

C-1-06

31, 1951

No. 31 of 1951.

# In the Privy Council.

## ON APPEAL

31453

FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

THE PERPETUAL EXECUTORS TRUSTEES AND AGENCY COMPANY (W.A.) LIMITED the Executor of the Will of PATRICK ANDREW CONNOLLY, deceased

RECEIVED BY THE PRIVY COUNCIL  
11 JUL 1951  
SITTING IN THE  
Appellants.

AND

10 GEORGE ALFRED MASLEN, JOHN ANDREW MASLEN, KENNETH GEORGE MASLEN and RICHARD WALLACE MASLEN

Respondents.

## Case for the Respondents

RECORD.

1. This is an appeal by special leave from an order of the High Court of Australia dated the 5th December, 1950, whereby the High Court by a majority (Latham, C.J., and Kitto, J., Fullagar, J., dissenting) allowed the Respondents' appeal from an order of Walker, J., in chambers in the Supreme Court of Western Australia dated the 14th June, 1950. p. 33. p. 8.

20 2. The order in council granting leave to appeal reserved to the Respondents the right to contend that no appeal lies in the absence of a certificate of the High Court of Australia pursuant to section 74 of the Commonwealth of Australia Constitution Act, 1900, which provides that no appeal shall be permitted from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States unless the High Court shall certify that the question is one which ought to be determined by His Majesty in Council.

30 3. The Appellants have not obtained such a certificate. The Respondents contend that such a certificate is necessary because the order which the Appellants desire to obtain must be based upon an interpretation of section 29 of the Wool Realisation (Distribution of Profits) Act, 1948, which overrides the ordinary law of the States in a way outside any powers of the Parliament of the Commonwealth of Australia under section 51 or any other provisions of the constitution.

4. The inter se point will appear more clearly if the facts relating to the appeal are first set out. The development of the Respondents' contentions on the preliminary point are therefore postponed until paragraphs 24 to 27.

p. 2, ll. 24-31.

p. 2, ll. 32-39.

5. The Appellants are the executors of the will of Patrick Andrew Connolly who died on the 28th December, 1946, and who at all material times until the 30th June, 1946, in equal partnership with Claude Ashley Laffer (who died on the 22nd January, 1949), had carried on in Western Australia a pastoral business under the name of Mardathuna Pastoral Company.

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6. By a deed dated the 17th June, 1946, to take effect from the 1st July, 1946, Patrick Andrew Connolly assigned the beneficial interest of his share in Mardathuna Pastoral Company to the Respondents in equal shares as tenants in common.

7. By a deed dated the 2nd October, 1946, Claude Ashley Laffer assigned his whole share in Mardathuna Pastoral Company to the First Respondent.

8. In exercise of the legislative powers conferred on the Parliament of the Commonwealth of Australia by section 51 of the constitution in relation to the defence of Australia and the acquisition of property on just terms for that purpose, the Parliament of Australia passed the National Security Act, 1939. On the 28th September, 1939, in pursuance of the powers conferred on him by that Act, the Governor General in Council made the National Security (Wool) Regulations for the carrying out of an arrangement made between the Governments of the United Kingdom and the Commonwealth for acquiring Australian wool in connection with the war with Germany. The regulations provided (A) that all wool grown in Australia should be compulsorily acquired, (B) that the regulations should be administered by the Central Wool Committee, (C) that all growers of wool should submit their wool to authorised persons for appraisalment, and (D) that every grower should be paid the appraised value.

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9. Regulation 30 was in the following terms :—

30. (1) All moneys payable by the Government of Great Britain under the arrangement made by that Government with the Commonwealth for acquiring Australian wool shall be received by the Central Wool Committee and out of such moneys the Central Wool Committee shall defray all costs, charges and expenses of administering these Regulations.

(2) Any moneys which may be received by the Central Wool Committee from the Government of Great Britain under or in consequence of such arrangement over and above the purchase price payable by such Government thereunder for the wool and any surplus which may arise shall be dealt with as the Central Wool Committee shall in its absolute discretion determine.

