

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA IN
JURISDICTION

IN ITS APPELLATE JURISDICTION
LONDON

21 JUL 1953

Between

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

Appellant
(Plaintiff)

- and -

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

Respondents
(Defendants)

RECORD OF PROCEEDINGS

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LEGAL STUDIES,
25, RUSSELL SQUARE,
LONDON,
W.C.1.

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O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA
IN ITS APPELLATE JURISDICTION

BETWEEN

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

Appellant

- and -

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

Respondents.

RECORD OF PROCEEDINGS

and JUDGMENTS of the Supreme Court of
Western Australia and the High Court of
Australia.

No. 1.

ORIGINATING SUMMONS

In the
Supreme Court
of Western
Australia

20 L E T the above named defendants attend the
Judge in Chambers at the Supreme Court Perth at
the time specified in the margin hereof upon the
application of the above named plaintiff for the
determination of the following questions namely:-

No. 1.
Originating
Summons
17th February
1950

30 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.

In the
Supreme
Court of
Western
Australia

2. Have the defendants any right title or interest in the said moneys or any of them by virtue of the said deed.

DATED this 17th day of February 1950.

No. 1. NOTE: If you do not attend either in person or by a Solicitor at the place above mentioned at the time mentioned in the indorsement hereon such order will be made and proceedings taken as the Judge may think just and expedient.

Originating Summons
17th February 1950,
continued

It is intended to serve this summons on the defendants only. 10

For hearing on Tuesday the 28th day of February at the hour of 10.30 o'clock in the forenoon.

This summons was taken out by Hubert Parker & Byass of 15 Howard Street, Perth. Solicitors for the Plaintiff.

No. 2.
Affidavit
of Percy
Granville
Carter sworn
14th February 1950

No. 2.

AFFIDAVIT of PERCY GRANVILLE CARTER
sworn 14th February 1950.

I, PERCY GRANVILLE CARTER of 96 Florence Road Nedlands in the State of Western Australia Company Secretary make oath and say as follows:- 20

1. I am the Secretary of The Perpetual Executors Trustees and Agency Company (W.A.) Limited.
2. Patrick Andrew Connolly late of City Mutual Buildings 62 Saint George's Terrace Perth in the State of Western Australia pastoralist deceased died on the 28th day of December 1946 after having made and duly executed his last Will and testament bearing date the 1st day of August 1946 whereof he appointed the said Company to be the Executor. 30
3. Probate of the said Will was granted by this Honourable Court to the said Company on the 24th day of December 1947.
4. The said Patrick Andrew Connolly deceased and one Claud Ashley Laffer (now deceased) carried on in partnership the business of pastoralists

under the name of the Mardathuna Pastoral Company. The said Patrick Andrew Connolly deceased and the said Claud Ashley Laffer deceased carried on the said business in partnership for many years and at all times relevant to this present application until the 17th day of June 1946.

In the Supreme Court of Western Australia Nō.2.

Affidavit of Percy Granville Carter sworn 14th February 1950, continued

10 5. By a deed dated the 17th day of June 1946 the said Patrick Andrew Connolly deceased assigned to the defendants all his right title and interest in the said Mardathuna Pastoral Company in accordance with the terms and conditions more particularly set forth in the said deed. A true copy of the said deed is hereunto annexed and marked with the letter "A".

20 6. The said Patrick Andrew Connolly deceased and the said Claud Ashley Laffer deceased were entitled to the assets and the profits of the said partnership business in equal shares and to the best of my knowledge information and belief there was no written partnership agreement between them in connection with this partnership.

7. Between the years 1939 and 1946 inclusive certain wool the property of the said partnership was marketed through the Westralian Farmers Co-operative Limited and through Elder Smith and Company Limited.

30 8. In the year 1948 the Wool Realisation (Distribution of Profits) Act being No. 87 of 1948 was passed by the Commonwealth Government. In respect to the said wool marketed as aforesaid the following sums of money have been received under the provisions of the said Act:

By the Perpetual Executors Trustees and Agency Company Limited as executor of the Will of Patrick Andrew Connolly deceased the sum of £2,132.9.2. from the Westralian Farmers Co-operative Limited.

By the defendants the sum of £562.14.11. from Elder Smith and Company Limited.

40 9. The Plaintiff and the defendants have agreed to hold the said monies pending the determination

In the Supreme Court of Western Australia No. 2. Affidavit of Percy Granville Carter sworn 14th February 1950, continued

of the question asked in the summons herein.

SWORN at Perth in the State of Western Australia this 14th day of February 1950 Before me) P. G. CARTER

H. N. WALKER

A Commissioner of the Supreme Court of Western Australia for taking affidavits.

This affidavit is filed on behalf of the Plaintiff.

No. 3.

No. 3.

Exhibit "A" referred to in the Affidavit of Percy Granville Carter

EXHIBIT "A" referred to in the Affidavit of Percy Granville Carter.

10

This is the exhibit marked "A" referred to in the annexed affidavit of Percy Granville Carter and sworn before me this 14th day of February 1950

H. N. WALKER

A Commissioner for taking affidavits

AN INDENTURE made the 17th day of June One thousand nine hundred and forty six BETWEEN PATRICK ANDREW CONNOLLY of City Mutual Buildings 62 Saint George's Terrace Perth in the State of Western Australia pastoralist of the one part GEORGE ALFRED MASLEN of Mardathuna Station in the State of Western Australia pastoralist of the second part JOHN ANDREW MASLEN of Mardathuna Station aforesaid pastoralist of the third part KENNETH GEORGE MASLEN of Mardathuna Station aforesaid pastoralist of the fourth part and RICHARD WALLACE MASLEN of Mardathuna Station aforesaid pastoralist of the fifth part

20

WHEREAS Patrick Andrew Connolly for some time past has been carrying on the business of pastoralists and graziers in partnership with one Claud Ashley Laffer of 17 Highway Nedlands in the said State Pastoralist under the name of the "Mardathuna Pastoral Company" on the station known as Mardathuna Station in the Gasgoyne District of

30

the said State A N D WHEREAS the parties hereto have agreed to make an exchange of the real and personal property hereinafter mentioned in manner hereinafter appearing A N D WHEREAS the said Richard Wallace Maslen is an infant and it is intended that on his coming of age he shall ratify and confirm these presents

In the Supreme Court of Western Australia No. 3. Exhibit "A" referred to in the Affidavit of Percy Granville Carter, continued

N O W THIS INDENTURE WITNESSETH:

10 That in consideration of the said agreement and in consideration of the assignment hereinafter contained by the said George Alfred Maslen to the said Patrick Andrew Connolly and for divers other good causes and considerations -

1. The said Patrick Andrew Connolly hereby assigns to the said George Alfred Maslen, John Andrew Maslen and Kenneth George Maslen all his right title and interest in:-

(a) All those lands being:-

20 (i) All those lands situate in the district of Gasgoyne in the said State comprising 314,405 acres or thereabouts and being the whole of the land comprised in Lease No. 394/694 Crown Lease 328/1936.

(ii) All those lands situate in the district of Gasgoyne in the said State comprising 590 acres or thereabouts and being the whole of the land comprised in Lease No. 1091/41A.

30 All of which said pieces of land are standing in the names of the said Claud Ashley Laffer and Patrick Andrew Connolly as tenants-in-common.

(b) All the buildings erections and improvements fixtures and fittings standing in or being upon the said lands.

40 (c) The goodwill of the business of the Mardathuna Pastoral Company carried on by the said Patrick Andrew Connolly and Claud Ashley Laffer upon and in connection with the said lands.

In the
Supreme
Court of
Western
Australia
No.3.
Exhibit "A"
referred to
in the Affi-
davit of
Percy
Granville
Carter,
continued

(d) All movable machinery engines plant vehicles furniture stores stock-in-trade utensils chattels and effects and the sheep horses cattle and live-stock employed on the said business or belonging thereto or being in or upon the said lands together with the benefit of all contracts and engagements and book debts to which the said Patrick Andrew Connolly and Claud Ashley Laffer may be entitled in connection with the said business together with all other assets of the said business. 10

(e) All moneys due by the said Mardathuna Pastoral Company to the said Patrick Andrew Connolly including the sum of Seven thousand pounds loaned by the said Patrick Andrew Connolly to the said Mardathuna Pastoral Company.

to be held by them as tenants-in-common in the following shares and in manner following that is to say:-

One equal fourth part to the said George Alfred Maslen his executors administrators and assigns, 20
one equal fourth part to the said John Andrew Maslen his executors administrators and assigns
one equal fourth part to Kenneth George Maslen his executors administrators and assigns, and one equal fourth part to the said George Alfred Maslen IN TRUST for the said Richard Wallace Maslen his executors administrators and assigns if and when he shall attain the age of twenty one years and shall within a reasonable time thereafter by deed ratify and confirm these presents and if the said Richard Wallace Maslen dies before attaining the age of twenty one years or fails to ratify these presents at the time and in the manner aforesaid then IN TRUST for the said George Alfred Maslen John Andrew Maslen and Kenneth George Maslen and their respective administrators executors and assigns as tenants-in-common in equal shares. 30

2. AND IT IS HEREBY AGREED that the said George Alfred Maslen may apply the whole or such part as he in his discretion shall think fit of the income of the one equal fourth part which he holds in trust aforesaid towards the maintenance education or advancement of the said Richard Wallace Maslen during his minority N O W IT IS FURTHER AGREED that the said George Alfred Maslen shall have power 40

to maintain the share which he so holds in trust as
 aforesaid in its present form of investment and to
 employ the said share so held in trust as aforesaid
 and the income and profits of such share and the
 investments representing the same in the carrying
 on of the said business of the said Mardathuna
 Pastoral Company and shall in respect of such share
 and the income and profits thereof and the
 investments representing the same have as full
 10 powers of management including the mortgaging and
 pledging of the same as he would have if he were
 the absolute owner thereof.

In the
 Supreme
 Court of
 Western
 Australia
 No. 3.
 Exhibit "A"
 referred to
 in the Affi-
 davit of
 Percy
 Granville
 Carter,
 continued

3. The aforesaid property is assigned subject to
 all mortgages easements encroachments and encum-
 brances affecting the same whether registered or
 not and the said George Alfred Maslen John Andrew
 Maslen Kenneth George Maslen and Richard Wallace
 Maslen hereby jointly and severally covenant with
 the said Patrick Andrew Connolly that they will
 20 duly and punctually pay all principal interest and
 other moneys from time to time due and payable by
 the said Patrick Andrew Connolly or by the said
 Mardathuna Pastoral Company under any of the said
 mortgages easements encroachments or encumbrances
 and will duly and punctually perform and/or observe
 all the covenants conditions and stipulations
 contained and/or implied in and do all acts and
 things required to be done under any of the said
 mortgages easements encroachments and encumbrances
 30 and will indemnify and keep indemnified the said
 Patrick Andrew Connolly his heirs executors and
 administrators against all accounts claims demands
 proceedings sales foreclosures or otherwise made or
 arising under or by virtue of any of the said
 mortgages easements encroachments or encumbrances.

