IN THE HIGH COURT OF AUS[illegible]TRALIA.

PORTER

V.

QUEENSLAND TRUSTTES LIMITED AND ANOTHER.

6/1937

REASONS FOR JUDGMENT.

890 folios

890 folios @ 6d per folio

£7/8/-

£109473

£7/5/-

£109474

Judgment delivered at MELBOURNE.

on 13th October, 1938.

H. J. Green, Govt. Print., Melb.

C.11235

PORTER v. QUEENSLAND TRUSTEES LIMITED AND ANOR.

Order.

Appeal allowed.

Judgment of the Supreme Court discharged.

In lieu thereof declare that George Benjamin Porter, deceased, was accountable to the plaintiff for the sum of £19,903.10.3 and the defendants as his Executors are liable to make good to the plaintiff the said sum out of the assets of his estate, and order that the defendants as such Executors pay to the plaintiff her costs of the action out of his estate.

Order that the defendants respondents pay to the plaintiff appellant her costs of this appeal out of the estate of George Benjamin Porter deceased.

PORTER v. QUEENSLAND TRUSTEES LIMITED AND ANOR.

Reasons for Judgment The Chief Justice.

PORTER v. QUEENSLAND TRUSTEES LIMITED AND ANOR.

The plaintiff Henrietta Porter is the sister of George Benjamin Porter deceased who died on 20th July 1930. The defendants are the executors and trustees of Porter's will. The plaintiff claimed that an account be taken of all sums received and paid by and all transactions and dealings of George Benjamin Porter as agent for the plaintiff in connection with a pastoral property known as Taree. The plaintiff claimed that she was the owner of Taree and that she had paid in full the purchase money for the property. The defendants contended that the plaintiff was not the owner of Taree, though the title was always in her name, but that Taree belonged to a family partnership and that it had been paid for out of monies belonging to the partnership and not out of monies belonging to the plaintiff. The defendants also relied upon the Statute of Frauds and Limitations 1867 sec. 16, alleging that the plaintiff's claim if any did not arise within six years of the commencement of the action. The writ was issued on 8th May 1936. The transactions out of which the controversy arises took place in 1923. No reply was pleaded to the defence, but in argument the plaintiff contended that George Benjamin Porter was an express trustee and that he still retained or had converted to his own use monies which he held in trust for the plaintiff and that accordingly his executors were not entitled to take advantage of the Statute of Limitations (Trustees and Executors Act 1897 sec. 52 which corresponds to sec. 8 of 51 and 52 Vic. c.59. After an extended hearing Webb J. gave judgment for the defendants.

This action presents one aspect of a family controversy which has arisen since the death of George Benjamin Porter in the year 1930. He had four sisters - Miss Sara Porter, Miss Clara Porter (afterwards Mrs Greenwood), Miss Henrietta Porter the plaintiff (called Ettie by members of the family) and Miss Ida Porter (afterwards Mrs Tait). The members of the family have been referred to in the litigation by their Christian names. By his will George left his property to the children of Mrs Greenwood and not to his surviving sisters. It is evident that bitter feeling has arisen between the sisters and the Greenwood family. As will be seen, pastoral lands had been held by members of the family in a manner which they regarded as inconsistent with the provisions of the Lands Acts of Queensland. The disclosure of the true position as to the ownership of the lands might have led to a forfeiture of the lands or to unpleasant inquiries by federal and State taxation departments. When both personal feelings and pecuniary interests are thus acutely involved it is not remarkable that there is a strong conflict of testimony in the evidence given. The plaintiff and her two surviving

sisters Sara and Ida asseverate most strongly that the plaintiff alone was interested in Taree and that she owed nothing in respect of Taree. The property, it is said, became hers absolutely in December 1919. When these ladies are confronted with statements contained in their own letters or in letters written by their brother George which appear to conflict with their assertions as to the ownership of Taree they exhibit a lack of memory and a failure of understanding which is very noticeable. On the other hand Gordon Greenwood, one of the defendants, whose evidence was of course given after the plaintiff had closed her case, gave evidence of a conversation betweeen George Porter and Miss Henrietta after the death of Clara with respect to the ownership of Taree, which, if true, was quite important. No reference, however, to this alleged conversation was made in the cross examination of any of the witnesses for the plaintiff, and it is very difficult to accept such evidence given in such circumstances.

The learned trial judge found against the plaintiff. The onus is upon the plaintiff to establish her case. Further, this is a case of a claim against the estate of a deceased person, and a court always scrutinises such claims very carefully and requires them to be established by satisfactory evidence. See Williams on Executors 12th Ed. I 476 . The learned judge in this case has found against the party upon whom the onus of proof lies. That party therefore assumes a difficult task in asking a court of appeal to reverse the findings of fact of the learned trial judge: Dearman v. Dearman 7 C.L.R. 549. I proceed now to consider ~~more~~ in detail the questions which arise.

During the life of George Porter, the brother and sisters were a happy family. The brother managed the family affairs. The sister Sara was evidently a competent woman upon whom the other sisters relied for advice. The sister Henrietta took part in the office work connected with the various sheep stations in which they members of the family were interested, and her letters show that she had an active intelligent interest in and knowledge of the working of the stations on the business side. The married sisters Clara and Ida had their own households and were not with

George to the same extent as Sara and Henrietta.

The father of the family died prior in 1914. As a result of arrangements made after his death, the four sisters became owners of a station known as New Park, and George became the owner of another station - The Island. New Park was sold on terms in 1913 or 1914 and the family left New Park in January 1914. During the period from 1911 to 1923 (when Clara died) members of the family became owners of or interested in the following stations - Marchmont, Taree and Langton Downs. George also acquired other station interests - Nelah Downs and Glenora. In this action the relation of the parties to Taree is the important matter.

The law of Queensland contains provisions directed against dummying. Sec. 59 of the Land Act 1910 provides:

" (1) Subject to this Act, no person who is -

.....

(c) In respect of the land applied for or held or any part thereof or interest therein, a trustee, agent, or servant of or for any other person;

shall be competent to apply for or hold any selection.

(2) Proof that the stock of any person other than the selector are ordinarily depastured on a selection shall be prima facie evidence that the selector is a trustee of the selection for the owner of the stock. "

These provisions were well known to George Porter and were known to the other members of the family as an incident of the tenure of pastoral leasehold land in Queensland. The problems which arise in this action have their origin in the fact that the brother and his four sisters desired to have a partnership or partnerships in pastoral enterprises which they regarded as at least of doubtful legality. The disclosure of such partnerships to the public authorities would have exposed their interests in the station lands to the risk of forfeiture. Accordingly the apparent ownership of the land used for carrying on pastoral enterprises cannot in this case be regarded as an indication of the true interests of the parties. It was important that the true interests should be concealed. This was admittedly the case with respect to Marchmont. The defendants assert, but the plaintiff denies, that it was also the case with respect to Taree. But it was not only the provisions of the Land Acts which

caused difficulty with respect to the law. It was necessary to make income tax returns and to satisfy the Commissioner of Income Tax that the ownership of Taree was in fact as represented in the returns. When in 1923 a sister (Mrs Greenwood) died, it became necessary to file statements supported by oath as to her pastoral interests. Later, in 1927, questions arose with respect to war-time profits taxation to be paid by Henrietta. In the discussions with taxation authorities George Porter always contended that Taree was solely owned by Henrietta. If Taree were in truth and were admitted to be the property of the family partnership, the aggregation of income from Marchmont and Taree would have resulted in the payment of a higher rate of tax (Income Tax Acts 1902to 1920 sec. 40). Thus it was necessary, so far as the taxation authorities were concerned, to insist strongly that Taree was the property of Henrietta and ~~that~~ that Marchmont was really owned by the three apparent partners whose names alone appeared in the books of account as the owners of the capital invested in Marchmont. This course was adopted.

George, as the learned trial judge finds, told one Boyd on one occasion that Taree belonged to Henrietta. Much stress was laid upon this evidence by counsel for the appellant. In my opinion it is of little importance. Whatever was the real position with respect to Taree, George would have said, if he referred to the matter at all, that it was owned by Henrietta. If it was really so owned, there would have been no reason why he should not speak the truth. If it was not really so owned, thene was every reason why he should not speak the truth. Thus, in any state of fact, he would have said the same thing - that Taree was owned by Henrietta, who was the apparent and registered owner. Thus statements as to the ownership of Taree made by members of the family cannot be accepted at their face value without confirmatory evidence.

In this action it had to be determined whether or not such statements represented the true position and the learned judge, after hearing evidence and seeing the witnesses, was of opinion that Taree belonged to a family partnership. In order to persuade this court to reverse such a decision, particularly when consideration is paid to what has already been said with respect to the onus of proof,

it is necessary for the appellant to show a clear case of error on the part of the learned trial judge.

The plaintiff's claim is that George Porter's executors should render an account of all the dealings with Taree upon the basis that he was, in his management of Taree, a trustee for his sister Henrietta. Evidence was given with respect to various amounts of money with which it was said George had dealt wrongly, but the learned judge found against the plaintiff on all these matters, and upon appeal argument was limited to what was done with respect to a particular sum of £19,903.10.3. The plaintiff contends that her brother George Benjamin Porter wrongly deprived her of this sum in the year 1923.

According to the account books of Marchmont and Taree in December 1919 this sum was owed by Taree to Marchmont. In June 1920, however, the debt was in effect wiped out without explanation. There were no credits to Henrietta shown in the books to justify the wiping out of the debt. Taree was then left apparently free from debt and the plaintiff contends that this was the true position. But in 1923 the debt was reinstated. The result was that, instead of Marchmont owing Taree £7915, Taree all at once fell into debt to Marchmont to the extent of £11,987. It is to these transactions that the major part of the evidence has been directed. In order/to even endeavour to understand them it is necessary to consider what took place prior to 1919.

In 1911 the property known as Marchmont was purchased. It consisted of three blocks. As the result of a family discussion, one block was put in the name of George, one in the name of Sara, and one in the name of Clara. But the fact that these three members of the family had the land in their names afforded no indication of their respective interests. Although the ownership of the land was distributed in the manner stated, all parties agree that George's interest in the enterprise carried on upon the land was one half, and that the four sisters had the other one half interest. Sara and Clara each had a one quarter interest, ostensibly, but they held their interests upon a secret trust, as to one half thereof, for the other two sisters. This arrangement was not disclosed to the Lands Department or even to the solicitor of the parties. In order to make it

more difficult to trace the ultimate destination of monies from Marchmont a procedure was adopted whereby George drew monies from Marchmont and paid one half thereof into the New Park bank account, the money in which belonged to the four sisters. Distributions were then made from this account to them.

At first there was no partnership deed and the agreement between members of the family was oral. In 1921, however, a partnership deed was prepared and according to the ~~title~~ deed, the interest of George was one half and the interests of Sara and Clara were one quarter each. It is agreed that this deed did not state the true interests of the sisters in Marchmont.

The position in 1914, therefore, was that George, Sara and Clara had separate blocks of Marchmont lands in their names and that the profits derived from working the station were distributed between George and his four sisters. The three surviving sisters all say that George announced his intention of trying to get land for the other sisters Henrietta and Ida. These statements by George are strongly relied upon by the plaintiff as supporting the contention that Taree was obtained for Henrietta. But the statements mentioned do not appear to me to support this conclusion to any substantial extent. They were made by George upon the basis that land had already been got for Sara and Clara, so that it remained only to get land for Henrietta and Ida. But land had been got for Sara and Clara only in the sense that some of the family land, namely, part of Marchmont, was in their names. The stated intentions of George would be satisfied if Henrietta and Ida were placed in the same position as Sara and Clara. The latter sisters had land in their names, but it was subject to a secret family trust. So also Taree, though put in Henrietta's name, may have been subject to such a trust - and such a position would not, in the circumstances of this case, have been inconsistent with the carrying out of an announced intention of getting land for all the sisters.