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10. Mardathuna Pastoral Company under the Regulations supplied wool to the Central Wool Committee through the Westralian Farmers Co-operative Limited in some cases, and through Elder Smith and Company Limited in other cases, until the compulsory acquisition of wool ceased on the 30th June, 1946.

11. Stocks of wool were accumulated during the war, and an agreement for their orderly disposal was made between the Governments of the United Kingdom, Australia, New Zealand and South Africa. In Australia statutory approval to the agreement was given by the Wool Realisation Act, 1945, which provided, inter alia, that the National Security (Wool) Regulations should be continued in force, that the disposal of stocks should be carried out by a company entitled "The Joint Organisation" in which the shares were to be held by nominees of the four Governments and that there should be set up an Australian Realisation Commission, the subsidiary in Australia of the Joint Organisation, to have and perform all the duties and all the powers, authorities and functions of the Central Wool Committee under the National Security (Wool) Regulations and other statutory regulations governing the disposal of wool and sheepskins.

12. The Wool Realisation (Distribution of Profits) Act, 1948, provided for the distribution of any ultimate profits accruing to the Commonwealth under the Wool Disposals plan and for other purposes. The Respondents submit that when the whole Act is examined its purposes are clear. The Act is to provide for the distribution of surplus profits by way of an increased price for the wool. Dealers, as distinct from brokers, are to be excluded from having any part in the machinery of distribution. As dealers had submitted wool for appraisalment the Act could not therefore authorise the Commission to pay a proper share of the profits to each person who had submitted wool. Having excluded dealers, the Act had to provide rules to make it possible for the Commission to know with certainty and without complicated inquiries to what persons the Commission could properly make payment. Payment is authorised to those persons, and it is left to them to distribute the moneys which they receive amongst those beneficially entitled, according to their several interests.

13. The Appellants, on the other hand, contend that the object of the Act was to ensure that only the actual owners of the sheep from which the wool came should receive any share in the surplus profits, and that the Act expressly excludes from benefit all other persons except such as by operation of law (as on death or bankruptcy) may have succeeded to the wool producers' rights.

14. The most relevant provisions of the Act may be summarised as follows :—

Section 4 is a definition section which includes a definition of "dealer" as a person, not being a broker or a person who owned the sheep from which the wool came, who submitted the wool for appraisalment in the course of a business of dealing in wool or of acting as an agent in submitting wool for appraisalment.

Sections 5 and 6 provide for determining the amounts available for distribution under the Act.

Part III, consisting of sections 7 to 14, deals with "Persons Entitled".

Section 7 requires the Commission to distribute the available amounts in accordance with the Act, to persons who supplied wool for appraisalment, proportionately to the appraised value.

Section 8 provides that wool submitted by a dealer (unless he owned the wool before the 28th September, 1939) is deemed to have been supplied for appraisalment by the dealer's principal or (if the wool had been submitted on the dealer's own behalf) the person from whom the dealer obtained the wool, unless such principal or person was also a dealer. In that case, the principal of the first dealer to deal with the wool or the person from whom such dealer obtained the wool is deemed to have supplied it for appraisalment. By sub-section (3) notwithstanding the terms of any contract, before or after the Act operates, no dealer is entitled to recover from another person any moneys paid to that other person under the Act.

Section 9 provides for payment to the trustee, with certain 20 exceptions, of moneys in respect of wool supplied for appraisalment by a bankrupt or by a person, since deceased, whose estate is being administered in bankruptcy, or by the personal representative of a person whose estate is being so administered.

Section 10 is in these terms:—

10.—(1) Where participating wool was supplied for appraisalment by a company which is defunct, an amount which would otherwise be payable under this Act to the company may be paid by the Commission to such person as appears to the Commission to be justly entitled to receive it. 30

(2) Where participating wool was supplied for appraisalment by a partnership which has been dissolved, an amount which would otherwise be payable under this Act to the partnership may be paid by the Commission to any former partner or partners (including the personal representatives of a deceased former partner).

