**Public Trustee v. Mortimer et al.**49 O.R. (2d) 741

**ONTARIO
HIGH COURT OF JUSTICE
SOUTHEY J.**
15TH FEBRUARY 1985.

*Partnership — Liability of partners — Fraud of partner — Partner in law firm acting as executor and defrauding estate — Using staff and facilities of partnership for administration of estate — Partnership liable for loss — Partnerships Act, R.S.O. 1960, c. 288, ss. 11, 12.*

*Limitations — Tort — Fraud — Partner in law firm acting as executor and defrauding estate — Leaving firm and concealing fraud — Fraud not discovered for five years — Action brought within six years of discovery of fraud — Action not barred — Limitations Act, R.S.O. 1980, c. 240, s. 45(1)(g).*

*Judgments and orders — Res judicata — Surrogate court judge absolving trustee of default in fraud by co-trustee on passing of accounts — Surrogate court lacks jurisdiction to decide issue — Not res judicata.*

*Judgments and orders — Interest — Prejudgment — Entitlement — Partners in law firm liable for theft by partner from estate — Liability for interest arises by statute and under general trusts law — No prejudgment interest awarded — Partnerships Act, R.S.O. 1960, c. 288, ss. 11, 12 — Judicature Act, R.S.O. 1980, c. 223, s. 36(5)(f).*

   The defendant, M, had acted as solicitor for the deceased since 1960 and held her power of attorney. In 1965, she made a will in which M and the defendant, A, his partner, were named executors and trustees. M and A and a third solicitor were also given a new power of attorney. The will gave a number of legacies and directed the trustees to pay the income from the residue to the deceased's god-daughter, C, her husband and their children in England until the death of C and her husband. Thereafter, certain legacies were to be paid to the children or their issue and other legatees and the balance was to be divided among certain charities. Subsequently in 1965 M and A joined the T.R. firm as partners. The deceased died in 1966 and letters probate were issued to the executors. The probate value of the estate was approximately $517,000. A did not take an active part in the administration of the estate and was not aware that he held a power of attorney. During the administration of the estate M used the staff and facilities of the T.R. firm. A left the T.R. firm in 1968 and M in 1969. It was subsequently discovered that M had stolen approximately $197,000 from the estate before he resigned from the firm. Subsequent thefts raised this amount to approximately $207,000. C and her family were unaware of the thefts until 1974 because M made payments to them of what he represented to be interest. They were concerned about delays in payments and M's failure to send them copies of the income tax returns and accounts and their solicitor wrote to M about these matters. Their concerns were alleviated when M thereafter paid C and her family promptly. However, in 1974 a cheque to them was returned N.S.F. and investigations then disclosed the defalcations. M pleaded guilty to fraud charges and was disbarred. On application by the plaintiff, the Public Trustee, the executors were removed and the Public Trustee was appointed sole trustee. On a subsequent passing of accounts in the surrogate court, A was held to have fulfilled his duty to account and was absolved of negligence and liability in M's fraud. The Public Trustee made application to the Law Society of Upper Canada for compensation and received a small proportion of the amount stolen as compensation. The Public Trustee then brought this action against M, A and the persons who were partners of the T.R. firm at the relevant times, or their estates, for damages for M's fraud.

   **Held,** judgment should be awarded to the plaintiff.

   (1) In order for M's former partners to be liable under ss. 11 and 12(a) of the Partnerships Act, R.S.O. 1960, c. 288, it must be shown that he acted in the ordinary course of the business of the firm or within the scope of his apparent authority. While the T.R. firm was a firm of solicitors and not a firm of executors and trustees, M did act in the ordinary course of business and within the scope of his apparent authority, because the firm permitted him to use its staff and facilities. Moreover, all correspondence was on the firm's letter-head, the estate's accounts were recorded in the firm's ledgers and accounts were rendered in the name of the firm. In addition, the partnership agreement stipulated that all offices and appointments held by a partner were held for the benefit of the partnership.

