[HIGH COURT OF AUSTRALIA.]

VISBORD . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

H. C. OF A. 1943.

MELBOURNE, *March* 11;

SYDNEY, *April* 15.

Latham C.J., Rich, Starke and Williams JJ.

Income Tax (Cth.)—Assessment—Capital or income—Moneys due under mortgage for principal and interest—Appointment of receiver—Income of mortgaged property accumulated in hands of receiver—Appropriation to payment of principal—Property Law Act 1928 (*Vict.*) (*No.* 3754), *ss.* 101, 109, 110—*Income Tax Assessment Act* 1922-1934 (*No.* 37 *of* 1922—*No.* 51 *of* 1934), *s.* 19—*Income Tax Assessment Act* 1936-1937 (*No.* 27 *of* 1936—*No.* 5 *of* 1937), *s.* 19.

The receiver appointed by a second mortgagee paid moneys collected by him into a trust banking account opened by the second mortgagee. Upon the appellant's becoming transferee of the first mortgage she informed the receiver that she did not require any payments for the time being out of moneys held by him. Subsequently the appellant became the transferee of the second mortgage and the balance in the trust account was transferred into a banking account in the name of the receiver; thereafter the receiver, at the appellant's direction, paid moneys which he collected into the last-mentioned account. Nothing was paid by the receiver to the appellant until the appellant sold the mortgaged property in exercise of her power of sale. Thereupon, there being a deficiency of principal, the receiver, at the appellant's direction concurred in by the mortgagor, paid the balance in the banking account to the appellant on account of principal.

Held, by *Rich*, *Starke* and *Williams* JJ. (*Latham* C.J. dissenting), that moneys collected by the receiver were assessable income of the appellant to the extent, in each year, of the interest which the appellant was entitled to be paid thereout.

CASE STATED.

Objections by Marie Visbord to assessments of Federal income tax, having been disallowed by the Commissioner, were treated as appeals to the High Court. *Latham* C.J. stated for the Full Court a case which was substantially as follows:—

1. Bourke Investments Pty. Ltd. (hereinafter referred to as "the company") is and at all material times has been a company duly incorporated under the *Companies Acts* (Vict.) and the shareholders therein are and at all material times have been the appellant, Marie Visbord, her husband, Harry Aaron Visbord, until his death on 6th July 1939, her son Wolf Ellis Visbord, her son Clive Visbord and her son Maurice Visbord. Its objects and the business carried on by it have at all material times included the lending of money at interest.

2. A property consisting of land situated at the corner of Collins and Spencer Streets, Melbourne, on which was erected a substantial building which was let out to various tenants, was purchased by Nicholas Condogianis in 1926 for £60,000. Condogianis was at all material times until the registration of a transfer of the land pursuant to the sale mentioned in par. 18 hereof the registered proprietor under the *Transfer of Land Acts* (Vict.) of an estate in fee simple in all such land.

3. By an instrument of mortgage dated 1st May 1928 Condogianis gave a mortgage over the property to the company to secure the repayment of the sum of £22,500 lent to him by it and interest thereon payable quarterly at the rate of twelve per cent per annum reducible to ten per cent per annum upon punctual payment. The principal moneys secured by the mortgage did not become payable until 30th July 1933 and the mortgage was expressed to be subject to the first mortgage hereinafter mentioned and was duly registered under the *Transfer of Land Acts* (Vict.) on 9th June 1928.

4. By an instrument of mortgage dated 16th May 1928 Condogianis gave a first mortgage over the property to William Thomas Finlay Atherton to secure the sum of £35,000 and interest thereon payable half-yearly at the rate of nine per cent per annum reducible to seven per cent per annum upon punctual payment. Such mortgage was duly registered under the *Transfer of Land Acts* (Vict.) on 9th June 1928, but before the mortgage to the company, and the principal moneys thereunder were expressed to be payable on 30th July 1933 or on earlier default in payment of interest or otherwise.

5. On 22nd March 1932 Condogianis was in arrears in payment of interest agreed to be paid by him under the second mortgage to the company and on that day the company duly appointed one F. R. Green, an employee of Harry Aaron Visbord, to be receiver "of all the lands and hereditaments comprised in the said mortgage." The appointment was made by the company as mortgagee under and in accordance with the powers conferred by the *Property Law Act* 1928 (Vict.).

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

6. Green, from the time of his appointment as receiver, until the sale of the property as hereinafter mentioned, collected all the rents thereof and paid thereout certain expenses as hereinafter described and from time to time arranged new leases with tenants of the property in the name of Condogianis or in his own name and did other acts of management in connection with the property. All his receipts and expenditure in respect of the property were by the direction of the company recorded by him in a cash book under the head " The Bourke Trust."

7. At or about the beginning of April 1932 the company opened an account at the Union Bank of Australia Ltd. under the name " Bourke Investments Pty. Ltd. Trust Account " and instructed Green to pay into the account all rents from the property which might be received by him, and he thereafter pursuant to such instruction and with the company's knowledge paid all such rents into the account until it was closed as mentioned hereunder.

8. By an instrument under seal dated 7th April 1932 Condogianis, after reciting the appointment of Green as receiver and the fact that the instrument was executed with the object of facilitating the company in obtaining, through the said receiver, an income or return from the said property available for or towards payment of what was or might become owing to it under the said second mortgage, appointed Green his attorney during the receivership to receive the rents of the property and to grant leases and do other acts in respect thereof on his behalf, and declared that all moneys received by Green under or by virtue of the powers so conferred should be deemed to be received by him as receiver appointed as aforesaid and should be dealt with accordingly.

9. From time to time down to 25th August 1936 Green prepared and submitted to the company for signature by the directors and they signed on its behalf cheques on the account for all rates and other expenses in connection with the property, and also until 31st August 1933 (when a transfer of the first mortgage to the appellant, Marie Visbord, in consideration of the sum of £35,000 was duly registered) for all interest from time to time due on the first mortgage and such expenses and interest were all paid by such cheques.

10. Shortly after the date of the transfer of the first mortgage to the appellant on 31st August 1933 the appellant informed Green that she did not require any payments to be made for the time being out of the moneys held by Green.

11. No interest on the first mortgage was paid out of the " Bourke Investments Pty. Ltd. Trust Account " or otherwise to the appellant during the period from 31st August 1933 to 24th August 1936 and save for certain sums which were prior to 24th August 1936 repaid

by the company to the said account no payment was made to the company or to its order in respect of the second mortgage between 22nd March 1932 and 24th August 1936 and save for the said sums no appropriation was made by Green during such last-mentioned period of the moneys in his hands as receiver or standing to the credit of the account to or towards either principal or interest on either the first or the second mortgage.

12. On 25th August 1936 a transfer was duly registered from the company to the appellant of the second mortgage, on which there was then owing £22,500 principal and (if all moneys paid into the "Bourke Investments Pty. Ltd. Trust Account" be left out of consideration) about £11,977 6s. 9d. for interest. The mortgage was purchased from the company by her in the name of Austral Loan Office, which was a trading name under which Mrs. Visbord for many years has carried on a money-lending business. The consideration paid by her to the company was £22,000 and for this consideration the company, on 24th August 1936, also assigned to her absolutely its right to require Green as receiver as aforesaid to apply and appropriate as it might direct moneys received by Green as receiver. The sum of £22,000 was paid to the company by her on 24th August 1936.

13. On 24th August 1936, being the date on which the transfer to the appellant was executed, the "Bourke Investments Pty. Ltd. Trust Account" was closed and the balance to the credit thereof transferred by the company to a new account opened by Green in the name of "F. R. Green receiver's account."

14. On 26th August 1936 the appellant, as proprietor of the first and second mortgages, demanded from Condogianis payment of the mortgage moneys, principal and interest, and gave him notice that if default continued for seven days, being the period fixed by each of the mortgages under and for the purposes of ss. 146 and 148 of the *Transfer of Land Act* (Vict.), she would sell the property. On 8th September 1936 Condogianis wrote to the appellant a letter in which he stated: "I wish the proceeds from the sale of the property, in conjunction with the moneys held in trust by the receiver, to be applied firstly to the payment of principal moneys owing, and the balance, if any, to the payment of interest under the first and second mortgages." At this date and at all material times there were in existence additional registered mortgages of the property expressed to be subject to the first and second mortgages.

15. On 9th September 1936 the appellant gave a direction to Green in the following terms:—"Bourke Investments Proprietary Limited has transferred to Austral Loan Office the second mortgage

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

dated 1st May 1928 given by Nicholas Condogianis to that Company and all incidental rights, including the Company's right to require you to apply and appropriate moneys received by you as Receiver for the Company. Austral Loan Office also holds a first mortgage over the property. Austral Loan Office wishes you and hereby authorises you to continue to act as Receiver under the second mortgage on the same conditions as set out in the appointment made by the Bourke Investments Proprietary Limited and for you to continue operating on the Trust account in the name of F. R. Green Receiver's Account at the Union Bank of Australia Ltd., Collins Street, Melbourne and also for you to arrange to appoint Mr. Wolf Ellis Visbord to countersign all cheques exceeding the sum of Two hundred pounds." Arrangements were forthwith made by her and Green with the bank that cheques on the account must be countersigned as aforesaid.

16. On 4th November 1936 the property was put up for auction by the appellant as mortgagee, but no bid was received.

17. From 9th September 1936 onwards Green continued to collect the rents from the property and to grant leases thereof and paid all such rents to the credit of the " F. R. Green receiver's account." Out of the moneys standing to the credit of the account all rates and certain other expenses in connection with the property were paid by him from time to time by cheques countersigned where necessary as above described, but no moneys were paid to the appellant thereout whether as principal or interest save as hereinafter appears.