As matters stood after George's death, the position was that Clara's executors and the other three sisters each had land in their names. Clara's executors and Sara had a Marchmont block and a share in a Marchmont partnership. Ida had an interest with

members of the Greenwood family in Langton Downs and Henrietta was the registered owner of Taree.

No question arises directly or indirectly as to Langton Downs, but the dealings with respect to Marchmont and Taree are so closely intertwined that it is impossible to arrive at any conclusion with respect to Taree without considering also the position in relation to Marchmont. As to Taree the position is that Henrietta is registered as owner and no other members of the family can establish any right in themselves to an interest in Taree because they would have to rely upon an illegal agreement in order to do so. If they succeeded in showing that they were interested in Taree the result would be that the land would become subject to forfeiture. The plaintiff's sisters, in their evidence, do not run the risk of imperilling Henrietta's ownership of Taree by claiming an interest for themselves which (as they recognise) the law would not allow them to hold. The defendant Gordon Greenwood, however, adopts a different attitude, and alleges that Taree was owned by a family partnership, though he realises that, if this were the case, the result might be that his Aunt Henrietta's interest in Taree would be forfeited.

The question which the learned trial judge had to decide was whether Henrietta really became the sole beneficial owner of Taree free from any liability for payment of purchase money. She claims that she has been wrongly charged in account with the sum of £19,903 and she seeks to recover this amount of money by means of an order for accounts. It lies upon her to establish her case. /

If Taree were simply a part of a family enterprise which involved both Marchmont and Taree, the distribution of the liability arising from the purchase of Taree as between the two properties would be a matter merely of the method of keeping partnership accounts which could properly be determined by George, who, by the admission of all parties, was the general manager of both Marchmont and Taree with very full powers. If, however, Taree was Henrietta's property to be paid for by her and in fact paid for by her, then George would have no authority to charge her again with ~~purchase money~~ the price of Taree if she had already paid it.

The purchase of Taree was made by George in 1914 at a time when Henrietta was in New Zealand. The contract was made between him as purchaser and Isabella Blyth as vendor. The transfer, however, by direction of George, was made to Henrietta. The price was £22,000 - with stamp duty etc. £22,672. George found the money for the purchase partly from his own resources and partly from Marchmont monies, except that, when a difficulty arose in relation to the fifth instalment, the four sisters helped by providing the sum of £4000 which they obtained by pledging their interests in New Park. It will be observed that Henrietta, like her three sisters, lent £1000 to George in order to enable George to pay for Taree. As Webb J. observes in his judgment, if the purchase were really a purchase on behalf of Henrietta, it was difficult to see why she lent money to George to enable him to purchase it.

At this stage the four sisters were evidently all on the same basis in relation to Taree, though Henrietta was the registered owner of Taree. So also all four sisters had the same real interest in Marchmont, though no part of Marchmont was owned in the names of Henrietta or Ida. The oral evidence of the plaintiff and her two sisters Sara and Ida is that Taree was always intended to be Henrietta's separate property, but the considerations mentioned with respect to the Land Acts and taxation matters, together with the admitted position as to Marchmont and the manner in which money was provided for the purchase of Taree make it difficult to attach any great weight to this oral evidence. This oral evidence really expresses the contentions of the witnesses - it

represents their views as to the conclusion which they wish the court to accept. It is, in my opinion, of little weight when the pecuniary and other interests of the witnesses are so closely concerned. It was not accepted by the learned judge. Evidence as to facts is on a different footing. The facts to which I have referred tell against the plaintiff and not in her favour. But there are many further facts to be considered.] [George managed Taree and Marchmont completely, though he kept two sisters, Sara and Henrietta, well informed as to what was being done. Separate accounts were kept for the two stations. Until 1916 the money which George had drawn from Marchmont in order to pay for Taree was shown as a debt owed by George to Marchmont but from that date it was shown as a liability by Taree to Marchmont. In December 1919 Taree was indebted to Marchmont in the sum of £19,906. About that time, according to the evidence of the surviving sisters, George told them that their sister Henrietta now had Taree free and that he was going to adjust matters. He provided them with £8000 for distribution between them. There still survives a page of a letter written by Sara to George in 1924 in which she sets out the distribution of monies which was made in December 1919. This letter, which was plainly written in December 1924, contains the following :-

" Sometime ago you asked if I knew what amount had been paid to Ida. A few days ago I came across your letter of December 1919 where you had sent cheques for £8000 as follows :

To Clara	£3406 13 4
To Ettie	2666 13 4
To Self	1926 13 4

From these amounts we paid

Ida Ettie paid	£1156 13 4
Clara "	416 13 4
Sara "	416 13 4
	£1990 0 0. "

It will be seen that Henrietta received a cheque for £2666.13.4 This amount is one third of the £8000. It is established that this cheque represented Taree monies. Of this amount the sum of £1156.13.4 was paid to Ida by Henrietta, and it will be seen that the other sisters contributed £416 each so as to make up to Ida a total sum of £1990 which, when allowance is made for exchange,

represents £2000 - one quarter of the £8000 distributed by George. If all the sisters had equal shares in a single family enterprise including Taree, this distribution would be perfectly intelligible so far as Ida was concerned. But a simple explanation of this character will not account for the amounts paid to the other sisters. The surviving sisters said that they simply did what George told them to do. But they also say that the distribution of the money was discussed and agreed upon between them on an occasion when they met in Sydney specially for the purpose. But they further say that they cannot remember anything about the basis of the distribution. There are no entries in any books which explain it. The distribution was doubtless made according to some principle and in relation to amounts which had been drawn by the parties but neither plaintiff nor defendants have been able to show what the principle was. In my opinion it cannot be said that the evidence up to this point shows affirmatively that Henrietta was the sole owner of Taree.

The "adjustment" referred to by George was further carried out by making entries in the books of Marchmont and Taree as at 30th June 1920. These entries purported to show that Henrietta had discharged the liability of Taree to Marchmont to the extent of £19,903. The credit was given to Henrietta in the Taree books under the title "Sundries" - which is not very informative. In the Marchmont journal the credit of £19.903 to Taree was accompanied by a note "see Mr. Porter for particulars." This note strongly suggests that the entry was to be justified by some transaction or transactions which do not appear in the books - it is not an entry recording the receipt of money or money's worth. In the Marchmont books the capital accounts of those who were shown in the books as owners of Marchmont, namely, George, Sara and Clara, were reduced in proportion to their interests, that is to say, the capital shown as belonging to George in Marchmont was reduced by one half of £19,903 and the capital shown as belonging to Sara and Clara was reduced by one quarter of £19,903 in each case. Thus, according to the books, the three ostensible partners in Marchmont

paid for Taree, and Henrietta received the benefit of the payment so as to have Taree free from liabilities. Henrietta was, according to the evidence, quite unaware that she had paid the sum of £19,903 either directly or indirectly; she accepted George's statement that she "had Taree free".

At this time George owed a sum of at least £2817 to Taree. This liability disappeared without explanation. All the witnesses agree that George in his dealings with members of the family was a very honest and very unselfish man. If Henrietta were the sole owner of Taree, there is difficulty in explaining the mere disappearance of this debt, which was an asset belonging to Henrietta. If, however, the adjustment made by George was an adjustment of a partnership account generally, the partnership to continue on the old basis, there is not the same room for criticism of George.

The effect of the adjustment made in 1919-1920 is variously described by the plaintiff's witnesses. Mrs Tait (Ida) had no clear idea as to what had happened. The opinion of Henrietta, as stated in her evidence, was that after 1919 she had no interest in Marchmont; she understood that her interest in Marchmont went to her brother George for part repayment of the money which he had invested in Taree. According to this view George would therefore from 1918 have been entitled to his original one half interest in Marchmont plus an additional one eighth interest received from Henrietta as part of the 1919-1920 adjustment. Her sister Sara, however, took a different view of the transaction. She said that Henrietta went out of Marchmont in 1919, but that her one eighth interest was divided between the other three sisters, that is, Clara, Sara and Ida, who would each receive one third of one eighth as additional interest, George receiving no additional interest. This view is plainly different from that advanced by Henrietta. It is further inconsistent with what was done when Clara died in 1923, when the statement for death duties represented her as owning only a one quarter interest in Marchmont. The result is that it is impossible to discover in the plaintiff's case any plain statement as to the real nature of the adjustment which is said to have taken place in 1919-1920.

From 1920 to 1923 the position remained as stated, that is, Henrietta was shown in the Taree books as the sole owner of Taree and George, Sara and Clara were shown in the books as the owners of Marchmont. Admittedly, however, Ida was interested in Marchmont. Henrietta drew some monies from Taree. It is not shown that she drew any monies from Marchmont. But, as already stated, ~~the~~ any drawings of Ida and Henrietta from Marchmont were made indirectly through George's bank account and the New Park account, and it cannot be said that the position is at all clear.

In 1922 a difficulty arose with respect to income tax. Again the evidence is unsatisfactory and obscure, but the nature of the difficulty can be surmised. Light is thrown upon it by a reference to the matter contained in a letter written on 2nd June 1927 by the accountants who kept the station accounts. The Deputy Federal Commissioner of Taxation had raised questions about Henrietta's war-time profits taxation, and, in particular, a question arose whether the amount owed by Taree to Marchmont should be treated as borrowed moneys or as capital. The answer to this question would affect the amount payable by Henrietta as war-time profits tax. The accountants replied to the effect that the partners in "George Porter and Company Marchmont", at no time had any interest in Taree beyond that of lenders. Their letter dated 2nd June 1927 contained the following statement:-

> " This can be substantiated by reference to the books of account and confirmed by recitation of an interview Mr. George Porter had with late Commissioner of Taxes Brennan, whereat the latter insisted upon Taree immediately repaying by cheque the amount of borrowed money and this was done on 3rd January 1923, £19,903. "

This letter shows that the late Commissioner of Taxes had raised the question whether Taree was or was not really a separate property of Henrietta's. He had evidently doubted the reality of the payment of £19,903 recorded in 1920 and he insisted that, if it were contended that Taree was a separate enterprise, it should really be treated as a separate enterprise and not as belonging to the family partnership. He therefore required Taree to repay to Marchmont, by an actual cheque, the sum of £19,903.

The evidence shows that, in 1923, George had complied with the

demand made by the Commissioner of Taxes. Winchcombe Carson Limited was the firm with which George Porter dealt in relation to all the stations in which members of the family were interested. He directed Winchcombe Carson Limited to draw a cheque upon the Taree account for £19,903. This was done on the 3rd January 1923 and the amount was paid to the credit of the Marchmont account in Winchcombe Carson Limited's office. The Taree account was not in sufficient credit to make it possible to meet the cheque and accordingly the sum of £8,500 was transferred from Marchmont to Taree as a loan so that the cheque could be met. In this way the requisition of the Commissioner of Taxation was satisfied. Thus Marchmont received £19,903 of Taree money. This is the transaction of which the plaintiff complains.

The account books record this transaction in the following manner, the entries being made as at 30th June 1923 : In the Marchmont journal the Taree account was debited with the sum of £19,903 and George Porter's capital account was credited with one half of this sum and the capital accounts of Sara and Mrs Greenwood were each credited with a quarter of the sum.