   (2) The action against M was not statute-barred since he was an express trustee and was a party to the fraud. A limitation period of six years applied to the action against the other defendants under s. 45(1)(g) of the Limitations Act, R.S.O. 1980, c. 240. However, in equity the period does not begin to run until the fraud is discovered or could reasonably have been discovered. It could not reasonably have been discovered until 1974. The cause of action was the fraud, not the concealment of it (the latter occurring after M had ceased to be a partner in the T.R. firm) and the action having been commenced within six years of the discovery of the thefts in 1974 could, therefore, be maintained against all the defendants.

   (3) The issue of A's liability was not res judicata because of the decision of the surrogate court judge on the passing of accounts. The surrogate court judge had no jurisdiction in those proceedings to decide the issue of A's vicarious liability under the Partnerships Act.

   (4) M was liable for the entire amount of the loss and the other defendants for the amount of the thefts which occurred while M was a partner. In addition, the defendants were liable on those respective amounts for the interest which those amounts would have earned if conservatively invested from 1974 until judgment, plus compensation for the beneficiaries' deprivation of the income, less deductions for compensation and expenses to the trustees. Interest should be calculated in this way rather than as prejudgment interest under s. 36 of the Judicature Act, R.S.O. 1980, c. 223, because the interest liability arises as of right by virtue of ss. 11 and 12 of the Partnerships Act and because M was a trustee. In those circumstances, s. 36(5)(f) of the Judicature Act precluded an award of prejudgment interest.

   Thompson v. Robinson (1889), 16 O.A.R. 175; Blair v. Bromley (1846), 5 Hare 542, 67 E.R. 1026; affd 2 Ph. 354, 41 E.R. 979; Moore v. Knight, [1891] 1 Ch. 547, *apld*

   Johnston v. Brandon (1919), 45 O.L.R. 369, *distd*

**Other cases referred to**

   Reitmeier v. Exner et al. (1970), 12 D.L.R. (3d) 627, 75 W.W.R. 97; revd 23 D.L.R. (3d) 744n, [1971] 5 W.W.R. 384; Rhodes v. Moules, [1895] 1 Ch. 236; Earl of Dundonald v. Masterman (1869), 7 Eq. 504; Re Cooper (No. 1) (1976), 21 O.R. (2d) 574, 90 D.L.R. (3d) 710; Re Cooper (No. 2) (1978), 21 O.R. (2d) 579, 90 D.L.R. (3d) 715

**Statutes referred to**

Charities Accounting Act, R.S.O. 1980, c. 65
Judicature Act, R.S.O. 1980, c. 223, s. 36 -- since repealed by Courts of Justice Act, 1984 (Ont.), c. 11, s. 187
Limitation Act, 1939 (U.K.), c. 21
Limitations Act, 1910 (Ont.), c. 34
Limitations Act, R.S.O. 1980, c. 240, ss. 28, 43, 45(1)(g)
Partnerships Act, R.S.O. 1960, c. 288 -- later R.S.O. 1970, c. 339, now R.S.O. 1980, c. 370 -- ss. 11, 12
Trustee Act, R.S.O. 1970, c. 470 -- now R.S.O. 1980, c. 512 -- ss. 33, 35

   ACTION for damages for fraud in respect of moneys stolen from an estate by a solicitor acting as executor for the estate.

   T. C. Marshall, Q.C., and D. Saxe, for plaintiff.

   R. V. Smiley, Q.C., and J. Hurley, for all defendants except Charles S. M. Mortimer and William Andrews.

   William Andrews, Q.C., defendant, appearing in person.

   No one appearing for defendant, Charles S. M. Mortimer.

   **SOUTHEY J.**:— This is an action by the Public Trustee for damages for the fraud of the defendant Mortimer in stealing more than $200,000 in which a number of charities were interested from an estate of which Mortimer was executor. The theft occurred during the years 1967, 1968 and 1969, while Mortimer was practising law in partnership with the other defendants, but without their knowledge or complicity in any way. The thefts were not discovered until 1974. The action was commenced in 1980. Mortimer did not deny liability.