18. On 9th November 1938 the property was again submitted for sale at auction, but the highest bid was £35,000, and no sale was made. On 11th October 1939 the property was submitted again for sale at auction and was sold by the appellant as mortgagee for £35,000 to her sons, Clive and Maurice Visbord, and her daughter-in-law, Adele Zara Visbord, on whose behalf the only bid received was made. At the date of this sale there was owing on the security of the first and second mortgages (if all sums paid into the bank accounts be left out of consideration) an amount of £85,562 6s. 3d. made up as follows :—

First Mortgage —Principal . .	. .	£35,000	0	0
Interest . .	. .	£11,629	3	9
Second Mortgage—Principal . .	. .	£22,500	0	0
Interest . .	. .	£16,433	2	6
Total		£85,562	6	3

The purchase price was paid by the purchasers to the appellant on or very shortly after 11th October 1939.

19. On 15th November 1939 the appellant gave to Green a direction in the following terms:—"As registered proprietor of mortgages Nos. 601160 and 601161 given by Nicholas Condogianis of property in Spencer Street Melbourne, under the second of which mortgages you are the receiver, and in conformity with his request to me of 8th September 1939 that the moneys held in trust by you should be applied firstly in payment of principal moneys owing, I direct that after paying or providing for the following payments which you as receiver are liable or may become liable to make, namely:—

Federal land tax to 30/6/39	2,006 12 6
M.M.B.W. rates to 30/6/40	257 4 0
Income Tax and Unemployment Relief Tax for which you have been assessed	832 17 3
	£3,096 13 9

you will pay the balance of the moneys in your hands to me as registered proprietor of the above-mentioned mortgages, as repayment of the balance of principal owing under mortgage No. 601160 and on account of the principal owing under mortgage No. 601161." Green paid to her on 11th December 1939 the sum of £16,415 4s. 10d. out of the F. R. Green receiver's account. Save and except in so far as the facts aforesaid may constitute an appropriation or appropriations of the rents there has been no appropriation of any part thereof to principal or interest under either the first or second mortgage and save as aforesaid no agreement to alter the statutory order of application of moneys received by a receiver as described in the *Property Law Act* 1928 (Vict.).

20. The appellant made returns of income in respect of the income years ended 30th June 1934, 30th June 1935, 30th June 1936 and 30th June 1937.

21. Neither the appellant nor the company ever returned any of the rents as income nor did the receiver. Condogianis returned the same as income received by him and deducted therefrom the interest payable in each year under the said mortgages.

22. On 23rd September 1937 the Commissioner required Green in his capacity as receiver to lodge returns for the period from 23rd March 1932 to 30th June 1937 inclusive of the rents and other income derived and the expenditure incurred by him as receiver, and Green on 11th October 1937 lodged such returns. It was not until such returns were so lodged that the Commissioner learned

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

what rents had been received by Green or of the existence or the titles of the bank accounts or of the payments made thereout.

23. On 24th September 1937 the Commissioner wrote to the appellant asking her to inform him why her returns of income had not included interest from the mortgage assigned to her, in view of the fact that amounts had been received by the receiver to which she, the first mortgagee, was entitled as interest payments. On 14th October 1937 Mrs. Visbord replied stating that her returns had not included interest from the mortgage because she had not received any interest on the mortgage or from the receiver. She further stated :—" The property mortgaged was recently offered for sale at auction after extensive advertisement. The best bid indicated that the property is worth many thousands of pounds less than the amounts of the mortgages. The mortgagor (Condogianis) acting within his power, has directed the Receiver, in respect of any moneys to become due to me, to apply them first to repayment of the amounts of the mortgages, and secondly, to interest thereon. Up to the present time the Receiver has not actually applied any moneys to payment of either principal or interest to me. If I should recover the whole of the principal due, and should then receive any further payment, such further payment will of course be applied to interest and returned for Income Tax. Under the law, the Receiver is deemed to be the agent of the mortgagor—not of the mortgagee—and I consider that I am not liable to furnish any returns in respect of interest which has not been paid or credited to me and probably will never be so paid or credited."

24. By an amended assessment (numbered 89886 for the financial year 1934-1935) in respect of the income of the income year ended 30th June 1934 and by an amended assessment (numbered 88194 for the financial year 1935-1936) in respect of the income of the income year ended 30th June 1935, each made and notified to the appellant on 11th November 1938, the Commissioner altered the taxable income and the income tax assessed to the appellant by increasing the assessable income, in respect of the income year ended 30th June 1934 by the inclusion of the sum of £1,404, which sum was equal to ten-twelfths of the net rents of the mortgaged property received by the receiver during the year remaining after payment of expenses and interest (ten-twelfths being the approximate fraction of that year during which the appellant was the owner of the first mortgage), and in respect of the income year ended 30th June 1935 by the inclusion of a sum of £2,450, being the interest at the rate of seven per cent per annum which would have been payable to the appellant under the first mortgage during that year

but for the *Financial Emergency Acts* (Vict.), which reduced the rate of interest to £5 8s. 6d. per cent per annum, and also increased the tax payable in respect of the income of the appellant in each of those income years by the inclusion of an amount of additional tax by way of penalty reduced to and fixed at a sum equal to interest at the rate of five per cent per annum on the tax avoided by reason of such rents and interest having been omitted from her returns. In assessing the appellant for income tax in respect of her income of the income years ended 30th June 1936 and 30th June 1937 the Commissioner, in the case of the year ended 30th June 1936, included in her assessable income (in assessment numbered 244081 for the financial year 1936-1937) a sum of £2,450, being the interest at the rate of seven per cent per annum which would have been due and payable to her under the said first mortgage during that year but for the *Financial Emergency Acts* (Vict.), and in the case of the year ended 30th June 1937, included in her assessable income (in assessment numbered 13687 in respect of the financial year 1937-1938) a sum of £2,997, being the net amount of the rents and profits of the mortgaged property received by the receiver during that year, after deducting the expenses paid out of the rents and profits during that year.

25. The Commissioner admits that in respect of each of the income years ending 30th June 1934, 1935 and 1936 interest has been calculated for the purposes of the amended assessments and assessment hereinbefore referred to at the rate of seven pounds per cent per annum instead of at the rate of £5 8s. 6d. per cent per annum at which rate the appellant was entitled to have such interest calculated by reason of the provisions of the *Financial Emergency Acts* (Vict.).

26. Each of the amended assessments in respect of the income years ending 30th June 1934 and 30th June 1935 was made within three years from the date when the tax payable on the assessment in respect of such income was originally due and payable. The Commissioner at all material times thought that the respective alterations and additions in and to the respective original assessments made by the amended assessments were necessary in order to ensure the completeness or accuracy of the respective original assessments. Neither the appellant nor the company made a full and true disclosure of all the material facts necessary for its assessment at any time before the amended assessments were made as aforesaid.

28. On 23rd December 1938 the appellant lodged with the Commissioner objections in writing against the amended assessments in respect of her income of the income years ended 30th June 1934 and 30th June 1935 and against the assessments in respect of her

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

income of the income years ended 30th June 1936 and 30th June 1937 on grounds the substance of which was as follows :—

(1) That the assessments were erroneous, were not in accordance with the *Income Tax Assessment Act* 1922-1934 or the *Income Tax Assessment Act* 1936-1937 and were not authorized by law.

(2) That the sums included by the assessments in the taxable income as the net amount of the rents and profits of the mortgaged property received by the receiver were not income or assessable or taxable income of the taxpayer within the meaning of the Acts.

(3) That the appellant did not during the relevant years derive, or receive, the sums assessed or any part thereof as rents or profits of a mortgaged property, or otherwise as income nor was she entitled to those sums as income.

(4) That the receiver appointed in respect of the mortgaged property was not a trustee within the meaning of the *Income Tax Assessment Acts* and he did not as a trustee derive or receive any income or income to which the appellant was presently entitled as income.

(5) That the appellant was not a beneficiary presently entitled to a share of the income of a trust estate within the meaning of the Acts.

(6) That if and so far as any moneys received by the receiver as such during any of the years in question were income, they were income of Condogianis and were received by the receiver as his agent and Condogianis included the same in his returns of income.

(7) That no part of any moneys received from the property by the receiver was or has been paid over by him to appellant on account of interest payable on her mortgage or at all nor applied nor appropriated in satisfaction or part satisfaction of such interest and accordingly they never became income in her hands or to which she was presently entitled.

(8) That the value of the mortgaged property was far less after satisfying prior encumbrances than the amount which was owing for principal moneys to the appellant as mortgagee, and the mortgagor and the appellant had agreed that all moneys received by the receiver and paid over to the appellant should be applied or appropriated in reduction of the principal moneys and not in satisfaction of any interest payable under the mortgage.

(9) If any part of the moneys received by the receiver were assessable income of the taxpayer for any relevant year, the sums assessed were excessive.

The following questions were stated for the opinion and consideration of the Full Court :—

Are the following sums, namely—

(*a*) the sum of £1,404 added to the appellant's income by amended assessment (numbered 89886 for the financial year 1934-1935) in respect of her income of the income year ended 30th June 1934,

(*b*) the sum of £2,450 added to the appellant's income by amended assessment (numbered 88194 for the financial year 1935-1936) in respect of her income of the income year ended 30th June 1935,

(*c*) the sum of £2,450 included in the appellant's income by assessment (numbered 244081 for the financial year 1936-1937) in respect of her income of the income year ended 30th June 1936,

(*d*) the sum of £2,997 included in the appellant's income by assessment (numbered 13687 for the financial year 1937-1938) in respect of her income of the income year ended 30th June 1937,

or any and which of them or any part of those sums or of any and which of them, or the sum to which the aforesaid sums should be reduced after giving effect to the reduction of income effected by the *Financial Emergency Acts* (Vict.), taxable income of the appellant—

in the case of the sums mentioned in sub-pars. *a* and *b* of this paragraph, within the meaning of the *Income Tax Assessment Act* 1922-1934, and

in the case of the sums mentioned in sub-pars. *c* and *d* of this paragraph, within the meaning of the *Income Tax Assessment Act* 1936-1937 ?

