REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

THE NATIONAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF AUSTRALASIA LIMITED AND ANOTHER . . Defendants, } Appellants;

AND

DWYER AND OTHERS . . . . . Plaintiffs, Respondents.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, 1939, Oct. 17-19, 23.

1940, Mar. 30.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Executors and Administrators—Powers—Duties—Failure to get in debt—Discretion to give time—Exercise in good faith—Limitation of actions—Action to recover legacy—Based on devastavit*—Differing periods of limitation—Vendor and purchaser—Vendor's remedies on purchaser's default—Supreme Court Act* 1928 (*Vict.*) (*No.* 3783), *sec.* 82*—*Trustee Act* 1928 (*Vict.*) (*No.* 3792), *secs.* 3, 15*, 61, 67—*Property Law Act* 1928 (*Vict.*) (*No.* 3754), *sec.* 304—*Transfer of Land Act* 1915 (*Vict.*) (*No.* 2740), *Twenty-fifth Schedule, Table A—Unemployed Occupiers and Farmers Relief Act* 1931 (*Vict.*) (*No.* 3962), *sec.* 21—*Financial Emergency Act* 1931 (*Vict.*) (*No.* 3961), *sec.* 28—*Financial Emergency (Amendment) Act* 1931 (*Vict.*) (*No.* 3970).

* By sec. 82 (1) (c) (viii.) of the *Supreme Court Act* 1928 (Vict.) it is provided that "actions suits or other proceedings as herein set out shall be commenced within the times herein expressed after the causes of such actions suits or other proceedings . . . All . . . actions in the nature of actions on the case: Six years."

By sec. 15 of the *Trustee Act* 1928 (Vict.) it is provided that executors, administrators and trustees "may, if and as . . . they think fit . . .

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The right to the balance of purchase money under a contract of sale of land formed part of the residuary estate of a testatrix. It fell due on 1st May 1930 pursuant to the terms of the contract, which incorporated the provisions of Table A of the *Transfer of Land Act* 1915 (Vict.). Being unable to pay the balance on the due date, the purchaser requested the executors to postpone the date for payment. This request was refused, but short extensions were granted from time to time till February 1931 to allow the purchaser to arrange finance. As a consideration for such extensions, the purchaser specially agreed to pay to the executors interest at the rate of 7 per cent per annum in lieu of 4½ per cent per annum which hitherto he had been paying; this agreement was made by the parties in apparent ignorance of and despite the fact that under a condition in Table A the purchaser, being in default with the payment of the balance, was bound to pay interest at 8 per cent per annum. In 1931 owing to the prevailing adverse economic conditions, the executors concluded that the land the subject matter of the contract was unsaleable and difficult to let, and they did not exercise their power under the contract, whereby on default by the purchaser they were entitled to rescind the contract and resell the land and recover any deficiency. At the end of 1931, moratorium legislation came into operation in Victoria, and, in substance, afforded the purchaser the power to prevent the executors pursuing their remedies for non-payment by the purchaser. The purchaser after 1931 fell into arrears with his interest, and on a threat of proceedings in September 1936 he obtained a stay order under the provisions of the *Farmers Debts Adjustment Act* 1935 (Vict.), the effect of which was to stay any proceedings against him. In March 1938 the Farmers' Debts Adjustment Board made an arrangement with the executors whereby arrears of interest were extinguished, £1,630 was paid by the board to the executors on account of principal and, upon a transfer by the executors of the legal estate in the land to the purchaser, the latter granted a mortgage to the executors to secure the then balance, which was to be paid on 1st February 1943, together with the interest thereon at 4 per cent per annum. A number of residuary beneficiaries in 1938 commenced proceedings in the Supreme Court of Victoria charging the executors with breach of duty in failing to get in the balance of purchase money on its due date and in failing to exercise their powers under the contract.

Held, by *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that (*a*), apart from sec. 15 of the *Trustee Act* 1928 (Vict.), in view of the adverse economic conditions and the nature of the remedies open to the executors, the probable and possible consequences of any attempt to exercise the vendor's powers of rescission and resale on a purchaser's default, the executors had committed no breach of duty in extending the purchaser's time to pay, and

(*e*) allow any time for payment of any debt; or (*f*) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust; and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to . . . them seem expedient, without being responsible for any loss occasioned by any act or thing so done by . . . them in good faith."

(*b*) further, the executors having actively exercised their discretion under sec. 15 in good faith, the concluding words of that section relieved them from any loss consequential upon the giving of time to the purchaser.

Per Latham C.J. (*Starke* J. *contra*): Although the action was one to recover a legacy, its real foundation was a *devastavit*, and, six years having elapsed between the date of the *devastavit* (1931) and the bringing of the action thereon (1938), the action must be barred by sec. 82 (1) (c) (VIII.) of the *Supreme Court Act* 1928 (Vict.).

Per Starke J.: If the executors had committed any breach, then in all the circumstances they had acted honestly and reasonably and ought fairly to be excused; with the consequence that, under sec. 61 of the *Trustee Act* 1928 (Vict.), the court would relieve them from any personal liability for the breach.

Decision of the Supreme Court of Victoria (*Mann* C.J.): *Dwyer* v. *National Trustees Executors and Agency Co. of Australasia Ltd.* [No. 2], (1939) V.L.R. 417, varied.

APPEAL from the Supreme Court of Victoria.

The National Trustees Executors and Agency Co. of Australasia Ltd. and James Edward Hogan (hereinafter referred to as "the defendants") were the executors appointed by the will of Winifred Dunn, who died on 13th October 1926. Probate of the will was granted to the defendants by the Supreme Court of Victoria in its probate jurisdiction on 17th December 1926. By the will the testatrix devised and bequeathed the residue of her real and personal estate to her nephews and nieces other than Margaret Patricia Daly and Elizabeth Hogan. William Dwyer, Winifred Heffernan, Anastasia Campbell, Patrick James Heffernan, Martin Dwyer, Mary Dwyer, Ellen Goody, Michael Dwyer and Eaneas Dwyer (hereinafter referred to as "the plaintiffs") were some of the residuary beneficiaries, who numbered thirty-seven in all.

The residue of the estate of the testatrix included a sum of £4,830 due under a contract of sale made on 24th January 1920 between Michael Dunn (the husband of the testatrix) as vendor, and James Kilian Walsh as purchaser, of 683 acres of land, situated near Cobram and used for wheat growing and lamb raising. The land was sold for £11 per acre on the terms that the purchaser should (as in fact he did) pay a deposit of £300 on the signing of the contract, an instalment of £1,700 on 1st May 1920, and an instalment of £683 on 1st May 1925. The balance of £4,830 was to be paid on 1st

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May 1930, and the balance owing from time to time was to bear interest at the rate of 4½ per cent per annum. The contract was expressed to be subject to the conditions set out in Table A in the Twenty-fifth Schedule of the *Transfer of Land Act* 1915. Those conditions, so far as relevant to this report, were as follows:—1. "If, from any cause whatsoever, his purchase shall not be completed at the time above specified, the purchaser shall pay interest on such of his acceptances or notes as shall become overdue at the rate of eight pounds per cent per annum to the time of completion, without prejudice however to the vendor's right under the sixth condition." "6. If the purchaser shall fail to comply with the above conditions, or shall not pay the whole of the deposit, or shall not give the acceptances or notes provided for by the contract, or shall not duly pay the same or any of them, his deposit money, or so much thereof as shall have been paid, shall be actually forfeited to the vendor, who shall be at liberty without notice to rescind the contract and to resell the property bought by the purchaser by public auction or private contract, and the deficiency (if any) in price occasioned by such sale, together with all expenses attending the same, shall immediately be made good by the defaulter at this present sale, and in case of non-payment the amount of such deficiency and expenses shall be recoverable by the vendor as and for liquidated damages, and it shall not be necessary previously to tender a transfer to the purchaser, or the vendor may deduct and retain such deficiency and expenses out of the amount of any of the before-mentioned acceptances or notes which shall then have been paid, repaying unto such defaulter within seven days after the completion of the sale the residue of such amount, but without any interest, and returning without any unnecessary delay any then unpaid acceptances or notes." Condition 5 in the contract itself was as follows: "Wherever 'acceptances or notes' are referred to in the said Table A of the *Transfer of Land Act* 1915 that reference shall include instalment of purchase money and of interest respectively." The benefit of this contract had been assigned to the testatrix on the death and intestacy of Michael Dunn as her share of his estate, and on her death the defendants, as her executors, became entitled to all the rights and powers as unpaid vendors under the contract.

In March 1930 Walsh, the purchaser, approached the defendants with a request to postpone the time for payment of the balance of purchase money from 1st May 1930, but this request was refused by them. Walsh then asked for a short extension to allow him through a firm of stock and station agents to arrange finance by a loan to be secured by mortgage. The defendants agreed to grant him an extension of two months upon his agreeing to pay interest at the rate of seven per cent per annum in lieu of 4½ per cent per annum as hitherto he had been paying. As he was unable to arrange the finance within the two months, further extensions were granted till 1st February 1931. The defendants then required Walsh to pay the balance, but he was unable to do so, and on 6th February 1931 the defendants sought the advice of the solicitor to the estate, who carried on practice at Cobram, as to whether the land would readily sell and at what figure. They also asked him, in the event of having "to take extreme measures" and of failure to sell, what rental could be expected. The solicitor on 12th February wrote that there was no hope of selling or leasing the land, as properties of similar nature had been, in February 1931, offered for sale and leasing and no bids or offers therefor had been received. He also wrote that the legal position of those seeking to exercise rights under a contract of sale similar to Walsh's contract was very involved and, in the event of a sale, it was desirable to obtain a definition of the defendants' rights in the matter. On 26th February the defendants wrote Walsh, requiring him to call at the office of the trustee company. On 18th March 1931 Walsh called and informed the defendants that he was unable to pay but that he was interested in his father's estate, out of which he hoped to get a substantial sum. A suggestion that Walsh should pay interest at 7½ per cent per annum and waive any moratorium was not agreed to by Walsh. On 20th April 1931 Walsh wrote, asking the defendants to allow his interest due 1st November 1931 to stand over till after the harvest. Without agreeing to this request, the defendants on several occasions during 1931 wrote Walsh, stating that the beneficiaries required a distribution and calling on him to pay the balance of purchase money. In view of the solicitor's advice and the observations made on a visit by the secretary of the trustee company to the Cobram district, the

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defendants took no steps in 1931 to enforce their remedies, either pursuant to the provisions of the contract or by litigation.

Owing to the financial depression which had developed since 1929 and reached its critical stages in 1931, the Victorian Parliament passed the *Unemployed Occupiers and Farmers Relief Act* 1931 (No. 3962) and the *Financial Emergency Acts* 1931 (No. 3961 and No. 3970) which came into operation on 24th September 1931 and 1st October 1931 respectively. The effect of these statutes (and particularly the former) was to afford relief to Walsh in the event of the appellants seeking to enforce the contract. Under sec. 21 of the former Act, a farmer was entitled to apply to a Court of Petty Sessions for a protection certificate, the effect of which would be to bar the remedies of any creditor, secured or otherwise, to enforce any debt or liability owing by the farmer. Walsh was a farmer within the meaning of the Act, and, although he did not apply for a protection certificate, Walsh deposed in evidence at the trial that he would have applied for a certificate if he had been sued or otherwise pressed for payment by the defendants. A protection certificate, if obtained by Walsh, would in the first instance have been in force for a period of twelve months, but there was power given by the Act No. 3962 (as amended by Acts Nos. 4060 and 4201) to extend the period of the certificate till 1st March 1937.

The *Financial Emergency Acts* 1931 also enacted that provided interest was not in arrears for a specified period and there had been no breach of other covenants, any mortgagor (which expression included a purchaser of land on a terms contract of sale) was entitled to apply to the Supreme Court for an order that the mortgagee (which expression included an unpaid vendor under a long term contract of sale) should not for a specified period exercise his powers under the mortgage (or contract of sale) to enforce payment of overdue principal moneys. The Acts also provided for reduction of the rate of interest under mortgages (including contracts of sale) by $22\frac{1}{2}$ per cent. Walsh, being a mortgagor within the meaning of the Acts, did not make any application to the Supreme Court for an order under the *Financial Emergency Acts*, but the rate of his interest was reduced from seven per cent per annum to £5 8s. 6d. per cent per annum pursuant to its provisions.

