[HIGH COURT OF AUSTRALIA.]

MAYNE . . . . . APPELLANT;
APPLICANT,

AND

THE PUBLIC TRUSTEE . . . . . RESPONDENT.
RESPONDENT,

H. C. OF A. 1945.

SYDNEY, *Dec.* 5, 7, 13.

Latham C.J., Dixon and Williams JJ.

*Bankruptcy—Statement of affairs—Disclosure by bankrupt of interest under a will—Income therefrom subsequently received by bankrupt—Application to own use—Death of bankrupt—Motion by official assignee against administrator to recover income so received and applied—Impressment of income with express or constructive trusts—Nature of proceedings—Statute of Limitations—Applicability.*

In 1922 L. voluntarily sequestrated his estate under the provisions of the *Bankruptcy Act* 1898 (N.S.W.) and in 1928 obtained his certificate of discharge. In his statement of affairs L. showed that he was entitled under a will to a life estate in certain government stocks producing an income of approximately £53 per annum. The trustees of the will were, apparently, unaware that the sequestration order had been made, and neither the official assignee originally appointed nor his successor appeared to have endeavoured to collect the income or sell the asset. The trustees continued to pay the income to L. until he died in 1942. Between the date of the sequestration order and the date of his death L. received the sum of £942 and did not account for any part of it to either official assignee.

Upon a motion in the Court of Bankruptcy, the official assignee sought to recover this sum from the administrator of L.'s estate.

*Held* that in the absence of evidence that L. ever accepted payments as affected by a trust or that his possession of the moneys was ever otherwise than adverse to the claim of the official assignee, the administrator was entitled to rely upon the Statute of Limitations and the official assignee could therefore only recover payments of income made to L. within six years before the service of the notice of motion.

*Cohen* v. *Cohen*, (1929) 42 C.L.R. 91, and *Soar* v. *Ashwell*, (1893) 2 Q.B. 390, referred to.

Decision of the Federal Court of Bankruptcy, affirmed.

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APPEAL from the Federal Court of Bankruptcy, District of New South Wales and the Australian Capital Territory.

Herbert Bruxton Ludlow, of Annandale, Sydney, medical practitioner, on 12th June 1922, voluntarily sequestrated his estate under the *Bankruptcy Act* 1898 (N.S.W.) and Charles Fairfax Waterloo Lloyd was appointed the official assignee thereof. The value of the assets in the estate was estimated to be £3,227 and the liabilities were estimated to amount to £10,659. The statement of his affairs, duly lodged with the official assignee by the bankrupt on 11th July 1922, disclosed, *inter alia*, a life interest under his mother's will in the following terms : " Life interest under the will of Mrs. Jane Ludlow (per annum) £53 4s. 4d."

The bankrupt obtained a certificate of discharge on 11th October 1928.

The bankrupt's mother, Mrs. Jane Ludlow, died on 10th June 1892, leaving a will by which she gave a share of her estate to the bankrupt in the following words : " And as to the last remaining share I direct . . . my said Trustees to hold the same in trust for my son Herbert during his life and to collect and get in the rents and income thereof And to pay the same into the hands of my son Herbert And I direct that my said son shall not be entitled to anticipate charge or alienate the same in any way whatever my desire being that he also shall be provided with an income And from and after the decease of my said son Herbert I direct my . . . Trustees to hold the said share and the rents and income thereof in trust for all the children of my said son as tenants in common."

The trustees named in the will duly obtained probate thereof and acted and continued to act as such until 4th November 1932, when the Public Trustee was appointed trustee in their stead.

On 8th October 1934, Robert David Mayne was appointed official assignee of the bankrupt's estate in lieu of Mr. C. F. W. Lloyd.

The bankrupt died on 24th June 1942 and letters of administration of his estate, the value of which was sworn at £8,526 5s., were, on 9th December 1942, granted to the Public Trustee.

Between 25th September 1925 and 18th June 1942, inclusive, various sums were from time to time paid by the original trustees of Mrs. Ludlow's will, and subsequently by their successor the Public Trustee, to the bankrupt in respect of his interest under the will. The sums so paid amounted to £942 13s. 3d. and at the date of the bankrupt's death there was payable in respect of this interest a further sum of £3 7s. 6d.

By motion under s. 134 (4) of the *Bankruptcy Act* 1898, the official assignee, Robert David Mayne, applied to the Federal Court in

Bankruptcy for an order directing the Public Trustee to pay to him as the official assignee of the bankrupt's estate the equivalent of the moneys so paid by the trustees of Mrs. Ludlow's will to the bankrupt from the date of the making of the sequestration order against him to the date of his death.

