

31,1951

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IN THE PRIVY COUNCIL

No. 31 of 1951

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N: THE PERPETUAL EXECUTORS TRUSTEES
AND AGENCY COMPANY (W.A) LIMITED
the Executor of the Will of
Patrick Andrew Connolly deceased
Appellants

- and -

GEORGE ALFRED MASLEN, JOHN
ANDREW MASLEN, KENNETH GEORGE
MASLEN and RICHARD WALLACE
MASLEN Respondents

CASE FOR THE APPELLANTS

1. This is an appeal by special leave from the judgments and order of the High Court of Australia dated the 5th day of December 1950 whereby the High Court by a majority (Latham C.J., and Kitto J., Fallager J, dissenting) allowed the Appellants' appeal from an order of Walker J. in chambers in the Supreme Court of Western Australia dated the 14th day of June 1950.
- 10 2. The issue for determination in this appeal is whether on the true construction of the Wool Realisation (Distribution of Profits) Act 1948 (No. 87 of 1948) the Appellants as Executors of the Will of Patrick Andrew Connolly deceased are entitled to a one half share of two sums of money distributed by the Australian Wool Realisation Commission in pursuance of the provisions of the said Act.
- 20 3. The National Security (Wool) Regulations made by the Governor-General on the 28th September of 1939 in pursuance of the powers conferred by the National Security Act 1939 provide for the carrying out of an arrangement made between the

Government of Great Britain and the Government of the Commonwealth for acquiring, in connection with the war between His Majesty the King and Germany, all wool produced in Australia with certain exemptions. The said Regulations in particular provide (a) that all wool grown in Australia shall be compulsorily acquired; (b) that the Regulations shall be administered by the Central Wool Committee; (c) that all growers of wool shall submit their wool to authorised persons for appraisal; and (d) that every grower shall be paid the appraised value. Regulation 30 provides as follows :-

"30. (1) All moneys payable by the Government of Great Britain under the arrangement made by that Government with the Commonwealth for acquiring Australian Wool shall be received by the Central Wool Committee and out of such moneys the Central Wool Committee shall defray all costs, charges and expenses of administering these Regulations, and make the payments for wool to the suppliers.

(2) Any moneys which may be received by the Central Wool Committee from the Government of Great Britain under or in consequence of such arrangement over and above the purchase price payable by such Government thereunder for the wool and any surplus which may arise shall be dealt with as the Central Wool Committee shall in its absolute discretion determine".

4. The Wool Realisation Act 1945 (No. 49 of 1945) gives statutory approval to an agreement between the Governments of the United Kingdom, the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa for the orderly disposal of stocks of wool accumulated during the war. The said Act provides, inter alia, that the National Security (Wool) Regulations aforesaid shall be continued in force, that the disposal of such accumulated stocks shall be carried out by a Company entitled "The Joint

10 Organisation" in which the shares are to be held by nominees of the four Governments and that there shall be set up an Australian Realisation Commission which will be the subsidiary in Australia of the Joint Organisation and which shall have and perform all the duties, and shall have and may exercise all the powers, authorities and functions of the Central Wool Committee under the National Security (Wool) Regulations aforesaid and other statutory Regulations governing the disposal of wool and sheep-skins.

5. On the 30th day of June 1946 the compulsory acquisition of wool ceased but the Joint Organisation continued and still continues to market the said accumulated stocks of wool.

20 6. The Wool Realisation (Distribution of Profits) Act 1948 (No. 87 of 1948) provides for the distribution of any ultimate profits accruing to the Commonwealth under the Wool Disposals plan and for other purposes. The sections of the said Act which are material to this appeal are as follows :-

"4. In this Act, unless the contrary intention appears -

30 "participating wool" means wool appraised under the National Security (Wool) Regulations (whether under those Regulations when in force under the National Security Act 1939, or that Act as amended, or under those Regulations when in force under the Wool Realisation Act 1945, or that Act as amended), being wool which was listed as participating wool in the appraisal catalogue used by the appraisers for the purpose of that appraisal;

40 "the wool disposals profit" means the credit balance, if any, found to have accrued to the Commonwealth upon the taking of an account of -

(a) The Commonwealth's share in the ultimate balance of profit (or loss) arising from

the transactions of the Joint Organisations; and

- (b) the moneys received by the Commonwealth from the Government of the United Kingdom in pursuance of the arrangement between the Commonwealth and that Government for the sharing of profits arising from the disposal of sheepskins acquired under the National Security (Sheepskins) Regulations.

