Pe.R. 88 C.L.R 401 : 1952 A.C. 215

[HIGH COURT OF AUSTRALIA.]

MASLEN AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

THE PERPETUAL EXECUTORS TRUSTEES & AGENCY COMPANY (W.A.) LIMITED } RESPONDENT.
PLAINTIFFS.

MASLEN . . . . . APPELLANT;
DEFENDANT,

AND

LAFFER . . . . . RESPONDENT;
PLAINTIFF.

MASLEN . . . . . APPELLANT;
DEFENDANT,

AND

THE PERPETUAL EXECUTORS TRUSTEES & AGENCY COMPANY (W.A.) LIMITED } RESPONDENT.
PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Sept.* 5.

SYDNEY, *Dec.* 11.

Latham C.J., Fullagar and Kitto JJ.

Partnership—Partnership wool delivered for appraisement under National Security (Wool) Regulations—Assignment by partners of interests in partnership—Dissolution of partnership—Death of partner—Partners giving and taking mutual releases with respect to partnership dealings—Distribution of profits by Australian Wool Realization Commission—Wool Realization Act 1945-1946 (*No.* 49 *of* 1945—*No.* 77 *of* 1946)—*Wool Realization (Distribution of Profits) Act* 1948 (*No.* 87 *of* 1948), *ss.* 7, 9, 10, 11, 18, 28, 29—*Partnership Act* 1895 (*W.A.*) (59 *Vict. No.* 23), *ss.* 33, 42, 44, 49, 57.

For many years prior to 30th June 1946 C. and L. carried on the business of pastoralists in partnership under the firm name of "Mardathuna Pastoral Company". Each partner was entitled to a one-half interest in the capital and profits of the partnership. By deed dated 17th June 1946 C. assigned

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to M. and his sons all his right title and interest as a partner in the assets of the partnership. By deed dated 2nd October 1946 L. assigned to M. all his right title and interest as a partner in the assets of the partnership. The assignments were expressed to take effect as from 1st July 1946 and 1st October 1946 respectively. On 28th December 1946 C. died and on 22nd January 1949 L. died. Prior to 30th June 1946 the partners had supplied certain wool for appraisement and after 21st December 1948, upon which date the *Wool Realization (Distribution of Profits) Act* 1948 came into operation, two sums of money were distributed in respect of such wool. Of these two sums one sum was received by the executor of the will of C. and the other sum was received by M.

Held, (*Fullagar* J. dissenting), that the partnership between C. and L. was dissolved, if not earlier, then on the death of C. by virtue of the *Partnership Act* 1895 (W.A.) s. 44 (1) and the condition precedent to the operation of s. 10 (3) of the *Wool Realization (Distribution of Profits) Act* 1948 had thereby been fulfilled; that the effect of s. 10 (3) of that Act was that the rights duties and liabilities of persons to whom money was paid under the Act were to be ascertained upon the statutory assumption that the wool was sold when supplied for appraisement although, in fact, not paid for until after the dissolution of the partnership; and that the assignees had vested in them all the rights in relation to partnership property which the deceased partners would have had had their partnership not been dissolved and such rights included the right to receive the money paid under the Act.

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

C. and M. had for many years carried on business as pastoralists in partnership under the firm name of "Mt. Gibson Station". The partners' interest in capital and income was three-fourths and one-fourth respectively. The business failed and the station property was sold in November 1946. At the date of C.'s death in December 1946 C.'s partnership account was substantially in credit and M.'s partnership account was substantially in debit. In the period 1939 to 1946 the partners had supplied wool for appraisement and the sum of £463 17s. 0d. was received by the partnership brokers and was paid by them to the executor of C.'s will. After C.'s death M. disputed the partnership accounts and this resulted in a deed of compromise dated 29th September 1949 executed by M. and C.'s executor by which the partnership was declared to have been dissolved as from the date of C.'s death. The deed contained mutual releases from all claims in respect of partnership dealings.

Held, that the money should be dealt with in accordance with the position between the partners as it existed when the wool was paid for, and as at that date there were no outstanding partnership claims, they having been settled by the deed; the executor of C.'s will was, therefore, not entitled to retain M.'s share in reduction of the amount said to have been owing by M. to the partnership and the money should be distributed three-fourths to the executor of C.'s will and one-fourth to M.

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

Maslen v. *Laffer*; *Maslen and others* v. *The Perpetual Executors Trustees and Agency Company (W.A.) Limited.*

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APPEAL from the Supreme Court of Western Australia.

For many years prior to the year 1946 Patrick Andrew Connolly and Claud Ashley Laffer carried on business together as pastoralists under the name of "Mardathuna Pastoral Company." The partnership agreement was never reduced to writing and the partners were entitled to the capital and income of the partnership in equal shares. By deed dated 17th June 1946, taking effect as from 1st July 1946, Connolly assigned to G. A. Maslen and his two sons all his right title and interest as a partner in the assets of the partnership. By deed dated 2nd October 1946, taking effect as from 1st October 1946, Laffer assigned to G. A. Maslen all his right title and interest as a partner in the assets of the partnership. Connolly died on 28th December 1946 and probate of his will was granted to the Perpetual Executors Trustees & Agency Company (W.A.) Limited. Laffer died on 22nd January 1949 and probate of his will was granted to his widow Eleanor Forrest Laffer. Between the years 1939 and 1946 inclusive the partnership marketed wool produced by them through the Westralian Farmers Co-operative Limited and Elder Smith & Co. Ltd., respectively. On 21st December 1948 the *Wool Realization (Distribution of Profits) Act* 1948 came into operation and since that date two distributions had been made under the Act with respect to the wool grown by Connolly and Laffer while trading as Mardathuna Pastoral Company and sent by that firm for appraisement between the years 1939 and 1946 inclusive. Of the two distributions made the sum of £2,132 9s. 2d. had been received by The Perpetual Executors Trustees & Agency Company (W.A.) Limited as executor of the will of Connolly and the sum of £562 14s. 11d. had been received by G. A. Maslen. On 17th February 1950 The Perpetual Executors Trustees & Agency Company (W.A.) Limited commenced proceedings in the Supreme Court of Western Australia by way of originating summons to have the following questions determined :—

1. Did the above-named deed dated 17th day of June 1946 validly assign to the defendants the interest or any part of the interest of the above-named Patrick Andrew Connolly deceased in the amount of £2,132 9s. 2d. and in the amount of £562 14s. 11d. paid in pursuance of the *Wool Realization (Distribution of Profits) Act* No. 87 of 1948 in respect of wool marketed by the Mardathuna Pastoral Co. ?