Fullagar K.C. (with him *Coppel*), for the appellant. The appellant never received—even notionally—any of the moneys collected by the receiver until they were ultimately appropriated to the payment of principal. The receiver, although appointed by the mortgagee, is the agent of the mortgagor (*Property Law Act* 1928 (Vict.), s. 109 (2)), and money collected by the receiver, while it remains in his hands, is held by him on behalf of the mortgagor: It is the mortgagor's money and cannot by any process of reasoning be deemed to be held on behalf of, or to have been paid to, the mortgagee (*Jefferys* v. *Dickson* (1), per Lord *Cranworth* ; *Law* v. *Glenn* (2) ; *Gaskell* v. *Gosling* (3)). Although the receiver is directed by s. 110 of the *Property Law Act* (Vict.) to apply moneys coming to his hands

(1) (1866) 1 Ch. App. 183, at p. 190. (2) (1867) 2 Ch. App. 634, at p. 641.
(3) (1896) 1 Q.B. 669, at pp. 691, 692.

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

in discharge of interest and then in discharge of principal, the duty to give priority to interest is owed only to persons immediately concerned (*Yourell* v. *Hibernian Bank Ltd.* (1)), and there is nothing in the Act to preclude an agreement between mortgagor and mortgagee to appropriate the moneys first in discharge of principal. In this case, at all events, no interested person is hurt by such an arrangement. The receiver owes no duty under s. 110 to the Federal Commissioner of Taxation, and there is nothing in the *Income Tax Assessment Acts* which alters the legal effect of the transactions in question here.

Dean, for the respondent. On the facts stated in the present case it is clear that the appellant assumed control of the receiver's account and that the receiver dealt with the account according to the appellant's directions. The mortgagee has a right to have the interest paid as provided in s. 110 (See *White* v. *Metcalf* (2)), and the receiver should so apply moneys in his hands. That he did not do so in the present case was due to the directions of the appellant; but this did not alter the duty of the receiver under s. 110, and he should be deemed to have complied with the section so that the amount available in his hands to pay interest should be regarded as held on behalf of the appellant: It must be regarded as having been payable to, and therefore as income of, the appellant in the relevant years. The purported appropriation to principal was contrary to s. 110 and should be disregarded. In any case it came at too late a stage to be of any effect so far as the years now in question are concerned.

Fullagar K.C., in reply, referred to *Dewar* v. *Inland Revenue Commissioners* (3).

Cur. adv. vult.

April 15.

The following written judgments were delivered :—

LATHAM C.J. The *Property Law Act* 1928 (Vict.) empowers a mortgagee to appoint a receiver of the income of the mortgaged property (ss. 101 and 109). Section 110 of the Act is as follows :—

"Subject to the provisions of this Part as to the application of insurance money, the receiver shall apply all money received by him as follows, namely :—

(*a*) In discharge of all rents, taxes, rates and outgoings whatever affecting the mortgaged property; and

(1) (1918) A.C. 372, at pp. 386, 387. (2) (1903) 2 Ch. 567, at pp. 570, 571.
(3) (1935) 2 K.B. 351.

(*b*) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

(*c*) In payment of his commission, and of the premiums on fire, life or other insurances (if any) properly payable under the mortgage deed or under this Part, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(*d*) In payment of the interest accruing due in respect of any principal sum due under the mortgage; and

(*e*) In or towards discharge of the principal money if so directed in writing by the mortgagee;

and shall pay the residue (if any) of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property."

The question to be determined upon this appeal is whether a mortgagee who has appointed a receiver under the Act is bound to apply moneys received from the receiver in the order set out in s. 110 (*d*) and (*e*) so that such moneys must be deemed to be received first on account of interest and on account of principal only after all liability for interest has been satisfied. If this is the true view of the effect of s. 110, the mortgagee will be liable to pay income tax upon the moneys received by him from the receiver, and perhaps upon moneys held by the receiver and not paid to the mortgagee, even though, as between mortgagor and mortgagee, no payment has been made on account of interest at all.

Land under the *Transfer of Land Act* 1928 (Vict.) was in 1928 subject to a first mortgage for £35,000 to W. T. F. Atherton, and to a second mortgage for £22,500 to Bourke Investments Pty. Ltd. On 22nd March 1932 the second mortgagee appointed one F. R. Green as receiver under and in accordance with the powers conferred by the *Property Law Act* 1928 (Vict.). The receiver collected the rents of the mortgaged property and paid them into a bank account controlled by the second mortgagee. On 7th April 1932 the mortgagor appointed Green as attorney to receive the rents, to grant leases, and to do other acts in respect of the property on his behalf, and he directed that rents received by Green should be deemed to be received by him in his capacity of receiver.

On 31st August 1933 the first mortgagee transferred the first mortgage to the appellant, Marie Visbord. Up to this time interest on the first mortgage had been duly paid out of the rents received.

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

Thereafter the rents, after payment of rates and taxes, were accumulated by the receiver with the consent of the appellant. No payments were made to the appellant as first mortgagee until the sale of the property hereafter mentioned.

On 25th August 1936 Bourke Investments Pty. Ltd. transferred the second mortgage to the appellant and also assigned to her absolutely the right to require the receiver as aforesaid to apply and appropriate as it might direct moneys received by him as such receiver. On 24th August 1936 the receiver opened a new bank account to which the credit of the former account was transferred. The account was in the name of " F. R. Green receiver's account."

The appellant then demanded from the mortgagor payment of the moneys due and gave notice that after the expiry of the period provided in that respect by the *Transfer of Land Act* (Vict.) she would sell the property.

On 8th September 1936 the mortgagor wrote to the appellant, who was now both first mortgagee and second mortgagee, a letter in which he stated, *inter alia* : " I wish the proceeds from the sale of the property, in conjunction with the moneys held in trust by the receiver, to be applied firstly to the payment of principal moneys owing, and the balance, if any, to the payment of interest under the first and second mortgages." Thus, so far as the mortgagor could appropriate the moneys in the hands of the receiver to payment of principal rather than of interest, he did so by this letter communicated to the mortgagee.

The appellant, who carried on business under the name of Austral Loan Office, on 9th September 1936 gave a direction to Green, the receiver, informing him that she had become the transferee of both mortgages. The notice continued : " Austral Loan Office wishes you and hereby authorizes you to continue to act as receiver under the second mortgage on the same conditions as set out in the appointment made by the Bourke Investments Proprietary Limited and for you to continue operating on the trust account in the name of F. R. Green Receiver's Account at the Union Bank of Australia Ltd., Collins Street, Melbourne and also for you to arrange to appoint Mr. Wolf Ellis Visbord to countersign all cheques exceeding the sum of two hundred pounds." The receiver acted in accordance with this authority. Rents were thereafter paid into the new banking account. Rates and taxes were paid out of this account, but no payments were made in respect of either principal or interest due under either of the mortgages until after the sale of the property. The property was not sold until 11th October 1939, when it was sold for £35,000, which amount was paid to the appellant. In the

meantime the receiver had collected in the bank account a sum of over £16,000.

On 15th November 1939 the appellant gave a notice in writing to the receiver by which, after a reference to the request of the mortgagor that the moneys held by the receiver should be applied first in payment of principal moneys, she directed that, after paying certain rates and taxes, he should pay the balance of the moneys in his hands to the appellant as registered proprietor of the two mortgages as repayment of the balance of principal owing under the first mortgage and on account of the principal owing under the second mortgage. The receiver acted in accordance with this direction.

The questions in the case arise under the *Income Tax Assessment Acts* 1922-1934 and 1936-1937 with respect to the income years ended 30th June 1934 and following years to 30th June 1937. In the first and fourth of these years, the net amount of rents (i.e., less rates, &c.) was less than the amount of interest due. For these years the Commissioner has assessed the appellant to income tax in respect of the net amount of the rents. In the second and third of these years the net amount of rents exceeded the amount of interest due. For these years the Commissioner has included in the assessments the amount of interest payable. The question is whether these assessments were properly made.

The argument for the Commissioner depends on the contention that the receiver was appointed under the provisions of the *Property Law Act* (Vict.) and that s. 110 of the Act requires him as a matter of law to apply moneys received by him towards discharge of liability for interest before applying any money to repayment of principal. If s. 110 imposes a statutory duty which is unalterable by the parties concerned, then it follows that the receiver held the rents subject to a duty to pay the money to the mortgagee in the first place on account of interest, and that the mortgagee was entitled to receive the money on account of interest, and not otherwise. If this is the true position, then under the *Income Tax Assessment Act* 1922-1934, s. 19, and the *Income Tax Assessment Act* 1936-1937, s. 19, the moneys so paid and received were, though not actually paid to the mortgagee in those years, accumulated on her behalf, so that they became income within the meaning of the Acts.

A receiver under the Act is the agent of the mortgagor, not of the mortgagee, and, though he is under a duty to apply the rents in a particular manner, the moneys in his hands are, until they are duly applied, the moneys of the mortgagor. Section 109 (2) of the Act expressly provides that a receiver appointed under the powers

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

conferred by the Act shall be deemed to be the agent of the mortgagor and that the mortgagor shall be solely liable for the receiver's acts or defaults, unless the mortgage deed otherwise provides: See also *Gaskell* v. *Gosling* (1), dissenting judgment of *Rigby* L.J. (2) (the judgment of the majority was reversed in the House of Lords (3) and the judgment of *Rigby* L.J. was expressly approved by Lord *Watson* (4), by Lord *Herschell* (5) and by Lord *Davey* (6)). In *White* v. *Metcalf* (7) the point was put very clearly when it was said by *Kekewich* J.: "If the receiver taking the rents and profits levants leaving the mortgagee in the lurch, the result is that the mortgagor still remains liable on his covenant, and is bound to pay notwithstanding that his agent unfortunately has received more than sufficient to keep down the interest." See also *Hibernian Bank* v. *Yourell* [*No.* 2] (8). These authorities show that moneys collected by a receiver become the moneys of the mortgagee only when he actually receives them from the receiver. So long as they are in the hands of the receiver they are the moneys of the mortgagor. As was stated in *In re Della Rocella's Estate* (9), "the mortgagee is bound only to give credit for such sums as reach his hands." Thus it cannot be said that when the receiver received the rents but did not pay them to the mortgagee the mortgagee must be regarded as having received them, whether on account of interest or on account of principal. It is, in my opinion, only in a popular sense that such moneys can be said to belong to the mortgagee before he receives them.

