IN THE HIGH COURT OF AUSTRALIA.

TRAUTWEIN

v.

RICHARDSON

REASONS FOR JUDGMENT.

Judgment delivered at MELBOURNE

on 18th DAY of MARCH, 1946.

H. J. Green, Govt. Print., Melb.

TRAUTWEIN v. RICHARDSON

ORDER.

Order of Court of Bankruptcy varied by -

(a) deleting in the declaration as to the Royal Hotel, Riverstone, the words - "that the providing of the money by the bankrupt for the purchase of the said hotel was an alienation made by the bankrupt with intent to defraud creditors" and substituting therefor the following words - "that the purchase by the bankrupt of the said hotel in the name of the appellant T.W. Trautwein constituted an alienation by the bankrupt of the said hotel with intent to defraud creditors which is void against the respondent, the trustee in bankruptcy";

(b) deleting in the declaration as to the Oceanic Hotel, Coogee, the words - "that the gift of the money by the bankrupt for the purchase of the Respondent's interest in the said hotel was an alienation made by the bankrupt with intent to defraud creditors", and substituting therefor the following words - "and this Court doth further declare that the purchase by the bankrupt of the undivided interest in the said hotel in the name of the appellant T.W. Trautwein constituted an alienation by the bankrupt of the said interest with intent to defraud creditors which is void against the respondent, the trustee in bankruptcy";

(c) deleting in the declaration as to -

the Club House Hotel,
the Commercial Hotel,
the Settlers Arms Hotel,
Wongala, and
Ruperra

after the word "purchase" the following words - "of each of the said properties" and adding the following words - "by the bankrupt of each of the said properties or of the estate or interest therein in the name of the appellant T.W. Trautwein";

(d) adding in the declaration that the purchase of the Royal Hotel Walgett was an alienation made by the bankrupt with intent to defraud creditors the following words after the word "hotel", namely "in the name of the appellant T.W. Trautwein";

(e) adding, in the declaration as to the property known as "Raymond" that the purchase of the property was an alienation made by the bankrupt with intent to defraud creditors, after the word "property" the following words - "in the name of the appellant T.W. Trautwein";

(f) deleting in the declaration as to the property known as "Cheverton" the words "that the purchase of the said property in so far as it gave to the respondent a one half interest therein" and substituting therefor the following words - "that the purchase of the said property in the name of Birdie Pitt to the extent of the undivided interest therein which the said Birdie Pitt purported to hold for the appellant T.W. Trautwein";

(g) adding, in the declaration that the purchase of the land on which is erected the Aerodrome Hotel was an alienation made by the bankrupt with intent to defraud creditors, after the word "land" the following words "by the bankrupt in the name of the appellant T.W. Trautwein";

(h) /

(h) adding a declaration that the conveyances and transfers directed by the order are without prejudice to any application on the part of the appellant to the Bankruptcy Court for an order declaring the liens or charges in his favour (if any) to which the properties directed to be conveyed or transferred are subject and what indemnity or indemnities, if any, should be given to the appellant in respect of them.

Appeals otherwise dismissed, with costs.

18.3.46

TRAUTWEIN v. RICHARDSON

REASONS FOR JUDGMENT. LATHAM C.J.

REASONS FOR JUDGMENT. LATHAM C.J.

These are appeals by Theo William Nugent Trautwein against ~~an order~~ of the Court of Bankruptcy (His Honour Judge Clyne) made upon two motions by the trustee of the bankrupt estate of Theodore Charles Trautwein, the father of the appellant.

The trustee claimed that certain property belonged to the bankrupt estate, or that it should be transferred to the trustee, and that the appellant (whom I shall call "the son") should furnish accounts of his dealings with and in respect of other property which had, for some period in the past, been vested in him. The claims of the trustee were based upon three grounds:

(1) That the appellant holds certain property in trust for the bankrupt. Under this claim the trustee alleges that certain transactions created trusts in the son in favour of the bankrupt and that they are good, valid and subsisting trusts, and he asks that they be enforced for the benefit of the bankrupt estate.

(2) Alternatively, that properties now held by the appellant were alienated to him by the bankrupt with intent to defraud the creditors of the bankrupt, and that the alienations are therefore now voidable at the instance of the trustee in bankruptcy - Conveyancing Act 1919-1939, sec. 37A - a provision which, in 1930, replaced 13 Eliz. c. 5. Under this claim the appellant does not seek to enforce any trust alleged to be created in favour of the bankrupt. On the contrary, he seeks to have certain alienations of property set aside so that the property alienated will re-vest in the trustee as representing the bankrupt for the benefit of the estate.

(3) That certain transfers of property by the bankrupt made within five years before the bankruptcy were settlements of property and were accordingly void as against the trustee - Bankruptcy Act 1924-33, sec. 94. Such a settlement is void as against the trustee unless the parties claiming under it

prove /

prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement - sec. 94(1)(ii). No attempt was made by the appellant to give such proof. Under this claim, as under the last-mentioned claim, the trustee does not adopt the transactions of the bankrupt, but repudiates them, and seeks to have them declared void.

The defences to these claims are:-

(1) That the trusts alleged to have been created by the bankrupt in favour of himself are not proved; that each transaction must be considered separately, and that there is no evidence (except in certain particular cases) to show either (a) that the appellant held the properties in trust for the bankrupt; or (b) that if he did not do so, the alienations by the bankrupt to the appellant were made with intent on the part of the bankrupt to defraud his creditors.

(2) That, so far as the respondent trustee relies on a trust in favour of the bankrupt, that trust was, on the respondent's case, a trust made with intent to defraud creditors. It is argued that such a trust is illegal, and therefore cannot be enforced by the trustee as successor to the interest of the bankrupt. The proper remedy in such a case, it is said, is not to enforce the trust, but to set aside a particular alienation made by the bankrupt. If the property alienated is still in the hands of the son, or can be traced into other property which is still in his hands, the setting aside of the alienation in proceedings against the son will vest the property in the trustee. But, it is contended, there is no other remedy against the son in such a case.

(3) That the transfers of property by the bankrupt to the appellant were transfers by a father to a son, and must be presumed to be advancements to the son. The evidence, it is contended, does not displace this presumption. Such transfers, if made more than five years before the bankruptcy (so as to

escape /

escape the operation of sec. 94 of the Bankruptcy Act) therefore must stand and cannot be set aside.

(4) That from the year 1917 the bankrupt from time to time created trusts of property, evidenced in several cases by contemporaneous documents, in favour of his then infant son; that the father dealt with the properties as his own, and so became liable to account for the proceeds to the son; that after the son came of age (on 19th August 1933) the father recognised his liability and transferred properties to him in satisfaction for the breaches of trust. If these transfers had been made within six months of the bankruptcy, they would have been preferences of the son as a creditor, and might therefore have been void as against the trustee under the Bankruptcy Act, sec. 95. But they were all made at earlier dates, and therefore, it is said, remain valid: Glegg v. Bromley, 1923 3 K.B., 474.

(5) As to transactions within five years of the bankruptcy, the appellant relies upon judicial interpretations of the Bankruptcy Act, sec. 94. Sec. 94(5) provides that "settlement" for the purposes of the section includes any conveyance or transfer of property, but it is established that the section applies only to transfers of property intended (presumably by the "settlor") to be retained by the "donee": In re Player, 15 Q.B.D., 682: In re Vansittart, 1893 1 Q.B., 181: Williams v. Lloyd, 50 C.L.R., 341. The challenged transfers, it is contended, were not "settlements" within the meaning of the section.

(6) Other questions which arise upon the appeal relate to the form of relief that should be granted if the trustee's case in respect of any property is accepted. In particular, the order made by the Court of Bankruptcy includes declarations with respect to properties which have passed out of the hands of the son. It is the case of the trustee that the son was a dummy for his father, so that in dealing with these properties he obeyed the directions of his father. As the dispositions of the property were therefore

made /

made with the consent of the father, there can be no outstanding liability to the father upon any trust in favour of the father. If this be the case there is no liability of the son upon those trusts and no order should have been made in respect of them.

(7) Further, transfers of property impeached under 13 Eliz. c. 5 (or the Conveyancing Act sec. 37A) or the Bankruptcy Act, sec. 94, are voidable only and not void, and are therefore valid until set aside. The learned Judge accepted this view of the law when he said:-

> "Where an alienation is avoided it is not avoided ab initio, but from the time when the creditors claim to treat it as such; and consequently where property has been conveyed under an alienation which is voidable the creditors are not entitled to the rents and profits prior to avoidance.
>
> Where the property comprised in a fraudulent alienation has been converted the creditors may follow it.
>
> See Halsbury's Laws of England 2nd Ed. Vol. 15 p. 260."

It is contended for the son that the declarations as to property no longer held by the son are useless. They cannot provide a foundation for any order against the son in respect of the property alienated and obviously they cannot affect in any way the rights of the persons to whom the property has passed from the son. Those persons are complete strangers to these proceedings.

The conclusions of the learned trial Judge are based upon a review of the bankrupt's business affairs from the year 1917 to the year 1940. The order of sequestration was made on 23rd September 1940 and the bankruptcy commenced on 30th August 1940, the act of bankruptcy consisting in failure to comply with a

bankruptcy /

bankruptcy notice: Bankruptcy Act, sec. 90. The only substantial debts of the bankrupt were debts in respect of Federal and State income tax, in all £212,639, a sum which includes penalties. At the time of sequestration the assets of the bankrupt consisted of a farm which realised £10,371, subject to a mortgage of £7,976, and some other assets which realised less than £4000. The net realisation of assets was about £8000, with some apparently negligible outstanding items. The amount of the liability of the bankrupt for income tax shows that prior to his bankruptcy he must have been a very wealthy man.

At the time of the sequestration members of the bankrupt's family held assets of large value which had been acquired since 1928, when the income tax authorities began to make searching enquiries into the bankrupt's affairs. Upon this appeal we are mainly concerned with properties acquired by the son since that date. Real property and funds belonging to the father, and real property and funds apparently belonging to other members of the family have been traced into these assets. No evidence has been given which suggests any other source than the father as an explanation of the acquisition by the son of properties worth many thousands of pounds.

The bankrupt is now about 77 years of age. In his business dealings he frequently used the names of his wife, Kathleen Gertrude Elizabeth Trautwein, his daughter K.W. Trautwein (afterwards Mrs. Frauenfelder), his son Theodore William Nugent Trautwein (the appellant), his mother Annie Mozall, his brother W.H. Trautwein, his married sisters Augusta Chapman and Hilda O'Grady, and/his brother-in-law Francis O'Grady. The bankrupt also used the names of a considerable number of other persons. The son, the brother, Mr. and Mrs. O'Grady and Mrs. Chapman gave evidence in the proceedings. The other persons named were not called as witnesses.

For many years prior to his bankruptcy the bankrupt engaged in dealing in real estate, particularly in hotel properties and hotel licences. He also made large investments in shares in

racing /

racing clubs. The practice of professing to be acting on behalf of other persons may well have strengthened the bargaining position of the bankrupt in his land and share transactions. He was a wealthy man, and there is no evidence that, apart from his liabilities for State and Federal income tax, he was ever in any circumstances of financial embarrassment. Many of his dealings were conducted for cash, or by transferring bonds, but the careful analysis of his transactions which has been made on behalf of the trustee has made it possible to trace the source of the consideration for which various properties, the ownership of which is now in question, were obtained.

The evidence shows that the bankrupt dealt with property as his own quite irrespective of the fact that the title to the property might stand in the name of one or other of his relatives. He was the business head of the family and the members of the family simply acted in accordance with his directions. They executed documents as he desired, sometimes without any knowledge whatever of the nature of the transactions which the documents carried out. Names were used apparently at random, but doubtless for some reason of convenience at the time. Contracts of purchase and sale were prepared in the name of one member of the family, and, upon execution, were altered so that another relative became the contracting party. On occasions one person signed the name of another with no formal authority. The fact that property stands in the name of the son can be regarded only as the very minimum of evidence that the father intended him to hold it beneficially.

In general, the learned Judge has taken the view that if the bankrupt provided any money or property which was used for the purchase of any other property in the name of the son, then prima facie the son held his interest in that property on trust for the bankrupt.