   The following are the principal issues:

1. In acting as an executor and trustee was Mortimer acting in the ordinary course of the business of the law firm, or within the scope of his apparent authority from the firm, within the meaning of ss. 11 or 12(a) of the Partnerships Act, R.S.O. 1980, c. 370?

2. Was the action against the former partners statute-barred at the expiration of six years from the time the alleged cause of action arose?

3. The extent to which interest should now be awarded in respect of the amount stolen, whether by way of damages or otherwise.

The background

   Mortimer was called to the bar in 1951. On June 24, 1965, Amy Frances Cooper, a woman of advanced years, signed a will in which she named Mortimer and Andrews as executors and trustees of her estate. Andrews had been called to the bar in 1962, and was practising in partnership with Mortimer. Mortimer had been the trusted solicitor and adviser of Mrs. Cooper for a number of years, as had his father before him. In 1960 she had given Mortimer a general power of attorney to manage her affairs, and this was replaced on the day she signed her will by a similar power of attorney to Mortimer, Andrews, and another person practising law with them. Andrews' evidence was that he could not remember ever having met Mrs. Cooper, and that he had not been aware of the power of attorney until many years later. It is clear that Andrews was known to Mrs. Cooper only through Mortimer.

   The will provided for the payment of a number of legacies to individuals and charities totalling $162,000. The residue was then to be retained by the trustees, who were directed to pay the income therefrom to the god-daughter of the testatrix, Mrs. Margaret Cracknell, of Guildford in England, her husband, Frederick Cracknell, and their children, in such proportions as the trustees should decide, for as long as either Mr. or Mrs. Cracknell should live. The trustees were authorized to encroach on capital for the benefit of Mr. and Mrs. Cracknell or their children to the extent that the trustees in their absolute discretion should consider advisable. Upon the death of the survivor of Mr. and Mrs. Cracknell, another round of legacies was to be paid to the Cracknell children, or their issue, and to any other individual legatees still living. The balance of the estate was then to be divided equally among the charitable legatees.

   The will provided that, on the death, resignation or inability to act of either of the trustees, the other trustee could act alone, or appoint another corporation or person to act with him. The trustees were given power to invest the moneys of the estate in such investments as they in their absolute discretion should deem advisable, without being limited to investments authorized by law for the investment of trust funds.

   Although the relationship between Mrs. Cooper and Mortimer was a professional one only, it is clear that she placed complete trust in his honesty and judgment. He had been handling all of her affairs since 1960, including the management of her portfolio of securities and paying her bills, and he arranged for her to be admitted to a nursing home when she became ill early in 1966.

   On October 15, 1965, Mortimer and Andrews joined the firm of Thomson, Rogers, as partners. Mrs. Cooper died on July 7, 1966. Letters probate were issued to Mortimer and Andrews on December 6, 1966. Andrews took little or no active part in the affairs of the estate, and purported to resign as trustee in a letter to Mortimer dated June 29, 1967. That letter was never filed with the surrogate court, and no steps were taken by Andrews to have himself removed as executor by order of the court. In the result, he remained an executor of the estate until removed by order of O'Driscoll J., made on May 31, 1976, after Mortimer's thefts had been discovered.

   Work on the estate was done largely by Mortimer and by Donald B. MacDermott, a junior solicitor employed by the firm of Thomson, Rogers, who worked with Mortimer. In addition to the application for probate, they attended to the distribution of the personal belongings of the deceased in accordance with the will, liquidated most or all of the assets, paid the debts and legacies, and, after consultation with the Cracknells, commenced to make payments of income in equal amounts to Mr. and Mrs. Cracknell and their three children. The property of the deceased was valued at $517,157.03 in the application for probate.

