[HIGH COURT OF AUSTRALIA.]

FEDERAL COMMISSIONER OF TAXATION . APPELLANT; RESPONDENT,

AND

OFFICIAL RECEIVER AND ANOTHER . . RESPONDENTS. APPLICANT AND RESPONDENT,

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY DISTRICT OF VICTORIA.

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MELBOURNE, *Feb.* 23; *June* 6.

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

Bankruptcy—Income Tax (Cth.)—Bankrupt—Vesting of property in trustee—After-acquired property—Personal earnings of bankrupt—Weekly deductions of tax by employer therefrom—Excess of deductions over tax liability—Provision for payment by Commissioner of Taxation of amount of excess "to the employee"—Right of employee to payment of amount—Whether a chose in action—Whether vested in trustee in absence of intervention—Whether amount could be paid to any person other than employee—Whether employee "in receipt" of amount prior to payment by commissioner—Bankruptcy Act 1924-1950 (*No.* 37 *of* 1924—*No.* 80 *of* 1950), *ss.* 91 (i), 99 (4), 101—*Income Tax and Social Services Contribution Assessment Act* 1936-1953 (*No.* 27 *of* 1936—*No.* 81 *of* 1953), *ss.* 16, 172, 202, 221H (2) (*b*), 221U, 221YE.

Section 91 (1) of the *Bankruptcy Act* 1924-1950 provides that, subject to the Act, the property of a bankrupt divisible among his creditors includes, *inter alia*, all property which is acquired by or devolves on him before his discharge. By s. 4 "property" is defined to include things in action. Section 99 (4) of the Act provides that where any part of the property of the bankrupt consists of things in action they shall be deemed to have been duly assigned to the trustee. Section 101 provides that subject to the Act where a bankrupt is in receipt of pay, pension, salary, emoluments, profits, wages, earnings or income, the trustee shall receive for distribution among the creditors, so much thereof as the Bankruptcy Court, on the application of the trustee, directs.

During the year ended 30th June 1954 T., an undischarged bankrupt, was in employment and earning wages. His employer made weekly deductions from his wages on account of income tax under the provisions of s. 221C (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953. When the bankrupt's income tax for the relevant year was assessed it was

found to be less by £44 6s. 3d. than the total amount of the deductions so made. He accordingly became entitled under s. 221H (2) (*b*) of the *Assessment Act* to receive from the commissioner a sum equal to the amount of the excess of the amount paid over the liability to tax, namely £44 6s. 3d. The official receiver, as trustee of T., claimed that he was entitled under the provisions of the *Bankruptcy Act* 1924-1950 to be paid the sum of £44 6s. 3d. in the hands of the commissioner otherwise due to T. under s. 221H (2) (*b*) of the Act.

Held, that the sum in question represented personal earnings of the bankrupt subsequent to bankruptcy, and did not vest in the official receiver in the absence of an order under s. 101 of the *Bankruptcy Act*.

Held, further, by *Dixon* C.J., *Williams* and *Fullagar* JJ. that the right of the bankrupt to the sum in question was not a chose in action so as to vest in the official receiver under s. 91 (1) or 99 (4) of the Act; by *Kitto* and *Taylor* JJ. that the right was a chose in action which, apart from the provisions of s. 101, would have vested in the official receiver under ss. 91 (1) and 99 (4); but by *Taylor* J. (*Kitto* J. being inclined to the same opinion) that s. 101 provided the exclusive means by which the official receiver could acquire a right to have any part of the sum paid to him; and by *Kitto* J. that the procedure of s. 101 was at least the only practicable means by which he might acquire such a right.

Held, further, by *Dixon* C.J., *Williams* and *Fullagar* JJ., *Kitto* and *Taylor* JJ. *contra*, that no order under s. 101 could be made against the commissioner because under s. 221H (2) (*b*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 he was precluded from paying the sum in question to any person other than the taxpayer or his personal representatives.

Held, further by *Dixon* C.J., *Williams* and *Fullagar* JJ., *Kitto* J. *contra*, and *Taylor* J. expressing no opinion, that no order under s. 101 could be made against the bankrupt in respect of the sum because he was not "in receipt" of it within the meaning of s. 101.

Observations on the duty of secrecy imposed by s. 16 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953.

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

APPEAL from the Federal Court of Bankruptcy District of Victoria.

By notice of motion dated 14th September 1955 the official receiver applied to the Federal Court of Bankruptcy at Melbourne for a decision as to the following questions arising in the bankruptcy of John Travis.

1. Whether the sum of £44 6s. 3d. due and payable by the Commissioner of Taxation in pursuance of the provisions of s. 221H (2) (*b*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953, being the amount of the excess of the sums deducted by the employer of the said John Travis in the year ended 30th

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June 1954 over the income tax and social services contribution payable by the said John Travis in that year, is property vested in the official receiver.

2. Whether the said sum is pay pension salary emoluments profits wages earnings or income within the meaning of s. 101 of the *Bankruptcy Act* 1924-1950.

3. If yea to 2, whether the said bankrupt is in receipt of the same within the meaning of s. 101 of the *Bankruptcy Act*.

4. Whether the said sum is now payable by the Commissioner of Taxation to the official receiver.

The official receiver's affidavit in support of the motion sworn on 14th September 1955 was substantially as follows :—" 2. That the sequestration order of the bankrupt estate of John Travis was made on 24th February 1950. No order of discharge of the said bankrupt has been made. 3. That I have been informed by the Deputy Commissioner of Taxation in respect of Victoria and verily believe that during the year ended 30th June 1954 the above-named bankrupt earned salary or wages in respect of which his employer made in that year deductions for income tax and social services contribution and accounted to the Deputy Commissioner of Taxation for the same in accordance with the provisions of Div. 2 of Pt. VI of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 and that in pursuance of the provisions of s. 221H (2) (*b*) of the said Act there is now due and payable by the Deputy Commissioner of Taxation the sum of £44 6s. 3d. being the amount of the excess of the sums so deducted over the tax and social services contribution payable by the bankrupt in that year. 4. That on 29th July 1955 I caused a letter to be sent to the said Deputy Commissioner of Taxation the contents of which, omitting formal parts, were as follows :—' With reference to your communication I note that your proposed action in respect of refunds from tax instalment deductions from the wages of bankrupt employees is to be treated on the basis that an application must be made by me under s. 101 of the *Bankruptcy Act* 1924-1950 before a refund will be paid to me as trustee of the estate. I disagree with this view, and in order that the matter may be tested in the Bankruptcy Court, now make a formal request to you to pay to me the sum of £44 6s. 3d. being refund due to J. Travis in respect of tax deductions for the year ended 30th June 1954. This claim is made on the basis that this refund is after-acquired property within the meaning of s. 91 (i) of the *Bankruptcy Act*. In regard to the list of amounts held in abeyance, which was attached to your memorandum, the undermentioned amounts may be paid to the bankrupts concerned :

[Then followed certain names.] It is desired that the other amounts shown on such list be retained pending the outcome of Court action which I propose consequent on my demand in respect of the bankrupt, J. Travis.' 5. That I subsequently received from the said Deputy Commissioner of Taxation a letter dated 11th August 1955 the contents of which, omitting formal parts, were as follows:— 'With reference to your memorandum of 29th July 1955, I have to advise that the sum of £44 6s. 3d., being refund due to John Travis, relates to income derived by Mr. Travis as an employee subsequent to the date of sequestration. It is the view of the Commissioner of Taxation, based on advice received from the Solicitor-General, that the refund in such circumstances, must be paid to the bankrupt unless the trustee obtains an order under s. 101 of the *Bankruptcy Act*.' 6. By reason of the foregoing matters the questions set out in the notice of motion filed herein on my behalf have arisen in the estate of the said John Travis and the decision of the court with respect thereto is respectfully requested."

The motion was heard before *Clyne* J. who in a written judgment delivered on 7th November 1955 ordered that the Commissioner of Taxation pay to the official receiver the sum of £44 6s. 3d. and his costs of and incidental to the motion.

From the decision of *Clyne* J. the commissioner appealed to the High Court. On the appeal coming on to be heard the High Court ordered that the bankrupt John Travis be made a party to the proceedings and adjourned the same in order to enable that to be done.

K. A. Aickin, for the appellant. Initially the moneys in question were part of the earnings of the bankrupt. They were then paid to the commissioner on account of a future liability to tax. They were not payments of tax and they do not become payments of tax until the commissioner has assessed the taxpayer. Looking at the matter at the time of payment there may not be any tax payable by the taxpayer in the relevant financial year, in which case none of the amounts will be retained by the commissioner or treated as being payments of tax. Nothing subsequently happened which had the effect of altering the nature of the moneys. No part of a bankrupt's personal earnings vest in the official receiver, who has no title apart from that which may be obtained under an order made in pursuance of s. 101 of the *Bankruptcy Act* 1924-1950. It is not possible to say that because a bankrupt has paid money into a bank it has ceased to be part of his personal earnings. [He

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referred to *In re Walter*; *Slocock* v. *Official Receiver* (1).] Section 101 proceeds on the basis that none of the salary etc. there described automatically vests in the official receiver. [He referred to *In re Roberts* (2); *Hesse* v. *Stevenson* (3); *Affleck* v. *Hammond* (4); *Williams* v. *Chambers* (5); *Hamilton* v. *Caldwell* (6); *Re Robertson*; *Ex parte Official Receiver* (7).] Section 221H (2) (*c*) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 is an exhaustive statement of the duties of the commissioner in relation to refunds. By implication the commissioner is not to be affected by assignments. The scheme contemplates payment of the refund to the employee personally if he is living and if not to his executors etc. It would not be possible for the commissioner to maintain the obligation of secrecy imposed by s. 16 of the Act if such assignments were to be recognised.

Murray V. McInerney, for the respondent, the official receiver. The right of the taxpayer against the commissioner is a chose in action. There is no necessity for the amount which the commissioner receives to be income. For example, under s. 221K of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 a non-employee may purchase tax stamps for application towards his ultimate tax liability. Section 221N, which provides that the commissioner may recover from an employer an amount which should have but has not been, deducted and may apply the amount recovered in or towards payment of the tax payable by the employee also emphasises that what the commissioner receives may not be the actual income of the taxpayer. There is nothing in s. 221H of the Act which renders unassignable the taxpayer's right to a refund although the assignee would take subject to whatever rights of set-off the commissioner possessed in respect of tax owing for other years. The official receiver's primary submission is that the refund is not a sum in the nature of salary wages or income. It is therefore not within s. 101 of the *Bankruptcy Act* 1924-1950 but the official receiver is entitled to it under s. 91 (1) or s. 99 (4) of that Act as being simply a chose in action. Personal earnings vest in the official receiver once he has intervened, as he has here. The only possible alternative to that view is that personal earnings vest in the official receiver except so much as is necessary for the maintenance and support of the bankrupt. [He referred to *In re*

(1) (1929) 1 Ch. 647, at p. 652.
(2) (1900) 1 Q.B. 122.
(3) (1803) 3 Bos. & Pul. 565, at pp. 577, 578 [127 E.R. 305, at p. 312].
(4) (1912) 3 K.B. 162, at pp. 163-167, 168, 169, 172, 173.
(5) (1847) 10 Q.B. 337 [116 E.R. 130].
(6) (1919) 88 L.J.P.C. 173.
(7) (1931) 4 A.B.C. 133.

Mirams (1); *In re Roberts* (2); *In re Graydon*; *Ex parte Official Receiver* (3); *In re Hawkins*; *Ex parte Official Receiver* (4); *Ex parte Huggins*; *In re Huggins* (5); *In re Pascoe* (6).] The Court should infer that no portion of the sum in question in this case is required for the maintenance of the bankrupt. The English doctrine as to personal earnings did not apply to money earned by the bankrupt in carrying on a business. [He referred to *In re Dowling*; *Ex parte Banks* (7); *Mercer* v. *Vans Colina* (8); *Crofton* v. *Poole* (9).] The purpose of s. 101 of the *Bankruptcy Act* is to enable the court to make provision for the bankrupt's personal maintenance. It is simply a machinery section. *Affleck* v. *Hammond* (10) is not inconsistent with this view. The trustee did not intervene in that case. *Williams* v. *Chambers* (11) is explained in *Wadling* v. *Oliphant* (12). Section 101 is directed to intercepting income which the bankrupt is in the process of receiving. [He referred to *In re Shine*; *Ex parte Shine* (13); *Ex parte Benwell*; *In re Hutton* (14).] The basis underlying s. 101 is the actual receipt of a recurring payment. That element is not present in this case. [He referred to *Nette* v. *Howarth* (15).]