In 1928 the income tax authorities began to make enquiries into the returns furnished by the bankrupt since 1921. As a result of these enquiries, past assessments were amended and, as the enquiries proceeded, it became quite obvious that very heavy

demands /

demands would be made upon the bankrupt for income tax. The evidence shows that, beginning with demands in May 1929 for over £25,000 for State income tax, and in 1930 for £108,000 for Federal income tax, the demands ultimately made in respect of State and Federal taxes and penalties amounted to £477,000. Large payments were made on account. In September 1937 the Federal Commissioner of Taxation recovered judgment against the bankrupt in respect of the years 1921-1927 for the amount of £101,996. There were further liabilities in respect of subsequent years. As already stated, at the date of sequestration the amount which he owed for income tax was £212,639. Counsel referred to the reports of the proceedings in this court with respect to the bankrupt's income tax - 56 C.L.R., pp. 63, 196 and 211. These reports show that the Commissioner of Taxation established against the bankrupt the proposition that he carried on a business of betting and a business of dealing in properties, so that receipts from these sources were income and not capital.

The bankrupt had no reason for attempting to defraud creditors before 1928 because apparently he had practically no creditors before that date. He was certainly in no financial difficulty during the period before 1928. It is probable (as already suggested) that he put his property in the names of other prople in order to facilitate dealings by appearing to act on behalf of others, who "would have to be consulted", and not of himself. He may also have intended to save income tax by representing that income derived from what in fact was his own property was the income of the other persons in whose names the property was held. Transactions which are designed to evade assessment to income tax may be offences against income tax law and may be void as against the Commissioner for Income Tax, but it is expressly provided that the provisions in the Income Tax Assessment Act do not avoid them as against other persons: Income Tax Assessment Act (Commonwealth) 1922-1934, secs. 66 to 72, sec. 93. In Payne v. McDonald (supra) the relation of 13 Eliz. c. 5 and of income tax laws to the subject of illegality is expounded. . An intent to avoid assessment

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to income tax is not an intent to defraud creditors, and in my opinion no reason except a general suspicion based upon subsequent events can be adduced to support a finding that before about 1928 the bankrupt had any intention to defraud any creditors. The position, however, was very different after 1928, when assessments were made to large amounts of tax.

The respondent trustee first contends that certain properties owned by the son are held by him in trust for the bankrupt and that he (the respondent) can enforce these trusts as successor to the interest of the bankrupt. These properties were, it is contended, purchased/or obtained by means of money, by exchange with property, which really belonged to, or was held on behalf of the bankrupt. The father provided, it is contended, either directly or indirectly, the value which was given for properties now apparently owned by the son. There is, it is conceded, a prima facie presumption of advancement in such a case because of the father-son relation, but that presumption is rebutted by evidence. The evidence, it is argued, shows that the properties were put in the name of the son, not to confer any benefit upon him, but to be held for the father, subject entirely to his directions, and with the object of putting them out of reach of the father's creditors. The evidence/provides, it is contended, the necessary rebuttal of the presumption of advancement. In the case of the Riverstone Hotel, for instance, if the evidence shows that it was intended by the father, with the knowledge of the son, that the son should hold his interest in the hotel for the father, then the respondent is entitled to enforce the trust for the benefit of the creditors whom he represents - the beneficial interest in the property being part of the bankrupt's estate. The trustee would be entitled to an order for the transfer to him of the son's interest, proper terms being imposed to protect the son against any outstanding liabilities in respect of the property.

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But it is contended for the son that though (1) a trust under which the son simply holds property for the bankrupt may be enforced against the son by the trustee, yet (2) if the evidence shows that the trust was created with intent to defraud creditors, the trust is illegal and cannot be enforced. The son relies upon the maxim In pari delicto potior est conditio defendentis.

It would be a strange result that proof of intent to defraud creditors should require the court in effect to promote and secure the defrauding of creditors by preventing the recovery by the trustee in bankruptcy of property alienated with such intent. It is true that a person who puts his property in the name of another person for an illegal purpose cannot recover the property from him if the illegal purpose has been carried out, even partially: see cases cited in Laws of England, 2nd Edn., Vol. 33, p. 153. But if the purpose has not been carried out, the transferee still simply holding the property for the alleged purpose, the transferor or his trustee in bankruptcy can recover the property notwithstanding that the transfer was made for some illegal purpose - Taylor v. Bowers, 1 Q.B.D., 291: Payne v. McDonald, 6 C.L.R., 208: Perpetual Trustees etc. Assn. v. Wright, 23 C.L.R., 185: Donaldson v. Freeson, 51 C.L.R., 598. The trustee, in seeking to recover the property for the benefit of creditors, is not setting up a fraud to make a title but is repudiating a fraud. In my opinion there is no doubt as to the right of a trustee in bankruptcy to recover from a trustee for the bankrupt property transferred to that trustee with intent to defraud creditors.

In the alternative, the respondent contends that certain transactions between the bankrupt and the son constituted alienations by the bankrupt with intent to defraud his creditors, and that, the son being a volunteer, these transactions should be declared to be void under the Conveyancing Act, sec. 37A. As to this contention, the son ------- urges that sec. 37A deals only with dispositions made by the bankrupt and that, for example, a transfer

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of land to the son by a third party at the instance of the father and paid for by the father would not fall within the statute. If such a transfer were declared void, it is argued, the result would be to revest the land in the vendor and not in the father. But the courts have not taken this view of 13 Eliz. c. 5, the substance of which is reproduced in sec. 37A of the Conveyancing Act. The courts have treated the provisions of 13 Eliz. c. 5 as producing the result that property bought with the debtor's money and procured by him to be vested in a volunteer with the intent of defrauding his creditors can be treated as if it belonged to the debtor: see the cases cited in Laws of England, 2nd Edn., Vol. 15, p. 246: In re Mouat, 1899 1 Ch., 831. Thus there is authority to support the declarations made in the order under appeal that purchases of property arranged by the bankrupt in the name of his son were alienations of property by the bankrupt.

The evidence is very voluminous, and it has been carefully analysed by the learned Judge in Bankruptcy. There is little actual conflict of evidence. Most of the evidence is documentary. The son was regarded as an unsatisfactory witness and the learned Judge did not accept his evidence on certain matters as to which he was the principal witness - particularly the alleged appropriation by the father of properties in compensation for breaches of trust by the father. There is, in my opinion, no reason for varying any of the findings of fact of the Bankruptcy Court as to the actual transactions of the parties concerned. But it is contended for the son that the facts found do not support the inferences drawn as to trust for the father and as to intent to defraud creditors.

In my opinion, these inferences are satisfactorily supported by the facts proved in relation to the period from 1928 onwards. The bankrupt was then threatened with very heavy liabilities for tax: he deprived himself of valuable assets which he owned or controlled: he brought about the result that his son, without providing the purchase money to any substantial extent, became the apparent owner of valuable assets: the son acted in relation to them according to his father's directions. The only alternative explanations suggested were (1) advancement, (2) appropriation to meet /

meet breaches of trust by the father. These explanations were rejected by the learned Judge, and, in my opinion, rightly. The facts which I have just summarised are more consistent with the inferences drawn by the learned Judge than they are with the opinion that the father was making bona fide straight out gifts to his son, and that he was not influenced by his own mounting liabilities. As to appropriation to meet breaches of trust - the corroboration of the unsatisfactory story of the son was very shadowy. I will return to this matter later.

I propose now to consider each class of declaration or order made by the order under appeal.

1. The order appealed from declares that the following properties were held by the son at the commencement of the bankruptcy upon trust for the bankrupt and directs that they be transferred by the son to the trustee in bankruptcy:-

(a) the Royal Hotel, Riverstone,
(b) the respondent's interest in the Oceanic Hotel, Coogee,
(c) 25,700 shares in Coogee Bay Hotel Pty. Ltd.,
(d) 500 shares in Tattersall's Hotel (Penrith) Pty. Ltd.,
(e) 21,709 shares in Gosford Racing Club Ltd.,
(f) 697 shares in Menangle Park Racing Club,
(g) 462 shares in Richmond Jockey Club Ltd.,
(h) 100 shares in Hotel Riverstone Pty. Ltd.,
(i) £1000 Bond No. 5035 issued 4% 1947, converted into Bond No. 8698.

Royal Hotel, Riverstone. This hotel was purchased on 15th September 1936 for £19,800 under a contract made between William Jospeh East as vendor and the son as purchaser. The bankrupt negotiated the purchase. The hotel was transferred to the son. £10,000 was paid to East and the son gave him a mortgage for the balance of purchase money - £9,800.

The bankrupt never owned the hotel: he did not alienate it or transfer it. Thus the trustee cannot obtain the hotel under either the Conveyancing Act, sec. 37A, or the Bankruptcy Act, sec. 94. It has been held that the son held the hotel in trust for the bankrupt.

This conclusion is based upon evidence relating to the means whereby the £10,000 paid to East was provided, supported by the fact that in 1939 the bankrupt paid £4,500 off the mortgage to East.

The £10,000 was shown to be part of a sum of

£22,000 /

£22,000 received upon the sale of the Royal Hotel, Walgett. The balance of £12,000 went to the bankrupt.

The Walgett Hotel was purchased in the name of the son for £19,000 on 6th February 1936. The bankrupt negotiated the purchase. The consideration of £19,000 consisted of three elements - (a) Lochgarrie Flats, taken as being of a value of £8,000, (b) cash £4000 and a bank cheque for £4000, (c) Wongala Cottage, taken as being of a value of £3000.

Lochgarrie Flats was bought by the bankrupt's daughter on 15th March 1935 for £8000. The contract was prepared in the name of the bankrupt as purchaser, but was altered so that the daughter appeared as the purchaser. The £8000 was paid by transferring Wilga Flats, taken at £3500, and a bank cheque for £4500. The contract for the purchase of Wilga Flats was prepared in the name of the bankrupt, but was altered so that the daughter appeared as the purchaser. The bankrupt signed her name to an addendum to the contract. Wilga Flats was subject to a mortgage when bought. The consideration given for Wilga Flats was the transfer of land at Parramatta Road, Drummoyne - valued at £3650. This land was in the name of the daughter. The purchase of it was arranged by the bankrupt. There is no evidence that the daughter provided any money to buy the land.

The bank cheque for £4500 was obtained in exchange for a cheque drawn by the Coogee Bay Hotel Ltd. in favour of the daughter, a cheque for £421:10:6 drawn by the bankrupt, and a cheque issued in return for cash. The bankrupt, not the daughter, made the request for the issue of the bank cheque for £4500 in the name of the vendor of Lochgarrie Flats.

Thus Lochgarrie Flats - element (a) in the consideration for the purchase of the Walgett Hotel - is shown to have been purchased by a transaction in which the daughter can be regarded only as a last-moment dummy for the bankrupt. It is not proved that the daughter out of her own resources provided any consideration.

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The second element, (b), in the consideration for the purchase of the Walgett Hotel was cash £4000 and a bank cheque for £4000, the bank cheque being issued in return for cash deposited in the account of the son. The source of this £8000 in cash is not proved. The son gave evidence, but did not satisfy the Judge that he provided any of the money. It is, I think, a reasonable inference that the only probable source of the money was the bankrupt.

As to the third element, (c) Wongala Cottage, in the consideration for the Walgett Hotel, the evidence shows that this property was obtained by the son in part payment for Raymond Flats. The contract of purchase was prepared in the name of the daughter, but was altered so that the son appeared as the purchaser.

Raymond Flats was bought in the name of the son on 16th March 1934 for £7600. The son did not even purport to find any of the purchase money. £7600 was provided as follows:-

(1) £3,100 cash from the bankrupt:

(2) Maroubra Bay Road property (£1000) apparently owned by Francis O'Grady but admitted by him to have been held on behalf of the bankrupt;

(3) Paine Street Randwick Property (£2000) apparently owned by Hilda O'Grady but purchased with money provided by the bankrupt, who also paid off mortgages on the property;

(4) Aston Gardens - land at Woollahra apparently owned by the daughter, who purchased it from the bankrupt's mother, Annie Mozall, on 2nd January 1934.

Though Annie Mozall was the vendor to the daughter, it is not without significance that the contract under which she acquired this property was in the name of the bankrupt as purchaser, though it is in fact signed by Annie Mozall and the transfer was made to her.

Thus an analysis of the purchase of the Walgett Hotel shows that the bankrupt in large measure, if not entirely, by indirect means, provided the consideration for the purchase.

It may be added that when Raymond Flats, apparently belonging to the son, was sold, he received Wongala Cottage (valued at £2000) but his mother received £5781 of the sale price.