   Andrews left Thomson, Rogers in December, 1968. Mortimer left the firm on February 28, 1969. The reasons for departure from the firm of these two defendants were entirely unrelated, and Andrews did not know when he left that Mortimer would be leaving. At the time Andrews left, he had no suspicion that Mortimer had been stealing from the estate. Andrews, like the Cracknells, continued to have complete confidence in the integrity of Mortimer until 1974. MacDermott left Thomson, Rogers at the end of July, 1967. There is no suggestion that he was involved in any way in the frauds, or that he had knowledge of them.

   It subsequently was discovered that Mortimer had stolen from the estate money and securities having a total value of $197,608.19 between June 29, 1967, when Andrews signed the letter of resignation, and February 28, 1969, when Mortimer ceased to be a member of the Thomson, Rogers partnership. Subsequent thefts by Mortimer bring the total of capital misappropriated by him while a partner of Thomson, Rogers and afterwards to $207,197.84. The extent of the thefts and the time they occurred were not disputed by any of the defendants. Generally speaking, Mortimer carried out the thefts by using funds of the estate to purchase term deposits or guaranteed investment certificates with trust companies and taking the funds for his own use at maturity, or by selling or depositing with brokers in his own accounts securities that were in bearer form.

   The Cracknells were unaware of the thefts for more than five years, because Mortimer continued to make payments to them of what he represented as being the interest to which they were entitled. When one of his cheques was returned unpaid in August, 1974, the Cracknells arranged for instructions to be given to Toronto solicitors to investigate the affairs of the estate, obtain accounts (which Mortimer had never provided) and ultimately have Mortimer replaced by a corporate trustee. By that time, however, Mortimer was an inmate of the Clark Institute, receiving treatment for alcoholism, and his law practice was being investigated by the Law Society of Upper Canada.

   Mortimer was arrested in early October, 1974, and charged with defrauding the Cracknells and other clients. It was discovered that there were no assets remaining in the Cooper estate. Mortimer was disbarred on October 18, 1974. On February 4, 1975, he pleaded guilty to 12 charges of fraud, including that relating to the Cooper estate, and was sentenced to a term of imprisonment of seven years and six months on each charge, concurrent.

   Because of the gifts to charities in the will, the Public Trustee had been given notice in 1966 of the application for probate, as required by the Charities Accounting Act, R.S.O. 1980, c. 65. On July 25, 1974, as a matter of routine, the Public Trustee's office wrote to Thomson, Rogers inquiring as to when the accounts of the estate would be passed. This letter was apparently forwarded to Mortimer's office, which wrote to the Public Trustee on September 3, 1974, informing him of Mortimer's illness.

   On October 10, 1975, the Public Trustee moved for an order requiring Mortimer and Andrews to pass their accounts in the surrogate court, requiring them to pay into court any funds of the Cooper estate in their hands, and removing them as executors. This motion, and a motion by Andrews for an order removing the proceedings into the Supreme Court and declaring that the affidavit which he had prepared and filed was a sufficient statement and account of his dealings, came before O'Driscoll J. on January 21, 1976. He rendered judgment on May 31, 1976 [Re Cooper (No. 1), 21 O.R. (2d) 574, 90 D.L.R. (3d) 710], granting the application by the Public Trustee, and appointing him to be the sole trustee, and dismissing Andrews' application. The formal orders of O'Driscoll J. on the motions were not entered until October 28, 1976. Both formal orders were incorrectly dated January 21, 1976.