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"5. As soon as practicable after the wool disposals profit has been ascertained, the Treasurer shall notify the amount thereof in the Gazette, and the amount so notified shall, for all purposes of this Act, be the amount of the wool disposals profit.

"6. (1) At any time before the wool disposals profit has been ascertained, the Minister may, with the approval of the Treasurer and after consultation with the Commission, and if he is satisfied that the financial position under the disposals Plan justifies his so doing by notice published in the Gazette, declare an amount to be available for distribution under this Act out of the expected net profit.

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(2) The moneys referred to in paragraph (b) of the definition of "the wool disposals profit" in section four of this Act shall not be taken into account by the Minister for the purposes of the last preceding sub-section.

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(3) When -

- (a) the wool disposals profit has been ascertained; and
- (b) the expenses and charges of the Commission in administering this Act (other than commission

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payable to brokers) including the estimated expenses and charges of a final distribution, have been certified by the Commission to the Minister,

10 the Minister shall, by notice published in the Gazette, declare a final amount to be available for distribution under this Act, being an amount equal to the excess of the net profit over the sum of the amounts (if any) in respect of which declarations have been made under sub-section (1) of this section.

20 (4) The amount certified by the Commission in pursuance of paragraph (b) of the last preceding sub-section shall, for all purposes of this Act, be deemed to be the amount of the expenses and charges of the Commission in administering this Act (other than commission payable to brokers).

"7. (1) Subject to this Act, an amount equal to each declared amount of profit shall be distributed by the Commission in accordance with this Act.

30 (2) There shall be payable by the Commission, out of each amount to be distributed under this Act, in relation to any participating wool, an amount which bears to the amount to be distributed the same proportion as the appraised value of that wool bears to the total of the appraised values of all participating wool.

(3) Subject to this Act, an amount payable under this Act in relation to any participating wool shall be payable to the person who supplied the wool for appraisalment.

40 (4) Where two or more persons jointly supplied participating wool of appraisalment, those persons shall, for the

purpose for determining their claims in relation to that wool in any distribution under this Act, be treated as one person.

"9. (1) Where any participating wool was supplied for appraisalment by -

- (a) a person whose affairs have at any subsequent time been administered, or are being administered, under any of the provisions of the Bankruptcy Act 1924-1948, by a trustee; 10
- (b) a person who has died and whose estate has at any subsequent time been, or is being, so administered; or
- (c) a personal representative in the administration of an estate which has at any subsequent time been, or is being, so administered; 20

an amount which would otherwise be payable under this Act to the person who supplied the participating wool or his personal representatives shall, subject to this section, be payable to the trustee.

"10. (1) Where participation wool was supplied for appraisalment by a company which is defunct, an amount which would otherwise be payable under this Act to the company may be paid by the Commission to such person as appears to the Commission to be justly entitled to receive it. 30

(2) Where participating wool was supplied for appraisalment by a partnership which has been dissolved, an amount which would otherwise be payable under this Act to the partnership may be paid by the Commission to any former partner or partners (including the personal representatives of a deceased 40

former partner).

(3) Where an amount has been paid in pursuance of this section, the rights, duties and liabilities of the person to whom it is paid in respect of the amount shall be the same as if it were part of the proceeds of a sale of the wool by the company or partnership, made at the time of the supply of the wool for appraisalment.

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"11. Subject to section nine of this Act, where participating wool was supplied for appraisalment by a person who has died -

(a) any amount which would otherwise be payable under this Act to that person shall be payable to the personal representatives of that person;

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(b) the rights, duties and liabilities of the personal representatives in respect of the amount shall be the same as if it were part of the proceeds of a sale of the wool by the deceased person made at the time of the supply of the wool for appraisalment.

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"28. No action or proceedings shall lie against the Commission or the Commonwealth for the recovery of any moneys claimed to be payable to any person under this Act, or of damages arising out of anything done or omitted to be done by the Commission in good faith in the performance of its functions under this Act.

