ref & ors pp. 324, 335. 24 ALR. 449.
" " 355/6 (1979) 1 NSWLR. 207.

[HIGH COURT OF AUSTRALIA.]

VACUUM OIL COMPANY PROPRIETARY LIMITED . . . . . } APPELLANT;
APPLICANT,

AND

WILTSHIRE . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE COURT OF BANKRUPTCY.
DISTRICT OF SOUTH AUSTRALIA.

H. C. OF A 1945.

ADELAIDE, *Sept.* 24, 25.

SYDNEY, *Dec.* 10.

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

Executors and Administrators—Business of testator carried on by executor—Insolvency of estate—Order of administration of assets—Order of priority of creditor of deceased—Whether assent to carrying on business established—Bankruptcy Act 1924-1945 (*No.* 37 *of* 1924—*No.* 42 *of* 1945), *s.* 155.

The executor of a deceased debtor, with no authority under the will, and with authority only for portion of the time under an order of a court, carried on the deceased's business. He paid a dividend to creditors of the deceased, including a company which had been pressing the deceased for payment. This company continued to trade with the executor on short terms and continued to press for reduction of the liability of the estate. In 1936, as a result of a resolution passed at a meeting of creditors at which a representative of the company was present, an attorney was appointed to wind up the business. In the following month an order was made for the administration of the estate in bankruptcy. The evidence showed that the company knew that there was a risk that an early liquidation of the business might well result in the deceased's debts not being paid in full. Particulars of the financial position forwarded to the company would, if carefully examined, have shown that the business was in difficulties. A letter from the executor to the company stating that he had been carrying on the business in the interests of the creditors and the beneficiaries remained unanswered. The evidence also showed that the company feared that steps to wind up the estate would be prejudicial to the company's own business interests in the district.

Latham C.J. and *Dixon* J. (*Starke* and *McTiernan* JJ. *contra*) were of opinion that the conduct of the company did not establish an active affirmative assent to the business being carried on for the benefit of creditors and that the company was not postponed to the claims of the trading creditors in

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respect of debts incurred after the expiration of the time to which the carrying on of the business was authorized by the order of the court.

Principles of law applicable to the ranking of creditors where an executor carries on the business of a testator considered.

Dowse v. *Gorton*, (1891) A.C. 190; *Re Millard*; *Ex parte Yates*, (1895) 72 L.T. 823; *In re Oxley*; *John Hornby & Sons* v. *Oxley*, (1914) 1 Ch. 604, considered.

Per Dixon J.: The subject dealt with by s. 155 of the *Bankruptcy Act* 1924-1945 is the property to which the deceased debtor was entitled at the time of his death so far as it has not been lawfully dealt with since his death before the order of administration is made, and subject to all liens, charges and rights, subsisting in other persons.

The Court being equally divided, the decision of the Court was in accordance with the opinion of the Chief Justice, and the order of the Court of Bankruptcy, District of South Australia (Judge *Paine*), was reversed.

APPEAL from the Court of Bankruptcy, District of South Australia.

Norman William Jay Woodman carried on the business of a garage proprietor at Broken Hill. He was slow in payment of his debts and Vacuum Oil Co. Pty. Ltd. (hereinafter called "the company"), one of his creditors, was pressing him for a reduction of the amount owing. Woodman died on 2nd March 1932, and his indebtedness to the company was then £575. Woodman left a will which was proved by one of his executors, H. W. Lee, on 21st June 1932. The will did not contain a power to postpone conversion of the estate or to carry on the garage business, but the business was in fact carried on by the executor. In June 1932 the executor paid a dividend of 5s. in the pound on account of outstanding debts. In December 1933, he obtained an order from the Supreme Court of New South Wales under s. 81 of the *Trustee Act* 1925-1929 (N.S.W.) authorizing him to carry on the business until 31st March 1934. He continued to carry on the business after that date and until October 1936. In October 1936, as a result of a resolution passed at a meeting of creditors of the business, Reginald Beecher Wiltshire was appointed attorney for the purpose of winding up the business. A representative of the company was present at this meeting of creditors and apparently approved the resolution. In November 1936, upon the petition of two creditors of the estate, an order was made for the administration of the estate in bankruptcy and Reginald Beecher Wiltshire was appointed the trustee in bankruptcy. At the time of the order the amount of £575 which was owing by the deceased to the company had been reduced to £431. After the death, however, the company had supplied goods

to the executor, sometimes for cash, sometimes on short credit. The amount owing on the new account was £36.

The effect of an economic depression was still apparent at the time of the death of the testator, and the volume of business continued to diminish. Though the company from time to time pressed the executor for payment, it appeared that the company was aware that there was a risk that an early liquidation of the business would mean that the testator's debts would not be paid in full. The company continued to press for payment, and its manager at Broken Hill was warned that further supplies should not be made on credit. Despite this warning, however, some limited credit was allowed. The executor supplied the company with particulars of the financial position of the business, and a careful examination of these would have shown that it was in difficulties. On 19th June 1934 the executor wrote to the company a letter stating that he had been carrying on the business " in the interests of the creditors and beneficiaries." This letter was not answered by the company, and, a year later, a compromise with the creditors was suggested to the company. It seemed from the evidence that the company was aware that the position of the business was unsound, but feared that steps to wind up the estate would be prejudicial to the company's own business interests in Broken Hill.

By an order dated 27th March 1940, in previous proceedings the Court of Bankruptcy, District of South Australia, had directed (so far as material) the following order of priority amongst the creditors :

" (2) The claims of those of the estate creditors who did not consent to the carrying on.

(5) Claims of trading creditors for debts incurred after 31st March 1934.

(6) Claims of the balance of the estate creditors " : See *Re Woodman* ; *Ex parte The Trustee* (1).

The company by notice of motion asked the Court of Bankruptcy, District of South Australia, that the trustee admit it to rank in the second group of creditors referred to in the order of 27th March 1940. His Honour Judge *Paine* found (*a*) that the company knew the shaky financial position of the estate at the testator's death ; (*b*) that the company knew that there was a definite risk that an early liquidation of the business would involve a substantial risk that the debts of the testator would not be paid in full ; (*c*) that the company, if not from the outset at least very soon after, considered that it would be in the interests of the testator's creditors and all others concerned to carry on that business ; (*d*) that the company

(1) (1940) 11 A.B.C. 159.

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was prepared to assist and did assist throughout in carrying on that business by supplying essential commodities on terms similar to those existing at the death of the testator; (*e*) that about two years, or at the outside three years, after the testator's death the company realized that no progress had been made since the first dividend was paid in May 1932; nevertheless the company continued its course of action for the whole of the subsequent period during which the business was carried on. His Honour held that the company had given an active affirmative assent to the carrying on of the business and was therefore properly classed in class (6) in the order of priority.

From this decision the company appealed to the High Court.