There was no appearance for the respondent Travis.

K. A. Aickin, in reply.

Cur. adv. vult.

June 6.

The following written judgments were delivered:—

DIXON C. J. In my opinion this appeal should be allowed and an order made dismissing the motion in the Federal Court of Bankruptcy. I concur in the grounds given in the judgments prepared by *Williams* J. and by *Fullagar* J. which I have had the advantage of reading. The reasoning by which these grounds are supported is perhaps expressed from slightly different points of view, but there is no inconsistency between the judgments, in both of which I respectfully concur.

(1) (1891) 1 Q.B. 594, at p. 597.
(2) (1900) 1 Q.B. 122.
(3) (1896) 1 Q.B. 417, at p. 421.
(4) (1892) 1 Q.B. 890, at pp. 893, 895, 896.
(5) (1882) 21 Ch. D. 85.
(6) (1944) Ch. 219, at pp. 225, 226.
(7) (1877) 4 Ch. D. 689.
(8) (1900) 1 Q.B. 130 (n).
(9) (1830) 1 B. & Ad. 568 [109 E.R. 898].
(10) (1912) 3 K.B. 162.
(11) (1847) 10 Q.B. 337 [116 E.R. 130].
(12) (1875) 1 Q.B.D. 145, at pp. 149, 150.
(13) (1892) 1 Q.B. 522, at pp. 526, 527, 529, 530, 531.
(14) (1884) 14 Q.B.D. 301, at pp. 306, 307, 308.
(15) (1935) 53 C.L.R. 55, at pp. 64, 65.

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WILLIAMS J. This is an appeal by the Deputy Commissioner of Taxation from an order of the Federal Court of Bankruptcy (*Clyne* J.) ordering the appellant to pay to the official receiver, the respondent on this appeal, the sum of £44 6s. 3d. and his costs of and incidental to the motion. The facts are very brief. The official receiver is the trustee of the estate of one John Travis whose estate was sequestrated on 24th February 1950. In respect of the year of income ending on 30th June 1954 the bankrupt earned salary or wages in respect of which his employer made in that year deductions for income tax and social services contribution and accounted to the Deputy Commissioner of Taxation in accordance with the provisions of Div. 2 of Pt. VI of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953. In pursuance of the provisions of s. 221H (2) (*b*) of that Act (hereinafter called the *Assessment Act*), there is now due and payable by the Deputy Commissioner of Taxation the sum of £44 6s. 3d. being the amount of the excess of the sums deducted over the tax and social services contribution payable by the bankrupt in that year. The Deputy Commissioner of Taxation informed the official receiver, under what authority to make the disclosure we were not told, that he had this sum in hand and the official receiver claimed that it should be paid to him as the trustee of the bankrupt's estate. But the deputy commissioner refused to do so because he considered that it was necessary for the official receiver first to obtain an order under s. 101 of the *Bankruptcy Act* 1924-1950. The official receiver considered that no such order was necessary claiming that the amount of the refund became vested in him as after-acquired property of the bankrupt by virtue of s. 91 (i) of the *Bankruptcy Act*. He filed a notice of motion in the Bankruptcy Court, making the deputy commissioner the respondent, asking the following questions: " 1. Whether the sum of £44 6s. 3d. due and payable by the Commissioner of Taxation in pursuance of the provisions of s. 221H of the *Income Tax Assessment Act* 1936 being the amount of the excess of the sums deducted by the employer of the said John Travis in the year ending 30th June 1954 over the income tax and social services contribution payable by the said John Travis in that year is property vested in the official receiver. 2. Whether the said sum is pay pension salary emoluments profits wages earnings or income within the meaning of s. 101 of the *Bankruptcy Act*. 3. If yea to 2 whether the said bankrupt is in receipt of the same within the meaning of s. 101 of the *Bankruptcy Act*. 4. Whether the said sum is now payable by the Commissioner of Taxation to the official receiver. "

His Honour did not answer the questions specifically but it is clear from his reasons for judgment that in his opinion the obligation imposed upon the commissioner by s. 221H (2) (*b*) of the *Assessment Act* to refund the excess was a chose in action which had vested in the official receiver as after-acquired property of the bankrupt. Accordingly he made the order already mentioned. The case appears to be a test case because there is evidence that the same question has arisen on other occasions between the Deputy Commissioner of Taxation and the official receiver. Remarkable as it may seem, the motion was heard in the absence of the bankrupt and he was not made a respondent to the notice of appeal. But upon the appeal coming on to be heard in this Court we required the bankrupt to be made a respondent and to be served with the notice of appeal. But he did not choose to appear or take any part in the proceedings.

The first question that arises for decision is whether his Honour was right in holding that the obligation of the commissioner to repay the £44 6s. 3d. to the bankrupt is a chose in action which vested in the official receiver under the provisions of the *Bankruptcy Act*. The official receiver relies on ss. 91 (i) and 99 (4) of that Act. Section 91 (i) provides that, subject to the Act, the property of the bankrupt divisible amongst his creditors (and property includes things in action—s. 4) includes all property which belongs to or is vested in the bankrupt at the commencement of the bankruptcy or is acquired by or devolves on him before his discharge. Section 99 (4) provides that where any part of the property of the bankrupt consists of things in action, they shall be deemed to have been duly assigned to the trustee. The *Assessment Act*, Pt. VI, Div. 2, provides for the collection of income tax and social services contribution by instalments. It was under these provisions that the employer of the bankrupt, as he was bound to do, made the deductions.

The general nature of these provisions is well known and it is unnecessary to go into detail. Section 221C (1) provides that for the purpose of enabling the collection by instalments from employees of income tax, where an employee receives or is entitled to receive from an employer in respect of a week or part thereof salary or wages in excess of two pounds, the employer shall, at the time of paying the salary or wages, make a deduction therefrom at such rate as is prescribed. Section 221G (1) provides that an employer . . . who pays to an employee salary or wages from which he is required to make a deduction shall, in respect of that employee, keep a tax deduction sheet in a form authorised by the commissioner, and shall—

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(*a*) at the time of paying salary or wages to that employee enter in the spaces provided for the purpose on the tax deduction sheet the amount of the salary or wages before making any deduction and the amount of any deduction made. The section then goes on to provide for the purchase by the employer and the affixing in the space provided for that purpose on the tax stamps sheet of tax stamps of a face value equal to the amount of the deductions made by him from the salary or wages of that employee paid during that period and for the employer at the end of each year completing and signing the tax stamps certificate and delivering it, together with the tax stamps sheet, to the employee, and signing the tax check sheets for that year in respect of his employees and forwarding them to the commissioner, together with a summary, in a form authorised by the commissioner, of the salaries or wages referred to in the sheets. Section 221H provides (1) for an employee forwarding any tax stamps sheets issued to him in respect of deductions made in any year of income from his salary or wages to the commissioner with the return which he is required under s. 161 of the Act to furnish in respect of that year of income; (2) where the commissioner receives from an employee a tax stamps sheet in respect of deductions made in any year of income from his salary or wages and the tax payable by the employee in respect of that year of income has been assessed, the commissioner shall— . . . (*b*) if that sum exceeds that tax—credit so much of that sum as is required in payment of that tax and any other tax payable by the employee, and pay to the employee an amount equal to any excess. Section 161 provides that every person shall . . . furnish to the commissioner . . . a return signed by him setting forth a full and complete statement of the total income derived by him during the year of income, and of any deductions claimed by him. Section 166 provides that from the returns, and from any other information in his possession, or from any one or more of these sources, the commissioner shall make an assessment of the amount of the taxable income of any taxpayer and of the tax payable thereon. Section 174 provides that as soon as conveniently may be after any assessment is made, the commissioner shall serve notice thereof in writing by post or otherwise upon the person liable to pay the tax.

The manner in which the system of collecting income tax by instalments from salary or wages dovetails with the general scheme of the *Assessment Act* as a whole is plain enough. The instalments are collected on account of the contingent liability of the salary or wage earner to pay income tax which will crystallise into an actual liability upon the making of the assessment. The instalments are

collected in advance by the employer on behalf of the commissioner out of salary or wages payable by the employer to the employee. They partially discharge the obligation of the employer to pay the salary or wages. The employee is still under an obligation to furnish an income tax return to the commissioner under s. 161 and it is from that return and from any other information in his possession that the commissioner in accordance with s. 166 makes the usual assessment of the amount of the taxable income of the taxpayer and of the tax payable thereon. Too little or too much may have been collected in advance by instalments. If too little, the salary or wage earner must pay the deficiency to the commissioner. If too much, he is entitled to a refund of the excess. There are several sections in the *Assessment Act* which require the commissioner to make a refund where the taxpayer has paid a greater amount on account of tax than is exigible under the Act. Section 172 provides that where by reason of any amendment the taxpayer's liability is reduced, the commissioner shall refund any tax overpaid. Section 202 provides that if an assessment is altered on an appeal or reference to a board of review a due adjustment shall be made, for which purpose amounts paid in excess shall be refunded and amounts short paid shall be recoverable as arrears. Section 221YE provides that in the circumstances there mentioned the commissioner shall be liable to refund amounts paid by way of provisional tax to the taxpayer. Section 221H (2) (*b*) contains the special provision providing for a refund where the total sum collected by instalments from an employee in receipt of salary or wages exceeds the amount of tax he is liable to pay. The refund becomes payable when the tax payable by the employee in respect of the year of income has been assessed. It should therefore be repaid to the employee when he receives his notice of assessment.

Section 16 of the *Assessment Act* contains very explicit provisions requiring officers of the Income Tax Department, subject to certain exceptions not applicable to the present case, to maintain secrecy relating to any information acquired by them with respect to the affairs of any person disclosed or obtained under the provisions of the Act. Sub-section (2) of s. 16 provides that subject to this section, an officer shall not either directly or indirectly, except in the performance of any duty as an officer, and either while he is, or after he ceases to be, an officer, make a record of, or divulge or communicate to any person any such information so acquired by him. No distinction whatever is drawn between information relating to the affairs of persons who are not bankrupts and those who are. Every taxpayer has the same protection.