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"29. Subject to this Act and the regulations, a share in distribution under this Act, or the possibility of such a share, shall be, and be deemed at all times to have been, absolutely inalienable prior to actual receipt of the share, whether by means of, or in consequence of, sale, assignment, charge, execution or otherwise".

7. At all material times between the year 1939 and the 30th day of June 1946 Patrick Andrew Connolly deceased and one Claude Ashley Laffer (now deceased) were carrying on at Mardathuna Station in the State of Western Australia a pastoral business in partnership under the name of "Mardathuna Pastoral Company". Wool was supplied by the partnership for appraisement under the National Security (Wool) Regulations and the appraised value was paid to the partnership in accordance with the said Regulations.

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pp. 4 - 9.

8. By a Deed of Assignment dated the 17th day of June 1946 the said Patrick Andrew Connolly deceased assigned to the Respondents George Alfred Maslen, John Andrew Maslen and Kenneth George Maslen all his right title and interest in the Mardathuna Pastoral Company, the assignment being expressed to take effect as from the first day of July 1946.

pp.53-7.

9. By a Deed of Assignment dated the 2nd. October 1946 the said Claude Ashley Laffer conveyed to the Respondent George Alfred Maslen all his right title and interest in the Mardathuna Pastoral Company.

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10. After the 21st December 1948 the following sums of money were received under the provisions of the said Act in respect of the said wool marketed as aforesaid:

By the Appellants as Executors of the Will of Patrick Andrew Connolly deceased the sum of £2,132. 9. 2. from the Westralian Farmers Co-operative Limited.

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By the Respondents the sum of £562.14.11. from Elder Smith & Co. Ltd.

The Appellants and the Respondents thereafter agreed to hold the said monies pending the determination of the question now in issue.

p.1.

11. By an originating summons dated the 17th day

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of February 1950, (No. P.5 of 1950) in the Supreme Court of Western Australia the Appellants instituted

THE PRESENT SUIT.

By the said originating summons they applied for the determination of the following questions:-

- 10 1. Did the above named deed dated the 17th day of June 1946 validly assign to the defendants the interest or any part of the interest of the above named Patrick Andrew Connolly deceased in the amount of £2132.9.2. and in the amount of £562.14.11. paid in pursuance of the Wool Realisation (Distribution of Profits) Act No. 87 of 1948 in respect of wool marketed by the Mardathuna Pastoral Co.
2. Have the defendants any right title or interest in the said moneys or any of them by virtue of the said deed.
- 20 12. The learned Judge who adjudicated upon the said Summons held, inter alia, that such proportion of the monies as had been distributed under the Act in respect of the said wool marketed before the 1st July 1946 should be held in trust for the estates of the said Patrick Andrew Connolly and of the said Claude Ashley Laffer respectively in equal shares. He made an Order accordingly and further ordered that the costs of all parties as between Solicitor and Client should be paid out of the sums of money which were the subject of the proceedings prior to any apportionment thereof. pp. 10-14. p. 15.
- 30 13. The Respondents appealed to the High Court of Australia.
14. The judgment of Latham, C.J. included the following passages:-
- "The Australian wool had been purchased by the United Kingdom Government and belonged p.20,1.17.

to it and under the agreement it became the property of the United Kingdom Government and the Commonwealth Government. It did not belong to the wool-growers who had already been paid for it in accordance with the appraised values.

The Commonwealth Parliament, however, decided that the moneys received under the agreement should be distributed to the persons who supplied the wool. The Commonwealth was under no obligation of any kind so to distribute the moneys. The moneys were not paid to the suppliers of the wool in discharge of a debt or by reason of any obligation existing before the 1948 Act was passed. The 1948 Act provided in Section 28 that no action or proceedings should lie against the Commission or the Commonwealth for the recovery of any moneys claimed to be payable to any person under the Act. It is, in my opinion, plain that the moneys paid under the Act had no relation to the discharge of any obligation but more strictly a gift made by the Commonwealth to persons selected in accordance with the Act: see In the Estate of W.O. Watt deceased, 25 S.R. N.S.W. 467: 38 C.L.R. 12: Perpetual Executors etc. Co. v. Federal Commissioner of Taxation, 67 C.L.R. 1. The Commonwealth Parliament was entitled to specify the conditions upon which the gift could be accepted and one of the conditions is to be found in Section 10, which has already been quoted."