4. The said George Alfred Maslen John Andrew
 Maslen Kenneth George Maslen and Richard Wallace
 Maslen do hereby further jointly and severally
 covenant with the said Patrick Andrew Connolly that
 40 they will during the continuance of the terms
 created by the said leases pay the rent reserved
 by the said Leases and perform all the covenants
 by the Lessee therein contained and/or implied and
 will keep the said Patrick Andrew Connolly his
 heirs executors and administrators indemnified
 against all actions expenses claims demands and
 liability on account of the non-payment of the said
 rent or the breach of the said covenants or any

In the
Supreme
Court of
Western
Australia
No.3.
Exhibit "A"
referred to
in the Affi-
davit of
Percy
Granville
Carter,
continued

of them.

5. This assignment shall take effect as from the first day of July One thousand nine hundred and forty six on which day the said George Alfred Maslen John Andrew Maslen Kenneth George Maslen and Richard Wallace Maslen shall be entitled to the possession of all the aforesaid property hereby assigned and to the receipt of the rents and profits thereof. The said George Alfred Maslen John Andrew Maslen Kenneth George Maslen and Richard Wallace Maslen hereby jointly and severally covenant with the said Patrick Andrew Connolly that as from the first day of July one thousand nine hundred and forty six they shall bear pay and discharge all outgoings in respect of the said property and the covenants on their behalf contained in paragraph three and four of these presents shall take effect as from the said first day of July one thousand nine hundred and fortysix

10

AND THIS IDENTURE ALSO WITNESSETH; that in further pursuance of the said agreement and in consideration of the assignment hereinbefore contained and for divers other good causes and considerations:-

20

6. The said George Alfred Maslen hereby assigns to the said Patrick Andrew Connolly his heirs executors administrators and assigns the unencumbered fee simple in possession of all those pieces of land being:-

(a) Portions of Canning Location 13 and being Lots 170 and 171 on deposited plan 3047 and being the whole of the land comprised in Certificate of Title Volume 495 Folio 65.

30

(b) Portion of Canning Location 13 and being part of Lot 172 on Plan 3047 and being the whole of the land comprised in Certificate of Title Volume 591 Folio 65.

(c) Portions of Canning Location 13 and being Lots 149, 150, 151, 166, 167, 168 and 169 on deposited plan 3047 and being the whole of the land comprised in Certificate of Title Volume 540 Folio 28.

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Together with the buildings erections improvements

fixtures and fittings standing therein or being thereon.

In the Supreme Court of Western Australia No. 3. Exhibit "A" referred to in the Affidavit of Percy Granville Carter, continued

7. The said Patrick Andrew Connolly shall be entitled to the possession of the said lands and to the receipt of the rents and profits thereof as from the first day of July one thousand nine hundred and forty six as from which date all outgoings shall be borne paid and discharged by the said Patrick Andrew Connolly and the same shall if necessary be apportioned.

10

8. This transaction is subject to any consent required under The National Security (Economic Organisation) Regulations.

IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year first hereinbefore written

SIGNED SEALED AND DELIVERED by the said PATRICK ANDREW CONNOLLY in the presence of:-

P.A. CONNOLLY

20

Arthur E. Turner
C.D.

SIGNED SEALED AND DELIVERED by the said GEORGE ALFRED MASLEN in the presence of:-

G.A. MASLEN

Arthur E. Turner

SIGNED SEALED AND DELIVERED by the said JOHN ANDREW MASLEN in the presence of:-

J.A. MASLEN

30

O. Mandelowitz.
J.P.

SIGNED SEALED AND DELIVERED by the said KENNETH GEORGE MASLEN in the presence of:-

K.G. MASLEN

O. Mendelowitz.
J.P.

SIGNED SEALED AND DELIVERED by the said RICHARD WALLACE MASLEN in the presence of:-

R.W. MASLEN

Arthur E. Turner

In the
Supreme
Court of
Western
Australia
No. 4.
Judgment
of His
Honour Mr.
Justice
Walker,
22nd May
1950

JUDGMENT of His Honour Mr. Justice Walker.

1. In these two matters the material facts are not disputed and are as follows:-

- (a) For many years prior to the year 1946 Patrick Andrew Connolly and Claud Ashley Laffer (now both deceased) under a verbal partnership agreement between them carried on business together as pastoralists under the name of Mardathuna Pastoral Company as partners in equal shares. 10
- (b) Between the years 1939 and 1946 inclusive the partnership marketed wool produced by them through Westralian Farmers' Cooperative Ltd and Elder Smith & Co. Ltd. respectively.
- (c) Since 21st December 1948 when the Wool Realisation (Distribution of Profits) Act 1948 (C'wealth) came into operation, two sums of money, £2,132.9.2. and £562.14.11. have been distributed under the provisions of that Act in respect of the said wool. 20
- (d) The sum of £2,132.9.2. has been received by the Perpetual Executors Trustees and Agency Company (W.A.) Ltd. as the Executor of the Will of Patrick Andrew Connolly decd. and the sum of £562.14.11. has been received by the defendants in these two proceedings.
- (e) By a deed dated 17th June 1946 Patrick Andrew Connolly assigned to the defendants named in Originating Summons P No.5/1950 all his right title and interest as a partner in the assets of the said partnership - Mardathuna Pastoral Co., which in accordance with the terms of the said deed took effect as from 1st July 1946. 30
- (f) By a deed dated 2nd October 1946 Claud Ashley Laffer assigned to the defendant George Alfred Maslen all his right title and interest as a partner in the assets of the said partnership - Mardathuna Pastoral Company, and in accordance with the terms 40

of the said deed such assignment took effect as from 1st October 1946.

In the
Supreme
Court of
Western
Australia
No.4.
Judgment
of His
Honour Mr.
Justice
Walker,
22nd May
1950,
continued

10 (g) Consequently after 1st October 1946 both the said Patrick Andrew Connolly and Claud Ashley Laffer no longer had any proprietary interest in, or any other legal right to, the former partnership business or the assets thereof, and in their place the defendants named in these two originating summonses with varying interest or shares as between them became the owners in possession of such business and assets, and continued so to be at the time when the said two sums of money, £2,132.9.2. and £562.14.11. were distributed under the above mentioned Act as aforesaid.

20 (h) Patrick Andrew Connolly died on 28th December 1946 and probate of his Will was granted to the Perpetual Executors Trustees and Agency Co. (W.A.) Ltd. as the Executor thereof. Claud Ashley Laffer died on 22nd January 1949 and probate of his Will was granted to his widow Eleanor Forrest Laffer as one of the Executors appointed by the said Will.

30 2. Questions have arisen concerning the person or persons entitled to take the beneficial interest in the said two sums of money which at present are being held in trust pending a decision upon such questions in these proceedings.

3. The Plaintiffs in Originating Summons P No. 5/1950 are concerned only in so far as the estate of Patrick Andrew Connolly deceased may be considered to have a beneficial interest in the said sums of money or either of them. The Plaintiff in Originating Summons L No. 4/1950 is concerned only in so far as the estate of Claud Ashley Laffer deceased may be considered to have a beneficial interest in the said sums of money or either of them.

40 4. The determination of the said questions depends upon an examination of the relevant provisions of the Wool Realization (Distribution of Profits) Act 1948 (C'wealth) and when examining those provisions it must be remembered that when Patrick Andrew

In the
Supreme
Court of
Western
Australia

No.4.
Judgment
of His
Honour Mr.
Justice
Walker,
22nd May
1950,
continued

Connolly and Claud Ashley Laffer respectively in 1946 assigned their said partnership interest to the respective defendants neither of them had in mind or contemplated the possibility of the said Act being subsequently enacted by the Commonwealth Parliament, and the distribution to their partnership of moneys under the said Act. Had such a possibility been in their minds and they had purported to include in the assignments of chattels made by them respectively an assignment of their expectant share of the moneys distributed under the said Act, it is certain that by reason of the provisions of section 29 of the Act such assignments of such expectant shares would have been null and void. 10

5. The relevant provisions of the Act appear to be the following --

- (a) Section 7, which prescribes the ratio in which the moneys available for distribution shall be distributed and the persons to whom such distribution shall be made when such persons are alive and are individuals. 20
- (b) Section 10, which prescribes the persons to whom distribution shall be made when the wool submitted for appraisal was supplied by a company which has since become defunct or by a partnership which has since been dissolved.
- (c) Section 11, which prescribes the person in a fiduciary capacity to whom the distribution shall be made when the person otherwise entitled to such distribution is deceased. 30

6. Under section 10 of the Act it is provided that where participating wool was supplied for appraisal by a partnership which has been dissolved, an amount which would otherwise be payable under the Act to the partnership may be paid by the Commission to any former partner or partners (including the personal representative of a deceased former partner): and that in such case, 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 40

sale of the wool by the partnership made at the time of the supply of the wool for appraisal. According to affidavits filed in these proceedings the participating wool was supplied for appraisal during the period 1939-1946 inclusive, but there is nothing to indicate whether any of such wool was so supplied subsequently to 30th June 1946, and before 31st December 1946.