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These secrecy provisions in themselves, and *a fortiori* when considered in conjunction with the general scheme of the Act, point and point necessarily to the plain intent, to be gathered from the general structure of the Act and its specific provisions, that the Act should provide a complete and exhaustive code of the rights and obligations of the commissioner and other officers of his department to members of the general public who are subject to its provisions and of those members of the general public to his department. In particular there is the obligation imposed on individuals to make the return required by s. 161 of the Act and the obligation imposed on the commissioner to assess the taxable income of such individuals and the tax payable thereon and to give them notice of the assessment. It is the amount of tax payable on that assessment that the particular person becomes under an immediate liability to pay. The taxpayer may be satisfied or dissatisfied with the assessment. If dissatisfied, he has the rights of objection, of reference and of appeal conferred upon him by the Act. If as a result of the commissioner acceding to the objection either in whole or in part or of a reference or an appeal succeeding in whole or in part, the liability of the taxpayer is reduced it is the duty of the commissioner to refund any tax overpaid. A similar duty is imposed on the commissioner where he has been overpaid in advance by collections of instalments or of provisional tax. The wording of ss. 172, 202, 221H (2) (*b*) and 221YE differs slightly but the duty to make a refund which they each create is in essence the same. It is not a duty which confers on taxpayers a right to bring an action against the commissioner personally. If it created an ordinary chose in action, it could be assigned, the assignee could give the commissioner notice of the assignment and the commissioner would become subject to all the incidents of law and equity relating to choses in action which are assignable. The commissioner would be bound to disclose to the assignee information relating to the affairs of the taxpayer assignor which he is prohibited from disclosing by s. 16 and it is impossible to reconcile such a consequence with the very specific provisions as to secrecy imposed upon the commissioner and his officers by this section. Section 8 provides that the commissioner shall have the general administration of the Act. In administering the Act the commissioner and his officers are acting on behalf of the Crown in right of the Commonwealth. Section 208 provides that income tax when it becomes due and payable shall be a debt due to the Queen on behalf of the Commonwealth, and payable to the commissioner in the manner and at the place prescribed. Section 209 provides that any tax unpaid may be

sued for and recovered in any court of competent jurisdiction by the commissioner or deputy commissioner suing in his official name. The obligations to the commissioner imposed on members of the general public by the Act are duties owed to him as representing the Crown. The taxes collected under the Act belong to the Crown. Likewise the obligations the commissioner and his officers incur under the Act towards members of the public are duties incurred on behalf of the Crown. The duty imposed on the commissioner to make a refund by the sections already referred to is a duty to do so on behalf of the Commonwealth. An action to recover such moneys could presumably be brought against the Commonwealth. The Act requires the commissioner to make the refunds. But it requires him to do so on behalf of the Crown. If the Commonwealth refused to make the necessary funds available for the purpose the commissioner would be under no personal liability to refund. There is no section in the Act corresponding to s. 209 enabling the commissioner or a deputy commissioner to be sued for a refund in his official name. The duty imposed upon the commissioner to refund by s. 221H (2) (*b*) is of this character. The amount of the refund could not be recovered in an action brought by the salary or wage earner against the commissioner personally or in his official capacity. Section 221U of the *Assessment Act* no doubt provides that all moneys received by the commissioner in pursuance of Pt. VI, Div. 2 shall form part of the Consolidated Revenue Fund, and there shall be payable out of that fund (which is, to the necessary extent, thereby appropriated accordingly) such amounts as the commissioner becomes liable to pay in accordance with the provisions of this division. But the mere fact that moneys are provided to enable the commissioner to fulfil the duty imposed upon him by the Act does not alter the character of the duty. The obligation to make the refund is simply one of a number of statutory duties imposed upon the commissioner by s. 221H (2). It is of the same quality as the other obligations contained in the sub-section. The commissioner is under a public duty to salary and wage earners to perform all of them, and to make and issue an assessment showing the state of account between him and them so that they will know whether they are entitled to a refund or not and be placed in a position to claim it. These are duties which could be enforced by mandamus: *Reg.* v. *Lords of the Treasury* (1); *Reg.* v. *Commissioners for Special Purposes of Income Tax* (2); *Reg.* v. *Commissioners for Special Purposes of Income Tax* (3); *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (4). If public funds are made available to the

(1) (1851) 16 Q.B. 357 [117 E.R. 916].
(2) (1888) 21 Q.B.D. 313.
(3) (1888) 59 L.T. 455.
(4) (1891) A.C. 531.

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commissioner to enable him to fulfil his duty to make a refund he could presumably be ordered to make it by mandamus. But if the Commonwealth pursued the completely unlikely course of refusing to make such funds available the commissioner could not be ordered to repay the excess personally and the only course open to the taxpayer would appear to be to sue the Commonwealth. Accordingly the contention of the official receiver that the right of the bankrupt to recover the £44 6s. 3d. from the commissioner is a chose in action which vested in him as after-acquired property of the bankrupt is untenable, the duty of the commissioner under s. 221H (2) (*b*) of the *Assessment Act* is a duty to pay the refund to the taxpayer and to him only (or his personal representative) and the order below must be set aside on this ground alone.

But we heard considerable argument as to the meaning and effect of certain provisions of the *Bankruptcy Act* 1924-1950 and in particular of the extent to which the personal earnings of a bankrupt are after-acquired property which becomes divisible amongst his creditors under s. 91 (i) of the *Bankruptcy Act*. All property of a bankrupt which he acquires or which devolves upon him before his discharge does not necessarily become divisible among his creditors. Section 98 of the *Bankruptcy Act* validates all transactions by a bankrupt with any person dealing with him bona fide and for value, in respect of property, whether real or personal, acquired by the bankrupt after the sequestration, if completed before any intervention by the trustee. In addition to this general provision relating to intervention by the trustee there is also the very specific provision contained in s. 101. This section provides that subject to the Act, where a bankrupt is in receipt of pay, pension, salary, emoluments, profits, wages, earnings, or income, the trustee shall receive for distribution amongst the creditors so much thereof as the court, on the application of the trustee, directs. His Honour, having formed the opinion that the obligation of the commissioner to make a refund to the taxpayer was a chose in action deemed to be assigned to the official receiver, did not think it strictly necessary to refer to s. 101 but, " in deference to counsel ", he made a brief reference to it. He said : " The after-acquired property of a bankrupt becomes vested in his trustee. See *In re Pascoe* (1). To this statement of the law there are some qualifications, and one of these qualifications is contained in s. 101. Whether it is a matter of implication or a matter of assumption moneys of the various descriptions mentioned in s. 101 which are being received by a bankrupt and will in the

(1) (1944) Ch. 219.

ordinary course of things continue to be received by him can be retained by him unless the court orders that such moneys or a portion thereof should be received by the trustee for the benefit of the bankrupt's creditors. Section 101 is, I consider, an extension of the long established principle of the bankruptcy law that a bankrupt is entitled to retain out of the fruits of his labours sufficient for the purpose of maintaining himself and his family." This statement can broadly be accepted. The personal earnings of a bankrupt, including his earnings by way of salary or wages, are, on the literal reading of s. 91 (i), after-acquired property of the bankrupt. As such they would vest in the official receiver, as and when the bankrupt received them, and, subject to s. 98, would be part of the property of the bankrupt divisible amongst his creditors. But it has invariably been held that the vesting provisions of *Bankruptcy Acts* must not be read literally so as to vest the whole of the personal earnings of the bankrupt in his official assignee because to do so would mean that the assignee might, in the words of Lord *Mansfield* in *Chippendale* v. *Tomlinson* (1) : " let the insolvent out to hire, and contract himself for his personal labour " : *Williams* v. *Chambers* (2). In *In re Roberts* (3), *Lindley* M.R., delivering the judgment of the Court of Appeal, said that the language of s. 44 (i) of the *Bankruptcy Act* 1883 (Imp.) (which corresponds to s. 91 (i) of our Act), " clear and express as it is, must not, . . . be taken so literally as to deprive the bankrupt of those fruits of his personal exertions which are necessary to enable him to live. But, on the other hand, the necessity is the limit of the exception " (4). His Lordship then referred to certain cases and continued : " Those cases are no authority for the proposition that property of a bankrupt acquired by his personal exertions since his bankruptcy and not wanted for his present support does not belong to his trustee. No such doctrine can be maintained in face of s. 44. After bankruptcy, and before his discharge, whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support " (5). These passages would at first sight suggest that the earnings of a bankrupt would automatically vest in his trustee except so much thereof as was required for the present support of himself and his family without the trustee obtaining an order of the court directing payment of the earnings or part thereof to him during the bankruptcy. But in the later case in the Court of Appeal of *Affleck* v. *Hammond* (6), this judgment of *Lindley* M.R. was discussed and it was pointed

(1) (1785) 1 Co. Bank L. 428, at p. 432.
(2) (1847) 10 Q.B. 337, at p. 345 [116 E.R. 130, at p. 133].
(3) (1900) 1 Q.B. 122.
(4) (1900) 1 Q.B., at p. 128.
(5) (1900) 1 Q.B., at p. 129.
(6) (1912) 3 K.B. 162.

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out by *Buckley* L.J. (as Lord *Wrenbury* then was) that it was one of the facts in *In re Roberts* (1) " that the property was not wanted for the bankrupt's support or maintenance ; the trustee would therefore be entitled to the whole of it " (2). In *Affleck* v. *Hammond* (3) it was held that a bankrupt who earns salary or wages is entitled to have them paid to him and that he can, if necessary, sue to recover the whole of his personal earnings because, to the extent that they are required for his maintenance, the earnings do not vest in the trustee. *Buckley* L.J. said : " the trustee can only get the money upon an application to the court " (2). In *Nette* v. *Howarth* (4), *Dixon* J. (as he then was) said : " In the receipts enumerated in s. 101 the words ' pay ', ' salary ' and ' wages ' refer to remuneration earned by present service. ' Pension ' refers predominantly to payments which follow service. The time has passed when the idiomatic use of the word extended to non-recurring payments. But it may perhaps include in this section a succession of payments which are not the consequence of past service or the like. ' Emolument ' too is a word which has ceased to bear its original meaning of mere gain, profit, or advantage. It too relates to revenue, whether casual or constant, arising from an office, station, or situation. ' Profits ', ' earnings ' and ' income ' are wide words. They cover the fruits of labour and much more besides. For example, ' income ' in the analogous s. 51 (2) of the English *Bankruptcy Act* 1914 includes maintenance payable under an order in divorce (*In re Landau ; Ex parte Trustee* (5)). Decisions interpreting expressions reproduced in the Australian section which occur in s. 51 and corresponding previous British enactments will be found in that case (*In re Landau* (5)) and in *Hollinshead* v. *Hazleton* (6). But the English and Australian provisions alike appear to be directed at revenue receipts. Indeed, they are reminiscent of the rule long established in bankruptcy, that the personal earnings of a bankrupt do not pass to his trustee except to the extent that they are not required for the support of himself and his family " (7). The law is stated in the same way in *In re Walter* ; *Slocock* v. *Official Receiver* (8) where *Tomlin* J. (as Lord *Tomlin* then was) said : " the section (that is s. 38 of the *Bankruptcy Act* 1914) does not deprive the bankrupt of those fruits of his personal exertions which are necessary to enable him to live ; in other words it is only the surplus over and above that which vests in the trustee " (9). In *In re Shine* ; *Ex parte*

(1) (1900) 1 Q.B. 122.
(2) (1912) 3 K.B., at p. 170.
(3) (1912) 3 K.B. 162.
(4) (1935) 53 C.L.R. 55.
(5) (1934) Ch. 549.
(6) (1916) 1 A.C. 428.
(7) (1935) 53 C.L.R., at p. 65.
(8) (1929) 1 Ch. 647.
(9) (1929) 1 Ch., at p. 653.

Shine (1), *Bowen* L.J. said : "As the Master of the Rolls has already said, the original contract was for personal services, and the creditors are not entitled to the benefit of it by the law of bankruptcy ; and, until this sub-section was put in force against him, by diverting to the use and advantage of his creditors that which was primâ facie up to that moment his own, he had a perfect right, although he was a bankrupt, to make any bargain he pleased with any person as to the remuneration which he was to receive for his personal services " (2). These and other cases cited to us establish that the question whether any part and if so what part of the personal earnings of a bankrupt vests in the official receiver as after-acquired property is really academic. If the official receiver claims any part of these earnings, he must apply to the Bankruptcy Court for an order. He must intervene in this specific manner. In the absence of such an order the bankrupt is free to dispose of the whole of these earnings. The English cases were decided in relation to sections in succeeding English *Bankruptcy Acts* which provided that, so far as material, where a bankrupt is in the receipt of a salary or income . . . the court upon the application of the trustee shall from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee during the bankruptcy. The sections in question are—in the *Bankruptcy Act* 1869 (Imp.), s. 90, the *Bankruptcy Act* 1883 (Imp.), s. 53 (2), the *Bankruptcy Act* 1914 (Imp.), s. 51 (2). Section 101 of the *Bankruptcy Act* (Cth.) includes more classes of property than the English Acts and it is also somewhat differently expressed. It provides that where a bankrupt is in receipt of pay etc. the trustee shall receive . . . so much thereof as the court, on the application of the trustee, directs. It therefore provides in express terms that an order of the court is necessary before any part of such pay etc. can be recovered by the trustee and it is implicit in the section that in the absence of such an order none of the pay etc. vests in the trustee under s. 91 (i) of the Act. It is the order that effectively vests the pay or any part thereof in the trustee. It thereby becomes part of the property of the bankrupt divisible amongst his creditors. The order can only apply to pay etc. of which the bankrupt is " in receipt " and this means in actual receipt (per *Bowen* L.J. in *In re Shine* ; *Ex parte Shine* (3)). His Honour, in his reasons, said that it would be strange indeed that where a taxpayer has paid to the commissioner a sum which is more than sufficient to discharge his liability for tax, the excess amount which

(1) (1892) 1 Q.B. 522.
(2) (1892) 1 Q.B., at p. 530.
(3) (1892) 1 Q.B., at p. 531.