As a result of the prevailing economic conditions, the value of Walsh's land fell from £11 per acre in 1920 to between £7 and £8 10s. per acre in 1930-1931, and, although frequently requested by the defendants to pay, Walsh made no payments of interest for the period 1st May 1931 to 1st May 1934, when £824, 3s. 6d. was owing by him in respect of arrears of interest. In March 1934, because of his default, the defendant Hogan visited Walsh at Cobram and obtained from him a bill of sale over his stock and plant and an assignment of storage warrants of 715 bags of wheat which Walsh had stored with John Darling & Son, as a security for the payment of arrears of interest. In consideration of these securities, the defendants agreed to reduce the interest back to the rate of $4\frac{1}{2}$ per cent per annum as originally provided under the contract. The defendants, however, did not register the bill of sale but did on 15th June 1934 receive the proceeds of the 715 bags of wheat, viz., £238 12s., which was applied on account of arrears of interest. The next payment made by Walsh on account of arrears was on 23rd July 1935, when he received an interest under a relative's will; he then paid £170 on account. Walsh was further requested to make payments for interest and threatened with action, but his next payments therefor were £366 3s. 6d. on 6th April 1936 and £130 on 4th May 1936.

In 1936 some of the beneficiaries were pressing the defendants to take action against Walsh, and, on further threat by the defendants to take action, Walsh paid a further £50 on account on 30th June 1936. After these payments, arrears of interest to 1st May 1936 amounted to £304 2s., and there were arrears of rates £123 2s. owing by Walsh in respect of the land to the Shire of Tungamah. Again some of the beneficiaries pressed the defendants, and, in September 1936, the defendants threatened Walsh with a writ and in fact instructed their solicitors to issue the same, but on 26th September 1936 Walsh obtained a stay order under the provisions of the *Farmers Debts Adjustment Act* 1935 (No. 4326), which provided for the compulsory adjustment of creditors' claims by a board appointed for the purpose. The board was provided with funds by the Victorian Parliament to make payments in its discretion on account of debtors in adjustments made by it. After protracted negotiations with the

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defendants, an adjustment was made by the board on account of Walsh. By the adjustment, the arrears of interest, £304 2s., to 1st May 1936 were extinguished, the board from its funds paid the defendants £1,630 on account of the principal sum, the defendants transferred the legal estate in the land to Walsh and took from him an instrument of mortgage secured thereon for the balance of purchase money, viz., £3,200, to be repaid on 1st February 1943 and to bear interest in the meantime at 4 per cent per annum.

The plaintiffs, who throughout were dissatisfied with the defendants' delay in winding up the estate and with the above adjustment, brought an action in the Supreme Court of Victoria, charging the defendants with breaches of duty as executors, namely, failing to get in the balance of purchase money on 1st May 1930, neglecting to enforce their rights under the contract, giving extensions of time to pay and reductions of interest, failing to collect interest at the proper rates agreed upon between the parties, failing to claim the full amount of interest under the adjustment by the Farmers' Debts Adjustment Board and treating the stay order under the *Farmers' Debts Adjustment Act* as preventing them from exercising their rights. The plaintiffs claimed a declaration that the defendants had been guilty of breaches of duty as aforesaid, accounts upon the footing of wilful default, a declaration that the defendants were bound to exercise their rights under condition 6 of Table A aforesaid, administration of the estate with the necessary accounts and inquiries and an order for the removal of the defendants as executors and appointment of new executors in their place.

In so far as it is material to this report, the defendants in their defence admitted that they had given Walsh extensions of time but averred that what they did seemed to them expedient and they acted reasonably and in good faith ; they relied upon the provisions of sec. 15 of the *Trustee Act* 1928 (Vict.) ; they averred that in 1929 an economic and financial depression reduced the value of Walsh's land so that the same could not be sold or leased ; they relied upon the provisions of the *Unemployed Occupiers and Farmers Relief Act* 1931 (Vict.) (No. 3962) and *Financial Emergency Acts* 1931 (Vict.) (No. 3961, No. 3970) ; they averred that the adjustment they made with the Farmers' Debts Adjustment Board was the best

they could make in the circumstances; they relied upon secs. 30 and 61 of the *Trustee Act* 1928 (Vict.); they averred that any action was barred by effluxion of time and relied upon sec. 67 of the *Trustee Act* 1928 (Vict.) and sec. 82 of the *Supreme Court Act* 1928 (Vict.); and they alleged that the plaintiffs were guilty of laches and delay.

Mann C.J., who tried the action, found that at all times from 24th September 1931 it was not possible for the defendants to enforce payment, by any means, of the unpaid purchase money or interest thereon, because Walsh would certainly have obtained the statutory protection under the *Unemployed Occupiers and Farmers Relief Act* 1931 as a matter of course. His Honour, however, came to the conclusion that "from 1st July 1930 at the latest there was no reason why the balance of purchase money should not have been got in by a sale of the property except a desire to postpone an unpleasant task without any defined purpose in view." His Honour, therefore, held the appellants guilty of breach of duty in not getting in the balance and held that, as the action was one to recover a legacy (the statutory period of limitation of which was fifteen years), the remedies consequential thereon were not barred by effluxion of time nor were they barred by laches or acquiescence. He decreed that the defendants should pay to the estate the sum of £3,200 and be chargeable with interest at eight per cent per annum on £4,830 from 1st May 1930 to 1st November 1930 and at four per cent per annum on £4,830 from 1st November 1930 to 1st February 1938 and at four per cent per annum on £3,200 from 1st February 1938 until date of payment of £3,200 as aforesaid. He also ordered that the defendants should be entitled to set off against the amounts for which they were chargeable as interest any sums received by them from Walsh for interest during the period from 1st May 1930 to the payment of the £3,200. He also ordered that the defendants might have recourse to and were entitled to be indemnified out of any moneys coming to their hands under the mortgage entered into by Walsh as a result of the adjustment under the *Farmers Debts Adjustment Act* 1935: *Dwyer* v. *National Trustees Executors and Agency Co. of Australasia Ltd.* [*No.* 2] (1).

(1) (1939) V.L.R. 417.

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The defendants appealed to the High Court from the decree of *Mann* C.J. The plaintiffs cross-appealed against the finding of *Mann* C.J. that the defendants could not have recovered any principal or interest other than what they did from Walsh after 24th September 1931.

Ham K.C. (for *Herring* K.C., on active service) (with him *Mulvany*), for the appellants. The appellants were entitled to give Walsh time to pay (*Trusts Act* 1915 (Vict.), sec. 25; *Trustee Act* 1928 (Vict.), sec. 15). The court below has introduced the word "reasonably" into the sections. All that executors have to show is that in good faith they have considered the matter and actively exercised their discretion. There is no evidence that the appellants had any affection for Walsh or were guilty of a lack of bona fides. The officers of the trustee company considered the circumstances carefully and exercised the discretion in good faith. The officers can do what the board should do (*Trustee Companies Act* 1928 (Vict.), sec. 16). There was no policy of the board of directors of the trustee company other than that each case had to be treated on its merits. In this case the board had to face a real difficulty created by *Ward* v. *Ellerton* (1), by having to return instalments or to turn the purchaser out and attempt to get a tenant. The land was unsaleable, there were difficulties of rescission and the appellants could not sue for the balance of purchase money. The appellants acted bona fide, and the question does not arise whether they acted reasonably. The *Trustee Act* 1928 (Vict.), sec. 61, may be contrasted. The effect of sec. 15 is set out in *Underhill's Law of Trusts and Trustees*, 8th ed. (1926), pp. 358, 359, art. 65. Sec. 61 was passed before sec. 15, and it is submitted that sec. 15 was passed to extend protection to trustees and personal representatives. All they have to do is to consider the problem and to come to a bona-fide conclusion in the exercise of their discretion (*Re Greenwood*; *Greenwood* v. *Firth* (2)). Sec. 15 is to protect trustees and personal representatives: if later it is proved to a court that they acted unreasonably but considered the matter and acted bona fide, then the section affords a defence (*In re Tong*; *Tong*

(1) (1927) V.L.R. 494.

(2) (1911) 105 L.T. 509.

v. *Trustees, Executors and Agency Co. Ltd.* (1)). *In re Chapman*; *Cocks* v. *Chapman* (2); *Re Owens*; *Jones* v. *Owens* (3). The appellants are also protected by sec. 67 of the *Trustee Act* 1928 (*In re Blow*; *St. Bartholomew's Hospital* (*Governors*) v. *Cambden* (4); *Ashburner's Principles of Equity*, 2nd ed. (1933), p. 148). This case comes within the provisions of sec. 67 (1) (*b*) of the *Trustee Act* 1928 (Vict.). It is a claim to recover money and is therefore barred after six years. The time begins to run at the earliest time that the *cestui que trust* can sue (*How* v. *Earl Winterton* (5); *Thorne* v. *Heard* (6)). *Ashburner's Principles of Equity*, 2nd ed. (1933), p. 514, sets out the position that is contended for (*In re Richardson*; *Pole* v. *Pattenden* (7)). To distinguish whether the limitation under the *Trustee Act* or whether the limitation under the *Property Law Act* is to apply, one must see whether the plaintiff is suing for a breach of trust or for a legacy. It is submitted that here there is no suing for a legacy and the decree does not order that the plaintiffs be paid anything.

Ashkanasy, for the respondents. The judgment below is correct in fact and law and should not be disturbed. Inferences of fact are amply supported by the evidence. [He referred to *National Trustees Company of Australasia* v. *General Finance Company of Australasia* (8).] The appellants are not entitled to rely on the *Trustee Act* 1928 (Vict.), sec. 15, as the following matters were not considered before they exercised their discretion, viz.: (*a*) the contract of sale; (*b*) the security for the liability under the contract; (*c*) the personal security afforded by the purchaser. The first is demonstrated by showing that the trustees purported to increase interest to seven per cent, whereas under the contract they were entitled to eight per cent. The second is demonstrated by the fact that the trustees made no effort to sell the land; the third, by the fact that no pressure was brought to bear on the purchaser. Hence, it cannot be said that the appellants considered the matter before exercising their discretion. A trustee company can only exercise its

(1) (1910) V.L.R. 110.
(2) (1896) 2 Ch. 763.
(3) (1882) 47 L.T. 61, at p. 64.
(4) (1914) 1 Ch. 233, at p. 240.
(5) (1896) 2 Ch. 626.
(6) (1894) 1 Ch. 599, at pp. 603, 605.
(7) (1920) 1 Ch. 423, at pp. 433, 439.
(8) (1905) A.C. 373.

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discretion through its board of directors, and sec. 16 of the *Trustee Companies Act* 1928 (Vict.) does not allow the company to deal with the matter through its officers. There is no statement of policy by the board, enabling the officers to carry out the ministerial acts necessary to implement the board's policy. The true view of the *Trustee Act* 1928 (Vict.), sec. 15, is that it is to be read as if inserted in the trust deed as a power which may be exercised by the trustees after an investigation of the facts and on proper grounds (*Re Owens*; *Jones* v. *Owens* (1)). The power must be exercised with prudence and care and in good faith. The test is: What would the reasonable business man have done in the discharge of his own interests? The power is to allow time for payment of a debt. This liability under the contract was not a "debt," as the execution of a transfer is a contemporaneous condition which has not been fulfilled (*Reynolds* v. *Fury* (2); *Harry Davies & Co. Pty. Ltd.* v. *East* (3)). No judgment was exercised by the trustee company at all (*Leeds Estate Building and Investment Company* v. *Shepherd* (4); *In re Leeds Banking Co.*; *Howard's Case* (5)). As to the limitation of time to bar the action, there was no limitation to actions against trustees till the *Trustee Act* 1928 (Vict.), sec. 67, was passed (*In re Marsden*; *Bowden and Gibbs* v. *Layland* (6); *In re Hyatt*; *Bowles* v. *Hyatt* (7); *Lacons* v. *Warmoll* (8); *In re Blow*; *St. Bartholomew's Hospital Governors* v. *Cambden* (9); *In re Jane Davis*; *In re T. H. Davis*; *Evans* v. *Moore* (10); *In re Barker*; *Buxton* v. *Campbell* (11); *In re Mackay*; *Mackay* v. *Gould* (12); *In re Timmis*; *Nixon* v. *Smith* (13); *Property Law Act* 1928 (Vict.), sec. 304; *Trustee Act* 1928 (Vict.), sec. 67). This is an action for a legacy, therefore the statutory bar is under the *Property Law Act*, namely, fifteen years (*In re Barker*; *Buxton* v. *Campbell* (11); *In re Richardson*; *Pole* v. *Pattenden* (14)). This action is not barred by the effluxion of time. There should be a variation of the court's order to allow interest at eight per cent from 1st May 1930 to 1st February 1938, as the appellants by the

(1) (1882) 47 L.T. at p. 64.
(2) (1921) V.L.R. 14.
(3) (1925) V.L.R. 681.
(4) (1887) 36 Ch. D. 787, at p. 804.
(5) (1866) 1 Ch. App. 561.
(6) (1884) 26 Ch. D. 783, at p. 788.
(7) (1888) 38 Ch. D. 609.
(8) (1907) 2 K.B. 350, at p. 365.
(9) (1914) 1 Ch., at p. 240.
(10) (1891) 3 Ch. 119.
(11) (1892) 2 Ch. 491.
(12) (1906) 1 Ch. 25.
(13) (1902) 1 Ch. 176.
(14) (1920) 1 Ch. 423.

exercise of reasonable diligence might have obtained interest at that rate (*Ruddenklau* v. *Charlesworth* (1); clauses 1 and 6 of Table A of the *Transfer of Land Act* 1915). The provisions of the *Farmers Relief Acts* and *Financial Emergency Acts* did not apply, as the purchaser sought no protection order and he was not a person entitled to relief as he was always in arrears with payment of his interest and rates.

