M. 2 of 1943

IN THE HIGH COURT OF AUSTRALIA.

THE WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY COMPANY LIMITED & ANOR.

V.

THE PERPETUAL EXECUTORS TRUSTEES AND AGENCY COMPANY (W.A.) LIMITED.

REASONS FOR JUDGMENT.

Judgment delivered at MELBOURNE

on 11th June, 1943.

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

C.2774

WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY CO.LTD.
AND ANOTHER (EXECUTORS)

v.

PERPETUAL EXECUTORS TRUSTEES AND AGENCY CO.(W.A.) LTD.
(EXECUTOR)

ORDER

1. Set aside the judgments of the Supreme Court of Western Australia dated 19th May 1942 and 29th October 1942.
2. Order that the plaintiff as the executor of Elizabeth Mary Ann Collins deceased do recover against the defendants the West Australian Trustee Executor and Agency Co.Ltd. and Copeland James Lewer the sum of £317.0.3 for interest mentioned in the amended Statement of Claim to be levied of the real and personal estate and property acknowledged in paragraph 3 of the Defence to be in the hands of the defendants as executors of the said R.E. Lewer to be administered and so far as the same shall not extend to be levied of the other real and personal estate and property of the said R.E. Lewer which shall hereafter come to the hands of the defendants as such executors to be administered.
3. Declare that the said defendants the executors of the said R.E. Lewer deceased were after the expiration of one year from the death of the said R.E. Lewer guilty of a devastavit or breach of duty in carrying on the business of the station at Dairy Creek in the pleadings mentioned.

4. Direct an inquiry before the Supreme Court of Western Australia or before such officer of that Court as it shall direct:-

(a) Whether by reason of such devastavit or breach of duty the said defendants have within six years next before the 16th July 1941 wasted, diminished or suffered to be lessened in value the said real and personal estate and property aforesaid of the said R.E. Lewer deceased called the station at Dairy Creek and:-

(b) Whether the said defendants are now by reason of such devastavit or breach of duty unable to satisfy all or any and what part of the above judgment for the sum of £317.0.3 and all or any and what part of the sum of £6,340 being the balance of purchase money payable to the plaintiff as such executor under the agreement in writing dated the 30th December 1927 in the pleadings mentioned out of the aforesaid real and personal property and estate of the said R.E. Lewer called the station at Dairy Creek.

5. And let the said Supreme Court or its officer certify accordingly.

6. And the plaintiff shall be at liberty to sign judgment and to recover against the said defendants the sum or sums so certified to be levied of the proper real and personal property and estate in Western Australia of the said defendants.

7. Order that the plaintiff as such executor do recover against the said defendants its costs of the action and of the appeal to the Supreme Court

and of the appeal to this Court up to the date of this order to be levied of the said real and personal estate of the said R.E. Lewer deceased acknowledged to be in the hands of the said defendants as such executors as aforesaid if they have so much in their hands to be administered and if they have not so much then to be levied of the proper real and personal estate and property in Western Australia of the said defendants.

8. Further questions of costs reserved for the consideration of the Supreme Court.

THE WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY COMPANY LIMITED AND ANOTHER.

v.

THE PERPETUAL EXECUTORS TRUSTEES AND AGENCY COMPANY (W.A.) LIMITED.

REASONS FOR JUDGMENT. LATHAM C. J.

THE WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY COMPANY LIMITED AND ANOTHER.

v.

THE PERPETUAL EXECUTORS TRUSTEE AND AGENCY COMPANY (W.A.) LIMITED.

REASONS FOR JUDGMENT. LATHAM C. J.

The appellants are the executors of the will of the late Rose Mary Lewer and the respondent is the executor of the will of the late Elizabeth Mary Ann Collins. The appellants were defendants in an action in which the plaintiff, the respondent, sought remedies in relation to a debt originally owed by Mrs. Lewer to Mrs. Collins. The appellants had carried on the pastoral business of their testatrix since her death in 1933 with the assent of the beneficiaries under her will. Seasons became bad in 1935 and there were serious losses. The defendants raised the defence that the plaintiff had assented to the carrying on of the business and accordingly was unable to charge the defendants upon the basis that the business had (as against the plaintiff) been carried on improperly. The Supreme Court of Western Australia (Wolff J.) found against this contention and his judgment was upheld by the Full Court of the Supreme Court. The defendants now appeal to this Court.

Mrs. Collins and Mrs. Lewer were sisters and carried on in partnership a pastoral business upon a station known as Dairy Creek. Mrs. Collins had a one-third share and Mrs. Lewer a two-thirds share in the business. On the 13th December 1927 the partners agreed to dissolve the partnership as from 10th January 1928 and Mrs. Collins sold her one-third share to Mrs. Lewer. The purchase money was £13,000, payable £500 as deposit, a further £500 on the 10th January 1938, and the balance by twelve annual payments of £1000 each on the 10th July in following years, with interest at 5½%.

Mrs. Lewer /

Mrs. Lewer undertook to pay all the debts of the partnership. The agreement contained a provision that if the purchaser did not pay the balance of the purchase money and interest as provided, the vendor should be at liberty to rescind the contract and to resell the one-third share and interest in the partnership.

On the 15th March 1928 a document under seal described as a mortgage was executed by the parties, under which the mortgagor (the purchaser) covenanted to pay the mortgagee (the vendor) on the 10th July 1928 the whole of the outstanding purchase price of £12,000 with interest, with a proviso that if the mortgagor paid instalments and interest as provided by the contract, the mortgagee would accept payment by instalments and would not take any steps to obtain payment of the sum of £12,000 by action, sale, possession, foreclosure or otherwise, unless the mortgagor should commit an act of bankruptcy or suffer a judgment or order of the court to be enforced against her by execution. By this document the mortgagor charged the one-third share in the partnership with the payments contracted to be made. The mortgage also contained a provision that in each year in which the annual payment of interest should not be duly made the mortgagee should be entitled to receive out of the one-third share of the net profit of the business the interest and principal due.

Mrs. Collins died on the 28th June 1928 and the respondent company proved her will as executor.

Payments were duly made under the agreement until the 10th July 1931, when default was made. On the 18th August 1931 the Mortgagees' Rights Restriction Act 1931 came into operation. This Act defined "mortgage" so as to include any agreement whereby security for payment of money was granted over any land, and provided that a mortgagee should not, without the leave of the Supreme Court, call up or demand payment from the mortgagor of the whole or any

part /

part of the principal moneys secured by the mortgage, commence or continue any action for the recovery of such moneys, or exercise any power of sale under the mortgage. At a later stage a question arose between the parties as to the applicability of this Act to the memorandum of charge to which reference has been made.

On the 15th September 1933 Mrs. Lewer died and probate of her will was granted to the defendants. By the will the whole of her estate was bequeathed to her executors in trust for her two daughters. The trustees were authorised to carry on any business in which Mrs. Lewer was engaged at her death for the benefit of the children, or to sell and convert it at their discretion. The trustees carried on the business and were still carrying on the business when the writ in this action was issued.

At the time of the death of Mrs. Lewer the amount owing under the agreement was £9000 for principal and £1,746 for interest, a total of £10,746. (As default had taken place the whole of the outstanding principal had become due). Payments were made by Mrs. Lewer's executors from time to time in response to demands made by the plaintiff. At the date when the writ was issued the amount owing was £317:0:3 for interest and £6,340:5:4 for principal.

At the time of the death of Mrs. Lewer her assets exceeded her liabilities by over £8000, as shown by defendants' answers to interrogatories. There was a contingent liability on a guarantee given by her in respect of advances to her husband for over £16,000, but this liability has at all material times remained a contingent liability. In the absence of an order of the Court, an executor is not entitled as against actual creditors to make provision to meet the possible claims of contingent creditors: Williams on Executors, 11th Ed. Vol. pp.785-7, stating the law before the Administration of Estates Act 1925 (15 Geo. V.c.23): Laws of England 2nd Ed.Vol.14 p.330. All the unsecured debts were paid off in 1934, and (apart from the contingent liability under the guarantee) the only remaining creditors were the Bank of New South Wales, which held first mortgages upon the assets of the estate, and the plaintiff as executor of Mrs. Collins.

The surplus /

The surplus of assets over liabilities decreased to £3,647 on the 30th June 1934, but on the 30th June 1935 there was a surplus of assets of £5,750. The year 1935 and following years were years of most severe drought and in 1937 the liabilities exceeded the assets. On the 30th June 1940 the liabilities exceeded the assets by over £4000. Thus the actual result of the carrying on of the station was that a surplus of over £8000 was converted into a deficiency of over £4000. In the same period the number of sheep on the station decreased from over 33,000 to between 4,000 and 5,000. It is therefore clear that the carrying on of the station resulted in losses which made it impossible for the estate to meet in full the liability to the plaintiff. It is found as a fact by the learned trial Judge, and there is evidence to support the finding, that the estate could have been realised in the years 1934 and 1935 so as to produce enough money to pay the debt.

The terms of the will authorised the trustees to carry on for the benefit of the beneficiaries, and the trustees in November 1934, and again in November 1938 obtained from the beneficiaries an express authority and assent to the carrying on of the station. The authority contained in the will and the authority given by the beneficiaries did not, however, in any way affect the rights of a creditor. But if a creditor assents to the carrying on of the business of a testator, the executor who carries on the business is entitled, as against the creditor, to be indemnified out of the assets of the estate (see Dowse v. Gorton 1891 A.C.190). The principal question which has been discussed on this appeal is whether the plaintiff assented to the carrying on of the business.

The evidence shows that the plaintiff company knew that the business was being carried on. The company pressed for payment from time to time, and received payments on account from time to time. It knew that the moneys for these payments were provided in part out of the proceeds of wool clips produced in the course of carrying on the business, and in part out of moneys borrowed by the defendants from the Bank of New South Wales for the purpose of carrying on the business. The plaintiff, after asking for payment,

consented /

consented in 1934 to wait for the realisation of the wool clip, and also actually pressed the defendants to obtain moneys from the bank in order to satisfy the debt. It is contended for the defendants that this court of conduct amounts to an assent by the creditor to the carrying on of the business.

In Dowse v. Gorton (supra) it was held that where a business has been carried on by executors under an authority conferred by the will, they are entitled to an indemnity out of the whole of the testator's estate, as against all persons claiming under the will. Such an authority, however, does not give to the executors any right to be indemnified as against the creditors of the testator. The executors may, as against both creditors and beneficiaries, carry on the business of a testator for such reasonable time as is necessary to enable them to sell the business as a going concern, and they are entitled to the indemnity in respect of liabilities thereby incurred during such a period. If, however, as in the present case, the executors carry on for a longer period and losses are incurred, then the executors become personally liable to the creditors of the testator to the amount of the losses so incurred and they have no right of indemnity out of the estate as against those creditors in respect of liabilities incurred by them in carrying on the business. It was held in Dowse v. Gorton that the mere fact that a creditor stood by while the business was being carried on and did not immediately take steps to enforce his debt would not of itself entitle the executors as against him to be indemnified out of the estate: see 1891 A.C. at p.199 per Lord Herschell L.C.