In the
Supreme
Court of
Western
Australia
No.4.
Judgment
of His
Honour Mr.
Justice
Walker,
22nd May
1950,
continued

- 10 Until 1st July 1946, the partners in the partnership of Mardathuna Pastoral Company were Patrick Andrew Connolly and Claud Ashley Laffer with equal share interests. After 30th June 1946 and until the 1st October 1946 the partners in the said partnership were Claud Ashley Laffer and the defendants named in Originating Summons P 5/1950, as the assignees of Patrick Andrew Connolly, the said Claud Ashley Laffer holding one half interest, and the said defendants as such assignees holding the other half interest between them; and after the
- 20 1st October 1946 the partners in the said partnership were the defendant named in Originating Summons L 4/1950 (George Alfred Maslen) as the assignee of the said Claud Ashley Laffer, and the defendants named in Originating Summons P 5/1950 as the assignees of Patrick Andrew Connolly, the assignee of Claud Ashley Laffer holding the latter's half interest, and the assignee of Patrick Andrew Connolly holding the other half interest between them.
- 30 7. Thus in the terms of section 10 of the said Act, it will be necessary to ascertain firstly in what proportions the said wool was marketed by the partnership (a) before 1st July 1946, (b) between 1st July 1946 and before 1st October 1946, and (c) between 1st October 1946 and 31st December 1946, and thereafter the persons who have respectively received and at present are holding the said two sums of money, namely, £2,132.9.2. and £562.14.11. distributed under the Act in
- 40 respect of such wool, will hold the same in proportions corresponding to the proportions in which the said wool was marketed by the partnership during the said three periods respectively.
8. Such persons will then hold the said moneys apportioned as aforesaid in trust as follows:-

In the
 Supreme
 Court of
 Western
 Australia
 No.4.
 Judgment
 of His
 Honour Mr.
 Justice
 Walker,
 22nd May
 1950,
 continued

- (a) as to that proportion of such moneys as has been distributed under the said Act in respect of that proportion of the said wool marketed before 1st July 1946 -- for the estates of Patrick Andrew Connolly deceased and of Claud Ashley Laffer deceased respectively in equal shares;
- (b) as to that proportion of such moneys as has been distributed under the said Act in respect of that proportion of the said wool marketed after 30th June 1946 and before 1st October 1946 - for the estate of Claud Ashley Laffer deceased as to one half share and for the defendants named in originating summons P 5/1950 as to the other half share between them; and 10
- (c) as to that proportion of such moneys as has been distributed under the said Act, in respect of that proportion of the said wool marketed after 30th September 1946 and up to 31st December 1946 -- for the defendants named in originating summons P 5/50 as to one half thereof, and for the defendant named in originating summons L 4/50 as to the other half thereof. In that way will compliance be had with the provisions of section 10 of the said Act that the persons now holding the said moneys shall have in respect to the same, the same rights duties and liabilities as if the said moneys were part of the proceeds of a sale of the wool made at the time when the partnership as it subsisted from time to time marketed the said wool. 20 30

9. There will be accordingly an order in the terms of paragraph 8 of this opinion.

10. There will also be an order that the costs of all the parties represented and appearing in the Originating Summonses P 5/50 and L 4/50 respectively as between solicitor and client shall be paid out of the said two sums of money prior to such apportionment thereof as may be necessary in accordance with the observations made by me in paragraph 7 of this opinion. Fit for counsel. 40

15.

No. 5.

ORDER of Supreme Court of Western Australia.

IN THE SUPREME COURT

P. No. 5 of 1950

OF WESTERN AUSTRALIA

In the
Supreme
Court of
Western
Australia

No. 5.
Order of
Supreme
Court of
Western
Australia
14th June
1950

IN THE MATTER of an Indenture dated
the 17th day of June 1946 between
PATRICK ANDREW CONNOLLY of the one
part and GEORGE ALFRED MASLEN,
JOHN ANDREW MASLEN, KENNETH GEORGE
MASLEN and RICKARD WALLACE MASLEN
of the other part

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B E T W E E N :

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

- and -

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

20

BEFORE THE HONOURABLE MR. JUSTICE WALKER:
IN CHAMBERS MONDAY THE 22nd DAY OF MAY 1950:
AND WEDNESDAY THE 14th DAY OF JUNE 1950:

UPON READING the originating summons herein
dated the 17th day of February 1950 and upon
reading the Affidavit of Percy Granville Carter
sworn 14th day of February 1950 and filed herein
and upon hearing Mr. W.H. Byass of Counsel for
the Plaintiff and Mr. J.P. Durack K.C. of counsel
for the Defendants IT IS ORDERED that the persons
who hold the sums of money being the sums of

30

In the
Supreme
Court of
Western
Australia

No. 5
Order of
Supreme
Court of
Western
Australia
14th June
1950

£2132. 9. 2. and £562.14.11. mentioned in the
said summons shall hold such sums in trust for
the following persons being the persons entitled
thereto namely:-

(a) As to that portion of the said monies
as has been distributed under the Wool
Realisation (Distribution of Profits)
Act No. 87 of 1948 in respect of that
portion of wool (being the wool
described in the said affidavit)
supplied for appraisalment before the
1st day of July 1946 for the estate
of Patrick Andrew Connolly deceased
and the estate of Claud Ashley Laffer
deceased respectively in equal shares
the Defendants having no right title
or interest to or in this portion of
the said monies.

10

(b) That as to that portion of the said
monies as has been distributed under
the said Act in respect of that portion
of the said wool supplied for
appraisalment after the 30th day of
June 1946 the Plaintiff has no
interest to or in that portion of the
said moneys and the said persons shall
hold this portion of the said monies
for the persons who are entitled
thereto as set out in the Judgment of
Walker J. in originating summons
L No. 4 of 1950 between Eleanor
Forrest Laffer (Plaintiff) and George
Alfred Maslen (Defendant).

20

30

AND IT IS FURTHER ORDERED that the costs of all
parties as between Solicitor and Client shall be
paid out of the said sums of money prior to any
apportionment thereof AND THAT these proceedings

16.

were fit to be attended by Counsel.

C. LANGOULANT

Associate

This order was extracted by Hubert Parker
& Byass, 15 Howard Street, Perth, Solicitors
for the Plaintiff.

In the
Supreme
Court of
Western
Australia

No. 5
Order of
Supreme
Court of
Western
Australia
14th June
1950

No. 6.

NOTICE OF APPEAL TO THE HIGH COURT
OF AUSTRALIA.

10

TAKE NOTICE that this Honourable Court
will be moved by way of Appeal at the sitting
hereof appointed to be held at Perth in the
State of Western Australia on the fifth day
of September 1950 or at such other time and
place as may be fixed by this Honourable
Court BY COUNSEL on behalf of the
Appellants that the whole of the Judgment
of the Supreme Court of Western Australia
made and given between the parties hereto
dated the 16th day of June 1950 be set
aside and that in lieu thereof Judgment be
entered for the Appellants (Defendants)
upon the following grounds:-

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(1) The Judgment was wrong in law in

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of
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in its
Appellate
Jurisdiction

No. 6
Notice of
Appeal,
6th July
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In the
High Court
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Appellate
Jurisdiction

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Appeal,
6th July
1950

that the learned Judge should have decreed that the persons who have received and at the present time are holding the two sums of money, namely, £2132. 9. 2. and £562.14.11. distributed under the Wool Realisation (Distribution of Profits) Act 1948 (Commonwealth) in respect of wool supplied for appraisement during the period 1939-1946 inclusive in these proceedings will hold one half share thereof for the defendants in equal shares and not for the estate of Patrick Andrew Connolly deceased.

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(2) The learned Judge was wrong in the construction which he placed on Section 10 (3) of the said Act and should have held that one half share of each of the two sums mentioned passed to the defendants under the Deed executed by Patrick Andrew Connolly deceased and the defendants and dated the 17th day of June 1946.

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(3) Section 29 of the said Act has no application in relation to the said Deed dated the 17th day of June 1946.

DATED this 6th day of July 1950

DWYER DURACK & DUNPHY
Solicitors for the (Defendants)
Appellants, 33 Barrack Street,
Perth.

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To the (Plaintiff) Respondent,
The Perpetual Executors Trustees and Agency
Company (W.A) Limited as executor of the Will
of Patrick Andrew Connolly deceased, and to
its Solicitors, Messrs. Hubert Parker & Byass,
15, Howard Street, Perth.

REASONS FOR JUDGMENT - Sir John Latham, C.J.

In the
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of
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in its
Appellate
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No. 7.
Reasons for
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Latham, C.J.

The question which arises in two of these appeals (G.A. Maslen & ors. v. The Perpetual Executors, Trustees & Agency Co. (W.A.) Limited, and G.A. Maslen v. E.F. Laffer) relates to the rights to moneys paid under the Wool Realization (Distribution of Profits) Act 1948 in respect of wool supplied by the partnership known as
10 Mardathuna Pastoral Company for appraisalment before 1st July 1946. (The order made in the Supreme Court deals also with moneys paid in respect of wool supplied after June 1946, but we were informed in the argument upon the appeal that no question arises between the parties as to these latter moneys).

P.A. Connolly and C. A. Laffer were partners in equal shares in carrying on the business of pastoralists on Mardathuna station. They had been
20 partners for a number of years. On 17th June 1946 Connolly by deed assigned his interest in the land, chattels, book debts and assets of the partnership (including a sum of £7000 lent by Connolly to the partnership firm) to the appellants in one of these cases - G.A. Maslen, J.A. Maslen, K.G. Maslen and R.W. Maslen - as tenants in common in equal shares. G.A. Maslen assigned certain land to P.A. Connolly as part of the consideration for the transfer of his share in the partnership assets,
30 and the assignees assumed liability under certain mortgages.

On 2nd October 1946 the other partner, C.A. Laffer, by deed assigned all his share in the land and other assets of the firm to G.A. Maslen, who is the appellant in the second case. Maslen covenanted to pay certain moneys to the Bank of New South Wales and to assume the liability under a certain mortgage.

P.A. Connolly died on 28th December 1946 and
40 C.A. Laffer died on 22nd January 1949.

After the Wool Realization (Distribution of Profits) Act 1948 (which was assented to on 21st December 1948) was passed a sum of £2132. 9. 2.

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continued

was received in accordance with (it has been assumed) the provisions of the Act from the Westralian Farmers' Co-operative Ltd. by the Perpetual Executors, Trustees and Agency Co. Ltd. as executor of the Will of Connolly and a sum of £562.14.11. was received from Elder Smith & Co. under the Act by the appellant G.A. Maslen in each case in respect of Mardathuna wool which had been produced by the former partnership and had been supplied and appraised under National Security Regulations. The recipients of these moneys have agreed to hold the moneys to abide the determination of the questions raised in the proceedings in which these appeals are brought. The executor of the Will of Connolly and the executrix of the Will of Laffer instituted separate proceedings by way of originating summons for the purpose of determining the rights of the parties in respect of the sums of money mentioned.

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The appellants in the first case, who are the assignees of P.A. Connolly, contend that they, and not the personal representative of Connolly, are entitled to one-half of the moneys, and the appellant in the second case, G.A. Maslen, as the assignee of C.A. Laffer, contends that he, and not the personal representative of Laffer, is entitled to one-half of the moneys. Walker J. did not accept these contentions and held that the money should be divided equally between the personal representatives of Connolly and Laffer.