The liability of the mortgagor on interest account or otherwise is not reduced by reason of the fact that the receiver holds moneys which are applicable to the reduction of that liability—just as liabilities in respect of rents and taxes, rates and outgoings, are not reduced because the receiver is directed by s. 110 (*a*) of the Act to apply money in discharge of those liabilities and has money in his hands for that purpose. As between mortgagor and mortgagee, just as in the other cases mentioned, the account between creditor and debtor is completely unaffected, both at law and in equity, by the fact that the receiver has money in hand, whatever the amount of the money may be in relation to those liabilities. The contrary view, in my opinion, treats the receiver, not as the agent of the mortgagor (as the statute requires), but as the agent of the mortgagee, and (by similar reasoning) as also the agent of a landlord in the case of a mortgaged leasehold and as the agent of a taxing

(1) (1896) 1 Q.B. 669.
(2) (1896) 1 Q.B., at pp. 691-693.
(3) (1897) A.C. 575.
(4) (1897) A.C., at p. 589.
(5) (1897) A.C., at p. 594.
(6) (1897) A.C., at p. 596.
(7) (1903) 2 Ch. 567, at p. 571.
(8) (1919) 1 Ir. R. 310, at p. 312.
(9) (1892) 29 L.R. Ir. 464, at p. 468.

authority and of other persons to whom payments in respect of outgoings were due.

It was not argued that the appointment of a receiver amounted to any kind of assignment to the mortgagee of rents to be collected. The fact that the receiver is bound to apply moneys in his hands in meeting the charges set out in s. 110 of the Act does not, in my opinion, constitute the receiver a trustee of moneys for a landlord or a municipality (s. 110 (*a*)) or for a prior chargee or mortgagee (s. 110 (*b*)). So also his statutory duty to apply moneys towards payment of interest (s. 110 (*d*)) or principal (s. 110 (*e*)) does not constitute him a trustee of moneys for the mortgagee or make the mortgagee an equitable assignee of those moneys. The fact that a person who has control of moneys is bound by statute to apply those moneys for the benefit of particular persons does not result in making him a trustee for those other persons as his *cestuis que trust*—whether the person so bound be a clerk of courts, a paymaster in the civil service, or a receiver under the *Property Law Act* (Vict.).

Unless the receiver is treated in some vague sense as the agent of the mortgagee, it appears to me to be impossible to hold that the receipt of rents by the receiver, or the retention of such rents by the receiver, constitutes a derivation of income by the mortgagee under any of the provisions of the *Income Tax Assessment Act*. Accordingly, in my opinion, the appellant did not derive income in respect of, or in relation to, the mortgages in the years in respect of which the Commissioner sought to charge tax, because in those years she derived nothing on either income or capital account in respect of the mortgages.

The appellant did, however, receive a sum of money in the year 1939 which, with the consent of the mortgagor and by her own decision communicated to the receiver (the agent of the mortgagor) has been appropriated to payment of principal. But if s. 110 imposes an unalterable statutory duty upon the receiver in such a case to discharge liability for interest before discharging any liability for principal, the moneys must be deemed to have been received, when they were received, on account of interest. It has, however, been quite clearly decided by the House of Lords that such a provision as s. 110 does not impose a statutory duty which is not alterable by agreement with the parties : See *Yourell* v. *Hibernian Bank* (1). Lord *Parker*, speaking of the provisions in question, says :— " I cannot, however, see why these provisions should not be varied with the consent of the parties interested " (2). In the present case it

(1) (1918) A.C. 372, at pp. 382, 387. (2) (1918) A.C., at p. 397.

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

is clear that all the parties interested in the moneys in question agreed that they should be applied in the first place to payment of principal and they must therefore be taken to have been so appropriated by an appropriation which, in the words of Lord *Wrenbury*, "cannot be disturbed" (1). See also the *Della Rocella Case* (2).

An argument was addressed to the Court based upon the fact that the appellant exercised some degree of control over the receiver in respect of the moneys in the bank account in his name. The suggestion was that the receiver therefore became the agent of the mortgagee so as to hold on her behalf the moneys in his hands. In my opinion the fact that the mortgagee assumed to give directions to the receiver could not affect the fact that the receiver was the agent of the mortgagor or the legal consequences of that fact. If, in acting in conformity with any direction which the mortgagee chose to give to him, the receiver had misapplied the rents, the mortgagor could have called him to account. Misapplication of moneys could not be justified on the ground that the mortgagee had either directed or consented to it: Cf. *Jefferys* v. *Dickson* (3). But, in the present case, the mortgagor had expressly directed the receiver to apply the rents as he did in fact apply them, i.e., towards discharge of principal in the first place. The concurrence of the mortgagee in that application and the direction of the mortgagee herself that the rents should be so applied did not, in my opinion, in any manner affect the position or vary the obligations of Green as receiver.

It was suggested in argument that because what the receiver collected were rents, moneys paid by him to the mortgagee must be income of the mortgagee. But the mortgagee would not receive the moneys as rents. (If he did collect rents personally or through an agent he would become a mortgagee in possession.) He would receive them only on account of some liability under the mortgage —as interest or principal. A receiver may continue to act when no interest is in arrear. He may be collecting rents for the purpose of paying off overdue principal. Surely it could not be said, because payments made to the mortgagee by the receiver on account of principal represented rents, that the moneys so paid were income of the mortgagee.

If for some reason the *Property Law Act* (Vict.) did not apply in the case of the present receiver, the ordinary rule with respect to appropriation of payments would be applicable (*Devaynes* v. *Noble*; *Clayton's Case* (4); *The Mecca* (5)). The debtor has the right when he

(1) (1918) A.C., at p. 401.
(2) (1892) 29 L.R. Ir. 464.
(3) (1866) 1 Ch. App. 183, at p. 190.
(4) (1816) 1 Mer. 572, at p. 608 [35 E.R. 781, at p. 792].
(5) (1897) A.C. 286.

makes a payment to appropriate the money to any of the debts owing to his creditor as he pleases, and, if the creditor takes the money, he is bound to recognize this appropriation. If the debtor does not make any appropriation when he makes the payment, the creditor is then entitled to make an appropriation, and he may do this at any time up to "the very last moment" (*The Mecca* (1)). In the present case the debtor appropriated all payments by the receiver in the first place to principal. If it could be held that for any reason such an appropriation of moneys in the hands of the receiver was ineffectual then the appropriation by the creditor to principal governs the case.

When both principal and interest are due under a mortgage and a payment is made to the mortgagee by the mortgagor personally or by any agent of the mortgagor—such as a banker, a solicitor, or a receiver appointed under the Act—the mortgagor and mortgagee may, in my opinion, agree to appropriate the payment either to principal or to interest. Neither the Commissioner of Taxation nor any other person can, in my view, challenge an appropriation so made so as to bring about the result that a payment made in fact on one account shall, in defiance of the intention of the parties to which long-established principles of law give effect, be treated as if it had been made on some other account. If a creditor, having the legal right to do so, chooses to appropriate money towards the payment of one debt rather than towards the payment of another debt, both creditor and debtor are bound by the appropriation and no third party, such as the Commissioner, can have anything to say in the matter.

Thus, upon any view of the facts, the moneys in question which were received by the appellant were received on account of principal and she is not assessable to income tax in respect of them.

The questions asked in the case inquire whether particular sums in particular years were taxable income of the appellant. The questions should, in my opinion, be answered in the negative.

RICH J. The material facts lie in a small compass. In 1928 a mortgagor granted a first and second mortgage over certain premises. In March 1932 the second mortgagee appointed a receiver, and in April of the same year opened a trust account in a bank, and directed the receiver to pay all moneys collected by him as such into this account. This the receiver did, and thereafter until 1936 all payments out of this account were made by the cheques of the second mortgagee. Until August 1933 the payments so made included the interest on the first mortgage. In that month the appellant obtained

(1) (1897) A.C. 286.

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

Rich J.

a transfer of the first mortgage, and she informed the second mortgagee's receiver that she did not require any payments to her to be made for the time being out of the moneys held by him. From August 1933 to August 1936 no interest was paid out of the trust account in respect of the first mortgage nor was any paid in respect of the second mortgage, except some which the second mortgagee took out of the trust account and subsequently recouped to it. No appropriation was purported to be made by the receiver of any moneys in his hands or lying in the trust account to either principal or interest of either of the mortgages. In August 1936 the appellant acquired a transfer of the second mortgage and obtained also from the second mortgagee an assignment of the second mortgagee's right to require the receiver to apply, and appropriate as directed, the moneys received by him as receiver.

At the same time the second mortgagee closed the trust account, and the balance to its credit was transferred to a new account opened by the receiver himself. The appellant authorized the receiver to operate on this trust account, subject to the condition that cheques should be countersigned by her nominee. The appellant having after this demanded payment of the principal and threatened a sale, the mortgagor in September intimated that he wished the proceeds of sale and the moneys held in trust by the receiver to be applied first to payment of the principal, and the balance if any to payment of interest under both mortgages. The mortgaged property was sold in October 1939 for £35,000. After this, the appellant directed the receiver, after paying certain outgoings, to pay the balance to her as repayment of principal outstanding on the first and second mortgages. The receiver accordingly in December 1939 paid her £16,415 10s. out of the balance in his trust account.