It is a question of fact whether the creditors have assented to the carrying on of the business of a testator. Dowse v. Gorton shows that merely standing by with knowledge does not amount to assent in the relevant sense. Assent in this sense means agreement with an executor that the business of his testator should be carried on for the benefit of the creditors as distinct from being carried on merely for the benefit of the beneficiaries. In Dowse v. Gorton it was held on the facts that the business was being carried on, not merely "for the benefit of those interested under the will", but also "for the purpose of

securing /

"securing the payment of the debt due" to the creditors: (1891 A.C. at p.204). In Re Oxley 1914 1 Ch. 604 the case of Dowse V. Gorton (supra) was explained and applied in the manner above stated. It was held that there must be, as Buckley L.J. said at p.616, "an active affirmative assent. Mere standing by with knowledge and doing nothing is not sufficient." A fortiori, if a creditor continually presses for payment of his debt when he knows that the business is being carried on, if it is clear that his contention is that in any event, that is, whether the carrying on of the business is or is not successful, he is entitled to be paid in full, this does not amount to assent so as to deprive the creditor of his full rights against the executors in respect of original assets of the testator. It is true that, as explained in Dowse v. Gorton, (at pp.203-4), if a creditor "comes for an administration decree" and seeks to obtain payment of his debt out of assets acquired by an executor only in the course of carrying on the business of the testator, he cannot claim the benefit of those assets without submitting to the executors being indemnified against the liabilities which they have incurred in producing or obtaining those assets. If a creditor makes a claim against such assets, he is regarded as approving the carrying on of the business, so that he is in the position of assenting thereto. In the present case, however, no claim is made, for administration of the estate and the only question is whether, upon the facts of the present case, the plaintiff agreed to the carrying on of the business for the purpose of securing the payment of the debt due.

The evidence shows that the plaintiff again and again pressed for payment of the debt and that from time to time payments were made on account. It is true that the creditor waited in 1934 until the proceeds of the wool clip came in and that the creditor was aware that the bank was financing the defendants in their management of the estate, but I agree with the opinion of the learned trial Judge and of the Full Court of the Supreme Court that there is no evidence to show that the creditor agreed to the carrying on of the business for the purpose of paying the debt due to it as executor of the will

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of Mrs. Collins. The will of Mrs. Lewer provided for the carrying on of the business for the benefit of the beneficiaries. The defendants, in carrying on the business, exercised this power in order to improve the position of the beneficiaries. On the 10th November 1934 they obtained an express authority from the beneficiaries to carry on Dairy Creek station and an indemnity against any loss incurred by carrying on the station. In November 1938 the defendant company wrote to the beneficiaries, informing them that the bank was of opinion that a further authority and indemnity should be obtained from the beneficiaries. The letter stated that the station had been carried on at the express request of the beneficiaries and urged that, in view of the fact that the Collins family were pressing for payment of the debt due, the beneficiaries ought to give a fully effective authority and indemnity. The beneficiaries did on the 23rd November 1938 give the further authority and indemnity which was requested. The document recited the provisions of the will of Mrs. Collins and the agreement for sale of her share in the partnership business to Mrs. Lewer and, further, that there was owing in respect of the sale as and by way of balance of purchase money approximately the sum of £6,340. Other recitals were in the following terms: "(h) With the consent of the beneficiaries the executors have carried on the said Dairy Creek station since the date of the death of the said Rose Emma Lewer deceased, but have not obtained the consent of the creditors of the estate of the said deceased to such carrying on. (i) The beneficiaries have agreed to enter into and execute these presents for the purpose of indemnifying the executors against all liability to the creditors of the estate of the said deceased, or otherwise howsoever as a consequence of the executors so carrying on the said station." By the operative words of this indenture an authority to carry on was given to the defendants, together with an indemnity against all actions, etc., brought against them in respect of carrying on the station.

The recitals /

The recitals in this document, to which the plaintiff was not a party, do not operate by way of estoppel in favour of the plaintiff, but they constitute very strong evidence indeed that the consent of the plaintiff to the carrying on of the station had not been obtained and that the defendants were carrying on the station with full knowledge of the personal risk which they were running. In my opinion there is ample evidence to support the finding of the learned trial Judge that the plaintiff did not assent to the carrying on of the station so as to require it to allow the executors to be indemnified out of any assets of the testator (whether existing at the death, or subsequently acquired) in priority to the payment of the debt in respect of which this action is brought.

In the case of Re Millard 72 L.T. 823 Lord Esher M.R. (who, though he dissented from the judgment of the Court on the facts, agreed with the other members of the Court of Appeal as far as the law was concerned) said "If an executor carries on the business for longer than a reasonable time without the consent of the creditors, he is a wrongdoer as against the creditors. They have, and I apprehend each of them has, a right to hold him personally liable for any loss by reason of his so carrying on the business." This is the principle which has been applied, and in my opinion has rightly been applied, to the decision of the present case.

If the executors still had in their hands assets of Mrs. Lewer which came to their hands at the time of her death, and if such assets were sufficient to satisfy the plaintiff's claim, there should (apart from any statutory restrictions contained in the Mortgagees' Rights Restriction Act 1931, to which I refer later) be judgment for the plaintiff against the defendants for the amount of the debt de bonis testatoris and for costs against the defendants de bonis testatoris et si non bonis propriis. Such assets, however, are subject to mortgages to the Bank of New South Wales which take priority over the claim of the plaintiff and accordingly they are insufficient to satisfy the debt. The defendants pleaded plene

administravunt /

administravunt praeter, but they failed to establish the plea. The plaintiff has, upon the basis of the facts which in my opinion were rightly found by the learned Judge, established a devastavit, a maladministration of assets, against the defendants. The defendants must therefore be charged upon the basis that they have not fully administered the estate. Accordingly, they are liable to the plaintiff to pay the amount of the debt due to the extent that (1) --------assets of the testatrix are still in their hands and properly available for application towards the payment of the debt, and to the extent of (2) any loss caused to the estate by reason of the devastavit found against them. In order to work out the rights of the parties, there should be an ascertainment of the amount of the debt due and the value of the assets mentioned under (1) above, and of the amount of damages payable under (2) above.

The learned trial Judge made an order under which an enquiry was directed as to the losses incurred in carrying on the business without any limit of time. In the Full Court it was held that the Limitation Act (W.A.) 1935, secs. 38 and 47, applied and that the enquiry should be limited to the period of six years before the amendment of the statement of claim (16th July 1941) which introduced the claim based upon a devastavit. An action based upon a devastavit is an action in the nature of an action on the case - sec. 38(1)(c)(vii); see cases cited in National Trustees Executors & Agency Co. of Australasia Ltd. v. Dwyer 63 C.L.R. 1 at pp.18-19. Thus the period of limitation is six years. Accordingly the enquiry was limited to the period since 16th July 1935. It was contended that the breach of trust constituting the devastavit took place in 1934, or in 1935 before the 16th July, because it was at that time that the loss caused by the failure to realise the estate was incurred. It was therefore urged that the cause of action arose before the 16th July 1935 and that the action was accordingly barred. Time runs under the Limitation Act in this case from the time when the cause of action accrued. In the case of a wrongful investment of trust moneys the cause of action accrues at the time of the investment, and the Courts do not allow

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the intention of the statute to be evaded by holding that there is a continuing breach of trust at each and every point of time during the period for which the improper investment is retained: see Buckland v. Ibbotson (1902) 28 V.L.R. 688, cf. In re Blow 1914 1 Ch. 233 at p.241. But the position is different where the breach of trust consists of a series of acts continued from day to day, as in the case of wrongfully carrying on a business. An active breach of trust continued so long as the business was carried on. The breach of trust would have ceased if and when theexecutors had ceased to carry on the business, but not before. The case is therefore distinguishable from cases in which a breach of trust for which proceedings are barred is followed by a period during which the fault of the executors consists only in a failure to remedy the breach of trust. I am therefore of opinion that the Full Court was right in holding that the Limitation Act was not an absolute bar to the action, but that the enquiry should be limited to the period of six years before the amendment of the statement of claim.

The matter is complicated, however, by the existence of the Mortgagees' Rights Restriction Act 1931. This Act, as already stated, prevents the enforcement of remedies for the recovery of principal moneys secured by any mortgage of land. It is argued for the defendants that the moneys now sought to be recovered include moneys so secured because they include principal moneys secured by the equitable charge of the 15th March 1928. It is said, as against this contention, that as between partners partnership property must be treated as personal estate (see Partnership Act W.A.1895,sec.32), so that the charge is not a mortgage of land, and therefore that the Act is not applicable. It is sought to rebut this reply by the argument that, whether or not the Act truly applies as between these parties in relation to this matter, it is no longer open to either of them to contend that the Act does not apply, because it has been conclusively determined in an action between them that the Act does apply. On the 13th May 1936 the plaintiff, suing as executor of the will of Mrs. Collins, sued the defendants as executors of the will of Mrs. Lewer for principal

and interest /

and interest due under the agreement for the sale of the partnership interest. By amendment the claim for interest was struck out and the action became an action for £2,340:5:4 principal due under the said agreement. The defendants took out a summons to set aside the writ for irregularity, and they obtained an order setting aside the writ on the ground that it was an action for the recovery of principal moneys due under a mortgage within the meaning of the Mortgagees' Rights Restriction Act, and that the leave of the Court to issue the writ had not been obtained as was necessary under section 7 (1)(b) of the Act. There is therefore a binding judicial decision between the parties which (it is said) precludes either party from contending that the Act does not apply to an action to recover the moneys which it is sought to recover in these proceedings.

There is, however, a reply to this contention. In the earlier action the defendants were sued only as executors and not, as now, upon a devastavit. In the present action they are sued, not only as executors, but also personally. The rule is that a party who litigates in different characters in two proceedings is, in contemplation of law, two separate and distinct personae, "so that a decision for or against the man who appears in a representative character is not conclusive in favour of, or (as the case may be) against, the same man appearing in subsequent proceedings as an individual": Spencer Bower on Res Judicata p.128, citing Bainbridge v. Bedderley 1847 2 Ph. 705; Leggot v. Great Northern Railway Company 1 Q.B.D. 599. In the present proceedings the plaintiff seeks a remedy based upon a devastavit by the defendant executors as a result of which they are personally liable to pay damages to the plaintiff - such damages being limited to the amount of the debt as a maximum and also being limited by the loss to the estate occasioned by the devastavit (Re Millard - supra; Lacons v. Warmoll 1907 2 K.B. 350 at pp.361-2, 366). In my opinion there is no objection in law to an order being made for the payment of this amount when ascertained. If the amount of the damages for devastavit is sufficient to satisfy the principal debt, no further question arises; if it is insufficient, the defendants are still bound to pay the balance of the debt out of any

assets /

assets of the testator which are in their hands which are properly available for that purpose; but, by reason of the estoppel arising from the order made in 1936, the plaintiff is not at liberty to contend that the Mortgagees' Rights Restriction Act does not apply in respect of the enforcement of this liability in respect of such a balance of the debt. Therefore in relation to any such balance the rights of the plaintiff are restricted by the Act. No leave of the Court has been obtained to bring proceedings in respect of this amount and accordingly no order for payment of such an amount should be made in the present action. In the present action (so far as more than payment of interest is concerned) the judgment should be limited so as to provide a remedy for the plaintiff in so far as it is entitled to require the executors to make good any loss resulting from the devastavit which has been established. Thus the proper order to make is an order to give effect to this right.