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the taxpayer is entitled to receive back from the commissioner can be regarded as earnings or income of the taxpayer within the meaning of s. 101. But what is there strange about that ? The instalments on account of tax that were deducted under the provisions of Pt. VI, Div. 2 of the *Assessment Act* were made from the salary or wages of the employee. Apart from these provisions the employer would have been bound to pay the bankrupt his salary or wages in full. It was part of these earnings that were appropriated for that purpose. But it was only a provisional appropriation. The commissioner is obliged to repay any sum found to be in excess of the required amount. The commissioner is obliged to restore the excess to the taxpayer and if the over collections were made out of salary or wages the restoration must be a refund of part of these salary or wages. It is a refund of part of the earnings of the bankrupt and money which he is entitled to retain in the absence of an order of the court under s. 101 of the Act. When he receives the refund and not before he will become for the first time in actual receipt of this part of his earnings. The official receiver may be able to obtain an order of the Bankruptcy Court under s. 101 of the *Bankruptcy Act* against the bankrupt for payment by the bankrupt of this sum or part thereof to him but it is not an order with which the deputy commissioner is concerned. It is the duty of the latter to pay the whole of the sum in question to the bankrupt and to make no disclosures about it to the official receiver. How otherwise could he comply with s. 16 of the *Assessment Act*.

For these reasons the appeal should be allowed with costs, the order below should be set aside and in lieu thereof there should be an order dismissing the motion with costs.

FULLAGAR J. This is an appeal from an order of the Federal Court of Bankruptcy made on motion at the instance of the official receiver.

The estate of John Travis was sequestrated by order made on 24th February 1950. The date of commencement of the bankruptcy does not appear. The bankrupt is still undischarged. During the year ended 30th June 1954 he earned salary or wages, in respect of which his employer, at the time of paying his salary or wages, made the deductions required by s. 221C of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 (which I will hereafter call the *Assessment Act*). The employer duly accounted to the appellant in accordance with the Act for the amounts so deducted. The bankrupt in due course furnished to the appellant, in compliance with s. 161 (1) and s. 221H (1) of the Act, a return of the income

derived by him in the year in question. When the tax payable on that income was assessed, it was found that the total of the amounts deducted by the employer exceeded the amount of the tax payable by £44 6s. 3d. In that event the appellant is required by s. 221H (2) (*b*) to pay the amount of the excess to the employee, and this he proposed to do. The respondent, however, claimed that the amount should be paid not to the bankrupt employee but to him. The basis of this contention was that the right to receive the amount in question was after-acquired property of the bankrupt, which vested in him, the official receiver, by virtue of s. 60 (1) and s. 91 (i) of the *Bankruptcy Act* 1924-1950. Correspondence took place between the appellant and the respondent, in the course of which the appellant maintained that it was his duty under the *Assessment Act* to pay the sum in question to the bankrupt unless the respondent obtained an order under s. 101 of the *Bankruptcy Act* directing or authorising him to receive that sum. The basis of this contention was, and is, that that sum represents salary or wages earned by the bankrupt.

By notice of motion dated 14th September 1955 the respondent sought from the Court of Bankruptcy, in effect, a decision on the questions whether the right to receive the sum of £44 6s. 3d. was vested in him, and whether s. 101 of the *Bankruptcy Act* was applicable to the case. I think that the notice of motion, though it is not very explicit in this respect, should be construed as asking also for an order that the appellant pay that sum to the respondent irrespective of s. 101 or alternatively for an order under s. 101. *Clyne* J. was of opinion that there was simply a debt due and payable by the appellant to the bankrupt—a debt, so to speak, in gross, though these are not his Honour's own words—and that it was impossible to characterise that debt as being or representing salary or wages of the bankrupt. He said that there was " in law a debt due and payable by the commissioner to the taxpayer, and not a repayment to the latter of part of his earnings ". His Honour accordingly held that the right to receive payment of that debt was a chose in action which vested in the respondent under s. 61 (1) and s. 91 (i) of the *Bankruptcy Act*, and that s. 101 had no application to the case. The order which he made was simply that the appellant pay to the respondent the sum of £44 6s. 3d.

Before proceeding further it should be mentioned that the bankrupt himself was not made a party to the proceedings in the Court of Bankruptcy, and the notice of motion was not served on him. When the appeal came on for hearing, it was pointed out that he was really the person primarily interested, and an order was made by consent joining him as a party to the appeal. The court was then

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informed on his behalf that he did not wish to take any part in the proceedings or to make any claim to the sum in question. The appeal then proceeded as between the original parties to it.

The appellant is not, of course, concerned to protect the interests either of the bankrupt or of his creditors. He is concerned primarily with obtaining a discharge from the duty (or "liability"—see s. 221U) which s. 221H of the *Assessment Act* imposes. He is also, I should imagine, concerned secondarily with considerations of convenience in the administration of Div. 2 of Pt. VI of the *Assessment Act*, in which s. 221H occurs. The respondent, for his part, is concerned simply with protecting the interests of creditors of the bankrupt.

Section 91 of the *Bankruptcy Act*, so far as material, provides that "the property of the bankrupt divisible among his creditors, and in this Act referred to as 'the property of the bankrupt' shall . . . subject to this Act . . . include—(i) all property which belongs to or is vested in the bankrupt at the commencement of bankruptcy, or is acquired by or devolves on him before his discharge." Section 101 is in the following terms:—"Subject to this Act, where a bankrupt is in receipt of pay, pension, salary, emoluments, profits, wages, earnings, or income, the trustee shall receive for distribution amongst the creditors so much thereof as the Court, on the application of the trustee, directs: Provided that this section shall not apply to any pay, pension, salary, or wages which by any Act or State Act is made exempt from attachment or incapable of being assigned or charged." This section is much wider in scope than the corresponding provision in the English Act, which is sub-s. (2) of s. 51 of the *Bankruptcy Act* 1914. That sub-section refers only to "salary or income" other than the "pay or salary" of servants of the Crown, for whom special provision is made by sub-s. (1), and it does not contain the proviso which appears in our s. 101. The word "income" in s. 51 has been construed as *ejusdem generis* with "salary".

It seems never to have been doubted that, in respect of a bankrupt's personal earnings after sequestration and before discharge, the absolute terms of s. 91 (i), which is s. 38 (a) of the English Act of 1914, must be read subject to a qualification. The qualification might have been regarded as arising from an implication to be found in s. 51 (2) (our s. 101). But in *In re Roberts* (1), *Lindley* M.R. placed it on more general grounds. The Master of the Rolls said:—"The *Bankruptcy Act* of 1883, like its predecessors, excepts a bankrupt's tools and contemplates the acquisition of future property by a bankrupt, and he must live to use his tools and acquire such

(1) (1900) 1 Q.B. 122.

property. The present Act, like previous *Bankruptcy Acts*, must be construed so as to enable him to do so; and the language of s. 44" (our s. 91 (i)), "clear and express as it is, must not, therefore, be taken so literally as to deprive the bankrupt of those fruits of his personal exertions which are necessary to enable him to live" (1). With regard to the extent of the qualification, two alternative views were open. It might have been held that personal earnings did not vest in the official receiver, and that his only right in respect thereof was to obtain an order under s. 51 (2) (our s. 101), which might be expected to give him so much of those personal earnings as were not required for the support of the bankrupt and of his family, if any. Or it might have been held that personal earnings did vest in the official receiver except to the extent to which they were required for the support of the bankrupt and his family. I should have thought myself, both prima facie as a matter of construction and on general considerations of convenience, that the former view was to be preferred. It is the latter view, however, that seems to have been accepted and established in England. Thus in the case, already cited, of *In re Roberts* (2), the Master of the Rolls, after referring to a number of decisions, said:—"Those cases are no authority for the proposition that property of a bankrupt acquired by his personal exertions since his bankruptcy and not wanted for his present support does not belong to his trustee. No such doctrine can be maintained in face of s. 44" (our s. 91 (i)). "After bankruptcy, and before his discharge, whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support. He may sue for and recover his earnings if his trustee does not interfere, but what he recovers he recovers for the benefit of his creditors, except to the extent necessary to support himself and his wife and family. The exception seems to include them" (3). See also *Williams* v. *Chambers* (4), noting the form of the plea which was held good on demurrer, and *In re Walker*; *Slocock* v. *Official Receiver* (5). In *Nette* v. *Howarth* (6) *Dixon* J. referred to "the rule long established in bankruptcy, that the personal earnings of a bankrupt do not pass to his trustee except to the extent that they are not required for the support of himself and his family" (7).

The distinction between the two possible views which I have mentioned is probably not of great practical importance in view of

(1) (1900) 1 Q.B., at p. 128.
(2) (1900) 1 Q.B. 122.
(3) (1900) 1 Q.B., at p. 129.
(4) (1847) 10 Q.B. 337 [116 E.R. 130].
(5) (1929) 1 Ch. 647, at pp. 652, 653.
(6) (1935) 53 C.L.R. 55.
(7) (1935) 53 C.L.R., at p. 65.

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the rule laid down in *Cohen* v. *Mitchell* (1) that " until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bonâ fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee " (2). In the case of personal earnings after bankruptcy, I am of opinion that, whatever may be the position under the English Act, under the Australian Act the only way in which the trustee can effectively " intervene " is by making an application for an order under s. 101.

I did not understand the view which I have just expressed to be contested in the present case. The respondent has maintained throughout, and *Clyne* J. has held, that the sum of £44 6s. 3d., which is in question, did not represent personal earnings of the bankrupt, but was simply the amount of a debt which became due and payable to the bankrupt as soon as the income tax payable by him on income derived in the year ended 30th June 1954 had been assessed by the Commissioner of Taxation. If this view is correct, the position is simply that a chose in action came into existence when the assessment was made, and vested *eo instanti* in the respondent, and s. 101 has nothing to do with the case.

Division 2 of Pt. VI of the *Assessment Act* has for its object the collection of income tax by instalments from " employees ". For this purpose s. 221C requires the employer, at the time of paying salary or wages to an employee, to make a deduction therefrom at such rate as is prescribed. The amounts so deducted are, in effect, paid by the employer to the Commissioner of Taxation. Two alternative procedures are provided, the one of which involves the issue of a " group certificate ", and the other of which involves the purchase and cancellation of " tax stamps ", but these things are merely matters of machinery. It is obviously impracticable for the " prescribed rate " of deduction to take into account all contingencies which may affect the amount of tax which will actually be payable on the employee's income of any year. He may derive income other than his salary or wages—e.g. income from property, or income from a business or profession. Or, on the other hand, he may be entitled to make from his assessable income such " allowable deductions " as life insurance premiums or medical expenses. Section 221D authorises the commissioner in special cases to vary the prescribed deduction which the employer is to make when paying salary or wages. In due course the employee must furnish to the commissioner under s. 161 his return of income derived during the year. The tax payable by him for the year is then

(1) (1890) 25 Q.B.D. 262.