Abbott K.C. (with him *Cornish*), for the appellant. Judge *Paine* has extracted from *Dowse* v. *Gorton* (1) the principle that, if a creditor continues to trade with an executor, he must be taken to have assented to the carrying on of the business. This goes too far. The true principle is that the creditor must, in effect, be the beneficiary for whom the executor has carried on (*Re Millard*; *Ex parte Yates* (2); *In re Oxley* (3)). The creditor is not postponed unless he is, in effect, risking the assets of the estate for his own benefit. This business was not carried on by the company. So far as the company knew it was being carried on by direction or under the authority of the Equity Court of New South Wales. The company did not benefit by the carrying on, and at worst it merely stood by.

K. L. Ward, for the respondent. Judge *Paine* had the three relevant authorities before him, understood them and applied the material parts of the judgments. *Dowse* v. *Gorton* (1) decided that a creditor who assents to the carrying on of the business is obliged to allow the executor his indemnity and that the executor is entitled to this indemnity out of all assets. The case did not decide that express authority to carry on is necessary. *In re Oxley* (3) is merely an application of the principle of *Dowse* v. *Gorton* (1) and *Re Millard*; *Ex parte Yates* (2) is a decision on the peculiar facts of that case. The result of the three cases is :—1. Whether or not there is " assent " is a question of fact; 2. The answer to this question involves proof of knowledge that the business was being carried on and that it was being carried on for the benefit of the creditors who assented thereto. The judge in the lower court had before him evidence on these matters.

Cur. adv. vult.

(1) (1891) A.C. 190.
(2) (1895) 72 L.T. 823.
(3) (1914) 1 Ch. 604.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from an order of the Court of Bankruptcy (his Honour Judge *Paine*) refusing an application for a direction that the trustee of the bankrupt estate of Norman William Jay Woodman deceased should admit, with a specified priority, a proof of debt of the appellant company.

The deceased carried on the business of a garage proprietor at Broken Hill. He died on 2nd March 1932, and one of the executors appointed by his will, H. W. Lee, obtained probate of the will on 21st June 1932. The will did not contain any power to postpone conversion of the estate or to carry on the garage business. In June 1932 the executor paid a dividend of 5s. in the pound on account of outstanding debts. He continued to carry on the business until October 1936, when, under pressure from creditors, he appointed the respondent R. B. Wiltshire as attorney for the purpose of winding up the business. On 5th November 1937 an order was made under the *Bankruptcy Act* 1924-1933, s. 155, for the administration of the estate in bankruptcy. The respondent is now trustee of the bankrupt estate. Questions arose as to the rights of the creditors of the testator who had not been paid, and of creditors whose debts had been incurred in the course of carrying on the business.

The appellant, Vacuum Oil Co. Pty. Ltd., was a creditor of the testator at the date of his death in the amount of £575. By payments on account the debt was reduced, but when the estate was put into bankruptcy the amount still owing to the company on account of this debt was £431. The company had continued to supply goods to the executor, sometimes for cash, sometimes on short credit, and the amount outstanding on the new account was £36.

The learned judge classified the claims against the estate in six classes. He placed in class 2 the claims of the estate creditors (that is, creditors of the testator at his death) who had not consented to the carrying on of the business, and in class 5 the claims of the creditors who had traded with the executor for debts incurred after 31st March 1934—the date when an authority given by the Equity Court of New South Wales to carry on the business expired. In class 6 the learned judge placed the claims of the other estate creditors. The appellant company contends that the learned judge wrongly held that the company had assented to the carrying on of the business and that its claim should therefore be included in class 2, not in class 6.

In the first place I refer to the general principles of law which have been developed in relation to the rights and liabilities of the parties concerned when an executor carries on the business of his testator.

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These parties are the executor, the beneficiaries who claim under the will, the creditors of the testator (who may be called estate creditors) and the creditors to whom debts have been incurred in the course of trading by the executor (who may be called trading creditors).

1. An executor is entitled (apart from any express authority given by the will) as against both beneficiaries and estate creditors to carry on the business of his testator for the purpose of realization, but only for that purpose (*Collinson* v. *Lister* (1)). In respect of debts incurred by him in so carrying on the business he is personally liable to the trading creditors—the debts are his debts, and not the debts of his testator (*Labouchere* v. *Tupper* (2) ; *Ex parte Garland* (3)). But as against beneficiaries and both classes of creditors he is entitled to indemnity in respect of those debts out of the assets of the estate (*Dowse* v. *Gorton* (4)).

2. If an executor is authorized by the will to carry on the business not merely for the purpose of realization, then it is still the case that debts incurred by him are his debts for which he is liable to the new creditors. The authority given by the testator is part of his disposition of his estate and binds beneficiaries under his will. Thus, as against the beneficiaries in such a case the executor is entitled to an indemnity against the new debts out of the assets of the estate which the testator authorized to be used for the purpose of carrying on the business and out of any assets acquired in the course of carrying on (*Ex parte Garland* (3)).

But the testator cannot by his will prejudice the rights of his own creditors (*In re Oxley* (5)). They may insist upon payment of the debts and upon realization of the assets of the estate in due course in order to obtain payment, notwithstanding any provisions in the will with respect to the carrying on of the business. They can make the executor account upon the basis of the assets which came to his hands or which he has subsequently acquired as executor, leaving the new creditors to get such remedy as they can against the executor himself, but with the added right of subrogation to his indemnity against the estate—an indemnity which will be worth nothing if the old creditors exhaust the estate (*Dowse* v. *Gorton* (6)).

3. If an executor carries on a business otherwise than for the purpose of realization and without authority given by the will of his testator, he acts at his own risk, the debts which he incurs are his debts, and he has no authority as against either beneficiaries or

(1) (1855) 20 Beav. 356 [52 E.R. 639].
(2) (1857) 11 Moo. P.C. 198 [14 E.R. 670].
(3) (1804) 10 Ves. Jun. 110 [32 E.R. 786].
(4) (1891) A.C. 190, at p. 199.
(5) (1914) 1 Ch. 604, at p. 613.
(6) (1891) A.C. 190.

creditors to come upon the assets of the estate for the purpose of meeting them (*Labouchere* v. *Tupper* (1)).

4. But if a beneficiary actually authorizes him to carry on the business he is entitled as against that beneficiary to indemnity out of the estate in respect of the debts which, in the course of such carrying on, he incurs to the trading creditors. Similarly, if a creditor of the testator actually authorizes him to carry on the business, he is entitled as against that creditor to a similar indemnity, which in each case enures by subrogation for the benefit of the new creditors (*Dowse* v. *Gorton* (2)).