(3) Where an amount has been paid in pursuance of this section, the rights, duties and liabilities of the person to whom it is paid in respect of the amount shall be the same as if it were part of the proceeds of a sale of the wool by the company or 40 partnership, made at the time of the supply of the wool for appraisalment.

Section 11 provides for payment (subject to section 9) to the personal representative of a deceased person who had supplied wool for appraisalment, the moneys to be treated as if the proceeds of a sale made at the time of supply.

Section 12 provides that (subject to section 9) moneys payable in respect of wool supplied by a trustee shall be payable to the trustee for the time being.

Section 13 gives a person who supplied wool held by him as security the rights and duties in respect of moneys paid under the Act which he would have had if the moneys were part of the price paid upon appraisalment of the wool.

10 Part IV regulates the method of distribution by requiring returns from brokers and other persons, and by permitting claims, as a basis for a list of persons entitled under the Act stating in respect of each person the appraised value of his wool. The list is to show the persons who are entitled to share in the distributions (section 18). In cases of doubt the Commission may make payments into Court. (It is to be noted that these persons are by no means necessarily those who are to receive the beneficial interest in the moneys when paid, but they are the persons to whom the moneys are to be paid by the Commission and from whom the Commission will receive a discharge: see section 19. The intention of the Act is clearly to keep this list as stable as possible with a minimum of alteration from time to time so that when the time to make a distribution arrives this can be carried out expeditiously.)

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In Part VI, which deals with miscellaneous matters, section 28 protects the Commission from legal proceedings.

Section 29 is in these terms:—

29. Subject to this Act and the regulations, a share in a distribution under this Act, or the possibility of such a share, shall be, and be deemed at all times to have been, absolutely inalienable prior to actual receipt of the share, whether by means of, or in consequence of, sale, assignment, charge, execution or otherwise.

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15. The Respondents submit that the opening words of section 29 show that its operating provisions are conditional, and have no application to cases arising under section 10 sub-sections (2) and (3) of the Act which expressly contemplate assignment. In any event section 29 only has reference to alterations by way of assignments etc. which would have the effect of altering the distribution list under section 18 and was never intended to affect assignments of the beneficial interests in these moneys. The only instance where the Act interferes with such beneficial interest is to be found in section 8 sub-section (3), which provides that "dealers" are not entitled to recover from another person any moneys paid to such person under the Act. But it will be noted that it is only dealers who are affected by this sub-section.

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16. In respect of wool produced by Mardathuna Pastoral Company, the Commission paid to the Westralian Farmers Co-operative Limited £2,132 9s. 2d. which was paid over to the Appellants and to Elder Smith and Company Limited £562 14s. 11d. which was paid over to the Respondents. The parties are agreed that both sums will be dealt with according to the answer to the questions raised by the originating summons out of which this appeal arises.

p. 3, ll. 18-26.  
p. 1.

p. 1.

17. The questions asked by the originating summons were :—

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

(2) Have the Defendants any right title or interest in the said moneys or any of them by virtue of the said deed. 10

18. By the deed of the 17th June 1946 Patrick Andrew Connolly assigned to the Respondents to be held by them as tenants in common "all his right title and interest in" (A) the partnership lands, (B) the buildings and fixtures thereon, (C) the partnership goodwill, (D) the machinery, stock-in-trade, livestock and other things employed in the partnership business "together with the benefit of all contracts and engagements and book debts to which the said Patrick Andrew Connolly and Claud Ashley Laffer may be entitled in connection with the said business together with all other assets of the said business," and (E) all moneys due by Mardathuna Pastoral Company to Patrick Andrew Connolly, 20 including £7,000 which he had lent to the Company.

