

[HIGH COURT OF AUSTRALIA.]

DIRECTOR OF WAR SERVICE HOMES . . . APPELLANT;
RESPONDENT,

AND

LAW RESPONDENT.
APPLICANT,

Bankruptcy—Agreement—Debtor—Director of War Service Homes—Land and dwelling-house to be erected thereon—Purchase by debtor—Deed of arrangement—Execution by debtor—“Assignment” of property to “trustees”—Discharge of liability under agreement—Interest in land and dwelling-house—Entitlement—Claim by trustee—War Service Homes Act 1918-1951, ss. 19A, 23, 29, 33, 35*—Bankruptcy Act 1924-1950, ss. 91 (iv), 192 (1) (a), (5), 199 (1) (a), (c), (d), (2), (4).*

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SYDNEY,

April 5, 6;
18.

Dixon C.J.
Williams,
Webb,
Fullagar and
Taylor JJ.

In January 1949, B. entered into an agreement with the Director of War Service Homes for the purchase by instalments of a piece of land and a dwelling-house to be erected thereon at a total cost of £2,295. In October 1952, B. executed a deed of arrangement under Pt. XII of the *Bankruptcy Act 1924-1950* in which B., as beneficial owner, conveyed, granted, released, assigned and transferred to his “Trustees their heirs, executors, administrators and assigns as joint tenants” all the property which, had a sequestration order been made, would have vested in the Official Receiver for division amongst B.’s creditors. L., the only trustee named in the deed, claimed that the deed operated as an assignment to him of B.’s interest under the contract with the Director of War Service Homes in the land and dwelling-house

* Sections 33 and 35 of the *War Service Homes Act 1918-1951*, so far as relevant, are as follows:—

Section 33—The estate or interest of any purchaser or borrower in any land or land and dwelling-house included in a contract of sale, mortgage or other security under this Act shall not be divested from the purchaser or borrower under any law relating to bankruptcy or insolvency, but if the purchaser or borrower becomes bankrupt or insolvent, or if the land or land and dwelling-house is seized in execution, the Director may—(a) in the case of a purchaser, cancel the contract of sale, and, in his discretion, forfeit the

instalments previously paid by the purchaser; and (b) in the case of a borrower, sell the estate and interest of the borrower in the land, or land and dwelling-house.

Section 35—(1) So long as any land or land and dwelling-house is subject to a contract of sale, mortgage or other security in accordance with this Act, a transfer (other than a transfer by or to the Director) of that land or land and dwelling-house or of any estate or interest therein shall not have any force or effect unless it— . . (c) is made with the consent in writing of the Director.

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thereon. Upon an application by L. that he was entitled to the benefit of the agreement and that, upon the discharge of the liability of B. under the agreement to the Director, he was entitled to the land the Bankruptcy Court made certain declarations to that effect. Upon appeal,

Held that L.'s claim failed on the grounds (1) that the operation of s. 33 of the *War Service Homes Act* 1918-1951 is to take the estate or interest of the purchaser under such a contract out of the property upon which a sequestration order would operate, and that the deed of arrangement, properly construed, only operated to pass such property as would have passed if a sequestration order had been made; (2) that the interest of B. under the contract, even though a claim or right within the meaning of s. 91 (iv) of the *Bankruptcy Act* 1924-1950, was nevertheless an interest within the meaning of s. 35 of the *War Service Homes Act*, and on the facts the Director had not, within the meaning of that section, given his consent to the assignment.

Decision of the Federal Court of Bankruptcy (*Clyne J.*) reversed.

APPEAL from the Court of Bankruptcy.

On 25th January 1949 James Branwell Bird, of Crow's Nest, Sydney, New South Wales, builder, entered into a written agreement with the Director of War Service Homes for the sale by the Director to him, Bird, of certain land situate at No. 54 Kallaroo Road, Lane Cove, together with the dwelling-house proposed to be erected thereon, for an amount and on the terms and conditions therein set out.