All the assets referred to in the bankrupt's statement of affairs, other than the said interest under the will, had been realized by the official assignee. Nothing was known as to the reason why the bankrupt's interest under the will had not been realized. This interest consisted of certain sums of money payable in respect of £1,045 5½ per cent government stock.

The evidence did not show why the said sums, amounting to £942 13s. 3d., so paid to the bankrupt had been paid to him and not to the official assignee of his estate.

Judge *Clyne* held that the official assignee's claim was in the nature of an action for money had and received and that the respondent was entitled to rely by way of defence on the Statute of Limitations and, therefore, that the official assignee could only succeed in respect of the sums paid to the bankrupt within six years of the service of the notice of motion, that is during the period between 22nd November 1938 and 18th June 1942 inclusive. His Honour ordered the respondent to pay to the applicant the sum of £159 7s., being the aggregate of the sums so paid to the bankrupt during that period, and held that the official assignee was entitled to the further sum of £3 7s. 6d. at the date of the bankrupt's death payable in respect of the interest under the will.

From that decision the official assignee appealed to the High Court.

*Badham* K.C. (with him *Loxton*), for the appellant. The Court below was in error in holding that the claim was one for money had and received and that so far as it referred to moneys received more than six years before the service of the notice of motion the claim was barred by the Statute of Limitations. Before and up to the time of the sequestration, the bankrupt was a *cestui que trust* as regards the trustees under his mother's will. Upon the sequestration, the official assignee became, *qua* the trustees of the mother's will, the *cestui que trust*, but he was also a trustee for the creditors whom he represented, and, for the purposes of this contention, is a representative of the bankrupt. The bankrupt knew of the trust, he put himself in the position of an express trustee and was not entitled to set up the Statute of Limitations. There was not in *Re Mansell*; *Ex parte Norton* (1) any question of a trust or any equitable interest; it was

(1) (1892) 9 Morr. 198.

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purely an inchoate right to receive the money free of any equitable interest thereunder and the only relationship was that of debtor and creditor. The bankrupt became at the time of sequestration a stranger to the trust upon which the trustees of his mother's will held the property. The duty of the trustees under the will was to forward the moneys to the official assignee. The bankrupt received those moneys in circumstances which make him a constructive trustee and render him unable to set up the Statute of Limitations. The position is correctly stated in *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 756, par. 1036. Where a person receives moneys with the knowledge of a trust and uses or employs those moneys for his own purposes or fails to get a proper discharge therefor, he himself is in the position of an express trustee and is unable to set up the Statute (*Lee* v. *Sankey* (1); *Soar* v. *Ashwell* (2); *In re Dixon*; *Heynes* v. *Dixon* (3); *In re Eyre-Williams*; *Williams* v. *Williams* (4); *In re Mason* (5); *In re Blake* (6)). The fact that the bankrupt received the moneys as and for his own moneys is, in the circumstances, immaterial: the whole of the moneys so received by him is recoverable (*In re Robinson*; *McLaren* v. *Public Trustee* (7)). The proceedings are not proceedings for money had and received; they arose out of the wrong receipt of trust funds and, therefore, the appellant is entitled to an equitable remedy.

[DIXON J. referred to *Rolfe* v. *Gregory* (8).]

*Moverley*, for the respondent. The Statute of Limitations applies in bankruptcy against the official assignee (*Re Mansell*; *Ex parte Norton* (9)). Upon and after obtaining his discharge from bankruptcy no action by the official assignee would lie against the bankrupt or his representative (*Martin* v. *Phillips* (10)). The facts do not warrant the finding that the bankrupt was at any time an express or direct trustee in respect of any of the moneys received by him. *Soar* v. *Ashwell* (11) and the other cases cited on this point on behalf of the appellant do no more than illustrate the well-known principle that where a person receives money which is already the subject of a trust and receives it with knowledge of the trust and presumes to act on it, he is put in the position of an express trustee. In the circumstances in which the bankrupt found himself, he did not receive the money as a stranger to the trust under his mother's will. His

(1) (1873) L.R. 15 Eq. 204, at p. 212.
(2) (1893) 2 Q.B. 390, at pp. 393, 394, 396, 397, 403, 405.
(3) (1900) 2 Ch. 561.
(4) (1923) 2 Ch. 533, at p. 538.
(5) (1928) Ch. 385, at p. 394.
(6) (1932) 1 Ch. 54, at pp. 62, 63.
(7) (1911) 1 Ch. 502, at p. 513.
(8) (1865) 4 DeG.J. & S. 576 [46 E.R. 1042].
(9) (1892) 9 Morr. 198.
(10) (1890) 11 L.R. (N.S.W.) 481.
(11) (1893) 2 Q.B. 390.