5. The position is the same if a creditor of the testator actively and positively assents to the executor carrying on the business, but it is not easy to determine, on the authorities, what kind of conduct should be held to amount to the necessary active and positive assent. The principle upon which the right of the executor in such a case to indemnity out of assets of the estate as against an estate creditor has been variously stated. In *Dowse* v. *Gorton* (3), Lord *Macnaghten* said : " If the business is carried on by the executors at the instance of the creditors without regard to the terms of the will, the executors, I suppose, have the ordinary rights of agents against their principals." In *In re Millard*; *Ex parte Yates* (4), *Smith* L.J. referred to the words of Lord *Macnaghten* and applied the principle suggested by him. In the same case, however, Lord *Esher* M.R. pointed out that it could hardly be said that the executor in such a case was the agent of the creditors, because, if he were, the creditors would be undisclosed principals in the business and would be liable to new creditors for goods supplied to the business. The law, however, had held otherwise. Lord *Esher* took the view that the executor carrying on was in the position of a trustee for the creditors and that Lord *Herschell* in *Dowse* v. *Gorton* (2) had based his judgment in that case upon the view that the executor was such a trustee. Upon either view the result followed that the executor was entitled to an indemnity as against the estate creditors—in one case the indemnity to which an agent is entitled against his principal and in the other case the indemnity which a *cestui que trust* is bound to give to his trustee against liabilities reasonably incurred in performing the trust—to use the words of Lord *Esher* M.R. in *Millard's Case* (4).

There are difficulties in adopting the theory of agency (as pointed out by Lord *Esher*) and there is no clear binding decision of any court (as distinct from *obiter dicta*) that the executor is a trustee in respect of creditors who have assented to the carrying on, but is not

(1) (1857) 11 Moo. P.C. 198 [14 E.R. 670].
(2) (1891) A.C. 190.
(3) (1891) A.C. 190, at p. 208.
(4) (1895) 72 L.T. 823.

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a trustee in the same sense with respect to creditors who have not assented to the carrying on.

6. The principle which has been developed in the cases appears to be *sui generis*. It was decided in *Dowse* v. *Gorton* (1) that knowledge by estate creditors that the business is being carried on otherwise than for purposes of realization does not amount to such an assent as to entitle the executors to an indemnity out of assets of the estate as against those creditors. There must be something more than mere knowledge and inaction—more than "standing by" with knowledge.

7. But the principle which has been applied is not an example of the application of the equitable doctrine of acquiescence. A person may lose his rights by acquiescence, that is, by quiescence in such circumstances that assent to an infringement of his rights which is taking place may reasonably be inferred. Acquiescence is an instance of estoppel by words or conduct (*De Bussche* v. *Alt* (2)). A person who so acquiesces is not allowed in equity to complain of the violation of his right because he has really induced the person infringing his right to pursue a course of action from which the latter person might otherwise have abstained. It is a condition, however, of the application of the doctrine of acquiescence that the person who acts in infringement of the right should be acting under a mistake as to his own rights. If he knows that he is infringing the right of another person he takes the risk of those rights being asserted against him (*Ramsden* v. *Dyson* (3)). Further, the person whose rights are infringed must know that the other person is acting under a mistaken belief (*Ramsden* v. *Dyson* (4); *Russell* v. *Watts* (5)). A case of acquiescence by an estate creditor in this sense in the executor trading might be made out in some cases. But there is no evidence of such acquiescence in the present case—no evidence of any such mistake or inducement—and I therefore set the equitable doctrine of acquiescence on one side.

8. There is one other matter to which reference may be made before endeavouring to apply the law to the present case. In *Dowse* v. *Gorton* (6), Lord *Macnaghten* expressed the opinion that estate creditors could not claim the assets of the business which had been acquired after the death of the testator and then refuse the executors indemnity in respect of liabilities incurred in carrying on the business. If they so acted, it was said, they would be reprobating after approbating. The same view is expressed in *In re*

(1) (1891) A.C. 190.
(2) (1878) 8 Ch. D. 286, at p. 314.
(3) (1866) L.R. 1 H.L. 129, at p. 141.
(4) (1866) L.R. 1 H.L. 129.
(5) (1883) 25 Ch. D. 559, at p. 576.
(6) (1891) A.C. 190, at p. 204.

Oxley (1), by *Cozens-Hardy* M.R. (2), and by *Buckley* L.J. (3). These observations were not necessary for the decision of either case, because Lord *Macnaghten* in *Dowse* v. *Gorton* (4) and the majority in *In re Oxley* (1) held that the creditors were not making any claim in respect of assets acquired subsequently to the d ath of the testator. I find much difficulty in reconciling these observations with the clearly established rule of law that assets acquired by an executor in carrying on the business of his testator are assets of the testator's estate in every respect in the same way as the testator's assets which came to the hands of the executor at the time of his testator's death. See the statement of the law by *Herschell* L.C. in *Dowse* v. *Gorton* (5), and the many cases cited in *Williams on Executors & Administrators*, 11th ed. (1921), vol. 2, pp. 1271 et seq., where the law is stated as it existed before the *Administration of Estates Act* 1925 (Imp.). When an estate creditor sues an executor for his debt or takes an administration order the assets upon which execution can be levied under a judgment *de bonis testatoris* or which can be administered in the suit are all the assets which the executor has obtained in his capacity as executor. A creditor so suing does not " claim against " any particular part of the assets. He is entitled as of course to the application to estate liabilities of all the estate assets, including assets acquired after the death. He may not have known that the business had been carried on. It would be a remarkable thing if the result of such a creditor taking the only possible steps to compel payment of his debt should be that he must be taken to have assented to the carrying on so as to be postponed to the trading creditors.

9. In the present case the testator's estate is being administered in bankruptcy under the provisions of s. 155 of the *Bankruptcy Act*. It is clear that all the assets in the hands of the executor as executor will be administered and that no distinction will be drawn between assets which belonged to the testator and assets which have been subsequently acquired by the executor in the course of carrying on the business. Thus all the estate creditors in the present case are, simply because they have lodged proofs of debt, claiming against all the assets. If the *obiter dicta* in *Dowse* v. *Gorton* (4) and *Oxley's Case* (1) to which I have referred were to be taken as accurately stating the relevant law the result would be that all the estate creditors, independently of any assent by them in fact to the business being carried on, would be treated as having assented on the ground

(1) (1914) 1 Ch. 604.
(2) (1914) 1 Ch., at p. 610.
(3) (1914) 1 Ch., at p. 614.
(4) (1891) A.C. 190.
(5) (1891) A.C. 190, at p. 198.

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that they could not " approbate " the business being carried on by claiming the after-acquired assets, and " reprobate " by refusing to allow the executor an indemnity out of those assets. If this were the law, then the result would be that all the estate creditors would be deemed to have assented because they have made claims to the satisfaction of which any assets in the executor's hands can be applied, even though some of them may have been completely unaware that the business had been carried on. The statements to which I have referred were not necessary for the decision of the cases mentioned and should not, I think, be regarded as an authoritative statement of the law.