The following memorandum was made in the journal:-

> " Writing back amounts wrongly entered June 1920. At that time Taree owed Marchmont £19,903.10.3 - this amount was written off - see 'M' Journal 130. Later on Taree paid Marchmont £19,903.10.3. which the indebtedness having been written off placed Taree a/c in credit - a false position which above entry rectifies. "

In the Taree account in the Marchmont ledger the entry was made as follows:-

> " Adjustment - Amt written off June 30 1920 in error this being at that time a debt Taree to Marchmont £19,903 10 3. "

~~The credits already mentioned were entered in the capital accounts of the three Marchmont partners, George, Sara and Clara. All these entries were made as at 30th June 1923.~~ According to the evidence given by Henrietta and supported by Sara, no information was given to any of the sisters at the time with respect to ~~the~~ this transaction which involved the attribution to Henrietta of a large liability which, according to the case presented by the plaintiff, she had already fully met in 1919 by payment. If both Marchmont and Taree were in truth assets of a family partnership, little objection

could be raised by the partners to what was, after all, only a bookkeeping alteration not really affecting the balances which would be due to them upon a full taking of accounts. Upon such a basis there would be no room for criticism of the honesty of George's action in acceding to the requisition of the Commissioner of Taxation without informing Henrietta or his other sisters. If, however, the true position was that Henrietta had really paid for Taree in 1919, it is evident that George was acting improperly in reinstating the liability against Henrietta and discharging it out of her money without her consent.

On 15th March 1923 Clara (Mrs Greenwood) died and new difficulties arose. Her executors had to make statements for the purpose of State succession duty and federal estate duty. In order to ascertain the value of Clara's share in Marchmont it was necessary to prepare a balance sheet of Marchmont. Her interest was taken as being one quarter in accordance with the provisions of the partnership deed. Though this was not the true position upon any view of the facts presented by the plaintiff or her witnesses. A balance sheet was prepared in September 1923 which showed Marchmont as indebted to Taree in the sum of £7915. This balance sheet was prepared as at 15th March 1923, the date of Clara's death, and it did not take into account the payment of £19,903 on 3rd January 1923 by Taree to Marchmont, the books apparently not having been fully written up. Later, in February 1924, a second balance sheet was prepared which took that payment into account. This second balance sheet accordingly showed Taree as indebted to Marchmont in the sum of £11,987, which is accounted for in part by the transfer, upon George's volition, of £8500 from Marchmont to Taree as a loan. When George saw the second balance sheet he objected to it. On 14th April 1924 he sent a telegram to the solicitor in Sydney who was dealing with Clara's estate, as follows :-

> " Last statement as received wrong. Do not lodge till hear from me. "

After discussion with the accountants to the firm he sent the following telegram on 18th April, 1924:-

> " Have interviewed accountants amended balance sheet correct lodge same. "

In the Marchmont diary a note appears in George's handwriting dated 10th April 1924:-

" 'Reach (i.e., Longreach) self with Dobbie and Botten fixed up accounts."

(Dobbie and Botten were then the accountants to the firm). The result of all these matters was that the value of Clara's estate for purposes of death duty was increased by nearly £5000 (one quarter of £19,903) and the amount of duty payable on her estate was accordingly increased. This was plainly done in order to keep Taree separate from Marchmont so far as the taxation authorities were concerned. Sara, who was Clara's executrix, was told of these matters by the solicitor to Clara's estate but, according to both Sara and Henrietta, nothing was said to Henrietta. If this is true, then the position is that George, who is given the highest credit for fair dealing by his sisters, made alterations so as to impose on Henrietta a liability for the large amount of £19,903 without any justification and without her authority.

In 1924 an amending Land Act was passed. The effect of sec. 16 of the Act was described as granting an amnesty in respect of past illegalities in pastoral land-holding upon condition of full disclosure. The Marchmont deed of 1921 was disclosed to the Lands Department as representing the true facts as at that date and since, though it did not do so. (Ida at least was certainly interested in Marchmont in 1921 and afterwards). The Department approved a partnership between George and Sara and Clara in Marchmont in the proportions of 17/50, 17/50 and 16/50 and their shares in capital were, so far as the books were concerned, altered accordingly. The plaintiff relied upon the fact that George did nothing after the 1924 Act to alter the apparent position with respect to Taree, of which she was the registered owner. It was argued for the plaintiff that the new Act presented an opportunity to disclose with impunity the true facts with respect to Taree, and that, if Taree was partnership property, there was no reason why that fact should not have been disclosed and the position regularised. But George's action in regard to Marchmont and his inaction in regard to Taree

are consistent with any state of real fact. As to Marchmont, he only disclosed what had been put into the form of a deed in 1921 - and that was not true. As to Taree, it was plainly better to let sleeping dogs lie. The Commissioner of Taxation had just before 3rd January 1923 been stoutly told that Taree belonged to Henrietta solely. There would have been difficulty with the income tax authorities if another account of the ownership of Taree had been given in 1924 - even if the Lands Department took no action. Thus the inaction of George with respect to Taree in connection with the Act of 1924 is as consistent with there being a partnership in Taree as with there not being such a partnership.

As I have already stated, the statements made to the taxation authorities were, in my opinion, designed to diminish the amount of taxation which would otherwise be payable and I am unable to regard them as reliable evidence as to the true position. In my opinion the correspondence between members of the family which appears in the evidence is much more important than the communications made to the accountants and solicitors and the Commissioner of Taxation. It is significant that the solicitor to Clara's estate did not know until after George's death in 1930 that Henrietta and Ida had or had ever had an interest in Marchmont, although he dealt with Clara's interest in Marchmont in 1923 after her death. Many letters from Sara and Clara were put in evidence and they throw some light upon the relation of the parties to Taree. For example, on 22nd June, 1926, Sara wrote to George as follows:-

> " Have carefully noted all you say as regards Taree. It certainly looks as if the Government intends taking a part. I did not think that they would have taken more than half. Your suggestions, I think, are very good as regards selling it to Willie and I should be pleased to assist in the way you suggest. "

The evidence shows that George had proposed that William Porter, a nephew should be assisted by each of the sisters giving him £3000

to enable him to purchase Taree. In the letter quoted Sara (who is said to have no interest whatever in Taree) writes as if Taree were part of the family estate and certainly not upon the basis that the sale of Taree was entirely a matter for her sister Henrietta as the real owner of Taree. So also on 22nd June 1926 the plaintiff Henrietta writes to George as follows:-

> " With regards to Willie and Taree I am quite willing to fall in with all you suggest - and think it would be a good idea as you say to sell Taree and get rid of it. Your suggestion to let Willie have it for £26,000 I think is a very good one and I am quite willing and would be pleased to give him some assistance and I think Sarawould too, she is writing to you on the matter. "

The phrasing of this letter is quite consistent with Taree being a family property and there is certainly no suggestion contained in it that Henrietta stands in a different position to Taree from that which her sisters occupy. Again, on 18th May 1927, Henrietta wrote to George - " Note that you may be able to get a buyer on to Taree. Yes I am sure that you would be glad if you could get a buyer and as you say get it off our hands. " In this letter Henrietta does not write as if she were sole owner of Taree. She asks nothing about the price asked or to be asked for Taree, but writes as if Taree were in the same position as any other of the family properties.

No interest was ever charged as between Marchmont and Taree on the monies owed between one station and the other. The whole ~~arrange~~ management was left to George in the case of Taree in exactly the same way as in the case of Marchmont. If Henrietta was the owner of Taree in a real as distinct from a formal legal sense, the normal course would have involved a charge of interest. Further, one would expect that some evidence, other than the contentions of interested witnesses, would be available to show that Henrietta exercised the rights of an owner in respect to Taree. There is nothing to show that Henrietta exercised any special rights as distinct from her sisters in relation to Taree except that some monies were drawn by Henrietta specifically from Taree and that from 1924 the accounts in Winchcombe Carson Limited's office were kept in her name instead of in the name of George Porter and Company. But these things were done at the suggestion or direction of George, not as independent acts of Henrietta purporting to act as owner. They were not inconsistent with a family

ownership of Taree. Except in communications to accountants, solicitors or taxation authorities, there is no clear statement anywhere in documents produced that Taree was beneficially the sole property of Henrietta. For reasons already stated, I am unable to attach any real weight to these communications. (George's attitude to taxation authorities is indicated by his complaint by letter on Dec. 9th 1916 to Messrs W.J. Allworth and Son of Sydney - " I received the Land Tax return papers you sent. I think you are giving them a bit too much information.") It is true that the title of Taree was in Henrietta's name, but the title of Marchmont was in the names of three members of the family only at times when admittedly other sisters had interests in Marchmont. Thus, I repeat, the apparent facts, so far as they consist in acts or statements of the persons interested, provide, in such a case as this, relatively slight evidence as to the real facts.

The learned trial judge reached the conclusion that Taree was a property belonging to a family partnership, though the terms of that partnership were not very clearly defined, and that it was not a ~~partnership~~ property belonging solely to Henrietta. In order to decide the case it was not necessary for the defendant to establish these propositions. It was for the plaintiff to satisfy the court that Taree was her property and that she had paid for it in some way. The learned trial judge saw the witnesses for the plaintiff and was not prepared to accept their oral evidence on the substantial matters in issue. The documentary evidence, in my opinion, does not, for the reasons which I have stated, establish the case of the plaintiff. I agree in the result with the learned trial judge, though I am not prepared to accept all the comments which he makes upon some of the oral evidence, ambiguous as it is. The evidence does not satisfy me that Henrietta was or is the beneficial owner of Taree as alleged, or that she paid in account or otherwise the sum of £19,903.10.3 for Taree. In my opinion the plaintiff has not shown that the decision of the learned trial judge was wrong, and therefore the appeal should be dismissed.

I have dealt with the case without considering whether certain letters written by George which were admitted as declarations agains interest were rightly admitted. These letters, written in December 1924, deal with family matters upon the basis that at that date the drawings of all the sisters ought to be made equal, and the defendants contended that they showed that Henrietta did not have any interest in Taree otherwise than as a partner with other members of the family. The plaintiff contends that the letters shoul not have been admitted. I have dealt with the case, so far as this matter is concerned, upon the basis contended for by the plaintiff. As the plaintiff has not, in my opinion, established her claim upon the facts, it is not necessary for me to consider whether or not the defendants are entitled to rely upon the Statute of Limitations.

For the reasons which I have given, I am of opinion that the appeal should be dismissed and the judgment of the Supreme Court affirmed.

HENRIETTA PORTER V. QUEENSLAND TRUSTEES LTD. AND OTHERS.

JUDGMENT. MR JUSTICE RICH.

HENRIETTA PORTER V. QUEENSLAND TRUSTEES LTD. AND OTHERS.

JUDGMENT. RICH J.