The judgment of the Supreme Court is in the first place a judgment that the plaintiff recover against the defendants the sum of £317:0:3 (the amount of interest claimed) de bonis testatoris. The Mortgagees' Rights Restriction Act does not prevent a judgment being given for the interest due. The Act, however, prevents judgment being given for the amount of principal as a debt due to the plaintiff by the defendants as executors. The form of the claims made by the plaintiff was evidently affected by the existence of the Act. The judgment substantially allows those claims. It is ordered and declared that the plaintiff is entitled to be paid all unpaid instalments of principal and interest in priority to any claim by the defendants for indemnity out of the assets of the estate in respect of debts and liabilities incurred in the course of carrying on the Dairy Creek station, without regard to any contingent liability of Mrs. Lewer. It is further declared that the defendants are personally legally liable to recoup to the estate losses due to the carrying on of the business, but only to the extent to which the assets of the

estate /

estate are insufficient to provide for the payment to the plaintiff of the instalments of principal and interest which are owing. In pursuance of these declarations it is ordered that an account be taken and an enquiry be made on the footing of wilful default as to what assets of the estate have been used in carrying on the business and as to the losses incurred. It is further ordered and directed that the defendants personally recoup to the estate such losses, and a declaration is made that the defendants are personally liable to pay to the plaintiff unpaid instalments of principal and interest in so far as the plaintiff is unable to recover them from Mrs. Lewer's estate, as and when the plaintiff is entitled to demand payment thereof. This liability is limited to the extent that the assets are insufficient to pay principal and interest.

This judgment is not a judgment for an amount of money, except in respect of £317 interest. Otherwise it is a judgment consisting of declarations and of orders for accounts and enquiries for the purpose of ascertaining an amount which may hereafter become payable if the restrictions imposed by the Mortgagees' Rights Restriction Act should be removed, or made inapplicable by an order of the Court. It will also be observed that an account is ordered on the footing of wilful default "as to what assets have been used" in carrying on the business. In my opinion it is possible and proper to provide a remedy more effective than that which is given by this judgment.

The plaintiff made claim for various declarations and for accounts and enquiries in order to obtain some remedy, notwithstanding the existence of the Mortgagees' Rights Restriction Act. The Action was, however, brought as a common law action. It was an action alleging and seeking a remedy for a devastavit, which is a pure common law proceeding. See e.g. Toller on Executors, 7th Ed. "Of Remedies against an Executor at law", p.462; Chitty - King's Bench Forms, 16th Ed., pp.681 et seq., where the forms of pleadings and judgments in such an action are set out.

The Supreme Court Act 1935 of W.A. adopts the Judicature system. Under that system it is the duty of the court to give such remedies as the facts proved may justify. Sec. 24(7) provides that

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the court in the exercise of its jurisdiction in every cause or matter shall have power to grant and shall grant, either absolutely, or on such reasonable terms and conditions as shall seem just, all such remedies whatsoever as any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them in the cause or matter. In the present case neither plaintiff nor defendant has claimed an order for administration and, for reasons which I am about to state, it is not necessary to make an order for administration. A creditor plaintiff who sues an executor for his debt, or for damages for devastavit, does not thereby ask for administration of the Estate.

He does not place himself in the position of being compelled to take an order for administration with enquiries as to other debts due, advertisements for creditors, etc., accounts, and payment of creditors rateably. He can be met by a plea of plene administravit or, as in the present case, by a plea of plene administravit praeter (see paragraphs 3 and 4 of the statement of claim and Bullen and Leake, 3rd Ed., p.579). Chitty (supra) p.682. The latter plea admits assets. These assets are represented by the equity in the assets which are subject to the secured claim of the bank. The defendant pleads that they are not available to meet the plaintiff's claim for the reason that the defendant is entitled to an indemnity out of them against debts incurred in carrying on the business with, it is alleged, the assent of the plaintiff. As such assent was not proved, the admission of assets stands.

If, before the Judicature Act, after a judgment de bonis testatoris there was a return of nulla bona and also of a devastavit, then the damages due to the devastavit had to be ascertained. An alternative procedure allowed the plaintiff to suggest a devastavit and sue on the first judgment. If he adopted this procedure, it was equally necessary to ascertain the damages due to the devastavit: see Bullen and Leake, 3rd Ed., pp.578-9, notes, where this common law procedure is set out. But under the Judicature Act it is no longer necessary to take separate sets of proceedings where the action is

directly /

directly based upon an allegation of devastavit. The Supreme Court Act, sec. 24(7) provides that the Court may exercise the powers and shall exercise the powers to which reference has already been made "so that, as far as possible, all matters so in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided". Thus, under the Judicature system where, as in the present case, the plaintiff founds his action upon an allegation of devastavit, there is no reason whatever for the double set of proceedings which formerly was necessary. The Court may, if it finds that the devastavit has been proved, at once give the proper judgment in a single proceeding.

The unusual form of the claims made by the plaintiff in the present proceeding was (as I have said) evidently due to the existence of the Mortgagees' Rights Restriction Act. A judgment could, notwithstanding the Act, be obtained for the amount of interest due, but, it was considered,(and the Supreme Court agreed) no judgment could be given for the principal due as such. In my opinion, however, the claims made by the plaintiff and the judgment of the Court are based upon an incorrect view of the remedies open to the plaintiff. For example, there is no foundation for the order that the defendants should be charged, not merely upon the footing of the assets which actually came to their hand, but upon the footing of assets which "might, without their wilful default, have been possessed or received," which is the ordinary form of order for an account on the footing of wilful default: see Seton Judgments and Orders, 6th Ed., vol. 2, p.1157. In the present case the defendants are chargeable only with the value of the assets which they did receive, and not for any assets or profits which they might have received. There is no allegation that they failed to get in assets of the estate. Further, the Mortgagees' Rights Restriction Act does not stand in the way of a proceeding for damages for devastavit, though it does prevent the recovery of certain secured debts. It has been decided between the parties that the Act prevents any

judgment /

judgment being given for the principal due under the contract of sale, or under the charge, but a claim for damages stands upon a different footing.

It is still the law that in the absence of an order for administration or of bankruptcy proceedings a vigilant creditor may recover judgment against an executor and obtain payment, notwithstanding the existence of debts other than his own. If he is an unsecured creditor and there are secured debts, or if he is a secured creditor, but securities prior to his own are in existence, then the assets available for him are pro tanto diminished, but the ascertainment of the value of the assets available to satisfy his claim does not require any proceedings outside the ordinary course of the common law.

The finding of devastavit against the defendants entitles the plaintiff to a judgment for damages for devastavit, that is, to a judgment for the amount of damage which the plaintiff has suffered by the devastavit. It may be that the damage suffered by the estate is greater than that suffered by the plaintiff. The claim of the plaintiff amounts to nearly £7000. If the damages suffered by the estate by reason of the devastavit were, say £10,000, the maximum loss of the plaintiff would nevertheless be £7000, and that maximum would be reduced to the extent that assets of the testator were available to satisfy the claim. There should be judgment for an amount of damages which the Court should proceed to ascertain. The damages should be ascertained by determining in the first place the total amount of the plaintiff's debt for principal and interest. Then the value of the assets in the estate at 16th July 1935 available for payment of that debt and which have not been so applied should be ascertained. The plaintiff cannot challenge any carrying on of the business before that date. The loss to the plaintiff by reason of the loss or depreciation of such assets should then be ascertained. This process is merely a process of ascertaining the damages due to the devastavit. Under the older but now (as I think) superseded common law practice, it would have been for a jury to fix the amount. Under the Judicature system when, as in this case, the trial was without a jury, the amount of damages should be ascertained by the Court.

I /

I point out that paragraph 3 of the defence (the plea of plene administravit praeter) admits that the defendants have assets of the testator in their hands, namely the equity in the assets (whatever it may be) after satisfying the claim of the secured creditor - the Bank of New South Wales. This plea also alleges that all the other estate and effects of Mrs. Lewer have been fully administered. The Statute of Limitations in effect establishes this plea in respect of all acts of the defendants before 16th July 1935. The only alleged outstanding debt other than that due to the plaintiff is the debt to the Bank of New South Wales. Thus all other liabilities are to be taken to have been discharged in a due course of administration but subject to the finding of devastavit, which relates to the period after 16th July 1935. The limitation of enquiry by reference to this date will protect the defendants in relation to any liabilities incurred prior to that date in carrying on the business.

All members of the Court agree that the appeal should be dismissed but all are of opinion that some variation should be made in the judgment of the Supreme Court. There is a division of opinion as to the form of such variation. In my opinion the variation should be made in the form proposed by my brother Starke.

THE WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY CO.LTD.

v.

THE PERPETUAL EXECUTORS TRUSTEES AND AGENCY COMPANY (W.A.) LIMITED.

JUDGMENT

MR. JUSTICE RICH.

THE WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY COMPANY LIMITED.

v.

THE PERPETUAL EXECUTORS TRUSTEES AND AGENCY COMPANY (W.A.) LIMITED.

REASONS FOR JUDGMENT. RICH J.

In this appeal two main questions fall for decision. The first is whether the evidence discloses assent on the part of the plaintiff Company to the carrying on of the business in question by the defendant Company. The primary Judge and the Full Court made concurrent findings of a negative character. And after considering the evidence, I have not reached the point of clear conviction that these findings are erroneous, Major v. Bretherton, 41 C.L.R. 62, where at pp. 69-71 Isaacs J. (as he then was) has collected the relevant decisions as to the rule to be observed with reference to concurrent findings on matters of fact. Accordingly the finding by the trial Judge, concurred in by the Full Court, that the defendants had committed a devastavit cannot be disturbed.

The second question relates to the effect of the Mortgagees' Rights Restriction Act 1931 (W.A.) on the relief to which the plaintiffs are entitled. It appears from the judgment of the Full Court that after the death of Mrs. Lewer all her debts were paid, with the exception of those secured to the Bank and Mrs. Collins, together with a contingent liability to the Bank under a guarantee. And the Bank having concurred in the carrying on by the defendant Company of the property in question cannot, in so far as it is an unsecured creditor, complain of the devastavit. It, therefore, follows that the only creditor of the testatrix is the plaintiff Company. But the Mortgagees' Rights Restriction Act according to the construction placed on it by the order of Draper J., 18th June, 1936, which is considered to be res judicata prevents the plaintiff Company from recovering against the assets of the testatrix without leave, although it does not prevent the plaintiff

Company /

Company from suing to recover from the defendants personally the amount lost by the failure of the defendants to realise the assets as from the 16th July 1935. And the plaintiff in this case is not asking for administration of the estate and that the assets shall be applied in a due course of administration so that in the order proposed to be now made he will be "So to speak, a trustee of the action for the benefit of the other creditors", in re Alpha Co. Limited 1903 1 Ch. 203 at p.206. Accordingly if it should turn out that there are any other creditors who have suffered by the devastavit and have not assented to it, they can claim against the amount the defendants are ordered to repay to the estate. But as the evidence appears to show that there are no other creditors, it will not be necessary to have an inquiry as to debts. This does not, however, mean that if there are any such creditors their claims are barred. Now the case presented by the original statement of claim appears to be what is called an old fashioned action of devastavit. But the amendments in the paragraphs of the statement of claim and in the prayers clothe it with an equity dress and it appears to have been treated as such because the orders made by the Supreme Court are outside the scope of a Common Law Judgment. However the facts of the case do not call for a full administration decree and the parties will not be absorbed or sunk in the Serbonian bog of long and complicated accounts and inquiries if an order is made on the lines of that suggested by my Brother Williams.

WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY CO.LTD.
AND ANOTHER (EXECUTORS)

v.

PERPETUAL EXECUTORS TRUSTEES AND AGENCY CO. (W. A.) LTD.
(EXECUTOR)

JUDGMENT STARKE J.

Appeal from a judgment of the Supreme Court of Western Australia in an action brought by the executor of Elizabeth Mary Ann Collins deceased, whom I shall call "Collins", against the executors of Rose Emma Lewer deceased, whom I shall call "Lewer". Elizabeth Mary Ann Collins died on 28th June 1928. Rose Emma Lewer died on 15th September 1933.

The action as originally framed was to recover a sum of £317 for interest under the provisions of an agreement made in 1927 between the deceased Collins and the deceased Lewer for the sale by the deceased Collins to the deceased Lewer of the one-third share or interest of the deceased Collins in a co-partnership with the deceased Lewer, carried on under the name of Dairy Creek Pastoral Company, consisting of certain pastoral leases, livestock, plant and chattels. And to the action so framed Lewer pleaded what under the common-law system of pleading would have been described as a plea of plene administravit praeter. It alleged an Indenture of Mortgage dated 15th March 1928 securing the purchase money and that Lewer had fully administered all the estate and effects of Lewer deceased that had come to its hands as her executor except the equity of Lewer deceased and her estate in the pastoral leases, livestock,

plant /

plant, chattels and other assets comprising Dairy Creek Station, Carnarvon, and, with that exception, Lewer had not at the commencement of the action or at any time afterwards nor had they now any estate or effects of Lewer deceased in their hands as executors to be administered. There was added, however, a paragraph which alleged that at the date of the agreement for sale and at the death of R.E. Lewer assets comprising the Dairy Creek Station were subject to securities held by the Bank of New South Wales for a sum of about £31,000 (of which £17,000 was a contingent liability) for which the estate of R.E. Lewer was liable.

Collins, I should think, might have taken judgment on this plea of plene administravit praeter for £317 interest to the extent of the assets acknowledged and of future assets quando acciderint (See Bullen and Leake, Pleadings, 3rd ed., pp. 579-580; Chitty's Forms, 10th ed., p.713; 13th ed., p.554). But, instead, Collins by leave amended its statement of claim and added a claim seeking to make Lewer personally responsible for unpaid instalments of purchase money under the agreement already mentioned and interest thereon in so far as Collins was unable to recover the same from the estate of Lewer deceased. It charged Lewer with a devastavit in that it carried on the business of Dairy Creek Station without the assent of Collins whereby it incurred such heavy losses that the assets of the estate remaining in the hands of Lewer were no longer sufficient to satisfy the liability of Lewer deceased owing at her death. Lewer did not admit this latter allegation but pleaded that owing to prolonged droughts and the absence of any demand for pastoral properties in the area in which the station was situated it was not possible to determine the value of the station or to say whether or not assets of Lewer deceased would be sufficient to satisfy her liabilities

owing /

owing at the date of her death. It also pleaded that the station business was carried on with the assent and acquiescence of Collins deceased and her executor. A further amendment of the statement of claim was made claiming a declaration that Collins was entitled to be paid all unpaid instalments of purchase money and interest under the agreement already mentioned in priority to any claim by Lewer for indemnity out of the estate of Lewer deceased in respect of debts and liabilities incurred by the defendants in the course of carrying on the business of Dairy Creek Station and in priority to any contingent liabilities of Lewer deceased under any guarantee given by her during her lifetime; also a declaration that Lewer was personally liable to recoup Lewer's estate the amount of all losses incurred in carrying on the business of Dairy Creek Station and to the extent that the assets were insufficient to pay or provide for the payment to the plaintiff of the unpaid instalments of principal and interest under the agreement mentioned; also all necessary accounts and inquiries on the footing of wilful default, and an order for payment by the defendants personally to the estate of Lewer deceased of all losses ascertained on the taking of accounts to have been incurred by Lewer by reason of their carrying on the business of Dairy Creek Station.

To this Lewer denied that Collins was entitled to the relief claimed in the last-mentioned amendment, which would, I assume, entitle Lewer to rely upon the Mortgagees' Rights Restriction Act 1931 of Western Australia. Lewer also pleaded the Limitation Act 1935, Ss.38 & 47, to all claims other than the claim for interest that did not arise within six years next before the 16th July 1941, which was the date upon which the claim based upon a devastavit was put forward in the pleadings and for that reason, I

suppose, treated as the date of the commencement of the action.

The pleadings can hardly be commended as a masterpiece of the pleader's art, but they bring out in a confused way the controversy between the parties. The facts appearing in evidence in this case have been so fully stated in the Supreme Court and by the Chief Justice and my brother Williams in this Court that I shall do little more than set forth the ultimate conclusion established by those facts and the result that follows in law.

(1) The plea of plene administravit praeteri-

The assets of Lewer deceased consisted almost entirely of her interest in the Dairy Creek Station, and such as did not consist of that interest had been dealt with in a due course of administration, as was proved or not disputed. The station had fallen heavily in value and was charged in favour of the Bank of New South Wales. But to the extent of the acknowledged assets I see no reason why Collins should not have judgment for £317.0.3 interest in the form already mentioned. The balance of purchase money due and owing to Collins under the agreement already mentioned: the Supreme Court had held in another action that the transaction between Collins deceased and Lewer deceased amounted to a sale of an interest in land within the meaning of the Mortgagees' Rights Restriction Act 1931, which prohibited Collins from calling up or demanding payment from Lewer of the balance of purchase money without the leave of the Court. And this, I suppose, mainly influenced Collins in amending its pleading as already mentioned and charging Lewer with a devastavit or a violation or neglect of duty as executor. The remedy, if the charge be proved, is against Lewer personally in respect of the wrong done by it to Collins (See Williams on Executors, 9th Ed., pp. 1690 et seq., 1863 et seq., Thorne v. Kerr, 2K. & J.54; Re

Hyatt /

Hyatt; Bowles v. Hyatt, 38 Ch. D. 609; Lacons v. Warmoll, (1907) 2 K.B. 350).

(2) The devastavit:-

There was a surplus of some £8,860 of assets over liabilities in the estate of Lewer deceased. Lewer did not realise the station but carried on the station business with the assent of the beneficiaries of Lewer deceased. But Lewer cannot by reason of the assent of the beneficiaries justify its action against the creditors of Lewer deceased, and, in particular, against Collins, unless its assent was also established (Dowse v. Gorton,(1891) A.C.190). The learned trial judge found as a fact that Lewer might have sold the Dairy Creek Station in 1934 or 1935, particularly in 1935, and at a sum that would have cleared all liabilities. And also that Lewer was guilty of a violation of its duty towards the creditors of Lewer deceased in not realising the station assets and in carrying on the business of the station whereby it sustained heavy losses of capital. He also found that the estate of Lewer deceased was insufficient to meet the claim of Collins and the debts and liabilities incurred by Lewer in the course of trading. But the learned Judge added that the efidence did not enable him to determine whether or not the estate was sufficiently solvent to pay in full the claim of Collins. These findings were supported on appeal. As already indicated, I refrain from detailed examination of the evidence and content myself with saying that there is ample evidence to sustain the findings. And they mean that Lewer was guilty of a devastavit, subject to the matters put forward in the amended defence of Collins.

(3) The defence:-

(a) Mortgagees' Rights Restriction Act (No. 19 of 1931), Western Australia)

This Act, however, is no answer to a claim against

Collins /

Collins personally on a devastavit. It deals with claims under mortgages or lands and agreements for the sale of lands and not with tortious acts such as are found in the present case.

(b) The Limitation Act 1935.

The liability of an executor for a devastavit is barred at the end of six years (Lacons v. Warmoll, (1907) 2 K.B. 350; National Trustees Executors and Agency Co. of Australasia Ltd. v. Dwyer, 63 C.L.R. 1, at pp.29-30). And in this case there is no difference between the liability of an executor at common law and in equity (Re Hyatt, 38 Ch. D.609, at p. 616). But it is not competent for an executor in an administration action, apart from the Trustees Act 1900 (W.A.) (now, Limitation Act 1935), to set up his own wrong. "The remedy in administration is upon the footing that a fund had been so dealt with that the executor had not discharged himself of it, and is therefore still liable to account for it; he cannot say he has parted with it; whereas an action for a devastavit proceeds upon the footing that the executor has parted with the fund, and is liable because he has parted with it" (Lacons v. Warmoll, (1907) 2 K.B. 350, at p.367). The Trustees Act 1900 (W.A.) (now, Limitation Act 1935), however, may be set up by an executor or trustee (Re Blow, St. Bartholomew's Hospital (Governors) v. Cambden, (1914) 1 Ch.233). The pleadings in the present case do not present it as one for administration but as an action for a devastavit and nothing else. Ordinarily time begins to run in such an action from the date of the devastavit; in this case, it was suggested, from the end of the executor's year. In the case of a breach of contract or a tort of a continuous nature a fresh cause of action arises from day to day so long as the breach of contract or tort continues. And there is no reason why the same rule should not apply to a devastavit which is

of a /

of a continuous nature, as, in this case, neglecting to realise and wrongfully carrying on business over an extended period of time (See re Swain; Swain v. Bringeman, (1891) 3 Ch. 233). The Supreme Court (Full Court) rejected the plea but thought no useful end would be gained by an inquiry into or an account of assets in the hands of Lewer or their dealing with the assets before the 16th July 1935, for the losses relied upon in this case all took place, according to the evidence, since that date.

(c) Assent to carrying on Dairy Creek Station.

The beneficiaries assented, but it is found as a fact by the trial Judge that neither Collins deceased nor her executor assented to the carrying on of the station or the violation of the duty which Lewer owed to them and the creditors of Lewer deceased. The Full Court on appeal concurred in this finding. Again, I refrain from a detailed examination of the evidence, for there is ample evidence to support it. The learned trial judge discusses the facts at large, and with his view I agree and also with his ultimate conclusion of the fact. In particular, I agree that Collins deceased and her executor knew that the station was being carried on, but both she and her executor were always pressing their claim for payment and never giving up any rights or assenting to any alteration of rights as a creditor (See Dowse v. Gorton, (1891) A.C.190). The result of this finding deprives Lewer of any right to be indemnified out of the testator's assets and any property which Lewer acquired as executor against losses and liabilities incurred by them in carrying on the station in priority to the claims of Collins, which was the main contest raised in the action (see Dowse v. Gorton, (1891) A.C. 190, at p.198; Abbott v. Parfitt, L.R. 6 Q.B. 346).

