

[HIGH COURT OF AUSTRALIA.]

DAVIS APPELLANT;
RESPONDENT,

AND

MACKERRAS RESPONDENT.
APPLICANT,

ON APPEAL FROM THE COURT OF BANKRUPTCY
DISTRICT OF VICTORIA.

H. C. OF A. *Bankruptcy—Wife's claim—Money or estate of wife in possession of husband—*
1930. *Bankruptcy of husband—Money "lent or intrusted" by wife to bankrupt—*
} *Bankruptcy Act 1924-1929 (No. 37 of 1924—No. 28 of 1929), sec. 85 (1)*.*

MELBOURNE,
June 4.
—
SYDNEY,
Aug. 11.
—

Possession of money or other estate of the wife of a bankrupt by her husband for mere physical custody or service does not constitute a "lending" or "intrusting" of such money or estate by the wife to her husband within the meaning of sec. 85 (1) of the *Bankruptcy Act 1924-1929*.

Isaacs C.J.,
Gavan Duffy,
Rich, Starke
and Dixon JJ.

APPEAL from the Court of Bankruptcy (District of Victoria).

This was an appeal by John G. Davis, as trustee in bankruptcy for John William Mackerras, against an order made by Judge *Moule* sitting as a Court of Bankruptcy for the District of Victoria whereby he ordered that of the sum of £900 held by the Official Receiver the sum of £788 18s. 2d. be paid by him to the respondent, Ermonce

* Sec. 85 (1) of the *Bankruptcy Act 1924-1929* provides: "Any money or other estate of the wife of a bankrupt lent or intrusted by her to him shall be treated as assets of his estate, and the wife shall not be entitled to claim any

dividend as a creditor in respect of any such money or other estate until all claims of his other creditors for valuable consideration in money or money's-worth have been satisfied."

Irene Mackerras, the wife of the bankrupt, John William Mackerras. The appellant claimed the moneys in question as being money of the wife of a bankrupt "lent or intrusted to him" within the meaning of sec. 85 (1) of the *Bankruptcy Act* 1924-1929. The respondent claimed the money as her own, and contended that she had not "lent or intrusted" the money to her husband within the meaning of that provision. The learned Judge in Bankruptcy found that the money in question was derived from money and property which belonged to the respondent. The respondent and her husband had left Melbourne to go to New Zealand, and the money in question was at first handed by the respondent to her husband for safe-keeping. While the respondent and her husband were actually travelling or outside their lodgings, the money was carried by the husband; but while in lodgings the respondent had charge of it. The respondent knew of the financial difficulties of her husband, and that he had been served with a bankruptcy notice. While in Sydney and while the husband had the money in his care the respondent and he went to a bank to arrange about the money being sent to Auckland, where they proposed to go. The respondent stated that she let her husband carry the money as it was safer with him. When they went to the bank she took no part in the arrangements there made with the teller except to sign her name in the signature book. Whilst the arrangements as to opening the account were being made at the bank the respondent's husband said to her, "What about having it in the joint names in case anything happens to you, so I could then draw the moneys to keep the family going?" and she said "Yes." The money was paid into the bank, not in the joint names of the husband and wife but in the alternative, so that either party could draw on the money when sent over to New Zealand. The respondent did not know that her husband could draw the money in New Zealand or that she could draw it herself, but knew that it could be withdrawn on one signature alone. The husband told the bank teller that it was his wife's money he was paying in. On 3rd March 1930 John William Mackerras was arrested at Sydney under a warrant purporting to have been issued out of the Court of Bankruptcy in pursuance of an order made by the Court under sec. 77 (1) (a) of the *Bankruptcy*

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had in his possession £100 in cash, which was seized by the officer executing the warrant, and a bank draft for £900 on the Auckland Branch of the Bank of New Zealand. After his arrest and on the same day the sum of £900 was drawn from the said Bank at Sydney, and of this sum £100 was handed to the respondent by the permission of the officer executing the warrant. The balance of the moneys, namely, the sum of £900 was retained by the said officer and was handed by him to the Official Receiver at Melbourne, who retained it. On 7th March 1930 a sequestration order was made by the Court of Bankruptcy against John William Mackerras. Of the sum of £900 it was not disputed that £111 1s. 10d. belonged to the children of the respondent and John William Mackerras, leaving the amount of £788 18s. 2d. in dispute.