10. Strictly, it would appear, the trading creditors, whose debts are owed only by the executor personally, should not be admitted as creditors in the administration under the *Bankruptcy Act*, s. 155, of the estate of the testator. They are not creditors of the testator's estate. But, as the executor may have a right of indemnity out of the estate assets in respect of the trading debts against some beneficiaries or some estate creditors, the trading creditors will be entitled to the benefit of his indemnity, and so will be entitled, through him, though not directly, to the application of estate assets to the satisfaction of their debts in priority to the claims of such beneficiaries or creditors. It is only in this way that the claims of trading creditors can come into consideration in these proceedings. It is upon this basis that the learned judge, in settling priorities, has taken into account the claims of the trading creditors in competition with those of the estate creditors and of beneficiaries, and no objection has been taken to this convenient procedure : Cf. *In re Wilson* (1).

11. I proceed now to consider the facts of the case upon the basis that the equitable doctrine of acquiescence is not here applicable and that standing by with knowledge that the business is being carried on is not sufficient to entitle the executor to an indemnity as against the estate creditors in respect of the claims of the trading creditors. The inquiry is whether the appellant company actively assented to the carrying on of the business for its benefit. The question is, to use the words of Lord *Herschell*, whether the business was carried on with the assent of the company for the purpose of securing the payment of the debt due to the company : See *Dowse* v. *Gorton* (2), per Lord *Herschell*. Such an assent must be " an active affirmative assent " (*In re Oxley* (3)). In *Re Millard* ; *Ex parte Yates* (4) the law is stated in the same way as in the other two

(1) (1942) V.L.R. 177 ; (1942) A.L.R. 277.
(2) (1891) A.C. 190, at p. 200.
(3) (1914) 1 Ch. 604, at p. 616.
(4) (1895) 72 L.T. 823.

cases, though there was a difference of opinion upon the facts of the case.

The learned judge has found that the company did actively assent to the carrying on of the business. This conclusion was founded upon the following facts :—Before the death of the deceased he had been slow in his payments and the company had been pressing for a reduction of the amount owing. After his death in March 1932, a depression still existed and trade decreased. The company from time to time pressed for payment. A payment of 25 per cent on account was made in June 1932. The company kept on pressing for payment through its manager at Broken Hill. The manager was warned that further supplies should not be made on credit and that he should insist upon cash payment, but from time to time some limited credit was allowed. The executor sent particulars of the financial position of the business to the company which, if examined with any degree of care, would have shown that the business was in difficulties. On 19th June 1934 the executor wrote to the company a letter in which he stated that he had been carrying on the business " in the interests of the creditors and beneficiaries." The company did not reply to this letter. A year later, on 19th June 1935, the manager of the business, who was a son of the testator, wrote a letter in which he suggested a compromise with the creditors. The company therefore knew that the business was not very sound, but were reluctant to take proceedings to wind up the estate because it was feared that such action would give the company a bad name in Broken Hill.

The executor obtained authority from the Equity Court in New South Wales under the *Trustee Act* 1925-1929, s. 81, to carry on the business until 31st March 1934. Under this section the court has jurisdiction to confer certain specified powers upon trustees (which include executors, s. 5) where in the administration of property vested in them a particular transaction is expedient, but where the transaction cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument creating the trust, or by law. One of the specified powers is a power to postpone the sale of property, and another specified power is a power to carry on a business during any period for which a sale may be postponed. An order under this section does no more than increase the powers of trustees in accordance with its terms, and can have no more effect than if the power had been conferred upon the trustees by the will itself. If a power to carry on the business had been contained in the will in the present case that fact would not have prejudiced in any way the rights of estate creditors, and the fact that the power was conferred by an order of the court cannot produce

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any further effect. I therefore regard the order of the court as not relevant to the rights of the company.

The learned judge paid a great deal of attention to the fact that in a communication to its Broken Hill manager an expression was used which indicated that the company had been abstaining from forcing payment of the old debt "for the sake of gallonage." His Honour said that this showed the motive of the company, so that the company not only knew that the business was being carried on, but approved its being carried on in order that it could sell petrol and oil.

In my opinion, with great respect to the contrary opinion of the learned judge, the facts stated do not establish the active affirmative assent which is required in order to justify the postponement of the company to the trading creditors. The assent which is important is an assent to the business being carried on as for the benefit of the creditors. In the present case the company did not in any way abandon or postpone its claim in respect of the estate debt. It was pressing for payment all the time. There are no facts which can be relied upon to show anything like an agreement that the claim should be held in abeyance until the result of carrying on the business was seen. The letter with respect to gallonage was written only after it had been determined that the business should be wound up and Mr. Wiltshire had been put in a position to sell the business if he could. The supply of goods to the executor and the receipt of payment therefor does not amount to an active affirmative assent of such a character as to show that the company regarded the executor as carrying on the business in the interests of the company. If A trades with B he does not thereby accept any responsibility in relation to B's business. B should not be held to be carrying on his business for the benefit of A just because A sells goods to him. The fact that prompt payment was insisted upon by the company (though with some slight concessions from time to time), shows that the company was not content to allow its interests to wait upon the results of trading by the executor. There was no express authority from the company to the executor to carry on as agent of the company, and there was not any express agreement by the company that the business should be carried on for its benefit. If the company had induced the executor to carry on, the case would be different. But there is no evidence to show that (even though there was no express assent, authority or agreement by the company) the company so acted as to entitle the executor to believe that it did so assent, authorize or agree. There is no evidence that the executor carried on by reason of such a belief, or that he in fact had such a belief.

I am therefore of opinion that the claim of the appellant should not, by the application of the doctrine of indemnity or for any other reason, be postponed to the claims of the trading creditors, and that, therefore, the company is entitled to be placed in class 2. Accordingly, in my opinion, the appeal should be allowed and the order varied in the manner stated.

As the members of the Court are equally divided in opinion, the decision of the Court is required to be in accordance with the opinion of the Chief Justice (*Judiciary Act* 1903-1940), and the appeal is accordingly allowed.

STARKE J. Appeal from the Court of Bankruptcy, District of South Australia.

One Woodman carried on for some time before his death the business of a garage proprietor at Broken Hill, where he died on 2nd March 1932. He left a will which was proved by one of the executors. There was no power given by the will to carry on the business or to postpone its realization. Nevertheless the executor who proved carried on the business, but in December 1933 he obtained an order from the Supreme Court of New South Wales pursuant to s. 81 of the *Trustee Act* 1925-1929 (N.S.W.) giving him leave to carry on the business until 31st March then next. But he carried on the business long after 31st March 1934 without any further authority. About October 1936 a meeting of Adelaide creditors of the business resolved that the respondent, Wiltshire, the present trustee in bankruptcy, should carry on the business as attorney for the executor for the purpose of winding it up. A representative of the appellant was present at the meeting and approved the resolution, as I gather from a letter dated 29th October 1936 to its Broken Hill branch. In November 1936 an order was made upon the petition of two creditors of the estate of Woodman deceased for its administration in bankruptcy (*Bankruptcy Act* 1924-1933, s. 155). The respondent was appointed trustee and has since proceeded to realize the estate. The appellant was a creditor of Woodman at the time of his death in the sum of £575 in round figures for petrol supplied, but this sum has since been reduced to £431 in round figures. In 1940 the trustee applied to the Bankruptcy Court for advice and direction as to the order of priority of payment of debts owing by the deceased at his death and debts incurred after the death by the executor without authority: See *Re Woodman; Ex parte The Trustee* (1). On this proceeding the court directed that the order of priority in which the whole of the proceeds of realization of the estate (after providing

(1) (1940) 11 A.B.C. 159.