(4) The Remedy:-

An executor /

An executor is liable to be sued for the debts of his testator the moment after the testator's death (See Williams on Executors, 9th ed., p.1877). In truth the action is a common-law action based upon legal rights. It is a claim against Lewer for interest agreed to be paid by its testator, Lewer deceased. A like claim might have been made for the balance of purchase money upon an express promise to pay contained in the agreement for sale or in the Indenture of Mortgage (Cutter v. Powell), 2 Sm.L.C., 12th ed., Vol. 2, pp.10-14; Workman, Clark & Co. Ltd. v. Lloyd Brazileno, (1908) 1 K.B. 968; Laird v. Pim, 7 M. & W. 474; Reynolds v. Fury, (1921) V.L.R. 14; Harry Davies & Co. Pty. v. East, (1925) V.L.R. 681)., but for the Mortgagees' Rights Restriction Act 1931, which prevented such a claim without the leave of the Supreme Court, as it held in other proceedings. Assets are admitted to the extent set forth in the pleadings, and it is conceded or proved that any other assets have been fully and duly administered. The debt alleged to be due to the bank is not a debt of a higher nature than Collins' debt, for all specialty and simple contract debts now stand in equal degree (Administration Act 1903, S.22), and part of it is alleged to be contingent, and an executor cannot refuse to pay a simple contract debt because he may have to provide for a contingent liability. In this state of facts the form of a judgment already suggested against Lewer would be appropriate in respect of the sum of £317.0.3 interest, but the balance of purchase money was not claimed against the executors as such for the reasons already mentioned. And assets acquired by an executor in carrying on his testator's business are as much assets of the testator as the assets in his possession at the time of his death (Abbott v. Parfitt, L.R. 6 Q.B. 346).

Execution of a judgment in the form suggested might be enforced by the Writ of Fieri Facias, which would follow

the form /

the form of judgment. The ancient form of procedure when this writ was returned nulla bona in whole or in part is set forth in Williams on Executors, 9th Ed., p. 1864, but the action of debt on the judgment suggesting a devastavit was substituted in lieu of the old proceeding by scire fieri inquiry (Williams on Executors, 9th ed., p. 1865). The foundation of this action is the judgment obtained against the executor, which would be conclusive upon him that he has assets to the extent acknowledged. "If, therefore, upon a fieri facias de bonis testatoris....either no goods can be found which were the testator's, or not sufficient to satisfy the demand" to the extent of assets acknowledged "(or, which is the same thing, if the executor will not expose them to the execution), that is evidence of a devastavit"; and, therefore, it is very reasonable that the executor should become personally liable and chargeable de bonis propriis (Williams on Executors, 9th ed., pp. 1865-1866.)

In the present case Collins has not adopted this method, but, instead, in its action brought to recover interest it has also charged a devastavit against Lewer in carrying on the Dairy Creek Station whereby it sustained such heavy losses that the assets of Lewer deceased remaining in its hands are now no longer sufficient to satisfy the liability of Lewer deceased owing at the date of her death in respect of interest, £317, and balance of purchase money, £6,340. Under the Supreme Court Act 1935 (Western Australia), which adopts the judicature system, this proceeding is, I think, permissible. The devastavit or breach of duty charged against Lewer deceased has been found, but the evidence is insufficient to determine whether or not the acknowledged assets in the estate of Lewer deceased are sufficient to pay in full the claim of Collins. A further remedy appropriate to meet the position thus arising must therefore be provided.

Again /

Again I repeat that this action is not an administration action, but a common-law action against executors, attracting remedies that have been long settled and are tolerably well known. To launch a creditor in a common-law action founded upon debt and upon a devastavit into the morasses of an administration suit and upon inquiries proper and usual in such actions involving the claims of other creditors is as unnecessary as, I think, it is erroneous. Assets are admitted in this case to the extent set forth in the amended defence available to satisfy Collins' claim. Lewer is liable to the extent of those assets de bonis testatoris and no more, but, if those assets have been wasted or diminished by Lewer whereby Collins cannot recover in whole or in part his judgment for interest or the balance of purchase money, then, to the extent that the assets have been so wasted and diminished, Lewer is liable de bonis propriis. And the usual order for the costs of action is de bonis testatoris et si non de bonis propriis. By way of explanation I should add that under a Writ of Fieri Facias in Western Australia all the real, chattel real and personal estate and property of a defendant may be seized and sold (Supreme Court Act 1935, S.118; Rules of Supreme Court, Ord. 40, App. H. Form No. 1.)

The judgment below should be set aside, and in my opinion, the amended judgment is that which should be given in the circumstances of this case.

THE WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY COMPANY LTD.

v.

THE PERPETUAL EXECUTORS TRUSTEES AND AGENCY COMPANY (W.A.) LTD.

JUDGMENT. WILLIAMS J.

The plaintiff in the action, the respondent in this appeal, is the sole executor and trustee of the will of Elizabeth Mary Ann Collins who died on 28th June 1928. The defendants, the appellants in this appeal, are the executors and trustees of the will of Rose Emma Lewer who died on 15th September 1933. Mrs. Collins and Mrs. Lewer had been partners in a grasing business carried on at Dairy Creek Station, Western Australia, Mrs. Collins having a one third and Mrs. Lewer a two thirds interest in the business. By a contract made on 13th December 1927 they agreed to dissolve the partnership as from 10th January 1928. The contract provided that, in addition to taking over the liabilities Mrs. Lewer should purchase the one third interest of Mrs. Collins in the business for £13,000 payable £500 by way of deposit, £500 on 10th January 1928, £1,000 on 10th July 1928, and the balance by annual instalments of £1,000 on 10th July in each successive year until the whole of the purchase money had been paid, the balance outstanding from time to time to carry interest at 5½ per centum per annum. Clause 9 of the contract provided as follows:-

> "The purchaser shall at the request and cost of the vendor execute a proper charge or mortgage of the share and interest hereby agreed to be sold such security to be prepared by the solicitor of the vendor at the cost of the purchaser and to contain all provisions which such solicitor shall reasonably consider necessary or expedient for the security of the vendor."

Pursuant to the contract an indenture of charge dated 15th March 1928 was executed by Mrs. Lewer. Clauses 1, 2 and 3 of the indenture are in the following terms:- "In pursuance of the said agreement and in consideration of the sum of Twelve thousand pounds now owing by the Mortgagor to the Mortgagee as aforesaid the Mortgagor hereby Covenants with the Mortgagee to pay to the Mortgagee on 10th day of July next the said sum of Twelve thousand pounds with interest thereon from 10th day of January 1928 at the rate of Five pounds ten shillings per centum per annum and if the said sum shall not be paid on that day then so long as any part thereof shall remain owing to pay interest at the rate aforesaid on the monies for the time being remaining owing on 10th July in every year provided nevertheless that if the Mortgagor shall pay

the said /

> the said sum of Twelve thousand pounds by the following instalments that is to say a first instalment of One thousand pounds on 10th day of July next and a further instalment of one thousand pounds on 10th day of July in each successive year thereafter until the whole of the said purchase money shall have been paid and shall pay interest at the rate aforesaid on the days hereinbefore fixed for the payment of interest upon the amount for the time being remaining unpaid the Mortgagee will accept payment by such instalments and will not take any steps to obtain payment of the said sum of Twelve thousand pounds by action sale possession foreclosure or otherwise unless the Mortgagor shall commit an act of bankruptcy or suffer a judgment or order of any Court to be in force against her by execution. 2. In further pursuance of the said agreement and consideration of the premises the Mortgagor hereby charges all the one third share in the said partnership and the capital assets and effects thereof and the profits thereof agreed to be sold to the Mortgagor under the said agreement with the payment to the Mortgagee of the said sum of Twelve thousand pounds and interest after the rate aforesaid. 3. It is hereby agreed and declared that during the continuance of this security in each year in which the annual payment of interest or part thereof or instalment of purchase money shall not be paid on the respective days hereinbefore provided for payment thereof the Mortgagee shall be entitled to receive out of the said one third share of the net profit of the said business direct from the Mortgagor or in the event of the Mortgagor having entered into partnership in the business of the station with any other person or persons than from the partners in the said business for the time being; (a) the amount of the said interest then being in arrear (b) the sum of One thousand pounds in reduction or discharge (as the case may be) of the said principal sum of Twelve thousand pounds.

It is to be noted that Clause 1 of the indenture, differing in this respect from the contract, caused the whole balance of purchase money to fall due on 10th July 1928, but provided that in the absence of default it could be paid by instalments on the same dates as those set out in the contract. Clause 3 of the contract provided that the vendor should deliver to the purchaser the livestock, plant and other chattels capable of passing by delivery on or before 10th January 1928 but did not expressly provide a date for the transfer of the vendor's interest in the leases. But the parties must have intended that the charge referred to in Clause 9 should be a charge over assets all of which had been conveyed and delivered to the purchaser. The indenture contains an absolute covenant for payment of the purchase money. This indicates an intention that completion of the whole of the contract should be contemporaneous with the execution of the indenture, so that the pastoral leases should have been transferred from the joint names of the partners into the sole name of Mrs. Lewer, on 15th March 1928, and the relief to which the plaintiff is entitled in the action should be made conditional on this being done. If, as the Supreme

Court /

Court considered, the rights of the plaintiff in the action had depended upon the contract and not upon the indenture, a question would have arisen as to whether the plaintiff could claim the purchase money except in an action for specific performance. But the obligation to pay the instalments would appear to have been independent of Mrs. Collins' obligation to transfer the leases: Garske v. Urquhart 21 S.R. 483: Howald v. Halling 27 S.R.(N.S.W.)334; McDonald v. Denny Lascelles 48 C.L.R. 457 at p.476.

At the date of Mrs. Lewer's death failure had occurred in due payment of the instalments so that the whole of the purchase money had become immediately payable. By her will Mrs. Lewer devised and bequeathed the whole of her estate, both real and personal, unto her executors in trust for her two daughters in equal shares, her trustees to manage the estate until the younger daughter attained the age of twenty one years, when the estate was to vest in and be paid or transferred to the daughters. As the younger daughter had attained the age of twenty one years before Mrs. Lewer's death, the sole duty of the defendants was to perform their executorial duties and to pay or transfer so much of the estate as then remained to the beneficiaries. The assets in the estate, which consisted almost entirely of the pastoral leases and the plant and sheep with which the grazing business was carried on, were valued for probate purposes at £39,473 and the liabilities, which included as secured creditors the Bank of New South Wales £18,694 and the plaintiff £10,746 and unsecured creditors £2,411, totalled £32,121, leaving a balance for duty of £7,351, but this balance was subsequently increased to £8,860. The estate was also contingently indebted to the Bank upon a guarantee given by Mrs.Lewer to the bank in respect of her husband's overdraft which at the date of her death stood at £17,000.