Clause 5 of the agreement provided, *inter alia*, that "the following clauses shall come into effect when the Director certifies that the dwelling-house is ready for occupation"—(a) that the Director would sell to the purchaser (Bird) who would purchase from the Director the said land and dwelling-house for the sum stated; (b) that the contract of sale was made under and subject to the *War Service Homes Act* 1918-1947, as amended, and to the regulations made thereunder; (c) that the purchaser agreed to fulfil in all respects on his part the terms and conditions of the contract and to pay punctually to the Director all amounts payable thereunder by him; (f) that the purchaser might enter into possession of the land and dwelling-house and occupy them as a tenant of the Director so long as the instalments payable under the contract were punctually paid as rental therefor; (h) that the purchaser would observe and comply in all respects with each and every material and relevant provision of the said Act, as amended, and regulations thereunder; (i) that when the purchase money and all the amounts payable under the contract were paid in full to the Director the Director would execute a proper transfer or conveyance of the land and dwelling-house to the purchaser; and (m) that time should be the essence of the contract.

The certificate of title to the land under the *Real Property Act* 1900 (N.S.W.) stood in the name of the Director of War Service Homes.

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Upon the completion of the dwelling-house Bird, his wife and children, commenced to reside therein and continued to do so.

On 21st October 1952, Bird executed a deed of arrangement, wherein he was referred to as “the debtor”, for the benefit of his creditors, under Pt. XII of the *Bankruptcy Act* 1924-1950, and it was registered thereunder on 30th October 1952. Charles Allen Law, a chartered accountant, was the sole trustee of the deed of arrangement, although immediately after reciting his name, occupation and address the deed continued: “all of Sydney in the said State Accountants (Aust.) and duly registered under Part VIII of the *Bankruptcy Act* 1924-50 as qualified to act as trustees (hereinafter called the Trustees) of the second part.”

The operative words of the assignment contained in the deed of arrangement were: “. . . the Debtor as beneficial owner hereby conveys grants releases assigns and transfers unto the Trustees their heirs executors administrators and assigns as joint tenants All the property which if a sequestration order were made in respect of his estate on the date of his execution of this Deed would vest in the Official Receiver named in such sequestration order and would be divisible amongst the Creditors of the Debtor in accordance with the provisions of the said *Bankruptcy Act* of which the Debtor or any person in trust for him is possessed or to which he or any such person is entitled legally or equitably in possession reversion remainder or expectancy (a true and particular account whereof so far as the Debtor can set forth is contained in the First Schedule hereto) . . . To Have and To Hold the said property hereby conveyed granted released assigned or transferred As to such part thereof as consists of real property unto and to the use of the Trustees and their heirs as joint tenants for all that the estate right title and interest of which the Debtor is seized or to which the Debtor is entitled whether in fee-simple or otherwise . . . And as to all such property (subject to the mortgages and charges if any affecting the same respectively) upon the trusts and subject to the provisions conditions and agreements hereinafter contained and declared of and concerning the same”.

In the first schedule of the deed the following, *inter alia*, appeared:

“ Residence—54 Kallaroo Rd. Lane Cove	4,000	0	0
Less due to War Service Homes	..	1,500	0 0
		2,500	0 0 ”

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The trustee claimed that the interest of Bird in the land and dwelling-house under the said agreement was vested in him, Law, as trustee under the deed of arrangement. He accordingly applied to the Federal Bankruptcy Court by way of motion for a declaration that as trustee for the assigned estate of Bird he was entitled to the benefit of the agreement with the Director of War Service Homes dated 25th January 1949, and that under the agreement he was entitled to the land upon the discharge of Bird's liability to the Director.

Declarations to that effect were made by the Federal Bankruptcy Court.

From that decision the Director appealed to the High Court.

Further facts appear in the judgment hereunder.