Ham K.C., in reply. In view of the uncertainty of the law subsequent to *Ward* v. *Ellerton* (2) the appellants should be excused under the *Trustee Act* 1928 (Vict.), sec. 61. They had acted honestly and reasonably and ought fairly to be excused. It would seem that the provision in clause 1 of Table A to increase the interest to rate of eight per cent on default was a penalty and therefore unenforceable. It is submitted that the position under a contract is the same as that under a mortgage. As to sec. 67 of the *Trustee Act* 1928 (Vict.), *Lacons* v. *Warmoll* (3) was approved in *In re Blow*; *St. Bartholomew's Hospital (Governors)* v. *Cambden* (4), and the only contrary view is a suggestion in *In re Richardson*; *Pole* v. *Pattenden* (5), where the matter is left open. Here there is no claim for a legacy.

Ashkanasy (by leave) referred to *Brunyate, Limitation of Actions in Equity* (1932), p. 115, as to the meaning of sec. 67 (1) (*a*) of the *Trustee Act* 1928 (Vict.).

Cur. adv. vult.

1940, Mar. 30.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal by the defendants in an action in which they were charged with breach of duty as executors of the will of Winifred Dunn deceased. The plaintiffs are nine of the residuary legatees under the will. The residuary gift is in the following terms : " The residue of my estate I give devise and bequeath unto my nephews and nieces " excepting two named nieces. This is a direct gift to the legatees. The executors are not trustees of the residue.

(1) (1925) N.Z.L.R. 161.
(2) (1927) V.L.R. 494.
(3) (1907) 2 K.B. 350.
(4) (1914) 1 Ch. at pp. 247, 248.
(5) (1920) 1 Ch. 423.

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Mrs. Dunn died on 13th October 1926. One Walsh owed to her a sum of £4,830 for balance of principal and £98 16s. 11d. for interest under a contract of sale of certain farm lands at Cobram. The balance of the principal was payable on 1st May 1930. Before the balance fell due Walsh applied for an extension of time within which to pay. In 1930 and the immediately succeeding years there was a period of most acute financial depression. The executors did not sue Walsh for the money due or resell the land under a clause in the contract of sale which would have entitled them so to resell. They contended that they did their best under very difficult circumstances to get the money. Walsh paid some interest but soon got into arrears, and he paid nothing on account of principal. The plaintiffs complained that the executors had been negligent in failing to enforce the contract against Walsh, and the learned trial judge (*Mann* C.J.) agreed with this contention. It would have been sufficient for the plaintiffs to prove the existence of the debt owed by Walsh and to leave it to the defendants to satisfy the court affirmatively that there was good reason or excuse for their failing to collect the money. " When the debt is proved the burden is thrown on the executor to show why he did not get it in " (per *Chitty* L.J. in *In re Stevens* ; *Cooke* v. *Stevens* (1)). The plaintiff, however, adduced evidence as to negligence, and the learned trial judge did not decide the case upon the principle mentioned. He made a positive finding of negligence against the executors. His Honour reached the conclusion that the executors did not realize their responsibility to the beneficiaries but were led by sympathy with Walsh, by good nature and by an unwillingness " to go to extremes " to postpone and really to abandon making any effective endeavour to obtain payment. A breach of duty by the executors being thus established, the plaintiffs were not bound to show that if the executors had performed their duty they would have secured payment of the outstanding balance or of part of it. The onus was on the executors to show that the estate had not suffered loss by reason of their breach of duty. The defendants failed to satisfy the learned judge on this question, and therefore judgment was given against the executors personally, provision being made in the

(1) (1898) 1 Ch. 162, at p. 171.

judgment under which the executors may indemnify themselves out of a mortgage which now represents the only amount recoverable from Walsh, the original amount owing having been reduced under the *Farmers Debts Adjustment Act* 1935.

It is necessary in considering the case to distinguish between two periods. On 24th September 1931 Act No. 3962—the *Unemployed Occupiers and Farmers Relief Act* 1931—came into operation. It provided for relief to farmers in respect of (*inter alia*) liabilities under contracts of sale of land. Walsh was a farmer. He was eligible to apply for a protection certificate under sec. 21 of the Act. The effect of a protection certificate is to protect the farmer who obtains it from any steps which otherwise a vendor could take under a contract of sale: See sec. 21 (10). As to this period his Honour said in his reasons for judgment:—"I am satisfied that throughout the whole of that period the statutes in force, and particularly" Act No. 3962, sec. 21 (10), "provided Walsh with a readily available means of protection against any steps that could, apart from the statutes, have been taken by the defendants to recover the unpaid purchase money. This was quite well known to both parties and the knowledge necessarily coloured and controlled all their negotiations and correspondence. I find as a fact that at all times from the 24th September 1931 it was not possible for the executors to enforce by any means payment of the unpaid purchase money or interest thereon, because Walsh would certainly have obtained the statutory protection as a matter of course." Therefore his Honour held that "the plaintiffs' right to relief, if any, rests upon the proof of a breach of duty by the executors prior to 24th September 1931." This conclusion has been attacked upon the appeal, but I agree with his Honour's judgment as to the later period for the reasons which he has stated.

During the earlier period, however, which elapsed on 24th September 1931, there was no statute in operation which enabled Walsh to obtain protection against the claim which the executors had against him. As to this period the learned Chief Justice decided that the plaintiffs had established breaches of duty by the defendants. I do not propose to examine this question because, in my opinion, the defendants have a good defence under a statute

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of limitations, even if they were, in the period mentioned, guilty of the breaches of duty alleged.

The learned Chief Justice held that the defendants were not protected by sec. 67 of the *Trustee Act* 1928, because, though an administration action brought for the purpose of recovering a legacy is an action to recover money or other property within the section (*In re Blow*; *St. Bartholomew's Hospital (Governors)* v. *Cambden* (1); *In re Richardson*; *Pole* v. *Pattenden* (2)), it is, as an action to recover a legacy (*In re Richardson*; *Pole* v. *Pattenden* (2); *Christian* v. *Devereux* (3); *Prior* v. *Horniblow* (4)), an action to which an existing statute of limitations applies, the existing statute being the *Property Law Act* 1928, sec. 304, which fixes a period of fifteen years in the case of actions to recover legacies. Sec. 67 of the *Trustee Act* does not apply where an existing statute of limitations is applicable (sec. 67 (1) (*b*)). Accordingly I agree that sec. 67 does not apply in this case. I further agree that sec. 304 of the *Property Law Act* is applicable because, as the authorities cited show, this is an action to recover a legacy; but this provision does not bar the action, because a period of fifteen years has not elapsed since a present right to receive their legacies accrued to the plaintiffs. It may be observed that, when outstanding assets which are available for the payment of a legacy come to the hands of an executor, time begins to run, in relation to those assets, from the date when they were received by the executor (*Laws of England*, 2nd ed., vol. 20, pp. 664, 665; *Williams* on *Executors*, 12th ed. (1930), vol. II., p. 1248). Thus, even if the plaintiffs should fail in the present action, they will be able to recover their legacies from the executors when the mortgage money is repaid and within fifteen years thereafter.

But these considerations do not, in my opinion, exhaust the case. This action to recover legacies is, as the statement of claim shows, based upon allegations that the executors have negligently failed to get in assets belonging to the estate. The allegations of breach of duty are as follows:—

1. That when Walsh failed to pay the balance due on 1st May 1930 the defendants wrongfully and in breach of their duties failed

(1) (1914) 1 Ch. 233.
(2) (1920) 1 Ch. 423.
(3) (1841) 12 Sim. 264 [59 E.R. 1133].
(4) (1836) 2 Y. & C. 200 [160 E.R. 369].

and neglected to get in the said balance of purchase money or to enforce their rights under the contract of sale (par. 7 of statement of claim).

2. That on or about 28th April 1930 the defendants wrongfully and in breach of their duties as executors notified Walsh that they would allow the balance to remain overdue or alternatively grant an extension of time for payment provided that Walsh paid interest at the rate of seven per centum per annum. Walsh did not so pay interest, but the executors still neglected to enforce their rights under the contract of sale (pars. 8 and 9 of statement of claim).

3. That on or about 9th September 1930 the defendants in breach of their duties as executors notified Walsh that they would allow the balance to remain overdue or alternatively again granted an extension of time upon Walsh paying interest at the rate of seven per cent per annum. Walsh did not pay interest, but the defendants still failed to get in the principal and interest (pars. 10 and 11 of statement of claim).

The plaintiffs claimed a declaration that the defendants had been guilty of breach of duty as executors, accounts on the footing of wilful default, administration of the estate, and other appropriate relief.

The plaintiff's case, therefore, is entirely founded upon alleged breach of duty by the executors in getting in money owing. Such a breach of duty is a *devastavit* (*Williams* on *Executors*, 12th ed. (1930), vol. II., pp. 1184, 1185). The plaintiffs rely and must necessarily rely upon a *devastavit* in order to obtain judgment *de bonis propriis*. If no claim were made based upon a *devastavit*, there would be no dispute between the parties. The executors do not deny that the plaintiffs are residuary legatees or that, when they have assets, they are bound to distribute them among the class of residuary legatees of which the plaintiffs are members. The only dispute is a dispute as to whether the executors have been guilty of negligence in their administration of the estate. Accordingly the action is necessarily and essentially an action based upon a *devastavit*.

Either a creditor or a beneficiary may bring an action based upon a *devastavit*. It may be noted that a proceeding by a beneficiary for a legacy generally takes the form of an administration action

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because an action at law does not lie against an executor for a general legacy to which he has not assented even though he may have expressly promised to pay, unless the executor " has by arrangement with the legatee ceased to hold money bequeathed in his character of executor so that he has become a debtor to the legatee " : See cases cited in *Williams* on *Executors*, 12th ed. (1930), vol. II., p. 1233. The terms " action of *devastavit* " (that is, an action based upon an allegation of *devastavit*) and " administration action " are not mutually exclusive. An administration action may or may not be an " action of *devastavit*." But an " action of *devastavit* " will usually, if not always, be an administration action. A breach of duty by an executor constituting a *devastavit* is a common basis for an administration action. See, for example, an ordinary form of statement of claim in an administration action as provided in Appendix C., sec. II., Form 2, in the *Rules of the Supreme Court of Victoria* 1916 (repeated in the 1938 rules) and in R.S.C. (England), where pars. 2 and 3 contain an allegation of *devastavit* in failing to collect moneys due to the estate. *In re Symons* ; *Luke* v. *Tonkin* (1) is an instance of such an administration action.