The question is whether for the purpose of Federal income tax the appellant should be regarded as having received payment of interest on the first mortgage from August 1933 to August 1936, and on both mortgages from the latter date, to the extent to which the moneys collected by the receiver and paid into one or other of the trust accounts would have sufficed to pay such interest. By virtue of s. 101 of the *Property Law Act* 1928 (Vict.) both the mortgages are subject to statutory provisions corresponding with those of the English *Conveyancing and Law of Property Act* 1881 (44 & 45 Vict. c. 41), s. 24, and the receiver was appointed pursuant to this section. Thus the statutory terms are imported into the mortgage deeds and regulate the contractual relations between the parties.

The question involved in the case now before us turns upon the character with which the moneys collected by a receiver became impressed in the events which have happened. The receiver undoubtedly became the agent of the mortgagor. As between the mortgagor and the mortgagee who appointed him, but not, it would appear, to any other extent (Cf. *Liverpool Corporation* v. *Hope* (1)) it became the receiver's duty to apply any income moneys collected, first in discharging certain outgoings, then in making certain other payments, then in paying the interest due to the mortgagee who appointed him, then in discharge of the principal money if so directed in writing by the mortgagee and then in paying the residue (if any) of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

It is not, I think, necessary in the present case to determine exactly what character should be attributed to moneys which have been collected by such a receiver whilst they are still in his hands or remain under his control unaffected by anything except the statutory provisions or their equivalent contained in the mortgage instrument. It may be remarked, however, that the statement of *Kekewich* J. in *White* v. *Metcalf* (2) that if the receiver levants with the money the mortgagor still remains liable to the mortgagee for any moneys which should have been paid to him thereout is inconsistent with the view that they may become impressed with an assignment or trust in favour of the mortgagee by the mere fact of having come to the hands of the receiver. But in the present case, the receiver, after having collected the moneys, paid them into a trust account of the second mortgagee who had appointed him, pursuant to a direction in that behalf from this mortgagee. Thereafter, as far as the moneys were not applied by the second mortgagee, they remained in the trust account, subject prima facie to the second mortgagee's control, until the appellant, who had already acquired a transfer of the first mortgage, acquired a transfer of the second also. The appellant then at once assumed control of the moneys in the trust account and also of the receiver. The moneys in the trust account were transferred to a new account, which, though in the receiver's name, was completely controlled by the appellant.

Upon these facts as regards the period between August 1933 and August 1936, when the appellant was entitled only to the interest on the first mortgage, I think that it was open to the Commissioner to draw the inference that, to the extent of the receiver's collections

(1) (1938) 1 K.B. 751. (2) (1903) 2 Ch. 567, at p. 571.

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

Rich J.

not earmarked for earlier payments, the moneys in the trust account were available for payment to her for payment of her interest, and that by intimating to the receiver that she did not require payments to be made to her for the time being she was in effect directing the accumulation on her behalf in the trust account of interest payments which were available to her and would otherwise have been made to her (s. 19 of the relevant *Income Tax Assessment Acts*).

As regards the period since August 1936 when the appellant acquired a transfer of the second mortgage also, and at the same time assumed control, although in a trust account opened in the receiver's name, of the moneys collected by the receiver, I think that it was open to the Commissioner to infer that the moneys collected by the receiver and paid into his account became from time to time appropriated to the appellant to the extent to which she was from time to time entitled to receive payments thereout, the appropriation being attributable in the first instance to interest (Cf. *In re Morley's Estate*; *Hollenden* v. *Molloy* (1)), and that she allowed these interest moneys to accumulate in an account which in substance, though not in name, was hers.

For these reasons I am of opinion that the questions asked should be answered favourably to the respondent.

STARKE J. Case stated pursuant to the *Income Tax Assessment Act* 1936-1940 and the *Judiciary Act*. The facts are set forth in the case, but those I think material may be shortly restated.

The registered proprietor under the *Transfer of Land Act* 1928 (Vict.) of certain lands at the corner of Collins and Spencer Streets, Melbourne, had in the year 1928 executed first and second mortgages of the lands. In March 1932 the mortgagor made default in payment of interest under the second mortgage and the second mortgagee appointed a receiver named Green pursuant to the provisions of the *Property Law Act* 1928 (Vict.). On 31st August 1933 the first mortgage was transferred to the appellant, and about this date the receiver was informed that the appellant did not require any payment to be made to her for the time being out of moneys held by him as receiver. On 24th August 1936 in consideration of a sum of £22,000 a transfer of the second mortgage to the appellant was executed, which was registered on 25th August 1936, and also of the right to require the receiver to apply and appropriate as she might direct moneys received by him as such receiver. The case states that the receiver from the time of his appointment until the sale of the land in 1939 collected rents and paid thereout various expenses. About

(1) (1937) Ch. 491, at p. 496.

April of 1932 the then registered proprietor of the second mortgage, Bourke Investments Pty. Ltd., opened an account with the Union Bank, called the "Bourke Investments Pty. Ltd. Trust Account," and instructed the receiver to pay into such account all rents from the land which might be received by him, which he did until the account was closed. At the time of the execution of the transfer of the second mortgage to the appellant (August 1936) there stood at the credit of the bank account just mentioned a sum of about £18,000, but that account was closed and a new account was opened in the name of the receiver, "F. R. Green receiver's account." No interest was paid to the appellant on the first mortgage from 31st August 1933 to 24th August 1936. And the case states that, save for certain sums which were, prior to 24th August 1936, repaid by Bourke Investments Pty. Ltd., no payment was made to the company or to its order in respect of the second mortgage between 22nd March 1932 and 24th August 1936, and, save for the said sums, no appropriation was made by the receiver during the said period of the moneys in his hands as receiver or standing to the credit of the said account to or towards principal or interest on either the first or the second mortgage. I do not follow this statement, for the moneys in the account, "Bourke Investments Pty. Ltd. Trust Account," opened by the company appear to have been paid to and to be under the direction of that company; but the statement is unimportant, for it can only affect the financial year 1936-1937 and to the extent that the sum of £2,997 included in the appellant's assessment for that year exceeds the interest on the moneys secured by the first mortgage.

The Commissioner has assessed the appellant to income tax for the financial years 1934-1935, 1935-1936, 1936-1937, 1937-1938, in respect of the following amounts:—

(*a*) For the financial year 1934-1935, the sum of £1,404 in respect of interest, namely, ten-twelfths due and payable to her under the first mortgage for the fraction of the year (namely, ten-twelfths) which ended on 30th June 1934, during which the appellant was the owner of the first mortgage, and which sum was equal to ten-twelfths of the net rents of the mortgaged property received by the receiver during the said year.

(*b*) For the financial year 1935-1936, the sum of £2,450 in respect of interest at the rate of seven per cent per annum which was due and payable to her under the first mortgage in the year that ended on 30th June 1935, subject to the provisions of the *Financial Emergency Acts* (Vict.), which reduced the rate of interest to £5 8s. 6d. per cent.

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

(*c*) For the financial year 1936-1937, the sum of £2,450 in respect of interest at the rate of seven per cent per annum which was due and payable to her under the first mortgage in the year that ended on 30th June 1936, subject to the provisions aforesaid of the *Financial Emergency Acts* (Vict.).

(*d*) For the financial year 1937-1938, the sum of £2,997 in respect of interest which was due and payable to her under the first and second mortgages in the year that ended on 30th June 1937 and was the net amount of the rents and profits of the mortgaged property received by the receiver during the said year.

The appellant contends that the receiver was by force of the *Property Law Act* 1928 (Vict.), s. 109 (2), deemed to be the agent of the mortgagor and must for all purposes be treated as such agent (*Law* v. *Glenn* (1); *D. Owen & Co.* v. *Cronk* (2); *Gosling* v. *Gaskell* (3)). But we must not lose sight of the substance of the appointment. It was made for the benefit of the mortgagee and to protect the mortgagee from liability as a mortgagee in possession or as a principal. And a receiver appointed pursuant to the Act, though an agent of the mortgagor, still by force of the provisions of the Act (s. 110) has a mandate or duty to apply all moneys received by him in the manner prescribed by the Act, which can be altered only by consent of the parties interested (*Yourell* v. *Hibernian Bank Ltd.* (4)). This mandate or duty, subject to the provisions of the Act as to the application of insurance moneys, requires the receiver to apply all money received by him (*inter alia*) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in respect whereof he is the receiver and in payment of interest accruing due in respect of any principal sum due under the mortgage and next in or towards discharge of the principal moneys if so directed by the mortgagee. This obligation is not, I should think, a trust or a charge or an assignment, but a mandate based upon valuable consideration enforceable by the mortgagee in appropriate proceedings. And it has been held under a corresponding provision that a receiver so appointed is bound to pay arrears of interest due to the mortgagee at the time of the appointment and not merely interest due after that date (*National Bank* v. *Kenney* (5)).

The receiver during the financial years 1934-1935, 1935-1936, and 1936-1937 had collected sufficient moneys to keep down the interest on the first mortgage year by year and also in the financial

(1) (1867) 2 Ch. App. 634, at p. 641.
(2) (1895) 1 Q.B. 265.
(3) (1897) A.C. 575.
(4) (1918) A.C. 372.
(5) (1898) 1 Ir. R. 197.

year 1937-1938 to keep down interest to the extent of £2,997, which was due and payable to the appellant under the first and second mortgages.

But the appellant asserts that the moneys came to the hands of the receiver as agent of the mortgagor and were never received by her or on her account as interest or income from either of her mortgage securities. "'Receivability' without receipt", it was said, "is nothing" (*Leigh* v. *Inland Revenue Commissioners* (1); *St. Lucia Usines and Estates Co.* v. *St. Lucia* (*Colonial Treasurer*) (2); *Commissioner of Taxes* (*S.A.*) v. *Executor Trustee and Agency Co. of South Australia Ltd.* (3)). But no such simple rule can be found in the *Income Tax Assessment Acts* 1922-1934, 1936-1937, as may be gathered from an examination of the provisions of the 1922-1934 Act defining "dividend," "income," "income from personal exertion," and from other provisions such as ss. 13, 16, 19, and other sections. And the 1936-1937 Act does not differ in substance. Subject to any express direction contained in the Acts the ascertainment of income must be "dealt with on business lines" and the method pursued must depend upon the circumstances of the particular case: See *Federal Commissioner of Taxation* v. *Thorogood* (4); *Commissioner of Taxes* (*S.A.*) v. *Executor Trustee and Agency Co. of South Australia Ltd.* (5).