The Riverstone Hotel purchase is a fair sample of the bankrupt's dealings. There was apparently a complete indifference to the apparent ownership of properties as between the bankrupt, his son, mother, sister and daughter. No accounts were kept of any credits or debits resulting to any of these participants in the various dealings. The properties were treated as if they all belonged to the same person - and that person, by reasonable inference, was the bankrupt. Large sums of cash were used, and this suggests a desire for concealment. There is no evidence that the son, so far as he provided assets for the purchase of the Riverstone Hotel, held those assets on his own account independently of his father. In my opinion it is a fair conclusion that he held his interest in the Riverstone Hotel in trust for his father.

The order of the Court of Bankruptcy contains two declarations and an order with respect to the Riverstone Hotel. First, there is a declaration that the hotel belongs to the applicant (the trustee in bankruptcy) on the ground that the son was at the commencement of the bankruptcy a trustee of the same for the bankrupt. This declaration should be affirmed. Secondly, there is a declaration that the providing of the money by the bankrupt for the purchase of the hotel was an alienation made by the bankrupt with intent to defraud creditors. I agree that the evidence supports the findings embodied in this declaration but, in view of the declaration that the hotel belongs to the trustee in bankruptcy, I do not see that any useful purpose is served by including a declaration with reference to the providing of the money by the bankrupt. The fact that the bankrupt provided this money is part of the evidence upon which the finding of trust for the bankrupt is based. It appears to me that no remedy in respect of the money can be given against the son and that the declaration that the hotel belongs to the trustee in bankruptcy fully meets the case. I would omit the declaration with respect to the providing of money by the bankrupt. With these declarations there is associated a declaration that inasmuch as property in the name of the daughter (namely Lochgarrie) was utilised in "the acquisition by the respondent on behalf of the bankrupt of the Royal Hotel, Walgett, the proceeds of the sale of which were paid to the vendor of the said hotel at Riverstone" and

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inasmuch as the daughter is not a party to the proceedings, the declarations already made are made subject to such charge, if any, as the daughter may have over the Riverstone Hotel. In my opinion this provision was rightly included in the order. Thirdly, the court orders that the son transfer the Riverstone Hotel to the trustee in bankruptcy. Upon the basis that the son held the hotel in trust for the bankrupt this is a proper order.

Oceanic Hotel. The order declares that the son's interest in the Oceanic Hotel, Coogee, belonged to the trustee in bankruptcy on the ground that the son was at the commencement of the bankruptcy a trustee of the same for the bankrupt.

This hotel, with furniture and effects, was purchased on 14th June 1939 in the names of the son and daughter as tenants in common from the City Mutual Life Assurance Society Ltd., selling as mortgagee. The father never owned the hotel and did not alienate or transfer it. Accordingly the provisions of the Conveyancing Act, sec. 37A, and Bankruptcy Act, sec. 94, are of no avail to the trustee in relation to the hotel itself or to the respondent's interest in the hotel.

The purchase price was £70,000. £20,000 was paid on account, leaving £50,000 outstanding under the contract of sale. The contract was arranged between the vendor and the father, who at a late stage in the negotiations introduced the daughter as a co-purchaser with his son. The contract of sale provided that a mortgage should be given for the outstanding balance, but this was not done. The son and daughter are therefore subject to a contractual liability to the City Mutual Life Assurance Company Ltd. of £50,000.

The amount of £20,000 came almost entirely from the proceeds of sale of the Aerodrome Hotel, Richmond. The Aerodrome Hotel stood in the name of the son. The land upon which it was built was paid for by the father and the learned Judge found that the licence which was transferred with the hotel was also paid for by the father. The Aerodrome Hotel was erected by Alex Maston Pty. Ltd. for a sum of £9,715. The building contract was made between this company and the son. The son admitted that the father paid the builder, but said that he paid him on his (the son's) behalf. The

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learned Judge found that the father paid the builder. This transaction took place in 1939, when the bankrupt was heavily indebted. In my opinion the learned Judge was entitled to draw the inference that the son held his interest in the Oceanic Hotel in trust for the bankrupt. Accordingly the order, in so far as it so declares, should be affirmed.

No provision, however, has been made for the protection of the son and the daughter against the outstanding liability of £50,000 under the contract of purchase of this hotel. In the present case we are dealing only with the interest of the son in the hotel. Upon the basis that the son is a trustee of his interest for his father, he is entitled to be indemnified by his father against liabilities incurred in carrying out the trust, and he is entitled to a lien on the trust property in respect of payments properly made in a performing the trust. The order should include, in my opinion, a term providing for the inclusion in any transfer by the son of provisions protecting his lien on the hotel in respect of any purchase money which may be paid by him, and also preserving the liability of the bankrupt to indemnify the son - a liability in respect of which the son may lodge a proof of debt.

There is a further declaration that the gift of the money by the bankrupt for the purchase of the respondent's interest in the hotel was an alienation made by the bankrupt with intent to defraud creditors. I would omit this declaration because it cannot be the foundation of any remedy in the present proceedings. In so far as money of the father went into the Oceanic Hotel the creditors will get the full benefit of it under the declaration that the son is a trustee of the hotel for the bankrupt.

25,700 shares Coogee Bay Hotel Pty. Ltd. As to these shares it has been declared that the respondent holds them on trust for the bankrupt, and a transfer of the shares is ordered.

The respondent's case with respect to these shares was that they were transferred to him in settlement of claims which he had against the father for breaches of trust. This defence depends upon the son establishing that from 1917 onwards his father from time to time transferred various properties to trustees for him, or himself declared that he held properties in trust for him.

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The trusts were to convey to him upon his attaining 21 years of age, or to deal with the property as the bankrupt and he should direct. This defence depends in the first place upon the establishment of the trusts alleged. His Honour found that a trust was established in 1917 when the son was only five years old. with respect to a property at Muswellbrook, and in 1922 with respect to a property at Rooty Hill. But His Honour was not prepared to find that trusts existed in respect of other property, namely land at Penshurst (1925), Maroubra Bay (1925), near Bellmore Hotel (1929), College Green Hotel (1929) and Orielton (1931). In most cases there are contemporary documents recording the trusts. All the properties, however, were disposed of by the bankrupt or in accordance with his directions. The proceeds of sale of these properties amounted to about £27,000. The son claimed that in 1935 his father recognised and admitted his liability to account for these proceeds and transferred to him various properties in satisfaction of his liability.

The son gave evidence that the father told him that he had seen Mr. A.C. Gain, barrister, on this matter in 1935. The fact that the bankrupt was consulting Mr. Gain in relation to his affairs is established by other evidence, e.g. that of Mr. Baldwin, the bankrupt's solicitor. The son said, and he was supported to some extent by Mr. Baldwin, that the father said that he had consulted Mr. Gain about his breaches of trust, and that Mr. Gain had advised him that he could make compensation for such breaches by transferring properties to the son and that the transfers would be effective if the father did not become bankrupt within five years of the transfer. (The Bankruptcy Act, sec. 94, applies only to transfers made within five years before sequestration, and sec. 95 relates only to preferences given to creditors within six months before sequestration.) According to the respondent the father said that he proposed to transfer properties in satisfaction of the breaches of trust.

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Among the properties said to have been so transferred were the Coogee Bay Hotel shares now under consideration (1933 to 1935), Raymond Flats (1934) and Gosford shares (April 1935).

The learned Judge completely disbelieved the story that any of these properties had been appropriated to meet breaches of trust in pursuance of advice received from Mr. Gain. Mr. Gain was not alive at the date of the proceedings in the Bankruptcy Court. It was said that Smith and Johnston, Accountants, had made an investigation of the alleged breaches of trust and had reached an estimate of the amount for which the bankrupt was liable, but no-one was called from that firm to support the statement. When the affairs of the bankrupt were under close examination before the Board of Review and the High Court in the taxation proceedings, no contention was made that these transfers were to be explained by appropriations to meet breaches of trust. When the notice of opposition in the present proceedings was filed the only trust alleged was a trust of land at Muswellbrook, and no mention was made of the other trusts now alleged.

In my opinion the learned Judge was fully justified in rejecting the evidence with respect to all alleged appropriations to meet breaches of trust.

This conclusion, however, does not prevent the son from lodging a proof of debt in respect of the alleged breaches and seeking to establish that his father disposed of property held in trust for him (the son) in breach of trust and has not accounted for the proceeds.

As far as the 25,700 Coogee Bay shares are concerned, the only reply to the claim of the trustee in respect of them was that they were either a gift outright to the son, or were assigned to him in satisfaction of breaches of trust. When the evidence given in circumstantial detail with respect to the latter contention was rejected, it would be too much to expect that it could be found in favour of the respondent that the shares were given outright.

The evidence showed that the bankrupt completely controlled the Coogee Bay Company; most if not all of the shareholders were his dummies; they dealt with their shares and such dividends as were declared in accordance with his directions; he obtained large loans without interest, using the credit of the company; cheques drawn were used in other personal transactions by the bankrupt and by members of his family, as, for example, in the acquisition of Lochgarrie Flats. The 25,700 shares were transferred to the son by the nominees of the bankrupt, not by the bankrupt himself. The order that the son held these shares in trust for the bankrupt should be affirmed.

In view of this order I am of opinion that the further declarations that the transfers of these shares to the respondent constituted alienations made by the bankrupt with intent to defraud creditors and that they are void are not necessary or useful and I would omit these declarations from the order.

500 shares in Tattersall's Hotel (Penrith) Pty. Ltd. The order with reference to these shares was not challenged.

21,709 shares in Gosford Racing Club. 697 shares in Menangle Park Racing Club. 462 shares in Richmond Jockey Club Ltd. The evidence with respect to these shares is substantially the same. It is to the effect that in 1934 and 1935 these shares were given by the bankrupt to the son. Admittedly he gave no consideration for them. The dividends on the shares were not infrequently paid into the bankrupt's bank account, and the evidence supports the conclusion that the son was merely the nominee of the bankrupt and that he held the shares in trust for him. In the case of these shares I would omit, for reasons already stated, the declaration that the purchase of the shares was an alienation with intent to defraud creditors and is void as against the trustee.

100 shares in Hotel Riverstone Pty. Ltd. The son said that he paid for these shares with £100 of his own money in order to qualify as governing director and so obtain complete control of the company under newly framed articles of association. The learned Judge regarded this transaction as merely part of the procedure adopted for placing the son in apparent but not real control of the Hotel Riverstone, and I can see no reason to dissent from this finding. I understood counsel for the trustee to say that there was no objection on his part to an addition to the order providing that upon the transfer of the shares the trustee shall repay to the respondent the purchase price of £100 and expenses incurred by him in the formation of the company.

£1000 bond. The order as to this bond is not challenged.

(2) I have dealt with the first part of the order made by the Court of Bankruptcy, which relates to properties still held in the name of the son. There are other properties which in the past have stood in the name of the son, but which have been disposed of by him. As to the following properties, it was declared that the provision of money to purchase them, or the transfers of them, constituted alienations made by the bankrupt with intent to defraud creditors:-

(a) purchase of the Royal Hotel, Walgett,
(b) purchase of Raymond Flats,
(c) purchase of Cheverton,
(d) purchase of land on which is erected the Aerodrome Hotel.

In my opinion these declarations should be omitted, for the reason that they can lead to no effective order. The acquisition of property as, for example, of the land on which the Aerodrome Hotel was erected, by the bankrupt was not an alienation of property by the bankrupt. Therefore the declarations must be regarded as dealing with money or other property which was used for the purchase of the various properties mentioned. The declarations are made upon the basis that such moneys or property belonged to the bankrupt. The properties purchased (directly or indirectly) with the moneys or other property have been declared to be held in trust for the bankrupt and it has been declared that

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the trustee is entitled to a transfer of them. Accordingly, it appears to me that no useful purpose is served by including in the order the declarations as to these properties. It should be added that an order made now setting aside an alienation made in the past would not make the son liable to account for rents and profits received during the past period when he was in possession - cases cited in Laws of England, 2nd Edn., Vol. 15, p. 260.

(3) As to the following properties, it was declared that while they stood in the name of the son they belonged beneficially to the bankrupt:-

(a) the Club House Hotel, Peak Hill,
(b) the Commercial Hotel, Old Angledool,
(c) the Settlers Arms Hotel, St. Albans,
(d) the property known as Wongala,
(e) the property known as Ruperra,
(f) the Royal Hotel, Walgett,
(g) Raymond Flats,
(h) half interest in Cheverton,
(i) land on which Aerodrome Hotel is erected.