A personal action against an executor in which the plaintiff relies upon a *devastavit* is an action on the case within 21 Jac. I. c. 16, s. 3, now embodied in the *Supreme Court Act* 1928, sec. 82 (1) (c) (VIII.), and the right of action, so far as it necessarily depends upon a *devastavit*, is barred six years after the *devastavit* (*In re Gale* ; *Blake* v. *Gale* (2) ; *In re Hyatt* ; *Bowles* v. *Hyatt* (3) ; *Lacons* v. *Warmoll* (4) ; *In re Blow* ; *St. Bartholomew's Hospital* (*Governors*) v. *Cambden* (5))—and see *Brunyate, Limitation of Actions in Equity* (1932), pp. 68, 69. I quote from *Lacons* v. *Warmoll* (6) : " In *Thorne* v. *Kerr* (7), *Page-Wood* V.C., and in *In re Gale* (2), *Bacon* V.C., decided that, where the action must be framed, and the plaintiff must rely, on a *devastavit*, and six years have elapsed, the Statute of Limitations applies. The law in that respect as laid down by those learned judges was distinctly recognized by *Chitty* J. in the case of *In re Hyatt* (3)." In *Hyatt's Case* (8) *Chitty* J. said : " If it is necessary that the demand

(1) (1882) 21 Ch. D. 757.
(2) (1883) 22 Ch. D. 820.
(3) (1888) 38 Ch. D. 609.
(4) (1907) 2 K.B. 350.
(5) (1914) 1 Ch. 233.
(6) (1907) 2 K.B. at p. 361.
(7) (1855) 2 K. & J. 54 [69 E.R. 691].
(8) (1888) 38 Ch. D., at p. 616.

against the executor should be framed on the principle of *devastavit*, or if the creditor going out of his way chooses to sue him in that form, there is no question that he can plead the Statute of Limitations against the *devastavit* so charged." In *In re Blow* (1), *Cozens-Hardy* M.R. was equally definite: "It is plain that such an action" (that is, an action the ground of which is a *devastavit*) "is barred by the lapse of six years after the tort was committed."

The respondent has relied upon the case of *In re Richardson*; *Pole* v. *Pattenden* (2) to support the proposition that an action by a residuary legatee seeking administration of an estate is an action to recover a legacy to which a twelve-year period of limitation is applicable under sec. 8 of the *Real Property Limitation Act* 1874, corresponding to sec. 304 of the *Property Law Act* in Victoria, where the period, however, is fifteen years. Undoubtedly the case does so decide. But it has no bearing upon the period of limitation which is applicable when a *devastavit* is relied upon, and, as in the present case, is necessarily the basis of the plaintiff's claim. *In re Richardson* (2) was an administration action which was not based upon any allegation of *devastavit*. As the headnote states, the beneficiaries brought an action against an executor "for the administration of the original testator's estate and for an account of his dealings therewith, but did not allege that any part of the estate had been misapplied." No question relating to *devastavit* arose, and no such question was discussed or decided in the case.

It may be suggested that there are difficulties in the application of more than one statute of limitations to a single proceeding and that it should not be held that the present action is an action to recover a legacy and so subject to a fifteen-year period of limitation, and also an action founded upon a *devastavit* and therefore subject also to a six year period of limitation. In *In re Richardson* (3) *Warrington* L.J. seemed to think that there were difficulties in the idea of two limitation provisions applying to the same proceeding. The difficulties are not specified, and I am unable to realize them. I can see no difficulty, for example, in a six-year period applying to all claims for wages and a twelve-months' period applying to

(1) (1914) 1 Ch., at p. 240. (2) (1920) 1 Ch. 423.
(3) (1920) 1 Ch., at p. 445.

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claims for wages made in a certain jurisdiction and a six-months' period applying to claims for wages of a particular character. All the statutes might be applicable in a particular case. I can perceive no inconsistency between the proposition that any plaintiff seeking payment of a legacy who relies upon a *devastavit* must bring his action within six years of the *devastavit* alleged and the proposition that, whether he makes any allegation of *devastavit* or not, he must bring his action within fifteen years after his right has accrued. It has long been recognized that it may be necessary to apply in relation to the same proceeding more than one statute of limitations. For example, in *Thorne* v. *Kerr* (1) a creditor on a bond suing a personal representative was met by a defence of the statute of limitations. So far as the action was simply a proceeding upon a bond the period of limitation was twenty years. But the plaintiff alleged a *devastavit*, and, as the bill was founded on a *devastavit*, it was said by Sir *William Page-Wood* V.C.: " The bond is what leads up to the remedy, but the real foundation of the suit is the *devastavit*, as to which the remedy is barred by the lapse of six years, this court following in that respect the analogy of the courts of law " (2). Thus, the remedy on the bond would be available for twenty years from the date when the right of action accrued or when an acknowledgment was given or a part payment made. But no remedy even in a proceeding upon a bond could be given where the plaintiff necessarily relied upon a *devastavit* except within six years from the alleged *devastavit*. Thus, in the present case it may be said, adapting the words of *Thorne* v. *Kerr* (1), the legacy is what leads up to the remedy, but the real foundation of the suit is the *devastavit* as to which the remedy is barred by the lapse of six years.

I have already expressed my opinion, agreeing with that of the learned Chief Justice, that the plaintiffs cannot justify any complaint with respect to the period after 24th September 1931. As to the earlier period, for the reasons which I have stated, I am of opinion that the defence of the statute of limitations (*Supreme Court Act* 1928, sec. 82 (1) (c) (VIII.)) is a good defence to the claim made by the plaintiffs. I am therefore of opinion that on this ground the appeal should be allowed. This view makes it unnecessary for me to consider other questions which were raised in the course of argument.

(1) (1855) 2 K. & J. 54 [69 E.R. 691.]
(2) (1855) 2 K. & J., at p. 64 [69 E.R., at p. 695].

STARKE J. Winifred Dunn died in 1926 leaving a will whereby she gave the residue of her estate to her nephews and nieces other than two nieces mentioned by her. These nephews and nieces numbered some thirty-seven persons, and the plaintiffs in this action, the respondents here, are nine of them. She appointed the National Trustees Executors and Agency Co. of Australasia Ltd. and James Edward Hogan her executors, who proved the will. The executors appear to have paid the debts, legacies and funeral and testamentary expenses. The residue of the testatrix's estate included the balance of purchase money due under a contract of sale between Michael Dunn and James Killian Walsh.

By this contract Dunn sold to Walsh a small farm at Cobram in Victoria containing 683 acres for £7,513. A cash deposit of £300 was paid and also instalments of the purchase money amounting to £2,383. The balance of the purchase money amounting to £4,830 was payable on 1st May 1930 and was to bear interest at the rate of 4½ per cent per annum from the date of possession. The conditions of Table A of the *Transfer of Land Act* 1915 were applied to the contract subject to the conditions and modifications mentioned in the contract. One of the conditions of Table A was as follows :— Clause 6. " If the purchaser shall fail to comply with the above conditions, or shall not pay the whole of the deposit, or shall not give the acceptances or notes provided for by the contract, or shall not duly pay the same or any of them, his deposit money, or so much thereof as shall have been paid, shall be actually forfeited to the vendor who shall be at liberty without notice to rescind the contract and to resell the property bought by the purchaser by public auction or private contract, and the deficiency (if any) in price occasioned by such sale, together with all expenses attending the same, shall immediately be made good by the defaulter at this present sale, and in case of non-payment the amount of such deficiency and expenses shall be recoverable by the vendor as and for liquidated damages, and it shall not be necessary previously to tender a transfer to the purchaser, or the vendor may deduct and retain such deficiency and expenses out of the amount of any of the before-mentioned acceptances or notes which shall then have been paid, repaying unto such defaulter within seven days after the completion of the

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sale the residue of such amount, but without any interest, and returning without any unnecessary delay any unpaid acceptances or notes." The contract itself stipulated that wherever " acceptances or notes " were referred to in Table A, that reference should include instalments of purchase money and of interest respectively.

The testatrix was the widow of Michael Dunn, and it is not disputed that the benefit of his contract had passed to and become part of her estate. The purchaser did not pay the balance of purchase money due on 1st May 1930, and six-months' interest also appears to have been outstanding, but that was subsequently paid. The duty of the executors to call for payment of the balance of purchase money and to take reasonable steps for enforcing its payment cannot be and was not questioned. And, when it was proved and admitted that the executors had not got in the money, the burden was upon them to justify their conduct or be answerable for all the consequences of their neglect (*In re Brogden*; *Billing* v. *Brogden* (1)). But it must not be overlooked that, independently of the *Trustee Act* 1928, to which I shall presently refer, the executors had a discretion whether they would press a debtor for payment and they would not be liable if they exercised their discretion honestly and fairly in giving time to a debtor although loss might result from their delay (*In re Owens*; *Jones* v. *Owens* (2); *Lewin* on *Trusts*, 11th ed. (1904), p. 723).

But the provisions now contained in the *Trustee Act* 1928, sec. 15, have extended the powers of executors :—" A personal representative " (which by sec. 3 means the executor original or by representation or administrator for the time being of a deceased person) " may, if and as he or they think fit . . . (*e*) allow any time for payment of any debt; or (*f*) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust; and for any of these purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by

(1) (1888) 38 Ch. D. 546.

(2) (1882) 47 L.T. 61.

him or them in good faith." The words " any debt " in these sub-sections cannot be construed technically: they cover all the pecuniary liabilities which the personal representative of the deceased has a right to collect: Cf. *Commissioner of Stamps (W.A.)* v. *West Australian Trustee Executor and Agency Co. Ltd.* (1). *Jessel* M.R. said in *Re Owens* (2) that the section might have a revolutionary effect on this branch of the law and that it looked as if the only question would be whether the executor had acted in good faith or not. But in *Re Greenwood*; *Greenwood* v. *Firth* (3) *Eve* J. intimated that good faith involved the exercise of active discretion on the part of executors and that loss arising from supineness or carelessness was altogether outside the section. The powers conferred upon executors by the *Trustee Act* 1928 are fiduciary powers and must be exercised for the benefit of their beneficiaries and for them alone. The view expressed by *Eve* J. appears to me to be in accordance with principle and to be a right interpretation of the section.

Turning now to the facts, the executors, it must be conceded, were placed, through no fault of their own, in a very difficult position. In Victoria, however, they are paid for the performance of their duties, and I see no reason therefore for any benevolent attitude towards them (*National Trustees Co. of Australasia* v. *General Finance Co. of Australasia* (4))—Cf. *In re Brogden*; *Billing* v. *Brogden* (5). Towards the end of 1929 a financial and economic crisis began to develop which became so critical that in May and June of 1931 the Governments in Australia met to consider the situation and what measures were possible to restore solvency and avoid default. A short history of the crisis may be found in the Commonwealth Year Book 1932, Appendix, c. VIII. A plan, called the Premiers' plan, was adopted. It involved legislation reducing all adjustable government expenditure, a conversion of the debts of the Governments at a reduced rate of interest, further taxation, a reduction of bank interest, and relief in respect of private mortgages. The prices of the primary commodities, wool and wheat, fell heavily, and so did the value of land. Thus, the land in question in this case was purchased by Walsh in 1920 at £11 per

(1) (1925) 36 C.L.R. 98, at pp. 117, 118.
(2) (1882) 47 L.T., at p. 64.
(3) (1911) 105 L.T. 509.
(4) (1905) A.C. at p. 381.
(5) (1888) 38 Ch. D. at p. 555.

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acre but in 1930-1931 its value had fallen to between £7 and £8 per acre, according to the evidence given on the part of the plaintiffs in the action. The Governments of Australia implemented the Premiers' plan. In September of 1931 the State of Victoria passed the *Financial Emergency Act* of 1931, No. 3961. It reduced interest on mortgages at a rate equivalent to four shillings and sixpence for every pound of interest (sec. 19). It enabled application to be made to a court, in certain cases, which it was said did not cover the present case, for restriction of a mortgagee's rights (sec. 28). The term " mortgage " included an agreement for sale and purchase of real or personal property under which interest was payable in respect of the whole or a portion of the purchase money (sec. 14). The Act was amended from time to time, but the provisions of the various acts do not require elaborate statement.

In September 1931 the State of Victoria also passed the *Unemployed Occupiers and Farmers Relief Act*, No. 3962. It enabled farmers in the position of Walsh to apply to a court for the issue of a protection certificate. On the issue and publication of such a certificate no action could be commenced against the farmer named in the certificate and no steps could be taken by any mortgagee or vendor under a contract of sale to enforce the remedies available to any such mortgagee or vendor and all such remedies were suspended (sec. 21). And in cases in which a protection certificate was issued and so long as it remained in force all moneys payable to the farmer were under the control of a Farmers Relief Board which might apportion them among creditors and others in the manner prescribed by the Act (sec. 27). This Act was also the subject of amendments which it is also immaterial to state with more elaboration.

Then in 1935 the State of Victoria passed the *Farmers Debts Adjustment Act*, No. 4326. It enabled a farmer to make application for the adjustment of his debts, which, with certain exceptions immaterial for present purposes, meant any debt due or accruing due by a farmer, liquidated or unliquidated, secured or unsecured. Upon receipt of the application a stay order issued to the farmer. During the operation of the stay order no action or proceeding, judicial or extra-judicial, could be commenced or put in force against the farmer or any property, estate, effects or assets of the farmer.