In this case the receiver had collected moneys which he was bound to apply pursuant to the Act in keeping down interest as well under the first as under the second mortgage. Interest had accrued due under the first mortgage, and moneys were available to pay it in the financial years 1934-1935, 1935-1936, 1936-1937, and the receiver was bound and, indeed, ready and willing to pay it. So, too, in the financial year 1937-1938 the receiver had in hand £2,997 available for payment of interest due and payable under the first and second mortgages and was prepared to pay it over to the appellant. But shortly after the transfer of the first mortgage to her (31st August 1933) the appellant informed the receiver that she did not require any payments to be made for the time being out of any moneys held by him, and this direction was acted upon both as to the first and also as to the second mortgage until an accumulated fund of £16,415 was paid over to the appellant in the year 1939.

A finding that interest accrued due and payable in the relevant years under such circumstances as these was income of the taxpayer is justifiable in fact and gives "a substantially correct reflex of the

(1) (1928) 1 K.B. 73, at p. 77.
(2) (1924) A.C. 508.
(3) (1938) 63 C.L.R. 108, at p. 155.
(4) (1927) 40 C.L.R. 454, at p. 457.
(5) (1938) 63 C.L.R. 108, at p. 154.

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

taxpayer's true income": See *Commissioner of Taxes (S.A.)* v. *Executor Trustee and Agency Co. of South Australia Ltd.* (1). And there is no express, nor any, direction in the *Income Tax Assessment Acts* to the contrary.

A further contention, however, on the part of the appellant was that she in November 1939 with the assent of the mortgagor appropriated the funds in the hands of the receiver in and towards repayment of the principal moneys owing on the first and second mortgages and accordingly that the receiver paid to her on 11th December 1939 the sum of £16,415 out of the moneys accumulated by him.

This action on the part of the appellant appears to have been an ingenious attempt to avoid payment of income tax. But in my opinion it fails, for the interest which had become due and payable in the relevant financial years had long before the so-called appropriation become income of the appellant assessable to income tax for those years.

The questions stated should be answered in the affirmative subject to any adjustment required by reason of the provisions of the *Financial Emergency Acts* (Vict.).

WILLIAMS J. From the facts in the case it appears that in May 1928 one Condogianis executed a first mortgage over certain rent-producing property situated at the corner of Collins and Spencer Streets, Melbourne, to secure the sum of £35,000 and interest thereon. In the same month he executed a second mortgage over the same property to Bourke Investments Pty. Ltd. to secure the sum of £22,500 and interest thereon.

On 22nd March 1932, the mortgagor having defaulted in the payment of interest under the second mortgage, the company appointed a receiver under the powers to do so conferred upon it by the *Property Law Act* 1928 (Vict.). The material sections of that Act are as follows:—

101. (1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this Part, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further, namely . . . (*c*) Where the mortgage deed is executed after the thirty-first day of December One thousand nine hundred and twelve, a power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or any part thereof.

(1) (1938) 63 C.L.R., at p. 154.

109. (1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Part shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this Part, or by the *Transfer of Land Act* 1928, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2) A receiver appointed under the powers conferred by this Part, or any corresponding previous enactment, shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the mortgage deed otherwise provides.

(3) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by action, distress or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee pursuant to this Part.

(4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

(6) The receiver shall for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, be entitled to retain out of any money received by him, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent (if any) to which the mortgagee might have insured and keep insured against loss or damage by fire, out of the money received by him, any building, effects or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

110. Subject to the provisions of this Part as to the application of insurance money, the receiver shall apply all money received by him as follows, namely:—

(*a*) In discharge of all rents, taxes, rates and outgoings whatever affecting the mortgaged property; and

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

(*b*) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

(*c*) In payment of his commission, and of the premiums on fire, life or other insurances (if any) properly payable under the mortgage deed or under this Part, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(*d*) In payment of the interest accruing due in respect of any principal sum due under the mortgage; and

(*e*) In or towards discharge of the principal money if so directed in writing by the mortgagee;

and shall pay the residue (if any) of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

On 31st August 1933 the first mortgage was transferred to the appellant. On 25th August 1936 the second mortgage was also transferred to her. On the following day the appellant demanded payment from the mortgagor of principal and interest under both mortgages and gave him notice that if default continued for seven days she would sell the property.

On 8th September 1936 the mortgagor wrote to the appellant as follows:—"I wish the proceeds from the sale of property, in conjunction with the moneys held in trust by the receiver, to be applied firstly to the payment of principal moneys owing, and the balance, if any, to the payment of interest under the first and second mortgages."

On 11th August 1939, after several previous unsuccessful attempts, the appellant sold the property for £35,000.

From the date of his appointment until the date of the sale the receiver collected the rents of the mortgaged property, paid the rates and certain other outgoings, granted leases from time to time and performed such other acts of management as were necessary. He paid his receipts into and his disbursements out of a receiver's account which he opened in a Melbourne bank. Until the transfer of the first mortgage to the appellant, he kept down the interest on that mortgage.

Except for certain payments to the company which it refunded prior to 22nd August 1936, no payments on account of interest were made to the company as a second mortgagee or to the appellant as first or second mortgagee. At the appellant's request, the receiver

accumulated in his bank account the moneys which she should have been paid under the statute.

At the date of the sale there was owing on the security of the first and second mortgages, leaving out of account the moneys amounting to £16,415 accumulated in the hands of the receiver, an amount of £85,562 6s. 3d. made up as follows :—on the first mortgage principal £35,000, and interest £11,629 3s. 9d., and on the second mortgage principal £22,500, and interest £16,433 2s. 6d. The appellant did not include in her income tax returns any sum representing interest on the first and second mortgages during the period she was the holder of these mortgages respectively. Pursuant to the authority of the mortgagor dated 8th September 1936 and a direction received from the appellant dated 15th November 1939, these accumulations were applied first in repayment of the balance of the principal sum still owing on the first mortgage after crediting the proceeds of sale of the mortgaged property ; and secondly towards repayment of the principal sum owing on the second mortgage.

The Commissioner claims that during the period the appellant was the owner of the first mortgage she ought to have returned interest at the rate of £5 8s. 3d. per cent per annum on the principal sum, this being the rate to which the interest on the mortgage was reduced by the *Financial Emergency Acts* 1931 (Vict.) ; and that during the period she was the owner of both mortgages she ought to have returned the net amount collected by the receiver. The appellant contends that she never received any such interest or income and that the whole sum in the receiver's account representing such interest and income was by agreement with the mortgagor appropriated to repayment of principal.

It is of course a well-established legal device for a mortgagee, upon default by a mortgagor, to have the right to appoint a receiver, who is to be the agent of the mortgagor, so that the mortgagee obtains the benefits without being subject to the liabilities of a mortgagee in possession. Provisions to this effect were at first included in the mortgage instrument, but the device was given statutory recognition when sections similar to ss. 101, 109 and 110 of the *Property Law Act* (Vict.) were included in the Imperial *Conveyancing and Law of Property Act* 1881. It has been decided that a mortgagee who has entered into possession of the mortgaged property can still appoint a receiver under the statute, that the mortgagee then ceases to be in possession, and that the possession is that of the receiver as agent for the mortgagor (*Refuge Assurance Co. Ltd.* v. *Pearlberg* (1)).

(1) (1938) Ch. 687.

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

The appointment of the receiver divests the mortgagee of all powers with respect to the mortgaged property which the receiver is appointed to exercise (*Woolston* v. *Ross* (1)). The receiver takes complete control of the mortgaged property and the mortgagor is as effectively dispossessed from control as he would be if the mortgagee had entered into possession (*Inland Revenue Commissioners* v. *Thompson* (2) ; *Meigh* v. *Wickenden* (3)).

Although the receiver is in law the agent of the mortgagor, he occupies a very special position. He is appointed to and may be removed from office by the mortgagee. He can demand and recover all the income of which he is appointed receiver by action distress or otherwise in the name either of the mortgagor (*M. Wheeler & Co.* v. *Warren* (4)), or of the mortgagee. If the mortgagor has attorned tenant to the mortgagee, the receiver can therefore sue the mortgagor for the rent in the name of the mortgagee. He can only insure or do necessary or proper repairs to the mortgaged property to the extent to which he is directed to insure or do such repairs by the mortgagee in writing. The mortgagor is unable to instruct him to do anything contrary to his statutory duties or to dismiss him. If the mortgagor dies the appointment of the receiver is not terminated (*In re Hale* ; *Lilley* v. *Foad* (5)). The compulsory winding up of a company operates as a dismissal of all the company's servants and agents. The company cannot authorize the receiver to do any act which it is unable to do itself, so that it cannot empower the receiver, after the date of the liquidation, to carry on its business so as to create debts provable against the unmortgaged assets of the company (*Gosling* v. *Gaskell* (6) ; *Thomas* v. *Todd* (7)) ; but the receiver can still continue to exercise his powers in the name of the company although the company is no longer liable for any debts which he may incur in doing so (*Gough's Garages Ltd.* v. *Pugsley* (8)). See also *In re Courts* (*Emergency Powers*) *Act* 1939 *and S. Brown & Son* (*General Warehousemen*) *Ltd.* (9) ; *In re Wood's Application* (10).