bankruptcy made no difference to his relationship *qua* that trust. All the bankruptcy did was to entitle the official assignee to receive the interest of the bankrupt whilst he remained a bankrupt and until his debts were paid. The moneys were received by the bankrupt in respect of his interest under the will; they were received as his own moneys and not as trust moneys. The fact that he received those moneys as his own did not make him an express trustee because he was a bankrupt. He received those moneys in his own right and it was his duty to account therefor to the official assignee. His failure to perform that duty is not a matter which gives rise to an express trusteeship on the part of the bankrupt, but is merely a failure to perform a duty. The moneys so received by the bankrupt cannot be identified or traced and the only action available to the official assignee was one for money had and received by the bankrupt. The bankrupt having received and retained the moneys was not an express trustee, and it does not follow merely because of those facts that the bankrupt may not well have been entitled to the moneys. In paying the moneys to the bankrupt the trustees under the will had not themselves committed any wrong. The onus was on the appellant to establish that the bankrupt was, in the circumstances, created an express or direct trustee and the mere facts that there had been a bankruptcy, that he had been discharged, and, in the meantime and after his discharge he had received certain moneys to which the official assignee was entitled would not constitute the bankrupt an express trustee. The principle involved is not to be found in *Soar* v. *Ashwell* (1), which dealt only with the case of moneys being received by a person as moneys upon a trust. The mere fact that all the property of the bankrupt has vested in the official assignee does not make express trustees all persons who may hold it on the bankruptcy. So far as the bare receipt of the moneys is concerned, the facts show that the bankrupt received them properly and lawfully. It is not to be inferred that merely because a bankrupt has received moneys in the circumstances shown he is not entitled to retain those moneys. The conduct of the bankrupt in retaining the moneys should not be assumed to be wrongful. There is not any authority which creates express trusteeship in a person who holds property to which the official assignee is entitled.

[LATHAM C.J. referred to *Taylor* v. *Davies* (2).]

In the ordinary course of administration, the only assumption would be that the official assignee permitted the bankrupt to receive and retain the moneys, unless it could be shown from the evidence that no such permission had been granted.

(1) (1893) 2 Q.B. 390.

(2) (1920) A.C. 636, at pp. 651, 653.

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*Badham* K.C., in reply. By s. 10 of the *Bankruptcy Act* 1898, the whole of the bankrupt's property, which included his interest or right in respect of that interest under his mother's will, vested automatically upon sequestration in the official assignee; therefore the bankrupt had no right to receive the moneys after the making of the sequestration order.

*Cur. adv. vult.*

Dec. 13.

The following written judgments were delivered :—

LATHAM C.J. I agree with the reasons for judgment of my brother *Williams*.

DIXON J. I have had an opportunity of reading the reasons prepared by *Williams* J. and agree in them.

WILLIAMS J. This is an appeal by Robert David Mayne, the official assignee of the estate of Herbert Bruxton Ludlow now deceased, against an order of the Federal Court of Bankruptcy ordering the Public Trustee, who is the administrator of the estate of the deceased, to pay to the appellant the sum of £150 9s. 7d., instead of the sum of £942 13s. 3d. claimed in the notice of motion.

The material facts may be shortly stated as follows. On 12th June 1922, Herbert Bruxton Ludlow voluntarily sequestrated his estate under the provisions of the *Bankruptcy Act* 1898 (N.S.W.), C. W. F. Lloyd being appointed the official assignee. On 11th October 1928, he obtained his certificate of discharge. On 8th October 1934, the appellant was appointed the official assignee of his estate in lieu of C. W. F. Lloyd. At the date of the sequestration order, the bankrupt was entitled under the will of his mother to an estate for life in certain personalty consisting of government stocks producing an income of approximately £53 per annum. The will directed the trustees to hold this property on trust for the bankrupt during his life and to collect and get in the income thereof and to pay the same into the hands of the bankrupt, and directed that he should not be entitled to anticipate charge or alienate the same in any way whatever so that he should be provided with an income. By his statement of affairs, the bankrupt estimated his assets to be of the value of £3,227 and his liabilities to be £10,659. He disclosed the life estate as an asset in the following terms: " life interest under the will of Mrs. Jane Ludlow (per annum £53 4s. 4d.)." The trustees of the will do not appear to have known that the sequestration order had been made, and neither of the official assignees appears to have taken any steps to collect the income or sell the asset. The result was that the

original trustees of the will continued to pay the income to the bankrupt until they retired on 4th November 1932, and that the respondent, who was then appointed the trustee in their place, also continued to pay the income to the bankrupt until the latter died on 26th June 1942. Between the date of the sequestration order and the date of his death, the bankrupt received the sum of £942 13s. 3d. and did not account for any part of it to either official assignee.