The Act provides for plans of debt adjustment and meetings of creditors to consider them. But when a plan was adopted and confirmed by the Farmers' Debts Adjustment Board it was binding on all creditors of the farmer (secs. 12, 15, 18, 31). Further provisions enable the board, out of moneys available in the Farmers' Debts Adjustment Fund, which is constituted by moneys provided by Parliament for the purpose and other moneys, to make payments to any creditor of a farmer in consideration of the adjustment of any debt of the farmer to such creditor (sec. 40). This is but an outline of the Act, but it is unnecessary to set it forth in detail or to refer to the later Act No. 4618 providing for apportionment as between life tenants and remaindermen of losses incurred by trust estates by reason of the operation of the principal Act.

Further, the enforcement of the contract against Walsh accentuated the difficulties in the way of the executors. A suit for specific performance of the contract or any other legal proceedings based on the contract was useless unless Walsh could perform his contract. The executors could not prudently have rescinded the contract, for the land had fallen heavily in value. They could not have both the land and the instalments of purchase money (some £2,383) that had been paid. They might forfeit the deposit, but they would have been accountable to the purchaser for the instalments of purchase money paid by him (*Mayson* v. *Clouet* (1); *Ward* v. *Ellerton* (2); *McDonald* v. *Dennys Lascelles Ltd.* (3)). But it was suggested that they might have exercised the powers conferred by clause 6 of Table A of the *Transfer of Land Act* 1915. It is by no means clear, however, on the Victorian decisions how this power should be exercised or what the consequences of its exercise would be. It has been held that the clause does not exclude any other right of rescission that a vendor may have and that the power given by the clause is not a total rescission and discharge of the contract but analogous to a power of sale in a mortgage (*Ward* v. *Ellerton* (2); *Grassmere Estate Co. Ltd.* v. *Illingworth* (4); *McGifford* v. *O'Brien* (5)). From this I gather that the default of the purchaser, within the

(1) (1924) A.C. 980.
(2) (1927) V.L.R. 494.
(3) (1933) 48 C.L.R. 457, at p. 470.
(4) (1889) 15 V.L.R. 687.
(5) (1932) V.L.R. 71.

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terms of the clause, does not in itself operate as a rescission of the contract, for the purchaser could not alone rescind it. It amounts, I take it, to a renunciation or repudiation of the contract on the part of the purchaser which a vendor is entitled to adopt and exercise his election to end the contract. The phrase is "to rescind the contract but subject to the right of resale given by the clause and the recovery of any deficiency consequent thereon." This brings the clause into line with the law relating to discharge of contract by breach or default in performance with the reservation of a right of resale: See *Leake* on *Contracts*, 3rd ed. (1892), pp. 750, 751; *Goods Act* 1928, sec. 52 (4). But the clause was not of any practical use to the executors in the present case unless a sale of the land could be effected for cash and at a price that, with the instalments in hand, would equal the price agreed to be paid under the rescinded contract.

The acts or omissions of the executors must now be considered having regard to these circumstances. The purchaser, Walsh, when the balance of his purchase money was falling due, suggested an extension of time, but the executors refused. He tried to raise the balance of the purchase money. In the meantime he sought an extension of time, and the executors granted two months with interest at seven per cent per annum although they might have demanded eight per cent under clause 1 of Table A. The executors kept pressing him and inquiring into his circumstances but giving him short extensions at seven per cent interest until the *Financial Emergency Act* and the *Unemployed Occupiers and Farmers Relief Act* were passed in September 1931. The good faith of the executors in granting these extensions is beyond question and was not in fact challenged. But the Chief Justice of the Supreme Court was of opinion that the executors' lack of energy was their failure to consider and resolve upon what their duty was in May 1930 and how it could be performed and the ever-pressing sense of the hardship to Walsh controlled their minds and that the rights of the beneficiaries were, unconsciously perhaps, subordinated to the dictates of good nature and sympathy. The considered opinion of the learned Chief Justice is entitled to great weight, but the *Trustee Act* 1928 confers upon executors a power to act as they "think fit" or "expedient."

Mistakes executors may make; but, if they are not inactive but fairly and conscientiously investigate the facts and come to an honest judgment upon the facts so ascertained that time should be allowed for payment of a debt or liability to the estate, then, in my opinion, the Act relieves them from responsibility for any loss occasioned by their act. Now I cannot agree that the executors failed to consider and resolve upon their duty in May 1930. The correspondence and the records disclose anxiety on their part to collect the purchase money, if they could, in the interest of the beneficiaries. At first an extension was refused, then granted for a short period, and in September 1930 granted until the 1st February 1931, provided interest at the rate of seven per cent was paid as a consideration, to enable the purchaser to arrange the necessary finance. But the purchaser was unable to pay in February 1931, and the executors considered what action should be taken and consulted the solicitor to the estate, who lived in the neighbourhood where the land was situated. He expressed the opinion that there was no hope of selling the land. The executors further discussed the matter and saw the purchaser, who said he was unable to pay anything but was interested in his father's estate, out of which he hoped to get a substantial sum when it was realized, but buyers were scarce. So the matter stood until September 1931, when the *Financial Emergency Act* and the *Unemployed Occupiers and Farmers Relief Act* were passed.

The Chief Justice was of opinion that the inaction of the executors was due to their sympathy for Walsh. They may well have had sympathy for Walsh, but I cannot think that the evidence warrants the conclusion that in allowing him time to meet his liability to the estate the executors were influenced by sympathy for him and thus subordinated the interests of their beneficiaries. A financial crisis of extraordinary severity had developed and was so critical that the Governments of Australia had been compelled to intervene in order to restore solvency and avoid default. Land values had fallen, and, despite the statements of some valuers who gave evidence, the land was practically unsaleable. So, too, it was almost hopeless to borrow money on the security of lands. All these facts are matters of common and public knowledge and hardly require proof. But, if

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proof be required, the Acts and circumstances already mentioned supply it. The executors gave time to Walsh for other and better reasons than sympathy with him. They had fairly investigated the facts and were satisfied (1) that Walsh was unable to pay the balance of the purchase money or to raise money whereby he could pay it; (2) that the land was practically unsaleable; (3) that proceedings to enforce the contract were useless, for Walsh could not pay and the land was unsaleable. A rescission of the contract might moreover render them accountable to Walsh for instalments of the purchase money that had already been paid.

It was in these circumstances and because of these facts that the executors thought it fit and expedient to allow time to Walsh for payment of his liability until the passing of the legislation in 1931 as already mentioned. In so doing they acted within their powers and were not guilty of any breach of duty.

The position after the passing of the *Financial Emergency Act* 1931 and the *Unemployed Occupiers and Farmers Relief Act* 1931 is even stronger. But it can be dealt with shortly. The plaintiffs' right to relief, said the Chief Justice, rests upon proof of a breach of duty by the executors prior to 24th September 1931, for at all times after that date it was not possible for the executors to enforce payment by any means of the unpaid purchase money or interest thereon, because Walsh could have obtained statutory protection as a matter of course. In this I agree.

But it was argued that the executors should be charged with interest that they failed to collect and interest thereon. All interest was paid up to 1st May 1930. The plaintiffs claim that interest was payable at the rate of eight per cent after that date on the balance of purchase money under clause 1 of Table A. The executors in fact accepted seven per cent to 1st November 1931 and thereafter charged £5 8s. 6d. per centum, based on the reduction of interest sanctioned by the *Financial Emergency Act* 1931 until 1st May 1934, when 4½ per cent was charged. But on 3rd July 1936, even at these rates, there was a sum of £304 2s. in arrear for interest. It was suggested that more interest might have been recovered if proceedings had been taken against Walsh. His plant and stock might have been seized and sold or security taken over it that Walsh was

willing to give. But such action would have destroyed Walsh's credit and made it impossible for him to carry on the farm, which was as much in the interests of the beneficiaries as of Walsh. His interest in the estate of his father and mother might have been attached. In fact the executors collected £170 out of about £300 received from this source, and the balance went in buying stock for the farm. In my opinion the executors collected all the moneys that could be obtained from Walsh and no proceedings that the executors took would have produced more. Between 1st May 1930 and the end of September 1936 the executors actually received £1,400 in round figures by way of interest, which strikes me as a truly remarkable result under the circumstances, and it goes far to justify their action in allowing Walsh time to pay. The breach of duty in collecting interest must relate to a period before the end of September 1936, for on the twenty-sixth day of that month Walsh applied for and obtained a stay order under the *Farmers Debts Adjustment Act* 1935. The executors in September 1936 proved under this Act for a sum of £5,134 2s., being as to £4,830 balance of purchase money and as to £304 2s. balance of interest due and unpaid. In May of 1938 the debt of Walsh was adjusted under that Act. The executors received a cash payment of £1,630, and the balance of the purchase money was secured by a mortgage for five years with interest at the rate of four per cent per annum, and the outstanding interest (£304 2s.) was written off. The sum of £1,630 was found by the authority adjusting the debt pursuant to the Act. No breach of duty can be founded upon or established in relation to this adjustment, for it is authorized and sanctioned by the Act.

In the result, therefore, it appears that the balance of the purchase money now payable under Walsh's contract, £3,200, is safely secured, though the payment was postponed for five years and interest reduced to four per cent. Many beneficiaries would have been satisfied with the efforts of executors that produced such results in the difficult period from the end of 1929. But the plaintiffs were not and brought this ill-advised action, in which the costs will, I fear, exceed the amount of their shares in the estate of the testatrix.

The executors also pleaded statutes of limitations to the action, namely, the *Supreme Court Act* 1928, sec. 82 (21 Jac. I. c. 16), and

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the *Trustee Act* 1928, sec. 67. The writ in the action was issued on 12th May 1938. It was contended that the action was for a *devastavit* against the executors and was consequently barred by the *Supreme Court Act* 1928, sec. 82 (actions on the case), within six years after the cause of such action (*Thorne* v. *Kerr* (1); *Lacons* v. *Warmoll* (2)). But this action, though not well pleaded, partakes more of the nature of an action to have the estate of the testatrix administered by the court and an account taken of such estate. In such an action, apart from the *Trustee Act* 1928, executors could not set up their own *devastavit* and claim protection (*In re Richardson*; *Pole* v. *Pattenden* (3)). The executors, however, relied upon the *Trustee Act* 1928, sec. 67. But sec. 67 (1) (*a*) is inapplicable to the case (*In re Richardson*; *Pole* v. *Pattenden* (3); *In re Blow*; *St. Bartholomew's Hospital* (*Governors*) v. *Cambden* (4)). And par. *b* is limited to cases in which no existing statute of limitation applies. An action brought by a residuary legatee against an executor for the administration of the testator's estate is, according to the authorities, an action for a legacy (*In re Richardson* (3); *In re Davis*; *Evans* v. *Moore* (5); *In re Barker*; *Buxton* v. *Campbell* (6); *In re Mackay*; *Mackay* v. *Gould* (7)). And the period of limitation for such actions is fifteen years next after the present right to receive the same (*Property Law Act* 1928, sec. 304). Consequently it would seem that no statute of limitations would have been an answer to the present action, but in the view I take of the facts that result is immaterial in this action. The case is free of any suggestion that the executors were guilty of any fraud or that they had retained the trust property or converted it to their own use.

Further, the executors relied upon the *Trustee Act* 1928, sec. 61, coupled with sec. 3 (interpretation section), and claimed that if they were guilty of any breaches of duty they nevertheless had acted honestly and reasonably and ought fairly to be excused and relieved from liability for such breaches and for omitting to obtain the directions of the court. In my opinion, had the executors been guilty

(1) (1855) 2 K. & J. 54 [69 E.R. 691].
(2) (1907) 2 K.B. 350.
(3) (1920) 1 Ch. 423.
(4) (1914) 1 Ch. 233.
(5) (1891) 3 Ch. 119.
(6) (1892) 2 Ch. 491.
(7) (1906) 1 Ch. 25.

of any breach of duty, they should, in the circumstances and upon the facts of this case, be excused under this section from liability for any such breach.

Lastly, I take leave to doubt whether it was right to charge the executors with the sum of £3,200, as does the decree in this case, and leave them to an indemnity out of moneys coming to their hands from the mortgage given by Walsh to them. The asset, which the executors had not collected, was still subsisting and well secured. It was not lost to the estate. The loss or detriment to the estate or to the beneficiaries was the delay in payment and loss of interest.

But, for the reasons already given, the judgment of the Supreme Court should be set aside and the action dismissed.