All these properties have been sold and, according to the case made for the trustee, the son, in so far as he had anything to do with the disposition of the properties, acted in accordance with the directions of the bankrupt. The bankrupt accordingly can have no claim against the son in respect of any of these properties, the son having fully accounted for them if they were held on trust for the bankrupt. The trustee can be in no better position than the bankrupt in respect of these properties. The bankrupt estate will receive the benefit of the value of them, because, as has already been shown, the proceeds of these properties, so far as they have been traced into properties still held by the son, will come to the trustee as part of the bankrupt estate.

A sum of £3000 lent by the son on mortgage to Frank Howell is declared to have been the bankrupt's money and to have been lent by the son as trustee for the bankrupt. This sum was lent by the son in his own name to Howell in August 1934. The money was repaid in February 1936, and there is no evidence that it was dealt with otherwise than in accordance with the directions of the bankrupt. In my opinion the declaration with respect to Howell's mortgage should be omitted from the order.

(4) In the case of the Royal Hotel, Riverstone, the Walgett Hotel, and Raymond Flats, a provision is included protecting any interest which the bankrupt's daughter Kathleen Waverley Frauenfelder may have in those properties, as she was not a party to the proceedings. So far as the Royal Hotel, Riverstone, is concerned, this appears to me to be a proper and necessary provision. But the Walgett Hotel and Raymond Flats

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now belong to strangers not parties to the proceedings, and no order in these proceedings can in any way affect those properties or give to the daughter or preserve for the daughter any rights in those properties. I would omit the declarations with respect to the interests of the daughter in the case of the Walgett Hotel and Raymond Flats.

(5) As to the house at Dover Heights, which became the home of the respondent after his marriage in 1937, it was declared that this property belonged to the trustee on the ground that its purchase constituted a settlement within the meaning of the Bankruptcy Act, sec. 94, and was void against the trustee. The house was bought in May 1938 from Messrs. Robertshaw and Naylor for £2,150. The son gave evidence that he provided the purchase price from his own moneys. He said that from about 1931 he had been betting successfully and had accumulated an amount of about £3000 which he kept in notes in his father's safe. He said that he gave £2140 in notes to his father to enable him to obtain a bank cheque to pay for the property, that his father duly obtained the cheque, and that it was used for this purpose. It was shown, however, that during about a year prior to the purchase he had an overdraft varying from £2000 to £4000, and the learned Judge naturally thought that it was improbable that he would keep some £3000 in notes in a safe instead of using it to save interest on the overdraft.

Further, it appeared that the cheque for £2140 which was actually used to pay for the property was a cheque which had been obtained by the father from the Bank of New South Wales in pursuance of a request made by him to split a cheque representing part of a sum of £45,000 borrowed by the Coogee Bay Hotel Company from the City Mutual Life Assurance Society and lent without interest by the Hotel Company to the bankrupt. This money was paid by means of six cheques, and in return for one of those cheques the cheque for £2140 in favour of the son was issued by the bank. His Honour accordingly rejected the son's evidence and held that the father

provided /

provided the £2140 to enable the son to purchase the property at Dover Heights. His Honour accepted the evidence of the respondent that the object of the transaction was to provide him with a home and found that the bankrupt intended to make a gift of the property to the respondent. Accordingly it was not held that this transaction was a transaction with intent to defeat creditors, or that the son holds the property in trust for the father. It has been found that the transaction was a gift by the father to the son. There is no reason for taking any other view of the evidence.

The transaction took place within five years of the order of sequestration and the Bankruptcy Act, sec. 94, was applied. His Honour held that the transaction was a gift of the house by the father to the son, that the purchase of the house constituted a settlement of the house within the meaning of sec. 94, and that it was void against the trustee in bankruptcy. An order was made that the son transfer the property to the trustee.

Under the English Bankruptcy Act 1883, sec. 47, which corresponds to sec. 94 of the Commonwealth Bankruptcy Act, it has been held that "If there is a gift by a father to a son of money or proceeds of property which can be traced and the money or proceeds is or are intended to be retained or preserved as the property of the donee, that money or those proceeds will be property in 'settlement'": In re Plummer, 1900 2 Q.B. 790, at p.804. It is true that the father never owned the house which is now the son's home and there is some difficulty in understanding how anyone can give away property which he never had: see Union Trustee Co. of Australia v. Webb, 19 C.L.R., 669, at p. 676: Perpetual Trustee Co. Ltd. v. Commissioner of Stamp Duties (Sargood's Case), 1938 S.R. (N.S.W.), 160. But in the case of the bankruptcy provision under consideration the courts have interpreted it in the manner stated and therefore the learned judge was justified in holding that the transaction with respect to the house at Dover Heights was a settlement of the house upon the son within the meaning of sec. 94, and it was rightly ordered that the son should transfer the house to the trustee. There is evidence,

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however, that the son has improved the house by expenditure of money and, in my opinion, the order should be made subject to a provision for an enquiry into that expenditure and to the payment by the trustee of the value of the improvements as at the time of sequestration. The claim for payment of the then value of the improvements is not a claim which could ever have been made against the father and is therefore not a claim in respect of which the son should be limited to a proof of debt in the insolvent estate. It is for this reason that in my opinion the order should be made subject to the provision which I have stated.

In reaching the conclusions which I have stated, I have not taken into account any evidence to which objection was taken on behalf of the appellant.

In my opinion the appeal should be dismissed, but the order should be varied in certain particulars in the manner which I have above stated.

TRAUTWEIN

v.

RICHARDSON

JUDGMENT STARKE J.

Appeal from a judgment of the Federal Court of Bankruptcy, New South Wales District, dated 19th December 1944 declaring in substance that certain property both real and personal belonged to the estate of T.C. Trautwein, a bankrupt, and directing assurances by the appellant for the purpose of vesting the same in the respondent the trustee in bankruptcy of T.C. Trautwein's estate and also declaring that certain other property both real and personal which formerly had stood in the name of the appellant belonged beneficially to the bankrupt while the same stood in the name of the bankrupt.

On the 23rd September 1940, the estate of T.C.Trautwein was sequestrated in bankruptcy and the respondent is the trustee of his estate. The bankrupt engaged in many dealings in real property including hotel property and in shares in companies and in bonds.

He appears to have been a successful speculator but apparently was unable or unwilling to meet his income taxes.

At the time of his bankruptcy there appears to have been owing by him an accumulated sum of more than £200,000 for the years 1921-1940 in respect of Federal and State Income Taxes, including penalties.

The net realisation of his estate is in the neighbourhood of £10,000 but there are some other assets which have not been realised and are apparently unrealisable.

The facts of the case have been exhaustively examined and stated by the learned Judge in Bankruptcy and the

accuracy of that statement has not been challenged in any important respect but only the inferences drawn by the Judge whose main conclusion is that the bankrupt used the names of his family, his wife, his son T.W.Trautwein, his daughter Kathleen Frauenfelder and his relations, his mother, his sisters Augusta Chapman and Hilda O'Grady and his brother-in-law Francis O'Grady and some other persons for the acquisition on his own account of various properties and for the purpose of defeating his creditors, principally the Income Tax authorities. But I do not propose to go again in detail over the facts stated by the Judge but rather to summarise facts that arrest attention and are material to the determination of this appeal.

And first I refer to what the Judge describes as the main defence of the appellant. It is that certain properties - land at Mus$wellbrook, the Rooty Hill Hotel, land at Penshurst, the College Green Hotel, land in Maroubra Bay Road Randwick, land at Maroubra, land near the Belmore Hotel, Orielton Farm and 10,200 shares in the Coogee Bay Company - were all acquired by the bankrupt in trust for and as an advancement to him.

And there were produced in support of that allegation declarations of trust and other documents relating to the Mus$wellbrook land (1917), the land at Penshurst (1925), land in Maroubra Bay Road (1925) and in High St. Maroubra (1928), College Green Hotel (1930)and a declaration of trust (1929) relating to land at Belmore was mentioned in this Court, which was not proved before the Judge.

The appellant further alleged that the bankrupt was guilty of breaches of trust in connection with these properties and that to compensate him for those breaches the bankrupt appropriated or acquired for the appellant other property namely, Raymond Flats, The Aerodrome Hotel, shares in the Coogee Bay Company, the Menangle Park Racing Club Ltd and

the Gosford Racing Club Ltd.

No doubt, said the Judge, according to the documents produced trusts were established in favour of the appellant in respect of the Muswellbrook property, the Rooty Hill Hotel, the College Green Hotel, the land at Penshurst, at Maroubra and Maroubra Bay Road. But, the Judge added, that he did not believe the evidence given by the appellant, that the bankrupt appropriated or made over to him as compensation for breaches of trust Raymond Flats, the Aerodrome Hotel, shares in Coogee Bay Company, the Menangle Park Racing Club Ltd. and the Gosford Racing Club Ltd.

The evidence of the appellant thus makes it clear that these latter properties were acquired by the bankrupt in the name of or in trust for the appellant but not for the purpose of compensating or recouping his losses in respect of breaches of trust committed in relation to properties in respect of which trusts were established. It is unnecessary to set forth the evidence upon which the Judge reached his conclusion: he saw and heard the appellant and has set forth the reasons for his conclusion at length. All I need say is that that conclusion is reasonably open on the evidence and should not be disturbed.

Before referring to particular properties the subject of this appeal, I would add, that the appellant was born in August 1912. He had, I gather, small means apart from the bankrupt's activities and little business experience.

I now propose to state some of what I call the arresting facts affecting particular properties the subject of this appeal.

Royal Hotel Riverstone:

In 1936 this hotel was acquired in the name of the appellant for the sum of £19,800. The sum of £10,000 was paid in cash by a cheque drawn on the account of the

appellant and the balance was secured on mortgage. The bankrupt arranged the purchase of the hotel and on settlement desired to reduce the mortgage amount and pay a larger amount in cash. But the vendor refused to receive in cash more than £10,000. In 1939 the bankrupt handed to the mortgagee or his agents the sum of over £4,500 in bank notes in part payment of the amount due on the mortgage and ultimately, according to the appellant, discharged the balance of the mortgage. The cash payment of £10,000 was derived from the proceeds of sale of the Royal Hotel, Walgett, which in 1936 had been acquired in the name of the appellant for the sum of £19,000 and was sold in the same year for the sum of £22,000. The balance of the proceeds of sale of the Walgett Hotel, £12,000, went to the bankrupt.

The bankrupt had arranged the purchase of the Walgett Hotel for £19,000. He provided £8,000 and the balance of the purchase money was satisfied by the transfer to the vendor of certain other properties namely, Lochgarrie Flats and Wongala Cottage. According to the appellant the purchase of the Walgett Hotel was suggested by the bankrupt and was discussed at a family council. The bankrupt said that he had discussed the matter with the owner of the hotel who was prepared to take "Wongala" and the block of flats called "Lochgarrie" in part payment of the purchase money. The purchase was effected and it was arranged that the property should be put in the appellant's name. Lochgarrie Flats was a property acquired in 1935 in the name of the bankrupt's daughter the consideration being £8,000. The bankrupt, according to the evidence, stated that he would make up later to his daughter the transfer by her of the Lochgarrie Flats. The flats, as already appears, were taken over at that value in part satisfaction of the consideration for the purchase of the Walgett Hotel. The consideration for the acquisition of Lochgarrie Flats in the daughters name was the payment of £4,500 and the transfer of "Wilga Flats" valued at £3,500.

The bankrupt had negotiated the acquisition of "Wilga Flats" in the name of his daughter for £3,650, subject to a mortgage of £1,850, which was satisfied by taking over certain land in Paramatta Road in the name of the daughter and also a mortgage which the holders or one of them agreed with the bankrupt to pay in case of default on the part of the mortgagor. In fact this mortgage was retransferred by the daughter in consideration of the payment of a sum of £1,700.

Wongala Cottage was a property acquired in 1935 in the name of the appellant at a value of £2,000 representing part of the consideration for the sale of Raymond Flats.