Morley, for the appellant. The money in question was “intrusted” by the wife of the bankrupt to her husband within the meaning of sec. 85 (1) of the *Bankruptcy Act*. This provision came originally from sec. 3 of the *Married Women's Property Act* 1882 (45 & 46 Vict. c. 75), and a similar provision now appears as sec. 6 of the *Married Women's Property Act* 1928 (Vict.). The words, which appear both in the English and in the Victorian Acts, “for the purpose of any trade or business carried on by him or otherwise” have been omitted from the Federal *Bankruptcy Act*, which gives the latter Act a wider scope than either of the former Acts. Under the *Bankruptcy Act* if the wife parts with her money or property to her husband it comes within the section.

Gorman K.C. and *T. G. Jones*, for the respondent, were not called upon.

Cur. adv. vult.

Aug. 11.

The following written judgments were delivered:—

ISAACS C.J., GAVAN DUFFY, STARKE AND DIXON JJ. Sec. 85 of the *Bankruptcy Act* 1924-1929, by sub-sec. 1, postpones a wife's claim as a creditor of her husband to the claims of his other creditors

for valuable consideration, in respect of "any money or other estate of the wife . . . lent or intrusted by her to him." In this case it is clear, assuming, as we must in the circumstances, that the facts are those found by the learned Judge who heard the application, that in law there was no loan and no intrusting of the £900 in contest to her husband. Starting with the accepted fact that the £900 was her property, she permitted her husband to arrange with the bank in her presence to transmit the sum to Auckland, stating that it was his wife's money, and in order to provide for the possibility of some event preventing her from there drawing it herself, the right to draw it was alternatively given to the husband. But she had the right and the power to draw the money, and her right was as between husband and wife expressly made primary, his being secondary and conditional only. Unless the extreme contention for the appellant that any permitted physical possession, however limited in time and purpose, as, for instance, as a mere messenger, be accepted, the facts of this case are clearly outside the section. The word "intrusted" is undoubtedly a flexible word, and its signification conforms to the context and the occasion of its use. In sec. 85 it occurs in an Act relating to bankruptcy, and in a section which is openly directed to protecting other creditors in preference to a claim by husband or wife in the other's bankruptcy. Further, the word "intrusted" is placed on a level with "lent," and the result of each is that the property so dealt with is "treated as assets" of the bankrupt's estate, the lender or intruster being postponed to other creditors. This indicates that "intrusted" implies that some legal power or some authority has been conferred upon the bankrupt enabling him to use or dispose of the property as if it were his own, whether he is under any obligation or not to account for it or its proceeds to his wife. *Rigby L.J.* in *In re Cronmire*; *Ex parte Cronmire* (1), expressed that view, as we understand him, when he said intrusting property to a husband meant "handing it over to him to deal with it as he might think fit." No possession for mere physical custody or service comes within sec. 85.

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(1) (1901) 1 K.B. 480, at p. 484.

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RICH J. I do not propose to attempt an exhaustive definition of the word "intrusted." Its meaning depends upon the context in which it is found. In the present case the word has not its colloquial or general meaning, but is used of property impressed with a kind of trust. In certain classes of cases, such as divorce, bankruptcy and collision cases, I am somewhat sceptical of the evidence given, but as the learned primary Judge, who saw the witnesses and heard their evidence, believed Mrs. Mackerras, I accept his finding. Even so, the result of her evidence is far from imposing any fiduciary obligation on the respondent. I agree that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Cleverdon & Hayes.*

Solicitors for the respondent, *McInerney & Williams.*

H. D. W.