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The moneys in question were paid in accordance with the Wool Realization (Distribution of Profits) Act. That Act, sec. 7 (2), provides for payments to be made in respect of "participating wool", that is, wool appraised under the National Security (Wool) Regulations. Sec. 7 (3) provides that, subject to the Act, an amount payable under the Act shall be payable to the person who supplied the participating wool for appraisalment. Sec. 9 deals with bankruptcy. Where Wool was supplied by a defunct company the money is to be paid to such person as appears to the Commission (that is, the Australian Wool Realization Commission established under the Wool Realization Act 1945-1946) to be justly entitled to receive it sec. 10 (1) Sec. 10 makes the following provisions for the case of dissolved partnerships:-

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"(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 former partner).

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10 (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".

Reasons for Judgment of Sir John Latham, C.J.
continued

Sec. 11 provides that, subject to sec. 9 of the Act, where participating wool was supplied for appraisalment by a person who has died -

- 20 "(a) any amount which would otherwise be payable under this Act to that person shall be payable to the personal representatives of that person: and
- (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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It is by reason of these provisions that moneys, the payment of which was authorised by the Act, were paid to the personal representative of Connolly and to G.A. Maslen.

40 The Wool Realization (Distribution of Profits) Act 1948 dealt with the distribution of profits arising from the Commonwealth's share in the ultimate balance of profits arising from the transactions of the Joint Organization which was established under the Wool Realization Act 1945-1946. Under the last mentioned Act the Commonwealth Parliament approved an agreement between the

In the United Kingdom, the Commonwealth of Australia, the High Court of Dominion of New Zealand and the Union of South Africa in relation to the disposal of wool which Australia had been purchased by the United Kingdom during in its the war and which had not been sold at the date of Appellate the Act. The agreement provided that the stock of Jurisdiction Dominion grown wool in the ownership of the United Kingdom as at 31st July 1945 should be transferred to the joint ownership of the United Kingdom

No.7. Reasons for Government and the Dominion Government concerned Judgment of and that such wool should be held and disposed of Sir John by the Joint Organization, which was to be Latham, C.J. incorporated as a private registered company in continued accordance with the agreement. Provision was made for the distribution between the Governments of the nett proceeds of the disposal of this carry-over wool. The Australian wool had been purchased by the United Kingdom Government and belonged 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 sec. 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 were 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 sec. 10, which has already been quoted. Another condition is contained in Sec. 29 -

"Subject to this Act and the regulations, a share in a 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 the actual receipt of the share, whether by means of, or in consequence of, sale, assignment, charge, execution or otherwise".

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10 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 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.

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continued

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

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In the Act, may become so entitled under such other
High Court provisions.

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Sec. 9, dealing with bankruptcy, sec.10,
dealing with defunct companies and dissolved
partnerships, and sec. 11, dealing with personal
representatives of deceased persons, are provisions
relating to special cases which, if any effect is
to be given to them, must be regarded as modifying
in those cases, which might otherwise be held to
be the effect of the general provisions of sec. 29. 10
In each of these cases the rights, duties and
liabilities of the actual recipient of moneys
depend upon events which have happened after the
supposed or notional sale of wool at the time of
supply for appraisement. These events are adminis-
tration in bankruptcy, a company becoming defunct,
the dissolution of a partnership, and the death of
a person. These events, it is recognised and
allowed, may create rights, duties or liabilities.
By reason of secs. 9, 10 and 11, sec. 29 cannot be 20
regarded as nullifying, in cases to which these three
sections apply, the legal consequence of all
events and transactions which happen or take place
after the supply of the wool. Sec.10, read with
sec. 11, does not provide that the partners (or
the representatives of a deceased partner) may
retain for themselves (or for the estate of a
deceased partner) money paid to them under sec.
10 (2). Sec. 10 (3) recognises that by reason of
the dissolution of a partnership other persons 30
than a former partner may in some cases have a
right to the money. This right will necessarily
be a right acquired under or created by some
relevant law other than the Commonwealth Act
itself. In the case of a dissolved partnership the
ordinary law as to rights, duties and liabilities
connected with a partnership is to apply.

The special provision relating to dissolved
partnerships produces results in the cases to
which it applies which are necessarily different 40
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 actual recipient are to be determined upon

the hypothesis 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 partnership, 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.

But sec. 10 (3) does not provide that the rights of the parties shall be the same as if the money had been received at the time of the supply of the wool for appraisalment. It provides that the rights shall be the same as if the money were part of the proceeds of a sale of the wool which had been made at that time. Therefore the question to be determined is - What are now the rights of the parties (according to partnership law and any other relevant law) upon the basis that the wool was sold by Connolly and Laffer at the time when it was supplied (that is, before 30th June 1946) but that it has only now been paid for?

When Connolly assigned his share in the partnership to the four appellants in the first case he transferred to them his proportion of the balance of the then existing assets over liabilities; Partnership Act 1895, sec. 33. But the assignees did not therefore become entitled to interfere in the management of the partnership business or affairs or to require accounts. They

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become entitled only to receive the share of the profits to which the assigning partner (that is, Connolly) would otherwise be entitled; Partnership Act, sec. 42. The Assignees all lived and worked on Mardathuna station and it is quite probable that an agreement was immediately made for a partnership between them and Laffer. There is, however, no evidence to that effect. When in October 1946, however, Laffer assigned his interest to G.A. Maslen, then both Connolly and Laffer had assigned all their interest in the partnership property to the appellants. The partnership between Connolly and Laffer was probably dissolved by agreement, though there is no evidence of that fact, but it was certainly dissolved by the death of Connolly in December 1946: Partnership Act, sec. 44 (1).

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When the partnership was dissolved the rights of the partners interse were, "subject to any agreement", as defined in the Partnership Act, sec. 57. Unless they otherwise agreed the assets would be sold, partnership debts paid, advances by partners adjusted, capital repaid, and residue divided. This procedure was not followed - each partner separately sold his share in the partnership to assignees who accordingly became entitled to all the partnership property and the rights of the partners as such including rights which, if there had been no assignment, would have accrued to the partners personally, or to their estates if they had died.

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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 Realization (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 was begun but

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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 argument for the respondent, in my opinion, ignores the fact of dissolution of the partnership, it treats the partnership as still subsisting, and as being unaffected by the fact of dissolution though it has in fact been dissolved and though the operation of sec. 10 (3) is expressly made conditional upon a dissolution having taken place. The respondent's argument in the present case produces the result that Connolly and Laffer, if they were alive, would be entitled to the money in question in the same shares etc. as if the partnership were still in existence though it has been dissolved. Sec. 10 (3) does not require or justify such an hypothesis. The question might have so provided, but it does not do so. To ignore the fact of dissolution, with its attendant circumstances (which determine the rights, duties and liabilities to which the section gives effect) is to contradict the fact which brings the section into operation. So also sec. 11 recognises, in my opinion, the effect in each particular case of the death of a particular person who, if he had been alive, would have been entitled to the money, and so brings into operation the law relating to the administration of the estates of deceased persons, and the law dealing with testamentary dispositions and intestacy. Sec. 10 (3) in my opinion, operates in a similar manner in the case of dissolved partnership. Neither the legal effect of the dissolution nor the legal effect of death,

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in the circumstances in which the dissolution or the death took place, is to be ignored. On the contrary, there is to be full recognition of the rights, duties and liabilities arising from those events. If secs. 9, 10 and 11 are regarded as express special exceptions from the general provisions of sec. 29, many of the suggested difficulties disappear.

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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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Thus, though the first question in each originating summons should be answered in the negative, the second question should be answered in the first case by declaring that the defendants are entitled in equal shares to one-half of the said moneys, and in the second case by declaring that the defendant G.A. Maslen is entitled to one-half of the said moneys. The appeals should be allowed and the questions answered as stated.

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In the third appeal (in respect of which special leave to appeal was granted) the parties are G.A. Maslen, appellant and the Perpetual Executors Trustees & Agency Co. (W.A.) Limited as executor of the Will of P.A. Connolly deceased respondent. G.A. Maslen and Connolly were for many years partners in a partnership known as the Mt. Gibson Station. Connolly's interest in the capital and income was three-fourths and that of Maslen was one-fourth. The business was unsuccessful. The capital account of Connolly was in credit and the capital account of the defendant was in debit when the station was sold in November 1946. The proceeds of the sale of the station were credited to the capital account of Connolly. On 28th December 1946 Connolly died. At that time, according to the accounts of the business, Connolly had a credit of £6,239.12.5. while Maslen

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was in debit in the sum of £7,024.1.4. On 29th September 1949 a deed of dissolution of partnership was executed by G.A. Maslen and the respondent as executor of the Will of Connolly. The partnership firm had supplied wool for appraisalment in the period 1939 to 1946 and a sum of £463.17.0. was received under the Wool Realization (Distribution of Profits) Act 1948 by the wool brokers of the partnership, the Westralian Co-operative Co. Limited, in respect of that wool, and was paid to Connolly's executor.

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Maslen disputed his liability as stated in the partnership accounts, and, after Connolly died, Maslen and others who were related to Connolly challenged the validity of his Will. The differences were compromised and settled by a deed of 29th September 1949 made between Maslen and Connolly's executor. This deed declared that the partnership between Connolly and Maslen should stand dissolved as from 28th December 1946 which was the date of Connolly's death. The deed also provided that Maslen released the company and Connolly's estate from all actions, claims and demands whatsoever which Maslen or his executors then had or thereafter but for the deed might have had against the company or Connolly's estate on account of the partnership or on any account whatsoever. Similarly the company as the executor of Connolly released Maslen from all actions, proceedings, claims and demands which the company or Connolly's estate had or but for the deed might have had against Maslen on account of the partnership. Thus there were mutual releases from all claims in respect of partnership dealings.

Walker J. decided that the plaintiff company held the money received on account of the wool in a fiduciary capacity by reason of sec.11 of the Wool Realization (Distribution of Profits) Act 1948. The company held the money subject to the conditions that the rights, duties and liabilities of the company as the personal representative of Connolly should be the same as if it were part of the proceeds of a sale of wool by the partnership made at the time of the supply of the wool for appraisalment (sec.10 (3)). If the wool had been

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sold at the time of appraisement, then, it was held, Connolly would have been entitled to three-fourths of the price and Maslen would have been entitled to one-fourth. But at that time the partnership owed money to Connolly and Maslen owed money to the partnership and therefore, if the money had been received before the dissolution, Connolly would have been entitled in account to three-fourths of it, Maslen to one-fourth, and, as Maslen was largely in debit, the result would have been that Connolly would have been entitled to the whole of the money. Accordingly it was held that the whole sum was an asset forming part of Connolly's estate.