(2) (1890) 25 Q.B.D., at p. 267.

assessed. It may then appear that the amount which has already been paid by means of the deductions from salary or wages made by the employer during the year is equal to, or more or less than, the tax payable for the year. Section 221H (2) accordingly provides that the commissioner shall (*a*) if the sum of those deductions does not exceed the tax payable, credit that sum in payment or part payment of that tax; (*b*) if that sum exceeds that tax, credit so much of that sum as is required in payment of that tax and any other tax payable by the employee, and pay to the employee an amount equal to any excess; or (*c*) if he is satisfied that there is no tax payable by the employee, pay to the employee an amount equal to that sum.

The present case falls within par. (*b*) of s. 221H (2). The assessment disclosed that the sum of the deductions made during the year by his employer from the bankrupt's salary or wages exceeded the tax payable by him for the year by £44 6s. 3d. It does not appear that any tax other than the tax on his salary or wages was payable by him. The sum of £44 6s. 3d., therefore, simply represents the difference between the tax payable by him and the total of the amounts deducted by his employer from his salary or wages during the year.

It does not, to my mind, carry the matter any further to say that a "debt" due and payable to the bankrupt arose when the assessment was made. It is obvious that the bankrupt became, by virtue of the statute, entitled to be paid some money, and in this sense, of course, it is true to say that a debt became due and payable to him. The statute created the "debt". But it did not create it out of nothing. It does not simply oblige the commissioner for no reason at all to pay a sum of money to the bankrupt. The question to be answered is:—Does that "debt", in substance and in reality, represent personal earnings of the bankrupt, or does it represent some other and different thing?

The question is not, in my opinion, answered by saying that the "debt" arose out of a right to a refund of income tax overpaid by the bankrupt or on his behalf. That is the truth, but it is not the whole truth, and to say that payment of the sum of £44 6s. 3d. will be a repayment of income tax overpaid is not inconsistent with saying that that sum represents personal earnings of the bankrupt for the purposes of the *Bankruptcy Act*. In order to arrive at the reality of the position, it is necessary to inquire how the bankrupt became entitled to payment of the sum in question. By virtue of what acts or things done or promised by him did that sum become payable? It is not *simply* that he made, or somebody made for

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him, an overpayment of income tax. The truth can be expressed by saying that he worked for that sum of £44 6s. 3d. He worked for his employer. His contractual remuneration was £x. He was paid £(x–y), the sum of £y representing the amount of income tax which it was assumed that he would be in due course required by law to pay. If that amount could have been accurately foreseen, he would have been paid not £(x–y) but £(x–z), z being less than y. He is now to receive the difference between £y and £z—not indeed from his employer, but from a person to whom the amount of that difference has been paid. But it is immaterial that he receives it not from his employer but from that other person. If the statute had required the Commissioner of Taxation to pay the difference between £y and £z to the employer, and required the employer to pay that difference to the employee, the position could never have been in doubt. The fact that the statute, avoiding unnecessary circuity, requires direct payment by the commissioner to the employee may make the position less obvious, but does not alter its reality. The right to receive this sum of £44 6s. 3d. really is a right to receive money which the bankrupt earned. How else did he acquire the right to payment of that sum? It is not the price of an article sold by him, or an instalment of the rent of a house let by him, or a dividend on shares owned by him. His right to payment arises because, and only because, he worked for a remuneration which is found, on a contingency which was contemplated throughout, not to have been paid to him in full.

For these reasons I am of opinion that the sum in question does represent personal earnings of the bankrupt, and that the respondent has no right in respect of that sum unless he can obtain an order under s. 101 of the *Bankruptcy Act*.

Whether the respondent could obtain an order under s. 101 against the bankrupt, requiring the bankrupt to pay to him the whole or some part of the sum of £44 6s. 3d. when received, is a question which does not arise on this appeal. The respondent did not by his motion seek such an order. What he sought and obtained was an order against the Commissioner of Taxation, and that order was made not under s. 101 but on the footing that the sum in question did not represent personal earnings of the bankrupt. But, if, as I hold, that sum does represent personal earnings, the question does arise whether an order under s. 101 can be made against the commissioner. I have said that I think that the notice of motion should be construed as asking, in the alternative, for such an order. Obviously no such order could be made on this appeal. If this Court thought that such an order could be made, the matter would have to

be remitted to *Clyne* J. But I am of opinion that, whether or not the sum in question is correctly regarded as personal earnings, no order under s. 101 can lawfully be made against the commissioner.

It is, indeed, only because of the possibility of an order against the bankrupt himself being sought in the future that I have thought it desirable to answer the question whether the sum of £44 6s. 3d. represents personal earnings. For the whole assumption on which the case was argued in the Court of Bankruptcy seems to me to be unfounded. That assumption was that on assessment of tax a chose in action came into existence which—whether absolutely or subject to the qualification stated in *In re Roberts* (1)—vested in the respondent under s. 50 (1) and s. 91 (i) of the *Bankruptcy Act*. The correctness of the assumption depends not on the *Bankruptcy Act* but on the *Assessment Act*. It is natural enough to say that, when s. 221H (2) (*b*) of that Act comes into operation, it creates a " debt ", but it is apt to be misleading.

Division 2 of Pt. VI of the *Assessment Act* contains an elaborate and carefully worked out scheme for the collection of tax by instalments from " employees ". The scheme involves the imposition of duties upon a particular class of taxpayers, upon their employers, and upon the commissioner. The scheme is such that it is inevitable that, at the end of a financial year, it will be found that some taxpayers of that class have paid too much tax, so that a refund to them is necessary. It is prima facie very unlikely that, when such a refund comes to be made, it should be intended that the commissioner should have to concern himself with such things as assignments, charges, bankruptcies or executions, with questions of validity and questions of priority. From the point of view of the legislature it is all a matter between the commissioner and the taxpayer, and the improbability of such an intention is increased by the direction of official secrecy which is contained in s. 16 of the Act. And, when the Act comes to prescribe what is to be done in the case where the deductions exceed the tax payable, we find it saying simply that " the commissioner shall pay to the employee " an amount equal to the excess. Those words mean, in my opinion, literally what they say, in the sense that they are to be regarded as requiring the commissioner to pay the amount of the excess to the taxpayer and not to anyone else. If he is dead, of course, the payment must be made to his personal representative, because that will be the only way in which payment can be made to him, but in all other cases it must be made to him personally.

(1) (1900) 1 Q.B. 122.

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In another sense, of course, the words do not mean literally what they say. They do not mean that the commissioner is personally liable to make the payment. Section 221U speaks of the commissioner as being " liable to pay ", but provides that payment is to be made out of the Consolidated Revenue Fund, which is " to the necessary extent appropriated accordingly ". I would not think that any action would lie against the commissioner for recovery of the amount of any excess. What s. 221H (2) (*b*) really means is that the commissioner is to take all necessary steps to see that payment is made in the course of normal departmental procedure out of Consolidated Revenue Fund. Mandamus might lie against him to compel him to take those steps. An action might lie against the Commonwealth. It is not necessary to determine these matters, but a consideration of them serves to emphasise that we have here nothing really analogous to an ordinary "debt", but simply a statutory direction to an officer of the Commonwealth to cause a payment to be made out of consolidated revenue to a specified person and an appropriation of consolidated revenue for the purpose of that payment and of no other payment.

The view which I have expressed does not mean that an amount which becomes payable to an employee taxpayer under s. 221H (2) (*b*) is incapable of being assigned or charged in the sense in which e.g. worker's compensation and some pensions are incapable of being assigned or charged. It does not deny the possibility of a transaction which will bind the sum received by the payee by making him a trustee of it for an assignee or chargee. But it does mean that the responsibility of the commissioner to the taxpayer is to him, and is not transmuted by the bankruptcy of the taxpayer into a liability to the official receiver under the *Bankruptcy Act*.

The appeal should, in my opinion, be allowed, and the order of the Court of Bankruptcy discharged. Since the only questions really argued on the motion and on this appeal were questions as between the appellant and the respondent, I think that this Court should simply order, in lieu of the order discharged, that the motion be dismissed.

KITTO J. During the year ended 30th June 1954, John Travis, an undischarged bankrupt, was in employment and earning salary or wages.

As each amount of salary or wages became payable, the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 (Cth.) bound the employer (as he was not, we are told, a group employer as defined in s. 221A) at the time of paying it to make a

deduction (s. 221C), to enter on a tax deduction sheet the amount of the salary or wages and the amount of the deduction and to affix on that sheet tax stamps equal to the amount of the deduction (s. 221G (1)). It was his duty (s. 221G (2)) at a later date to deliver to the bankrupt the portion of the sheet provided for the affixing of tax stamps, called the tax stamps sheet (defined in s. 221A), and a portion of it which provided for the certification of the amount of the deductions made, called the tax stamps certificate (also defined in s. 221A). The bankrupt had to forward the tax stamps sheet to the commissioner with his income tax return (s. 221H (1)). All these things were done; and when the bankrupt's income tax for the relevant year was assessed it was found to be less than the sum represented by the face value of the tax stamps on his tax stamps sheet. Thus the case fell within s. 221H (2) (*b*), which provides that in such an event " the Commissioner shall . . . credit so much of that sum as is required in payment of that tax and any other tax payable by the employee, and pay to the employee an amount equal to any excess ". The amount of the excess which the commissioner thus became " liable to pay ",—to use the phrase in s. 221U—became by virtue of that section payable out of the Consolidated Revenue Fund, which was thereby appropriated to the necessary extent.

In these circumstances a difference of opinion arose between the Deputy Commissioner of Taxation in Melbourne and the bankrupt's official receiver. The deputy commissioner contended that he must pay the amount of the excess to the bankrupt taxpayer unless an order to the contrary should be made under s. 101 of the *Bankruptcy Act* 1924-1950 (Cth.). The official receiver, on the other hand, contended that the deputy commissioner should pay the whole amount to him without any order under s. 101 having been made, on the ground that the amount was property acquired by the bankrupt before his discharge, and, as such, was vested in the official receiver by the combined operation of ss. 60, 91 (i) and 99 (4) of the *Bankruptcy Act*.

The official receiver then applied to the Bankruptcy Court for answers to questions which were involved in the controversy, and for an order that the deputy commissioner pay to him the whole of the amount in dispute (which would be the appropriate order if the right to the amount were vested in him by ss. 60, 91 (i) and 99 (4)), or an order that the deputy commissioner pay to him for distribution amongst the creditors the whole of the amount or such part of it as the court might direct (which would be appropriate if an

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order under s. 101 were necessary). The only parties to the application were the official receiver and the deputy commissioner: the bankrupt was not joined or served, and, notwithstanding r. 93 of the *Bankruptcy Rules*, he was given no notice of the proceedings.

Clyne J. made an order, not answering any of the questions asked, but ordering that the whole amount be paid to the official receiver. This his Honour did, holding that s. 101 had no application to the case but that the official receiver was entitled to the amount by force of the vesting provisions of the Act. The order so made is the subject of this appeal.

Two grounds have been suggested upon which it might be held that no right to the amount is vested in the official receiver as property acquired by the bankrupt before his discharge. One is, as I understand it, that on the true construction of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 (Cth.) the statutory duty of the commissioner to pay the amount imports no correlative right in the bankrupt constituting property which passes to his official receiver. The other is that the amount payable by the commissioner is saved to the bankrupt by the doctrine that the vesting provisions of the *Bankruptcy Act*, despite the generality of their terms, do not apply to personal earnings of a bankrupt which are needed for the maintenance of his family and himself. Of course, even if on either ground the official receiver should be held to have no title with respect to the amount by virtue of the vesting sections, that fact is no answer to an application for an order under s. 101: *In re Shine*; *Ex parte Shine* (1); *In re Saunders*; *Ex parte Saunders* (2); *In re Garrett* (3); *In re Landau*; *Ex parte Trustee* (4). But before it can be held that an order under that section could be made, three questions must be considered. The first two are questions depending upon the construction of s. 101 itself, namely (1) whether the amount is of such a character as to be comprehended in any of the words of description used in the section; and (2) whether a bankrupt to whom such an amount becomes payable is "in receipt of" it within the meaning of the section. The remaining question, which arises on the construction of the *Income Tax and Social Services Contribution Assessment Act*, is whether that Act expressly or by implication precludes the making of an order under s. 101 with respect to such an amount.