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

On the same day similar proceedings were commenced by Laffer as executrix of the will of C. A. Laffer deceased and identical questions were asked save that in this case the date of the relevant deed was 2nd October 1946 and the defendant to this action was G. A. Maslen alone, he being the only assignee. The actions were heard together by *Walker* J., who decided that the money should be divided equally between the personal representatives of Connolly and of Laffer respectively.

From this decision the defendants in both cases appealed to the High Court.

Maslen v. *The Perpetual Executors Trustees & Agency Company (W.A.) Limited.*

For many years prior to 1939 P. A. Connolly and G. A. Maslen carried on the business as pastoralists in partnership under the name of " Mt. Gibson Station." The partnership agreement was never reduced to writing, but it was common ground that Connolly was entitled to a three-fourths' share of the capital and income of the partnership and that the defendant Maslen to a one-fourth share. For many years the partnership business was carried on at a loss and in the annual accounts the capital account of Connolly was in credit while the capital account of Maslen was in debit. In or about the month of November 1946 the station property known as Mt. Gibson Station, which was the sole asset of value in the partnership business, was sold. The proceeds of the sale were credited to the capital account of Connolly. On 28th December 1946 Connolly died and partnership accounts were prepared as at this date, which accounts showed that Connolly's capital account was in credit in the sum of £6,239 12s. 5d. and that Maslen's account was in debit in the sum of £7,024 1s. 4d. After Connolly's death Maslen and other of the deceased's relatives challenged the validity of Connolly's will and G. A. Maslen also denied the correctness of the partnership accounts. These disputes were eventually settled and the terms of settlement of both matters were set out in a deed dated 24th September 1946. This deed declared the partnership to have been dissolved as from the date of Connolly's death, namely, 28th December 1946, and also contained mutual releases from all claims in respect of partnership dealings. Between the years 1939 and 1946 inclusive certain wool the property of the partnership was marketed through Westralian Farmers Co-operative Ltd. In the year 1948 the *Wool Realization (Distribution*

of Profits) *Act* 1948 came into operation and a distribution of £463 17s. 0d. had been made pursuant to this Act in respect of the wool marketed between the years 1939 and 1946 inclusive and this sum had been paid to and received by the Perpetual Executors Trustees & Agency Company (W.A.) Limited as executor of the will of Connolly. Connolly's executor contended that the moneys were to be dealt with as if they had been received by Connolly during his lifetime and thus before the dissolution of the partnership and it was claimed that the share (one-fourth) which would otherwise be paid to Maslen should be applied by Connolly's executor in reduction of the amount at that date said to be owing by Maslen to the partnership. This contention was resisted by Maslen and the executor commenced proceedings in the Supreme Court of Western Australia by way of originating summons to have the matter decided. The questions asked were :—

1. By virtue of the provisions of the above-named deed and dated 29th day of September 1949, who is entitled to the sum of £463 17s. 0d. paid in pursuance of the *Wool Realization* (*Distribution of Profits*) *Act* No. 87 of 1948 in respect of wool marketed by Mt. Gibson Station ? Is the plaintiff entitled to the said money ? Is the defendant entitled to the said money ?

2. If the plaintiff and the defendant are entitled to share the said money, in what proportions are they entitled or what is the manner of distribution ?

The Supreme Court of Western Australia (*Walker* J.) held that the money should be dealt with as if it were part of the proceeds of the sale of wool received by the partnership at the time that the wool was supplied for appraisement. As at this date Maslen owed money to the partnership and therefore, if the money had been received as at this date it would all belong to Connolly. Accordingly his Honour held that the whole sum was an asset forming part of Connolly's estate.

From this decision the plaintiff sought special leave to appeal to the High Court.

The three cases the subject of this report were argued together.

J. W. Durack K.C. (with him *J. Dunphy*), for all the appellants and for the applicants for special leave. The relevant section of the *Wool Realization* (*Distribution of Profits*) *Act* 1948 is s. 10. For this section to operate it is necessary to establish : 1. That the partnership had existed : 2. That the partnership supplied wool for appraisement : 3. That the partnership has been dissolved : and 4. That the Commission had paid the money to a former

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partner or to the personal representatives of a deceased partner. When money has been paid under the Act it is to be dealt with according to the position as it existed when the money is received and not in accordance with the position as it existed when the wool was sold. Section 29 of the Act has no application to the present case. This is not a case of an assignment of a share in distribution as such at all; it is an assignment of partnership assets. The appellants are not claiming a derivative title based on the assignments contained in the deed. They are claiming an original title based upon s. 10 (3) of the Act. Section 29 of the Act is not absolute; it is expressly made "subject to this Act." The legislature clearly contemplated that a change may occur in the persons entitled to "a share in distribution under the Act." The change may be effected by bankruptcy, by a company becoming defunct, by the terms of a will or by a dissolution of partnership. These four cases have the effect of modifying the prohibition contained in s. 29 of the Act. Section 18 of the Act, which provides for a register of persons entitled to a share in distribution, and particularly sub-s. (4) of that section, which enables the Commission to make alterations to the list, clearly envisages the possibility of some person other than the supplier of the wool becoming entitled to a share in distribution.

T. S. Louch K.C. (with him *W. M. Byass*), for the respondent the Perpetual Executors Trustees & Agency Company (W.A.) Limited (two cases). Payments made under the *Wool Realization (Distribution of Profits) Act* 1948 are in the nature of a gift from the Commonwealth Government (*Commissioner of Taxes* v. *Union Trustee Co. of Australia, Ltd.* (1)). The appraised value of the wool is the limit of the suppliers' rights (*John Cooke & Co. Pty. Ltd.* v. *Commonwealth* (2)). A supplier of wool for appraisement has no right of action with respect to moneys payable under the *Wool Realization (Distribution of Profits) Act*. The money to be paid under the Act was never a book debt and could not pass under the assignment of book debts contained in the deeds. Payments under the Act could not have been in the contemplation of the parties to the deeds at the time of their execution, and if such payments had been foreseen and had been assigned then such assignment would have been ineffective. A share in a distribution under the Act is made absolutely inalienable by s. 29. The money is to be regarded as if it had been received at the time of the supply of the wool for appraisement.