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p. 21,1.8.

"It must, I think, be conceded that in 1946, when the assignments of the shares in the partnership were made, there was no debt which could be regarded as represented by the moneys which have since been paid. There was then no right which could be assigned. The terms of Sec. 29 made it impossible to hold that the assignments in 1946 of the shares in the partnership then operated as assignments of what ultimately proved (after the 1948 Act was passed) to be an interest in the

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10 moneys now in question. Sec. 29 prevents the assignment of even a possibility of a share in a distribution under the Act. No attempted assignment could in 1946 or at any time thereafter, have given an assignee thereunder any right against the Commonwealth Government or any other Government. The first question in each originating summons in these two appeals enquires whether the deeds of assignment of shares in the partnership validly assigned the interest or any part of the interest of the partners in the moneys paid under the Act Sec. 29 requires these questions to be answered in the negative.

20 But this answer to the first question does not necessarily mean that the personal representatives of deceased partners, after the partnership was dissolved, are as of course entitled to moneys paid under the Act in respect of wool supplied by the partnership. It is necessary to consider certain provisions of the Act which may modify what would otherwise be the result of Sec. 29 considered by itself. Sec. 29 is not an absolute provision. It is introduced by the words "subject to this Act". These words show that, though assignment by act of parties or any alienation by other means is prohibited, other provisions of the Act may produce the result that some person other than the person who, apart from such provisions, would be entitled to retain moneys paid under the Act, may become so entitled under such other provisions".

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40 "The special provision relating to dissolved partnerships produces results in the cases to which it applies which are necessarily different from the results in cases where there have been dealings by persons who were not members of a partnership which has been dissolved. In the former cases the Act expressly provides in sec. 10 (3) that the rights, duties and liabilities of the p. 22, 1.38.

actual recipient are to be determined upon the hypotheses that the wool had been sold by the partnership at the time when it was supplied for appraisalment. There is no such provision applying to other cases. Effect must be given to section 10 (3) and that can be done, I think, only by applying the ordinary law relating to partnerships, notwithstanding sec. 29. A transaction in a case where there was no dissolution of a partnership may have to be ignored by reason of sec. 29. But, when there has been a dissolution of a partnership, reference may properly be made to a contemporaneous or subsequent transaction in order to ascertain the rights, duties and liabilities for the preservation and enforcement of which sec. 10 (3) specifically provides.

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In the Supreme Court sec. 10 (3) was treated as bringing about the result that the rights to the moneys should be determined upon the basis that the wool should be deemed to have been sold at the time of the supply for appraisalment and that the money should be regarded as having been received at the same time. If that had been the case then the partners Connolly and Laffer, would have been entitled to the money in equal shares".

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p.24,1.32.

"Sec. 49 of the Partnership Act provides that "After the dissolution of a partnership the rights and obligations of the partners continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun, but unfinished, at the time of the dissolution.." The effect of sec. 10 of the Wool Realisation (Distribution of Profits) Act 1948 is that the moneys paid under the Act shall be distributed upon the basis that wool was sold by the partnership but not paid for at the time when it was supplied for appraisalment. Therefore the supply of the wool and the payment of the money must be regarded as a transaction which

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was begun but unfinished at the time of the dissolution of the partnership. What were the rights of the partners? If Connolly and Laffer had lived and had either remained partners or had dissolved the partnership, and the money had been paid, the money would, subject to any agreement between them have been equally divisible between them. But in the present case Connolly and Laffer had transferred all their interests to the appellants. The appellants in the first case have all the rights which Connolly would have had or his executors could have in relation to any partnership property (including property coming to the partnership after the dissolution) against Laffer or his executrix and G. A. Maslen, has all the corresponding rights of Laffer and his executrix as against Connolly or his executor".