B. P. Macfarlan Q.C. (with him *E. N. Dawes*), for the appellant. There is nothing in the *Bankruptcy Act* 1924-1950 which would detract from the full operation of the *War Service Homes Act* 1918-1951. It is a special Act, or is an Act dealing with a special matter, and the general provisions of the *Bankruptcy Act* 1924-1950 do not detract or derogate from these matters. The dominant feature of the *War Service Homes Act*, as shown by s. 19A and s. 23, is to provide homes for persons described in that Act as eligible persons. The correspondence shows that although the Director accepted payment of an instalment he insisted on his rights under the Act, and also that he did not consent to the proposed, or the actual, assignment under the deed of arrangement to the respondent. If bankruptcy or insolvency means bankruptcy or insolvency in its strict sense then this deed intended to pass that which would have passed or vested in the Official Receiver if an order of sequestration had been made. By reason of s. 33 the property the subject of this agreement would not have passed if a sequestration order had been made. The schedule is really an inaccurate or incomplete description of what passed under the deed. Unless the property in the schedule could fall within the description of the operative words in cl. 1 of the deed, it does not and cannot pass. If that step is taken s. 33 would prevent the property from passing if there had been an order of sequestration; that would conclude the matter and the respondent would not be entitled to any form of relief which he claims.

The principle involved is stated in *Lukey v. Edmunds* (1); *Bank Officials' Association (South Australian Branch) v. Savings Bank of*

(1) (1916) 21 C.L.R. 336.

South Australia (1); *Barker v. Edger* (2); *Blackpool Corporation v. Starr Estate Co.* (3) and *Seward v. The Vera Cruz* (4). Alternatively, based upon the construction of s. 33 of the *War Service Homes Act* 1918-1951, the phrase "under any law relating to bankruptcy or insolvency" also includes a case where there has been an assignment under a deed of arrangement under Pt. XII. [He referred to *R. v. Adams* (5).]

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[DIXON C.J. referred to *Armstrong v. Wilkins* (6).]

Deeds of arrangement are still within the understanding of what is "bankruptcy" within the meaning of the Act (*Re Hawkesford* (7); *Re Giles' Deed of Inspectorship* (8); *Re Hill and Ellis* (9)). Whatever the true position with regard to deeds of arrangement, it cannot be denied that they are regulated and controlled, and what is done under them is authorized, by Pt. XII of the *Bankruptcy Act* which, on any view, is a law relating to bankruptcy within the meaning of s. 33 of the *War Service Homes Act*. There are some sections within Pt. XIV (see *R. v. Adams* (5)), which apply only where a person is an actual bankrupt. Except as to those particular offences and those sections, Pt. XIV is fully applicable. The incorporation under s. 199, which is in Pt. XII, of so much of the general bankruptcy provisions of the Act, makes a deed of arrangement under Pt. XII at least a matter which arises under a law relating to bankruptcy. The divesting includes both compulsive and voluntary acts. It is because of the provisions of Pt. XII and in compliance with those provisions that the divesting really does take place under this Part. The effect of *Armstrong v. Wilkins* (6) is overcome by the fact that unless something is done which is sanctioned by Pt. XII, namely, registration, then the deed is void. So far as s. 35 is concerned this is an estate, or the right which Bird had at the date of the execution of the deed of arrangement was an estate or interest of the kind to which s. 35 (1) refers—on this assumption, that what the deed of arrangement sought to do was to assign that, and that because the Director has not consented, there had not been an assignment. The legislature's intention was that the *War Service Homes Act* and the protection it gives to eligible persons in the enjoyment of their homes was intended to operate outside the bankruptcy law. That legislative intention has been affirmed by amendments from time to time since 1924 to s. 35 and by amendment to s. 33.

(1) (1923) 32 C.L.R. 276, at pp. 282, 289.

(2) (1898) A.C. 748.

(3) (1922) 1 A.C. 27.