This appeal depends upon what can only be described as a question of fact. The determination of the question is governed by documentary evidence and presumptive inferences which remove the case entirely from the category of findings resting upon the testimony of witnesses. The testimony of the witnesses alone would be sufficient if accepted to sustain the appeal. However, Webb J. who heard the case gave elaborate reasons for his refusal to act upon this evidence. With very many of these reasons I find myself quite unable to concur. But it is unnecessary to discuss the question whether the reasons which lead him to decline to give effect to the strong case made on the oral testimony are of such a nature as to take the case out of the general rule which gives a predominating effect to the opinion of a judge who sees and hears the witnesses, because on the whole circumstances of the case I am clearly of opinion that the conclusion at which His Honour arrived does not represent the true facts. The conclusion was that the appellant Henrietta Porter and her sisters Sara, Clara

and Ida Porter were ~~partners~~ partners with their brother George not only in Marchmont sheep station but also in Taree. This view was not taken by anybody when on the death of Clara the question of their proprietary interests fell to be determined for the purposes of probate and taxation. It was not the view or at any rate the pecuniary view presented at the trial, it has no support in the documents and it is not borne out by an analysis of the sources whence the purchase money for Taree was ultimately found, i.e. whence it was recouped as distinguished from its initial supply. The appellant's claim did not directly involve the question whether such a partnership had subsisted. But if Taree had been the subject of such a partnership her claim would doubtlessly be more difficult to maintain. Her claim rests on the comparatively simple proposition that the Taree account with Winchcombe Carson & Co was debited without her authority with the sum of £19,903:10:3 which she claims and that this account was at the time hers beneficially and subsequently transferred into her name as the person legally entitled to the credits and responsible for the debits. It is said that it is a claim against a deceased person's estate

and that she is therefore bound to establish clearly the liability of the deceased person. Her brother is dead and the statement is therefore literally true. But it must be remembered that her brother long before his death had taken every requisite step to place the legal title to Taree in her name, had caused the account books of Taree to be squared off so as to represent her completely free of all liability to the proprietors of Marchmont of which he himself was one, and had assumed the management of the Taree station as a separate enterprise, the subject of separate accounting, and had operated on the Taree account with all the outward appearance of a fiduciary agent. In the next place the circumstantial evidence is strong to show that when he drew the £19,903:10:3 from the account of Winchcombe Carson & Co he did so because the tax Commissioner had forced him into an untenable position. He could not explain the writing off of that amount as between Marchmont and Taree without divulging Henrietta's former interest in Marchmont, a thing which he could not afford tohave disclosed to the Crown's lands office. Everything points to the view that he was most unwilling to consent to the writing back of this amount and the accompanying transfer of the sum from the account with Winchcombe

Carson & Co. Indeed it is apparent that he did not retain a complete grasp of the significance and consequences of the writing back. This is shown by his actions over the approval of the balance sheets of Clara's estate. I can see no reasonable explanation of the whole course of dealing as disclosed by the documents ~~of~~ and the independent evidence except that George set about the acquisition of Henrietta in her name of Taree and the clearing of it from debt so that it should be hers absolutely and then in the course of managing it on her behalf felt himself forced by the exigencies of the situation created by the tax Commissioner and the land laws to repay the Marchmont partnership consisting of himself, Sara and Clara's executors the sum in question. I do not think that the appellant authorised his doing so and I think moreover that he did not intend finally to deprive her beneficially of the amount paid. In seeking to obtain Taree for his sister Henrietta George was taking a course no doubt determined by the legal impossiblity of including persons who were not entitled to a lease in a partnership for working the leases. There is no reason to impute to him an intention to take the unlawful course of constituting her a nominee or trustee for the Marchmont partnership. The far

greater probability is that he wished to avoid jeopardising the future position of his sisters and in particular of Henrietta. My interpretation of the facts of the case leaves George an unwilling party but nevertheless a party to the unauthorised diversion of funds which he was contributing as a fiduciary agent of his sister Henrietta to the purposes of the Marchmont partnership. No doubt in his lifetime Henrietta would have been guided by sisterly affection and if the facts had been brought clearly to her knowledge she might well have abstained from making any claim against her brother personally. But in his lifetime the question did not arise because the position was never explained to her and she did not understand it. After his death different considerations became applicable. In my opinion the appellant's claim is amply substantiated. I have made no point of the failure of the respondents to call any of the accountants who might have given direct evidence of the purpose of the reversal of the entries and the circumstances in which it was done. But I was not satisfied by the explanations attempted at the bar of the absence of any such evidence at the trial. There remains only the

question whether the appellant's claim is answered by laches or by the statute of limitations. Laches is, I think, put out of the case by the appellant's ignorance of what had actually been done, an ignorance which I think transparently appears from the record. The ordinary statute of limitations is clearly excluded by the fact that George was a fiduciary agent who expressly and intentionally undertook that role. The Trustee Act provisions which are transcribed in Queensland by sec.52 of the Trustee and Executors Acts 1897 do not, in my opinion, give any protection because the money was applied for the benefit of the Marchmont partnership of which George was the principal member, and this, in my view amounts to conversion to his own use.

In my opinion the appeal should be allowed and the judgment of the Supreme Court discharged. In its place it should be declared that George Porter deceased was accountable to the plaintiff for the sum of £19,902:10:3 and that his executors are liable to make good to her such sum out of his estate. The costs of the action and of this appeal to be paid by the defendant executors to the plaintiff out of the estate of George Porter deceased.

PORTER v. QUEENSLAND TRUSTEES LTD. AND ANOTHER

JUDGMENT STARKE J.

Henrietta Porter brought an action in the Supreme Court of Queensland against the respondents, the executors of her brother George Benjamin Porter, claiming an account of all moneys and property received by her brother as her agent and manager and of all dealings therewith. It was dismissed and Henrietta Porter has now brought an appeal to this Court. But the only question debated before this Court was whether the Executors of George Benjamin Porter are liable to make good to Henrietta Porter out of the estate a sum of £19,903.10.3. The evidence is voluminous but the main facts of the case are fairly clear. The real difficulties are the inferences that should be drawn from them.

William Porter, a pastoralist, died in or prior to the year 1911. Amongst children who survived him were his son George Benjamin Porter and his daughters Sarah, Clara, who married one Greenwood, Ida, who married one Tait, and the appellant Henrietta. Mrs Clara Greenwood died in the year 1923 leaving issue and George Benjamin Porter in the year 1930. William Porter was possessed of certain pastoral properties known as "The Island" and "New Park". Apparently he devised "The Island" with some other property to his daughters and "New Park" to his son George. The daughters however transferred "The Island" to George and George transferred "New Park" to the daughters, possibly owing to some wish expressed by their father. The brother George managed both "The Island" and "New Park" properties. George and his sisters were on most affectionate terms and the sisters trusted him implicitly and placed the utmost confidence in him. It is clear that their trust and confidence was not misplaced and that this unfortunate action would never have been necessary had he lived. But the executors of George have the children of Clara Greenwood to consider and, as prudent executors, cannot, as I well understand, concede or compromise the claim made by Henrietta in the circumstances of this case. A judicial decision is therefore necessary to decide the rights of the parties.

The pastoral property known as "New Park" was subdivided and sold after William Porter's death but the purchase money was paid in

instalments. But about the year 1911 George and his sisters bought another property in Queensland called "Marchmont" for £42,000. It comprised three grazing selections of nearly equal extent: each about 20,000 acres. The Queensland Land Laws prohibited dummying and the rule seems to have been that one selector could hold only one selection Consequently one of the selections was put in the name of George, another in the name of Sarah, and another in the name of Clara. A partnership dated the 7th of June 1931 between George and his sisters Sarah and Clara sets forth that they have become and would remain partners in the business of graziers under the name of George Porter & Co. and that the business should be carried on upon "Marchmont." It is stipulated that the partner's shares in the net profits should be :- George; one half, Sarah: one quarter, Clara: one quarter, but it is expressly provided that the "Marchmont" selections should remain the separate property of each holder thereof respectively in his or her sole right. But despite the inference from these facts that George Sarah and Clara were entitled between them to "Marchmont" it is conceded and indeed proved that Ida and Henrietta were each entitled to one eighth share held by Sarah and Clara respectively, as well, I think, in the selections as in the profits derived from them.

The fifth paragraph of the Defence states that from the year 1914 until the 15th of March 1923 the persons beneficially interested in the firm of George Porter & Co. were (a) the said George Benjamin Porter who was entitled to one half share in the assets and profits of the said partnership which was held in his own name and (b) the plaintiff (that is Henrietta) and her three sisters Sarah, Clara and Ida who were each ent tled to one eighth interest in the assets and profits of the said partnership, the said interests being held in the names of Sarah and Clara. The oral evidence of Sarah, Henrietta and Ida supports the view that the four sisters had originally an equal interest in "Marchmont", and so, I think, does the evidence of L.G. Greenwood. Perhaps more impressive still are the entries in the current account of the four sisters called the "New Park Estate" with the Commercial Banking Company of Sydney Ltd. at Forbes. Sums were paid into this account during September October and November 1911 under the name of George Porter amounting in round figures to £21,250 and during the same period sums were paid out of the account to

George Porter or his bankers the Commercial Banking Company Ltd. at Forbes amounting with exchange in round figures to £36,265. The evidence does not, I think, disclose whether the sum of £21,250 represents moneys owing or advanced by George Porter to his sisters or part of the proceeds of "New Park" as seems likely. But there seems little doubt that the sum of £36,265 was appropriated towards the purchase and carrying on of "Marchmont." On any view of the accounts the sisters provided for "Marchmont" £15,000 in round figures more than they had received from their brother George. An accountant Thompson deposed that he had investigated the "New Park Estate" account and was of opinion that the figures indicated that the four sisters had provided for the purchase of "Marchmont" a sum of, approximately, £17,500. It is more, if the sum of £21,250 represents moneys actually due to the sisters. Again it is clear on the evidence that profits from "Marchmont" were paid into the banking account of George Porter and through his account and possibly directly into the "New Park" account and personal drawings were made from that account on behalf of each of the sisters. Other profits, about £63,000, from "Marchmont" were also accumulated and were credited to the capital accounts of each of the four partners in George Porter & Co but I shall refer to them later.

In 1914 another station called "Taree" was purchased. The purchaser, according to the Contract of Sale and Purchase, was George Porter. The area of the station was about 27,000 acres and the purchase money for the station stock and plant was £22,000. According to the evidence George Porter declared that the station was purchased for his sister Henrietta. At all events the titles to the station were transferred from the Vendor directly to Henrietta. The transfers were executed in escrow in 1914 but were apparently released from escrow in 1915. Part of the purchase money seems originally to have been drawn upon the banking account of George Porter with the Commercial Banking Company of Sydney. But ultimately "Marchmont" provided the moneys. The moneys were taken from the banking account of George Porter and debited to his private drawings from "Marchmont" and later credited to his account in the "Marchmont" books. But these moneys and also other moneys, the proceeds of "Marchmont" wool and carcasses sold to Gladstone Meat Works, were credited to "Marchmont" in the "Taree" books and debited to "Taree" in the "Marchmont" books. At all

events on the 31st of December 1919 the "Taree" books disclosed that there was owing to "Marchmont" on balance of account £19,906.10.10. In the "Marchmont" account in the "Taree" books is an entry 31st December 1919 "To capital account £19,903.10.3." and in the "Marchmont" books this sum is carried to the debit of the capital accounts of George Sarah and Clara in "Marchmont": George the sum of £9951; Sarah and Clara each £4975.17.7. A Journal entry in the "Marchmont" books as to these entries simply records "See Mr Porter for particulars". And in Henrietta's account in the "Taree" books under date 1st January 1920 is an entry "By sundries £19,903.10.3." The result is that the sum of £19,903.10.3 due by "Taree" to "Marchmont" was extinguished and Henrietta credited with that sum.