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The appellant G.A. Maslen contends, and in my opinion rightly, that it is wrong to determine the rights of the parties upon the supposition that the money was paid before the dissolution. It is true that the right to the money could not be assigned. But that does not mean that the mutual releases from all claims and demands on account of the partnership contained in the deed of 29th September 1949 should be ignored. If there had been no dissolution and an account had been taken without any other adjustment of rights by agreement, doubtless the result would have been that Connolly would have been entitled to require Maslen to pay what he could towards meeting his liability on capital account and therefore, as the firm owed Connolly money, Connolly would have received the benefit of the whole of the money received on account of the sale of the wool. But for good consideration Maslen and the executor of Connolly executed complete releases of claims in relation to all matters affecting the partnership. This deed did not assign the right of either party to moneys under the 1948 Act, but it does have the effect of preventing either party from saying that the other party is indebted either to himself or to the partnership. Sec. 29 does not prevent these mutual releases from taking effect as releases. The consequence is that the matter must be dealt with upon the basis that there are no partnership claims outstanding as between Maslen and Connolly's executor. Therefore the money must be treated, in view of these releases as received on partnership account for goods sold

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by the partnership, and as distributable between the two partners, neither of whom owes anything, directly or indirectly, upon partnership account. Thus the money is distributable according to the interests of the partners in the partnership, three-fourths to the executor of Connolly and one-fourth to Maslen.

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10 I am therefore of opinion that this appeal should be allowed and that the questions asked in the originating summons in the third case should be answered by declaring that the plaintiff company as executor of the Will of P.A. Connolly deceased is entitled to three-fourths of the sum of £463.17.0. mentioned in question 1 of the originating summons, and that G.A. Maslen is entitled to one-fourth thereof.

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20 I agree with Fullager J. in his comments upon the unnecessary institution of duplicated proceedings. But if an order is made for the payment of all costs of the appeal out of the moneys in dispute, the executors will be protected as to their costs and the other parties will bear those costs and their own costs. This is an appropriate order in the circumstances of these cases.

No. 8.

REASONS FOR JUDGMENT - Kitto, J.

30 I shall deal first with the two appeals relating to the moneys paid under the Wool Realization (Distribution of Profits) Act 1948 in respect of wool supplied for appraisalment by the Mardathuna Pastoral Company in which Connolly and Laffer were partners in equal shares.

Each partner in 1946 assigned his interest in the partnership assets, Connolly to G.A. Maslen and his sons, and Laffer to G.A. Maslen. Each assignor was entitled at the date of his assignment to "an unascertained interest in every single asset of the partnership, and it is not right to

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continued

regard him as being merely entitled to a particular sum of cash ascertained from the balance sheet of the partnership as drawn up at the date of" dissolution: Manley v. Sartori (1927) 1 Ch. 157 at 163/4; In re Fuller's Contract, 1933 Ch. 652 at 656; Trustees Executors & Agency Co. Ltd. v. Federal Commissioner of Taxation 69 C.L.R. 270 at 285. It is true that sec. 33 of the Partnership Act, 1895, (W.A.) provides that the share of a partner in the partnership property at any time is the proportion of the then existing partnership assets to which he would be entitled if the whole were realised and converted into money, and after all the then existing debts and liabilities of the firm had been discharged. But, as is shown by the heading of Part III of the Act, in which sec. 33 occurs, this is one of the provisions which regulate the relations of partners to one another; and it does no more than give statutory effect to the view always maintained by the Courts, (see Bakewell v. Deputy Federal Commissioner of Taxation 58 C.L.R. 743 at 770, and cases there cited) as to the "indefinite and fluctuating interest" of each partner vis a vis the others. "No doubt, as between himself and his partners, his interest in individual items is subject to their right to have all the assets of the partnership for the time being dealt with in accordance with the partnership agreement, but his interest in them is none the less real for that"; Sharpe v. Union Trustee Co. of Australia Ltd., 69 C.L.R. 539 at 551, per Rich, J. whose judgment is on this point not in conflict with anything said by the majority of the Court. 10 20 30

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 other partners"; but it does not prevent such an assignment from taking full effect according to its terms as against the assignor. 40

It follows that if the partnership, instead of supplying the wool for appraisalment 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.

10 Accordingly, in my opinion, if the unpaid purchase money had come in on the date when in fact the sum paid under the Wool Realization (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.

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20 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 appraisalment. 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.

30 There remains the question whether sec. 29 affects the case. Its operation is (subject to the Act) to avoid any alienation of a share in a distribution under the Act or of the possibility of such a share. It must be given full effect where one person is entitled to a share according to the provisions of the Act and another person claims that share by force of a purported assignment or other alienation. But that is not the situation in this case. There never was a purported assignment of a share in a distribution under the Act or of the possibility of such a share, or even of an interest in such a share or possibility.

40 The assignments under which the appellants claim comprise nothing but the interests of the respective partners in the assets of the partnership, and those assets did not at any time include a share, or the possibility of a share, in a distribution under the Act. The appellants therefore do not claim in the character of assignees of a

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share which the Act entitles the partnership to receive, or of the interests of the individual partners in such a share. They claim on the ground that sec. 10 (3) by its own direct operation entitles them to a share. They do not rely upon the assignments as instruments of title to a share; they rely upon them as instruments of title to the actual assets of the partnership, and they assert that the Act gives to them, because as beneficial owners of those assets they would be entitled to the proceeds of a sale of wool, and original, and not a derivative, right to the share.

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In my opinion the contention of the appellants is well-founded. Section 29 does not invalidate assignments of the assets of a partnership, nor assignments by individual partners of their interests in those assets; and sec. 10 (3) cannot be construed as if there were added to it the words "and there had been no assignment or other alienation affecting the beneficial ownership of such proceeds".

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I would allow the first two appeals and answer the questions in the manner indicated by the Chief Justice.

In relation to the third appeal, I agree with the judgment of the Chief Justice, and I would allow the appeal accordingly.

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Each of these appeals is concerned with the beneficial interest in certain sums distributed by the Australian Wool Realization Commission under the Wool Realization (Distribution of Profits) Act 1948. In the first two cases the "participating Wool" was supplied by a partnership known as the Mardathuna Pastoral Company. The relevant facts with respect to this partnership may be shortly stated as follows.

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For many years prior to the 30th June 1946

Patrick Andrew Connolly and Claud Ashley Laffer carried on business in partnership under the firm name above-mentioned. There was no partnership deed, but each of the partners was entitled to one-half interest in the capital and profits of the partnership. All the relevant participating wool was supplied for appraisal before the 30th June 1946, although this does not appear to have been made clear in the court below.

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10 By a deed dated the 17th June 1946, which was to take effect according to its terms as from the 1st July 1946. Connolly purported to assign to G.A. Maslen and his two sons, John Maslen and Kenneth Maslen, "all his right, title and interest in" certain lands "standing in the names of" Connolly and Laffer as tenants in common and all the assets of the business of the Mardathuna Pastoral Company, including book debts. Each of the "assignees" was to be entitled to a one-quarter interest in the assets assigned, and the remaining quarter was to be held in trust for Richard Maslen, another son of G.A. Maslen and an infant, subject to his attaining the age of 21 years and ratifying the deed. Since Richard Maslen is a party to these proceedings and has no guardian ad litem, he presumably did attain 21 years and did ratify the deed, but these things are nowhere expressly stated. The consideration for the assignment was the assumption by G.A. Maslen and his three sons of the liabilities of Connolly or of the partnership in respect of rent mortgage interest and other outgoings as from the 1st July 1946, and also the assignment of the fee simple in certain lands by G.A. Maslen to Connolly.

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40 By a Deed dated 2nd October 1946, which was to take effect according to its terms as from the 1st October 1946, Laffer purported to assign to G.A. Maslen all his right, title and interest in the Mardathuna Pastoral Company and its assets, including book debts. The consideration for the assignment was an assumption of liability to pay mortgage interest and rent and also the payment by the purchaser of a debt of £6,500 owing to the Bank of New South Wales. It was provided that if the bank did not, within a reasonable time after payment to it of the sum of £6,500, discharge a

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second mortgage held by it over the lands upon which the business was carried on, the deed should be of no effect. Presumably this condition subsequent did not take effect, but again there is no evidence as to whether it did or not.

On 28th December 1946 Patrick Andrew Connolly died. Probate of his Will was in due course granted to the Perpetual Executors Co. as executor thereof.

On 21st December 1948 the Wool Realization (Distribution of Profits) Act 1948 came into force. 10

On 22nd January 1949 Claud Ashley Laffer died. Probate of his Will was in due course granted to his widow, Eleanor Forrest Laffer, as one of the executors thereof.

On some unspecified date or dates the Australian Wool Realization Commission, in pursuance of the Wool Realization (Distribution of Profits) Act 1948, paid two sums (amounting together to £2695.4.1.) in respect of participating wool supplied for appraisalment by the Mardathuna Pastoral Company before 30th June 1946. 20
One would infer from a number of unsatisfactory statements in the affidavits that both sums were originally paid by the Commission in pursuance of sec. 21 of the Act to the brokers through whom the wool had been supplied, the Westralian Farmers Co-operative Limited receiving £2132.9.2. and Elder Smith & Co. Ltd. £562.14.11. The amount received by the Westralian Farmers Co. was paid by that Company to the Perpetual Executors Co. as the executor of the Will of P.A. Connolly deceased; whether this was done in pursuance of a direction from the Commission under sec. 21 (2) does not appear. The amount received by Elder Smith was paid by that company, according to one affidavit, to G.A. Maslen and according to the other affidavit, to G.A. Maslen and his three sons. 30
Whichever affidavit is correct again it does not appear whether or not the payment was made in pursuance of a direction from the Commission under sec. 21 (2). There appears to be no justification under the Act for the payment to G.A. 40

10 Maslen or to G.A. Maslen and his sons. However, the case was argued throughout on the assumption that both sums were held by persons entitled under the Act to receive it in the first place, and on the further assumption that the question of what persons were beneficially entitled to those sums and in what shares was to be determined by reference to the provisions of the Act and any other relevant rule or rules of law. Since there is no a priori 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.

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20 Before examining the relevant provisions of the Act, it is necessary to consider the effect of the events which had happened in respect of the Mardathuna Pastoral Company before the passing of the Act. The material before the court is scanty and altogether inadequate, although certain facts were stated at the bar without contradiction and certain inferences from those facts appear to be common ground. It would appear that G.A. Maslen had managed the pastoral property of the Mardathuna Pastoral Company for the partnership of Connolly and Laffer, and that after the "assignment" of the 17th June 1946 he continued to manage the property. After the "assignment" of the 2nd October 1946 he and his sons appear to have entered into possession of the property and to have continued in possession of it up to the commencement of the proceedings in the Supreme Court. It seems to be a fair enough inference that the old partnership was dissolved by agreement before the death of Connolly in December 1946, and that its business has ever since been owned and carried on by G.A. Maslen and his three sons. It seems also to be a fair inference, having regard to the above facts and to the terms of the deed of 40 the 2nd October 1946, that a partnership was constituted between G.A. Maslen and his three sons. There is no material before the Court, however, which would enable one to say what are the terms of that partnership and, in particular, what are the respective rights of the four partners in respect of capital and profits. Again, while it may be very probable that the affairs of

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the dissolved partnership of Connolly and Laffer have been completely wound up and all its debts paid, no evidence is before the court bearing on this possibly quite important matter. However, I think on the whole, unsatisfactory though the position is, that the court can deal with the matter on the material before it, supplemented by the facts and inferences which I have mentioned.

