposing of the wool. The first question asked in the originating summons appears to relate to the gross proceeds. It should be answered : (*a*) Yes, subject to all proper deductions therefrom ; (*b*) Does not arise.

The second question is concerned with the manner in which three sums paid by or on behalf of the executors in respect of certain annuities should be borne as between the tenant for life and the remaindermen. The three grazing properties which have been mentioned came to the testator under a provision in the will of his

(1) (1945) 72 C.L.R., at pp. 527, 530.
(2) (1945) 72 C.L.R., at p. 533.
(3) (1951) 84 C.L.R., at p. 546.

deceased father. By that will, the three station properties were directed to be held upon trust, after the death of the testator's mother who took a life interest, for the testator absolutely, but, as to the Jarramongup property, subject to and charged with the payment to each of three named daughters (the testator's sisters) during her life of an annuity of £150. The father's will was made in 1917, but the evidence does not disclose when he died. The mother died in 1933.

At the death of the testator, which occurred on 25th September, 1950, the three annuities were still charged on Jarramongup. As has already been mentioned, the three properties were immediately sold by the executors. Certain delays in completion occurred, and it was not until January 1952 that settlement was effected and the purchase money received. In order to make title to Jarramongup, the executors procured the annuitants to discharge their annuities in consideration of the purchase of annuities from the Australian Mutual Provident Society in the names of the father's executors. In the interval between the death of the testator and the discharge of the annuities, the three sums now in question were paid to the annuitants. The first was a sum of £385 10s. 0d., which was paid in October 1950, in respect of the annuity year ending on the 29th of that month. This sum satisfied the annuities which were accruing due but had not become payable when the death of the testator occurred. The second was a sum of similar amount, and was paid in respect of the next annuity year, expiring on 29th October 1951. The third was a sum of £32 2s. 6d., paid in February 1952, by way of a quarterly instalment of one of the annuities, that instalment having fallen due, or being treated as having fallen due, on 29th January 1952.

*Virtue* J. held that the burden of these payments ought not to be apportioned between income and capital by an application of the rule in *Allhusen* v. *Whittell* (1), but should be borne by the income of the residuary estate, save that the first payment should fall primarily upon the corpus of the estate to the extent that the share contributed by operations on Jarramongup Station during the year prior to 29th October 1950 towards the net profit of the testator's grazing business during that period was sufficient for the purpose. The exception was made because his Honour held that, while the proceeds of the sale of wool shorn after the death belonged to corpus, they should nevertheless be regarded as income, so far as they were attributable to that property, for the purpose of deciding the incidence of the first annuity payment.

(1) (1867) L.R. 4 Eq. 295.

H. C. OF A. 1952. HASSELL v. PERPETUAL EXECUTORS TRUSTEES & AGENCY CO. (W.A.) LTD. AND BALL. Dixon C.J. Webb J. Fullagar J. Kitto J.

In deciding that the rule in *Allhusen* v. *Whittell* (1), was inapplicable the learned judge was clearly right. The rule requires that, as between the life tenant and the remainderman of a settled residuary estate, the liabilities which must be met or provided for before the residuary estate can be ascertained are to be treated as discharged neither wholly out of income nor wholly out of corpus but in just proportions out of both. The rule, which applies unless a contrary intention is indicated by the will or is to be inferred from the nature of the property or the circumstances of the case, rests upon a *prima facie* presumption that the gift of income to the life tenant is intended to comprise, not the income of the entire estate, but the income of so much of the estate as exceeds what is needed to meet the testator's liabilities and the non-residuary dispositions of his will. An annuity is apportionable under the rule if the testator was under a personal liability to pay it; the peculiar character of such a liability has no other consequence than to require the adoption of an appropriate method of giving effect to the rule, and two formulae have been evolved for the purpose: *Halsbury, Laws of England*, 2nd ed., vol. 14, p. 368, pars. 689, 690; vol. 27, p. 222, par. 399. But where an annuity, though charged upon property forming part of the testator's estate, was not a personal liability of the testator and therefore is not a liability which must be discharged before the settled residue is ascertained, the rule has no application. This is the effect of the decision of the Court of Appeal in *In re Darby*; *Russell* v. *MacGregor* (2). In that case, the residuary estate settled by the will of a testatrix included property which had come to her under her father's will subject to and charged with the payment by her of an annuity to a third person. The Court of Appeal, having held that the annuity was payable primarily out of the income of the property upon which it was charged, with recourse to capital if the income should be insufficient, held also that by accepting the property subject to the charge the testatrix had not assumed a personal liability to pay the annuity. In the absence of a personal liability the Court held that the intention of the testatrix must be taken to have been that the manner in which the annuity should be borne as between her life tenant and remainderman should not be different from the manner in which the annuitant was entitled to have it paid. Accordingly the decision was that the rule in *Allhusen* v. *Whittell* (1) did not apply, and a declaration was made that the annuity was to be deemed for all purposes to be payable wholly out of the income of the property representing the father's estate, except in so far as such

(1) (1867) L.R. 4 Eq. 295. (2) (1939) Ch. 905.