Perhaps it is well to notice here a distribution in 1919 of a sum of about £8000 and again in 1924 of another sum of £8000 referred to in letters dated the 6th of December 1924 to Sarah and Ida. The letters were admitted as declarations against interest by George Porter but I should not so regard them but think they were admissible as communications between the parties and acted upon by all of them including Henrietta. I do not attach much importance to them. The drawings of Ida from "Marchmont" in respect of her share were not in proportion to those of her brother and sisters and it was desired to bring the drawings nearer to equality. It is not surprising if Henrietta had overdrawn her share in "Marchmont" that she should contribute nor is it of any importance from what source she contributed. She in fact contributed from the funds of "Taree" on the 10th of December 1919 the sum of £2666.13.4. But this contribution does not explain why the sum of £19,903.10.3. was written off the "Marchmont" account in favour of "Taree" nor does it throw any light upon the question. According to the case made by Henrietta her brother bought "Taree" for her, arranged that the purchase money should be ~~afxfxxxdx frxxx~~ provided for her out of her interest in "Marchmont" and that it was so provided by the writing off of the sum of £19,903.10.3 in the manner already mentioned; whilst the other view is that no such transaction in fact took place and that the sum of £19,903.10.3 was written off the amount owing by "Taree" in error. Some light is thrown upon the question by the purchase in 1923 by the sister Ida and the Greenwood family of a station property called "Langton" for £75,000. Ida

admittedly acquired one fifth interest in this property but she sold it about 1934 to Gordon Greenwood. It is not disputed, according to the evidence, that a considerable amount of the purchase money was provided by "Marchmont" for and on account of Ida's fifth interest in "Langton". Henrietta and Ida had, as already stated, each one eighth share in the capital and profits of "Marchmont". The four sisters had contributed out of their "New Park" account as already stated £15,000 at least towards the purchase money of "Marchmont", some £42,000 but between 30th June 1924 and 30th June 1919 "Marchmont" profits had been accumulated amounting to some £63,000 which, as I understand the evidence of the accountant Thompson, had been carried to the capital accounts of the partners George Sarah and Clara in proportion to their shares. But Henrietta and Ida had one eighth share in the capital contributions by the sisters to "Marchmont" and in the accumulated profits of "Marchmont" added to capital. It follows on the figures I have taken that Henrietta and Ida had each between £11,000 and £12,000 invested in "Marchmont". Thompson in an account which he prepared for the Court endeavoured to show that the account betwwen Henrietta and "Marchmont" according to the books almost equalised itself at the sum of £19,903.10.3 which was written off the "Marchmont" account against "Taree". Thompson's account is not conclusive but it is not without weight. In my judgment the evidence is strong and really uncontradicted that the interests of Henrietta and Ida in "Marchmont" were treated after the acquisition of "Taree" and "Langton" respectively as if they had ceased or been extinguished. No claim was made to their capital contribution to "Marchmont" or to the accumulated profits added to the capital accounts of the partners in "Marchmont". The writing off of the "Taree" account of the sum of £19,903.10.3 remained recorded and effectual in both the "Marchmont" and "Taree" books until 1923. "Taree" had been put in Henrietta's name, the balance due from "Taree" to "Marchmont" had been written off and Henrietta had given up any claim or interest in "Marchmont". The only hypothesis that will satisfy this state of facts is that "Taree" was purchased for Henrietta and that the purchase of that station on her account had been settled by writing off her interest in "Marchmont" against the balance owing to "Marchmont" on "Taree" account. In my judgment the position of Henrietta so far is strong and clear. But in 1923 Clara Greenwood died. It was necessary

for the purposes of Probate Succession and Estate Duties to prepare a statement of her assets and liabilities. A "Marchmont" station balance sheet which had been made up to the date of her death - the 10th of March 1923 - disclosed "Taree" account on the liability side of the balance sheet at £7915.15.9. In March 1924 it was pointed out by Greaves, a solicitor acting in connection with the Greenwood estate, that there was a discrepancy of approximately £7000 between a balance sheet forwarded to him in September 1923 and that above mentioned and he requested an explanation. George Porter could not apparently explain the discrepancy and challenged the amount which according to the balance sheet was owing by"Marchmont" to "Taree".

On the 24th of March 1924 Dobbie & Botten Ltd. Accountants of Longreach in a letter to Porter's solicitors at Longreach said in relation to the discrepancy pointed out by Greaves :- "While we were engaged in preparing the Balance Sheet for you Messrs Porter and Greenwood (that is Gordon Greenwood) called upon us and were shown a Balance Sheet as at 30th June 1923. The Balance Sheet showed as did the Balance Sheet as at 15th March 1923 which was sent to Mr Greaves that "Marchmont" was indebted to "Taree". Mr Porter questioned the correctness of this. An investigation into the accounts between "Taree" and "Marchmont" proved that the books were at fault. In January 1920 the indebtedness of "Taree" to "Marchmont" viz. £19,903.10.3 had been written off and the capital of the partners relatively written down. Subsequently it was decided to reinstate the liability and a cheque for £19,903.10.3 was paid by "Taree" to "Marchmont". The liability however was not re-established in the books of account of "Taree" and "Marchmont" as it should have been. An adjustment was made by us in writing up the capital accounts of the partners to the extent of which one fourth viz. £4975.17.7. was transferred to Mrs Greenwood's capital account..... We regret that Mr Greaves should have been supplied with figures which have been found incorrect but the statement sent to that gentleman was compiled from the books handed to us together with supplementary stock figures given to us to incorporate in the statement."

George Porter challenged the Balance Sheet so prepared but finally announced that he had seen the accountant and that the amended Balance Sheet was correct. It is not clear from the letter who decided to

reinstate the liability of "Taree" at £19,903.10.3. Gordon Greenwood and the accountants knew nothing of the facts and George Porter appears to have been persuaded that the books were wrong. The liability on account of "Marchmont" to "Taree" of £7915 does not itself appear to have been challenged but the writing off of £19,903.10.3. The entries in the books must now be stated. In George Porter's "Taree" account is an entry under date January 3rd 1923 :- "Paid cheque to"Marchmont" £19,903.10.3." And in the "Marchmont" account in the "Taree" books is entered under date January 3rd 1923 :- "To transfer to Winchombe Carson £19,903.10.3" and on the opposite side under the balancing date June 30th 1923 "Amount wrongly written off June 1920 £19,903.10.3." In the "Marchmont" Journal is this explanation of the payment of £19,903,10,3:- "Writing back amounts wrongly entered in June 1920. At that time "Taree" owed "Marchmont" £19,903.10.3. This amount was written off. See "Marchmont" Journal 130. Later on "Taree" paid "Marchmont" £19,903. 10.3 which, the indebtedness having been written off, placed "Taree" account in credit; a false position which the above entry rectifies." The rectifying entry carried one half of the sum of £19,903.10.3 to the credit of the capital account in "Marchmont" of George Porter and one quarter to the credit of the capital account of each of the sisters Sarah and Clara. Thus was the liability of "Taree" to "Marchmont" reinstated. And apparently returns made by the executors of Clara Greenwood for probate and other purposes were based upon the reinstatement of that liability and her share or interest in "Marchmont" treated accordingly.

At this point may be mentioned an agreement dated the 25th of September 1925 between George, Sarah and the executors of Clara. The Queensland law was modified in 1924. According to Gordon Greenwood the Lands Department were empowered to and did overlook various contraventions of the old acts if disclosed and if the Department approved of the existing agreements or further or other agreements. The agreement recites the approval of the Minister of Land and constitutes an agreement of partnership. The business of the partnership was to be carried on at "Marchmont" as before but the shares of the partners were divided as follows :- George Porter 17/50: Sarah 17/50: and the Executrix of Clara 16/50 as required by the Lands Department. It was stipulated that the agreement

should not constitute a joint ownership in the selections and that such selections should be the distinct property of each holder thereof and that nothing should constitute any of the parties an agent trustee or servant for the partnership or of "any other person or persons whomsoever."

During the negotiation with the Lands Department for the approval of this agreement ~~xxxx~~ the shares of Henrietta and Ida in "Marchmont" might have been mentioned with safety if they had then existed, but no suggestion of any such interest anywhere appears.

Some minor matters were referred to during the argument: George suggested the sale of "Taree" to Henrietta as if he had the right of disposition. But he managed everything for her and suggested and did what he thought was in her interest. Again the "Taree" station account was in the name of and was worked by George Porter. It is not surprising having regard to the complete powers and trust reposed in George Porter. However in 1924 it was changed to the name of Henrietta Porter and in 1927 a complete power of attorney was given to George. Again interest was not charged on transactions between "Marchmont" and "Taree". The law does not require that members of the same family should be usurers. But despite all these facts it is quite certain that Henrietta took no part in reinstating the liability of "Taree" to "Marchmont" and knew nothing about it. It is equally certain that the accountants Dobbie and Botten Ltd. at Longreach and Gordon Greenwood who reinstated the liability of £19,903.10.3 were not acquainted with the facts that ~~xxxx~~ led to the writing off of that sum. George Porter knew them but though apparently a good pastoralist he was not much of an accountant. I suppose he was told that the sum of £19,903.10.3 was written off by mistake and that he could not or did not wish to explain it because of difficulties with the Lands Department and perhaps with Taxation authorities. At all events he acquiesced in the alteration with hesitation, as is established by the letters and telegrams in evidence and further he found a sum of £8500 from "Marchmont" funds which he paid in to the "Taree" account to finance the reinstatement. But was the interest of Henrietta in "Marchmont" also reinstated or had it ceased and been extinguished? Clearly Clara Greenwood's estate had been valued

and administered on the basis that it was entitled to one fourth share in "Marchmont". The learned trial judge however concluded that Henrietta acquired and held "Taree" for herself and others. It is opposed to the entries in the books of account of 1919-1920 extinguishing the liability of "Taree" to "Marchmont" and the other documents to which I have referred apart altogether from the oral evidence with which the learned judge was not wholly satisfied. And there is nothing remarkable in the fact that George Porter and his sisters each desired to have a separate interest in some selection.

It must be conceded however that the book entries of 1923-1924 support the learned judge's conclusion. But the accountant who was responsible for the entries knew nothing of the original entries and is dead, so he cannot assist in solving the facts. Gordon Greenwood knew nothing of the original entries. But he relates a curious conversation in 1923 between George and Henrietta. "Mr Porter told Miss Henrietta Porter in my presence in his office at "Marchmont" that his three sisters had lost an eighth interest in "Marchmont" on account of Mrs Greenwood's death and they had only gained an eighth interest in "Taree" he would compensate them for the loss by giving them his whole half interest in "Taree"." It is contrary to all the proved facts that Sarah gave up any interest in "Marchmont" or acquired any interest in "Taree" and no reliance can be placed upon this part of Gordon Greenwood's evidence. It gives the impression that Gordon Greenwood was more concerned with the Greenwood interest in "Marchmont" than with a candid statement of the facts. George Porter is dead and cannot give his account of the 1923 transaction. It was strongly impressed upon the Court that Henrietta's claim against a dead man should be scrutinised closely. But the truth is that the 1919-1920 entries were made in the books of account of "Marchmont" and "Taree" in favour of Henrietta by the direction of George Porter himself and that about 1923-1924 George Porter directed or acquiesced in the books being altered and the original position restored. In these circumstances the burden is upon the estate of George Porter to explain the 1923-1924 entries and to satisfy the Court that they were right. It is not in truth a claim against the estate of a dead man but a claim on the part of the estate of a dead man to undo a position which he created and settled by the

entries of 1919-1920. The 1923-1924 entries were directed by George Porter or he allowed persons who knew nothing of the 1919-1920 position to make entries which completely reversed that position without consultation or agreement with the party affected, namely Henrietta. The reasons for making the alterations in the books have been much canvassed in this Court. But it is, I think, beyond doubt that George never intended to deprive his sister Henrietta of her rights. Yet it seems clear that since the 1923-1924 entries Henrietta could not enforce any rights to one eighth interest in "Marchmont". One fourth share has already been provided for and administered as part of the estate of Clara Greenwood and, apart altogether from the provisions of the land laws of Queensland and the partnership agreement of 1925 made pursuant to those laws, Henrietta's position is seriously prejudiced by the death of George Porter and the evidence in this case that she ceased to have an interest in "Marchmont" when she acquired "Taree".