DIXON J. This appeal is brought by executors against a decree ordering them to pay (i.e., make good out of their own funds) to the estate of their testatrix an amount representing a chose in action forming part of the estate, which they failed to reduce into possession, and charging them with interest thereon at four per cent per annum from the date when, as it appeared to the court, such amount ought to have been got in. The chose in action is now represented by a security, a first mortgage with an unexpired term of some years, and the decree also authorized the executors, upon making good the amount to the estate, to have recourse to this mortgage and indemnify themselves out of the moneys thereby secured. The decree also enabled the executors to take credit for the amounts actually collected for interest on the principal sum owing from time to time to the estate and to set off the sum so collected against the liability for interest imposed upon the executors by the decree. Besides the liability for interest at four per cent per annum calculated upon the amount outstanding from the date when it ought to have been got in, the decree imposed upon the executors a liability to a higher rate of interest calculated for a short antecedent period during which the executors collected interest at a rate lower than that legally chargeable. The chose in action for which the executors have thus been made personally responsible consisted of the balance of purchase money payable to the estate of the testatrix under a

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contract for the sale of land upon long terms. The testatrix, whose name was Winifred Dunn, was not herself the vendor; she was an assignee of the vendor's right to the balance of the purchase money. The contract of sale had been made on 24th January 1920 by one Michael Dunn as vendor. The land was 683 acres situated near Cobram and suitable for wheat growing and raising lambs. The purchaser was a farmer named Walsh, at that time a young man. The price was £11 an acre or £7,513. Of this sum £2,000 was paid at or about the time of the contract and £683 five years later. Under the terms of the contract the balance, £4,830, was due on 1st May 1930, when the contract was to be completed. In the meantime interest at $4\frac{1}{2}$ per cent per annum was payable upon the balance of purchase money, half-yearly. During the currency of the contract, the vendor, Michael Dunn, died. The administration of his estate passed to Winifred Dunn, apparently as his administratrix, and she, being entitled as a beneficiary, on 7th December 1925 took in satisfaction of part of her share in Michael Dunn's estate an assignment of the balance of purchase money payable under the contract. The assignment was not put in evidence, but it may be assumed that Winifred Dunn obtained a title to all the rights and remedies exercisable by the vendor under the contract and, in the event of rescission, would have been entitled to the land. She died on 13th October 1926. By her last will she appointed the defendants, the National Trustees Executors and Agency Co. of Australasia Ltd. and James Edward Hogan, her executors and after some specific bequests bequeathed the residue of her estate, which included the balance of purchase money payable under Walsh's contract, to nephews and nieces, thirty-seven in number. The estate of the testatrix appears to have been fully administered except for the getting in and distribution amongst these residuary legatees of the sum of £4,830 due from the purchaser Walsh on 1st May 1930. But when this date came the country had passed under the influence of the financial depression, and Walsh craved time to pay the principal sum. He did not find the money before the legislation came into force which the Victorian Parliament enacted for the protection of persons in the position of Walsh, that is to say, the *Unemployed Occupiers and Farmers Relief Act* 1931 (No. 3962), which took effect

on 24th September 1931, and the *Financial Emergency Acts* 1931 (Nos. 3961 and 3970), which took effect on 1st October 1931.

Treating this legislation as providing an actual or potential protection to Walsh which made it futile to attempt to enforce payment of the principal sum owing under the contract, the executors allowed it to remain outstanding until after the enactment of the *Farmers Debts Adjustment Act* 1935. Eventually, under the threat of the executors to issue a writ against him, Walsh, on 26th September 1935, made an application under that Act and obtained a stay order. Much time passed before the Farmers' Debts Adjustment Board dealt with his case, but at length, in March 1938, a plan of debt adjustment was formulated which the National Trustees &c. Co. thought fit to approve. According to the plan the purchaser, Walsh, was to be relieved of £304 2s. arrears of interest accrued up to 1st May 1936, a sum which was to be extinguished. As from that date the principal sum of £4,830 was to bear interest at four per cent per annum only, but a payment of £1,630 was to be made on account of principal out of moneys found by the board. The executors were then to transfer the land to the purchaser, Walsh, and to take a mortgage back from him to secure the unpaid balance of £3,200. The currency of the mortgage was to be five years from 1st February 1938. Some of the residuary legatees had been complaining of the delay in the distribution of the estate, and on 12th May 1938, when this plan of debt adjustment was ripe for confirmation, nine of them issued against the executors the writ in the present action. The plan, however, was adopted and carried out. Walsh's mortgage for £3,200 for five years at four per cent per annum is the security to which under the decree the executors are to have recourse by way of indemnity.

The decree treats the failure of the executors to get in the balance of purchase money when or not long after it fell due as the consequence of a breach of duty on their part. It fixes 1st November 1930 as a date by which the full amount of £4,830 should have been in the defendants' hands available for distribution, and proceeds to adjust the rights of the residuary legatees and the executors accordingly. In effect it requires the executors to make good the amount as from the date, paying four per cent interest, the rate adopted as

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equitable, but taking over by way of indemnity the interest payments made by Walsh and the mortgage given by him to secure the outstanding balance of purchase money, viz., £3,200, unpaid at the time of the transfer. Between 1st May 1930 and 1st November 1930 the executors are required to pay interest at eight per cent per annum. The reason is that under Table A of the *Transfer of Land Act* 1915, which was incorporated in the contract of sale, a defaulting purchaser is liable for interest at eight per cent on overdue purchase money. Of this fact the executors appear to have been unaware or unmindful, though for the period in question they did obtain from Walsh, as a condition of giving him time, interest at seven per cent per annum instead of at the ordinary rate of 4½ per cent expressed to be payable during the term of the contract. Between the amount of interest for which the executors are made liable under this decree up to the date of the issue of the writ and the amount actually paid to the executors by the purchaser Walsh, there is little or no difference. The rates of interest under the decree and the mortgage are the same, four per cent per annum. The security of the mortgage is a good one, and no actual loss seems to have been suffered or is to be feared. Under the decree as made substantially all that the plaintiffs obtain is the advantage of an immediate distribution of £3,200 over an investment of that sum until 1st May 1943 and a distribution at that date.

The defendants, however, on their side, particularly the National Trustees &c. Co. Ltd., are probably concerned less about the material effect of the decree than at the finding upon which it is based, namely, that they failed in their duty as executors. The finding relates entirely to the period before 24th September 1931, when the special legislation for the protection of mortgagees and purchasers began to operate. *Mann* C.J., who heard the suit, agreed that after that time the executors could not have obtained payment from Walsh, who, if they had proceeded to exercise any of the remedies otherwise available to them, would have obtained statutory protection. But his Honour, for reasons which are fully stated in his judgment, came, " with some reluctance, to the conclusion that from the 1st July 1930 at the latest there was no reason why this money " (*scil.*, the £4,830 due under Walsh's contract on 1st May

1930) " should not have been got in by a sale of the property, except a desire to postpone an unpleasant task without any defined purpose in view " (1).

Walsh did not simply make default; he made successive requests for time to enable him to find the principal moneys, and before granting him time the executors, in circumstances it will be necessary briefly to state, gave consideration to the position. But in the period in question they took no active steps against Walsh, and this, in his Honour's opinion, was to be explained by a failure on their part to consider and resolve upon what their duty was in May 1930 and how it could be performed and by the existence, as a result, of an ever-pressing sense of the hardship to Walsh involved in doing anything at all, which controlled their minds.

Sec. 15 of the *Trustee Act* 1928 expressly empowers executors and trustees to " allow any time for payment of any debt . . . without being responsible for any loss occasioned by any act or thing so done by . . . them in good faith."

It was conceded that the actions of the executors in repeatedly allowing more time for payment were bona fide in the sense tha they proceeded from no dishonest motive. But his Honour considered that more was necessary. He thought the provision required " a reasoned use of their powers towards a fulfilment of the trusts," and he was satisfied that this was lacking. Upon these findings he held that it was for the executors to show that, even if they had done their duty, nevertheless the money could not have been got in; it was not for the beneficiaries to prove that the result would have been the recovery of the money.

It will be seen that the decree and the reasons for it present the case as one in which but for the default of the executors money would have been got in and distributed among the residuary legatees, who accordingly are entitled to be placed in the same position as if a distribution had been made in due time. The proceeding thus becomes as nearly as may be a suit to recover legacies. It is only as such a suit that it could succeed so far as the claim is founded upon any default before 12th May 1932, a date six years before the issue of the writ. For, unless it is an action or suit to recover a legacy

(1) (1939) V.L.R., at p. 431.

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and, as such, is subject to the period of limitation of fifteen years fixed by what is now sec. 304 of the *Property Law Act* 1928 (Vict.), the suit, which clearly is an action or other proceeding to recover money, is one to which no existing statute of limitations applies within the meaning of sec. 67 (1) (*b*) of the *Trustee Act* 1928 and so is limited by the six years which bar an action of money had and received; that is, unless possibly sec. 67 (1) (*a*) operates upon sec. 82 (1) (c) (VIII.) to produce the same result, on the view that it is an equitable proceeding founded on a *devastavit* for which an action on the case would lie: Cf. *In re Hyatt*; *Bowles* v. *Hyatt* (1); *Lacons* v. *Warmoll* (2); *In re Blow*; *St Bartholomew's Hospital (Governors)* v. *Cambden* (3)).

The necessity, thus arising, of restricting the relief to that appropriate to the recovery of a legacy may have some importance in considering the substantive question of the executors' liability. For, unless the plaintiffs can establish some breach of duty committed after 12th May 1932, they must prove circumstances giving them an immediate title to payment of the legacy. They must show that owing to the conduct of the executors the latter became chargeable with the full amount of the balance of purchase money notwithstanding that in fact they had not got it in.

So far from thinking that the plaintiffs have proved conduct of such a kind, an examination of the materials contained in the record has led me to the conclusion that the executors should be absolved altogether from the charges of breach of duty. In considering the course adopted by the executors there are two matters which ought steadily to be borne in mind. The first is the uncertainty and bewilderment prevailing during the period in question as a result of the disastrous change in the financial condition of the country. The second is the nature of the moneys which, it is said, the executors should have got in, viz., the final balance of purchase money payable under a contract for the sale of land upon terms. As to the first it is perhaps desirable to quote the following passage from the judgment of *Starke* J. in *I'Anson* v. *Greene* (4) :—" A financial and economic crisis began to develop towards the end of 1929. One of the elements

(1) (1888) 38 Ch. D. 609.
(2) (1907) 2 K.B. 350.
(3) (1914) 1 Ch. 233.
(4) (1938) Unreported.

which contributed to the crisis was a fall in the prices of commodities throughout the world. Thus in Australia the price of greasy wool had, according to the Statistician, fallen between 1926 and 1933 from 16½d. per pound to about 8½d.; and the value of wheat in the Sydney market was during February and March 1926 5s. 11¾d. per bushel but it fell during February and March 1931 to 2s. 1¾d. and was in February and March 1932 3s. 1d. and 3s. 2d. respectively. Indeed the position became so critical that in May and June 1931 the Governments in Australia met in conference to consider the situation and what measures were possible to restore solvency and avoid default. A plan was adopted which is called the Premiers' plan. It embraced measures reducing by 20 per cent all adjustable government expenditure; a conversion of internal debts of the Government on a basis of 22½ per centum reduction of interest, further taxation, a reduction of bank interest on deposits and advances and relief in respect of private mortgages. Earlier in the year the Federal Arbitration Court had made a reduction in the wages of industrials and other wage-fixing bodies had more or less followed the Federal Court. All these facts are matters of public and general knowledge in Australia and judges are not obliged to shut their eyes to matters of this character."

As to the second matter, viz., the nature of the moneys owing to the estate which the executors were administering, it is important to understand the choice of courses which actually and theoretically was open to them, that is, before 24th September 1931. In a contract for the sale of land instalments of purchase money expressly made payable before the time fixed for completion by conveyance or transfer may be sued for as a liquidated demand or debt, but a balance of purchase money payable on completion may stand in a different position. If conveyance or transfer is a condition precedent to or concurrent with payment of the final balance of purchase money, as more often than not it will be found to be, then the vendor can enforce the contract only by a suit for specific performance or an action for damages either for loss of the contract or for delay or an action for interest: See *Reynolds* v. *Fury* (1), where the cases are collected and discussed; cf. *Ruddenklau* v. *Charlesworth* (2).

(1) (1921) V.L.R. 14.

(2) (1925) N.Z.L.R., at p. 164.