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for all legal and other expenses of realization and administration and the trustee's remuneration and certain costs) should be as follows :—

(1) Such of the two claims for legal expenses as are shown to have been properly incurred by the executor in connection with three applications to the Equity Court of New South Wales, or otherwise in connection with the administration of the estate.

(2) The claims of those of the estate creditors who did not consent to the carrying on (of the business).

(3) Such of the claims for wages as are shown to be due pursuant to any order of the Equity Court of New South Wales.

(4) (*a*) Claims of the four South Australian beneficiaries.

(*b*) Any claims found to be due to the three infant Broken Hill beneficiaries.

These claims to rank *pari passu.*

(5) Claims of trading creditors for debts incurred after 31st March 1934.

(6) Claims of the balance of the estate creditors.

(7) Claims by the remaining beneficiaries.

And liberty was reserved to all parties to apply: See *Re Woodman* (1).

I do not stay to inquire whether this direction can or cannot be supported, for no objection has been made to it. The appellant sought to prove in bankruptcy for its debt and claimed to rank as a creditor in the second group above mentioned in respect of the sum of £431, the balance of the moneys due by the deceased to the company at the date of his death, but the trustee rejected this claim. And the appellant then moved the Court of Bankruptcy that the trustee be directed to admit the appellant to rank as a creditor in the second group in respect of the sum of £431, but its motion was refused. And it is against this order that an appeal has been brought to this Court.

The appellant did not lose its priority as a creditor of the deceased unless it consented to his business being carried on by his executor. An active consent is necessary: it is not enough if the appellant merely stood by and did nothing (*Ex parte Garland* (2); *Dowse* v. *Gorton* (3); *In re Oxley*; *John Hornby & Sons* v. *Oxley* (4)). In *In re Oxley* (5) *Buckley* L.J. stated the principles governing this case :—" In order to introduce the principle of *Dowse* v. *Gorton* (3) it must I think be established that the old creditor has so acted, either by claiming (as he did in that case) the assets of the continued

(1) (1940) 11 A.B.C. 159.
(2) (1804) 10 Ves. Jun. 110 [32 E.R. 786].
(3) (1891) A.C. 190.
(4) (1914) 1 Ch. 604.
(5) (1914) 1 Ch. 604, at p. 616

business or by affirmative acts by which he so adopts the action of the executors in carrying on the business, as to show that he has abandoned that which is prima facie his right, that which has been asserted by the plaintiffs in this case, to have the assets of their debtor administered in due course for payment of their debts, and that he has assented to another course, namely, that the fund to which he is entitled to look shall be risked in trade with the result that there may be loss or there may be further additions made for his benefit. It is necessary, I think, to show an active affirmative assent. Mere standing by with knowledge and doing nothing is not sufficient." But an active consent need not be express ; it may be inferred from the conduct of the creditor. And whether an active consent has or has not been given depends upon the facts of the particular case. The judge in bankruptcy examined the facts at length and with care and reached several conclusions of fact which I think are warranted by the evidence :—

(*a*) That the appellant knew the shaky financial position of the estate at the testator's death.

(*b*) That the appellant knew that there was a definite risk that an early liquidation of the business would involve a substantial risk that the debts of the testator would not be paid in full.

(*c*) That the appellant, if not from the outset, at least very soon after, considered that it would be in the interests of the testator's creditors and all others concerned to carry on that business.

(*d*) That the appellant was prepared to assist and did assist throughout in carrying on that business by supplying essential commodities on terms similar to those existing at the death of the testator. And I would add—

(*e*) Assented to the appointment by the executor of the respondent as his attorney under power for the purpose of investigating discrepancies already disclosed and for winding up the business as a going concern.

On these facts the judge found that the appellant had actively assented to the business being carried on by the executor and consequently that its motion must be refused. The finding is one that is reasonably open upon these facts, supported as they are by the evidence adduced before the judge.

The result is that the appeal should be dismissed.

Dixon J. The order of the Court of Bankruptcy for the administration of the deceased debtor's estate was made five years and eight months after his death. During that time his business had been carried on by or under the authority of the executor appointed by

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his will. The will contained no power to carry on the deceased's business, and, as clearly it was not done with the purpose of winding it up, the executor acted at first in breach of his duty, that is except in so far as he obtained the consent of the parties concerned, beneficiaries and creditors. At the end, however, of a period of about two years and nine months, the executor secured an order of the Supreme Court in Equity authorizing him "to carry on the business with the assets consisting therein" for three or four months more. The order could operate only as between him and the beneficiaries, in other words, it would have the same effect as a power or direction contained in the testator's will. At the expiration of the order, the executor continued the business without making any fresh application. However, not only had he failed to pay in full the creditors of his testator, he had, as might have been expected, contracted new trade debts. After the business had struggled on for nearly two more years a meeting of creditors was called. They decided that the executor should authorize the present respondent, who subsequently became the trustee under the administration in bankruptcy, to sell or wind up the business, and, in the meantime, to carry it on. The executor, accordingly, executed a power of attorney in his favour. He acted under the power for some time but, his efforts proving ineffectual, at the end of twelve months an order was made in bankruptcy.

The assets are not sufficient to provide for the unpaid debts of the testator and for the liabilities to trade creditors incurred by the executor in carrying on the business, and it devolved upon his Honour Judge *Paine* to settle the order of priority. He placed those creditors of the testator who did not consent to the carrying on of the business ahead of the creditors to whom the executor had become indebted in carrying on the business, and the remaining creditors of the testator he placed behind them.

The trustee declined to admit the proof of debt, I think, of any creditor of the testator except upon the footing that, as a consenting party to the carrying on of his business, he was postponed. The present appellant, however, to whom the testator died indebted in a not inconsiderable sum, claimed to rank before the executor's creditors and appealed to the judge.

In a full and careful judgment, the learned judge examined not only the facts and inferences affecting the particular position of the appellant but also the three leading cases upon the subject:— *Dowse* v. *Gorton* (1); *Re Millard*; *Ex parte Yates* (2); and *In re Oxley*; *John Hornby & Sons* v. *Oxley* (3). His Honour said that he

(1) (1891) A.C. 190. (2) (1895) 72 L.T. 823. (3) (1914) 1 Ch. 604.

had found great difficulty in applying the legal principles to the facts of this particular case, but his conclusion was that the appellant had given what *Buckley* L.J. called " an active affirmative assent " (1) to the carrying on of the business for the benefit of both original creditors and of beneficiaries.