(4) (1884) 10 App. Cas. 59.

(5) (1935) 53 C.L.R. 563.

(6) (1940) 63 C.L.R. 489.

(7) (1937) 10 A.B.C. 26, at p. 29.

(8) (1939) 10 A.B.C. 265, at pp. 274, 275.

(9) (1942) 13 A.B.C. 57, at p. 61.

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R. Else-Mitchell (with him *D. A. Staff*), for the applicant-respondent. In conformity with the established rule where one finds a printed document having blanks in it and steps have been taken to insert details by manuscript or typewriter, one should endeavour, consistent with the language, to produce an effect which conforms with manuscript and typewriter. The words of assignment in cl. 1 should be read in the light of what appears in the schedule and in the Act. The original proceeding was brought in the Bankruptcy Court, in effect to meet the situation which was being raised by the Director and in answer to the claim asserted in the correspondence, that the matter was covered entirely by s. 33. The answer to the case put under s. 35 is that the form in which the trustee gets relief, if he can get relief, is immaterial. It does not matter whether it is by s. 33 not being applicable for one reason or s. 35 not being applicable for another. It does not matter whether it is done by his having the ability to redeem and then getting and selling the property. It is not essential for the trustee to make this property available that he should be able to get himself registered on the title, discharge the liability and then convey. If he can achieve that same result by any method it is sufficient. Section 35 does not deny or destroy every assignment or transfer. Section 35 of the *War Service Homes Act* 1918-1951 is not applicable to this transaction. That section manifests an intention that persons other than eligible persons shall not gain the benefit of the favourable terms of repayment and favourable rates of interest for which this Act provides: see sub-ss. (1A) and (2). The mischief at which the section is directed is the confining of the benefits of the Act to the field of eligible persons and to prevent by indiscriminate sales the beneficial terms and rates of interest being passed on to strangers who would be outside the scope of the scheme. The *Bankruptcy Act* 1924-1950, by s. 91, provides explicitly that the property of the bankrupt which would vest on a sequestration order and which must in any event pass by this deed, includes in par. (iv) the claim or right of the bankrupt to property under any contract, bill of sale, hire purchase, mortgage or lien made with the bankrupt or the debtor, on the trustee discharging or offering to discharge any legal liability with respect thereto. Those words refer to a claim or right to property but nevertheless they are included in the phrase "property of the bankrupt which passes on sequestration" and would pass by this deed. The contractual right to redeem or pay off those transactions, with or without the statutory right to pay off under s. 29, is a claim or right to property within s. 91 (iv). That claim or right is not such a claim or right

as it can be said that the transfer thereof can be prohibited under s. 35 (1). In so far as s. 91 (iv) provides for these anomalous claims to rights or property passing to the trustee, that is a right which passed in this instance and the passing or assignment of that right is not forbidden by s. 35. That section does not operate to fetter the exercise by the trustee of the right under s. 91 (iv), nor does it prevent the trustee standing in the shoes of the debtor and exercising the contractual right. Section 91 (iv) was discussed in *Lawrence v. Keenan* (1).

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B. P. Macfarlan Q.C., in reply.

Cur. adv. vult.

THE COURT delivered the following written judgment:—

April 18.

James Bramwell Bird on 25th January 1949 entered into an agreement with the Director of War Service Homes for the purchase of a piece of land and a dwelling-house to be erected thereon. The site was in Kallaroo Road Lane Cove and the house was numbered 54. The capital cost of the land and dwelling was ultimately fixed at £2,295. Bird paid a deposit of £295. The balance of purchase money, together with interest at three and three-quarter per cent per annum, was payable in 540 equal monthly instalments. By 21st October 1952 the amount owing under the agreement had been reduced to £1,948. On that date Bird executed a deed of arrangement which on 30th October 1952 was registered under Pt. XII of the *Bankruptcy Act* 1924-1950. The operative words of the assignment contained in the deed of arrangement, in which he is called "the Debtor", are as follows:—"... the Debtor as beneficial owner hereby conveys grants releases assigns and transfers unto the Trustees their heirs executors administrators and assigns as joint tenants all the property which if a sequestration order were made in respect of his estate on the date of his execution of this Deed would vest in the Official Receiver named in such sequestration order and would be divisible amongst the Creditors of the Debtor in accordance with the provisions of the said *Bankruptcy Act* of which the Debtor or any person in trust for him is possessed or to which he or any such person is entitled legally or equitably in possession reversion remainder or expectancy (a true and particular account whereof so far as the Debtor can set it forth is contained in the First Schedule hereto)."