The purpose of the notice of motion was to recover this sum of £942 13s. 3d. from the respondent as administrator of the estate of the bankrupt. The learned Judge in Bankruptcy held that the proceedings were in the nature of an action for money had and received so that the respondent was entitled to rely on the Statute of Limitations, and that the appellant could therefore only recover payments of income made to the bankrupt within six years of the filing of the notice of motion. These payments totalled the above sum of £150 9s. 7d. The only ground which has been argued on the appeal is that his Honour was wrong in so holding and that he should have ordered the respondent to pay the whole of the sum of £942 13s. 3d. to the appellant. The case made for the appellant was that, since the effect of the sequestration order was to vest the life estate in the official assignee, the bankrupt ceased to be a *cestui que trust* under the trusts of the will, his place being taken by the official assignee, so that when the bankrupt received payments from time to time from the trustees of the will he received moneys which were to his knowledge impressed with an express trust in favour of the official assignee. We were referred to *Soar* v. *Ashwell* (1); *In re Dixon*; *Heynes* v. *Dixon* (2); *In re Eyre-Williams*; *Williams* v. *Williams* (3); *In re Blake*; *Re Minahan's Petition of Right* (4); and it was contended that the receipt of the moneys by the bankrupt constituted him a constructive trustee of the property for the official assignee, and that the circumstances were such that, when called upon to account for the moneys, he, and therefore his personal representative, could not avail himself of the lapse of time as a defence. As *Dixon* J. pointed out in *Cohen* v. *Cohen* (5), the Statute of Limitations, by its terms, does not operate directly on equitable remedies, but such remedies are barred in courts of equity by analogy to the statute. He said:— "The analogy is found in the case of constructive trusts, where the equity is fastened upon the trustee not because he intended to become the fiduciary of property but because of the character of his dealings and in spite of his intention to take the property for himself. But

(1) (1893) Q.B. 390.
(2) (1900) 2 Ch. 561.
(3) (1923) 2 Ch. 533.
(4) (1932) 1 Ch. 54.
(5) (1929) 42 C.L.R. 91, at pp. 99, 100.

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courts of equity have refused to see any analogy when a person, intending to act in a capacity which is fiduciary, has received, as and for the beneficial property of another, something which he is to hold, apply or account for specifically for his benefit. Such a person is either an express trustee, or, if that name does not in strictness belong to him, he stands in the same position as a direct or express trustee (see *Soar* v. *Ashwell* (1) ) " (2).

It is clear that when the income of the life estate was paid to the bankrupt from time to time by the trustees of the will, he received the moneys as his own and not on account of any other person and applied them to his own use. The notice of motion was not filed until after his death, so that he has not had the opportunity of explaining why he retained the moneys instead of paying them to the official assignee. It is possible that, in view of the terms of the will, he thought that income accruing due after the date of sequestration became his property either absolutely or subject to intervention by the official assignee. It is even more possible that he thought that income accruing due after his discharge did so. It would be wrong, as his Honour said, to impute dishonesty to him, and it is really immaterial whether he believed that he could lawfully retain the payments for his own benefit or not. The important point is that there is no evidence that he ever accepted payments as affected by a trust, or that his possession of the moneys was ever otherwise than adverse to the claim of the official assignee. The facts, therefore, bring the transaction within the first, but not within the second, of the two propositions in *Cohen* v. *Cohen* (3), so that, if the law is correctly summarized in these propositions, the appeal must fail.