   The next step appears to have been a petition by Andrews in the surrogate court, dated June 2, 1977, asking that the accounts be audited, taken and passed. Andrews had filed extensive accounts together with affidavits dated May 24 and June 2, 1977, in an effort to comply with the order of O'Driscoll J. He had filed a further affidavit dated September 3, 1977, before the first hearing held by His Honour Judge Trotter, the surrogate court judge, on September 19, 1977. Andrews was directed on that date to obtain further information, which he did. The matter came on again before Judge Trotter on June 21, 1978, at which time Mortimer gave viva voce evidence. The Public Trustee took the position before the surrogate court judge that the material filed by Andrews was not adequate, and that he should be found liable. These submissions were rejected by Judge Trotter in reasons delivered on June 30, 1978 [Re Cooper (No. 2), 21 O.R. (2d) 579, 90 D.L.R. (3d) 715], in which he observed that the accounts as filed were not in the usual form, but that in many respects they were more extensive and detailed than the usual accounts. He concluded that Andrews had made every reasonable effort to obtain the information requested of him, and then said [at p. 582 O.R., p. 718 D.L.R.]:

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|  |    I accept Mr. Andrews' explanation as to his association with Mr. Mortimer in this matter. I find as a fact that Mr. Andrews had no reason to suspect Mr. Mortimer of dishonesty and in all the circumstances acted as a prudent executor and trustee would have acted under the circumstances. There was no misconduct, neglect or default on the part of Mr. Andrews. The loss through this estate was occasioned wholly by the wilful misconduct and appropriation to his own use by Mr. Mortimer. In the normal business relations that Mr. Andrews would have had with Mr. Mortimer in the Thomson, Rogers firm there was no reason for Mr. Andrews to suspect Mr. Mortimer of any dishonesty and I find as a fact that there is no way in which Mr. Andrews can be blamed for the losses suffered by this estate. Admittedly, it is a most unfortunate loss to the beneficiaries of the estate but it should be remembered that it was the deceased during her lifetime who misplaced her trust in Mr. Mortimer and not in Mr. Andrews. |  |

   The formal order of Judge Trotter was signed on October 17, 1978.

   Following receipt of the reasons of Judge Trotter, the Public Trustee made application to the Law Society of Upper Canada for compensation. A hearing was held before a referee, who issued a report in July, 1979 (according to the index in ex. 1), in which he, with regret, refused to agree with the argument, very persuasively put by the Public Trustee, that the $25,000 limit for individual claims should apply in relation to each of the individuals and charities who suffered loss. In the result, the Public Trustee received only $13,750 from the Law Society. Of more significance to these proceedings is the fact that the referee referred in his report to ss. 11 and 12 of the Partnerships Act, and caused the Public Trustee to consider for the first time a claim against the partners of Thomson, Rogers.

   Eventually, the Public Trustee commenced this action on August 22, 1980, against the persons who were the partners of Thomson, Rogers at the material times, or their personal representatives. Thus, the writ was issued more than 11 years after Mortimer ceased to be a partner of Thomson, Rogers, but before the expiration of six years from August 29, 1974, the date of the letter to J. H. Cracknell from his bank reporting that Mortimer's cheque of July 3, 1974, had been returned unpaid, because of "not sufficient funds".

   The plaintiff abandoned at trial its claim against the partners of Thomson, Rogers based on negligence, breach of contract and breach of trust. The plaintiff makes no claim against Andrews in this action for his conduct as a co-trustee, so that the issues as to his liability are the same as those in the case of the other defendants (apart from Mortimer). The action was discontinued without costs as against Marjorie Muir Thomson and Canada Trust Company, executors and trustees under the last will and testament of Berence J. Thomson, deceased.

Application of ss. 11 and 12(a) of the Partnerships Act

   Mr. Smiley provided me with a copy of the Partnerships Act, R.S.O. 1970, c. 339. Ms. Saxe provided me with a copy of the Partnerships Act, R.S.O. 1980, c. 370. The relevant sections, namely, s. 11 and s. 12(a) are the same in both those consolidations, and are identical with the same sections in the statute in force at the time of the thefts, namely, R.S.O. 1960, c. 288. The sections read as follows:

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|  |    11. Where by any wrongful act or omission of a partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to a person not being a partner of the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act. |  |

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|  | 12. In the following cases, namely, |  |

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|  |  (a)  where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it; |  |

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   the firm is liable to make good the loss.