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Now the relation constituted by a contract of partnership is a peculiar relation. Sec. 33 of the Western Australian Partnership Act 1895 (which is not in the English Partnership Act 1890) purports to define the "share" of a partner in partnership property. Whatever may be the effect of this section, it is not easy on the authorities to say whether, if the deeds of June and October 1946 had stood alone and nothing else had happened, G.A. Maslen or his sons could have been said to have acquired any interest in any partnership asset. See, on the one hand, Re Ritson (1899) 1 Ch. 128, at p. 131. Rodriguez v. Speyer (1919) A.C. 59 at p. 68 (per Lord Finlay L.C.) and Bakewell v. Commissioner of Taxation (1937) 58 C.L.R. 743 at p. 770 and cases there cited (per Dixon and Evatt JJ.) and, on the other hand, Gray v. Smith (1889) 43 Ch. D. 208, Re Holland (1907) 2 Ch. 88, Manley v. Sartori (1927) 1 Ch. 157 at pp. 163-4 Re Fuller's Contract (1933) Ch. 652 at p. 656 and Trustees Executors & Agency Co. Ltd. v. Commissioners of Taxation (1944) 69 C.L.R. 270, at p. 285 (per Rich J). I should have thought that, if nothing more appeared than the execution of the two deeds neither Maslen nor his sons could have been held to have acquired any interest in any particular asset of the partnership of Connolly and Laffer, that neither "assignment" would have dissolved the partnership (though either might perhaps have afforded a ground for dissolution) and that the rights of G.A. Maslen and his sons would have been no more and no less than those described in sec. 42 of the Partnership Act 1895. Little more does in fact appear from the material actually put before the Court, but I have already referred to certain other facts and inferences which were stated during argument by counsel on the one side and appeared to be accepted by counsel on the other side. I think on the whole, that this case

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ought to be dealt with by this Court on the footing that all the assets of the old partnership of Connolly and Laffer, including book debts, existing on the 1st October 1946, had been acquired as from that date by G.A. Maslen and his sons. This acquisition was effected, not by either of the two deeds or by both operating together, but by those deeds combined with what was done after their execution and the implications arising therefrom.

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It is now necessary to consider the relevant provisions of the Commonwealth Act. The main general provision is found in sub-section (3) of sec. 7 which provides that, subject to the Act, an amount payable under the Act in relation to any participating wool shall be payable to the person who supplied the wool for appraisalment. In all cases where it is possible to pay the money to the person or persons who supplied the wool for appraisalment the money when paid will belong beneficially to that person or those persons. So, in the case of a partnership or company which supplied wool for appraisalment and is still subsisting at the time of payment, the money is payable to, and when paid will belong beneficially to, the partnership or company. The general principle of the Act is obvious enough - the wool produced and profit, and the man who produced the wool should receive the profit. Effect is to be given to this principle notwithstanding anything which purports to be an assignment or alienation made between the date of supply for appraisalment and the date of payment of the share of profit, for sec. 29 provides:-

"Subject to this Act and the regulations, a share in a 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".

I do not think it necessary for present purposes to determine whether, in the absence of sec. 29, there could have been anything in the

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nature of an effective assignment or charge or other alienation of an expectancy of a share of any profit which might ultimately arise from the disposal of wool supplied for appraisalment and paid for at the appraised price. I think, however, that Mr. Louch was right in saying that there could be no effective assignment or alienation, if by so saying he meant that no purported assignment or alienation could give to the assignee or alienee any right against the Commonwealth in any event. There could be nothing to assign unless (a) a profit should be realised, and (b) the Commonwealth should choose to distribute that profit. It may be that, if sec. 29 had not been enacted, an "assignment" could have been made which would have been effective as between assignor and assignee in the sense that, if the Commonwealth chose to pay the assignor, the assignor would have held what he received upon trust for the assignee; of Re Lind (1915) 2 Ch. 345, and Re Gillott's Settlement; Chattock v. Reid (1934) Ch. 97. Sec. 29, however, excludes even this possibility. I am inclined to think that the expectant interest of a supplier of participating wool in any ultimate profit was capable of being bequeathed by Will and would pass upon death of the supplier intestate to the next of kin of the supplier. And, if I were right in this, I would not think that sec. 29 affected transmission on death. I would regard sec. 29 as concerned only with alienation inter vivos.

Sec. 10 of the Act is in the following terms:-

"(1) Where participating 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.

(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 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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It is convenient at this stage to set out also sec. 11 of the Act, which provides:-

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

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

(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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I think that this case is to be treated, notwithstanding the payment by the brokers to G. A. Maslen or the Maslens, as governed by the provisions of Sec. 10 (3), and I do not think that sec. 10 (3) is to be too strictly construed. I think it means that, whoever may actually receive the moneys from the Commission or its agent, the recipient becomes in effect a trustee. He may have "rights" himself; if so, he may give effect to them. Other persons may have "rights". If so, it is his "duty" to give effect to those rights. If he does not, he will be subject to "liabilities".

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On this footing the argument for the Maslens is essentially simple, though it requires to be carefully stated in order that it may be duly examined.

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The appellants do not rely - and clearly could not successfully rely - on any assignment to them of the expectant share of Connolly and Laffer in any distributable profit ultimately arising from "participating wool" supplied for appraisalment by Connolly and Laffer. Even if we assume assignability in equity, neither the deed of July 1946 nor the deed of October 1946, could, as a matter of construction, carry any share of the wool profit. At the dates of execution the expectant share was clearly not a book debt of the partnership nor was it an asset of the partnership of any other kind. The appellants concede this. They concede that there was never at any stage anything in the nature of an effective assignment of the expectant share of Connolly and Laffer in any wool profit. Their claim is founded not on any such assignment but on what they say is the indirect effect of sec. 10 (3) of the Act. They assert no sale or gift to them of any expectant share of Connolly and Laffer in any wool profit. They say that sec. 10 (3) requires us to assume that the share of the wool profit in question was part of the proceeds of a sale of the wool made at the time when Connolly and Laffer supplied the relevant participating wool for appraisalment. If that share had been part of the proceeds of such a sale, it would have constituted a book debt owing to Connolly and Laffer at the dates of the two assignments of July and October 1946. Those assignments included book debts, and must, therefore, by virtue of sec. 10 (3) be taken to have included Connolly and Laffer's share of wool profit.

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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 what 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. The character so given to the money received attaches to it only from the moment of receipt. I will examine further in a

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moment the results of this view, but it is convenient to consider first some of the results of the view put by the appellants.

An initial objection to the view put by the appellants is that it treats the words "as if it were" (which naturally refer to the time of receipt) as equivalent to "as if it had at all times and for all purposes been". To my mind the words simply do not mean that. If they be assumed to be capable of bearing that meaning, it will be legitimate to look at the practical effects which that meaning will produce. And the first thing that strikes one is that one result of this construction is to give to contracts completely executed according to their tenor, and to transactions completely past and closed, an effect which the parties never for a moment intended them to have. An assignment of book debts made by partners in 1946 will, if the partnership is subsequently dissolved, carry the partnership's share of the wool profit, though this was contrary to the intention of assignors and assignees alike. But this is not all. An assignment in 1946 of their expectant share of the wool profit by partners who subsequently dissolve partnership will not carry that share, although obviously both assignors and assignees intended that it should do so. 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 relate to it. No doubt a sovereign legislature has power to enact that all past assignments of pictures shall be void but a past assignment of books shall be deemed to have transferred the property in all pictures owned by the assignor. But such a law would be a legislative curiosity, and, if the language actually used were capable of any construction which would give the enactment a more sensible effect, such a construction would be bound to be preferred.

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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:-

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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.

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2. An assignment in terms by partners of a share in the wool 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.

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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.

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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.

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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 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.

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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
20 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
20 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.

30 The first of the six points noted above is
not, in itself, of a very serious character.
Legislation which creates rights may attach to
them such incidents as is thought fit, and sec.
29 itself begins with the words "subject to this
Act". But, if a radical departure from the
principle clearly stated in sec. 29 were intended,
one would certainly expect a more definite
expression of such an intention; one would not
expect the departure to arise as a sort of by
product. And the other points constitute more or
less preposterous anomalies. If no other construc-
40 tion of sec. 10 (3) than that for which the
appellant contends were possible, we should, I
suppose, have to give effect to it and assume
that its anomalous consequences were simply not
foreseen. But the other construction of sec. 10
(3) to which I have already adverted, gives, in
my opinion, a more reasonable meaning to the

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words used, avoids any serious anomaly, and attributes a common and reasonable function both to sec. 10 (3) and to sec.11 (b).

I do not think that sec. 10 (3) alters the nature or effect of any past transaction in any way. It does not operate unless and until some person has in his hands a sum of money representing a share of the wool profit which would have gone to the partners if the partnership had not been dissolved. It then says that he is to deal with that sum of money as if it were part of the proceeds of the sale of the wool supplied by the partnership for appraisalment. It means that he is to deal with that sum as if it became on payment an asset of the partnership of that nature. It will be available for creditors, if the creditors have not been paid in full. If there are no outstanding debts of the partnership, it will be divisible among the partners according to the terms of the partnership agreement. It may in some cases be material to determine whether it is capital or income of the partnership. If so, the subsection says that it is income, and income of a particular year or years. It does no more than these things. It has no retrospective operation. If the partners have in the past purported to assign their expectant share of the wool profit, that assignment is ineffective by virtue of sec. 29. If, as in this case, they have assigned book debts existing at the time of the assignment, the effect of that assignment remains unaltered. The effect of sec. 10 (3) in the case of a defunct company will be exactly parallel, though a question might arise which could hardly arise in the case of a dissolved partnership. I am inclined to think that the intention is to place the recipient of the moneys in the position of a liquidator and in substance to revive the liquidation *protanto*, or, if there has been no liquidation, to commence a "liquidation" *ad hoc*. But it may be that, unless the company can be restored to life, as under sec. 295 of the Victorian Companies Act, 1928, such provisions as those of secs. 297-299 of that Act would be applicable. It is unnecessary, however, to consider this point.