A mortgage may provide that upon default in payment of interest the mortgagee shall be entitled to enter into possession of the mortgaged property, but until the exercise of that right after default, the mortgagor can still continue to collect the income for his own benefit. There are at least three methods by which the mortgagee upon default can become entitled to receive his interest out of the

(1) (1900) 1 Ch. 788.
(2) (1937) 1 K.B. 290.
(3) (1942) 2 K.B. 160, at pp. 168, 169.
(4) (1928) Ch. 840.
(5) (1899) 2 Ch. 107.
(6) (1897) A.C. 575.
(7) (1926) 2 K.B. 511.
(8) (1930) 1 K.B. 615.
(9) (1940) Ch. 961.
(10) (1941) Ch. 112.

income of the mortgaged property without becoming liable as a mortgagee in possession.

1. If a mortgagor were to agree with a mortgagee that, upon default in payment of interest, the mortgagor should still be allowed to collect the income of the mortgaged property, but that he would open a separate bank account into which he would pay all the income he collected, and that he would dispose of the income in a similar manner to that prescribed in the Act, such an agreement would be an equitable assignment of future property which would give the mortgagee an equitable interest in the income as and when it was collected by the mortgagor and an enforceable right to have the income disposed of in the manner agreed upon (*Tailby* v. *Official Receiver* (1); *In re Lind*; *Industrials Finance Syndicate Ltd.* v. *Lind* (2); *Cotton* v. *Heyl* (3)).

2. A mortgagor could agree upon default irrevocably to appoint the mortgagee his attorney to collect the income, and to pay it into a separate fund, the mortgagee to dispose of the moneys in the fund in the manner prescribed in the statute. This would also amount to an equitable assignment to the mortgagee of the income to which he became entitled under the agreement. In *Wilkinson* v. *Wilkinson* (4) the Master of the Rolls said: "A power of attorney given to a creditor is not revocable. It is an equitable security, conferring a right to receive and withhold the rents until the debts are paid" —See also *Oldham* v. *Oldham* (5).

3. A mortgagor and a mortgagee could agree that either should appoint a receiver to collect the income, pay it into a separate fund, and dispose of the moneys in the fund in the manner provided by the statute. The third method is intermediate between methods 1 and 2, but, if it was adopted, it would only be natural for the mortgagee to stipulate that he should have the right to appoint the receiver and that the receiver should be the agent of the mortgagor so as to avoid any risk of the mortgagee being charged as a mortgagee in possession. Substantially the same legal results would flow from the adoption of any of these methods, but the third method has some advantages for both the mortgagor and the mortgagee. As the receiver is the agent of the mortgagor, the mortgagor would have a right to sue the receiver if he acted otherwise than in accordance with the authority conferred upon him by the statute, and he would be better protected if the fund was in the hands of a receiver than he would be if the fund was in the hands of the mortgagee.

(1) (1888) 13 App. Cas. 523, at pp. 547-549.
(2) (1915) 2 Ch. 345, at p. 360.
(3) (1930) Ch. 510, at pp. 520, 521.
(4) (1819) 3 Swans. 516, at p. 527 [36 E.R. 958, at p. 962].
(5) (1867) L.R. 3 Eq. 404.

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

The mortgagee on the other hand would avoid the liability of a mortgagee in possession, the fund would be in safer hands if collected by a receiver whom he chose than if it was collected by the mortgagor, and the mortgagor would still remain responsible if the receiver mishandled the fund. As *Kekewich* J. said in *White* v. *Metcalf* (1), "If the receiver taking the rents and profits levants leaving the mortgagee in the lurch, the result is that the mortgagor still remains liable on his covenant, and is bound to pay notwithstanding that his agent unfortunately has received more than sufficient to keep down the interest."

All these methods would be a means of realizing the income from the mortgaged property for the benefit of the mortgagee. In many mortgages, particularly debentures, the agreement between a mortgagor and mortgagee provides that the receiver, acting as the agent of the mortgagor, in addition to collecting the income, shall have power to realize the assets, and apply the net proceeds of sale first in discharge of the mortgage debt and secondly in payment of the balance to the mortgagor. It has been held that a receiver appointed by the court occupies a fiduciary position (*In re Gent*; *Gent-Davis* v. *Harris* (2); *In re Magadi Soda Co. Ltd.* (3)); and there would appear to be no distinction in principle in this respect between the position of a receiver appointed by the court and a receiver appointed by the mortgage deed. In each case he holds a particular fund in which, whether it consists of principal or of interest or partly of one and partly of the other, both the mortgagor and the mortgagee are interested, the mortgagee having the prior claim and the balance belonging to the mortgagor after these claims have been satisfied. In the case of principal it has been held that an agent of the mortgagor is in a fiduciary position (*Marris* v. *Ingram* (4)) and there is no reason why he should not be in the same position with respect to the interest. In *Perpetual Trustee Co. Ltd.* v. *Smith* (5), where a large number of the authorities are collected, *Jordan* C.J. said: "An agreement for value to arrange that identifiable moneys in the hands or to come into the hands of an attorney for the promisor are to be paid to a third party, is just as effectual to bind the moneys as a direct agreement that the moneys shall be paid" (6).

The provisions of the statute create a statutory term imported into the mortgage deed regulating the contractual relations between the parties (*Refuge Assurance Co. Ltd.* v. *Pearlberg* (7); *Liverpool*

(1) (1903) 2 Ch. 567, at p. 571.
(2) (1888) 40 Ch. D. 190.
(3) (1925) 94 L.J. Ch. 217, at p. 219.
(4) (1879) 13 Ch. D. 338.
(5) (1938) 39 S.R. (N.S.W.) 19; 56 W.N. 96.
(6) (1938) 39 S.R. (N.S.W.), at p. 38; 56 W.N., at p. 99.
(7) (1938) Ch., at p. 691.

Corporation v. *Hope* (1)). The receiver is the agent of the mortgagor, but he is collecting the income for the benefit of the mortgagee. It is because the mortgagee has the prior right to the income so far as it is required to keep down his interest that the receiver is unable to expend it upon insurance or repairs without the authority of the mortgagee until that interest has been paid. In *White* v. *Metcalf* (2) his Lordship, after referring to the disbursements which the receiver is entitled to make under his statutory authority, continued : " What the receiver has in hand, after making all these payments, is applicable to keeping down the interest of the mortgage. When he has done that *the balance belongs to the mortgagor*, and the mortgagor may do what he likes with that balance, and may have it applied in repairs or otherwise as he thinks fit. *But until the interest is kept down the balance, after paying these outgoings which are provided for, belongs to the mortgagee*, and the only discharge which the receiver can get is from the mortgagee. *It is to the mortgagee that he must look for his authority, and to the mortgagee that he is accountable.*" In *Deyes* v. *Wood* (3) *Scrutton* J. said : " The whole scheme of ss. 19 and 24 of the *Conveyancing Act* as to receivers is that they are receivers of income only, paying interest out of that, and *accounting for the balance to the mortgagor* " ; *Vaughan Williams* L.J. said : " When one looks at the provisions of the *Conveyancing Act* 1881 . . . one sees that they are directed to the appointment of a receiver, not for the purpose of taking possession, as a mortgagee taking possession used to do, or of realizing the security, but only for the purpose of the receipt and application of income in the manner provided for " (4). In *Yourell* v. *Hibernian Bank Ltd.* (5) Lord *Atkinson*, after referring to the terms of the receiver's statutory duties, said :—" It has been strongly pressed on behalf of the respondents that by this latter clause a statutory duty is imposed upon the receiver to pay from time to time the surplus moneys remaining in his hands, after satisfying the claims arising under the earlier provisions of the section, in discharge of the interest accruing due on the mortgage ; that he could not be relieved from that duty ; and that the application of any portion of the surplus to the payment *pro tanto* of the principal was illegal and wholly void and not binding on anyone. I respectfully dissent from that proposition ; not a shred of authority was cited in support of it. Such a duty as the statute imposes on the receiver under head 4 of this sub-section is not owed by him to the Crown or to the general public. *It is owed merely to the mortgagor, the mortgagee, and to puisne incumbrancers.* It is not proved

(1) (1938) 1 K.B. 751, at p. 755.
(2) (1903) 2 Ch., at p. 572.
(3) (1911) 1 K.B. 806, at p. 814.
(4) (1911) 1 K.B., at p. 821.
(5) (1918) A.C. 372, at pp. 386, 387.

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

that there were any puisne incumbrancers other than the appellants. No doubt any one of those persons who was prejudiced by the alleged misapplication by the receiver of these surplus moneys might hold his principal, the mortgagor, or himself responsible; but it is not competent for the person who procures the breach by the receiver of his so-called statutory duty once or twice every year for a period over eight years, with the full concurrence and consent of the mortgagors, who now, together with the puisne incumbrancers, approve of, adopt, and rely upon the course pursued, to repudiate the results of the mode of application of the moneys he himself has procured to be adopted."

These statements of the proprietary interests of the mortgagee and the mortgagor in a fund in the hands of a receiver appointed under the statute are entirely in line with statements in the earlier cases to the same effect where the receiver was appointed under the express term contained in the mortgage deed. In *Lord Kensington* v. *Bouverie* (1) *Turner* L.J. said: "The receiver is appointed merely to secure the interest upon the debt, and when that interest has been paid the rents belong to the mortgagor." In *Jefferys* v. *Dickson* (2) Lord *Cranworth* L.C. said:—"But a receiver who has been appointed by a mortgagee under the ordinary power for that purpose, is in possession as agent, not of the mortgagee, but of the mortgagor, and it cannot be that the mortgagor, if his agent is receiving and misapplying the rents, has no means of calling him to account without paying off the mortgage. It may be that he could not make the mortgagee party to a bill against the receiver without offering to redeem; but if that be so, it must follow that he might file a bill against the receiver alone, treating him as his agent, *bound to account for all his receipts after keeping down the interest due to the mortgagee.*" The receiver could not be sued at common law in an action for money had and received (*Bartlett* v. *Dimond* (3); *Pardoe* v. *Price* (4); *Edwards* v. *Lowndes* (5)). But the position, as the court pointed out in these cases, is different in equity.