(1) (1931) A.C. 258, at p. 263. (2) (1921) 31 C.L.R. 394.

W. M. Byass for the respondent Laffer adopted the arguments of *T. S. Louch* K.C.

Cur. adv. vult.

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

P. A. Connolly and C. A. Laffer were partners in equal shares in carrying on the business of pastoralists on Mardathuna Station. They had been partners for a number of years. On 17th June 1946 Connolly by deed assigned his interest in the land, chattels, book debts and assets of the partnership (including a sum of £7,000 lent by Connolly to the partnership firm) to the appellants in one of these cases—G. A. Maslen, J. A. Maslen, K. G. Maslen and R. W. Maslen—as tenants in common in equal shares. G. A. Maslen assigned certain land to P. A. Connolly as part of the consideration for the transfer of his share in the partnership assets, and the assignees assumed liability under certain mortgages.

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

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

After the *Wool Realization (Distribution of Profits) Act* 1948 (which was assented to on 21st December 1948) was passed, a sum of £2,132 9s. 2d. was received in accordance (it has been assumed) with the provisions of the Act from the Westralian Farmers' Co-operative Ltd. by the Perpetual Executors, Trustees and Agency Co. Ltd. as executor of the will of Connolly and a sum of £562 14s. 11d. was received from Elder Smith & Co. under the Act by the appellant G. A. Maslen in each case in respect of Mardathuna wool which had been produced by the former partnership and had been supplied and appraised under National Security Regulations. The recipients of these moneys have agreed to hold

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the moneys to abide the determination of the questions raised in the proceedings in which these appeals are brought.

The executor of the will of Connolly and the executrix of the will of Laffer instituted separate proceedings by way of originating summons for the purpose of determining the rights of the parties in respect of the sums of money mentioned.

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

The moneys in question were paid in accordance with the *Wool Realization (Distribution of Profits) Act*. That Act, s. 7 (2), provides for payments to be made in respect of "participating wool," that is, wool appraised under the *National Security (Wool) Regulations*. Section 7 (3) provides that, subject to the Act, an amount payable under the Act shall be payable to the person who supplied the participating wool for appraisement. Section 9 deals with bankruptcy. Where wool was supplied by a defunct company the money is to be paid to such person as appears to the Commission (that is, the Australian Wool Realization Commission established under the *Wool Realization Act* 1945-1946) to be justly entitled to receive it: s. 10 (1). Section 10 makes the following provisions for the case of dissolved partnerships:—"(2) Where participating wool was supplied for appraisement by a partnership which has been dissolved, an amount which would otherwise be payable under this Act to the partnership may be paid by the Commission to any former partner or partners (including the personal representatives of a deceased former partner). (3) Where an amount has been paid in pursuance of this section, the rights, duties and liabilities of the person to whom it is paid in respect of the amount shall be the same as if it were part of the proceeds of a sale of the wool by the company or partnership, made at the time of the supply of the wool for appraisement."

Section 11 provides that, subject to s. 9 of the Act, where participating wool was supplied for appraisement by a person who has died—"(a) any amount which would otherwise be payable under this Act to that person shall be payable to the personal representatives of that person; and (b) the rights, duties and

liabilities of the personal representatives in respect of the amount shall be the same as if it were part of the proceeds of a sale of the wool by the deceased person made at the time of the supply of the wool for appraisement." It is by reason of these provisions that moneys, the payment of which was authorized by the Act, were paid to the personal representative of Connolly and to G. A. Maslen.

The *Wool Realization (Distribution of Profits) Act* 1948 dealt with the distribution of profits arising from the Commonwealth's share in the ultimate balance of profits arising from the transactions of the joint organization which was established under the *Wool Realization Act* 1945-1946. Under the last-mentioned Act the Commonwealth Parliament approved an agreement between the United Kingdom, the Commonwealth of Australia, the Dominion of New Zealand and the Union of South Africa in relation to the disposal of wool which had been purchased by the United Kingdom during the war and which had not been sold at the date of the Act. The agreement provided that the stock of Dominion-grown wool in the ownership of the United Kingdom as at 31st July 1945 should be transferred to the joint ownership of the United Kingdom Government and the Dominion Government concerned and that such wool should be held and disposed of by the joint organization, which was to be incorporated as a private registered company in accordance with the agreement. Provision was made for the distribution between the Governments of the net proceeds of the disposal of this carry-over wool. The Australian wool had been purchased by the United Kingdom Government and belonged to it and under the agreement it became the property of the United Kingdom and the Commonwealth Government. It did not belong to the wool-growers, who had already been paid for it in accordance with the appraised values.

The Commonwealth Parliament, however, decided that the moneys received under the agreement should be distributed to the persons who supplied the wool. The Commonwealth was under no obligation of any kind so to distribute the moneys. The moneys were not paid to the suppliers of the wool in discharge of a debt or by reason of any obligation existing before the 1948 Act was passed. The 1948 Act provided in s. 28 that no action or proceedings should lie against the Commission or the Commonwealth for the recovery of any moneys claimed to be payable to any person under the Act. It is, in my opinion, plain that the moneys paid under the Act had no relation to the discharge of any obligation but were strictly a gift made by the Commonwealth to

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persons selected in accordance with the Act: see *In the Estate of W. O. Watt (deceased)* (1); *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Watt's Case)* (2); *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation (Thomson's Case)* (3). The Commonwealth Parliament was entitled to specify the conditions upon which the gift could be accepted and one of the conditions is to be found in s. 10, which has already been quoted. Another condition is contained in s. 29:—"Subject to this Act and the regulations, a share in a distribution under this Act, or the possibility of such a share, shall be, and be deemed at all times to have been, absolutely inalienable prior to actual receipt of the share, whether by means of, or in consequence of, sale, assignment, charge, execution or otherwise."