Unfortunately only one person, the respondent Law, was named in the deed as a trustee. His name and description are inserted in

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the printed form, which then goes on with the words :—" and duly registered under Part VIII of the *Bankruptcy Act* 1924-1950 as qualified to act as trustees (hereinafter called the Trustees)". Whether an attempt to vest a piece of land in several persons as joint tenants when one only is named or identified can be effective without rectification may be doubted, but it is not a question to which the parties were prepared to address themselves and it may be put on one side. The schedule to which the operative words of the deed refer contains the following reference to the land and dwelling :—

" Residence—54 Kallaroo Rd., Lane Cove	£4,000	0	0
Less due to War Service Homes	..	1,500	0 0
		<hr/>	
		2,500	0 0 "

The trustee under the deed claimed that the deed operated as an assignment to him of Bird's interest under the contract with the Director of War Service Homes in the land and dwelling-house thereon. The trustee accordingly applied to the Federal Bankruptcy Court for a declaration that he is entitled to the benefit of the agreement and that, upon discharge of the liability of Bird, under the agreement, to the Director of War Service Homes, he is entitled to the land. The Bankruptcy Court made certain declarations to that effect. From the decree of the Bankruptcy Court the Director of War Service Homes now appeals.

In that court it seems to have been assumed that, unless s. 33 of the *War Service Homes Act* 1918-1951 applied directly to the deed as an instrument divesting an estate or interest from Bird as a purchaser and doing so under a law relating to bankruptcy or insolvency, the deed would operate to pass Bird's interest in the land, under the contract, to the trustee. Section 33 provides that the estate or interest of any purchaser or borrower in any land or land and dwelling-house included in a contract of sale, mortgage or other security under the *War Service Homes Act* shall not be divested from the purchaser or borrower under any Act relating to bankruptcy or insolvency. The section goes on to confer upon the Director in case of bankruptcy the power of cancelling the contract or forfeiting the deposit. The Federal Court of Bankruptcy construed s. 33 as not extending to an assignment amounting to a deed of arrangement. The Bankruptcy Court treated s. 33 as inapplicable on the ground that a deed of arrangement operates to pass the property by reason of the general law governing assurances of property and does not divest the property from the debtor by virtue of the

Bankruptcy Act or any other law relating to bankruptcy or insolvency. H. C. OF A.
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That may be so, but there is an antecedent question. Section 33 clearly would prevent an actual sequestration from passing the interest in the contract to the Official Receiver. How then could that interest be comprised in the parcels of the deed of 21st October 1952? The parcels are expressly confined to the property which, if the sequestration order were made in respect of the debtor's estate, would vest in the Official Receiver named in the sequestration order and would be divisible amongst the creditors of the debtor in accordance with the provisions of the *Bankruptcy Act*. The operation of s. 33 is to take the estate or interest of the purchaser under such a contract out of the property upon which a sequestration order would operate. If it be suggested that the mention of the residence in the schedule to the deed of conveyance is a ground for construing the parcels so as to include it, the answer is that the schedule is nothing but a true and particular account of the property contained under the general description so far as the debtor can set it forth. That is the language of the deed. Mention of the property in the particulars cannot extend the operation of the parcels. It is nothing but a misdescription of the property upon which the words of the deed are capable of operating: cf. *Ex parte Jardine*; *Re McManus* (1).