19. This deed is governed by the law of the State of Western Australia. The Respondents will refer in particular to the Partnership Act, 1895, which contains the following amongst other provisions :—

33. The share of a partner in the partnership property at any time is the proportion of the then existing partnership assets to which he would be entitled if the whole were realised and converted into money, and after all the then existing debts and liabilities of the firm had been discharged.

\* \* \* \* \*

42.—(1) An assignment by any partner of his share in the 30 partnership, either absolute or by way of mortgage, does not, as against the other partners, entitle the assignee during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs, or to acquire any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the 40 assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

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44.—(1) Subject to any agreement between the partners every partnership is also dissolved by the death or bankruptcy of any partner.

\* \* \* \* \*

49. After the dissolution of a partnership, the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

10        Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has, after the bankruptcy, represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

20        50. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively, after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the Court to wind up the business and affairs of the firm.

51. On the dissolution of a partnership every partner shall be entitled, in the absence of any agreement to the contrary, to have the goodwill of the business sold for the common benefit of all the partners.

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30        57. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed :—

(a) Losses, including losses and deficiencies of capital shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits;

(b) The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order :—

40        (1) In paying the debts and liabilities of the firm to persons who are not partners therein;

(2) In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;

(3) In paying to each partner rateably what is due from the firm to him in respect of capital;

(4) The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

pp. 4-7.

20. Walker, J., held that section 10 (3) was to be treated as bringing about the result that the rights to the moneys should be determined upon the basis that the wool should be deemed to have been sold at the time of the supply of the wool for appraisalment and that the money should be regarded as having been received at the same time. If that had been so the partners Connolly and Laffer would have been entitled to the moneys in equal shares. In his view the effect of sections 7, 10 and 11 was therefore to vest the beneficial interest in the moneys in the estates of Patrick Andrew Connolly and Claud Ashley Laffer in equal shares. 10

p. 33.

pp. 10-18.

p. 13, l. 32—  
p. 14, l. 56.

21. The High Court of Australia allowed the Respondents' appeal. Latham, C.J., thought it plain that moneys paid under the Act had no relation to the discharge of any obligation but was strictly a gift to persons selected in accordance with the Act, the provisions in sections 10 and 29 being conditions of the gift. Section 29 is, however, expressly "subject to this Act", and by section 10 (3) in the case of dissolved partnerships the rights, duties and liabilities of the recipient are to be determined upon the hypothesis that the wool had been sold by the partnership when it was supplied for appraisalment, but the money paid by the Commission and to be treated as part of the price was not to be regarded as received at the time of sale. In the opinion of Latham, C.J., the question was what were the rights under the ordinary law in respect of the proceeds of wool sold before the 30th June, 1946, but only paid when the Commission made payment. The partnership between Patrick Andrew Connolly and Claud Ashley Laffer if not previously dissolved by agreement was certainly dissolved by the death of Patrick Andrew Connolly in 1946, and the argument for the Appellants, in the Chief Justice's opinion, ignores the dissolution and treats the partnership as still subsisting and contradicts the fact which brings the section into operation. The dissolution brings section 10 (3) into operation with the result that the moneys in question must be treated as representing wool sold in 1946 but not paid for until after the dissolution. Accordingly, although the first question in the summons was in his opinion to be answered in the negative, the Chief Justice held that the Respondents are entitled to one-half of the moneys in equal shares, and the Respondent George Alfred Maslen is entitled to the other half. 20 30

p. 15, l. 1—  
p. 16, l. 7.

p. 15, ll. 5-39.

p. 15, ll. 39-53.

pp. 19-21.

p. 20, ll. 20-29.  
p. 20, l. 30—  
p. 21, l. 9.

22. Kitto, J., reached the same conclusion. The assignments vested in the assignees the assignors' respective interests in the assets of the partnership, so that if the partnership had sold wool in 1946 and part of the price had still been outstanding when the assignments were executed, the assignees would have been entitled to it. Section 10 (3) produces that result. Kitto, J., thought that section 29 must be given full effect when one person claims under the Act and another under a purported assignment or alienation; but the Respondents' claim rested on the direct operation of section 10 (3) which entitles them to the share. 40

pp. 22-32.

p. 24, ll. 16-27.