It must, I think, be conceded that in 1946, when the assignments of the shares in the partnership were made, there was no debt which could be regarded as represented by the moneys which have since been paid. There was then no right which could be assigned. The terms of s. 29 make it impossible to hold that the assignments in 1946 of the shares in the partnership then operated as assignments of what ultimately proved (after the 1948 Act was passed) to be an interest in the moneys now in question. Section 29 prevents the assignment of even a possibility of a share in a distribution under the Act. No attempted assignment could, in 1946 or at any time thereafter, have given an assignee thereunder any right against the Commonwealth Government or any other Government. The first question in each originating summons in these two appeals inquires whether the deeds of assignment of shares in the partnership validly assigned the interest or any part of the interest of the partners in the moneys paid under the Act. Section 29 requires these questions to be answered in the negative.

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

(1) (1925) 25 S.R. (N.S.W.) 467; 42 W.N. 191.
(2) (1926) 38 C.L.R. 12.
(3) (1948) 77 C.L.R. 1.

result that some person other than the person who, apart from such provisions, would be entitled to retain moneys paid under the Act, may become so entitled under such other provisions.

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

The special provision relating to dissolved partnerships produces results in the cases to which it applies which are necessarily different from the results in cases where there have been dealings by persons who were not members of a partnership which has been dissolved. In the former cases the Act expressly provides in s. 10 (3) that the rights, duties and liabilities of the actual recipient are to be determined upon the hypothesis that the wool had been sold by the partnership at the time when it was supplied for appraisement. There is no such provision applying to other cases. Effect must be given to s. 10 (3) and that can be done, I think, only by applying the ordinary law relating to partnerships, notwithstanding s. 29. A transaction in a case where there was no dissolution of a partnership may have to be ignored by reason of s. 29. But, when there has been a dissolution of a partnership,

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reference may properly be made to a contemporaneous or subsequent transaction in order to ascertain the rights, duties and liabilities for the preservation and enforcement of which s. 10 (3) specifically provides.

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

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

When Connolly assigned his share in the partnership to the four appellants in the first case he transferred to them his proportion of the balance of the then existing assets over liabilities : *Partnership Act* 1895 (W.A.), s. 33. But the assignees did not therefore become entitled to interfere in the management of the partnership business or affairs or to require accounts. They became entitled only to receive the share of the profits to which the assigning partner (that is, Connolly) would otherwise be entitled : *Partnership Act*, s. 42. The assignees all lived and worked on Mardathuna Station and it is quite probable that an agreement was immediately made for a partnership between them and Laffer. There is, however, no evidence to that effect. When in October 1946, however, Laffer assigned his interest to G. A. Maslen, then both Connolly and Laffer had assigned all their interest in the partnership property to the appellants. The partnership between Connolly and Laffer was probably dissolved by agreement, though there is no evidence of that fact, but it was certainly dissolved by the death of Connolly in December 1946 : *Partnership Act*, s. 44 (1).

When the partnership was dissolved the rights of the partners *inter se* were, "subject to any agreement," as defined in the *Partnership Act*, s. 57. Unless they otherwise agreed the assets would be sold, partnership debts paid, advances by partners

adjusted, capital repaid, and residue divided. This procedure was not followed—each partner separately sold his share in the partnership to assignees who accordingly became entitled to all the partnership property and the rights of the partners as such, including rights which, if there had been no assignment, would have accrued to the partners personally, or to their estates if they had died.

Section 49 of the *Partnership Act* provides that: "After the dissolution of a partnership . . . the . . . rights and obligations of the partners continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun, but unfinished, at the time of the dissolution." The effect of s. 10 of the *Wool Realization (Distribution of Profits) Act* 1948 is that the moneys paid under the Act shall be distributed upon the basis that wool was sold by the partnership but not paid for at the time when it was supplied for appraisement. Therefore the supply of the wool and the payment of the money must be regarded as a transaction which was begun but unfinished at the time of the dissolution of the partnership. What were the rights of the partners? If Connolly and Laffer had lived and had either remained partners or had dissolved the partnership, and the money had been paid, the money would, subject to any agreement between them, have been equally divisible between them. But in the present case Connolly and Laffer had transferred all their interests to the appellants. The appellants in the first case have all the rights which Connolly would have had or his executors could have in relation to any partnership property (including property coming to the partnership after the dissolution), against Laffer or his executrix and G. A. Maslen has all the corresponding rights of Laffer and his executrix as against Connolly or his executor.

The argument for the respondent, in my opinion, ignores the fact of dissolution of the partnership. It treats the partnership as still subsisting, and as being unaffected by the fact of dissolution, though it has in fact been dissolved and though the operation of s. 10 (3) is expressly made conditional upon a dissolution having taken place. The respondent's argument in the present case produces the result that Connolly and Laffer, if they were alive, would be entitled to the money in question in the same shares, &c., as if the partnership were still in existence though it has been dissolved. Section 10 (3) does not require or justify such an hypothesis. The section might have so provided, but it does not do so. To ignore the fact of dissolution, with its attendant circumstances (which

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determine the rights, duties and liabilities to which the section gives effect) is to contradict the fact which brings the section into operation. So also s. 11 recognizes, in my opinion, the effect in each particular case of the death of a particular person who, if he had been alive, would have been entitled to the money, and so brings into operation the law relating to the administration of the estates of deceased persons, and the law dealing with testamentary dispositions and intestacy. Section 10 (3), in my opinion, operates in a similar manner in the case of dissolved partnerships. Neither the legal effect of the dissolution nor the legal effect of death, in the circumstances in which the dissolution or the death took place, is to be ignored. On the contrary, there is to be full recognition of the rights, duties and liabilities arising from those events. If ss. 9, 10 and 11 are regarded as express special exceptions from the general provisions of s. 29, many of the suggested difficulties disappear.

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

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

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

credit of £6,239 12s. 5d., while Maslen was in debit in the sum of £7,024 1s. 4d. On 29th September 1949 a deed of dissolution of partnership was executed by G. A. Maslen and the respondent as executor of the will of Connolly. The partnership firm had supplied wool for appraisement in the period 1939 to 1946 and a sum of £463 17s. 0d. was received under the *Wool Realization (Distribution of Profits) Act* 1948 by the wool brokers of the partnership, the Westralian Co-operative Co. Limited, in respect of that wool, and was paid to Connolly's executor.