George Porter may have been confused by the statement of the accountant and Gordon Greenwood that the 1919-1920 entries were wrong and should be altered. He was obviously hesitant about the new entries as can be gathered by his telegrams at the time. It was also suggested that the alterations were made to avoid difficulties under both the Income Tax and War Profits Acts. Avoiding difficulties by false entries involve however to my mind danger of heavy penalties if the truth were deliberately concealed and the argument struck me as one common enough amongst lawyers but generally discarded by men of affairs. Personally I prefer to think that George Porter was in a state of confusion but was nevertheless an honest man and sincerely attached to his sisters. But whatever the reason for the alteration in the book entries 1923-1924 the evidence does not satisfactorily displace the interest of Henrietta in "Taree" nor establish that the liability of £19,903.10.3 due on account from "Taree" to "Marchmont" was wrongly written off. As I have said the burden of establishing these propositions was in the circumstances of the case upon the representatives of George Porter. The facts found by the learned judge are of much importance and should prevail in any case of doubt. But I am unable to agree with

him on this occasion mainly I think because the rights of Henrietta were settled in 1919-1920 in the manner already mentioned and can only be displaced by evidence on the part of the representatives of George Porter which explain the settlement and displace it on intelligible grounds. In my judgment the representatives of George Porter have completely failed in this task.

But the question still remains whether lapse of time bars the remedy of Henrietta in this action. If her claim be a common law claim or one recognized as analogous to such a claim in equity then Henrietta's right of action has long been barred. It is said however that George Porter was in the position of a fiduciary agent. But it is not every claim against a fiduciary agent that is outside the protection of the Statute of Limitations, as I think is well illustrated by the cases of Friend v Young 1897 2 Ch. 431 and Henry v Hammond 1913 2 K.B. 515. In my opinion it is essential that the fiduciary agent should act or assume to act as a trustee and in that capacity hold the property funds or money of the principal. Soar v Ashwell 1893 2 Q.B. 390; Rochefoucald v. Boustead 1897 1 Ch. 196; Life Association of Scotland v Siddall 3 De G. F. & J. 58; Reid Newfoundland Co. v Anglo American Telegraph Co. 1912 A.C. 555. But the Trustees and Executors Act 1897 Queensland which adopts the English Trustee Act of 1888 has made considerable alteration in the law. Except where the claim against a trustee is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy or is to recover trust property or the proceeds thereof still retained by the trustee or previously received by the trustee and converted to his own use, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to the action or proceeding in the like manner and to the like extent as if his claim had been against him in an action of debt for money had and received. See How v Earl Winterton 1896 2 Ch 626.

In the present case there was an account with Winchombe Carson Ltd. of Brisbane. It was an account current in the name of "George Porter Taree Account." It was the "Taree" working account and as George Porter really controlled and managed "Taree" he naturally drew upon and worked the account as he thought proper. But the moneys paid into or out of that account were all for and on account of

Henrietta and George was accountable to her. His power management and control were so large and discretionary that many payments within his power and authority would not amount to any breach of his duty as a fiduciary person which in cases involving more specific direction or less discretion might constitute a breach of trust. But large and discretionary as were the powers of George Porter still they cannot justify the drawing out of Henrietta's account a large sum of money for the purpose of undoing a transaction in her favour and in settlement of her rights without her consent and approval. It is clear enough that Winchombe Carson Ltd were not trustees for Henrietta: they were in the position of bankers. Foley v. Hill 2 H.L.C. 28. But George Porter took control and management of the account and of the funds credited or debited to it just as if he were the principal instead of his sister Henrietta. But Henrietta would nevertheless be barred by the Statute already mentioned unless she established either (1) That George Porter in fraud of her wrongly appropriated the sum of £19,903.10.3., a position which both she and her counsel have always strongly and rightly disclaimed. (2) That the sum of £19,903. 10.3 or the proceeds thereof are still retained by George Porter or his representatives. The evidence does not make it very clear whether the money or its proceeds are"still retained": that is retained at the commencement of the action in his hands or under his control. In re Page 1893 1 Ch. 304; Thorne v. Heard 1894 1 Ch. at 604; Wasswll v Leggatt 1896 1 Ch. 554 (3) Or that trust property or the proceeds thereof namely the sum of £19,903.10.3 was received by George Porter and converted to his own use. On January 3rd he drew a cheque on the "Taree" account which was in his name for £19,903.10.3 It was handed over to Winchombe Carson Ltd., paid, and the proceeds c credited to the "Marchmont" account in the name probably of George Porter himself or at all events in the name of George Porter, Sarah and the representatives of Clara Greenwood. In my judgment such a transaction amounts to the conversion of the trust property, namely the cheque or the proceeds thereof, within the meaning of the Act. Paget on Banking 3rd Edn. Chap. 16 p. 273. The cases of re Gurney 1893 1 Ch. 590; re Timmis 1902 1 Ch. 176; re Sharp 1906 1 Ch. 793 are of no authority in the present case for the facts upon which they are founded bear no resemblance to the facts of the present case.

Acquiescence and Laches were also relied upon. But during her brother's lifetime - he died in 1930 - Henrietta, I am satisfied, was ignorant of the position which the book entries 1923-1924 created and gave up no rights whatsoever or by any act or omission on her part induced her brother to change his position. Indeed I doubt if the facts became known to Henrietta until after Winchombe Carson Ltd. made claims upon her in 1935 which were in truth brought about by the entries of 1923-1924. And the action was commenced in May of 1936. Laches is equally untenable. I am content with Lord Blackburn's statement of the doctrine in Erlanger v. New Sombrero Phosphate Co. 3 Ap. Ca. at p. 1279 :- "I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it." In my opinion the balance of justice in the present case inclines strongly in favour of Henrietta and I believe that George Porter would agree and have made his sister's position unassailable if he were alive.

The result is that the appeal should be allowed, the judgment below reversed, and the representatives of George Porter deceased declared accountable to Henrietta for the sum of £19,903.10.3 out of the assets of his estate. Interest perhaps should be added but as the Porter family did not charge interest one against the other this Court may abide by the family rule and make no provision for it. But Henrietta is entitled to her costs out of George Porter's Estate both here and below.

HENRIETTA PORTER v QUEENSLAND TRUSTEES LTD AND GREENWOOD EXECUTORS OF GEORGE BENJAMIN PORTER DECEASED.

JUDGMENT DIXON J.

HENRIETTA PORTER v QUEENSLAND TRUSTEES LTD AND GREENWOOD EXECUTORS OF GEORGE BENJAMIN PORTER DECEASED.

The appeal is confined to the question whether the respondents, the executors of George Benjamin Porter deceased, are bound to make good to the appellant, Henrietta Porter, a sum of £19903 : 10 : 3 out of the assets of their testator. The claim of the appellant to this sum of money rests upon the allegation that in the course of managing her affairs as her fiduciary agent the deceased caused a payment of that amount to be made out of her moneys into the funds of a partnership of which he was a member and that the payment, for which no consideration was given, was made without

her prior authority or subsequent ratification.

The deceased,who died on 20th July 1930, was the appellant's brother. She was one of four sisters. From the death of their father,which occurred in 1911,the deceased,whom it is convenient to call by his christian name George, appears to have applied himself to the furtherance of the interests of his sisters as much as,if not more than,his own. Under a family arrangement concerning the property left by their father,the four sisters became entitled to a sheep and cattle station,called New Park, situated near Forbes in New South Wales. George became entitled to a station called the Island,which was also in New South Wales. In the year of their father's death it was decided to subdivide New Park,

presumably into farming areas,and to sell it piece-meal. In the event,many years elapsed before New Park was completely realized. George retained the Island. But he determined to acquire a pastoral property or properties in Queensland for the benefit of himself and his sisters. In September 1911,he contracted to buy for £42,000 a sheep station, called Marchmont, in the vicinity of Longreach. Of the purchase price his sisters found with the aid of New Park at least £17,000, possibly a full half, and George found the balance. Marchmont comprised three Crown leases. Under the legislation of Queensland relating to Crown lands one person could hold only one of these leases. The lease upon

which the homestead stood was transferred to George, another lease was transferred to a sister whose married name was Clara Greenwood, and the third lease to an unmarried sister named Sarah. George seems to have understood thoroughly that no one but the holder could take a beneficial interest in any of the three leases and the sisters or some of them, were probably also alive to this fact. George stated at the time, if the evidence is to be believed, that he would obtain properties elsewhere for the other two sisters, that is for the appellant Henrietta and for a sister whose married name is Ida Tait. But no objection was apprehended if the three holders of the adjoining leases constituting Marchmont worked them together as one pastoral undertaking and divided the profits. It was desired,

however, at all events until independent properties were acquired for Henrietta and Ida, to divide the profits among the four sisters and the brother and further to do so in proportions according to which George would take a half and each of the four sisters one eighth. But it was considered unsafe to disclose that persons who were not leaseholders were receiving shares of the profits. In the books which were kept George, Clara Greenwood and Sarah were shown as entitled to the capital of the partnership. They were shown as entitled in the proportions of a half for George and a quarter each for Clara and Sarah. Henrietta and Ida were not shown as having any interest. All four sisters appear to have had complete faith in George, and with justification. No doubt

the parties relied much more on family relationship than upon legal rights, and it may be supposed that none of them formed, much less expressed, a conception of their mutual rights and interests which accorded with any legal category. But I think that the proper conclusion from the whole of the evidence is that it was intended that Clara Greenwood and Sarah should each be the full beneficial owner of her respective lease, as George should be of his : that a partnership undertaking carried on upon the leases, that is in the stock and in the profits, should exist ; that George should have one half share and his sisters the other half share in the partnership ; that their half share should, so to speak, be vested in Clara Greenwood and Sarah, who should, however, hold it for

themselves and their sisters Ida Tait and Henrietta in equal proportions ; and,finally, that George should have complete control of the management of the station and of all matters connected with the adventure including drawings on account of profits or otherwise. I think further that the probabilities are in favour of the truth of the evidence that George said that independent properties should be acquired for Henrietta and Ida. In the result such a property was bought in 1914 and the transfer was taken in the name of Henrietta and a share was taken in 1923 by Ida Tait in another property,called Langton,which was acquired by some members of the Greenwood family and herself.

The appeal is concerned with the management of the property acquired in the name of Henrietta. This was a sheep station, called Taree, situated near Aramac. It comprised two leases both of which might be held by one person if she had no other holding. George contracted to buy the station for £22,000. With stamp duty and the price of extra sheep the cost in fact amounted to £22,672 .2 Id. This sum which was paid in instalments was found in the first instance by George. But he was recouped, in effect, out of the partnership account. In the books of the partnership kept in respect of Marchmont the station called Taree was shown as indebted to the station called Marchmont for the full amount of the purchase money and correspondingly in the books kept in respect of

Taree that station was shown as so indebted to Marchmont. In the latter books the capital account was under the name of Henrietta : in the former there were capital accounts for George, Sarah and Clara constructed on the footing that they were the members of the firm, which was called George Porter & Co.

At the wool selling brokers who, in effect, acted as bankers for them there was an account called " George Porter Marchmont Account " and another called " George Porter Taree Account ". George operated on both these accounts, but they were kept strictly separate. There were dealings between the two stations in respect of sheep and other things but the ledger accounts in the respective

set of books showed the effect of these transactions as debits and credits between the two undertakings. As at 31st December 1919 the Taree books gave a balance in favour of Marchmont of £19,906. 10 10d. and the Marchmont books a balance against Taree ~~of £19,903 : 10 : 3~~ of £19,903 : 10 : 3d. This latter sum was written off in both sets of books, that is it was shown as discharged or extinguished. In the Taree books an entry was made in the Marchmont ledger account " To Capital account £19,903 : 10 : 3 " and Henrietta's account was credited with the same amount by an item " By Sundries ". In the Marchmont books the balance against Taree in the Taree ledger account was simply met under date Ist January 1920 by a corresponding entry of £ 19,903 : 10 :10d (not 3d) without

explanation. But under date 30th June 1920 the capital account of each partner was reduced by sums amounting to £19,903 : IO : 3d. viz. George £9951 : 15 : 1d , Sarah and Clara each £4975 : 17: 7d. The Journal showed that these amounts were from £19,903 : IO :3d due by Taree and,as a narration, said, " See Mr Porter for particulars". It is evident that the object of these entries must have been to record the fact that the liability described as that of Taree to Marchmont had been released or discharged at the expense of the capital of the partnership in the latter.