   The thefts by Mortimer occurred because of his control over the assets of the Cooper estate resulting from his position as executor and trustee. The position of the defendant partners is that they were at all material times a firm of barristers and solicitors, not a firm of executors or trustees, and that Mortimer was not acting in the ordinary course of the business of the firm when he acted as executor and trustee. Mr. Smiley referred to the unfettered discretion given to the trustee under the will with respect to investments, and likened their position to that of a scrivener (one who receives money to place it out at interest). He relied on the decision of Clute J. in Johnston v. Brandon (1919), 45 O.L.R. 369, who, at p. 374, referred to the following passage dealing with scriveners in the decision of the Court of Appeal in Thompson v. Robinson (1889), 16 O.A.R. 175:

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|  |    Osler, J.A. (p. 181), referring to Harman v. Johnson (1853), 2 E. & B. 61 [118 E.R. 691], quotes Crompton, J., as saying: "Attorneys may often become liable for similar acts of their partners, where the partnership is in the habit of carrying on business by what you may call a general commission; but they do not necessarily act under such a general commission." It was held in the Harman case that the receipt of money by one of the firm of attorneys from a client, professedly on behalf of the firm, for the general purpose of investing it, as soon as he can meet with a good security, is not an act within the scope of the ordinary business of an attorney, so as, without further proof of authority from his partners, to render them liable to account for the money so deposited; such a transaction being part of the business of a scrivener, and attorneys, as such, not necessarily being scriveners. But, if money be deposited with one partner for the purpose of its being invested on a particular security, the other partners are liable to account for it, such a transaction coming within the ordinary business of an attorney. |  |

   Clute J. distinguished Thompson v. Robinson on the grounds that in the case before him it did not appear that the moneys sought to be recovered were received for any particular investment, and because there was in fact no partnership. He held that the innocent person (Brandon), whose name was included in the firm name, but who was not a partner, was not liable.

   In Thompson v. Robinson, the innocent partner was found liable for the money lost on some mortgages in which the plaintiff 's money was invested, because the money in question was actually received by the firm, entered in its books, deposited in its bank account, and paid out to borrowers on the firm's cheques.

   After reading the other authorities on which Ms. Saxe relied, it appears to me that it is a question of fact in every case whether a particular transaction is part of the ordinary course of the business of the firm, or whether a partner receiving money or property is acting within the scope of his apparent authority when he does so. The fact that a transaction is dealt with in the books of the firm is strong evidence that it is part of the ordinary course of the business of the firm: see, particularly, the dissenting judgment of Brownridge J.A. in Reitmeier v. Exner et al. (1970), 12 D.L.R. (3d) 627, 75 W.W.R. 97 (Sask. C.A.); approved by the Supreme Court of Canada at 23 D.L.R. (3d) 744n, [1971] 5 W.W.R. 384; Rhodes v. Moules, [1895] 1 Ch. 236, and Earl of Dundonald v. Masterman (1869), 7 Eq. 504.

   I think it is quite possible for the affairs of a law firm to be arranged in such a way that a partner acting as an executor of an estate would not be acting in the ordinary course of the business of the firm. The firm could exclude such activity from its business. There would probably be an agreement between the partners to that effect, and one might expect to find that the partner would not charge the estate on an account issued in the firm's name, would personally keep any fees and compensation paid, rather than treat them as revenues of the firm, would keep the funds of the estate in an account separate from his firm's trust account, and would keep a set of accounting records from the estate separate from those of his firm. If he wanted to be careful to make it clear that his work as an executor was not part of the firm's business, he would not use firm letter-head when writing as an executor.