It will be seen that the construction of the *Income Tax and Social Services Contribution Assessment Act* is involved both in the

(1) (1892) 1 Q.B. 522.
(2) (1895) 2 Q.B. 117.
(3) (1930) 2 Ch. 137.
(4) (1934) Ch. 549.

argument as to vesting and in the argument as to jurisdiction under s. 101. It is convenient, therefore, to turn to that Act at once.

The duty which s. 221H (2) (*b*) in terms imposes upon the commissioner, with respect to any excess of the value of stamps on an employee's tax stamps sheet over the assessed amount of his tax, is to " pay to the employee " an amount equal to the excess. It has not been suggested, nor does it seem fairly open to argument, that when this duty arises in a particular case, reinforced as it is by the appropriation of the Consolidated Revenue Fund to the necessary extent by s. 221U, there arises no corresponding legal right in the taxpayer to have the duty performed. The right clearly exists; what is the appropriate procedure for its enforcement I do not stay to inquire. Neither is it material to consider whether notice to the commissioner of any purported assignment of the right by the taxpayer, or any charge over it which he has purported to give, will entitle the assignee or chargee to require the commissioner to pay the amount to him instead of to the taxpayer. Let it be assumed, as has been suggested (though I am not to be taken as agreeing with the suggestion) that the commissioner would be right in insisting in such a case that he must obey the statute according to its terms, and must therefore disregard the assignment or charge, unless (I suppose the suggestion must mean) the assignee or chargee were appointed expressly or by implication the taxpayer's agent to receive payment of the amount on his behalf. The assumption cannot affect the problem before us, for the unassignability of a right to be paid money does not necessarily exclude it from the category of property which vests in the official receiver under the *Bankruptcy Act*: *Ex parte Huggins; In re Huggins* (1); *Hollinshead* v. *Hazleton* (2); and cf. *National Trustees Executors & Agency Co. of Australasia Ltd.* v. *Federal Commissioner of Taxation* (3). If the right we are considering is outside the category, that must be the result of an indication to that effect to be found in the *Income Tax and Social Services Contribution Assessment Act*.

I have not been able to discover any such indication, nor do I see in the Act anything capable of being read as such an indication, unless it be the expression " pay to the employee " in s. 221H (2) (*b*) itself. Read not only literally but as if the Act took effect in a vacuum, these words no doubt would exclude payment to anyone but the employee. But the Act takes effect as part of a system of law which contains the *Bankruptcy Act*; and it would accord with sound principles of construction to hold that when Parliament

(1) (1882) 21 Ch. D. 85, at pp. 90, 91.
(2) (1916) 1 A.C. 428, at p. 447.
(3) (1954) 91 C.L.R. 540.

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creates a right to receive money it does so with the knowledge that general provisions applying to such rights in cases of bankruptcy have already been made, and intends, unless the contrary is indicated, that those provisions shall take effect with respect to the particular right created. Accordingly I should regard it as a sound proposition that any statute providing for payments to be made to individuals, whether out of government funds or otherwise, should be read together with the *Bankruptcy Act* unless a positive intention is disclosed that the provisions of that Act shall not apply. Where the intention is not expressed, courts should, I think, be slow to imply it, bearing in mind that the *Bankruptcy Act* embodies the system which Parliament has set up for the purpose of ensuring that all the resources of bankrupts are applied for the benefit of their creditors and themselves in the manner which is considered generally most expedient, and that an exception is not likely to be intended unless there are reasons for it which are so special that they would lead almost inevitably to the making of an explicit provision on the point.

In the *Income Tax and Social Services Contribution Assessment Act* I do not find such an intention disclosed, either by express words or by implication. In addition to s. 221H (2) (*b*), there are several other provisions in the Act for the repayment by the commissioner to taxpayers of moneys which have proved to be overpayments of tax. The others are ss. 172, 202 and 221YE. All are couched in such terms as one would expect to find in sections drawn so as to create rights subject to the operation of the bankruptcy law. Together with s. 221U, they entitle taxpayers to receive payments out of government funds in the events to which they respectively refer, and they give no hint of an intention that the law as to choses in action generally, and the bankruptcy law in particular, shall not be as applicable as it is to other kinds of government debts.

Some reliance has been placed upon the secrecy provisions contained in s. 16, but the relevance of those provisions, I must confess, escapes me. By sub-s. (2) the commissioner and his subordinates are forbidden, subject to the section, to divulge to any person any information they have acquired, by reason of their appointments or employment or in the course of their employment, respecting the affairs of any other person, except in the performance of their duty as officers. The application of this provision depends upon a delimitation of their duty as officers. In the present case the deputy commissioner disclosed to the official receiver the fact that the amount in question had become payable to the bankrupt, and

no doubt in doing so he conceived that he was acting within the limits of a duty which his own Act and the *Bankruptcy Act* combined to impose upon him. Whether he was right or wrong may be easier to say when this appeal has been decided; but I cannot see how the decision of the appeal is made any easier by a consideration of s. 16. The suggestion seems to be that s. 16 sets or confirms the tone of the Act, and that the Act should be construed as one which provides for an individual relationship between commissioner and taxpayer, to the exclusion of other people, each being required to do certain things in relation to the other without regard or reference to anyone else. But when, out of the communings of the commissioner and a taxpayer with each other, there has developed a situation in which nothing remains to be done except that an amount is to be paid to the taxpayer out of the Consolidated Revenue Fund, what is there so personal about the relationship as it then exists that from it an implication should be thought to arise that the taxpayer's right to receive the amount is not affected by his bankruptcy in the same way as his right to receive any other amount that may be payable to him?

But it seems to be said further that, at least when you consider the nature and complexity of the system which must necessarily exist for the administration of the *Income Tax and Social Services Contribution Assessment Act*, you should feel it to be improbable that the legislature would have meant the commissioner, when the occasion arises for making a refund under s. 221H (2) (*b*), to pay regard to anyone but the taxpayer himself. The improbability apparently stops short of excluding his legal personal representatives if he is dead, but not his official receiver if he is a bankrupt. With all respect to those who take this view, it is not clear to me why the suggested improbability should be thought to exist, or why, if it does exist, it should be thought a sufficient ground for placing upon the Act a construction different from that which it would otherwise bear. Many statutes provide for money payments to be made by public officials from public funds. Not infrequently the departments concerned are large and the persons entitled to payments are numerous. Yet it has never been held, as far as I am aware, that in considerations of departmental inconvenience or the like a sufficient warrant may be found for implying into a statute an exclusion of the right to receive such payments from the normal operation of the bankruptcy law. If such an exclusion were intended, an express provision effecting it would almost inevitably suggest itself at once to the draftsman; and in the absence of any provision on the point expressly made in the *Income Tax and Social*

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Services Contribution Assessment Act a court should, in my opinion, see a strong reason for declining to imply one, unless compelling reasons for doing so are to be found in the Act itself. I do not perceive, any more than the deputy commissioner appears to have perceived, any reason why, when the conditions have arisen in which a refund is payable under s. 221H (2) (*b*), the commissioner should be considered in a different position, so far as the bankruptcy law is concerned, from that which is occupied by anyone else in the community who is under a duty to pay money to a specified person on behalf of, or out of the funds of, a third party.

It is not unimportant to remember that what s. 221H (2) (*b*) does is to give the taxpayer a right to a payment out of Commonwealth moneys in substitution for a right to a payment by his employer of which he has been deprived by the operation of the Act, and deprived unnecessarily, as it has turned out, in the sense that he has been thereby kept out of money not required to meet his tax liability. If he had not been deprived of his right against his employer, the law of bankruptcy would have applied to it, and it would have vested in his official receiver unless saved to him by the doctrine as to personal earnings, or by s. 101, or by some other principle or provision of the bankruptcy law. I should have thought it in the highest degree improbable that the legislature would have intended that the right given the employee in place of a former right which it had taken from him should be in a different position from that former right so far as availability for the benefit of creditors in bankruptcy is concerned. It would require clear words to convince me that Parliament really intended to give bankrupt taxpayers more opportunity to deprive their creditors of the benefit of tax refunds than they would have had to deprive them of the salary or wages which the refunds represent.

I turn to consider the case, therefore, on the footing, which both the deputy commissioner and the official receiver accepted in their correspondence, that the whole problem is one as to the application of the bankruptcy doctrine concerning personal earnings or the application of s. 101 of the *Bankruptcy Act*. The difficulty which led the official receiver to deny that the bankrupt could support a claim to the refund in competition with his own by relying on the doctrine as to personal earnings was that an amount which becomes payable to a person who is in fact an employee but in his character of taxpayer, not in pursuance of a contract of employment but in discharge of an independent statutory duty, by a person who is not his employer, and out of moneys which do not belong to his employer, differs in essential respects from that which is strictly comprehended

in "personal earnings". But in considering the doctrine as to personal earnings we are concerned with a principle; and it would be inconsistent with the reasons which are the foundation of the principle if it were held that in the statement of it the expression "personal earnings" is used in so narrow a sense as not to include refunds of excess tax deductions which have been made from salary or wages. The principle insists that what a bankrupt earns by his personal labour, so far as it is needed to maintain his family and himself, forms no part of the property divisible amongst his creditors, because the Act is not to be construed as preventing him from earning his own living: *Ex parte Vine*; *In re Wilson* (1). What must be considered in relation to a given sum of money is a question of substance and of fact, namely whether the money is in truth the reward, or part of the reward, for personal labour done by the bankrupt. Where a bankrupt has been employed at a salary or wages which, if paid to him in full by his employer, would constitute personal earnings in the relevant sense, that which he gets back from the commissioner by way of refund of tax deductions, no less than that which he has been paid directly by his employer, must necessarily be counted in any computation of the reward which his labour has brought him. It must therefore be covered by the principle.

It seems probable, and may be assumed, that the salary or wages of the bankrupt in this case were personal earnings in the relevant sense. There is no evidence, however, as to whether the amount of the tax refund was needed by the bankrupt for purposes of maintenance. I do not think that in this state of affairs the assumption should be accepted which appeared to underly a part of the argument before us, namely that in these circumstances the dispute between the deputy commissioner and the official receiver should be decided by considering simply where the onus lay of proving that the amount was needed for maintenance. If, as I think, the right to the refund forms after-acquired property of the bankrupt, and therefore is vested in the official receiver save to the extent that it is excepted from the vesting provisions of the Act by the doctrine as to personal earnings, still it is clear law that the bankrupt is entitled to recover the whole amount from the commissioner unless the official receiver intervenes: *Jameson & Co.* v. *Brick & Stone Co. Ltd.* (2); *Bailey* v. *Thurston & Co. Ltd.* (3), and that a purported intervention is effectual in respect only of so much of the amount as is not in fact required for the maintenance of the bankrupt and his

(1) (1878) 8 Ch. D. 364, at p. 366.
(2) (1878) 4 Q.B.D. 208.
(3) (1903) 1 K.B. 137.

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family : *Bailey* v. *Thurston & Co. Ltd.* (1) ; *Affleck* v. *Hammond* (2). The official receiver, by claiming the amount from the deputy commissioner, has purported to intervene ; but whether his intervention was effectual as to any and what part of the amount it was not competent for *Clyne* J. to decide, for the bankrupt was not before him and the proceedings were therefore not properly constituted for the determination of the question. His Honour thought that he had not to decide that question, but in this I think, with respect, that he was mistaken. In my opinion the order which he made on the footing that the whole amount of the refund was vested in the official receiver cannot stand.