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The contract in the present case is badly drawn, but probably the effect of clause 1 of Table A was to make payment of the final balance of £4,830 and transfer of the land concurrent conditions. At all events it would have been unwise for the executors to bring an action for the balance of purchase money. To bring a suit for specific performance would have been unwise for other reasons. The only cause of the purchaser's failure to complete at once was that he was unable to find the purchase money, and a decree for specific performance would in such circumstances prove only an embarrassment to the vendor. If, notwithstanding the decree, the purchaser failed to complete, it would mean that the executors claiming under the vendor would need to move the court to rescind the contract or to allow the executors to rescind it under clause 6 of Table A of the *Transfer of Land Act* 1915. If that clause had been absent, it would no doubt have been open to the executors to treat the contract as discharged by the purchaser's default. It is true that it contained no clause expressly making time of the essence of the contract. But a notice to the purchaser fixing some reasonable time for completion might have enabled the executors to terminate the contract. Whether the presence of clause 6 in the contract excludes reliance upon such an expedient is perhaps a question. In any event, however, to take such a course would have been foolish. The land would have been left on the executors' hands. The deposit, £300, might have been forfeited, but the instalments could not have been retained unless for the purpose of answering damages. To estimate damages would not have been easy, and the risk of litigation would have been considerable. The remaining course which the executors might have chosen was to exercise the power or powers given by clause 6 of Table A, and it is their failure to use that provision which, as I understand it, is the real ground of complaint against them. The clause, read with clause 10, provides that if the purchaser should not duly pay the instalment or instalments of purchase money (an expression which probably covers the final balance payable on completion) his deposit money should be actually forfeited to the vendor, who should be at liberty without notice to rescind the contract and to resell the property, and the deficiency (if any) in price occasioned by such

sale together with all expenses attending the same should be recoverable by the vendor as and for liquidated damages or the vendor might deduct and retain such deficiency out of the amount of any instalment or instalments which should then have been paid, repaying unto such defaulter within seven days of the completion of the sale the residue of such amount, but without interest.

Some doubt exists as to what amounts to an exercise of the power of rescission thus given. The words "without notice" mean "without prior notice." One view of the clause is that it gave a single power, that is to say, a power, in effect, to rescind by reselling. Another view is that it gave two powers, one of rescission and the other of resale. An intermediate view is that it gave a power of rescission with a view to resale, it being incumbent on the vendor who rescinded under the clause to proceed to resell. The first view of the clause is that which was eventually adopted in the Supreme Court of Victoria: *Ward* v. *Ellerton* (1), where *Irvine* C.J. said:—"The use of the expression '*without notice* to rescind the contract and to resell the property,' suggests that the only mode of 'rescinding,' whatever the word may mean in this connection, is by reselling. Probably the vendor might, by notice that he intended to exercise the power given him by that clause, whatever it may be, determine the election vested in him, but the particular mode provided by the contract for the determination of that election is not by notice but by his acting under the power—that is, by reselling the land." This view does not appear to have been dissented from in the Full Court, where the actual decision was reversed (2), and I think that the view expressed in *McGifford* v. *O'Brien* (3) by *Mann* C.J. means that there is a single power exercisable by resale. I think, however, that the contrary construction of clause 6 was tacitly assumed in the earlier cases of *Samuel* v. *McGillivray* (4) and *Grassmere Estate Co. Ltd.* v. *Illingworth* (5).

It is said that the executors ought in the present case to have taken some step towards realizing the land in pursuance of clause 6. In answer to the objection that it was undesirable for the executors

(1) (1927) V.L.R. 264, at p. 268.
(2) (1927) V.L.R. 494.
(3) (1932) V.L.R. 71, at p. 79.
(4) (1887) 14 V.L.R. 784.
(5) (1889) 15 V.L.R. 687.

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to run any risk of relieving Walsh from his purchase and rendering themselves accountable to him for the return of instalments unless and until they actually resold at a price sufficient to cover themselves to a purchaser certain to complete, it was suggested that it was open to them to search for a prospective buyer to whom they might resell and that they could not prejudice their position by doing so. It may be doubted whether any useful attempts could be made to find a buyer except at the cost of taking some overt step which would on the view expressed by *Irvine* C.J. " determine the election vested in them " or at all events provide some foundation for a contention to that effect on the part of Walsh.

But before dealing with the question whether the executors were guilty of a breach of duty in failing to act under clause 6 or to take further steps towards doing so, it is better to state briefly the course events actually took. On 11th March 1930, that is, seven weeks before the due date, Walsh wrote asking the executors to consider allowing the balance of purchase money to go on for another term. After consultation the executors refused the request. Thereupon Walsh sought the aid of a stock and station agent for the purpose of raising a loan to pay the purchase money. The latter wrote to the executors, asking for three months time to enable him to find the money. The request was considered, and the executors decided to grant an extension of two months upon condition that interest at the rate of seven per cent per annum was paid. They were not aware, it seems, that under clause 1 of Table A a defaulting purchaser must pay eight per cent per annum on overdue purchase money, or possibly they did not ascertain that Table A formed part of the contract. At the end of the two months Walsh and his agent called at the office of the National Trustees Executors and Agency Co. of Australasia Ltd. Death has deprived the defendants of the evidence of three of the chief officers of the company who dealt with the question from time to time of what should be done about Walsh's default, but according to Walsh's evidence, he was questioned about his position and the efforts made to find the money. He told the company's officer that he expected to receive from his father's estate moneys to which he was entitled. The prospects of obtaining a loan were gone into, and Walsh was told that the money must

be found because it must be distributed among the beneficiaries. The defendant Hogan favoured an extension until 1st February 1931 but after consultation with him and consideration the company decided simply to hold their hand for two months or so. On 1st September 1930 they wrote accordingly to Walsh's agent, asking how the matter stood. He replied to the effect that he had understood that Mr. Hogan's proposal to give Walsh until February 1931 had been acquiesced in. Some consideration of the matter took place within the company's office, and then it was decided to give Walsh until 1st February 1931 to find the money, he paying seven per cent per annum in the meantime. The interest payments were in fact made. Early in January the matter was again brought up for discussion, and the executors notified Walsh that the money would be urgently required on 1st February 1931. Walsh replied that he was unable to find the money and the best he could do was to continue to pay reasonable interest if they would let it stand over. The executors then consulted the solicitor to the estate, who practised at Cobram. They explained the facts and asked him whether the land, which they had no doubt he knew well, would readily sell and at what figure, and, if not, what rental they might expect to obtain. His answer was that he did know the property, and that there was no hope of selling or leasing it at the then present time. He added some discouraging observations about the need for very long terms in the unlikely event of any sale being effected and the involved state of the law with respect to the remedies of a vendor whose purchaser made default. At or a little before this time an association of farmers had been formed at Cobram, as elsewhere, for the purpose of boycotting realization of securities held over farming lands; but, apart from this difficulty, an attempt to sell agricultural land in the early part of 1931 was a thing not lightly to be undertaken. The executors pressed Walsh to come to Melbourne to see them, and, after questioning him and considering the matter, they decided to continue on the footing that he paid seven per cent per annum interest. This was the condition of the matter on 24th September 1931, when the *Unemployed Occupiers and Farmers Relief Act* 1931 came into force. Seven days later the operation of the *Financial Emergency Acts* 1931 commenced. It is convenient to

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deal with the case in two periods, of which the first ends at this point, not only because these enactments introduced new elements into the question at issue, but also because the finding made against the executors is limited to the earlier period in which the rights of the executors were uncontrolled by legislation. I am unable to agree with the view that the executors were guilty of any breach of duty. No remedy available to them against Walsh was from a practical point of view worth considering except the reselling of the property under clause 6. But to take the definite step of offering the property for sale by public auction or to advertise it for sale by private contract would, I think, have been extremely unwise. It would have jeopardized the sale to Walsh and exposed the executors to the risk of a claim by him for some part of the instalments already paid. It seems unlikely that a buyer would have appeared, and no prudent vendor who could not afford to relieve an existing purchaser from his obligation to complete the sale would risk any definitive step under clause 6 of Table A of the *Transfer of Land Act* 1915 unless he was absolutely certain of effecting a resale at a sufficient price to a reliable buyer. Further, a cash sale was beyond the bounds of hope, and to make a further sale on long terms would have been of no advantage to the residuary legatees. The executors had to do the best they could during the most difficult period of our financial history, and they took a course which in fact resulted in the estate suffering no loss at all, though it is true that it protracted the administration of the estate for a great length of time during which the fund remains outstanding and undistributed.

Independently of sec. 15 of the *Trustee Act* 1928, I should have thought that the executors had not failed in their duty. Walsh's liability to the estate was not a common-law debt depending on personal security. There can seldom be a positive objection of a material kind to enforcing such a debt by recovering judgment. Walsh's was a liability secured by the land and not recoverable as a debt. Perhaps there is something to be said for the view that for this reason sec. 15 (*e*) does not cover the liability; that there was no "debt." But on the whole I think that word should be given a very wide application and should not be restricted to sums

certain immediately recoverable by action. If so, I think that the concluding words of the section provide a complete protection to the executors. Their giving time was an act or thing done by them in good faith. In *Re Greenwood*; *Greenwood* v. *Firth* (1) *Eve* J. confined the protection to cases where the executors or trustees did more than remain passive or supine; where they exercised an active discretion. The conduct of the executors in the present case responds, in my opinion, to this test. On each occasion in the period up to 24th September 1931 they actively considered the giving of time, examined the question and decided it as an active exercise of discretion.

As to the period after 24th September 1931 it was the respondent's counsel who attacked the conclusion of *Mann* C.J. He did so on the ground that owing to interest falling into arrear Walsh was for most of the time without the qualification necessary to enable him to invoke the protection of sec. 28 of the *Financial Emergency Acts* 1931 (Nos. 3961 and 3970) and that, although he was under no disqualification from seeking the protection of sec. 21 of the *Unemployed Occupiers and Farmers Relief Act* 1931 (No. 3962), he might have been unwilling to incur the disadvantages which followed resort to it. I feel no doubt that any attempt on the part of the executors to sell the land would have led Walsh to obtain a protection certificate under the latter Act.

The long history of the executors' relations with Walsh during the period from 1931 to 1938 includes successful efforts, particularly on the part of the defendant Hogan, to obtain from Walsh moneys to cover interest payments from the disposal of his wheat and from arrangements to accelerate payment of his share of the corpus of his father's estate. There is no reason to think that, during these years, long as the period is, any further moneys could have been obtained, or that, before the enactment of the *Farmers Debts Adjustment Act* 1935, the issue, or threat to issue, process against Walsh would have been of any use. To discuss the facts of this period in detail would serve no purpose. It is, I think, sufficient to say that I see no reason to doubt the correctness of the conclusion that the executors were guilty of no breach of duty in relation to the period.

(1) (1911) 105 L.T., at p. 514.

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The complaint that the executors should have charged Walsh interest at eight per cent per annum and that, had they done so, some greater benefit would have accrued to the estate is, I think, answered by the actual facts. Walsh was unable to pay the interest at the rates charged. In the end the Farmers' Debts Adjustment Board extinguished £304 of arrears of interest. They did so in order to leave the principal only owing. Any further arrears undoubtedly would have suffered the same fate.

In my opinion the appeal should be allowed and the cross-appeal dismissed, with costs.

The judgment of the Supreme Court should be discharged, and in lieu thereof the action should be dismissed with costs, including the costs of pleadings, interrogatories and discovery.

EVATT J. In my opinion the judgment of *Mann* C.J. should be affirmed, and, except on one point, I desire to add nothing to the reasons so clearly stated in that judgment.

That point is whether this court should disturb the finding that the executors were guilty of a breach of duty in granting extensions of time for payment of the balance of the purchase money, and in failing to take any steps to collect that balance.

Under the legislation of most of the Australian States, including Victoria, profit-making concerns have been incorporated in order to enable such corporations to perform the duties of executors and trustees. These bodies often hold themselves out as possessing special qualifications for the performance of the onerous duties involved, and it is expected that the public will benefit from the fact that they employ special officers with knowledge of land values and considerable experience in the prompt and routine solution of legal problems. These bodies often claim to have governing boards which include persons who might reasonably be expected to place at the company's disposal that commercial or legal experience, the absence of which tends to deter many individuals from assuming the duties of trustee or executor. This special position of trustee companies is referred to by the Privy Council in *National Trustees Co. of Australasia* v. *General Finance Co. of Australasia* (1).

(1) (1905) A.C., at p. 381.