Immediately after Mrs. Lewer's death the plaintiff commenced to press the defendants for payment of the overdue instalments and interest then amounting to £4,685. After some negotiations, it agreed, in March 1934, to accept £3,000 on account and to allow the balance to stand over until the woolclip was sold at the end of the year. During the negotiations the plaintiff informed the defendants that according to legal advice

the indenture /

the indenture was not a security so that the contract was not affected by the statutory reduction of interest. When the plaintiff accepted the sum of £3,000 it stated that the payment was to be without prejudice to the contention that the Mortgagees' Rights Restriction Act (W.A.) 1931 did not apply to the transaction, and that it was entitled at any time to sue for the balance of purchase money then outstanding; but that, rather than immediately involve both estates in litigation to decide a doubtful point of law, its clients preferred to allow the contention to stand over in the expectation that, after the next woolclip was sold, the defendants would be prepared to offer a substantial sum in further reduction of the total indebtedness. In April 1934 the defendants to the knowledge of the plaintiff borrowed from the Bank a sufficient sum to pay income tax, the unsecured creditors and its own corpus commission. The funeral expenses, the testamentary expenses to date, and the death duties had already been paid. On 10th November 1934 the defendants obtained an authority in writing from the daughters to continue to carry on the business until further notice, and for that purpose to make the necessary financial arrangements with the Bank. In March 1935 the plaintiff wrote to the defendants that the amount due for unpaid instalments was £2,951 and the balance of principal owing £7,469. On 27th March 1935 the defendants wrote to the plaintiff that the Bank was only prepared to make available an amount of £1,000 in reduction of the debt. The plaintiff agreed in June 1935 to accept £2,000. In November 1935 the plaintiff wrote that it understood that most of the woolclip had been sold and demanded payment of all arrears of principal and interest by 1st January 1936. After further correspondence the defendants wrote on 19th February 1936 that in view of the dry season and of anticipated heavy stock losses the Bank was not prepared to make any provision in that year for payment to the plaintiff.

In May 1936 the plaintiff issued a writ out of the Supreme Court of Western Australia against the defendants as executors claiming payment of £2,340 being the amount of the overdue instalments. The defendants thereupon served a summons on the plaintiff to have the writ set aside on the ground that the action

was to recover principal monies due under a mortgage or equitable charge embodied in the contract and indenture and that the leave of the Court to issue the writ was necessary under sec. 7(1)(b) of the Mortgagees' Rights Restriction Act 1931. At the hearing of the summons the writ was set aside on the ground that the transaction amounted to a sale of an interest in land within the meaning of the Act. The point was not raised that the contract and indenture related to partnership, property, and, therefore, by virtue of sec. 32 of the Partnership Act (W.A.)1895 to personal and not to real estate.

After the dismissal of this action the plaintiff continued to press for interest as it accrued due from time to time. In 1936 the station suffered a disastrous drought in which the greater part of the sheep perished. Since that year the station has been carried on at a loss. In December 1937 the plaintiff wrote to the defendants that it had always been opposed to the carrying on of the station and had always wished that the estate should be wound up, and the indebtedness paid off. But the plaintiff had never expressed any such affirmative opposition, and the defendants' reply that the plaintiff had never intimated that it was opposed to the carrying on of the station and that the trend of the correspondence had been rather to the contrary appears to state the position with far greater accuracy.

Towards the end of 1938 negotiations took place with a view to the defendants, after making a further payment of £2,000, transferring the station to the daughters, but the negotiations proved abortive. On 23rd November 1938 the daughters executed in favour of the defendants at their request, an indenture, which the defendants' solicitors had redrafted because it was not quite adequate in its initial form, by which, after reciting the carrying on of the station since the death of Mrs. Lewer and the history of the debt to the plaintiff upon which £6,340 was still owing, and that the station had been carried on with the consent of the daughters but without the consent of the creditors, the daughters covenanted with the defendants to indemnify them against all liabilities to the creditors in respect of such carrying on. On 6th August 1940

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the defendants wrote to the plaintiff that in view of the drought conditions which then existed the Bank could not see its way clear to provide the amount of the interest which had fallen due on 11th July 1940.

On 12th November 1940 the plaintiff issued a writ out of the Supreme Court of Western Australia against the defendants as executors claiming the sum of £317.0.3 for overdue interest. On 13th November 1940 the defendant company wrote to the defendant Lewer that there was no defence to the claim for interest but that if the plaintiff decided to proceed with the threatened action against them personally and amended the pleadings for this purpose they must again claim the protection of the Mortgagees' Rights Restriction Act and enter a defence. On 16th July 1941 the statement of claim was amended by adding the following allegations:-

8. At the date of the death of the said Rose Emma Lewer her estate consisted of the pastoral leases, livestock, plant and chattels at "Dairy Creek" Station but little else.
9. At the date of her death the assets of the estate of the said Rose Emma Lewer exceeded the liabilities of the said estate by at least £7,350.
10. Since the death of the said Rose Emma Lewer continuously to the present time the defendants have without the assent of the plaintiff carried on the business of Dairy Creek Station and have thereby incurred such heavy losses that the assets of the said estate remaining in the hands of the defendants are now no longer sufficient to satisfy the liabilities of the said Rose Emma Lewer owing at the date of her death.

And by claiming:-

(A) A declaration that the Plaintiff is entitled to be paid all unpaid instalments of principal and interest under the Agreement of the 30th December 1927 in priority to any claim by the Defendants for indemnity out of the assets of the Estate of R.E. Lewer in respect of debts and liabilities incurred by the Defendants in the course of carrying on the business of Dairy Creek Station and also in priority to any contingent liabilities of the said R.E. Lewer under any Guarantee given by her during her lifetime.-
(B) A Declaration that the Defendants are personally legally liable to recoup to the Estate of the said R.E. Lewer the amount of all losses (including losses during trading by fluctuations in the value of the capital assets) which may have been or which may be incurred in the carrying on of the business of Dairy Creek Station by the Defendants in their representative capacity and to the extent that the assets of the Estate of the said R.E. Lewer may be insufficient to pay or provide for the payment to the plaintiff of the unpaid instalments of principal and interest thereon payable to it under the Agreement of the 30th December 1927.
(C) All necessary Accounts and enquiries on the footing of wilful default.
(D) An Order for the payment by the Defendants personally to the Estate of R.E. Lewer of all losses which are ascertained upon the taking of accounts to have been or may be incurred by the defendants by reason of their carrying

on the business of Dairy Creek Station as aforesaid.

(E) A declaration that the defendant the West Australian Trustee Executor and Agency Company Limited and the Defendant Copeland James Lewer are personally liable to pay to the Plaintiff the unpaid instalments of principal (amounting to the said sum of £6340.5.4) and interest thereon payable under the agreement referred to in paragraph 2 above in so far as the plaintiff may be unable to recover the same from the estate of the said Rose Emma Lewer as and when the Plaintiff is entitled to demand payment thereof from the said estate. Such liability to be limited to the extent that the assets of the estate of the said Rose Emma Lewer may be insufficient to pay or provide for the payment to the Plaintiff of the unpaid instalments of principal and interest thereon payable to it under the said agreement.

The defendants relied upon the following amongst other defences:

6. The defendants admit that since the death of the said Rose Emma Lewer they have carried on the business of Dairy Creek Station but say that the station business was so carried on with the assent and acquiescence of the said Elizabeth Mary Ann Collins and the plaintiff and that the plaintiff is estopped from denying such assent and acquiescence.

9. The plaintiff's alleged rights of action other than the claim for interest in paragraph 11(a) of the statement of claim did not arise, if at all, within six years next before the 16th day of July 1941 and were and are barred by the Limitation Act 1935 sections 38 and 47.

The learned trial Judge held that the plaintiff had not assented to and could not be considered to be a party to the carrying on of the business which had been carried on entirely upon the defendants' own initiative in the interests of the daughters. He overruled the other defences and gave judgment for the plaintiff. He adjudged that the plaintiff should recover against the defendants the sum of £317.0.3 de bonis testatoris. The defendants do not object to this order. He also made the declarations and orders which I have set out, and ordered that an account should be taken and an inquiry had before the Master on the footing of wilful default as to what assets of the estate had been used by the defendants in carrying on the business since the death of the testatrix and as to what losses (including losses during trading by fluctuations in the value of the capital assets) had been incurred by the defendants during the carrying on of the business, and that all questions of law arising on the account and inquiry and the costs of such account and inquiry be reserved for further consideration.

The Full Court of Western Australia agreed with the

findings of the learned trial judge on appeal and affirmed his judgment but with a variation that the accounts and inquiries which he had directed should be taken and made as from 16th July 1935.

On appeal to this Court, Mr. Fullagar strenuously contended that the learned trial Judge and the Full Court had both come to a wrong conclusion upon their concurrent findings that the plaintiff had not assented to the carrying on of the business. The evidence on this issue, which is almost entirely documentary, depends upon the proper inferences to be drawn from facts which are not in dispute, so that if this Court had a "tolerably clear conviction" The P. Caland 1893 A.C. at p.216, that the findings were wrong, it would be open to it to overrule them. But, having carefully considered the evidence, I entirely agree with the findings. The onus was on the defendants to establish the assent, but, independently of the onus, the only affirmative findings open on the facts were, to my mind, not only that the plaintiff did not assent to the carrying on of the business but also that the defendants never thought that the plaintiff had done so. I am unable to accept Mr. Fullagar's submission that the recital in the indenture on 23rd November 1938 referred only to a neglect by the defendants to obtain a formal consent. The defendants never suggested that the plaintiff had assented prior to the date of the amended statement of defence and it appears to have been a mere afterthought. At the date of Mrs. Lewer's death the Mortgagees' Rights Restriction Act of 1931 was in force. This Act restricted the rights of mortgagees and vendors of land to sue for moneys secured by a mortgage of land or for unpaid purchase moneys owing on a contract for the sale of land. Sec. 2 includes the following definitions:- "Land"

> includes any estate of interest in land. "Mortgage" includes any deed, memorandum or mortgage, instrument or agreement whereby security for payment of money is granted over any land, and in equitable mortgage by deposit of title deeds, and any document whereby the duration of a mortgage is extended, and includes also an agreement for the sale of land, which has not been completed by conveyance or transfer under which the purchase money is payable by instalments or otherwise, whether such instalments are described as rent or otherwise.

Sec. 7 provides inter alia that a mortgagee shall not, without the leave of the Supreme Court - (a) call up, or demand payment from the

> mortgagor of the whole or any part of the principal moneys secured by the mortgage: (b) commence or continue any action or proceeding for the recovery of any principal moneys due under the mortgage, or the enforcement of any judgment for any such moneys.

Sec. 10 provides that notwithstanding anything in the Act, if the purchaser under any agreement for sale of land - (a) is in arrear for a period of twelve months in respect of any payment of principal or interest or interest due by him under the agreement; and (b) has made, during any period of six months, no payment in respect of any portion of the amount due by him under the agreement, any vendor may serve on the purchaser a notice intimating that he proposes after the expiry of one month from the service of the notice to exercise all or any of his rights under the agreement. (2) After the expiry of such period of one month the vendor may, unless the purchaser has paid every amount in arrear at the date of the service of the notice, or the Supreme Court, upon the application of the purchaser made within such period, otherwise directs, exercise all or any of his said rights as if this act did not apply to the said agreement.

Sec. 17(2) provides that any Act, measure, or proceeding done or taken in contravention of the Act shall be deemed to be invalid and illegal.