According to the evidence of Henrietta Sarah and Ida the three sisters who survived George it is the bookkeeping counterpart of and represents a declaration made by George to them that Taree

had been paid for out of Henrietta's share and was thenceforth her property free from liability. George, Sarah and Henrietta had arranged to go to England, sailing on 17th March 1920. Before they went George had resolved to put their affairs upon a proper footing. The Island of which he was sole owner owed Taree a sum of £2871-13-5d for cattle and this was written off at the same time. On 10th December 1919, a distribution of £8,000 was made among the four sisters. A cheque for one-third of this sum was sent to Henrietta and debited to the Taree account. From the Marchmont account Clara Greenwood received a cheque for £3,406 : 13: 4d and Sarah a cheque for £1,926 : 13 : 4d. From these figures, it would appear that, as between Clara and Sarah, £740 should for some reason be made up by it was considered that the latter to the

former. But out of their respective cheques Sarah and Clara paid Ida £416 : 13 : 4d each and Henrietta £1156 : 13 : 4d, that is £740 more than her sisters. This looks as if Ida's prima facie share of the £8,000 was £1250 (three times £416 : 13 : 4d) but that in her case correspondingly, as between herself and Henrietta, it was thought that the latter should make up £740 to her. Possibly Sarah and Henrietta had been overpaid on some other account or occasion at the expense of their sisters to the extent of £740 each.

The appellant's cause of action is based upon the subsequent treatment of the sum of £19,903 : 10 : 3d in the accounts between the two stations. But the foundation upon which it rests

is formed by the rights which she claims had accrued to her before her departure to England. She claims that she had become the sole person beneficially entitled not only to the leases of the Taree station but to the whole undertaking and the profits arising therefrom. According to her case,her brother George,who remained in control,was conducting the undertaking on her behalf and so as her fiduciary agent. Before considering the correctness of this description of the situation,it is convenient to state the facts which,according to her contention,constitute a breach of the rights she thus claims. George remained away but a short time ; he returned not later than October 1920. But Sarah and Henrietta did not return to Australia until February 1922. They had other

resources besides the earnings of Marchmont and Taree to sustain the expense of their tour. Not long after her return Henrietta fell ill and her brother George does not appear to have mentioned any relevant matters of business to her until about December 1922. He then told her that some difficulties had arisen, difficulties of which she gave an account that is by no means clear or fully intelligible. But her account includes statements which she attributes to George that a nephew, Gordon Greenwood, and a bookkeeper had been going through the books from the beginning and disputing certain matters ; that the taxation authorities were claiming that Taree was George's station and not Henrietta's ; that Gordon

Greenwood insisted upon George giving a cheque for a certain amount or two amounts ; and that, if he did give his cheque for these amounts Marchmont would recredit Henrietta with the full amount that station owed her.

Now under the law of Queensland, then in force, the Commissione of Income Tax had a discretion to assess the tax upon the income of a partnership, if that income exceeded £2,500, as if it were the income of an individual person instead of assessing the partners in their individual capacities. There is no direct evidence that he proposed to exercise this power and to do so on the basis that Taree and Marchmont belonged to one firm. But the return of income from Taree had been sent in under the name of Henrietta as the taxpayer.

As far back as 5th December 1916 the Federal Commissioner of Taxation had been explicitly informed that Taree was owned by Henrietta and not by George Porter. Returns of War Time Profits had also been sent in under her name as owner of the business there carried on. It appears that for the year ending 30th June 1918 her War Time Profits Tax was paid on 23rd June 1920 ; but her assessments generally for that tax were still under review in June and July 1927. At the latter date the question whether the amount which had been owing by Taree to Marchmont was borrowed money was under discussion and the accountants who superintended the books then stated that a former Commissioner of Taxes had insisted that Taree should immediately repay by cheque the amount of borrowed

money and that this was done on 3rd January 1923 by repaying £19,903 : IO : 3d. In fact such a payment was made from the Paree account to the Marchmont account on that date. It is the payment of which the appellant Henrietta complains in the present proceedings, complains on the ground that it meant the misapplication of her moneys to the purposes of the firm of George Porter & Co as proprietors of Marchmont.

The circumstances stated point to the correctness of the suggested explanation of the ~~amount~~ payment, an explanation which, as I understand it, both parties are disposed to adopt. The suggested explanation is that when the Queensland Commissioner of Income Tax saw that in the income year ending 30th June 1920 a sum

of £19,903 : 10 : 3d shown as owed by Henrietta Porter as proprietor of Taree to George Porter & Co as proprietors of Marchmont had been written off as discharged, although not paid or satisfied by any apparent consideration, that officer suspected that the amount had never been a debt and that there was one family partnership carrying on both undertakings, or that George was sole proprietor of both, and proposed accordingly, unless convinced that he was mistaken, to aggregate the income and assess George , either as a partner or as sole proprietor, upon the footing that the total income was the income of an individual taxpayer. He insisted that, if in truth the amount written off were a debt, it should actually

be repaid in a manner that would establish the reality of the payment and the truth of the statement that it was an actual debt. What was actually done appears clearly enough from the accounts and the documents. On 27th December 1922, George drew a cheque or order for £8,500 upon the Marchmont account of the wool selling brokers who under his direction paid it into the Taree account of the same brokers. This was for the purpose of replenishing the Taree account which was thus brought up to a credit of £21,398 : 17 :9d . Then, on 3rd January 1923, he drew a cheque or order against this credit in the Taree account for £19,903 : 10 : 3d which was paid into the Marchmont account. The result was that an advance was made of £8,500 by Marchmont to Taree and that Taree paid Marchmont

£19,903 : 10 :3d. On the assumption that the Marchmont account was that of George Porter & Co, being a firm of which at that time Henrietta was not a member, and that the Taree account was that of Henrietta, it meant that she had borrowed from her brother and sisters £8,500 and had paid them a sum of £19,903 : 10 3d.

The advance was repaid by Henrietta Porter in two payments, one made on 30th June 1924 and the other on 1st July 1926. As from March 1924 the name of the Taree account with the wool selling brokers was changed from George Porter Taree ~~Ac~~ Account to Miss Henrietta Porter. On 30th June 1924 she drew a cheque for £4000 which was paid to the credit of the Marchmont account and on 1st July 1926 she drew another cheque for £7,853:18:8d which

was dealt with in the same manner. This figure was that of the balance shewn by the Marchmont ledger account in the Taree books as owing to Marchmont, and closed that account. It is thus clear that if at the end of 1922 the appellant Henrietta Porter was beneficially entitled to the amount standing at the credit of the Taree account with the wool selling brokers and no justification existed for paying the firm of George Porter & Co the sum of £19,903 : 10 : 3d she was deprived of that amount by what George Porter did.

When the Taree books came to be written up the transaction was shown in the Marchmont ledger account as a transfer under date 3rd January 1923 and a corresponding entry was made under date

30th June 1923 - " Amount wrongly written off June 1920 ".

In the account headed " Miss H.Porter Capital " her capital was debited with £19,903 : IO : 3d under the entry " 1923 June 30;to " Marchmont a/c wrongly written off. "

In the Marchmont books,on the other hand, it would seem that at first the payment was merely credited to Taree in the Taree ledger account without any corresponding debit against Taree. It would thus operate on the face of the account to create a debit against Marchmont in favour of Taree. On 15th March 1923,Clara Greenwood died and it became necessary to make up for the purpose of death duties an account of her interest in Marchmont as at that date shewing its value. The account made up showed,amongst other things,

a debit owing by Marchmont to Taree. When George Porter was shown this account he questioned its correctness. It was then found that no entry appeared in the books establishing or reinstating a liability in respect of which the £19,903 : IO : 3d had been paid. In the Taree ledger account an entry was then made to the debit of Taree under June 30 1923, " Adjustment - Amount " written off June 30 1920 in error this being at that time a debt " Taree to Marchmont £199.903 : IO :3" . The amount was carried in proportions of one half to George and a quarter each to Sarah and Clara deceased, to the respective capital accounts of the partners which were increased accordingly. A narration was made in the journal as follows :- " Writing back amounts wrongly entered

" June 1920. At that time Taree owed Marchmont £19,903 : 10 : 3 .
" This amount was written off; see etc.... Later on Taree paid
" Marchmont £19,903 : 10 : 3 which, the indebtedness having been
" written off, placed Taree a/c in credit - a false position which
" above entry rectifies. " A fresh balance sheet was made up for the purpose of ascertaining the value of Clara Greenwood's interest in the Marchmont undertaking. This time Marchmont was shown as having been on 15th March 1923 a creditor of Taree and the value of her interest in Marchmont was consequently increased. But George then objected that Taree was not in debt to Marchmont. The accountants, however, in the course of a discussion the substance of which can only be conjectured, convinced him that the balance sheet must be submitted in its second form and he gave his approval.

A large body of oral and documentary evidence was adduced at the trial, but, owing to the failure to call some persons as witnesses and to the deaths of others, the material facts must depend on inference and upon the not very clear or satisfactory evidence of the three ladies. But, once the general circumstances of the case are apprehended, the matters upon which the liability of George depends reduce themselves to relatively short questions. The first of them is whether, before going to Europe in March 1920, Henrietta had become solely entitled to the leases and the undertaking called Taree free of the liability in the sum of £19,903 : 10 : 8 to the proprietors of that called Marchmont. Everything, in my opinion, points to the conclusion that it was

George's intention to place her in that position. The one thing that could not account for the writing off in 1919-1920 of that sum is mistake or error. It is clearly a considered and deliberate act intended to represent Henrietta as discharged from liability to the owners of Marchmont. To draw a picture of a far sighted and continually developing pretence to conceal a real partnership in both stations appears to me not only to disregard the consideration that it would be *à priori* more probable that George as well as his sisters would desire to establish themselves in accordance with the law, but also needlessly to deny the truth or significance of the evidence that he repeatedly professed his intention of obtaining a place for each of his sisters, that he

stated to the family and to strangers that Taree was Henrietta's property, and that at every point where the ownership of an interest in the stock or profits of Taree might have become a question, e.g. at the death of Clara and the death of George, it was assumed as a matter of course that no interest existed except Henrietta's. It must must be borne in mind in considering the effect of various incidents that the declared intention of George was to establish each of his sisters as the owner of a property by progressive steps, taking a commencement in the family division of New Park and depending upon events and opportunities arising at a necessarily indefinite and possibly remote time. Meanwhile George occupied the position of a trusted brother devoting himself to the management of the pastoral affairs

of the family. His sisters, although not uninformed about such matters, resigned themselves entirely to his control. It was inevitable that over a period of years he should on occasions fail to observe in some details the niceties of proprietary rights and the strict division and attribution of moneys and it was natural for him to use the first personal possessive pronoun singular with some latitude. Thus an early statement to a banker by which he included Taree among his available assets can have no weight against the many countervailing circumstances. The letters to Sarah and Ida of 6th December 1924, signed on his behalf by Gordon Greenwood, were much relied upon as tending against the view that George acknowledged Henrietta to

be the owner of Taree. I pass by the question of their admissibility. I think a careful study of the letters shows that, in the first place, they reflect not the mind of George but that of Gordon Greenwood, and, in the next place, that they are based on the view that Taree is to be Henrietta's portion and, in the third place, that they constitute the formulation of an intricate plan of cross payments designed to bring up the amount of the share of Ida Tait, who had recently joined with the Greenwood family in the acquisition of Langton Station, and to do so without the withdrawal of cash from the family enterprises. The letters are written after the repayment of the £19,903 : 10 : 3d of which Henrietta now complains, a repayment which Gordon