In cases of this description, the priorities are worked out upon principles involving some intricacy.

The creditors of a deceased person are entitled to be paid out of the assets in a due course of administration and a due course of administration does not include the carrying on of the deceased's business, except in so far as may be reasonably necessary for the purpose of realization or winding up.

An executor or administrator, who carries on a business, except for that purpose, cannot, therefore, indemnify himself out of the assets in respect of liabilities he has incurred in so doing at the expense of creditors of the deceased. He cannot do so even if he is empowered by the will to carry on the business, for that power can operate only as between himself and the beneficiaries and that is true, also, of any order or decree extending or adding to the powers derived from a will or other trust instrument.

The liabilities the executor incurs in carrying on the business are his personal debts and give the creditors to whom he has incurred them no direct right of recourse to the assets of the estate. But, if the executor has acted under some authority binding upon those who otherwise would be entitled to the assets, their claims are subject to his right to be indemnified out of the assets in respect of liabilities he has incurred in the proper performance of his duties or exercise of his powers. He has a lien over the assets which takes priority over the rights in or in reference to the assets of beneficiaries or others who stand in that situation. But the claims of creditors of the deceased, whose rights are, of course, independent of his will, cannot be postponed so as to rank behind this lien, except by their own act or conduct. Although the executor's creditors to whom he has become indebted in the course of carrying on the business have no direct claim upon the assets, because they deal with him on the footing of his personal liability, yet in equity they may be subrogated to his right of indemnity or lien. The principle is stated in a few words by *Turner* L.J. in *Ex parte Edmonds* (2) :—" The executor or trustee directed to carry on the business having the right to resort for his indemnity to the assets directed to be employed in carrying it on, the creditors of the trade are entitled to the benefit of that right, and

(1) (1914) 1 Ch., at p. 616.

(2) (1862) 4 DeG. F. & J. 488, at p. 498 [45 E.R. 1273, at p. 1277].

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thus become creditors of the fund to which the executor or trustee has a right to resort."

But the creditors of the trade carried on by the executor must, as in all other cases of subrogation, depend upon his rights, and in that sense their claims upon the assets of the estate are indirect. This is well shown by the example of an executor who, through his wrongful act, has lost his right of indemnity or has disentitled himself to an indemnity except on terms of making good a loss to the estate. In such a case the creditors of his trade can have no better right (*In re Johnson* (1)).

The application of these principles to the present case means that the claims of the trade creditors of the executor to rank before the creditors of the deceased debtor in the administration of his estate in bankruptcy must rest upon the existence in the executor, at the date when the order for administration in bankruptcy was made, of a right to be indemnified out of the assets in respect of those claims or to a lien over the assets. Further, the lien or right of indemnification must take priority over the rights of creditors of the deceased and, as already explained, that can only be by reason of their own act or conduct.

His Honour Judge *Paine* thought that the particular creditor in question, the appellant, had given its active assent and for this reason was postponed to the executor's right of indemnity to which the latter's trade creditors are subrogated. It is the correctness of this view that we must decide.

But, it may be asked, how can this question arise in " the administration in bankruptcy of the deceased debtor's estate " ? (Cf. s. 155 of the *Bankruptcy Act* 1924-1945.) Is it not the debtor's estate as he left it ? And is not the combined effect of s. 155 (4) and ss. 84-87, to establish an order of priority and subject thereto an equality in which claims upon the assets rank, an order taking no account of the claims of trade creditors of the executor ?

The answer lies in the fact that the executor's lien is a claim upon those assets and that the order for administration does not overreach it. The subject dealt with by s. 155 is the estate of the deceased debtor, that is, the property to which he was entitled at the time of his death so far as it had not been lawfully dealt with since his death before the order of administration was made and subject to all liens, charges and rights subsisting in other persons: Cf. per *Chitty* L.J. in *Hasluck* v. *Clark* (2). Further, in *Levy* v. *Kum Chah* (3), it was said :—" When the Bankruptcy Court under-

(1) (1880) 15 Ch. D. 548, at pp. 552, 555.
(2) (1899) 1 Q.B. 699, at p. 707.
(3) (1936) 56 C.L.R. 159, at p. 173.

takes the administration of assets which was the function of the executor, just as when the Court of Chancery did so, the liabilities incurred by him as the person otherwise charged by law with the administration of the assets and his consequent claims upon the assets for recoupment or otherwise are matters which attend the administration and are not independent of the control and application of the deceased's property."

Perhaps it may be well to add that in some circumstances the executor's right to indemnity might be brought under the provision for the testamentary expenses : Cf. s. 84 (1) (*b*) and s. 155 (8) and (11).

The question, therefore, upon which the appeal turns is what conduct on the part of a creditor of a deceased is enough to postpone him to the executor's claims upon the assets to be indemnified against liabilities incurred in carrying on the deceased's business and whether what the appellant did, or failed to do, brings its conduct within the description. An examination of the three cases already mentioned and of the authorities lying behind them suggests that to the first part of this question the answer should take the form of a rather general proposition. It is that rights may be lost or prejudiced by conduct making it inequitable that they should be asserted, and if a creditor in the hope of obtaining an advantage and for that purpose contributes by his agreement or concurrence to the executor's pursuing a course exposing him to risk of personal liability unless paid out of the estate, the creditor does by that conduct lose or prejudice his claim upon the assets by postponing it to the executor's lien. There are many differing states of fact in which it would be inequitable to allow the creditors of the deceased to assert their legal rights against his assets in priority to the executor's lien for indemnity. The assertion of a legal right may be inequitable for more than one reason, and it happens that, in the three principal cases, on the facts the reasons considered, though kindred, were not the same. They illustrated different aspects of the same general rule, and, therefore, do not employ precisely the same test. In *Dowse* v. *Gorton* (1), the creditors concerned had looked in the deceased's lifetime to the carrying on of the business, the will empowered the executors to carry it on they knew that, if it were sold, it might not realize enough to pay their debt, and, to the executors' proposal to carry it on, they gave their assent in circumstances leading to the inference that it was carried on not only in the interest of beneficiaries but also for the purpose of securing the

(1) (1891) A.C. 190.

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payment of the debt due to them. Their consent in these circumstances made it manifestly unjust that they should exercise their paramount legal right against the estate and so defeat the executors' indemnity.