   None of these indicia that might have suggested that Mortimer's work as an executor and trustee of the Cooper estate was not done as part of the ordinary business of the Thomson, Rogers firm were present in the case at bar. There was no evidence of an agreement excluding such work from the firm's business. Instead, the general partnership agreement provided that all offices and appointments held by any partner during the partnership were to be held for the benefit of the partnership. Some of the work in connection with the estate that was clearly the work of the executors rather than of the estate's solicitors, for example, the distribution of income, was done for Mortimer (and Andrews) by Donald MacDermott, a junior solicitor employed by the firm. The typing and bookkeeping was done by employees of the firm's management company. Almost all correspondence with the Cracknells by both MacDermott and Mortimer was on firm letter-head. The record of receipts and disbursements made in connection with the estate was kept in the firm's ledgers, the funds of the estate were deposited in the firm's bank account, and payments to legatees and creditors were made by firm cheques. Accounts for "compensation applicable to income" were rendered in the name of Thomson, Rogers and were addressed to Mortimer as trustee. The evidence includes several letters from MacDermott to the Cracknells reporting that "Executors' fees" were chargeable in respect of income. Such compensation and charges were paid by deduction from the sums that otherwise would have been paid to the income beneficiaries and were taken into the firm's revenues.

   I think the conclusion is unavoidable on the foregoing evidence that Mortimer's work as an executor and trustee of the Cooper estate was done while he was acting in the ordinary course of the business of the firm. The only evidence to the contrary was the statement by Mr. Outerbridge, who was the managing partner of Thomson, Rogers at the time, that the firm was not carrying on business as executor, administrator or trustee. Mr. Outerbridge, in my judgment, was in error.

   While there may be some question as to whether Mortimer, as executor and trustee, was acting in the ordinary course of the business of the firm, there can be no doubt, in my view, that the firm, by permitting Mortimer to use the stationery, accounts, staff and other facilities of the firm in connection with his activities as executor and trustee, had vested Mortimer with apparent authority to receive the money or property of the estate which he subsequently misapplied. I therefore find that the partners of Thomson, Rogers at the time Mortimer stole the funds of the estate became liable to the estate, or its beneficiaries, for their losses under both s. 11 and s. 12(a) of the Partnerships Act.

Application of the Limitations Act

   The rules respecting the limitation of actions against a trustee, which includes an executor, are contained in s. 43 of the Limitations Act, R.S.O. 1980, c. 240. They are inapplicable to the claim against Mortimer, because they do not apply where the claim is founded upon a fraud to which the trustee was a party. The claim against Mortimer is not subject to any limitation period.

   The exception for fraud contained in s. 43(2) not only applies to an action against a trustee, but also to an action against a person claiming through a trustee. Ms. Saxe submitted that the other partners of Thomson, Rogers were persons claiming through Mortimer, so that the action against them was also not covered by any limitation period. She did not develop the argument, however, and I reject it simply because I do not understand how it can be said that the other partners are in any way claiming through Mortimer. I suspect that this "claiming through" provision has no application to the type of claim with which we are here concerned.

   If the partners of Thomson, Rogers are liable for the fraud committed by Mortimer, they are liable vicariously under the provisions of the Partnerships Act that I have dealt with above. The issue that has given me most difficulty in this case is the application of the Limitations Act to the claim in respect of that liability.

   Counsel for all parties appeared to accept that the applicable limitation period was six years under s. 45(1)(g) of the Limitations Act, which provides:

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|  |    45(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned, |  |

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| (g) |  | an action ... upon the case other than for slander, |  |

   within six years after the cause of action arose ...

   Mortimer's frauds took place no later than March of 1969, more than 11 years before the action was commenced, but he concealed them from the Cracknells until August, 1974, by making payments to them with more or less regularity. He represented these payments as being the interest on the capital of the estate, and in his correspondence with the Cracknells and others he maintained the facade that the trust funds of the estate existed and were earning interest. The plaintiff relies on the rules respecting the postponement of the commencement of the limitation period in cases of concealed fraud.

   The only reference to concealed fraud in the Limitations Act is in s. 28, pertaining to actions for the recovery of land or rent. It reads as follows:

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|  |    28. In every case of a concealed fraud, the right of a person to bring an action for the recovery of any land or rent of which he or any person through whom he claims may have been deprived by the fraud shall be deemed to have first accrued at and not before the time at which the fraud was or with reasonable diligence might have been first known or discovered. |  |

The section is clearly inapplicable to the case at bar, but I should think that in a uniform system of law the same rule would be applicable in all cases of concealed fraud.