Greenwood supported, and I think understood better than George. Further, it must not be forgotten that, expert as George was at pastoral management and perhaps the substance of business, he was not well equipped in relation to book keeping and documents. Indeed one witness pronounced him illiterate. But dominant as George's desires were, it is not enough that he should resolve that his sister Henri should take Taree in lieu of her share or interest in the proceeds of the operations upon Marchmont. His resolve or proposal must have been communicated to his sisters and they must have assented to it. That this was sufficiently done appears from their evidence, which on this point is so strongly

supported by circumstances and by general probabilities that it should be accepted. The objection that the writing down of capital in the Marchmont books does not reflect a setting off of Henrietta's claim in reference to Marchmont for Marchmont's claim upon Taree, is of course based upon logical considerations. If Henrietta's one eighth share were, so to speak, applied to satisfy her liability to the partnership, the consequences clearly ought not to have been those shown by the division of a reduction of £19,903 : 10 : 3d among George, Clara and Sarah , half to George and one quarter each to his two sisters. But again, even apart from the possibility that George did not grasp the accountancy, we are dealing with the arrangement of a brother who pursued his

sisters' advantage at the expense of his own in very many matters. At the same time, he received the benefit of the sum of £2871 : 13 : 5d owing in respect of the Island to Taree. It was difficult to make an accurate adjustment as between himself and his sisters Clara, Sarah and Ida without disclosing on the face of the books that Henrietta had some locus standi in relation to Marchmont, a disclosure he doubtless feared to make. All things considered therefore it was natural enough for him to adopt a course more favourable to his remaining sisters and suffer half the capital reduction himself.

A matter upon which little was said during the hearing of the appeal was the circumstance that on 7th June 1921 a formal

deed of partnership in respect of the operations on Marchmont was drawn up between George,Sarah and Clara. The term was for five years from 1st July 1918, a date the reason for which does not appear. The making of such an agreement is at least consistent with the view that Henrietta was altogether out of Marchmont and that Ida's interests must depend upon future provision.

I am of opinion that the proper conclusion from the facts is that George,Clara and Ida in consideration of Henrietta relinquishing any claim to share in the earnings of Marchmont and in respect of the moneys provided by her for its purchase discharged her from all claims on their part in respect of the

moneys, or moneys worth, provided by them in the purchase of Taree. I do not think that it was ever intended that the Marchmont leases should be held by George, Clara, or Sarah otherwise than on their own behalf or that Henrietta should hold the Taree leases otherwise than beneficially. I do not see how any illegality in the rights discharged on one side or the other could affect the authority of George for his subsequent application in 1923 of the £19,903 : 10 : 3d, but there does not appear to be such an illegality. The result of what was done at the end of 1919 and the beginning of 1920 is, in my opinion, that from then on it was incumbent upon George in the management and control of the family affairs to treat Taree as an

undertaking belonging exclusively to Henrietta and to administer it for her benefit accordingly. That he intended to do so is, I think, clear. But the requirement of the Commissioner of Income Tax placed him in an awkward dilemma. If George, or those acting for him, met it by explaining that Henrietta had an interest in the undertaking conducted upon Marchmont which was set off against the debt, it would not be easy to foresee the consequences which the disclosure might produce when the Commissioner communicated it to the Crown Lands Office. On the other hand, unless the disclosure was made, no truthful explanation could be given of the writing off and no explanation could be made which would give it any better appearance than a voluntary forgiveness

of the debt. George seems to have undergone a period of anxiety and hesitation, but, at length, to have given way to the pressure of circumstances aided, I think, by the persuasion of Gordon Greenwood. The dangers between which it was necessary to pass were the forfeiture of the Marchmont leases, on the one hand, and the aggregation of the family income, on the other. To seek to avoid these dangers by appropriating to the joint account of George Porter & Co £19,903 : 10 :3d of money belonging to Henrietta was not within the scope of the very wide authority under which he managed the latter's affairs. He was clearly her fiduciary agent and unless he obtained her particular authority freely given for the payment away of so large an amount, his act

was a breach of duty, involving him in a personal obligation at law and in equity to make good the sum. But, at this point, a question arises which is not the least difficult in the case. Did George obtain her express authority for what he proposed ? Her account of what passed between them in December 1922 suggests that he discussed with her the difficulties which had arisen and told her of his perplexity.

The learned primary Judge felt some general distrust of the testimony of the sisters and, although I cannot agree in some of the views he expressed as to the significance of the phraseology they employed, the record shows that some of their answers were not very satisfactory . Is Henrietta suppressing

the fact that her brother fully explained that he proposed to pay away her money absolutely and that she with a full understanding authorized him to do so ? On the whole I think not. I believe that George himself intended to do no more than pay a cheque to Marchmont which would satisfy the Commissioner but would be afterwards made good by Marchmont. Probably he did not fully grasp the implications of the payment. This is reflected both in the state of the accounts when the Marchmont entries were first made and in his own objection to the first balance sheet made up after Clara's death which showed Marchmont a debtor to Taree, and to the second which showed Taree a debtor to Marchmont. I do not think that Henrietta ever understood that she was

giving up £19,903 : 10 : 3d,and I do not think that he made any clear explanation to her of the intended transaction. What put the payment beyond recall was the manner in which the books of Marchmont were entered up when the second balance sheet,as at Clara's death,was prepared, together with the subsequent payment of the £4,000 in 1924 and the final payment in 1926 of £7,853 : 18 8d. which cleared the account. It does not appear what was the occasion for these payments. It was said that Henrietta subsequently acquiesced in what had been done and so lost her right to complain. Though the learned primary Judge was prepared to infer that she learnt what had happened,I am unable to find any sufficient grounds for that conclusion. Indeed,on

the contrary, I doubt very much whether she obtained any real understanding of the position, at all events, until shortly before the institution of the suit. There are other difficulties in the way of a plea of acquiescence but for the reason given it must, in my opinion, fall to the ground in any case.

Apart, therefore, from the effect of lapse of time, I think that George Porter deceased was liable to make good to the appellant Henrietta the sum of £19,903 : 10 : 3d.

The present suit was begun on 8th May 1936, that is less than six years after George's death but much more than six years after the misapplication of the plaintiff-appellant's money.

Sec. 16 of the Queensland Frauds and Limitation Act of 1867 is based upon 21 Jac. 1 c.16 sec. 3. The suit is for equitable relief and the limitation of six years which the provision imposes upon actions at law does not directly apply by the force of statute, itself ; but if a cause of action upon which the claim to equitable relief is founded possesses sufficient analogy, then under the principles administered by Courts of Equity the limitation would be applied to the suit. Where the proceeding is against a person occupying the situation of a direct or express trustee and it has reference to property which has come under his control in that capacity, Courts of Equity have not seen any resemblance to the causes of action expressly covered by the

statutory limitation sufficient to justify an equitable application by analogy. This principle not only operates when property is transferred to or otherwise vested in a trustee upon trusts expressly declared, but it applies also whenever a person occupying a fiduciary position undertakes in that character the control of distinct property on behalf of another. If he voluntarily assumes to control, on behalf of others, assets which are not to become his beneficially, it does not matter that no property in the assets is vested in him or that the position he occupies is ordinary described by some other name than trustee. " The possession of an express trustee was treated by the Courts " as the possession of his cestuis que trustent, and accordingly

" time did not run in his favour against them. This disability
" applied,not only to a trustee named as such in the instrument
" of trust,but to persons who,though not so named,had assumed the
" position of a trustee for others or had taken possession or
" control of prpperty on their behalf, such (for instance) as
" the persons enumerated in the judgment of Bowen L.J. in Soar
" v Ashwell 1893 2 Q.B. 390 , or those whose position was in
" question in Burdick v Garrick L.R. 5 Ch 233, in re Sharpe
" 1892 1 Ch. 154, Rochefoucauld v Boustead 1897 1 Ch 196 ,
" and Reid- Newfoundland Co. v Anglo- American Telegraph Co
" 1912 A.C. 555. These persons,though not originally
" trustees,had taken upon themselves the custody and administration
" of property on behalf of others ; and though sometimes
" referred to as constructive trustees,they were,in fact, actual
" trustees,though not so named. It followed that their
" possession also was treated as the possession of the persons
" for whom they acted, and they,like express trustees,were
" disabled from taking advantage of the time bar. " per Lord

Cave in Taylor v Davies 1920 A.C. 636 at pp.650-1. See further Brunyate Limitation of Actions in Equity pp.79-82.

In the present case George assumed control of Taree and of the moneys arising from the business there conducted and he exercised that control on behalf of his sister Henrietta. At the time in question the account with the wool selling brokers stood in his name and he was in point of law their creditor or debtor according to the state of the account. But he occupied a fiduciary position in relation to this account as in relation to the rest of the affairs of Taree. Wide as was the power of acting on her behalf reposed in him by Henrietta, the assets were

not his ; he was not entitled to treat them as his own property. He was bound to account specifically for what stood to his credit at the wool selling brokers' account, just as ultimately, if there had been an unsatisfied liability on that account, he could have resorted to the assets of Faree to discharge it, or called upon her to indemnify him. In my opinion, he held the account as a fiduciary agent and, like a direct trustee, was unable to invoke the application by analogy of 21 Jac. 1 c .16. But by sec.52 of the Trustees & Executors Acts 1897 (Qd.) the provisions of sec. 8 of the English Trustee Act 1888 have been adopted. Under this enactment the liability of George would be barred at the end of six years from the accrual of the cause of action for his

breach of duty,unless the case fell within the exception as a proceeding to recover trust property or the proceeds thereof previously received by the trustee and converted to his own use. There is no reason for limiting this exception to dishonest receipt or conversion. It extends to honest mistake and to conversion arising from praiseworthy motives.

There can,I think,be no doubt that the partnership of George Porter & Co consisting of himself,Sarah and Clara Greenwood or her executors and possibly Ida received the benefit of the sum of £19,903 : 10:3d which,upon the view I have expressed,belonged to Henrietta. And they received it by reason of the act of George

in drawing the cheque on 3rd January 1923 and paying it into their account, or by that act coupled with the subsequent writing back of the liability of Taree and the payments on 30th June 1924 and Ist July 1926, which were made by him in the exercise of the authority given to him by Henrietta to operate on the account after it was put in her name. The case is quite unlike that of re Gurney 1893 I Ch.590, where a trustee advanced money on an insufficient security and the advance was applied to the payment of an overdraft with a bank in which the trustee was a partner. Here the money was applied directly to the joint use of George himself and his sisters, being members of the partnership. As a partner, he was responsible for the liabilities of the firm

which received the money and was entitled as a tenant in common to the entire assets which assets were of course all applicable to the purposes of the partnership.

In my opinion the appropriation of the moneys to the use of himself and his co-partners amounted to a conversion to his own use of the entire sum and not only of the half share by which his capital was increased.

A separate defence of laches was argued. No change of position on the part of George or his executors in consequence of the delay was proved and, on the view of the facts I have adopted, it is not easy to see how the appellant's rights could be barred

because she did not discover what had actually been done by her brother in respect of the £19,903 : IO :3d and prosecute her claim to that sum earlier.

In my opinion the appeal should be allowed with costs. A decree should be made declaring that the defendants as executors are liable to make good to the plaintiff out of the assets of their testator the sum of £19,903 : IO : 3d.

I think that the plaintiff should receive the costs of the suit de bonis testatoris.