In *In re Millard*; *Ex parte Yates* (1), the widow of the deceased, Millard, was universal legatee and sole executrix under his will, which contained no power of carrying on the business. She, however, attempted to carry it on, but, after about six months, she called a meeting of creditors, having incurred debts about equal in amount to those of her deceased husband. Yates was the creditor, as well as a friend of the deceased, and he consented to the course she took in continuing the business. Four months or so after the death of the deceased, he entered into an agreement with her, which, after reciting his consent, extended the time for payment of one of the debts owing to him by the deceased, took her personal obligation for it and made certain provisions in relation to the business to ensure payment. In those circumstances the majority of the Court of Appeal considered that the executrix gained no priority for her lien over Yates' debt. "The business was to be carried on for the maintenance and benefit of Mrs. Millard" (per *Rigby* L.J. (2)). *Smith* L.J. said:—"It is true that he could have thrown the estate into the courts and have it administered, and that he was not desirous of doing this, and he did not do so. He let the widow go on. He took a fresh bill from her for the £1,600 money lent, upon which she made herself personally liable, and he took the power of seeing how the business was progressing, and of putting a stop to it if he did not find that it was going on to his satisfaction and his money was in danger. I cannot myself find from this that he undertook that she should act as his agent, and that she should continue the business for him, and that he would become liable to her for the costs and expenses which she might thereby incur" (3).

In *In re Oxley* (4) the widow and son of the deceased, being executrix and executor under his will and the former being his universal legatee, carried on his business for four years after his death with the knowledge of his three principal creditors, who raised no objection. *Joyce* J. and the Court of Appeal decided that the creditors of the deceased were not postponed, on the grounds (1) that acquiescence was not enough, their active assent was necessary; (2) that the carrying on acquiesced in was not for the benefit or advantage of the creditors but for that of the widow; (3) that there was no attempt on

(1) (1895) 72 L.T. 823.
(2) (1895) 72 L.T. 823, at p. 828.
(3) (1895) 72 L.T. 823, at p. 827.
(4) (1914) 1 Ch. 604.

the part of the creditors to obtain or adopt any special benefit arising from the executors' continuance of the business.

It is, I think, apparent that in the two later cases the court was concerned, not with formulating a test, but rather with excluding upon the facts possible grounds upon which priority might conceivably be claimed for the lien or right of indemnity of the executor. On the other hand, in *Dowse* v. *Gorton* (1) a very clear case existed for postponing the creditors' claim on grounds of equity. But, in the circumstances of the present appeal, it appears to me that, unless the view is adopted that the appellant company consented to the executor's carrying on the business so as to better the prospects of payment in full and so contributed to the executor's pursuing that course, there is no ground for regarding it as inequitable for it to assert a prior claim to satisfaction out of the assets.

After a close examination of the materials contained in the transcript and of the reasons of the learned judge for his conclusion that the appellant actively assented, I have come to the conclusion that it is not the fact that the appellant gave its consent in the hope of securing payment of its debt and with that object or that its conduct in any way contributed to the executor's pursuing the course of carrying on the business.

We had the advantage of a full discussion of the facts by counsel for the trustee, who very properly supported the judgment under appeal. His argument emphasized the difficulties of realizing a business of the kind under consideration during the years in question, the interest of the appellant company had in the continuance of the business as an agency for the retail distribution of its supplies, the knowledge of the appellant company of what was being done and of its own legal position, the reports of the appellant of the expectations of improvement in the business and ultimate payment of the debts, and, in the end, the concurrence of the company in the appointment of the now trustee as attorney under power to conduct the business with a view to realization. In the last fourteen paragraphs of his judgment, his Honour Judge *Paine* presents in a summary form some important considerations and his final conclusions of fact which are restated in other judgments. But, notwithstanding these views, the transcript leaves me with the strong impression that the appellant company was concerned primarily with the collection of its debt as soon as might be, and that it treated the matter as one for the executor, with whom it was reluctant to interfere unless driven to it. It allowed the matter to drift on for different reasons varying from time to time. At first, it was influenced by the

(1) (1891) A.C. 190.

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payment of a dividend and representations of early liquidation of the entire debt; later, I have no doubt the order of the Equity Court was accepted as authority for the executor to go on; at all times the odium which in the locality would attach to harsh action and the unwisdom in a business point of view of incurring it combined with a natural policy of not closing up a retail distributor's business, and those motives led the appellant company to suffer the executor, or rather the family, to carry on the business. I cannot regard the course taken jointly with other creditors of obtaining the appointment of the now trustee to be the executor's attorney under power as affecting the rights up to that time. The object was to ensure that the executor did sell or wind up the business. No case has been made for any special order in respect of any unpaid liabilities incurred under the power of attorney.

To my mind the facts fall far short of what is required for the application of the principle of *Dowse* v. *Gorton* (1). The effect of that decision was, I think, succinctly given by *Joyce* J. in *In re Oxley* (2) when he said that in *Dowse* v. *Gorton* (1) the conclusion arrived at by the court was that the business was carried on by arrangement with the creditors and really for their benefit and that to hold that mere standing by was sufficient to postpone them would be contrary to what Lord *Herschell* said (3).

In the present case the executor carried on the business entirely in the interests of his testator's family and the appellant company acquiesced, without giving any express consent. The reasons why it did so were negative rather than positive and indefinite and confused rather than specific or decisive and they certainly did not amount to a resolve to pursue a course for a defined advantage.

For the foregoing reasons, I am of opinion that the appeal should be allowed. I think that an order should be made varying the order under appeal by substituting for par. 1 thereof the direction sought by the notice of appeal and by substituting for the declaration that no order be made as to the applicant's costs (the appellant in this Court) an order that its taxed costs of the application be paid out of the estate. The costs of the appellant and of the respondent trustee of this appeal should be paid out of the estate.

McTIERNAN J. The order of the Court of Bankruptcy, from which this appeal is brought, denies to a debt contracted by the appellant with the testator the priority applicable to a debt of this class in the administration of the estate of a deceased. The rights of the creditors

(1) (1891) A.C. 190.
(2) (1914) 1 Ch. 604, at p. 606.
(3) (1891) A.C. 190, at p. 199.

of a person who dies leaving assets are stated by *Buckley* L.J. in the case of *In re Oxley* (1). The ground of the decision of the Court of Bankruptcy is that the testator's business was carried on after his death with the appellant's assent, and that, by reason of the nature of the assent, the executor is entitled, in priority to the appellant's claim as a creditor of the estate, to be indemnified out of the estate in respect of the debts incurred by the executor in carrying on the business.

The executor had no authority under the terms of the will to carry on the business. He carried it on for a period for the purpose of selling it as a going concern and then with the leave of the Court of Equity pending realization. When this leave terminated the executor or his manager continued to carry on the business without authority. While the executor was carrying on the business new debts, as distinct from the old estate debts, were incurred.