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"The moneys in question must be treated in the same way as if they represented wool sold in 1946 and not paid for till after the dissolution. Each partner (or his estate) would prima facie be entitled to one-half of these moneys. Their respective assignees now have the rights of their assignors, so that the appellants in the first case are entitled to one-half and G.A. Maslen, appellant in the second case, is entitled to one-half of the moneys".

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p. 26, l. 9.

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The judgment of Kitto, J. included the following passage:-

"The assignments were effectual as against the assignors to vest in the assignees the beneficial interests of the assignors respectively in the assets of the partnership. Section 42 of the Partnership Act prescribes, negatively and positively, what is to be the effect of an assignment by a partner of his share in the partnership, "as against the

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p. 30, l. 34.

other partners"; but it does not prevent such an assignment from taking full effect according to its terms as against the assignor.

It follows that if the partnership, instead of supplying the wool for appraisement in 1946, had then sold it, and if a portion of the purchase money had been still outstanding when the assignments were executed, each assignment would have vested in the assignee the beneficial interest of the assignor in the partnership's right of action for the unpaid purchase money. The partnership was eventually dissolved by one means or another, and there is no suggestion that any partnership debts or liabilities remain undischarged. According, in my opinion, if the unpaid purchase money had come in on the date when in fact the sum paid under the Wool Realisation (Distribution of Profits) Act 1948 was received, it would have belonged beneficially to G.A. Maslen and his sons and to G.A. Maslen in equal moieties.

Section 10 (3) of the Act provides that the rights, duties and liabilities of the person to whom such a sum was paid under the Act shall be the same as if it were the proceeds of a sale of the wool by the partnership, made at the time of the supply of the wool for appraisement. In my opinion the effect of this provision, as applied to the facts of this case, is, according to the natural meaning of the words, that the sum should be paid as to one half to G.A. Maslen and his sons and as to the other half to G.A. Maslen".

The judgment of Fullagar J. contained the following passages:-

"Since there is no option right to any payment and since it is only by virtue of the Act that any payment can lawfully be made, it must be primarily to the Act that we look in ascertaining who is beneficially entitled to any moneys paid".

obvious enough the wool produced the profit, and the main who produced the wool should receive the profit".

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10 "Sec. 10 (3) has, in my opinion, no such meaning or effect as is attributed to it by the appellants. It may be conceded that the subsection has not been very happily drafted, but that the language used really means is, I think that the share of wool profit, when paid, is to be treated in the hands of the recipient as an asset of the dissolved partnership possessing the character of money paid for wool sold by the partnership. The words mean that, and, in my opinion, they do not mean anything more". p. 40,1.35.

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20 "The appellants must, if they are to succeed, assert that the provisions of Sec. 29 are relaxed by Sec. 10 (3) and attribute assignability to an expectant share. But they must at the same time deny the effectiveness of an assignment of an expectant share as such. An expectant share of the wool profit, they say, is not and never was assignable by an instrument which described it as such, but is made retrospectively assignable by an instrument which did not refer to it and was never intended to refer to it". p. 41,1.28.

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30 "Other very remarkable results follow if the appellant's argument is accepted. Some of its consequences, including that which I have mentioned above and which I would regard as practically amounting to a self contradiction, may be summarised as follows:- p. 42,1.1.

- 1. It has the practical effect of attributing assignability to something which, whether assignable in equity or not, is made non-assignable by sec. 29, and which it was

obviously the general policy of the legislature to treat as having been at all times incapable of assignment.

2. An assignment in terms by partners of a share in the wool profit as such will be of no effect, although the parties intended that any share ultimately receivable should be received by the assignee, and although an adequate price was paid by the assignee. But an assignment of book debts will be effective to carry the share ultimately receivable, although the parties never gave a moment's thought to any share possibly receivable and the consideration for the assignment was arrived at without reference to any such share. The position will be the same if the parties deliberately and consciously excluded any share of wool profit from their minds. 10

3. An assignment of all the assets of a business including book debts, by a single individual who then goes out of business will not carry that individual's share of the wool profit. But a similar assignment by partners who then dissolve partnership will carry the partners share of the wool profit. 20

4. An assignment of the assets of a business, including book debts, or a simple assignment of book debts, by partners who remain in partnership after the assignment will not carry their share of the wool profit. But, if they dissolve partnership after the assignment, the assignment will carry their share of the wool profit. 30

5. If they made the assignment intending to dissolve the partnership, and the Act became law before they had dissolved it, they could postpone dissolution until after payment, and so by a unilateral act affect the destination of a possibly very large sum of money. I say this on the assumption that the material date for the purposes of sec. 10 is the date of payment, but. I think that 40

this must be so, because obviously a company might become defunct between the commencement of the Act and the date of payment, and, if sec. 10 did not apply no payment could be made to anybody.