In the present case the outstanding facts are not in dispute. On May 1st, 1930, a sum of £4,830 became due to the estate. That sum represented the balance of purchase money payable by one Walsh under a contract of sale the terms of which were in accordance with Table A of the *Transfer of Land Act* 1915. This large sum having become payable, no statutory bar to its recovery existed until September 24th, 1931, nearly seventeen months later, when, owing to a serious financial depression, the legislature of Victoria intervened for the protection of a class of persons in a position similar to that of Walsh. The plaintiffs, who are seeking to enforce their claims as legatees in the estate, assert that throughout this long period of seventeen months, their interests were not reasonably protected. The Chief Justice has found in their favour on the facts, and, in my opinion, his main findings, so far from being " clearly wrong "—a necessary condition to their being upset by a court of appeal—are clearly right. They find considerable support in the documents and minutes showing the recommendations and decisions taken by the principal officers of the trustee company. Some of these I refer to in order.

I. On March 28th, 1930, Walsh was informed by the company that the balance of purchase money was wanted for immediate distribution, and that a request which he had made for extension of time for payment could not be entertained. I agree with *Mann* C.J. that the company's answer was not only a correct performance of their duty, but " marked out in clear and simple language " the course of their duty. In my opinion it is fallacious to project back to this early stage of the matter the special conditions which came into existence some twelve months later in the very depths of the economic depression.

II. In face of this correct decision of the company, we find that shortly after (on April 15th), when Walsh's request for extension of time was renewed through one McNamara (a commission agent), two-months' extension of time was granted, avowedly " to enable him (Walsh) to arrange the necessary finance." It was stipulated that, in the meantime, interest on the balance owing should be increased from 4½ per cent to 7 per cent. The minutes passing between the officers of the company who were responsible for this

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sudden change of front evidence a complete failure to look at the matter from the point of view of the beneficiaries. Moreover, the contract of sale required the payment of 8 per cent interest on moneys in default, a fact which shows clearly what is otherwise established, that no attention was paid by the company to the plain legal rights of the executors under the contract.

III. But, on September 9th, 1930, the company also granted a further extension until February 1931 despite the fact that, as one of the minutes showed, "the money is urgently wanted for distribution in payment of balance of legacies." The same minute spoke in laudatory terms of Walsh, and mentioned that, at the time of sale of the land in 1920, the price was £11 per acre, but that Walsh now valued the land at about £15 per acre. At no time did the executors obtain any independent valuation. *Mann* C.J. said: "It is difficult to assign any reason for any of these extensions other than mere good nature." I entirely agree with this comment.

IV. A further stage of the matter was reached in January 1931, when one of the officers stated in a minute: "I think we have a duty to perform to collect the balance owing and must be advised as to the course we must adopt in all the circumstances." Thereupon, another officer minuted: "Submit matter to solicitor for advice and import into your letter that we have no doubt the property is well known to him and we would like to know for our guidance if our duty is to go to extremes, whether the property would readily sell and at what price, and in the event of a failure to sell, would it let at a greater net rental than the interest." Accordingly a letter was sent to the solicitor for the estate, who was asked for *his* opinion of the property "as to whether it would sell, and at what approximate figure."

Thus, the trustee company, expert in the administration of estates, chose to make the question of the saleability of the land a matter for the casual opinion of a country attorney—who incidentally had also acted as attorney for the defaulting purchaser in a small matter not in any way related to the contract of sale.

Then, although he had not been asked to do so, the solicitor volunteered to the company the interesting piece of information that "the legal position of those seeking to exercise rights under

a contract of sale is very involved." Reverting to the minute already mentioned, the Chief Justice rightly described the phrase "*if our duty is to go to extremes*" as "illuminating," because "it shows that the executors were shrinking from the prospect of having to take any action of their own. The only course open to them was the course expressly provided for by the contract under which Walsh had possessed the land."

In the course of evidence given at the trial, an officer of the company suggested two reasons for its having given time to Walsh in 1930. One reason I need not repeat, because it is sufficiently dealt with in the judgment appealed from. The other reason consisted in the terrors of litigation. In fact there was nothing to litigate. The contract gave an express power of sale, and the evidence shows pretty clearly that the balance of purchase money would probably have been recovered; for, as *Mann* C.J. has found, the land in question was "high-class farm land for wheat growing and for fat-lamb raising in a much favoured district." But the executors never tried to realize the balance by sale under the power, never took the obvious step of obtaining a valuation, never even required an inspection of the land by their own skilled expert, although that course was suggested by a prominent officer.

It comes to this: That from the outset the company never addressed its mind to the question of its plain duty towards the beneficiaries. "The result was," says *Mann* C.J., "that an ever-pressing sense of the hardship to Walsh involved in doing anything at all controlled their minds. The rights of the beneficiaries were unconsciously perhaps subordinated to the natural dictates of good nature and sympathy. Operating along with these influences and tending to the same result was a vague belief that action of any kind would involve litigation. After months of purposeless delay they were content to leave the whole matter to the decision of the local solicitor." And the Chief Justice also found: "that from the 1st July 1930 at the latest there was no reason why this money should not have been got in by a sale of the property, except a desire to postpone an unpleasant task without any defined purpose in view."

Notwithstanding these strong findings of fact, it is contended hat the executor is protected by sec. 15 of the *Trustee Act* 1928.

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Mann C.J. was of opinion that the section, so far as it protected executors or trustees from personal liability in respect of their having granted time for the payment of debts was " not designed to modify the duties of executors or trustees as such." On the contrary, his view was that the section " merely clothed them with powers the more effectually to carry out their duties and relieved them from the consequences of acts which might otherwise have been held *ultra vires*." Upon this basis, the learned trial judge would have been prepared to apply the section if he had been able to find that reasonable persons in the position of the executors, appreciative of their legal rights, and applying their minds to the matter, had determined that the best way of obtaining the balance of purchase money was to wait some little time to enable Walsh to borrow the money. But he was forced to hold that the executors, although able to recover the balance outstanding, held their hand rather from a desire to be lenient and generous to Walsh. He therefore found as a fact that there was no reasoned use or exercise by the executors of their statutory powers in aid of the fulfilment of their trust and in effect that they allowed time to run without any assignable purpose or object being stamped upon their decision.

His opinion that in such a state of facts the section could not protect the executors is borne out by *Re Greenwood*; *Greenwood* v. *Firth* (1), where *Eve* J. said: " In determining, therefore, whether the conduct of the trustee has or has not been bona fide in any particular case, the court is bound to have regard to all the circumstances, and if these lead to the conclusion that the loss has arisen from the neglect or carelessness or supineness of the trustee, and not from a mistaken but bona fide exercise by him of the statutory powers vested in him, then, in my opinion, the case is one outside the sub-section altogether, and in respect of which no relief is thereby afforded to the trustee."

In my opinion this decision of *Eve* J. is right.

I also agree with the opinion of *Mann* C.J. that, after his main finding of neglect of duty, it lay upon the executors to show that the balance of purchase money could not have been obtained prior to the intervention of the Victorian legislature. Not only was this

(1) (1911) 105 L.T. at p. 514.

not shown by the executors, the contrary appears to have been the view adopted by *Mann* C.J.

I should add that at no time throughout the company's dealings in relation to the matter of the Walsh contract, was it considered in any way by the board of directors in charge of the business of the company. It is true that, under the Victorian statute, this company may lawfully perform its functions through the agency of its officers, and if such officers are at fault, their fault is imputed to the company. But it is the company which assumes the duties incident to the position of executor or trustee and important decisions in relation to such duties and their performance would presumably be made by a governing board of directors. Cases can be imagined where the exercise of a difficult discretionary power or duty is called for and where the failure of a governing board to consider the matter at all may establish a breach of duty by the company. Here the minutes show differences of opinion and of points of view among the various officers of the company. If, at the crucial times, these minutes with their valuable expressions of opinion, had been submitted to the governing board, I think that such board would probably have decided that the company's plain duty towards the beneficiaries of the estate was to take immediate steps to enforce their legal rights. As it turns out, the failure of the directors to consider the matter is of no moment in the present case ; but only because of the Chief Justice's findings which are adverse to the company's officers, and so to the company itself.

I am of opinion that the appeal should be dismissed.

McTIERNAN J. In my opinion the appeal should be allowed and the cross-appeal dismissed.

It was clearly within the powers conferred on the appellants by sec. 15 of the *Trustee Act* 1928 to allow time for the payment of the moneys due under the contract of sale. Apart from statute trustees might " under circumstances," as is stated by *Lewin* on *Trusts*, 10th ed. (1898), at p. 702, release or compound a debt. Such circumstances are defined in *Underhill's Law of Trusts*, 5th ed. (1901), at p. 191, as " where they " (trustees) " bona fide and reasonably believed that that course was for the benefit of their

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beneficiaries" : See *Ratcliffe* v. *Winch* (1); *Forshaw* v. *Higginson* (2); *Blue* v. *Marshall* (3). The provisions which have been enacted by sec. 15 of the *Trustee Act* 1928 largely extended the powers of trustees and executors to enter into arrangements with respect to the payment of a debt in place of enforcing the obligation strictly according to its tenor. It is a condition of the exercise of these extended powers that any act or thing done under such powers should be done in good faith. The need for good faith is expressed clearly in the section, while the limitation of the section to an act or thing done under it renders the section inapplicable to a case where a debt is not got in because of mere inaction: See *Re Greenwood*; *Greenwood* v. *Firth* (4). The good faith of the appellants in allowing time is established, and the evidence which has already been referred to in detail shows that the appellants did actively exercise a discretion to allow the purchaser time for payment in consequence of representations made by him. In the case of *Re Owens*; *Jones* v. *Owens* (5), which related to the duty of an executor to sue, *Jessel* M.R., in referring to statutory provisions similar to sec. 15, said:—"I may add that in future cases of this kind sec. 37 of the *Conveyancing and Law of Property Act* 1881 will have to be considered. It may have a revolutionary effect on this branch of the law. It looks as if the only question left would be, whether the executors have acted in good faith." If this dictum correctly expresses the intention of provisions contained in sec. 15, the section provides a good defence to the respondents' suit. The appellants are, however, on stronger ground; for, if it were necessary to the validity of their action in allowing the purchaser time for payment that it was a reasonable as well as honest exercise of their discretion, that conclusion is, in the circumstances of this case, the proper one. In *Buxton* v. *Buxton* (6), Sir *Charles Pepys* M.R. said:—"I can find no case, and none has been produced in which an executor has been called upon to bear the loss that has arisen, because, in the bona fide exercise of a reasonable discretion, the conclusion he came to has

(1) (1853) 17 Beav. 217 [51 E.R. 1016].
(2) (1857) 8 DeG. M. & G. 827 [44 E.R. 609].
(3) (1735) 3 P. Wms. 381 [24 E.R. 1110].
(4) (1911) 105 L.T. 509.
(5) (1884) 47 L.T., at p. 64.
(6) (1835) 1 My. & C. 80, at pp. 95, 96 [40 E.R. 307, at p. 313].

turned out unfortunately." (See also *Marsden* v. *Kent* (1); *In re Chapman*; *Cocks* v. *Chapman* (2).)

The relevant circumstances in the present case were the economic depression as it affected a purchaser of farming land, particularly a farmer who purchased on long terms, and the embarrassment and difficulty with which the pursuit of any of the remedies which the vendors had under the contract was attended. It is unnecessary to enter into a discussion of these matters, as they have already been elaborated in the reasons for judgment already given. In my opinion, the evidence does not establish that the appellants were guilty of any wilful default or neglect by not getting in the money due under the contract of sale before the purchaser came within the protection of the Victorian Moratorium statutes. I agree that thereafter these acts and the *Farmers Debts Adjustment Act* 1935 preclude the possibility, as the learned Chief Justice of the Supreme Court of Victoria held, of the appellants having been guilty of any default or neglect in not getting in the money according to the tenor of the contract. The contrary view which was urged on the respondents' behalf was that the purchaser was not, upon the true construction of the Moratorium Acts, entitled to be protected from the enforcement of his obligation under the contract. The question depends upon an examination of this legislation. In my judgment such an examination bears out the conclusion arrived at by the Chief Justice of the Supreme Court of Victoria on this branch of the case.

In the view which I have taken it is unnecessary to decide which of the several statutes of limitation would apply to such a suit as the present one.

Appeal allowed with costs. Judgment of Supreme Court set aside and in lieu thereof ordered that action be dismissed with costs, including costs of pleadings, discovery, interrogatories and shorthand notes.

Solicitors for the appellants, *Gillott, Moir & Ahern.*
Solicitors for the respondents, *Walter Kemp & Townsend.*

O. J. G.

(1) (1877) 5 Ch. D. 598.

(2) (1896) 2 Ch. 763, at p. 776.