The occasions on which a constructive trustee is placed, for the purposes of the Statute of Limitations, in the same position as an express trustee were discussed in *Soar* v. *Ashwell* (1). *Bowen* L.J. (4) divided them into four classes. The important class for the present purpose is the third class, that is to say where a person has received trust property and dealt with it in a manner inconsistent with trusts of which he was cognizant. But it would seem from the nature of the case cited (*Lee* v. *Sankey* (5) ), and from his remarks in the following paragraph, that, although the words are capable of a wider construction, his Lordship was referring to the receipt of trust property by the recipient as trust property to be dealt with in a fiduciary capacity. In the following paragraph his Lordship said that " a person occupying a fiduciary relation, who has property

(1) (1893) 2 Q.B. 390.
(2) (1929) 42 C.L.R., at p. 100.
(3) (1929) 42 C.L.R. 91.
(4) (1893) 2 Q.B., at pp. 396, 397.
(5) (1872) L.R. 15 Eq. 204.

deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and confidence in virtue of which he received it. He never can discharge himself except by restoring the property, which he never has held otherwise than upon this confidence . . . and this confidence or trust imposes on him the liability of an express or direct trustee" (1). In *Hovenden* v. *Lord Annesley* (2), Lord *Redesdale* said, with respect to the operation of the Statute of Limitations upon cases of trust in equity, that the distinction is, if the trust be constituted by an act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will be a bar; but if a party is to be constituted a trustee by the decree of a court of equity founded on fraud, or the like, his possession is adverse, and the Statute of Limitations will run from the time that the circumstances of the fraud were discovered: Cf. *Macintosh* v. *Macintosh* (3); *Lawrence* v. *Birmingham* (4). This distinction between the cases where property is received by a person under such circumstances that his possession is considered in equity to be the possession of the *cestuis que trust*, and where property is received by a person under circumstances which create a constructive trust, was clearly stated by *Maugham* J. in *In re Blake* (5), when he said that "constructive trusts are of various kinds, and without attempting a classification I may point out that there is a wide difference from the point of view of the effect of lapse of time between cases where the constructive trustee must be taken to have knowingly assumed the obligations of a trustee and those where the relationship is due merely to equitable principles" (6). *Soar* v. *Ashwell* (7), therefore, would appear to be an authority that a person who for some purposes may be described as a constructive trustee is only placed in the same category as an express trustee in relation to lapse of time as a defence when he accepts property in the circumstances mentioned in the second proposition in *Cohen* v. *Cohen* (8), and then proceeds to dispose of it in a manner inconsistent with express trusts of the property of which he has knowledge.

But the appellant contends that a person who takes possession, though adverse, of property which is subject to an express trust with full notice of the trust thereby becomes, though only a constructive

(1) (1893) 2 Q.B., at p. 397.
(2) (1806) 2 Sch. & Lof. 607, at pp. 633, 634.
(3) (1916) 17 S.R. (N.S.W.) 11.
(4) (1923) 23 S.R. (N.S.W.) 381.
(5) (1932) 1 Ch. 54.
(6) (1932) 1 Ch., at pp. 62, 63.
(7) (1893) 2 Q.B. 390.
(8) (1929) 42 C.L.R. 91.

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trustee of the property, liable to account in equity for the property or its value at any length of time. Support for this contention might appear at first sight to be found in *In re Dixon* (1) and in *In re Eyre-Williams* (2). But in each of these cases the moneys were in fact paid to the accounting parties in such circumstances that they were received in a fiduciary capacity. In *In re Dixon* (1), the moneys were lent to the husband and accepted by him as moneys impressed with a trust and subject to a fiduciary obligation to repay the debt to the trustees of the settlement. In *In re Eyre-Williams* (2), it was the testator himself who had created the trust of the mortgage debt which was subsequently paid to him, so that he received the mortgage moneys subject to a fiduciary obligation to pay the moneys to the trustee of the marriage settlement. There was in each case a direct trust created between the recipients of the moneys and the trustees of the settlements. They were in the same position as the husband with respect to the first sum of £1,000 in *Stone* v. *Stone* (3), and the father in *Burrowes* v. *Gore* (4). It is in the light of these circumstances that remarks in the judgments of their Lordships should be read. These authorities do not seem to support the wider propositions contended for. The law was, in my opinion, correctly stated by *Dixon* J. in *Cohen* v. *Cohen* (5) in the passages cited, and, as I have said, the present case falls within the first proposition.

I would therefore dismiss the appeal.

*Appeal dismissed. Appellant to pay the respondent's costs with liberty to recoup himself out of the bankrupt's estate.*

Solicitor for the appellant, *Herman Fawl.*

Solicitors for the respondent, *Priddle, Gosling, Dalrymple & Sillar.*

J. B.

(1) (1900) 2 Ch. 561.
(2) (1923) 2 Ch. 533.
(3) (1869) L.R. 5 Ch. 74.
(4) (1858) 6 H.L.C. 907 [10 E.R. 1551].
(5) (1929) 42 C.L.R., at pp. 99, 100.