In *Dowse* v. *Gorton* (2), it was held that the executors in that case were entitled, in priority to claims by the testator's creditors, to be indemnified out of the testator's estate against the liabilities which the executors had properly incurred. In that case the executors carried on the testator's business for a considerable period after his death in accordance with the provisions of the will, and with the assent of the testator's creditors. It was the creditors' assent, not the authority given by the testator to the executors to carry on the business, which raised the executor's indemnity. Lord *Herschell* said (3):—"I think it is clear that where a business has been carried on under such an authority as was conferred upon the executors by the will of this testator, they would be entitled to a general indemnity out of the estate as against all persons claiming under the will. But I take it to be equally clear that they could not, by reason only of such authority, maintain this right against the creditors of the testator. The executors would, no doubt, be entitled to carry on a business of the testator for such reasonable time as was necessary to enable them to sell his business property as a going concern, and would even, as against his creditors, be entitled to an indemnity in respect of the liabilities properly incurred in so doing. But, in the present case, the businesses were carried on for a period of three years; and it is obvious that this was not done merely for the purpose of effecting a sale. I agree with the contention of the learned counsel for the appellants, that the mere fact that a creditor stood by under such circumstances, and did not immediately take steps to enforce his debt, would not of itself entitle the executors, as against

(1) (1914) 1 Ch. 604, at p. 613.
(2) (1891) A.C. 190.
(3) (1891) A.C. 190, at p. 199.

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him, to be indemnified out of the estate. But when all the circumstances of the case are considered, I do not think this is the true view of them." After reviewing the circumstances, Lord *Herschell* said :— " Under the circumstances I think the proper inference is that the businesses were not merely continued for the benefit of those interested under the will, but that they were also carried on with the assent of the representative of Luke Turner, for the purpose of securing the payment of the debt due to them." His Lordship added :—" If this be the true view it can hardly be contested, that the executors of Gorton are, as against the appellants, entitled to be indemnified out of their testator's estate, against the liabilities which they have properly incurred." Lord *Macnaghten*, who reached the same conclusion, said :—" On the testator's death, knowing as much about the Anvil Street business as the executors did, and having been fully informed of the position of the estate, they (the representatives of the creditors) must have seen that the chance of obtaining payment in full depended upon the Anvil Street business being carried on successfully for some years to come. Under these circumstances they assent to the continuance of the business, and allow the executors to use their property for the purpose of carrying it on, retaining of course the right to intervene at any moment. I cannot doubt that the proper conclusion is that the testator's businesses were carried on by the executors under the power contained in the will, with the sanction of the appellants, for the benefit of the estate, and in the interest of the creditors as well as in the interest of the beneficiaries." (1).

Their Lordships decided that the indemnity to which they held that the executors were entitled was not limited to new assets acquired since the testator's death. On this matter Lord *Macnaghten* said :—" But I can see no reason in any case for limiting the indemnity to that portion of the assets which may have come into existence or changed its form since the testator's death. An unsecured creditor has no rights against any specific part of the assets. He can have no greater right in respect of one part of the assets than another. It is all one estate." (2).

In the case of *In re Oxley* (3) the doctrine laid down in *Dowse* v. *Gorton* (4) is expounded. *Cozens-Hardy* M.R. said that the assent requisite under the doctrine would not be established by proving merely acquiescence by the creditor. He defined " acquiescence " in this connection as " not objecting for a considerable time " to the creditors' action in carrying on the business. *Buckley* L.J. said that

(1) (1891) A.C., at p. 205.
(2) (1891) A.C., at p. 208.
(3) (1914) 1 Ch. 604.
(4) (1891) A.C. 190.

it would be inconsistent with the doctrine in *Dowse* v. *Gorton* (1) to say that " mere knowledge and absence of action one way or the other preclude the old creditor from saying that he stands upon his original rights " (2). The criterion which he laid down in order to determine whether the creditor has so precluded himself is expressed in these words : " In order to introduce the principle of *Dowse* v. *Gorton* (1), it must I think be established that the old creditor has so acted, either by claiming (as he did in that case) the assets of the continued business or by affirmative acts by which he so adopts the action of the executors in carrying on the business, as to shew that he has abandoned that which is prima facie his right, that which has been asserted by the plaintiffs in this case, to have the assets of their debtor administered in due course for payment of their debts, and that he has assented to another course, namely, that the fund to which he is entitled to look shall be risked in trade with the result that there may be loss or there may be further additions made for his benefit. It is necessary I think to show an active affirmative assent. Mere standing by with knowledge and doing nothing is not sufficient " (3). *Phillimore* L.J. said : " The business must be carried on with the consent, or assent if you like, of the testator's creditors, they recognizing that the business is being carried on for their benefit, and assenting to its being so carried on " (4).

The respondent has the onus of establishing that the appellant gave an assent, which satisfies this doctrine, to the carrying on of the business by the executor. The evidence is fully set out in the reasons of his Honour Judge *Paine*, and is summarized by the Chief Justice. The issue of fact to be established is not a simple one. It involves the proof of affirmative acts which show that the appellant adopted the executor's action, abandoned its rights as a creditor to have the estate administered in due course for the payment of debts, and assented to the carrying on of the business in its own interest. His Honour made the following findings :—

" (*a*) That the company knew the shaky financial position of the estate at the testator's death.

(*b*) That the company knew that there was a definite risk that an early liquidation of the business would involve a substantial risk that the debts of the testator would not be paid in full.

(*c*) That the company, if not from the outset, at least very soon after, considered that it would be in the interests of the testator's creditors and all others concerned to carry on that business.

(1) (1891) A.C. 190.
(2) (1914) 1 Ch., at p. 615.
(3) (1914) 1 Ch., at p. 616.
(4) (1914) 1 Ch., at p. 617.

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(*d*) That the company was prepared to assist and did assist throughout in carrying on that business by supplying essential commodities on terms similar to those existing at the death of the testator. In these respects the case presents a fairly close parallel with the factors found in *Dowse* v. *Gorton* (1) and considered sufficient by Lord *Herschell*.

(*e*) That about two years, or at the outside three years, after the testator's death the company realized that no progress had been made since the first dividend was paid in May 1932, nevertheless the company continued its course of action for the whole of the subsequent period of carrying on."

There is evidence upon which his Honour could reasonably reach these findings. These facts establish more than acquiescence by the appellant in the carrying on of the business by the executor. They establish a course of conduct which I think is consistent only with the abandonment by the appellant of its priority as a creditor of the estate and its active assent to the carrying on of the business by the executor for its benefit.

In my opinion the appeal should be dismissed.

Appeal allowed. Order of the Court of Bankruptcy discharged. Order that the trustee's rejection of the appellant company's proof of debt be varied by admitting the company to rank in respect of the sum of £431 8*s.* 3*d. as a creditor in the second group of creditors referred to in the order of the said Court made on 27th March* 1940. *Costs of both parties of motion in Court of Bankruptcy and of appeal to this Court to be paid out of the estate.*

Solicitors for the appellant, *Lempriere, Abbott & Cornish.*
Solicitors for the respondent, *Ward, Mollison, Litchfield & Ward.*

C. C. B.

(1) (1891) A.C. 190.