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

Walker J. decided that the plaintiff company held the money received on account of the wool in a fiduciary capacity by reason of s. 11 of the *Wool Realization (Distribution of Profits) Act* 1948. The company held the money subject to the condition that the rights, duties and liabilities of the company as the personal representative of Connolly should be the same as if it were part of the proceeds of a sale of wool by the partnership made at the time of the supply of the wool for appraisement (s. 10 (3)). If the wool had been sold at the time of appraisement, then, it was held, Connolly would have been entitled to three-fourths of the price and Maslen would have been entitled to one-fourth. But at that time the partnership owed money to Connolly and Maslen owed money to the partnership and therefore, if the money had been received before the dissolution, Connolly would have been entitled in account to three-fourths of it, Maslen to one-fourth, and, as Maslen was largely in debt, the result would have been that Connolly

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would have been entitled to the whole of the money. Accordingly it was held that the whole sum was an asset forming part of Connolly's estate.

The appellant G. A. Maslen contends, and in my opinion rightly, that it is wrong to determine the rights of the parties upon the supposition that the money was paid before the dissolution. It is true that the right to the money could not be assigned. But that does not mean that the mutual releases from all claims and demands on account of the partnership contained in the deed of 29th September 1949 should be ignored. If there had been no dissolution and an account had been taken without any other adjustment of rights by agreement, doubtless the result would have been that Connolly would have been entitled to require Maslen to pay what he could towards meeting his liability on capital account and therefore, as the firm owed Connolly money, Connolly would have received the benefit of the whole of the money received on account of the sale of the wool. But for good consideration Maslen and the executor of Connolly executed complete releases of claims in relation to all matters affecting the partnership. This deed did not assign the right of either party to moneys under the 1948 Act, but it does have the effect of preventing either party from saying that the other party is indebted either to himself or to the partnership. Section 29 does not prevent these mutual releases from taking effect as releases. The consequence is that the matter must be dealt with upon the basis that there are no partnership claims outstanding as between Maslen and Connolly's executor. Therefore the money must be treated, in view of these releases, as received on partnership account for goods sold by the partnership, and as distributable between the two partners, neither of whom owes anything, directly or indirectly, upon partnership account. Thus the money is distributable according to the interests of the partners in the partnership, three-fourths to the executor of Connolly and one-fourth to Maslen.

I am therefore of opinion that this appeal should be allowed and that the questions asked in the originating summons in the third case should be answered by declaring that the plaintiff company as executor of the will of P. A. Connolly deceased is entitled to three-fourths of the sum of £463 17s. 0d. mentioned in question 1 of the originating summons, and that G. A. Maslen is entitled to one-fourth thereof.

I agree with *Fullagar* J. in his comments upon the unnecessary institution of duplicated proceedings. But if an order is made

for the payment of all costs of the appeal out of the moneys in dispute, the executors will be protected as to their costs and the other parties will bear those costs and their own costs. This is an appropriate order in the circumstances of these cases.

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

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

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

By a deed dated 2nd October 1946, which was to take effect according to its terms as from 1st October 1946, Laffer purported to assign to G. A. Maslen all his right, title and interest in the Mardathuna Pastoral Company and its assets, including book debts.

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The consideration for the assignment was an assumption of liability to pay mortgage interest and rent and also the payment by the purchaser of a debt of £6,500 owing to the Bank of New South Wales. It was provided that if the bank did not, within a reasonable time after payment to it of the sum of £6,500, discharge a second mortgage held by it over the lands upon which the business was carried on, the deed should be of no effect. Presumably this condition subsequent did not take effect, but again there is no evidence as to whether it did or not.

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

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

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

On some unspecified date or dates the Australian Wool Realization Commission, in pursuance of the *Wool Realization (Distribution of Profits) Act* 1948, paid two sums (amounting together to £2,695 4s. 1d.) in respect of participating wool supplied for appraisement by the Mardathuna Pastoral Company before 30th June 1946. One would infer from a number of unsatisfactory statements in the affidavits that both sums were originally paid by the Commission in pursuance of s. 21 of the Act to the brokers through whom the wool had been supplied, the Westralian Farmers Co-operative Limited receiving £2,132 9s. 2d., and Elder Smith & Co. Ltd. £562 14s. 11d. The amount received by the Westralian Farmers Co. was paid by that company to the Perpetual Executors Co. as the executor of the will of P. A. Connolly deceased : whether this was done in pursuance of a direction from the Commission under s. 21 (2) does not appear. The amount received by Elder Smith was paid by that company, according to one affidavit, to G. A. Maslen, and according to the other affidavit, to G. A. Maslen and his three sons. Whichever affidavit is correct, again it does not appear whether or not the payment was made in pursuance of a direction from the Commission under s. 21 (2). There appears to be no justification under the Act for the payment to G. A. Maslen or to G. A. Maslen and his sons. However, the case was argued throughout on the assumption that both sums were held by persons entitled under the Act to receive it in the first place, and on the further assumption that the question of what persons were bene-

ficially entitled to those sums and in what shares was to be determined by reference to the provisions of the Act and any other relevant rule or rules of law. Since there is no *a priori* right to any payment and since it is only by virtue of the Act that any payment can lawfully be made, it must be primarily to the Act that we look in ascertaining who is beneficially entitled to any moneys paid.

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

Now the relation constituted by a contract of partnership is a peculiar relation. Section 33 of the Western Australian *Partnership Act* 1895 (which is not in the English *Partnership Act* 1890) purports to define the "share" of a partner in partnership property. Whatever may be the effect of this section, it is not easy on the authorities

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to say whether, if the deeds of June and October 1946 had stood alone and nothing else had happened, G. A. Maslen or his sons could have been said to have acquired any interest in any partnership asset. See, on the one hand, *Re Ritson* ; *Ritson* v. *Ritson* (1) ; *Rodriguez* v. *Speyer Bros.* (2), and *Bakewell* v. *Deputy Federal Commissioner of Taxation* (*S.A.*) (3), and cases there cited, and, on the other hand, *Gray* v. *Smith* (4) ; *Re Holland* ; *Brettell* v. *Holland* (5), *Manley* v. *Sartori* (6), *Re Fuller's Contract* (7), and *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (8). I should have thought that, if nothing more appeared than the execution of the two deeds, neither Maslen nor his sons could have been held to have acquired any interest in any particular asset of the partnership of Connolly and Laffer, that neither "assignment" would have dissolved the partnership (though either might perhaps have afforded a ground for dissolution), and that the rights of G. A. Maslen and his sons would have been no more and no less than those described in s. 42 of the *Partnership Act* 1895. Little more does in fact appear from the material actually put before the Court, but I have already referred to certain other facts and inferences which were stated during argument by counsel on the one side and appeared to be accepted by counsel on the other side. I think, on the whole, that this case ought to be dealt with by this Court on the footing that all the assets of the old partnership of Connolly and Laffer, including book debts, existing on 1st October 1946, had been acquired as from that date by G. A. Maslen and his sons. This acquisition was effected, not by either of the two deeds or by both operating together, but by those deeds combined with what was done after their execution and the implications arising therefrom.