It is because the first mortgagee is entitled to the rents collected by a receiver whom he appoints to the extent provided by the statute in priority to the mortgagor or any puisne mortgagee that, in a case where the first mortgagee has to apply to the court for leave to place a receiver whom he has appointed in possession of the income of the mortgaged premises, a receiver already appointed by the court

(1) (1855) 7 DeG. M. & G. 134, at p. 157 [44 E.R. 53, at p. 62].
(2) (1866) 1 Ch. App. 183, at p. 190.
(3) (1845) 14 M. & W. 50 [153 E.R. 385].
(4) (1847) 16 M. & W. 451 [153 E.R. 1266].
(5) (1852) 1 E. & B. 81 [118 E.R. 367].

in an action brought by the second mortgagee who is in possession of the income, must account for the income of the mortgaged property to the receiver appointed by the first mortgagee from the date upon which the first mortgagee commences proceedings for leave to place his receiver in possession (*In re Belbridge Property Trust Ltd.*; *Swale Estates Ltd.* v. *Bellbridge Property Trust Ltd.* (1)).

For valuable consideration the mortgagor has agreed with the mortgagee that the moneys which the receiver shall collect shall be applied by the receiver in the manner provided by the statute. In *Yeates* v. *Groves* (2) Lord *Thurlow*, in a passage cited by Lord *Cottenham* in *Burn* v. *Carvalho* (3), said :—" This is nothing but a direction by a man to pay part of his money to another for a foregone valuable consideration. If he could transfer, he has done it; and, it being his own money, he could transfer." A part of a debt can be assigned in equity (*Williams* v. *Atlantic Assurance Co. Ltd.* (4)). Subject to the right of the receiver to pay the outgoings and his commission thereout the money in the fund is owned by the mortgagee and mortgagor in the proportions fixed by the statute, and the receiver holds the fund in a fiduciary capacity on behalf of the mortgagee and the mortgagor to dispose of the moneys in this way. It is more than an agreement for valuable consideration that a fund shall be applied in a particular way. An obligation is imposed upon the receiver in favour of the creditor to make the payments to which the mortgagee is entitled out of the fund (*Palmer* v. *Carey* (5)).

It is probable that only the mortgagee who appointed the receiver, in an action brought against the receiver and the mortgagor, or against the receiver (*Leicester Permanent Building Society* v. *Butt* (6)), could sue to enforce these duties. It is unnecessary to decide the point whether any other mortgagee could sue, because the appellant was at all material times the owner of the second mortgage in respect of which the receiver was appointed. But if she did sue, it would be for the benefit of all the mortgagees interested in the property (*Yourell* v. *Hibernian Bank Ltd.* (7); *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (8); *Carberry* v. *Gardiner* (9)). But the statutory duties of the receiver are owed only to the mortgagor and mortgagees so that no public taxing or rating authority could sue the receiver for damages if he failed to pay rates and taxes out of his receipts (*Yourell* v.

(1) (1941) Ch. 304.
(2) (1791) 1 Ves. Jun. 280, at pp. 281, 282 [30 E.R. 343, at p. 344.]
(3) (1834) 4 My. & Cr. 690, at p. 702 [41 E.R. 265, at p. 270].
(4) (1933) 1 K.B. 81.
(5) (1926) A.C. 703, at p. 706.
(6) (1943) 169 L.T. 261.
(7) (1918) A.C. 372.
(8) (1933) A.C. 70, at p. 79.
(9) (1936) 36 S.R. (N.S.W.) 559, at pp. 573, 574.

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

Hibernian Bank Ltd. (1); *Refuge Assurance Co. Ltd.* v. *Pearlberg* (2); *Liverpool Corporation* v. *Hope* (3)). Consequently the fund, to the extent to which it consists of moneys to which the mortgagee is entitled, consists of moneys which belong to him. These moneys, in the absence of agreement with the mortgagor, must be applied by the mortgagee for the purposes for which they are paid, but there is nothing to prevent the moneys, by an agreement between the mortgagee and the mortgagor, being applied for some other purpose, as for instance in reduction of principal instead of in payment of interest; but no such agreement could be made by the mortgagor with any one mortgagee which would prejudice the position of another mortgagee. For instance, the mortgagor and the first mortgagee could not agree that the income which was received to keep down the interest on the first mortgage should be applied in reduction of principal, if the effect of doing so was to make the power of sale under the first mortgage exercisable on default in keeping down the interest to the prejudice of the second mortgagee. Any such agreement would relate to moneys in the fund which belong to the mortgagee, and would only be required because, in the absence of such an agreement, it would be a breach of contract on the part of the mortgagee to request the receiver to apply it otherwise than in accordance with the provisions of the statute. Where, by agreement between the mortgagor and the mortgagee, the income which should have been applied in reduction of interest is allowed to accumulate in the hands of the receiver in order to be applied in reduction of principal upon the sale of the mortgaged property, this income, within the meaning of s. 19 of the *Income Tax Assessment Acts* 1922-1934 and 1936-1937, must be deemed to have been derived by the mortgagee from the mortgaged property, although it was not actually paid over to him but was accumulated on his behalf. In *Yourell* v. *Hibernian Bank Ltd.* (4) the receiver appointed by the bank had collected the income and paid it to the bank. The bank credited this income in the accounts in reduction of principal, and its action in doing so was subsequently ratified by the mortgagor. Apart from this ratification it would have been necessary to recast the accounts and apply the income in the first instance in reduction of interest. But there is nothing in the speeches of their Lordships to suggest that the moneys collected by the receiver were not the moneys of the bank. The speeches are to the opposite effect. Lord *Wrenbury* said: "The amounts received never, I think, sufficed to pay the interest due, so nothing turns upon the fact that any residue

(1) (1918) A.C. 372.
(2) (1938) Ch. 687.
(3) (1938) 1 K.B. 751.
(4) (1918) A.C. 372.

has to be paid to the mortgagor. What in fact happened was that the receiver paid the amounts to the credit of the banking account; in other words, he paid them to the mortgagor. He ought to have paid them to the mortgagees in reduction of interest. But the mortgagees were the bankers, and in placing them to the credit of the mortgagor's current account they were assenting to payment being made to the mortgagor to the credit of his current account, with the result that they went, not in reduction of interest, but to part payment of principal" (1).

But an agreement that the income to which the mortgagee is entitled shall be applied in reduction of principal cannot alter its character for the purposes of income tax any more than an agreement that income derived from the property by a mortgagee in possession available to pay the interest should be applied in reduction of principal could do so. The money in the fund to which the agreement relates, to the extent to which the mortgagee has claims upon it, belongs to the mortgagee. Otherwise, if the mortgagor went bankrupt, although the mortgage had been executed more than six months before the presentation of the petition so that it could not be set aside as a preference under the *Bankruptcy Act*, the moneys still in the receiver's hands at the date of the sequestration order would form part of the estate of the bankrupt. The same position would arise upon the liquidation of a mortgagor company, but the contrary view is made clear in the speeches of the House of Lords in *Gosling* v. *Gaskell* (2). Lord *Watson* said:—"But the radical right to the business continued to be an asset of the company; and if it had been so successful under the management of Mr. Kelly as to yield profits sufficient to meet the claims of debenture-holders, who had no interest beyond that of mortgagees, it would, no doubt, have been at once reclaimed by the liquidator for the behoof of the general creditors" (3). Lord *Herschell* said:—"The profits made by the carrying on of the business of the company were, before as well as after the winding-up order, part of the security for the payment of the debts due to the debenture-holders, and after as well as prior to the winding up the profits of the business, *subject to the claim of the mortgagees*, belonged to the company. It had not ceased to exist; it could still hold and also acquire property. If the business had proved profitable and the assets of the company had been more than sufficient to discharge the mortgage claims, the liquidator of the company could, and doubtless would, have intervened, and applied the surplus to the payment of the creditors of the company,

(1) (1918) A.C., at p. 401. (2) (1897) A.C. 575.
(3) (1897) A.C., at p. 588.

H. C. OF A. 1943.

VISBORD v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

and all that remained after they had been paid would have been the property of the company" (1).

Moreover, after the company has gone into liquidation, in a case where the trust deed does not give the debenture holders the right to appoint a receiver, so that the trustees for the debenture holders must apply to the court to have a receiver appointed, the court will exercise a discretion whether to appoint a receiver or leave the liquidator to wind up the company's affairs or to appoint the liquidator to be receiver for the debenture holders as well as liquidator; but, where the trust deed gives the trustee the right to appoint a receiver out of court, the court will give leave to the trustees to place the receiver whom they appoint in possession of the company's assets. This is because the moneys collected by the receiver to the extent required to satisfy the mortgage debt, belong to the debenture holders (*In re Henry Pound, Son, & Hutchins* (2); *Strong* v. *Carlyle Press* (3)). Regard must be had, of course, to the respective rights of the mortgagor and the mortgagee in the mortgaged property in determining the extent to which the income of the mortgaged property collected by the receiver is the income of the mortgagee for the purposes of the *Income Tax Assessment Acts*. The income of the mortgagee is the interest on his debt, so that income in the hands of the receiver applied by direction of the mortgagee in reduction of principal after the interest on the mortgage has been paid would not be his income for the purposes of income tax (*Inland Revenue Commissioners* v. *Paterson* (4); *Inland Revenue Commissioners* v. *Thompson* (5)).

In my opinion the questions asked should be answered in the affirmative.

Questions answered as follows:—Yes; As to each of the sums mentioned in (a), (b), (c) and (d) subject to any adjustment required by reason of the provisions of the Victorian Financial Emergency Acts. Case remitted to Chief Justice. Costs of case costs in the appeal.

Solicitors for the appellant, *Davies, Campbell & Piesse.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

E. F. H.

(1) (1897) A.C., at p. 593.
(2) (1889) 42 Ch. D. 402.
(3) (1893) 1 Ch. 268, at p. 276.
(4) (1924) 9 Tax Cas. 163.
(5) (1937) 1 K.B., at p. 303.