23. Fullagar, J., dissented. After setting out the facts he drew the inference that the partnership had been dissolved by agreement before the death of Patrick Andrew Connolly and that the business was thereafter



carried on by the Respondents in partnership. Fullagar, J., regarded section 29 as concerned only with alienation inter vivos. In his view the case was governed by section 10 (3) which, however, was not to be too strictly construed. It did not, he thought, have the meaning or effect attributed to it by the Respondents, but only meant that payments were to be treated as assets of the dissolved partnership of the nature of proceeds of the sale of the wool. He thought the Respondents' view produced odd results, whereas his view gave a more reasonable meaning to the words, avoided serious anomaly and accorded with the other provisions of sections 10 and 11. Any purported assignment of an expectant share of the wool profit is, in his opinion, ineffective by virtue of section 29.

p. 25, l. 18—  
p. 26, l. 17.  
p. 27, ll. 1-54.

p. 27, l. 55—  
p. 32, l. 16.

p. 30, l. 23, 153.

24. If section 29 is properly to be construed as having the effect of rendering null and void contracts and dispositions relating to the beneficial interest in a share in a distribution under the Act, the Respondents respectfully submit that the Parliament of the Commonwealth of Australia exceeded its powers in passing the section, and that the section is ultra vires and inoperative.

25. The Respondents' contention is that the only legislative power in such matters is vested by the Constitution in the Parliaments of the States. The powers of the Parliament of the Commonwealth, so far as relevant, must be found, it is submitted, in section 51 of the Constitution. The only relevant placita appear to be (vi), (xxxix) and (xxxix). These provisions are as follows :—

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to :—

\* \* \* \* \*

(vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth :

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30 (xxxix) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws :

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(xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

40 26. The acquisition of the wool on just terms was, as the Respondents admit, a proper exercise of the defence power, but the Respondents submit that the Commonwealth Parliament could not in 1948 override the ordinary law of any State and provide that a transaction which under the State law was a valid and effective transaction enforceable in the Courts, should be of no effect.

27. Accordingly, if section 29 is to bear the construction for which the Appellants contend, this appeal raises a question as to the limits inter se of the constitutional powers of the Commonwealth and those of the several States. Under the decisions of the Judicial Committee of the Privy Council, the appeal cannot, by virtue of section 74 of the Constitution, be heard without a certificate of the High Court of Australia.

28. The Respondents therefore submit that they are entitled to the moneys in question both by virtue of the assignments made by Patrick Andrew Connolly and Claud Ashley Laffer and on a proper construction of the Wool Realisation (Distribution of Profits) Act, 1948, and that this 10 appeal should be dismissed with costs for the following amongst other

### REASONS

- (1) BECAUSE this appeal does not lie without a certificate of the High Court of Australia.
- (2) BECAUSE the Parliament of Australia has no power to enact provisions which affect the operation of assignments or other alienations valid under the law of Western Australia.
- (3) BECAUSE the moneys in question under the terms of section 10 (3) of the Wool Realisation (Distribution of 20 Profits) Act, 1948, belong to the Respondents.
- (4) BECAUSE the reasoning of Latham, C.J., and Kitto, J., is to be preferred to that of Walker, J., and Fullagar, J.

J. P. DURACK.

FRANK GAHAN.

In the Privy Council

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**ON APPEAL**  
*from the High Court of Australia.*

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BETWEEN

THE PERPETUAL EXECUTORS  
TRUSTEES AND AGENCY  
COMPANY (W.A.) LIMITED the  
Executor of the will of Patrick  
Andrew Connolly, deceased - - *Appellants*

AND

GEORGE ALFRED MASLEN, JOHN  
ANDREW MASLEN, KENNETH  
GEORGE MASLEN, AND  
RICHARD WALLACE MASLEN *Respondents*

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**Case for the Respondents**

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