So far, I have assumed that personal earnings of a bankrupt which are not required by him for maintenance may be recovered by his official receiver independently of s. 101. In *Affleck* v. *Hammond* (3) however, *Vaughan Williams* L.J. suggested and *Buckley* L.J. held that the only way in which the official receiver may get any of the moneys covered by s. 101 is to obtain an order from the court, and as at present advised I should be disposed to take that view : cf. *Ex parte Huggins* ; *In re Huggins* (4). But the question is probably academic, because the only practical course for an official receiver to adopt, when he learns that a refund under s. 221H (2) (*b*) is or is about to become payable to a bankrupt in respect of tax deductions made from salary or wages earned after the commencement of the bankruptcy (the bankrupt not consenting to the refund being paid to the official receiver) is to apply to the Bankruptcy Court, making the commissioner and the bankrupt parties, for a decision as to whether he should receive some or all of the refund for distribution amongst the creditors ; and (at least if the salary or wages are within the concept of personal earnings) the amount which the court would think fit to fix under s. 101 is not likely to differ from that which it would hold to be preserved to the bankrupt by the doctrine as to personal earnings : see *In re Rogers* ; *Ex parte Collins* (5). If the official receiver presses the commissioner to pay the amount to him without any order of the court or consent of the bankrupt, and will not himself apply to the court, I should think the proper course for the commissioner to adopt is to apply to the court under s. 25 ; and on the hearing it would clearly be competent for the court to direct the official receiver to make an application under s. 101.

(1) (1903) 1 K.B. 137, at p. 142.
(2) (1912) 3 K.B. 162, at p. 172.
(3) (1912) 3 K.B. 162, at pp. 167, 170.
(4) (1882) 21 Ch. D. 85, at pp. 92, 94.
(5) (1894) 1 Q.B. 424, at p. 431.

On an application under s. 101, as I have already mentioned, it is immaterial to consider whether the right to the tax refund is property vested in the official receiver. Moreover, even if there were to be read into the *Income Tax and Social Services Contribution Assessment Act* a provision similar to the express provision which *Farwell* J. had to consider in the case of *In re Garrett* (1), to the effect that the right to receive a payment under s. 221H (2) (*b*) should not pass to any trustee in bankruptcy, that provision, as *In re Garrett* (1) shows, would not exclude the court's jurisdiction to make an order under s. 101 with respect to the payment. And the requirement of s. 221H (2) (*b*) to pay "to the employee" surely cannot exclude the jurisdiction either. It is precisely because money becomes, or is in course of becoming, payable to a bankrupt that it is possible to say, in the words of s. 101, that he is in receipt of it. If the point had actually occurred to the draftsman of s. 221H (2) (*b*) and he had formed a positive intention that tax refunds should be capable of interception under s. 101, I should hardly expect to find s. 221H (2) (*b*) differently expressed. It would not be likely that specific reference would be made to s. 101. No reference to the corresponding Imperial provision was found in the instruments which the House of Lords considered in *Hollinshead* v. *Hazelton* (2), or in the order of the Divorce Court which was considered by the Court of Appeal in *In re Landau*; *Ex parte Trustee* (3), or in the *Indian Pensions Act* which was considered by that court in *In re Saunders*; *Ex parte Saunders* (4); and there was no reference to s. 101 in the New South Wales Acts which this Court considered in *Stuart-Robertson* v. *Lloyd* (5) and *Nette* v. *Howarth* (6). Yet in none of these cases was the provision regarded as inapplicable because the amount in question was in terms made payable to a specified or ascertainable person.

As to whether the conditions for the application of s. 101 are fulfilled where an amount becomes payable under s. 221H (2) (*b*), I do not think there is much room for doubt. Considered as the subject of a payment which the commissioner must make, the amount is not, of course, a payment for services, nor is it made under any contract, nor is it periodically recurrent or computed with reference to recurrent events. In these respects it has a superficial resemblance to the amount which was the subject of the decision in *Nette* v. *Howarth* (6). For the purposes of s. 101, however, it is necessary to consider the character of the amount from the point of view of the recipient. To

(1) (1930) 2 Ch. 137.
(2) (1916) 1 A.C. 428.
(3) (1934) Ch. 549.
(4) (1895) 2 Q.B. 424.
(5) (1932) 47 C.L.R. 482.
(6) (1935) 53 C.L.R. 55.

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him, as I have pointed out, it is part of the fruits of his employment. The only difference between it and the moneys which his employer paid him directly as salary or wages is that the *Income Tax and Social Services Contribution Assessment Act* has operated to defer the time at which he was entitled to receive it, and to substitute for the obligation of his employer to pay it an obligation of the commissioner to pay it out of the Consolidated Revenue Fund. But neither the postponement of the date of receipt nor the change in the identity of the immediate payer can make any difference to the character of the amount from the taxpayer's point of view. If in strictness it should be denied the title of salary or wages, at least it must be conceded the title of income, even on the strictest application of the view that "income", in s. 101, is confined to receipts *ejusdem generis* with those described by the other words used. And it seems clear that the amount is part of the salary, wages or income of which the bankrupt is "in receipt". He is entitled to receive it, and it is about to be paid to him unless intercepted. That seems to me enough to make the expression entirely apposite to the case.

For these reasons I am of opinion that the order of *Clyne* J. should be set aside, and that the matter should be remitted to his Honour to be heard as an application for an order under s. 101, notice being given to the bankrupt as required by r. 93 of the *Bankruptcy Rules*.

To that end, I should allow the appeal.

TAYLOR J. The first-named respondent to this appeal is the official receiver for the bankruptcy district of Victoria and he is the trustee of the bankrupt estate of one, John Travis, whose estate was sequestrated on 24th February 1950. Travis is still an undischarged bankrupt and during the year which ended on 30th June 1954 he earned salary or wages from which, in accordance with the provisions of s. 221C of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953, his employer make periodical deductions at the prescribed rate, and, in respect of which the employer otherwise complied with the provisions of Div. 2 of Pt. VI of that Act. After the close of the income year referred to and after the tax payable by the bankrupt in respect of that year had been assessed, it was found that he was entitled to receive from the appellant a refund of £44 6s. 3d. This fact was communicated by the appellant to the first-named respondent who thereupon claimed to be entitled to this sum as the trustee of the estate of the bankrupt. The claim was rejected by the appellant but, in proceedings subsequently instituted in the Federal Court of Bankruptcy, the said respondent obtained

an order directing payment to him of the sum in question. It is from this order that the present appeal is brought.

The order appealed from was made upon an application to which the only parties were the appellant and the official receiver. No notice was given to the bankrupt who, apparently, remained unaware of the application and of the making of the order until after appropriate notice was given to him, in accordance with the directions of this Court, of the proceedings in the appeal. Not unnaturally he is content at this stage to allow the appellant to continue to bear the expense of advancing arguments favourable to his interest and, though now a respondent, he does not wish to be represented on the appeal. For reasons which are obvious the original application should not have been entertained in his absence.

The right to receive the amount now in question constitutes after-acquired property of the bankrupt and, according to contentions advanced on behalf of the official receiver, this right vested in him, consequent upon the making of the sequestration order, pursuant to ss. 60 (1) and 91 (i) of the *Bankruptcy Act* 1924-1950. But it is asserted on behalf of the appellant that the amount in question constitutes wages or salary payable to the bankrupt and that s. 91 (i)—which defines " the property of the bankrupt "—does not extend to any part of the personal earnings of the bankrupt after bankruptcy or, alternatively, that it does not extend to any part of such personal earnings as is required for the present maintenance of the bankrupt and his family. The first of these alternative contentions rests upon the view that s. 101 of the *Bankruptcy Act* constitutes an exclusive provision relating to the personal earnings of bankrupts and, therefore, that it operates to except from the wide provisions of s. 91 (i) salary and wages earned after bankruptcy. Other questions arose upon the appeal but it is convenient to postpone consideration of them for the moment.

The first question which arises upon the competing contentions referred to is whether the amount payable by the appellant constitutes wages or salary of the bankrupt. After referring to the relevant provisions of the *Income Tax and Social Services Contribution Assessment Act* the learned judge in bankruptcy formed the opinion that it does not. He observed that each periodical amount payable to the commissioner under those provisions constituted a debt due to the Queen on behalf of the Commonwealth (s. 221R (1)), that all moneys received by the Commissioner of Taxation in pursuance of those provisions are to form part of the Consolidated Revenue Fund (s. 221U) and that where, upon assessment, it is found that the aggregate of the periodical payments exceeds the tax payable by the

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employee an amount equal to the excess is to be paid to the latter out of that fund. But it is of importance to notice that the provisions of Div. 2 of Pt. VI of the Act do not impose upon an employee any obligation to make periodical payments to the commissioner; the obligation is directly imposed upon the employer to make deductions at the prescribed rate from the wages or salary due to an employee and to account to the commissioner for the amount so deducted in one of the methods provided by the Act. If an employer fails to make the appropriate deductions he is, nevertheless, liable to pay to the commissioner the amounts which he has failed to deduct (s. 221N), though it is true that the employer may in such a case, and after he has discharged his liability to the commissioner, recover from the employee any amount or amounts so paid. But at no stage prior to assessment is the employee directly liable to the commissioner to make periodical payments either as tax or on account of a future tax liability; the debt which is created is one which is owed by the employer to the Crown who has no recourse whatever against the employee. It may, of course, be said that the purpose of the legislation is to permit and, in fact, require the appropriation of some part of an employee's earnings to discharge an indebtedness of the employer and that, in this sense, a liability is imposed upon the employee. Again, it may be said that the employee's right to recover the residue of his wages or salary from his employer is extinguished and that after a deduction has been made he has no further interest, as wages or salary or at all, in the amount thereof. But his right is not extinguished by payment either to him or on account of any existing liability on his part. The substance of the matter, as I see it, is that the Act directs interception of portion of the wages or salary payable to an employee and authorises the retention by the commissioner of sums so deducted and collected in accordance with the provisions of the Act to answer the future tax liability, if any, of the employee. The fact that amounts received by the commissioner are paid into consolidated revenue and that excess payments are repayable out of this fund in no way affects the substance of the matter. Portion of the wages or salary of the employee is withheld and retained against his future contingent liability and if an excessive amount is withheld and retained the excess when paid to him is simply a deferred payment of portion of his wages or salary. This view would, I think, be inescapable if periodical deductions were made by the direction of the employee for the purpose of constituting a fund to meet a future unascertained liability and I can see no reason why the same view should not prevail where the

deductions are made for this purpose under the authority of a statute. The legislative provisions are quite unlike those under consideration in *Nette* v. *Howarth* (1) where the view was taken that a refund of contributions paid pursuant to the *Superannuation Act* 1916-1930 (N.S.W.) was not a deferred payment of salary.

If, as I think, such payments constitute deferred salary or wages the question which next arises is whether the right to receive the sum in question in this case ever vested in the respondent. The first contention of the appellant on this point concedes that the wide language of s. 91 (i) of the *Bankruptcy Act*—" all property which belongs to or is vested in the bankrupt at the commencement of bankruptcy, or is acquired by or devolves on him before his discharge "—is adequate to embrace the personal earnings of a bankrupt but it asserts that the provisions of s. 101 are intended to deal *exclusively* with after-acquired property of this description. That section is in the following terms : " 101. Subject to this Act, where a bankrupt is in receipt of pay, pension, salary, emoluments, profits, wages, earnings, or income, the trustee shall receive for distribution amongst the creditors as much thereof as the court, on the application of the trustee, directs : Provided that this section shall not apply to any pay, pension, salary, or wages which by any Act or State Act is made exempt from attachment or incapable of being assigned or charged." This provision, it is said, shows that after-acquired property of the character to which the section applies was not intended to vest in the trustee pursuant to ss. 60 (1) and 91 (i) and that the right of a trustee to resort to it, or to any part of it, depends upon the making of an appropriate order under the section. The argument was reinforced by reference to the decision in *Williams* v. *Chambers* (2) as an authority for the proposition that the right to sue for personal earnings accruing due after bankruptcy does not vest in a bankrupt's trustee. The observations of Lord *Denman* in this case rather suggest that in no circumstances could the assignee of an insolvent debtor sue to recover any part of the personal earnings of the debtor. But the case was decided on demurrer and for the purposes of the question of law involved it was common ground that the earnings which the assignee of the insolvent debtor sought to recover were not more than sufficient for the necessary support of the debtor and his family. In these circumstances I find difficulty in attributing to his Lordship any intention to decide that in no circumstances could the assignee of an insolvent debtor, under the relevant English legislation, sue to recover part of the personal

(1) (1935) 53 C.L.R. 55.