The effect of sec. 11 will also be exactly parallel in the case of a supplier of wool who

dies before payment is made under the Act, though I think that sec. 11 may have a further and indirect effect. It does not operate unless and until the personal representatives have in their hands a sum of money representing a share of the wool profit which would have gone to their testator or intestate if he had not died. In their hands it will form part of the estate of the deceased. It will be available for payment of the debts of the deceased as pure personalty, and will be treated in all respects in the administration of the estate as if it possessed the character which sec. 11 gives to it. But sec. 11 does no more than these things. It has no retrospective operation. If the deceased has in his lifetime purported to assign his expectant share of the wool profit, that assignment is ineffective by virtue of sec. 29. If he has assigned book debts existing at the time of the assignment, the effect of that assignment remains unaltered.

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The possible further and indirect effect of sec. 11, to which I have referred, is this. I think it is to be taken as contemplating that the beneficial interest in an expectant share of the wool profit is capable of being disposed of by Will, and will pass as upon an intestacy. I would think (as I have said) that sec. 29 was concerned only with alienation inter vivos and did not affect in any way the possibility of disposition by will or devolution upon intestacy. Whether, apart from any enactment upon the subject, the beneficial interest in the share in the wool profit given by the Act would be capable of disposition by Will or would pass to the next of kin of a deceased supplier of wool is a question to which I have already adverted, and upon which no opinion need, I think, be formed for present purposes. I have said that I am inclined to think that it should be answered in the affirmative. Sec. 11 I think, contemplates, though it does not specifically enact, this view. On this view a bequest of "my share in any profit ultimately realised on wool supplied by me for appraisalment" would carry the beneficial interest in the share payable to the personal representatives of the testator, but a bequest of "book debts owing to me

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at the time of my death" would not. This is the exact converse of the view put by the appellants in this case. On the latter view the latter form of bequest would carry the testator's share, but the former would not.

An essential difference between the two views of sec. 10 (3) lies, I think in the point of time as at which the character given by the subsection to the "amount paid" is to attach to it. But the difference really goes deeper than that, because I would not regard the subsection as doing more than giving a particular legal character to a sum of money, whereas the appellants' view regards the subsection as doing a great deal more than that. The appellants treat it as creating the inferential consequences that a debt must be regarded as having been owed to the suppliers as from the date of the supply of the relevant wool for appraisal. But the appellants, if they stopped even there, would still fail, because the assignments here in question, as a matter of construction related only to debts actually owing at the time of execution. The appellants must go even further and maintain that the subsection involves the further inferential consequences that any past transaction affecting debts owing to the suppliers at the time of the transaction must be deemed to have affected a notional debt created by the subsection. A structure is thus built upon a foundation which cannot carry it. All the sec. 10 (3) really says is that we are to treat a sum of money as having been paid for a specified consideration.

The reasons for preferring the view which I have adopted seem to me to be very strong. By way of conclusion, they may be summarised as follows. First, the view which I have adopted gives the more natural meaning to the actual words. The time to which sec. 10 (3) refers is the time when "an amount has been paid in pursuance of this section". The prescribed "character" is given only to the "amount paid". The description of the notional position begins with the words "as if it were". What the words suggest is that the notional position should be regarded as being created at and not before the time of payment. Secondly, the appellants' view gives to the subsection, and also to sec. 11 (b) a meaning that is retrospective in the true sense. It asserts retrospectivity in the

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literal sense. It says: "Whereas the truth was and is A. the fact shall be and be deemed to have been B". On the other view, the statute does no more than define, subject to all actually existing factors, including the factor expressed in sec. 29 the character of a payment which the statute authorises. Thirdly, the appellants' argument gives to transactions concluded, and fully performed according to the intention of the parties, a meaning and effect which the parties did not intend them to bear. Fourthly and finally, the appellants' view involves other consequences which I would myself regard as grotesque.

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This is a very important case, and I must say that I have felt much difficulty over it. As so often happens, however, I think that the fundamental difficulty lies rather in realising what the question really is than in answering the question when it has been reduced to definite and answerable terms, and in the end I have come to a quite clear conclusion.

I am of opinion that the first two appeals should be dismissed.

The third appeal raises an entirely different question, and I find it sufficient to say as to it that I agree with the Chief Justice.

No. 10.

ORDER of High Court of Australia.

IN THE HIGH COURT OF AUSTRALIA APPEAL No. 2 of
WESTERN AUSTRALIA REGISTRY 1950

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ON APPEAL from the Supreme Court of the State of Western Australia.

P. No. 5. of 1950

IN THE MATTER of an Indenture dated the 17th day of June 1946 BETWEEN PATRICK ANDREW CONNOLLY of the one part and GEORGE ALFRED MASLEN, JOHN ANDREW MASLEN, KENNETH GEORGE MASLEN and RICHARD WALLACE MASLEN of the other part

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BETWEEN: GEORGE ALFRED MASLEN, JOHN ANDREW MASLEN, KENNETH GEORGE MASLEN and RICHARD WALLACE MASLEN (Defendants) Appellants

- and -

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

In the High Court of Australia in its Appellate Jurisdiction

No. 9
Reasons for Judgment of Fullagar, J.
continued

No.10
Order of High Court of Australia
5th December 1950.

In the
High Court
of
Australia
in its
Appellate
Jurisdiction

No.10
Order of
High Court
of Australia
5th December
1950
continued

BEFORE THEIR HONOURS, THE CHIEF JUSTICE, SIR JOHN
LATHAM, MR. JUSTICE FULLAGAR AND MR. JUSTICE KITTO.

THE 5th DAY OF DECEMBER 1950

THIS APPEAL from the Order of His Honour, Mr. Justice Walker of the Supreme Court of Western Australia made in Chambers on the 14th day of June 1950 coming on for hearing on the 5th and 6th days of September 1950 at Perth in the said State and UPON READING the transcript herein and UPON HEARING Mr. J.P. Durack K.C. with him Mr. J. Dunphy of Counsel for the Appellants and Mr. T. Louch K.C. with him Mr. W.M. Byass of Counsel for the Respondent and the same standing for Judgment this day THIS COURT DOTH ORDER that this Appeal be and the same is allowed and that the Order of His Honour Mr. Justice Walker made on the 22nd day of May 1950 and the 14th day of June 1950 in favour of the Respondent be and the same is hereby set aside and IT IS FURTHER ORDERED that the first question in the Originating Summons dated the 17th day of February 1950 taken out in Action P. No. 5 of 1950 in the Supreme Court of Western Australia be answered in the negative and that the second question in the said Originating Summons be answered as follows, namely, that the Appellants are entitled in equal shares to one half of each of the sums of £2,132. 9. 1. 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 except for the Order made on appeal from the Order of His Honour Mr. Justice Walker in Action L. No. 4 of 1950 in the said Supreme Court Eleanor Forrest Laffer Executrix of the Will of Claud Ashley Laffer deceased would have been entitled to the other half of the said sums of £2,132. 9. 2. and £562.14.11 respectively AND IT IS FURTHER ORDERED that the costs of all parties be taxed those of the Respondent being taxed as between Solicitor and Client and that all such costs shall be paid out of the said sums of £2,132. 9. 2. and £562.14.11.

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By the Court,

E. LAWSON TURNBULL

Acting District Registrar

THIS ORDER was taken out by Dwyer Durack & Dunphy of 33 Barrack Street, Perth, Solicitors for the above named Appellants.

No.11.

ORDER IN COUNCIL Granting Special Leave
to Appeal.

AT THE COURT OF BUCKINGHAM PALACE

The 11th day of July, 1951.

Present

THE KING'S MOST EXCELLENT MAJESTY

LORD PRIVY SEAL
Mr. SECRETARY EDE
Mr. NOEL-BAKER

SIR HUMPHREY O'LEARY
Mr. GRENFELL
Mr. YOUNGER

In the
Privy Council

No.11.
Order in
Council
Granting
Special Leave
to Appeal,
11th July
1951.

(L.S.)

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W H E R E A S there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 5th day of June 1951 in the words following, viz:-

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"Whereas by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Perpetual Executors Trustees and Agency Company (W.A.) Limited, the Executor of the Will of Patrick Andrew Connolly deceased in the matter of an Appeal from the High Court of Australia between the Petitioners Appellants and (1) George Alfred Maslen (2) John Andrew Maslen (3) Kenneth George Maslen (4) Richard Wallace Maslen Respondents setting forth (amongst other matters): that the Petitioners pray for special leave to appeal from the

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Order of the High Court dated the 5th December 1950 whereby the High Court by a majority allowed the Respondents' Appeal from an Order of the Supreme Court of Western Australia dated the 14th June 1950: that the issue for determination is whether on the true construction of the Wool Realisation (Distribution of Profits) Act 1948 (No. 87 of 1948) the Petitioners as Executors of the Will of Patrick Andrew Connolly deceased are entitled to two sums of money distributed by the Australian Wool Realisation Commission in

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In the
Privy Council

No. 11.
Order in
Council
Granting
Special Leave
to Appeal,
11th July
1951,
continued

pursuance of the provisions of the Act: that at all material times between the year 1939 and the 30th 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': that wool was supplied by the Company for appraisalment under the National Security (Wool) Regulations and the appraised value was paid to the Company in accordance with the Regulations: that by a Deed of Assignment dated the 17th June 1946 Patrick Andrew Connolly deceased assigned to the first three Respondents all his right title and interest in the Mardathuna Pastoral Company the assignment being expressed to take effect as from the 1st July 1946; that by a Deed of Assignment dated the 17th October 1946 Claude Ashley Laffer conveyed to the 1st Respondent all his right title and interest in the Mardathuna Pastoral Company: that after the 21st December 1948 the following sums of money were received under the provisions of the Act in respect of the wool marketed: (a) by the Petitioners as Executor of the Will of Patrick Andrew Connolly deceased the sum of £2,132.9.2. from the Westralian Farmers Co-operative Limited (b) by the Respondents the sum of £562.14.11. from Elder Smith & Co.Ltd: that the Petitioners and the Respondents thereafter agreed to hold the monies pending the determination of the question now in issue: that on the 17th February 1950 the Petitioners took out an Originating Summons (No. P.5 of 1950) in the Supreme Court of Western Australia for the determination of the following questions:- (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 £2,132.9.2. 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?: that a similar Summons was taken out by the Executrix

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of the said Claude Ashley Laffer: that it was held inter alia that such proportion of the monies as had been distributed under the Act in respect of the wool marketed before the 1st July 1946 should be held in trust for the estates of Patrick Andrew Connolly and Claude Ashley Laffer respectively in equal shares and an Order was made accordingly: that the Respondents appealed to the High Court of Australia which Court 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 '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: that the Petitioners submit that the Order of the High Court should be set aside and the Order of the Supreme Court of Western Australia restored: And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal from the Order of the High Court dated the 5th December 1950 and for such further and other relief as to Your Majesty in Council may seem meet:

In the
Privy Council
No.11.
Order in
Council
Granting
Special Leave
to Appeal,
11th July
1951,
continued

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"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Order of the High Court of Australia dated the 5th day of December 1950 upon the footing that at the hearing of the Appeal it shall be reserved to the Respondents to raise as a preliminary point the plea that the Appeal does not lie without a certificate of the High Court of Australia:

"And Their Lordships do further report to

In the
Privy Council

No.11.
Order in
Council
Granting
Special Leave
to Appeal,
11th July
1951
continued

Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same".