Raymond Flats were acquired in 1935 in the name of the appellant for the sum of £7,600. The purchase price was satisfied by a payment in cash of £3,100, the transfer of certain properties in Maroubra Bay Road and Paine Street Randwick valued at £1,000 and £2,000, standing in the names of Francis and Hilda O'Grady respectively of which the bankrupt was the beneficial owner, and of a property called "Aston Gardens" Woollahara valued at £1,500, acquired in the name of the bankrupt's daughter from his mother Annie Mozall in whose name apparently the bankrupt had purchased the property. The evidence does not, I think, disclose the source of the cash payment £3,100. Raymond Flats it will be remembered was one of the properties which the appellant said the bankrupt appropriated or made over to him as compensation for breaches of trust committed by the bankrupt.

Oceanic Hotel Coogee.

The bankrupt held a lease of this hotel from 1931 to 1939. In 1939 he proposed a further lease for a period of one year with an option of purchase for £70,000. The landlord declined the offer but agreed to sell for £70,000 including furniture. The purchase was made in the name of the appellant and the bankrupt's daughter. A sum of £20,000 was paid by means of two cheques [redacted]

One for £1,000 drawn by the bankrupt and the appellant as directors on the account of the Coogee Bay Company Ltd. and later refunded by means of a cheque drawn by the bankrupt on the Oceanic Hotel account. The other a cheque for £19,000 drawn by the appellant on his account into which had been paid £2,000 in cash and also a sum of £17,500 or thereabouts, part of the proceeds of sale of the Aerodrome Hotel. The balance £50,000 remained outstanding.

The land on which the Aerodrome Hotel stands was acquired in the name of the appellant and a building was erected thereon at a cost, found by the bankrupt, of about £10,000. The Aerodrome Hotel, it will be remembered, was one of the properties which the appellant said was appropriated or made over to him by the bankrupt as compensation for breaches of trust committed by the bankrupt.

In 1935 the Settler's Arms Hotel had been acquired in the name of the appellant but the hotel was delicensed and in 1938 the license was acquired and transferred to the Aerodrome Hotel.

Cheverton Flats.

This property was acquired in the name of "Birdie Pitt" for £16,500 and was sold in 1940 for £15,250. It was subject to a mortgage of £12,500 which was taken over. The appellant asserted that he agreed with his sister to purchase this property. The Judge accepted this statement, for the purposes of the day, and only declared that one half interest belonged to the bankrupt while it stood in the name of "Birdie Pitt". "Birdie Pitt", whose real name is Morris, was a dressmaker employed by the female members of the Trautwein family. She had no beneficial interest in the property. The £4,000 for the equity of the property was satisfied by the payment of £2,000 cash and the transfer of a property known as "Ruperra" in Elizabeth Bay valued at £2,000. Apparently the cash payment of £2,000 was derived from a sum

of £2,104 credited to the account of the appellant and being the balance payable in respect of the resale of the flats by "Birdie Pitt".

The property known as "Ruperra" had been acquired in 1938 in the name of the appellant in part satisfaction of a sale of "Orielton Farm" which was one of the properties which the appellant said had been appropriated or made over to him as compensation for breaches of trust.

"Orielton Farm" had been acquired in 1931 in the name of the bankrupt's brother for £16,000 subject to a mortgage of £10,500. The mortgage was taken over, and the balance of the price was satisfied by the transfer of land in Randwick valued at £1,000 acquired in the name of the bankrupt's daughter and of an equity in flats known as "Ambassador Flats" acquired in the name of the bankrupt's brother, valued at £4,500. The Randwick property had been acquired for £2,100 in exchange for the Park Gate Hotel valued at £800 acquired by the bankrupt in 1925; land at Penshurst valued at £1,000 acquired by the bankrupt in 1925, and cash £300. The "Ambassador Flats" had been acquired in 1930 in the name of the bankrupt's brother in part satisfaction of a sale by the bankrupt of the Regent Hotel, South Kensington, erected, I gather, on land acquired by the bankrupt in the name of his mother Annie Mozall. The acquisition of Cheverton Flats is thus traced to the acquisitions by the bankrupt of the Park Gate Hotel, the land at Penshurst and the Regent Hotel.

Royal Hotel Walgett.

Wongala Cottage.

Raymond Flats.

Settler's Arms.

Ruperra, Elizabeth Bay Road.

Club House, Hotel Peak Hill.

Commercial Hotel.

All these properties had also been sold at the date of sequestration but it is declared that while the properties stood in the name of the appellant they belonged beneficially to the bankrupt. All but the Club House Hotel, Peak Hill and the Commercial Hotel have been already mentioned. Royal Hotel Walgett, Wongala Cottage and Raymond Flats in connection with the Royal Hotel Riverstone. Settler's Arms in connection with the Oceanic Hotel. Ruperra in connection with Cheverton Flats.

The Club House Hotel, Peak Hill was acquired in 1934 in the name of the appellant. But he said that he knew nothing about it and had never had anything to do with it and had heard that the bankrupt bought it and sold it practically straight away at a profit.

The Commercial Hotel.

About 1935 Walsh and Cashel purchased this hotel from the registered proprietors. Walsh's interest was acquired in the name of the appellant and in 1936 was sold to Tooth & Co. Ltd. The registered proprietors, Walsh and Cashel, in consideration of £800 paid to them, and in consideration of £500 paid by Tooth & Co. Ltd. to the appellant and of £500 paid by Tooheys Ltd. to Cashel, transferred the hotel to Tooth and Co. Ltd. and Tooheys Ltd. The appellant said he knew nothing about the transaction but that he handed over to the bankrupt the sum of £500 to hold on his behalf.

The judgment appealed from also declares that certain personal property standing in the name of the appellant forms part of the bankrupt's estate and directs that the same be transferred to the respondent as trustee of that estate.

Coogee Bay Hotel Pty.Ltd. 25, 700 shares.

In 1926-1927 the bankrupt acquired some 78,000 shares in the Coogee Bay Hotel Ltd., which changed its name in 1937 to the Coogee Bay Hotel Proprietary Ltd. In 1928 the bankrupt transferred 10,000 shares to his mother Annie Mozall, 10,000

shares to his sister, Augusta Chapman, who at the time held 200 shares, and in 1931 he transferred 17,418 shares to his daughter, 10,000 shares to his sister Hilda O'Grady, 10,000 shares to his wife and 10,000 shares to his brother who at the time also held 200 shares in the company. In 1932 the bankrupt's wife transferred 5,000 shares to one Egan and another 5,000 shares in 1933 to one Hill who in 1934 transferred the same to one Hooker who sometimes acted as agent for the bankrupt. In 1933 one Small transferred 500 shares to the appellant and in 1935 the bankrupt's sisters each transferred to him 10,000 shares and also in 1935 Egan transferred to the appellant 5,000 shares which the bankrupt's wife had transferred to him. Small, the bankrupt's sisters and Egan had no beneficial interest in the shares in their names and held them for the bankrupt. The brother stated that the bankrupt desired to put 10,000 shares in his name for the appellant and he replied that he was agreeable. Accordingly shares were transferred into his name but he had no beneficial interest in them. In 1940 one Coward transferred to the appellant 312 shares. The appellant asserted, as already appears, that the shares transferred into his name were compensation for breaches of trust on the part of the bankrupt. About 1935 the appellant applied for 100 Governor shares which were allotted to him and gave him complete control of the company. The bankrupt and his wife relinquished their positions as managing director and director of the company and were thereupon appointed as ordinary directors.

The company at first fixed the appellant's remuneration as governing director at £30 per week, but in 1936 increased it to £4,700 for the year and in 1937 raised it to £5,700 while for the same period the bankrupt and his wife's remuneration was fixed at £1,300 and £500 per year.

In 1938 the company borrowed £45,000 and advanced it to the bankrupt free of interest and without security. Later

a further sum of £15,000 was borrowed of which £14,500 was advanced to the bankrupt free of interest and without security: the balance was advanced to the appellant. Advances made to the bankrupt's daughter were also to be free of interest and without security.

Amounts standing to the credit of the bankrupt's wife for director's fees were transferred to the credit of the bankrupt. And likewise in 1937 a sum of nearly £4,000 standing to the credit of the appellant's account was transferred to the credit of the bankrupt's account.

Tattersalls Hotel Penrith Proprietary Ltd. 500 shares.

In 1939 the bankrupt held a lease of this hotel for 10 years. The company was incorporated in 1939 for the purpose of carrying on the hotel business. But the lease of the premises remained in the bankrupt. The bankrupt was appointed Chairman of Directors of the company. Applications for shares were made by and allotted to various persons. The appellant applied for and was allotted 500 shares. Minutes of a directors meeting of the company record in 1940 that the directors being satisfied that certain shares were held either by or in trust for the bankrupt resolved that the same be transferred into the name of his trustee in bankruptcy. These shares were:-

500 shares in the name of T. C. Trautwein.
500 " " " " " M. Hogan.
1000 shares in the name of H.M. Ansley
1000 " " " " " Francis O'Grady
500 " " " " " Austin Frauenfelder
500 " " " " " Alex J. Maston
500 " " " " " Ronald Walker.

The remaining shares issued by the company were:-

500 shares in the name of the appellant (already mentioned)
1 share " " " " E.W. Ryan
1 share " " " " C.J.Angles
500 shares " " " " Ronald Walker.
1000 shares " " " " K.W. Frauenfelder
1100 shares " " " " L.J. Hooker

The application in the name of Walker was for 1,000 shares and he was allotted that number. But it should be observed that the shares allotted to Hogan, Frauenfelder and Walker were all paid by means of cheques drawn by the Scottish Loan and Finance Co. Ltd. The amount payable in respect of the shares issued in the name of the appellant were satisfied by means of a cheque drawn on his account but into which a sum of £500 was paid a day or so before from another account in his name, a cheque from the bankrupt's wife, a cheque drawn by one Forsyth and two small cheques drawn by the Coogee Bay Hotel Proprietary Ltd. And according to the respondent the shares in the name of Hooker belonged to him.

Gosford Racing Club Ltd. 21,709 shares.

These shares were acquired about the year 1935 in the name of the appellant from various sources. One Hooker, who sometimes acted for the bankrupt negotiated two of these acquisitions. And as to 9,400 of these shares acquired from Gaut's Estate the evidence is that the bankrupt purchased them. But it will be remembered that the appellant said that the bankrupt appropriated or made over these shares to him as compensation for breaches of trust committed by the bankrupt.

Menangle Park Racing Club Ltd. 697 shares.

These shares were transferred to the appellant in 1934-5 by three different persons. About the same time, 1935-1936, shares were transferred into the name of Annie Mozall (300) and 450 more at some unspecified date, the bankrupt's wife (1325), the bankrupt's sister Hilda (600), his brother-in-law Francis O'Grady (501), the bankrupt's sister Augusta (200) and the bankrupt himself (522). The bankrupt's sisters and his brother-in-law had no beneficial interest in their shares and the O'Gradys transferred the shares in their names to the trustee in bankruptcy. And the appellant asserted, as already stated, that the shares in his name were appropriated or made over to him by the bankrupt as compensation for breaches of trust

committed by him and he also said that he did not provide the consideration for their transfer.

Richmond Jockey Club Ltd. 462 shares.

The Jockey Club Co. acquired certain property from the Richmond Trotting & Racing Club Ltd. in which the bankrupt was interested. As part of the consideration for the acquisition of the property of the Trotting Club the Jockey Club agreed to allot to the bankrupt and his nominees certain shares. Accordingly 462 shares were allotted to the appellant who gave no consideration for them.

Riverstone Hotel Pty. Ltd. 100 shares.

This company was formed to take over the tenancy of the Royal Hotel, Riverstone, already mentioned. The appellant was allotted 100 shares and his sister 100 shares. If, however, the appellant held the hotel itself in trust for the bankrupt the benefit of this tenancy accrues to him or his estate.

Howell's Mortgage £3,000.

The judgment declares that the sum of £3,000 lent by the appellant on mortgage to Frank Howell was money that belonged beneficially to the bankrupt and was lent by the appellant to Howell as a trustee for the bankrupt. About 1934 the sum of £3,000 was lent to Howell on the security of a mortgage given to the appellant. The appellant's evidence is to the effect that the bankrupt gave him the money so that he could lend it to Howell, which he did. By 1936 the principal money and interest had all been repaid.

Bonds Numbered 5035 & 8698.

Bond 5035 was converted into Bond 8698. The appellant asserted that he requested the bankrupt to purchase the bonds for him, that he did so, and that the appellant paid him for the same. The judge did not believe the appellant and was satisfied that the bonds were purchased by the bankrupt on his own account and out of the loan of £45,000 made to him

by the Coogee Bay Company Pty. Ltd.