As completion of the contract had not in fact taken place, because Mrs. Collins had never transferred her joint interest in the leases to Mrs. Lever, the Act applied to both the contract and the indenture. While the plaintiff might have exercised its rights under sec. 10 of the Act if the contract had been the only instrument operative between the parties, it would have been impossible for it to have done so when, even if these contractual rights had not been merged in the covenant in the indenture, the same debt would still have been secured by the charge over land contained in the indenture. As the plaintiff had been advised that the indenture was not an enforceable security, it considered that the contract governed the rights of the parties, which explains why it only demanded payment of the overdue instalments and interest and not of the whole amount of the debt. In 1934 and 1935 the plaintiff received on account payments of £3,000 and £2,000 respectively. The fact that the plaintiff knew that the defendants were continuing to carry on the business, and were borrowing money from the bank to make these payments, so that the amount the defendants would be able to offer in each year in reduction of the debt without selling the station depended upon the results of the trading, is not sufficient evidence that the plaintiff assented to the carrying on of the business for its benefit.

The purpose of the defendants in carrying on the business was gradually to pay off the debt and then transfer the

station /

to the daughters. The plaintiff and the defendants were at arms length from the beginning. The defendants believed that the Act prevented the plaintiff from suing without the leave of the Court, while the plaintiff, although doubtful whether the Act applied to the transaction, believed that, in the event of it doing so, it was useless to apply to the Court for leave to sue so long as the interest was being paid regularly, and, a fortiori, so long as substantial payments were also being made in reduction of the instalments. There is no evidence of any real intermeddling in the conduct of the business by the plaintiff. On one occasion the plaintiff discussed the estimates for the expenses of running the station, and suggested they might be pruned in some respects, but this was only because the less the Bank had to advance for this purpose, the more it would be likely to advance to reduce the plaintiff's debt. There is ample evidence of pressure to recover the interest and as much of the overdue instalments as possible. As soon as the defendants refused to pay a substantial annual sum in reduction of the debt the plaintiff issued the first writ. After this writ had been set aside, both parties assumed that the Act protected the defendants. The letter of 19th December 1937 left the defendants in no doubt as to the plaintiff's attitude, but after that date they still continued to carry on the business in the same way as before. Interest was paid in 1938 and 1939, but as soon as it fell into arrears in 1940 the plaintiff issued the second writ. Mr. Fullagar relied strongly upon the decision of the House of Lords in Dowse v. Gorton 1891 A.C.190; The facts in that case at first sight bear a superficial similarity to the present facts. There the testator, as here the testatrix, was paying off by instalments a debt which the parties at the date of the contract contemplated would be paid off out of the profits of the business, there had been default in the lifetime of the purchaser, and the assets of the testator at the date of death exceeded his liabilities. But the evidence of assent on the part of the vendor to the executors of the purchaser continuing to carry on the business after the date of his death was stronger, the property with which the business was being carried on was still

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property of the vendor, and there was no Act to prevent the vendor exercising his rights upon default. In in re Oxley 1914 1 Ch. 604 at p. 616 Buckley L. J. said that assent connotes that the creditor must have assented to the fund to which he is entitled to look for payment being risked in trade with the result that there may be losses which he will have to bear or further additions made for his benefit, and that it was necessary to show an active affirmative assent. The evidence in the present case quite fails to show an affirmative assent, it shows at most "standing by with knowledge" which in some circumstances, as Phillimore L.J. pointed out in the same case at p. 617, "can be a portion of the evidence of consent"; but in the present case it is only evidence of an attitude which the plaintiff believed was forced upon it by law. I agree with the Supreme Court that the defendants were, as the indenture of 23rd November 1938 recited, carrying on the business without the consent of the plaintiff for the benefit of the daughters, believing that the Act would enable them to keep the plaintiff at bay if it became importunate. If the seasons had remained favourable they would probably have been able to pay off the plaintiff and to transfer the station to the daughters according to plan, but the evidence quite fails to establish that the plaintiff had agreed to share the risks involved in postponing conversion for this purpose. This defence, therefore, fails.

But the question still remains whether the plaintiff can be granted any relief except in respect of overdue interest in an action commenced without the leave of the Court under the Mortgagees' Rights Restriction Act. During the hearings in the Supreme Court doubts were expressed whether clauses 2 and 3 of the indenture were enforceable. But it must be remembered that the contract and indenture were entered into as a means of winding up the partnership. In the absence of agreement a partnership must be wound up in accordance with sec. 50 of the Partnership Act (W.A.)1896 by a sale of the assets for cash. But the Statutory method often results in a sacrifice of the assets to the detriment of the partners, so that it has become a common practice for partners who wish to continue the business to purchase the share of the outgoing

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partner. If the rights of the parties had continued to be governed by the contract, Mrs. Collins as an unpaid vendor, upon rescission of the contract, might have been remitted to her rights to have the partnership wound up under the Act and a purchaser of her one third share under clause 11 of the contract to the rights of an assignee of this share: Vyse v. Foster L.R.T./H.L. 318. Sec. 55 of the Act provides that if the continuing partner carries on the business of the firm with its capital or assets without any final settlement of accounts, then, in the absence of any agreement to the contrary, the outgoing partner is entitled, at his option, to such share of the profits as may be attributable to this use of the share of the partnership assets or to interest at the rate of 6 per cent per annum on the amount of his share of the partnership assets. The indenture contemplated that Mrs. Lewer would continue to carry on the business with the assets of the partnership either alone or with a new partner or partners, but that, pending payment of the purchase money in full, Mrs. Collins should have a security over the assets and profits in lieu of her rights as an outgoing partner under the Act. The indenture therefore gave her a security over one third of the assets of the partnership and over one third of the profits in lieu of her right to a lien over the assets and a share in the profits under the Act. As it was plainly intended that Mrs.Lewer should continue to carry on the business, the charge over the assets sheep and other trading stock in the ordinary course of business. The indenture does not give an express power of sale, but the concluding words of clause 1 appear to contemplate that the Court could order sale or foreclosure. There would be no insuperable difficulty in the Court making either order. Buyers upon a sale would no doubt be scarce, but this would be a commercial and not a legal difficulty. The buyer in the event of a sale and the plaintiff in the event of foreclosure would have become a tenant in common with Mrs. Lewer of a one third interest in the assets. Even if the indenture is a bill of sale within the meaning of the Bills of Sale Act (W.A.) 1899, that Act does not avoid the security as between the parties but only in favour of the trustee in

Bankruptcy /

Bankruptcy or execution creditor.

The rights of the parties in the action, therefore, must be determined so far as it becomes material to do so, on the basis that the indenture is a valid and enforceable instrument; and that as the ground of the dismissal of the first action was that the transaction was a mortgage of land within the meaning of the Mortgagees' Rights Restriction Act, it is res judicata between the parties that the contract and indenture are mortgages of land within the meaning of the Act.

At the date of Mrs. Lewer's death the whole of the balance of purchase money had become due under the indenture, the condition subject to which she was entitled to discharge her indebtedness by annual instalments having been broken. There was, therefore, in the absence of some assent by the plaintiff, an obligation imposed upon the defendants to realise the assets of the estate within a reasonable time and pay the debt. A reasonable time usually means the executor's year. If the assets are realised within this time the onus lies upon a creditor to prove that there has been unreasonable delay, but if an executor postpones realization until after this period the onus will lie upon him to prove that the further delay was reasonable; in re Tankard 1942 1 Ch. 69. The uncontradicted evidence is that during 1934 and 1935 the defendants could have sold the station to advantage. Until the drought the assets at book values, omitting any liability for the contingent debt, showed a substantial surplus over the liabilities, so that, if these values had been realised the plaintiff, subject to the contingent liability, would have been paid in full.

The claim for a devastavit was first introduced into the statement of claim on 16th July 1941, so that the plaintiff can only sue in respect of any damage which it has suffered by reason of the failure of the defendants to realise the estate since 16th July 1935: in re Swain, Swain v. Bringeman 1891 3 Ch. 233: How v. Earl Winterton 1896 2 Ch. 626.

Apart from the Act the plaintiff could have sued to recover the principal of the debt at common law. The defendants could have pleaded plene administravit praeter. Under this plea /

plea the defendants could have proved the amount due to the bank as a secured creditor and their own prior right to pay out of the assets any liabilities which they had incurred in administering the estate including the carrying on of the business prior to 16th July 1935. If the present action could be considered to be a common law action, it might be said that the defendants had pleased this plea but that they had failed to establish it. The effect of such a failure would be a finding that the defendants had in their hands at the date of death assets which, if they had been properly administered, would have been sufficient to pay the plaintiff's debt. The judgment would have been a judgment for payment of the debt and costs de bonis testatoris et si non de bonis propriis. This is the only form in which judgment could properly have been given at common law: Gorton v. Gregory 3 B & S 90 at pps. 98 and 99: 122 E.R at pps 38 and 39. Execution would then have issued against the assets of the testatrix, which came into the hands of the defendants at the date of her death: in re Hubback 29 Ch. div. at p. 945: re Oxley Hornby v. Oxley in the Court below 110 L.T. 626 at p. 627 on appeal 1914 1 Ch. at pps. 609 and 614. It would only have been after the Sheriff had made a return of nulla bona upon this execution that further proceedings would have been taken to recover the debt and costs out of the assets of the defendants. The three ways in which this could have been done (1) by the Sheriff, returning a devastavit as well as nulla bona (2) by a scire fieri inquiry and (3) by an action of debt on the judgment suggesting a devastavit are fully described in 1 Wm. Saunders 219: 85 E.R. pps. 234-236. Of these three ways the third is the one which has prevailed, so that, in order to have been in a position to issue execution against the defendants for the devastavit, the plaintiff would have had to bring a second action the foundation for which would have been the judgment against the defendants de bonis testatoris in the first action: Ward v. Thomas 2 Dowl. 87: Thompson v. Clarke 17 T.L.R. 455: in re Marvin 1905 2 Ch. 490: Lacons v. Wormall 1907 2 K.B. 350 at p.360: Batchelar v. Evans 1939 1 Ch. 1007: Annual Practice (Red Book) 1940 pps. 208 and 219: Annual practice (White Book) 1940 at p.152: Williams on Executors 12th Ed.pps.1254-5.

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So in Lee v. Park 1 Keen.714: 48 E.R. 482 a creditor had recovered judgment against an executor at common law de bonis testatoris et si non de bonis propriis as to costs before a decree was made for the administration of the estate in equity. A motion to restrain the creditor from issuing execution on the judgment was refused. At p.723, 48 E.R. at p. 486, LOrd Langdale said:- "Now Lord Eldon, very recently before the date of this Order, in the case of Terrewest v. Featherby had observed 'that the creditor's judgment would be of no service to him if he were delayed here until it could be ascertained, whether there were assets of the testator to answer his demand, which might not be till after all chance of recovering against the executor de bonis propriis was entirely gone.' "

It is pointed out in Wm. Saunders Vol.1 p.336 (a): 85 E.R. at p. 482 that "if the judgment be entered de bonis propriis, instead of de bonis testatoris si &c. it is considered <u>as a mere clerical mistake</u> which the Court below will amend on motion even after the record has been removed by error and argument into the Court of Error."