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution. 10

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

F. J. FERNAU 20

Annexures.

No.12.
Originating
Summons.
Laffer v.
Maslen
L.4 of 1950
17th Febru-
ary 1950

ANNEXURES

No.12.

ORIGINATING SUMMONS. Laffer v. Maslen
L.4 of 1950

IN THE SUPREME COURT
OF WESTERN AUSTRALIA

L. No. 4 of 1950

IN THE MATTER of an Indenture of Sale dated 2nd day of October 1946 between Claud Ashley Laffer deceased of the one part and George Alfred Maslen of the other part 30

BETWEEN

ELEANOR FORREST LAFFER Executrix of
the Will of Claude Ashley Laffer
deceased Plaintiff

and

GEORGE ALFRED MASLEN Defendant

LET the above named defendant attend the

Judge in Chambers at the Supreme Court Perth at the time specified in the margin hereof upon the application of the above named Plaintiff for the determination of the following questions namely:

Annexures

No.12.

Originating
Summons
Laffer v.
Maslen
L.4 of 1950
17th Febru-
ary 1950,
continued

1. Did the above named deed dated the 2nd day of October 1946 validly assign to the defendant the interest or any part of the interest of the above named Claud Ashley Laffer deceased in the amount of £2,132.9.2. and in the amount of
10 £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 Company.

2. Has the defendant any right title or interest in the said moneys or any of them by virtue of the said deed.

DATED this 17th day of February 1950.

NOTE: If you do not attend either in person or by a Solicitor at the place above mentioned in the
20 indorsement hereon such order will be made and proceedings taken as the Judge may think just and expedient.

It is intended to serve this summons on the defendant only.
For hearing on Tuesday the 28th day of February at the hour of 10.30 o'clock in the forenoon.
This summons was taken out by Hubert Parker & Byass of 15 Howard Street, Perth - solicitors for the Plaintiff.

No.13.

No.13.

30 This is the Exhibit marked "A" referred to in the annexed affidavit of Eleanor Forrest Laffer and sworn before me this 20th day of January 1950.

Deed of
Assignment
Laffer to
Maslen, 2nd
October 1946

Brian Simpson

A Commissioner for taking Affidavits.

THIS INDENTURE made the 2nd day of October One

Annexures thousand nine hundred and forty six Between
 --- CLAUDE ASHLEY LAFFER of 17 Highway Nedlands in
 No.13. the State of Western Australia Pastoralist (in
 Deed of this deed called "the Vendor") of the one part and
 Assignment GEORGE ALFRED MASLEN of Mardathuna Station in the
 Laffer to State of Western Australia Pastoralist (in this
 Maslen, 2nd Deed called "the Purchaser") of the other part
 October 1946
 continued

WITNESS as follows:

1. The Vendor assigns to the Purchaser all his right title and interest in the Mardathuna Pastoral 10 Company (in this Deed called "the Company") and the assets belonging thereto. Without in any way affecting the generality of the foregoing assignment the property hereby assigned included and the Vendor hereby assigns to the Purchaser:-

(a) All the right title and interest of the Vendor -

(i) In the Pastoral Lease registered as Lease No. 394/694 Crown Lease No. 328/1936 and the lands comprised therein (being Three hundred and fourteen thousand four hundred and five acres or thereabouts) and all the improvements to on or in such lands. 20

(ii) In the Lease registered No. 1091/41A and the lands comprised therein (being Reserve 16524 containing five hundred and ninety acres or thereabouts) and all the improvements to on or in such lands (which Leases lands and improvements are in this Deed collectively referred to as "the Leases") 30

(b) All the right title and interest of the Vendor in the goodwill of the business of the Company.

(c) All the right title and interest of the Vendors in the machinery engines plant vehicles furniture stores stock-in-trade utensils tools chattels effects sheep horses cattle and livestock in or upon the Leases or belonging to the Company together with the

benefit of all contracts and engagements and book debts belonging to the Company.

Annexures

No.13.

Deed of
Assignment
Laffer to
Maslen, 2nd
October 1946,
continued

TO HOLD the same henceforth unto and to the use of the Purchaser his Executors Administrators and assigns

2. The Purchaser covenants with the Vendor to pay to the Bank of New South Wales Perth in the said State the sum of Six thousand five hundred pounds (£6,500.0.0.) subject to the provisions of Clause eight of this Deed.
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3. Crown Lease No. 328/1936 is assigned subject to mortgage No. 8672/1929 to the National Bank of Australasia Limited Perth in the said State and subject thereto the Vendor covenants with the Purchaser to assign the Leases to the Purchaser free from all mortgages and encumbrances.
4. The Purchaser further covenants with the Vendor
- (a) To duly and punctually pay all principal interest and other moneys from time to time due and payable by the vendor or by the Company under Mortgage No. 8672/1929 to the National Bank of Australasia Limited and to duly and punctually perform and observe all the covenants conditions and stipulations contained in and do all acts and things required to be done under the said mortgage and to indemnify and keep indemnified the Vendor against all accounts claims demands proceedings sales foreclosures or otherwise made or arising under or by virtue of the said mortgage.
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- (b) During the continuance of the terms and any extension of the terms created by the Leases to pay the rent reserved by the Leases and perform all the covenants by the Lessee therein contained and to keep the Vendor indemnified against all actions expenses claims demands and liability on account of the non-payment of the said rent or the breach of the said covenants or any of them.
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5. This assignment shall take effect on and from

Annexures the first day of October one thousand nine
 --- hundred and forty six on and from which day the
 No.13. Purchaser shall be entitled to the possession of
 Deed of all the property hereby assigned and to the
 Assignment receipt of the rents and profits thereof. The
 Laffer to Purchaser covenants with the Vendor on and from
 Maslen, 2nd the first day of October one thousand nine hundred
 October . . . and forty six to pay all outgoings in respect of
 1946, the property hereby assigned and the covenants
 continued contained in paragraph four of this Deed shall 10
 take effect on and from the first day of October
 one thousand nine hundred and forty six.

6. The Vendor covenants with the Purchaser to
 use his best endeavours to obtain the Transfer to
 the Purchaser of all the right title and interest
 of the Vendor in the Leases and this Deed is made
 upon the express condition that if the consent of
 the lands Department to such Transfer is not
 obtained within a reasonable time then this deed
 shall be of no effect and shall be unenforceable 20
 by either party provided that all moneys paid in
 pursuance of this Deed shall be recoverable by
 the party paying them and if such moneys can not
 be recovered the party for whose benefit they were
 paid shall repay such moneys to the party who
 paid them.

7. The Vendor covenants to sign all necessary
 Transfers and applications and documents and do
 all acts and things necessary in order to transfer
 to the Purchaser all the right title and interest 30
 of the Vendor in the Leases.

8. The Vendor covenants with the Purchaser to
 use his best endeavours to obtain from the Bank
 of New South Wales Perth aforesaid in return for
 the payment to the Bank of the sum of six
 thousand five hundred pounds by the Purchaser
 under the provisions of clause two of this Deed
 a discharge of Mortgage No. 8673/1929 to the
 Bank over Crown Lease No. 328/1936 and this deed
 is made on the express condition that if the Bank 40
 does not within a reasonable time consent to
 grant a discharge of the said mortgage in return
 for the payment to it of the said sum of Six
 thousand five hundred pounds then this deed shall

be of no effect and shall be unenforceable by either party provided that all moneys paid in pursuance of this Deed shall be recoverable by the party paying them and if such moneys can not be recovered the party for whose benefit they were paid shall repay such moneys to the party who paid them.

Annexures

No.13.
Deed of
Assignment
Laffer to
Maslen, 2nd
October 1946,
continued

10 9. The Purchaser covenants with the Vendor to pay the costs of and incidental to the preparation execution and stamping of this Deed and of the counterpart thereof and of obtaining the consent thereto of the Treasurer under the National Security Regulations and of the Transfer of the right title and interest of the Vendor in the Leases.

10. This Deed is entered into subject to any consent required under the National Security (Economic Organization) Regulations.

20 IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

SIGNED SEALED AND DELIVERED)
by the said CLAUD ASHLEY) C. A. LAFFER
LAFFER in the presence of:-)

M. Byass
Solicitor
Perth.

SIGNED SEALED AND DELIVERED)
by the said GEORGE ALFRED)
MASLEN in the presence of:-)

Annexures

No. 14.

 No.14.
 List of
 documents
 omitted
 from the
 Record.

LIST OF DOCUMENTS omitted from the Record.

Nature of Document

1. Affidavit of Boyd Gardner Marshall as to Appealable Amount sworn the 6th day of July 1950.
2. Praecipe for payment into Court of security for costs of Appeal to High Court.
3. Entry of Appeal for hearing in the High Court of Australia. 10
4. List of Documents for inclusion in Appeal Book.
5. Summons for extension of time for filing Notice of Appeal to High Court of Australia.
6. Affidavits of John Peter Durack sworn the 26th day of July 1950.
7. Consent of Solicitors for Respondent.
8. Order of Mr. Justice McTiernan dated the 31st day of July 1950 granting extension of time.
9. Re-entry of Appeal for hearing before the High Court of Australia. 20

IN THE PRIVY COUNCIL

No. 31 of 1951

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA IN ITS APPELLATE
JURISDICTION

Between

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

• Appellant
(Plaintiff)

- and -

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

Respondents
(Defendants)

RECORD OF PROCEEDINGS

and JUDGMENTS of the Supreme Court of Western
Australia and the High Court of Australia

BARTLETT & GLUCKSTEIN
199, Piccadilly,
London, W.1.
Appellant's Solicitors

M. L. MOSS & SON
Savoy House,
115/116, Strand,
London, W.C.2.
Respondent's Solicitors