It will be gathered from this summary, as was said by the learned judge, that the bankrupt took a leading part in planning these various transactions, negotiating them, deciding what property should be purchased and how the acquisition should be financed and carried out. And also that the bankrupt was trafficking in property in the names of other people. Also that his methods of acquiring property were unusual, and as the judge said, circuitous. Moreover the bankrupt's acquisition of property in the names of other people was coincident with the increasing and overwhelming demands upon him for income taxes. And the dispositions in favour of the appellant involve amounts that arrest attention. Thus £19,800 in cash (including mortgage repayments) was put into Royal Hotel, Riverstone and £20,000 cash into the Oceanic Hotel, Coogee. The evidence does not, I think, state the exact value of the shares standing in the name of the appellant but it is to be observed that advances were made to the bankrupt by the Coogee Bay Company Pty. Ltd. of £60,000 free of security and interest from moneys that it had borrowed on the security, I apprehend, of the hotel property. The appellant, it will be remembered, had the complete control of the company as the holder of 100 Governor Shares. And the appellant was a young man - who attained his majority in 1933 - and, as already appears, of small means and little business experience. The learned judge also relied upon other facts connected with the receipt of rents, profits and dividends and he also referred to some dealings with the Blue Mountains Hotel, The Ivanhoe Hotel, the Belmore Hotel and the Maroubra Hotel which in the main he discarded.

But I do not find it necessary to investigate these matters in detail for the summary given is sufficient, in my judgment, for the determination of the appeal.

The decision of the judge in bankruptcy must be displaced

by the appellant especially in a case in which he saw and heard material witnesses. The suggestion on the part of the appellant that the dispositions in his favour were for his advancement in life is destroyed partly by his own assertion that many were made to compensate him for various breaches of trust on the part of the bankrupt, and partly by the magnitude, the time and the form of the various dispositions. True, the judge did not accept the appellants assertion that the dispositions were made to compensate the appellant for breaches of trust committed by the bankrupt, but it nevertheless operates against any presumption of advancement. Omitting for the time being the transaction relating to "Dover Heights", which has not yet been mentioned and which I shall examine later, and putting also on one side the suggestion of advancement, the facts already summarised amply sustain the judge's conclusion that at the commencement of the bankruptcy the Riverstone Hotel and the interest in the Oceanic Hotel acquired in the name of the appellant and the shares in the Coogee Bay Hotel Pty. Ltd. and the other shares before mentioned belonged to the respondent the trustee in bankruptcy on the ground that the appellant was a trustee of the same for the bankrupt.

But I must refer to a formal objection in connection with the Oceanic Hotel.

It was said that the proceedings relating to this Hotel are defective for want of parties. It will be remembered that the hotel was acquired in the name of the appellant and his sister, the bankrupt's daughter. But the declaration and ancillary order affect the appellant's interest alone and the order directing an assurance relates to that interest and in no way affects the interest, if any, of the daughter. This objection fails.

The judge's conclusion as to the Bonds and the order as to Bond No. 8698 is well supported by the evidence.

And his conclusions as to property that formerly stood in the name of the appellant is also supported by the evidence. I refer to Royal Hotel, Walgett, Wongala Cottage, Raymond Flats, used directly or indirectly in financing the purchase of the Royal Hotel at Riverstone. And to the Aerodrome Hotel and Settler's Arms used directly or indirectly in financing the Oceanic Hotel. And to a half interest in Cheverton Flats acquired in the name of "Birdie Pitt" and the property "Ruperra" used in financing the purchase. And to Howell's Mortgage. And also to the Club House Hotel and the Commercial Hotel. It was contended, however, that the declarations in respect of these properties were "in the air" and were not made as a step towards obtaining any relief. But in the majority of cases the declarations are a step towards obtaining a declaration in respect of other properties e.g./Royal Hotel Riverstone, Oceanic/Hotel and Cheverton Flats. And in all cases they are a step towards further administration in bankruptcy of the bankrupt's estate. No order is made requiring an assurance of these properties to the trustee and standing alone they do not entitle the trustee to any account of rents, profits or dividends received by the appellant. But they may with other evidence form the basis of further proceedings in bankruptcy for account. They are not declarations "in the air", but are a step towards further remedies or accounts. And it was also objected that the proceeding, so far as it related to Cheverton Flats, was defective as to parties. "Birdie Pitt", in whose name the property was acquired, and the bankrupt's daughter were, it was said, necessary parties. But the declaration and order only relate to one half interest in the property while it stood in the name of "Birdie Pitt", a mere nominee of the appellant, and does not affect the other half interest which may or may not belong to the bankrupt's daughter and in respect of which other proceedings are pending, so the Court was informed.

The trustee in bankruptcy also relied upon the provisions of S. 37A of the Conveyancing Act 1919 (N.S.W.), as amended, which corresponds with the Statute 13 Eliz. c. 5. The judge declared that the provision of money by the bankrupt for the purchase of the Royal Hotel, Riverstone, the gift of money by the bankrupt for the purchase of the appellant's interest in the Oceanic Hotel, the purchase of properties which formerly stood in the name of the appellant, the transfer of shares in the Coogee Bay Hotel Pty. Ltd. and the purchase of the shares, other than the shares in the Riverstone Hotel Pty. Ltd., were alienations made by the bankrupt with intent to defraud creditors. The Conveyancing Act 1919-1932, S. 37A provides:- "Save as provided in this section, every alienation of property, made...with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced". The provision does not extend to alienations of property in good faith. "In whatever way the disposition of property be affected, it will be held within the meaning of the Statute, which is general, for the suppression of fraud; and a man will not be allowed to do in one way that which he cannot do in another". (May, Fraudulent and Voluntary Dispositions of Property, 3rd ed, p. 20).

The facts of the case warrant the conclusion that the bankrupt purchased property in the name of the appellant and had assurances made to him of that property with intent to defraud his creditors principally the Income Tax Commissioners. And once it was found that these purchases were not for the advancement of the appellant but for the bankrupt himself, then the conclusion is almost inevitable that the purchases and assurances were made with intent to defraud creditors. But what property was alienated by the bankrupt? He was not named as the purchaser nor was he a party to any instrument of conveyance, transfer or assurance. Under the Statute of Elizabeth "all kinds of real and personal property, whether

legal or equitable, vested or contingent, in possession or reversionary, which are subject to the payment of debts, and liable to be taken in execution, at the time of the fraudulent conveyance; but (unless the debtor be dead or a bankrupt) no property which is not so liable". A purchase in the name of a child or other third person was not originally held to be within the Statute 13 Eliz. But that does not now appear to be the law. (May on Fraudulent Dispositions 3rd ed. pp. 13-18). Wood V.C. in Barrack v McCulloch 3 K.& J. 117, at p. 118 said:- "The late case of French v French (6 DeG. Mac. & G. 95) shows that property purchased as it was in that case with the goods of the debtor is within the statute. The debtor in that case sold his business and stock-in-trade in consideration of a money payment, and also an annuity to himself, and a contingent annuity to his wife if she survived him; and it was held that the annuity so purchased for his wife was a gift to her by her husband, which was void under the Statute as against his creditors".

So in the case before the Court the purchase of property by the bankrupt in the name of the appellant and conveyed, transferred or assured to him by the vendors as arranged by the bankrupt constituted an alienation of property by him within the meaning of the Conveyancing Act and having been so purchased and assurances obtained with intent to defraud his creditors the dispositions are void at the instance of the trustee in bankruptcy.

But I would substitute for the declarations made below declarations that the purchase of the various properties in the name of the appellant and the assurances made into his name constituted alienations of property by the bankrupt with intent to defraud his creditors and that the same are void against the respondent his trustee in bankruptcy.

The "Dover Heights" property remains for consideration. This property was purchased in May 1938 and transferred to

the appellant in the same month. It was purchased as a home for the appellant who had married in 1937. It was purchased in the name of the appellant. But the bankrupt provided the purchase money £2,140 out of the sum of £45,000, already mentioned, advanced to him by the Coogee Bay Co. Pty. Ltd. A declaration was made by the judge that Dover Heights belongs to the respondent as trustee in bankruptcy on the ground that its purchase constituted a settlement of the same within the meaning of S. 94 of the Bankruptcy Act 1924-1933 and as such was and is void against the respondent as such trustee. That section provides:- "Any settlement of property (not being certain settlements immaterial here) shall...if the settlor becomes bankrupt at any subsequent time within five years after the date of the settlement - be void against the trustee in the bankruptcy unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the settlor's interest in the property passed to the trustee of the settlement or to the donee thereunder on its execution". "'Settlement' for the purposes of this section includes any conveyance or transfer of property". "The transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer. The end and purpose of the thing must be a settlement, that is, a disposition of property to be held for the enjoyment of some other person. Thus a purchase by the father of shares, which are registered in the son's name, and upon which the son receives the dividends, is within the Statute. But where the gift is of money to be expended at once, the transaction is not...within the section (In re Player ex parte Harvey 15 Q.B.D. 682, at p. 687; Williams v. Lloyd 50 C.L.R. 341, at pp. 364-375).

It is contended that the bankrupt settled the sum of

£2,140 upon the appellant and not the property itself though it was conceded that the property stood charged with that sum. But on the whole I think the finding of the judge cannot be disturbed. It is a question of fact whether the bankrupt himself purchased the property in the name of the appellant or provided him with a sum of money to purchase the property for himself. Speaking generally the bankrupt did not provide the appellant with moneys to purchase property but negotiated purchases on his own account and had them transferred then into the name of the appellant. The judge was justified, I think, in concluding that the bankrupt pursued his usual method of business and himself purchased "Dover Heights" and had it transferred into the name of the appellant as a settlement for his benefit.

It was suggested on the part of the appellant during the argument before this Court, that he is entitled to a lien or charge in respect of obligations incurred by him in connection with any property which he is by the judgment appealed against directed to convey or transfer to the trustee in bankruptcy, and to be indemnified by the trustee in bankruptcy against obligations in respect of which the appellant may become liable in respect of the property so directed to be conveyed or transferred. This claim was not made before the Bankruptcy Court nor in the notice of appeal to this Court.

It may be that the appellant is entitled to liens and charges and to be indemnified against obligations properly incurred by him in connection with property directed to be conveyed or transferred to the trustee in bankruptcy, but whether the indemnity should be personal on the part of the trustee, leaving him to his right of indemnity against the bankrupt's estate, or confined to the assets of the bankrupt's estate, has not been argued, and this Court should not, I think, finally dispose of the matter without more

precise knowledge of the claims of the appellant. It will be sufficient protection for him if it be declared that, the conveyances and transfers directed by the judgment are without prejudice to any application on his part to the Bankruptcy Court for an order declaring, what, if any, liens or charges in his favour the properties are subject and what indemnity or indemnities, (if any), should be given to the appellant. Subject to the approval of the judge, the parties, if they agree, can settle the form and in case they differ then the judge in bankruptcy can dispose of the matter.

Subject to the variations and additions mentioned, this appeal should be dismissed.

T R A U T W E I N v R I C H A R D S O N

JUDGMENT

DIXON J.

With a sound forensic instinct counsel for the appellant opened his argument in support of the appeal by an attack upon the evidentiary use which, as he thought, had been/or might be made of other transactions of like character in determining whether any given piece of property standing in the appellant's name had been placed there by way of trust for the bankrupt or with intent to defraud his creditors or as a settlement. It was a sound course to take forensically because only by insulating any given transaction or series of transactions by which property came to stand in the appellant's name from the general course of dealing by the bankrupt, his father, is it possible to regard the fact that it was acquired in his name as any ground at all for supposing the property to be his beneficially. In arriving at his findings the learned judge of the Court of Bankruptcy took great pains to deal separately with each item of property enumerated in the notices of

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motion and to base his decision with respect to a particular piece of property upon the circumstances attending the chain of transactions ending in its acquisition by the appellant. He went much further in excluding evidence of similar transactions than, in the very striking circumstances of this case, I myself should be disposed to go. For, as the examination of the details of the rather numerous transactions in issue sufficed to show, the plain fact is that we have in this case the use of nominees as a regular course of dealing, dummying habitually practised.