But an action to recover a judgment de bonis testatoris brought without the leave of the Court would be illegal under the Act, so that the action cannot be regarded as an action at common law, and the claims in the statement of claim which I have set out, which include prayers that the amount of the devastavit shall be recouped to the estate, for accounts and inquiries, and that the plaintiff's debt may be paid in priority to moneys required to meet liabilities against which the defendants claim to be indemnified and without providing for the contingent debt to the bank, show plainly to my mind that the action to recover the principal of the debt is intended to be an action to have the estate administered in equity: see Halsbury 2 Ed. Vol.13 p.37. The duties owed by an executor to a creditor are of a fiduciary nature, so that a creditor can sue an executor in equity to recover his debt in due course of administration: A.G. v. Cornthwaite 2 Cox 44: 30 E.R. 21, and if an executor has committed a devastavit, a creditor can recover the same damages in

equity as at common law: in re Baker 20 Ch. div. 230. Where a judgment for the administration of theestate is given the modern practice under a Judicature Act is to transfer an action commenced at common law against an executor as an executor and/personally to the Chancery Division; in re Pimm 1916 W.N. 202. At first it was usual, although not strictly necessary, for a creditor to sue on behalf of himself and all the other creditors for the administration of the personal estate, and he had to sue in this way in a suit for the administration of real estate not devised to an executor on trust for sale and payment of debts: Daniels Chancery Practice 8th Ed. pps.174 and 175. In England after 1852 a creditor could sue in his own name for the administration of the personal estate: in re Blount, Naylor v. Blount 27 W.R. 865: in re Greaves 18 Ch. div. 551: and, since the Transfer of Land Act 1897, for the administration of the real estate: in re James 1911 2 Ch. 348. In Western Australia, where the real as well as the personal estate is made assets for the payment of debts, Order 55 Rule 5 of the Rules of the Supreme Court enables a creditor to sue in his own name for the administration of the real and personal estate of the deceased. But this alteration in procedure did not affect the manner in which equity deals with the substantive rights of the creditors. If an executor admits assets the creditor who sues is entitled to an immediate order for payment of his debt: Woodgate v. Field 2 Hare 211: 67 E.R. 88. But otherwise, after judgment for administration, the creditors standing in equal degree must be paid rateably.

> "A devastavit or waste in an executor or administrator is when he doth misemploy the estate of the deceased and misdemean himself in the management thereof against the trust imposed in him;" Sheppard's Touchstone p. 485

cited in re Blow 1914 1 Ch. 233 at p. 245. It is treated at common law as a tort and in equity as a breach of duty: in re Hyatt 38 Ch. div. 609 at pps. 617-618. It is an action against an executor personally so that he can plead the Statute of Limitations: Thorne v. Kerr 2 K. & J. 54: 69 E.R. 691: in re Hyatt (supra) at p. 616: Lacons v. Warmoll 1907 2 K.B. 350: in re Blow (supra).

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As amongst creditors of equal degree an executor, prior to an order for the administration of the estate, subject to some statutory provision to the contrary, has always been entitled to prefer one creditor to the others, and to pay him in full, although by doing so the assets may be so depleted that the debts of the other creditors will only be paid in part or will not be paid at all. Sec. 22 (1) of the Administration Act 1903 (W.A.) provides that in the administration of the estate of every deceased person all creditors of such person shall be treated as standing in equal degree, and be paid accordingly out of the assets whether legal or equitable. This provision, which re-enacts Hinds Palmer's Act, the object of which was to place specialty and simple contract creditors on an equal footing inter se, in no way deprives an executor of this right: in re Samson 1906 2 Ch. 584.

It follows that a vigilant creditor who sues an executor and recovers judgment at law is entitled to recover his debt in full de bonis testatoris although insufficient assets are left to satisfy the other debts. In a similar manner where an executor commits a devastavit and the estate thereby suffers damage, a creditor who sues an executor personally and proves a devastavit can issue execution for the whole amount of the devastavit leaving nothing for the rest of the creditors if the whole amount is required to satisfy his judgment debt: Wentworth on Executors 14th Ed. p. 309. But in equity a creditor who has sued and recovered judgment that the assets be applied in due course of administration is treated as a trustee of the action for the benefit of the other creditors: in re Wester Wemyss 1940 1 Ch. at p. 25.

Usually therefore there must be an inquiry as to the debts, but in the present case the evidence establishes that all the unsecured creditors of the testatrix have been paid except the bank in respect of the contingent debt (if this is an unsecured debt) and that the bank has assented to the carrying on of the business so that the inquiry can be dispensed with, because where the plaintiff is the only creditor he can be placed in equity in substantially the same position as though

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he had sued for his debt at law: in re Greaves (supra): in re Thomas 1912 2 Ch. 348: in re Blow (supra).

The evidence proves that immediately prior to the action the defendants were contending that the whole of the assets in the estate were mortgaged to the bank, that the only fund out of which any part of the plaintiff's debt could be paid was out of moneys provided by the bank, and that, as the bank had refused to make any advance, there were no funds available to satisfy the plaintiff's claim even for the overdue interest. An officer of the defendant company said that the estate was hopelessly bankrupt and his evidence is borne out by the answers to interrogatories. It appears to be clear, therefore, that there are now no assets of the testatrix available to satisfy the plaintiff's claim, so that it can be immediately assessed on the basis that the only fund available to satisfy the claim is the amount the defendants should restore to the estate to satisfy the devastavit: Rogers v. Soutten 2 Keen 598: 48 E.R.758:

The damage which the plaintiff has suffered by the defendants' breach of duty is the amount which it would have received if the assets had been realised on or about the 16th July 1935. If the sums required to discharge the secured debt to the bank and to satisfy the defendants' indemnity on that date exceed the sum which the assets would have realised then the plaintiff has not suffered any damage. There is nothing in the Act to prevent the plaintiff praying that the necessary accounts and inquiries should be held to establish this amount. It is a proceeding against the defendants personally and in equity does not require that there should be any prior judgment against the estate for the principal of the debt or for costs.

But I am of opinion that, apart from the order for payment of £317.0.3 de bonis testatoris, the remainder of the judgment of the Supreme Court cannot stand. It is based upon the premises that so long as the Mortgagees' Rights Restriction Act is in force there is no form of action in which the plaintiff without leave can recover any immediate sum except for interest. It therefore takes the form of a condition declaratory order to the effect that if at some future date the plaintiff should become

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entitled to recover the unpaid instalments, and the assets of the estate at that time should be insufficient to satisfy them, the defendants must then repay to the estate an amount not exceeding the loss which the estate has suffered by their devastavit sufficient to satisfy the balance of the debt then outstanding to the extent to which it cannot be recovered out of the estate. Non constat that at that uncertain future time the assets in the estate will not be sufficient to satisfy this balance in which case the action need not have been brought, yet the defendants have been ordered to pay the costs in any event. But the main objection to the judgment is that the action, in so far as it seeks any order for payment out of the assets (whether it seeks an immediate or a future payment) is an action to recover moneys due under a mortgage, and therefore, illegal, if commenced without the leave of the Court. A declaration is also made with respect to the rights of the plaintiff to have the assets which will then exist in the estate applies in satisfaction of the plaintiff's debt in priority to the defendants right to use these assets to satisfy the personal liabilities which they will have incurred to subsequent creditors in carrying on the business. But the plaintiff cannot approbate the acts of the defendants in acquiring these assets, but reprobate their right to recoup themselves thereout for any liabilities which they have incurred in doing so: Dowse v. Gorton (supra).

The judgment also provides that the plaintiff is entitled to be paid out of the estate without regard to any contingent liability of the testatrix under any guarantee given by her during her lifetime. This provision relates to the contingent debt to the bank. An executor can safely distribute the estate without setting aside a fund to provide for a contingent debt provided that the Court in administering the estate makes an order authorising him to do so. But the Court has a discretion, the exercise of which must depend upon circumstances, so that such an order should only be made immediately prior to the distribution and not when the distribution is to take place at some future uncertain date, before which the contingent debt may ripen into an actual debt:

in re King 1907 1 Ch. 72: in re Lewis 1939 1 Ch. 232; in re Arnold 166 L.T. 199. The bank's securities were not tendered so that there is no evidence whether or not this contingent liability is charged on the mortgaged assets. But in the event of it being charged, it will have to be taken into account in ascertaining the secured indebtedness to the Bank.

I am of opinion that there should be judgment for an inquiry and an account of (1) the assets comprised in the estate of the testatrix at 16th July 1935 and what would have been the net proceeds of sale of the se aesets if they had been sold on or about that date. (Taylor v. Tabrum 6 Sim. 281: 58 E.R.599 Fry v. Fry 27 Beav. 144: 54 E.R. 56). (2) What amount would have been available to satisfy the debt of the plaintiff upon such a sale after deducting from the net proceeds of sale the amount of the principal interest and costs which would have been properly payable to the bank if its securities had been discharged on 16th July 1935, and the amount required to indemnify the defendants against any liabilities which they had incurred in administering the estate (including the carrying on of the business) prior to 16th July 1935. These inquiries and accounts will establish the amount the plaintiff would have received if the assets had been sold on 16th July 1935.

As the issue mainly contested at the hearing was whether the plaintiff had assented to the carrying on of the business, the defendants should be ordered to pay the costs of the action up to and inclusive of this judgment. Further consideration of the action and all further questions of costs should be reserved.

When the action comes on for hearing upon further consideration, the plaintiff will be entitled to ask for an order against the defendants personally for payment of the amount ascertained by the inquiry and accounts to be the amount which it would have recovered if the assets had been sold on 16th July 1935. Any sums paid to the plaintiff on account of the principal of the debt after 16th July 1935 would have to be credited in reduction of the principal amount found to be due to the plaintiff.

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As the amount for which the plaintiff will ultimately recover judgment on further consideration will be calculated on the basis of what it would have received if the estate had been realised on 16th July 1935 it will have no further claim against the estate. It has claimed that the assets should not have been risked in trade after that date and its claim will have been ascertained on that basis so that it cannot have any further claim against the defendants if a profit is made by carrying on the business in the future.

Payment to the plaintiff should be made conditional upon Mrs. Collins' interest in the leases being transferred to the defendants.

Subject to this variation of the judgment of the Supreme Court, the appeal should be dismissed.

But I am not in entire agreement with the proposed order. It smacks of the old common law judgment de bonis testatoris et si non de bonis propriis, but, with respect to the principal bone of contention, namely the right to recover the instalments, it omits the essential ingredient of judgment de bonis testatoris, presumably because it is recognised that judgment for payment of the instalments de bonis testatoris would be illegal. As the plaintiff deliberately chose to commence proceedings to recover the instalments without the leave of the Court so that it could not sue for judgment de bonis testatoris and could only sue the defendants personally for damages for failure to realise the assets at the appropriate date the costs should not be made payable out of the estate. The orders of the learned trial Judge and of the Full Court with respect to costs were right. The defendants should be ordered to pay the costs of the present appeal. Assuming that in other respects the order will lead to the same result as the order which I have outlined I agree with it. Otherwise I disagree with it.