It is now necessary to consider the relevant provisions of the Commonwealth Act. The main general provision is found in sub-s. (3) of s. 7, which provides that, subject to the Act, an amount payable under the Act in relation to any participating wool shall be payable to the person who supplied the wool for appraisement. In all cases where it is possible to pay the money to the person or persons who supplied the wool for appraisement the money when paid will belong beneficially to that person or those persons. So, in the case of a partnership or company which supplied wool

(1) (1899) 1 Ch. 128, at p. 131.
(2) (1919) A.C. 59 (per Lord *Finlay* L.C.), at p. 68.
(3) (1937) 58 C.L.R. 743 (per *Dixon* and *Evatt* JJ.), at p. 770.
(4) (1889) 43 Ch.D. 208.
(5) (1907) 2 Ch. 88.
(6) (1927) 1 Ch. 157, at pp. 163, 164.
(7) (1933) Ch. 652, at p. 656.
(8) (1944) 69 C.L.R. 270 (per *Rich* J.), at p. 285.

for appraisement and is still subsisting at the time of payment, the money is payable to, and when paid will belong beneficially to, the partnership or company. The general principle of the Act is obvious enough—the wool produced the profit, and the man who produced the wool should receive the profit. Effect is to be given to this principle notwithstanding anything which purports to be an assignment or alienation made between the date of supply for appraisement and the date of payment of the share of profit, for s. 29 provides :—" Subject to this Act and the regulations, a share in a distribution under this Act, or the possibility of such a share, shall be, and be deemed at all times to have been, absolutely inalienable prior to actual receipt of the share, whether by means of, or in consequence of, sale, assignment, charge, execution or otherwise."

I do not think it necessary for present purposes to determine whether, in the absence of s. 29, there could have been anything in the nature of an effective assignment or charge or other alienation of an expectancy of a share of any profit which might ultimately arise from the disposal of wool supplied for appraisement and paid for at the appraised price. I think, however, that Mr. *Louch* was right in saying that there could be no effective assignment or alienation, if by so saying he meant that no purported assignment or alienation could give to the assignee or alienee any right against the Commonwealth in any event. There could be nothing to assign unless (a) a profit should be realised, and (b) the Commonwealth should choose to distribute that profit. It may be that, if s. 29 had not been enacted, an " assignment " could have been made which would have been effective as between assignor and assignee in the sense that, if the Commonwealth chose to pay the assignor, the assignor would have held what he received upon trust for the assignee : cf. *Re Lind* ; *Industrials Finance Syndicate Ltd.* v. *Lind* (1), and *Re Gillott's Settlement* ; *Chattock* v. *Reid* (2). Section 29, however, excludes even this possibility. I am inclined to think that the expectant interest of a supplier of participating wool in any ultimate profit was capable of being bequeathed by will and would pass upon death of the supplier intestate to the next-of-kin of the supplier. And, if I were right in this, I would not think that s. 29 affected transmission on death. I would regard s. 29 as concerned only with alienation *inter vivos*.

Section 10 of the Act is in the following terms :—" (1) Where participating wool was supplied for appraisement by a company which is defunct, an amount which would otherwise be payable

(1) (1915) 2 Ch. 345. (2) (1934) Ch. 97.

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under this Act to the company may be paid by the Commission to such person as appears to the Commission to be justly entitled to receive it. (2) Where participating wool was supplied for appraisement by a partnership which has been dissolved, an amount which would otherwise be payable under this Act to the partnership may be paid by the Commission to any former partner or partners (including the personal representatives of a deceased former partner). (3) Where an amount has been paid in pursuance of this section, the rights, duties and liabilities of the person to whom it is paid in respect of the amount shall be the same as if it were part of the proceeds of a sale of the wool by the company or partnership, made at the time of the supply of the wool for appraisement."

It is convenient at this stage to set out also s. 11 of the Act, which provides:—"Subject to section nine of this Act, where participating wool was supplied for appraisement by a person who has died—(a) any amount which would otherwise be payable under this Act to that person shall be payable to the personal representatives of that person; and (b) the rights, duties and liabilities of the personal representatives in respect of the amount shall be the same as if it were part of the proceeds of a sale of the wool by the deceased person made at the time of the supply of the wool for appraisement."

I think that this case is to be treated, notwithstanding the payment by the brokers to G. A. Maslen or the Maslens, as governed by the provisions of s. 10 (3). And I do not think that s. 10 (3) is to be too strictly construed. I think it means that, whoever may actually receive the moneys from the Commission or its agent, the recipient becomes in effect a trustee. He may have "rights" himself: if so, he may give effect to them. Other persons may have "rights." If so, it is his "duty" to give effect to those rights. If he does not, he will be subject to "liabilities." On this footing the argument for the Maslens is essentially simple, though it requires to be carefully stated in order that it may be duly examined.