The bankrupt, in his very successful business of buying and reselling or exchanging hotels, flats, houses, shares, securities and other forms of property, commonly used the names of others for the purpose of his transactions. The names of his mother, his wife, his son, his daughter, his brother, his sisters, and his brother or brothers-in-law, were all employed as well as those of others not related to him.

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The practice was of long standing and it is plain that his dummies became but marionettes, often taking not even a formal part in the business for which their names were borrowed. They were not always aware that their names had been used, often had no understanding of the matters and at times found that their names had been signed for them without their knowledge.

The purposes of this course of deception no doubt varied from time to time and from occasion to occasion, but for some years a leading object was defrauding the revenue, at first by avoiding assessment to income tax upon the bankrupt's true taxable income, and, later, defeating the collection of income tax assessed; evasion of land tax may also have been in view.

In choosing the particular name in which any given property should be acquired it may be supposed that the bankrupt was guided by come considerations of convenience or business advantage but, if so, it has been found impossible at this date to discover on what

principle /

principle he proceeded. For it looks almost as if it was a mere chance whether a contract or title was taken in the name of his son, his daughter, his wife or someone else. Names were sometimes changed at the last minute. Properties in one name, or their proceeds, were used for the acquisition of properties in another name, in the course of transactions by way of purchase or exchange negotiated by the bankrupt.

Bank accounts were regarded in much the same way. That which the bankrupt ordinarily used was in the name of a limited company formed to conduct an hotel, but the moneys in his son's bank account at any moment might be traceable to any of the many sources of capital or of revenue available to the bankrupt and the bankrupt did not scruple to sign cheques upon it without, it is said, the express authority of his son.

When the manner in which the bankrupt was accustomed to conduct his affairs is ascertained, and it is shown by the course of transactions/

transactions proved, then the formal presumptions of advancement which might arise from a purchase by a parent in the name of a child are seen to have no reality in their application to this case.

Whether the relation of parent and child be treated as a circumstance from which it is the practice of the court to draw an inference or as the foundation of a definite presumption of law (see 48 C.L.R. at pp.689-90) it is plain from all the facts in the present case that the circumstance cannot support a conclusion that the appellant is the beneficial owner of what was acquired in his name from resources traceable directly or indirectly to the bankrupt his father. The learned judge in the Court of Bankruptcy gave consideration to the possibility that the members of the family took beneficially interests in common in the mass of property which, under the direction of the bankrupt, was acquired in their various names, or in some part or parts of that mass. But he rejected this conjectural interpretation of the facts. In my opinion he was clearly right in so doing. He

regarded /

regarded the evidence as confirming the view that the bankrupt was dealing with his own property and using the names of his relatives and others for the purpose. Everything, I think, points to such a conclusion. Leaving on one side some specific matters I shall mention, I have no doubt of the correctness of the finding that the appellant was a trustee for the bankrupt of the various items of property in respect of which the order under appeal makes declarations to that effect. But, before dealing with the specific matters arising in connexion with the finding that the appellant was a trustee or nominee of his father, it is convenient to state my view of an objection taken to a further declaration made in the decree or order under appeal. The notices of motion included in the grounds of relief claims under sec. 37A of the Conveyancing Act 1919-1939 (N.S.W.), which replaces 13 Eliz. c. 5. The decree accedes to these claims, with some unimportant exceptions, and, after declaring the trust of a particular form of property, goes on to declare that the transaction under which the property was /

was placed in the appellant's name was an alienation made by the bankrupt with intent to defeat and delay creditors.

It is objected that the declarations, or the grounds or findings on which they are based, are incompatible; that the one supposes that the son was constituted a trustee for his father who retained the beneficial interest, and the other that, in order to defeat his creditors, the father made over the beneficial interest to his son. I cannot agree that there is any incompatibility between the two declarations. A main purpose of 13 Eliz. c. 5 was to avoid against creditors feigned or covinous alienations where the debtor retained the substantial benefit of the property but produced the deed of conveyance or assignment in bar of execution. Indeed in Twyne's Case itself it is said "fraud is always apparalled and clad with a trust and trust is the cover of fraud", 1601 3 Co. R. 81a 76 E.R. at p. 813. The declarations appear to me to combine to fit the facts of the present case exactly. It is

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a case in which, for the purpose of defeating his creditor, the Commissioner of Taxation, the bankrupt caused property acquired as his beneficially to be taken in the name of his son. If the old proverb is that "Trust is the mother of deceit", here the deceit of the bankrupt was the mother of the trust. There is no reason why the decree should not cover both aspects of the matter, each leading as it does to the same active or effective relief, namely a transfer to the trustee in bankruptcy, which relief the decree proceeds to order.

In the case of one property, the Oceanic Hotel, there is a declaration that the appellant is a trustee of his interest therein and a declaration that the gift of the money by the bankrupt for the purchase of the interest was an alienation made by the bankrupt with intent to defraud. The word "gift" is used here and elsewhere in the decree apparently in its primary legal, but now unusual, sense "importing no more than the transferring of the property of a /

a thing from one to another" (Sheppard Touchstone 227), without any implication of bounty or benefit. Even so the manner in which the declaration is expressed may appear somewhat infelicitous, particularly in relation to the facts, which show that so much of the purchase money as has been paid was derived in part through the Coogee Bay Hotel Co. and in part from the proceeds of sale of the Aerodrome Hotel, which passed through the appellant's bank account, an hotel the selling value of which was attributable to transactions on the bankrupt's part in the son's name into which it is unnecessary to enter. But what is meant is plain enough, and I do not know that this court is called upon to redraft the declaration for no purpose except to secure a more artistic form.

In other declarations the providing of the money by the bankrupt for the purchasing of an hotel in his son's name or the purchase of shares in his son's name is declared to be an alienation with intent to defraud creditors and to be void as against the

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trustee in bankruptcy. These declarations appear to me to be in accordance with the law as established by authority under 13 Eliz. c. 5 and I do not think that we should regard the attempt to re-express the text of the statute in modern form as intended to disturb the traditional and well settled operation of this branch of law. Under that operation a purchase made in the name of another or in the joint names of the debtor and another has been considered property available, at the instance of creditors or a trustee in bankruptcy, for the satisfaction of debts, if the purpose of placing it in the name of the other party or in the joint names was to defeat or delay creditors: see Stileman v. Ashdown, 1742 2 Atkyns 477 and 608; 26 E.R. 688; French v. French, 1855 6 De.G. Mac. & G. 95 at pp. 102-3; 43 E.R., 1166 at 1169; Barrack v. McCulloch, 1856 2 K. & J., 110; 69 E.R., 1043; Neale v. Day, 1858 28 L.J. Ch. 45; cf. re Herman (1916)16 S.R. (N.S.W.) 264; re Player No. 1 (1885) 54 L.J. Q.B. 553; 53 L.J. 768: 2 Movr. 261; Brown v. Bellaris, 1820 5 Madd. 53; 56 E.R. 815, cases under bankruptcy legislation. By analogous reasoning

changes in the form of property made over by the debtor with intent to defraud have been held not to stand in the way of relief; creditors may follow the fund: re Mouat, 1899 1 Ch., 831. I should ADD that similar reasoning applies with reference to sec. 94 of the Bankruptcy Act and that I cannot see why item No. 3 "Dover Heights" should not fall within it.

I think that it is unnecessary to say more on the main part of the case, what may be called the affirmative case of the trustee in bankruptcy. The learned judge of the Court of Bankruptcy has dealt in full detail with the history of each transaction and has given a careful and complete account of the evidence upon which he reached his conclusions. His Honour's judgment appeared to me wholly to withstand the very able attack made upon it by the appellant's counsel, who examined each transaction in turn, as well as the rival pictures of the whole case which might be drawn as the result of more general considerations. While in reference to particular transactions counsel was able to sugges

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arguments not lacking plausibility, a consideration of the whole case always brings the mind back to the evident fact that throughout the time that matters the bankrupt assumed complete dominion in fact of the funds and properties in the names of the various members of his family, including his son, and continued his use of dummying while the heavy claims of the Commissioner of Taxation hung over him. Of his endeavours by hook or by crook to defeat those claims there can be no doubt. I have had the advantage of reading the judgments prepared by the Chief Justice and Starke J. and I see no reason for adding anything further on this branch of the case.

The specific matters which I said arose in connexion with the finding that the appellant was a trustee or nominee of his father also bear upon the findings that the bankrupt made the dispositions intending to defeat his creditors. The first of them is the affirmative plea or answer on the part of the appellant to the effect that certain of the properties were made over to him in respect of or in satisfaction

of obligations incurred by his father, the bankrupt, to him. The obligations arose out of trusts in favour of the appellant created by written instruments in respect of various pieces of property in 1917: 1925: 1928: 1929: 1930:and, in respect of other pieces of property, out of trusts alleged to have been created orally. The bankrupt dealt with property subject to the trusts or alleged trusts or the proceeds as his own, or perhaps it would be better to say as he would with any other property standing in the names of himself or others responsive to his directions.

The appellant's case was that in this way his father had become responsible to him to an amount of about thirtyfour thousand pounds, and that when certain flats, an hotel property and certain shares in racing and hotel companies were placed in his name, it was done by way of appropriation to the trusts or in satisfaction of his father's liability for the trust funds or for breaches of trust.

In the judgment under appeal the detailed facts and evidence are fully set out and closely examined. Whatever may have been the

motives actuating the bankrupt in earlier years in creating trusts in favour of his then infant son, it is clear that he treated the constitution of the trusts as no reason why he should not deal with the properties affected and dispose of the proceeds as he chose for the purpose of his transactions in trafficing in property. Without casting any doubt on his accountability, as a consequence, to his son, the fact cannot be ignored that the bankrupt himself regarded the trust instruments as no impairment of his mastery of th situation and as amounting to no more than other formalities used to cloak his real ownership and control of property.

The incredulity of the learned judge in bankruptcy concerning the story of the appropriation of property to satisfy the bankrupt's liability is not surprising. Apart from the low view he took of the credibility of the testimony, the content of the proof adduced is very unsatisfactory. The explanation of the

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story perhaps is that in the course of investigating the facts for the purpose of the appeals against the Commissioner's re-assessment of the bankrupt for income tax, the legal advisers of the bankrupt brought to light the instruments of trust and thereupon discussions arose concerning courses that the bankrupt might legitimately take, in consequence of his liability to his son, so that property would be withdrawn from the reach of the Commissioner. Such discussions or suggestions may furnish the foundation of the story, but they were never acted upon by actual appropriations of property. We may be sure that if it had been decided to revive the trusts and satisfy the obligations of the bankrupt that ensued from his application of the property or funds affected by them, formal instruments would have been prepared to carry out the intention. Although it is true that an intention to prefer a creditor is quite different from an intention to defeat and delay creditors and that an appropriation to satisfy the trust funds could be given the complexion of a mere preference, yet in the circumstance

of this case, faced as the bankrupt then was by a huge liability to the Commissioner as his sole creditor, the validity of appropriation to his son in satisfaction of the trusts might not be easily defended. At all events it is not remarkable that nothing of the sort was done formally and under legal guidance. I agree with the learned judge in thinking it was not done at all. A contention was put forward that loaded down with liability as the bankrupt was on and from 1930-1931 he would be unlikely to attempt to create trusts in his favour, though he might desire to give beneficial interests to members of his family, and that it was fantastic to suppose that he contemplated avoiding the payment of income tax to which he had been actually assessed. If the bankrupt was found to have continued the use of nominees and to have done so for the purpose of evading tax, then, it was said, his purpose must be taken to have been to escape final assessment for his full liability, not to avoid satisfaction of assessments duly made and upheld. This

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it was contended might, and doubtless did, involve an art or contrivance amounting to a fraud on the revenue laws: see for example sec. 69 of the Income Tax Assessment Act 1922-1934 and sec. 231 of the Income Tax Assessment Act 1936-1945. But so much the worse for the trustee in bankruptcy. For ex turpi causa non oritur actio. The bankrupt could not enforce a trust founded on illegality; the trustee in bankruptcy, so it was said, merely stood in his shoes and had no better title to do so, and the trustee in bankruptcy could not avail himself of the 13 Eliz. c. 5 or its modern statutory version because an attempt to avoid assessment is a purpose of avoiding the imposition of a liability, a purpose of avoiding becoming a debtor, not an intent to defeat a creditor or creditors.