(2) (1847) 10 Q.B. 337 [116 E.R. 130].

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earnings of the latter. (See also per *Blackburn* J. in *Wadling* v. *Oliphant* (1)). Moreover, such a broad view would be quite inconsistent with later cases in England where provisions resembling those under consideration in this case have been reviewed on a number of occasions. In particular, as early as *In re Roberts* (2), it was said : " It may be that a bankrupt's trustee cannot maintain an action for money earned by the bankrupt since his bankruptcy by his personal exertions, if such money is required by him for his personal support and maintenance : see *Williams* v. *Chambers* (3), the pleadings in which, however, alleged promises to pay the assignees for work done by the bankrupt. The *Bankruptcy Act* of 1883, like its predecessors, excepts a bankrupt's tools and contemplates the acquisition of future property by a bankrupt, and he must live to use his tools and acquire such property. The present Act, like previous *Bankruptcy Acts*, must be construed so as to enable him to do so ; and the language of s. 44, clear and express as it is, must not, therefore, be taken so literally as to deprive the bankrupt of those fruits of his personal exertions which are necessary to enable him to live. But, on the other hand, the necessity is the limit of the exception. This is in entire accordance with modern decisions : see *Mercer* v. *Vans Colina* (4) ; *In re Graydon* (5) ; *Wadling* v. *Oliphant* (6) ; *Emden* v. *Carte* (7) ; *In re Rogers* (8) ; *Benwell's Case* (9) ; and does not conflict with other cases. That case turns entirely on s. 53, and is only an authority for the proposition that a prospective order cannot be made impounding the future personal earnings of a bankrupt. Similar observations apply to *In re Shine* ; *Ex parte Shine* (10). Those cases are no authority for the proposition that property of a bankrupt acquired by his personal exertions since his bankruptcy and not wanted for his present support does not belong to his trustee. No such doctrine can be maintained in face of s. 44. After bankruptcy, and before his discharge, whatever property a bankrupt acquires belongs to his trustee, save only what is necessary for his support. He may sue for and recover his earnings if his trustee does not interfere, but what he recovers he recovers for the benefit of his creditors, except to the extent necessary to support himself and his wife and family. The exception seems to include them " (11). So far as I can see the rule as stated in the second last sentence of these observations has never been doubted in England and has been

(1) (1875) 1 Q.B.D. 145, at p. 149.
(2) (1900) 1 Q.B. 122.
(3) (1847) 10 Q.B. 337 [116 E.R. 130].
(4) (1898) 67 L.J. (Q.B.) 424.
(5) (1896) 1 Q.B. 417.
(6) (1875) 1 Q.B.D. 145.
(7) (1881) 17 Ch. D. 768.
(8) (1894) 1 Q.B. 425.
(9) (1884) 14 Q.B.D. 301.
(10) (1892) 1 Q.B. 522.
(11) (1900) 1 Q.B., at pp. 128, 129.

referred to in Australia as " the rule long established in bankruptcy " (*Nette* v. *Howarth* (1)).

The rule as stated, however, leaves much to be desired as a practical definition of the respective rights of a bankrupt and his trustee and in this circumstance, no doubt, is to be found the reason for the making of special provision—in England as early as 1869—with respect to the salary and income of bankrupts. By the *Bankruptcy Act* 1869 " the property of the bankrupt " was defined in terms almost identical with and, certainly, as wide as the language employed in s. 91 (i) of the present Australian Act. But by ss. 89 and 90 of the former Act special provision was made relating to, first of all, the pay, salary, emoluments and pensions of bankrupts who were or had been officers of the army or navy, or officers or clerks or otherwise employed in the civil service of the Crown, or, who were in the enjoyment of any pension or compensation granted by the Treasury and, secondly, relating to the salary or income, other than as aforesaid, of persons becoming bankrupt. With respect to income of the former character s. 89 provided that " the trustee . . . shall receive for distribution amongst the creditors so much of the bankrupt's pay, half pay, salary, emolument, or pension as the court, upon the application of the trustee, thinks just and reasonable, to be paid in such manner and at such times as the court, with the consent in writing of the chief officer of the department under which the pay, half pay, salary, emolument, pension or compensation is enjoyed, directs ". But with respect to salary and income falling into the second category it was provided, by s. 90, that the court should " upon the application of the trustee . . . from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee . . . to be applied by him in such manner as the court may direct ". In the main the first of these sections dealt with personal earnings which would not vest in the trustee of a bankrupt by force of the general provisions of the Act, whilst the second section was dealing with earnings which, to the extent to which they were not required for the maintenance of the bankrupt and his family, would so vest. Consequently the trustee's right to receive any part of personal earnings falling into the first category depended entirely on s. 89 whereas, it may be said, the trustee's right to earnings which fell into the second category did not entirely depend upon the provisions of s. 90; the latter section was quite capable of being regarded merely as providing a summary method of ascertaining the extent of the trustee's right to some part of a bankrupt's salary or income and as convenient machinery for enforcing

(1) (1935) 53 C.L.R., at p. 65.

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the right when ascertained. With this in mind significant differences are discernible in the language employed in the sections. Appropriately enough s. 89 provided that " the trustee . . . shall receive for distribution amongst the creditors so much " of the bankrupt's personal earnings " as the court . . . thinks just and reasonable " for the section was enacted on the view that all or, at the least, a great part of the personal earnings referred to in the section would not otherwise become available to the trustee for distribution. Consequently an order made pursuant to its terms was to be the trustee's title to receive some part of them. Section 90 pursued a different form. It merely provided that " the court upon the application of the trustee shall from time to time make such order as it thinks just for the payment of " such earnings " or any part thereof, to the trustee ". The presence of such a provision as this was not inconsistent with the notion that the trustee was, otherwise, entitled to such part of a bankrupt's salary or income as was not required for the maintenance of himself and his family. The difficulties in the way of giving practical effect to that notion furnish a ready reason for the provision of special machinery to enable the respective rights of a bankrupt and his trustee to be determined in one proceeding rather than in repeated and interminable proceedings from time to time. The later *Bankruptcy Acts* of 1883 (sub-ss. 53 (1) and (2)) and of 1914 (sub-ss. 51 (1) and (2)) contain provisions similar to those contained in the earlier Act and the distinction in verbiage in relation to the two categories of personal earnings is preserved. But s. 101 of the Act under consideration in this case presents features of a different character. Section 101 deals generally with income of the character therein specified subject to a proviso which makes it inapplicable to any pay, pension, salary or wages which by any Act or State Act is made exempt from attachment or incapable of being assigned or charged. With respect, however, to other personal earnings it expressly provides that " the trustee shall receive for distribution amongst the creditors so much thereof as the court, on the application of the trustee, directs." What has already been said is sufficient to indicate that these words are capable of a meaning which would give to the section an operation beyond that of a mere machinery provision designed to enable the extent of the trustee's right to be determined and enforced in a summary manner. It rather suggests that the title to the trustee's right to receive any part of a bankrupt's personal earnings after bankruptcy will be found in an order made under this section and that such an order will not constitute a mere quantification of the trustee's pre-existing right. The express

statement in the section that the latter shall receive for distribution amongst the creditors so much thereof as the court directs strongly suggests that apart from the making of an order no part of the personal earnings are to be available for this purpose. Further, the language employed is that which for many years has been used in relation to personal earnings which, in the main, were not available to creditors without an order of the court and it has been chosen notwithstanding that language appropriate to a mere machinery provision had for many years been used in juxtaposition. Apart from any other considerations, however, I feel that there is great force in the contention that when the section says that the trustee shall receive so much of a bankrupt's earnings as the court directs it means that he shall receive the amount or amounts specified in an order and no more. The language used seems to me to indicate that it was intended that such an order should constitute the title of the trustee to receive such part of the bankrupt's personal earnings as the court should think ought to be made available for distribution amongst the creditors and that without any such order he should have no title to any part. Perhaps another way of stating the effect of the section is to say, as was said by *Lukin* J. in *In re Howarth*; *Ex parte Official Receiver* (1), that the trustee's right to intervene in relation to after-acquired income of the character specified in s. 101, is restricted by that section to an application pursuant to its provisions. It is perhaps worthy of note that this view, though referred to, was not questioned in the subsequent appeal to this Court: *Nette* v. *Howarth* (2). In my view the language of s. 101, particularly when it is considered in the light of the parallel provisions which have existed in England for so many years, is consistent only with an intention that its special provisions should operate exclusively in relation to the subject matter to which it applies and, accordingly, I am of the opinion that personal earnings of the nature specified do not pass to the trustee in bankruptcy under the general provisions of ss. 60 (1) and 91 (i).

What already appears is sufficient to dispose of the appeal but before parting with the case I should refer to the suggestion made during argument that the right of an employee to repayment of any excess moneys in the hands of the commissioner is not a right capable of assignment or one which will devolve upon his trustee in bankruptcy. But the fact that the payment is one required to be made by the Crown does not, of itself, lead to this conclusion:

(1) (1934) 8 A.B.C. 16.

(2) (1935) 53 C.L.R. 55.

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R. v. *Brown* (1), nor was any such suggestion made; on the contrary reliance was placed on grounds of a rather more special character. Section 221H (2) provides that where the commissioner receives from an employee a tax stamps sheet or a group certificate, or both, in respect of deductions made in any year of income from his salary or wages, and the tax payable by the employee in respect of that year of income has been assessed the commissioner shall, if that sum exceeds that tax, credit so much of that sum as is required in payment of that tax and any other tax payable by the employee, and pay to the employee an amount equal to any excess. It is contended that this provision requires the payment of any excess amount to be made to the employee and to nobody else and this is so, it is said, whether or not the moneys payable represent salary or wages of the employee. It is not suggested that this result is produced by any express provision of the Act but rather that it follows from the personal and confidential nature of the relationship established by the Act between the commissioner and the taxpayer. In particular the secrecy provisions in s. 16 of the Act were referred to and it was suggested that it would be contrary to these provisions for the commissioner or an officer to disclose information to or deal with an assignee, whether voluntary or statutory, in matters touching a taxpayer's affairs. Indeed, it was said that the disclosure to the official receiver that a sum in excess of that required to discharge the tax liability of the bankrupt was held by the appellant may well be a breach of these provisions. But the answer is to be found in an examination of the provisions of s. 16. The prohibition which it is material to consider is to be found in sub-s. (2) which provides, in effect, that an officer shall not either directly or indirectly, except in the performance of any duty as an officer, and either while he is, or after he ceases to be an officer, make a record of, or divulge or communicate to any person any information acquired by him, by reason of his appointment, or employment, or in the course of that employment, respecting the affairs of any other person disclosed or obtained under the provisions of the Act or of any previous law of the Commonwealth relating to income tax. Of course, if the Act provided that the right to receive excess payments should not be assignable it would be improper for an officer to deal with a person who claimed to be an assignee of such a right. But if such a right be assignable it would be the plain duty of an officer to recognise and deal with an assignee and, indeed, in cases where there is a dispute as to the existence of a

(1) (1912) 14 C.L.R. 17.

valid agreement, to notify both parties and, in substance, interplead. I find nothing in these provisions to indicate that s. 221H should be understood as creating a right which is not assignable; the provisions are neutral and throw no light on this point. I should add that so far as I can see there is no other provision of the Act or any consideration of public policy which should lead us to that conclusion. The section creates a right to payment, the right constitutes a chose in action and as such it is assignable. In these circumstances there is nothing in this independent argument to assist the appellant but for the reasons given earlier the order appealed from should be discharged.

Appeal allowed with costs. Order below set aside. In lieu thereof order that the motion be dismissed with costs.

Solicitor for the appellant, *H. E. Renfree*, Crown Solicitor for the Commonwealth of Australia.

Solicitors for the respondent, the official receiver, *Madden, Butler, Elder & Graham.*

R. D. B.