The appellants do not rely—and clearly could not successfully rely—on any assignment to them of the expectant share of Connolly and Laffer in any distributable profit ultimately arising from "participating wool" supplied for appraisement by Connolly and Laffer. Even if we assume assignability in equity, neither the deed of July 1946 nor the deed of October 1946, could, as a matter of construction, carry any share of the wool profit. At the dates of execution the expectant share was clearly not a book debt of

the partnership nor was it an asset of the partnership of any other kind. The appellants concede this. They concede that there was never at any stage anything in the nature of an effective assignment of the expectant share of Connolly and Laffer in any wool profit. Their claim is founded not on any such assignment but on what they say is the indirect effect of s. 10 (3) of the Act. They assert no sale or gift to them of any expectant share of Connolly and Laffer in any wool profit. They say that s. 10 (3) requires us to assume that the share of the wool profit in question was part of the proceeds of a sale of the wool made at the time when Connolly and Laffer supplied the relevant participating wool for appraisement. If that share had been part of the proceeds of such a sale, it would have constituted a book debt owing to Connolly and Laffer at the dates of the two assignments of July and October 1946. Those assignments included book debts, and must therefore, by virtue of s. 10 (3), be taken to have included Connolly and Laffer's share of wool profit.

Section 10 (3) has, in my opinion, no such meaning or effect as is attributed to it by the appellants. It may be conceded that the sub-section has not been very happily drafted, but what the language used really means is, I think, that the share of wool profit, when paid, is to be treated in the hands of the recipient as an asset of the dissolved partnership possessing the character of money paid for wool sold by the partnership. The words mean that, and, in my opinion, they do not mean anything more. The character so given to the money received attaches to it only from the moment of receipt. I will examine further in a moment the results of this view, but it is convenient to consider first some of the results of the view put by the appellants.

An initial objection to the view put by the appellants is that it treats the words " as if it were " (which naturally refer to the time of receipt) as equivalent to " as if it had at all times and for all purposes been." To my mind the words simply do not mean that. If they be assumed to be capable of bearing that meaning, it will be legitimate to look at the practical effects which that meaning will produce. And the first thing that strikes one is that one result of this construction is to give to contracts completely executed according to their tenor, and to transactions completely past and closed, an effect which the parties never for a moment intended them to have. An assignment of book debts made by partners in 1946 will, if the partnership is subsequently dissolved, carry the partnership's share of the wool profit, though this was contrary to the intention of assignors and assignees alike. But

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this is not all. An assignment in 1946 of their expectant share of the wool profit by partners who subsequently dissolve partnership will not carry that share, although obviously both assignors and assignees intended that it should do so. The appellants must, if they are to succeed, assert that the provisions of s. 29 are relaxed by s. 10 (3) and attribute assignability to an expectant share. But they must at the same time deny the effectiveness of an assignment of an expectant share as such. An expectant share of the wool profit, they say, is not and never was assignable by an instrument which describes it as such, but is made retrospectively assignable by an instrument which did not refer to it and was never intended to refer to it. No doubt a sovereign legislature has power to enact that all past assignments of pictures shall be void but a past assignment of books shall be deemed to have transferred the property in all pictures owned by the assignor. But such a law would be a legislative curiosity, and, if the language actually used were capable of any construction which would give the enactment a more sensible effect, such a construction would be bound to be preferred.

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

1. It has the practical effect of attributing assignability to something which, whether assignable in equity or not, is made non-assignable by s. 29, and which it was obviously the general policy of the legislature to treat as having been at all times incapable of assignment.

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

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

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

5. If they made the assignment intending to dissolve the partnership, and the Act became law before they had dissolved it, they could postpone dissolution until after payment, and so by a unilateral act affect the destination of a possibly very large sum of money. I say this on the assumption that the material date for the purposes of s. 10 is the date of payment, but I think that this must be so, because obviously a company might become defunct between the commencement of the Act and the date of payment, and, if s. 10 did not apply, no payment could be made to anybody.

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

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

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attributes a common and reasonable function both to s. 10 (3) and to s. 11 (b).

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

The effect of s. 11 will also be exactly parallel in the case of a supplier of wool who dies before payment is made under the Act, though I think that s. 11 may have a further and indirect effect. It does not operate unless and until the personal representatives have in their hands a sum of money representing a share of the wool profit which would have gone to their testator or intestate if he had not died. In their hands it will form part of the estate of the deceased. It will be available for payment of the debts of the deceased as pure personalty, and will be treated in all respects in the administration of the estate as if it possessed the character

which s. 11 gives to it. But s. 11 does no more than these things. It has no retrospective operation. If the deceased has in his lifetime purported to assign his expectant share of the wool profit, that assignment is ineffective by virtue of s. 29. If he has assigned book debts existing at the time of the assignment, the effect of that assignment remains unaltered.

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

An essential difference between the two views of s. 10 (3) lies, I think, in the point of time as at which the character given by the sub-section to the " amount paid " is to attach to it. But the difference really goes deeper than that, because I would not regard the sub-section as doing more than giving a particular legal character to a sum of money, whereas the appellants' view regards the sub-section as doing a great deal more than that. The appellants treat it as creating the inferential consequence that a debt must be regarded as having been owed to the suppliers as from the date of the supply of the relevant wool for appraisement. But the appellants, if they stopped even there, would still fail, because the assignments here in question, as a matter of construction, related only to debts *actually* owing at the time of execution. The appellants must go even further and maintain that the sub-section

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involves the further inferential consequence that any past transaction affecting debts owing to the suppliers at the time of the transaction must be deemed to have affected a notional debt created by the sub-section. A structure is thus built up on a foundation which cannot carry it.

The reasons for preferring the view which I have adopted seem to me to be very strong. By way of conclusion, they may be summarized as follows. First, the view which I have adopted gives the more natural meaning to the actual words. The time to which s. 10 (3) refers is the time when "an amount has been paid in pursuance of this section." The prescribed "character" is given only to the "amount paid." The description of the notional position begins with the words "as if it were." What the words suggest is that the notional position should be regarded as being created at and not before the time of payment. Secondly, the appellants' view gives to the sub-section, and also to s. 11 (b), a meaning that is retrospective in the true sense. It asserts retrospectivity in the literal sense. It says: "Whereas the truth was and is A, the fact shall be and be deemed to have been B." On the other view, the statute does no more than define, subject to all actually existing factors, including the factor expressed in s. 29, the character of a payment which the statute authorizes. Thirdly, the appellants' argument gives to transactions concluded, and fully performed according to the intention of the parties, a meaning and effect which the parties did not intend them to bear. Fourthly, and finally, the appellants' view involves other consequences which I would myself regard as grotesque.