This contention is, I think, met at once by the finding of the fact that in truth the intent of the bankrupt was to defeat and delay creditors. The material items of property held in the name of the appellant which have been declared to have been acquired by

transactions /

transactions in fraud of the bankrupt's creditors are numbered in the notices of motion 1, 2, 4, 5, 6, 7, 9, 10 and 19 or 21. None of these transactions occurred earlier than 1933 and there is ample ground for the conclusion that, confronted with the mounting reassessments of the Commissioner and with the consciousness of years of evasion now discovered, the bankrupt used his son among other dummies for the purpose of defeating the enforcement of his liability. No doubt, under 13 Eliz. c. 5, a transaction actually operating to defeat and delay creditors amounted to an illegality, and if it took the form of a trust for the debtor he could not enforce it by a suit against his trustee [illegible], at all events, where the onus of proof rested on the plaintiff: see Greene and Cotterells Case  Woodford v. Multon, 1601 Cary 13: 21 E.R. 7: Gascoigine v. Gascoigne, 1918 1 K.B., 223 and compare with Payne v. McDonald, 1908 6 C.L.R. 208: Perpetual Executors etc. Co. v. Wright, 1917 23 C.L.R., 185, and Donaldson v. Freeson, 1934 51 C.L.R., 598, cases which, while conceding the

doctrine where the fraud has produced an effect, deny its application where no creditor has actually been defeated or delayed: see Drever v. Drever, 1936 A.L.R., 446, at p. 449. A fraudulent conveyance under 13 Eliz. c. 5 involved penal consequences (see Michael v. Gay, 1858 1 F. & F., 409: 175 E.R. 785) independently of its achieving its end. But sec. 37A of the Conveyancing Act 1919-1939 (N.S.W.) appears to change the nature of the legislation and restrict it to the avoidance of transactions: see Hanbury Modern Equity, 1st Ed., p. 197. Even so, since it is fraud,the doctrine ex turpi causa non oritur actio may continue to apply. But of course that is of no importance to the trustee in bankruptcy, who is one of the class of persons against whom the fraud is not to avail and who cannot be affected by the disqualifications which arise in the case of the bankrupt himself from the application of the maxim. In any case, apart from the statute and on the hypothesis that the trust was in fraud only of the revenue laws, an hypothesis under which item 10 in the notices of motion may fall, I should be of

opinion that the trustee in bankruptcy was not affected by the fact that the bankrupt's purpose was unlawful. The trustee in bankruptcy has a public duty to perform in the interests of an equal distribution of the property in truth belonging to the bankrupt among his creditors and he could not be prejudiced in his remedy by the fraudulent character of a contrivance on the part of the bankrupt to prevent the accrual of a liability to one of them, that is to the Commissioner. The doctrine rests on public policy and the trustee in bankruptcy is, in such a case, outside the policy or reason of the rule.

The third of the specific matters I have to mention relates to the reservation in the decree of the claim, if any, of the appellant's sister to an interest in item No. 1 of the properties in respect of which a trust is declared. This piece of property is the Riverstone Hotel, acquired in the appellant's name for £19,800, of which £10,000 was paid in cash, £9,800 being secured by a mortgage, an amount which has since been reduced to

£5,300. The payment of £10,000 was made from moneys the proceeds of sale of the Royal Hotel Walgett. Part of the consideration originally given by the bankrupt or the appellant for the latter hotel consisted in another property called Wongala Cottage, which in turn had been acquired by way of exchange for some flats called "Raymond". Raymond Flats had been acquired by an exchange to which a property called Aston Gardens standing in the appellant's sister's name had contributed. By this long train an asset once standing in her name was represented in the purchase money paid for the Royal Hotel Riverstone. There was, in addition, a further and much larger contribution from assets in her name. For a place named "Lochgarrie" standing in her name and valued at £8000 was transferred to the vendor of the Royal Hotel Walgett in part satisfaction of the purchase money.

In view of these facts, the learned judge of the Bankruptcy Court, in making the declarations concerning the Royal Hotel

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Riverstone, added by way of proviso that inasmuch as property in the name of the appellant's sister was utilised in the acquisition by the appellant on behalf of the bankrupt of the Royal Hotel Walgett, the proceeds of the sale of which were paid to the vendor of that hotel, and inasmuch as she is not a party to the proceedings, the declarations were made subject to such charge, if any, as the sister may have over the hotel at Riverstone.

In the same way, in declarations made in respect of the beneficial interest in the Walgett Hotel and Raymond Flats while they were in the appellant's name, her rights, if any at that stage, are expressly reserved.

As the notices of motion were originally framed the bankrupt's daughter and other alleged nominees were made parties, but the facts of the case as they now appear not, I assume, being before the Bankruptcy Court, it was held that this involved an inadmissible joinder of separate matters (see 1942 C.L.R., 585, particularly at p. 602).

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On the hearing of this appeal it was objected on the part of the appellant that it was not open to the Court of Bankruptcy to make such a reservation and so to leave the question of the daughter's interest in the air.

In the same way an objection was made to the course taken in respect of item No. 2, the Oceanic Hotel, Coogee. The title to that property was taken in the names of the appellant and his sister together. The declarations in the decree are expressed with reference to the appellant's "interest in the Oceanic Hotel". The objections, although at times presented as if going to non-joinder of parties, appeared to me to come down eventually to the contention that there was no room upon the facts for the view that the appellant was, in the one case, trustee subject to a charge in favour of his sister and, in the other, trustee of an undivided interest and at that an undivided interest of unascertained proportion. As a proposition of fact there is much to be said for the view that either

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the bankrupt was or was not the beneficial owner of the Riverstone Hotel free from any interest on the part of his daughter, and of the Oceanic Hotel as an entirety; for the case made depended on its being his money that acquired the hotels. In other words, it is claimed that there is no room on the facts for a middle position. But that does not seem to me to establish the objection. The course taken in making the declarations, while not very convenient, was the only one left open, once the name of the bankrupt's daughter was removed from the record. The learned judge, to whatever conclusion as to the equitable ownership the facts proved might lead, could not set aside the interest at law of an absent party. It was no fault of the trustee in bankruptcy, who had named the daughter as respondent to his motions, that her absence from the record made it necessary to reserve her rights and to make piecemeal declarations as to the beneficial interest in the hotels.

The fourth of the specific matters I desire to mention is

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is the question whether in reference to the transfer which the appellant has been ordered to make of his interest in the Oceanic Hotel, the decree should provide for some form of indemnity against the liability of the appellant to the vendors of that property for an outstanding balance of purchase money. I cannot find that this question was raised in the Court of Bankruptcy or in the notice of appeal to this court from the decree or order. Under the contract by which the Oceanic Hotel was bought in the names of the appellant and his sister as purchasers a balance of purchase money of £48,000, together with £2000 for chattels, was payable on 31st December 1942. The contract contemplated completion by conveyance on 31st December 1939, the balance of £48,000 being then secured by a mortgage given to the vendor by the purchasers. Apparently, however, the matter still remains in contract. The appellant's liability under the contract to the vendor will of course continue notwithstanding that, in obedience to the decree, he vests his interest in the trustee in bankruptcy.

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As a trustee the appellant is entitled to be indemnified out of the asset in respect of this liability. That is to say, for anything he paid on account of purchase money he would be entitled to a lien or charge over the interest in the land to which the contract and the payment of purchase money gave rise. His lien or charge would of course attach also to the legal estate, if the contract were completed by conveyance to him and his sister. As his sister and he appear to have been trustees for his father absolutely, that is as a person entitled to the full beneficial interest in the contract of sale, they would, prima facie, be entitled, before his bankruptcy, to be indemnified by him personally. "Where the only cestui que trust is a person sui juris, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property: it extends further and imposes upon the cestui que trust a personal obligation enforceable in equity to

indemnify his trustee"- Hardoon v. Belilios, 1901 A.C., 118, at p. 124 per Lord Lindley for the Privy Council. This doctrine applies equally to a cestui que trust who takes his equitable title by assignment from the original beneficial owner, that is if he becomes the only and absolute cestui que trust: Hardoon v. Belilios ibid: Ashburner Equity, 2nd Ed., 160-162.

When the court orders a transfer of the estate or interest held by a trustee to his cestui que trust and liabilities have attached to the trustee which will continue in him, notwithstanding the transfer, a proper indemnity on the part of the cestui que trust taking the conveyance will be required. See the decrees in Keech v. Sandford, 1726 Cas. T. King, at p. 62: 25 E.R. at p. 224: Giddings v. Giddings, 1827 3 Russ. 241, at p. 260: 38 E.R., 567, at p. 574, both, however, cases of constructive trust.

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To what extent then is the appellant entitled to be indemnified by the trustee in bankruptcy? Clearly he is entitled to have his right preserved to a lien or charge, should he be called upon to pay any of the balance of purchase money. He is, according to the foregoing principles, also entitled to have from the trustee in bankruptcy on transfer of his interest an indemnity to be answered at all events out of the estate. Is he entitled to go beyond this and to have the personal indemnity of the trustee in bankruptcy? On the whole I think not. The trustee takes as an officer of the court in his representative capacity. If before the bankruptcy the appellant had assigned the interest under the contract to his father, he would have had only his father's obligation, which would have been turned into a right of proof upon the assets. It is recognised in Hardoon v. Belilios ibid at p. 127 that if "there is no beneficiary who can justly be expected or required personally to indemnify the trustee against /

against the whole of the burdens incident to his legal ownership", the indemnity may be limited to the trust estate. The instances from which the generalization is drawn are trusts for tenants for life, or for infants and special trusts limiting the right of indemnity. But the affirmative imposition of personal liability is limited to cestuis que trust absolutely entitled to the full beneficial interest and sui juris. The trustee in bankruptcy is not within the class: see Elliott v. Canadian Credit Men's Trust Association Ltd., 1935 S.C.R. (Can.) 1 at pp. 11-12, per Hughes J. In my opinion the assurances vesting the interest under the contract in the trustee in bankruptcy should be expressed to be without prejudice to the appellant's right to a lien or charge thereover in case of his being called upon to pay and paying any part of the outstanding balance of purchase money and should contain an indemnity by the trustee in bankruptcy out of the estate against liability for the balance of purchase money. As the

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matter has now been raised, it would be as well to amend the decree or order so that this requirement is expressed therein.

There are two further matters affecting the form of the decree. Following the notices of motion, the decree makes declarations concerning properties which were placed in the name of the appellant but were afterwards sold or otherwise disposed of. They are items Nos. 11, 12, 13, 14, 15, 16, 17, 18, 21, 23, 24. The transactions form part of the history of the funds applied in the acquisition of the properties in respect of which active or effective relief was claimed. It is objected, however, that the declarations are made in the air and expose the appellant to a risk of subsequent orders to account to which he should not be exposed. The declarations are strictly in accordance with facts found after an exhaustive enquiry. They say with precision simply that the particular item of property belonged beneficially to the bankrupt while it stood in the name of the appellant. Such a declaration /

declaration does not of itself involve a liability on the part of the appellant to account. A nominee who does not handle the rents and profits or proceeds of the property is but a dry trustee. In the circumstances of this case it may be true that no consequential relief will be claimed or would be granted under these declarations. Counsel for the trustee in bankruptcy said that the footing on which he desired the court to deal with the decree was that it did not per se impose a personal liability upon the appellant in relation to those items of property with which he had parted. But in a complicated series of fraudulent transactions such as these before the court it does not seem unwise for a court of administration, as the Court of Bankruptcy is, to declare the beneficial right in property that has been dealt with by the bankrupt. It is a step in ascertaining other rights declared by the decree and a step, but no more then a step, in determining other possible questions between the appellant and the trustee in bankruptcy /

bankruptcy. In my opinion these declarations should not be disturbed.

Finally, a point was made in relation to item No. 10 in the notices of motion. The item relates to 100 shares in Hotel Riverstone Pty. Ltd., a company formed just a year before the commencement of the bankruptcy. It was that the appellant was entitled to be indemnified against expenses he may have incurred in and about the formation of the company and the acquisition of the shares. Counsel for the trustee in bankruptcy seemed inclined to acquiesce in this view, but the matter is relatively trivial and I am unable to say whether the appellant found any money from his own resources. If the parties agree about it, the decree can be amended to give effect to the point, but I am not prepared, on my understanding the facts, to say that it should be done, particularly as it is not a matter raised in the notice of appeal, or,I think, before the Court of Bankruptcy.

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Subject to what I have said about amendments in the order I think that the appeal should be dismissed with costs.