10 6. The position must, of course, be the same under sec. 11 (b) as under Sec. 10 (3). The consequences of the appellant's view need not be stated again mutatis mutandis by reference to sec. 11 (b). But, because the position is somewhat simpler, it becomes more startling if we look at sec. 11 (b). It will be sufficient to take one example. A on 1st July 1946 assigns all the assets of his business, including book debts to B. C on 1st July 1946 assigns all the assets of his business, including book debts to D. Each has done precisely the same thing: assume assignments in identical terms. A dies the day before payment under the Act is made. C dies the day after payment is made. A's assignment will carry his share in the wool profit, which will belong to his assignee. C's will not: the moneys will be payable to him and belong to him".

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The High Court therefore made an Order that the first question in the Originating Summons be answered in the negative and that the second question therein be answered as follows, namely

30 "that the Appellants are entitled in equal shares to one half of each of the sums of £2,132. 9. 2. and £562.14.11. respectively paid in pursuance of the Wool Realisation (Distribution of Profits) Act No. 87 of 1948 in respect of wool marketed by The Mardathuna Pastoral Company" and that the costs of all parties should be taxed, those of the Respondent being taxed as between Solicitor and Client and that all such costs should be paid out of the said sums of £2,132.9.2. and £562.14.11.

40 15. Special Leave to appeal to His Majesty in Council was granted by an Order-in-Council dated

the 11th day of July, 1951 upon the footing that it should be reserved to the Respondents to raise as a preliminary point that the Appeal does not lie without a certificate of the High Court of Australia.

The Appellants submit that this Appeal should be allowed and the aforesaid order of the High Court of Australia set aside and the order of Walker J. restored for the following amongst other

R E A S O N S

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1. BECAUSE Latham, C.J. was right in holding that the terms of Section 29 of the Wool Realisation (Distribution of Profits) Act prevented the assignment of even a possibility of a share in a distribution under the Act, but wrong in holding that this section was modified by other sections of the said Act.
2. BECAUSE Latham, C.J. was right in holding that moneys distributed under the said Act have no relation to the discharge of any obligation to the suppliers of wool and are a gift made by the Commonwealth to persons selected in accordance with the Act; but wrong in holding that the assignees of the share of a partner in a partnership which has been dissolved are entitled under the Act to claim or receive such gift. 20
3. BECAUSE Latham, C.J. was wrong in holding that the moneys in question must be treated in the same way as if they represented wool sold in 1946 and not paid for until after the dissolution. It is submitted that in so holding he was importing into the section a provision which it does not contain. 30
4. BECAUSE Kitto, J. was wrong in holding that the sums paid under the aforesaid Act were equivalent to or could be regarded as, unpaid purchase money. It is submitted such a conclusion is contrary to the manifest intention of the Act namely that all payments should go to those who actually produced the 40

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wool for appraisement.

5. BECAUSE the dissenting judgment of Fullagar, J. was right.
6. BECAUSE the order of Walker J. was right and should be restored.
7. BECAUSE no question arises in this Appeal as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States and no certificate of the High Court of Australia pursuant to Section 74 of the Commonwealth of Australia Constitution is necessary.

T. S. LOOCH
DINGLE FOOT

No. 31 of 1951

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT OF
AUSTRALIA

Between

THE PERPETUAL EXECUTORS TRUSTEES
AND AGENCY COMPANY (W.A.) LIMITED
the Executor of the Will of
Patrick Andrew Connolly deceased

- and -

GEORGE ALFRED MASLEN, JOHN ANDREW
MASLEN, KENNETH GEORGE MASLEN and
RICHARD WALLACE MASLEN

CASE FOR THE APPELLANTS

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