It is true that after the words quoted from the parcels of the deed there follow the words:—"of which the Debtor or any person in trust for him is possessed or to which he or any such person is entitled legally or equitably in possession reversion remainder or expectancy". It was contended on behalf of the trustee that the latter part of this phrase amounted to an assignment of property which fell outside the previous words of the parcels limiting the property to that which would vest in the Official Receiver on sequestration. In other words, the clause beginning "or to which he or any person is entitled legally or equitably in possession reversion remainder or expectancy" was treated as an alternative, not to the expression "of which the Debtor &c. is possessed", but to the whole of the relative clause following the word "property". In support of this contention the language of s. 192 (5) was referred to, which, it was maintained, bore the meaning sought to be placed upon the parcels. It seems reasonably clear, however, that that is not the meaning either of s. 192 (5) or of the deed. All that is covered is the property which would vest on sequestration

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if the debtor or any person holding in trust for him is possessed thereof or if he or any such person is entitled thereto legally or equitably in possession reversion remainder or expectancy.

It follows from this that the trustee's claim to the purchaser's interest in the land under the contract fails *in limine*.

But had the deed of arrangement contained language sufficient to include that estate or interest the trustee's claim would have encountered s. 35 of the *War Service Homes Act* 1918-1951. Section 35 (1) provides that "so long as any land or land and dwelling-house is subject to a contract of sale, mortgage or other security in accordance with this Act a transfer (other than a transfer by or to the Director) of that land or land and dwelling-house or any estate or interest therein shall not have any force or effect unless it . . . (c) is made with the consent in writing of the Director." The remainder of the provision is not material.

The land and dwelling-house in question are of course subject to a contract of sale. The word "transfer" is defined by sub-s. (4) of s. 35 to include conveyance, assignment and surrender. If the hypothesis be adopted that the parcels of the deed suffice to include the interest under the contract, they amount to an assignment of an interest in the land and dwelling-house. The director has not given his consent, whether in writing or otherwise. It is difficult, therefore, to see how the trustee could have any right in relation to the land or dwelling-house even on the hypothesis stated. For that reason alone the decree made by the Federal Court of Bankruptcy would be erroneous.

It was suggested, however, that possibly the trustee might obtain a right in virtue of s. 91 (iv) of the *Bankruptcy Act* 1924-1950 considered in its relation to the deed of arrangement. That enactment provides that the property of the bankrupt divisible amongst his creditors shall include the claim or right of the bankrupt to property under any contract, bill of sale, hire-purchase agreement, mortgage or lien made by or with the bankrupt or debtor on his trustee discharging or offering to discharge any legal liability with respect thereto. The argument was that there might be rights in the contract which, on the hypothesis that the parcels to the deed extended to it, were comprised within the description of s. 91 (iv) of the *Bankruptcy Act* 1924-1950 but yet were not caught by the language of s. 35 (1) of the *War Service Homes Act* 1918-1951. It was then suggested that perhaps the trustee might resort to s. 29 of the *War Service Homes Act* 1918-1951 and by paying the money referred to in that section to the director call for a transfer of the land. But it is a sufficient answer to this contention that the claim or

right of the debtor Bird under the contract with the Director to the land, by its very nature, necessarily involved an interest within the meaning of s. 35 which accordingly would prevent the supposed assignment having any force or effect.

It follows that the decree of the Court of Bankruptcy cannot stand. The appeal should be allowed and the order of the Court of Bankruptcy discharged.

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*Appeal allowed with costs. Order of Court of
Bankruptcy discharged. In lieu thereof
order that the motion of the respondent
trustee to that court be dismissed with costs.*

Solicitor for the appellant, *D. D. Bell*, Crown Solicitor for the Commonwealth.

Solicitor for the respondent, *W. A. Mayne*.

J. B.