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

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

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

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

Each partner in 1946 assigned his interest in the partnership assets: Connolly to G. A. Maslen and his sons, and Laffer to G. A. Maslen. Each assignor was entitled at the date of his assignment to "an unascertained interest in every single asset of the partnership, and it is not right to regard him as being merely entitled to a particular sum of cash ascertained from the balance sheet of the partnership as drawn up at the date of" dissolution: *Manley* v. *Sartori* (1); *In re Fuller's Contract* (2); *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (3). It is true that s. 33 of the *Partnership Act*, 1895 (W.A.) provides that the share of a partner in the partnership property at any time is the proportion of the then existing partnership assets to which he would be entitled if the whole were realized and converted into money, and after all the then existing debts and liabilities of the firm had been discharged. But, as is shown by the heading of Part III of the Act, in which s. 33 occurs, this is one of the provisions which regulate the relations of partners to one another; and it does no more than give statutory effect to the view always maintained by the courts (see *Bakewell* v. *Deputy Federal Commissioner of Taxation* (*S.A.*) (4), and cases there cited), as to the "indefinite and fluctuating interest" of each partner *vis a vis* the others. "No doubt, as between himself and his partners, his interest in individual items is subject to their right to have all the assets of the partnership for the time being dealt with in accordance with the partnership agreement, but his interest in them is none the less real for that": *Sharp* v. *Union Trustee Co. of Australia Ltd.* (5), per *Rich* J., whose judgment is on this point not in conflict with anything said by the majority of the Court.

The assignments were effectual as against the assignors to vest in the assignees the beneficial interests of the assignors respectively in the assets of the partnership. Section 42 of the *Partnership Act* prescribes, negatively and positively, what is to be the effect of an assignment by a partner of his share in the partnership, "as against the other partners"; but it does not prevent such an assignment from taking full effect according to its terms as against the assignor.

It follows that if the partnership, instead of supplying the wool for appraisement in 1946, had then sold it, and if a portion of the purchase money had been still outstanding when the assignments were executed, each assignment would have vested in the assignee

(1) (1927) 1 Ch. 157, at pp. 163, 164.
(2) (1933) Ch. 652, at p. 656.
(3) (1944) 69 C.L.R. 270, at p. 285.
(4) (1937) 58 C.L.R. 743, at p. 770.
(5) (1944) 69 C.L.R. 539, at p. 551.

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the beneficial interest of the assignor in the partnership's right of action for the unpaid purchase money. The partnership was eventually dissolved by one means or another, and there is no suggestion that any partnership debts or liabilities remain undischarged. Accordingly, in my opinion, if the unpaid purchase money had come in on the date when in fact the sum paid under the *Wool Realization (Distribution of Profits) Act* 1948 was received, it would have belonged beneficially to G. A. Maslen and his sons and to G. A. Maslen in equal moieties.

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

There remains the question whether s. 29 affects the case. Its operation is (subject to the Act) to avoid any alienation of a share in a distribution under the Act or of the possibility of such a share. It must be given full effect where one person is entitled to a share according to the provisions of the Act and another person claims that share by force of a purported assignment or other alienation. But that is not the situation in this case. There never was a purported assignment of a share in a distribution under the Act or of the possibility of such a share, or even of an interest in such a share or possibility. The assignments under which the appellants claim comprise nothing but the interests of the respective partners in the assets of the partnership, and those assets did not at any time include a share, or the possibility of a share, in a distribution under the Act. The appellants therefore do not claim in the character of assignees of a share which the Act entitles the partnership to receive, or of the interests of the individual partners in such a share. They claim on the ground that s. 10 (3) by its own direct operation entitles them to a share. They do not rely upon the assignments as instruments of title to a share; they rely upon them as instruments of title to the actual assets of the partnership, and they assert that the Act gives to them, because as beneficial owners of those assets they would be entitled to the proceeds of a sale of wool, an original, and not a derivative, right to the share.

In my opinion the contention of the appellants is well-founded. Section 29 does not invalidate assignments of the assets of a

partnership, nor assignments by individual partners of their interests in those assets; and s. 10 (3) cannot be construed as if there were added to it the words "and there had been no assignment or other alienation affecting the beneficial ownership of such proceeds."

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

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

MASLEN *v.* THE PERPETUAL EXECUTORS, TRUSTEES & AGENCY COMPANY (W.A.) LIMITED.

Appeal allowed. Order of Supreme Court set aside except as to costs. Questions in originating summons answered :—

1. *The plaintiff company as executor of the will of P. A. Connolly deceased and the defendant G. A. Maslen.*
2. *The plaintiff company is entitled to three-fourths of the said sum as such executor and the defendant G. A. Maslen is entitled to one-fourth thereof.*

Costs of all parties of appeal to be paid out of the sum of £463 17*s.* 0*d., referred to in the said summons; those of appellant as between solicitor and client.*

MASLEN *v.* LAFFER.

Appeal allowed. Order of Supreme Court set aside except as to costs. First question answered—No. Second question answered by declaring that the defendant G. A. Maslen is entitled to one-half of the portion of the sums of money referred to in the affidavit of Eleanor Forrest Laffer sworn on the 20th day of January 1950 *and filed herein and distributed under the Wool Realization (Distribution of Profits) Act* 1948 *in respect of the wool described in the said affidavit which was supplied for appraisement before* 1*st July* 1946.

Costs of all the parties of appeal to be paid out of the said sums; those of E. F. Laffer as between solicitor and client.

MASLEN AND OTHERS *v.* THE PERPETUAL EXECUTORS TRUSTEES & AGENCY COMPANY (W.A.) LIMITED.

Appeal Allowed. Order of Supreme Court set aside except as to costs. First question in originating summons answered—No. Second question answered by declaring that the defendants G. A. Maslen, J. A. Maslen, K. G. Maslen and R. W. Maslen are entitled to one-half of the sums of money referred to in the affidavit of Percy Granville

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Carter sworn on the 14th February 1950 and filed herein and distributed under the Wool Realization (Distribution of Profits) Act 1948 in respect of the wool described in the said affidavit which was supplied for appraisement 1st July 1946.

Costs of all parties of appeal to be paid out of the said sums; those of the plaintiff company as between solicitor and client.

Solicitors for the appellants in each case: *Dwyer, Durack & Dunphy.*

Solicitors for the respondents in each case: *Hubert Parker & Byass.*

F. T. P. B.