   As is pointed out in the "Report on Limitation of Actions" of the Ontario Law Reform Commission (1969), at p. 109, there are certain equitable rules outside the express terms of the Act, which postpone the running of time in certain fraud and mistake situations. The authors of the report said: "The extent of these equitable rules is neither clear nor sufficient." They then referred to the English Law Revision Committee "Report on Limitations" (1936), in which the following was said at p. 29:

THE EFFECT OF CONCEALED FRAUD

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| 22. |  | As a general rule it is no answer to a plea of the Statutes of Limitation to say that the plaintiff was unaware of the existence of his cause of action until after the expiration of the statutory period. But cases may occur in which such ignorance on the part of the plaintiff is brought about by the fraudulent conduct of the defendant. Either the cause of action may spring from the fraud of the defendant or else the existence of a cause of action untainted in its origin by fraud may have been concealed from the plaintiff by the fraudulent conduct of the defendant. It is obviously unjust that a defendant should be permitted to rely upon a lapse of time created by his own misconduct, but the present state of the law is so obscure and pregnant with difficulties that it must be regarded as uncertain whether a fraudulent defendant can in all cases be prevented from setting up the plea that the action has been brought out of time. |  |

      Up to a point the law is reasonably clear.

   The report then refers to suits in equity for the recovery of land or rent, and continues at p. 30:

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|  | Much of the ground is also covered by the equitable doctrine that a plaintiff is not to be affected by the lapse of time where his ignorance is due to the fraud of the defendant, and he has had no reasonable opportunity of discovering such fraud before bringing his action. The extent, however, of the area within which the equitable doctrine is operative is still a matter of doubt and controversy. |  |

   The uncertainties in the English law resulted in large part from the differences in jurisdiction between the courts of law and the courts of equity. The 1936 committee recommended changes in the statute, as did three later law reform studies in 1949, 1962 and 1966, and substantial legislative reforms were made in England in 1939, 1954 and 1963.

   There has been no substantial overhaul of the Limitations Act in Ontario, which was first enacted in 1910 [c. 34]. The report of the Ontario Law Reform Commission said at p. 7 in its reporting letter to the Attorney-General:

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|  |    The Limitations Act of Ontario (R.S.O. 1960, c. 214) is a collection of provisions drawn from thirteen English statutes enacted between 1588 and 1888. In many respects the meaning of the Ontario statute is obscure, its language archaic and its substance out of touch with modern conditions. |  |

   Because there has been no new legislation in Ontario, it is necessary to apply the equitable principles that have become established outside our statute, and in England before legislative reform occurred. These are the principles described above as "neither clear nor sufficient".

   I think that the old rule applicable in cases of fraud is correctly stated in the old Ontario text Weaver on Limitations (1939), at p. 334:

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|  |    Therefore fraud on the part of one party prevents the Statute from running until it is discovered or until it might with reasonable diligence be discovered, and, where there are no laches on the part of the person defrauded, his action is not barred even though the other party took no active steps to conceal the fraud. In Bulli Coal Mining Company v. Osborne [[1899] A.C. 351], which was an action for trespass in taking coal furtively from the underground working of a mine, Lord James of Hereford says at page 363 "It has always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is therefore no room for the application of the Statute in the case of concealed fraud so long as the party defrauded remains in ignorance without any fault of his own. The contention that the Statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity." |  |

   The question of laches would also depend in this case on whether the Cracknells could have discovered the true situation with the exercise of reasonable diligence. I refer to the following passage in Franks on Limitation of Actions (1959) (London), p. 237:

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|  |    This principle that ignorance negatives laches underlies the rules governing fraud and mistake. Thus where the plaintiff 's claim to relief rests upon the defendant's fraud or where, being non-fraudulent, its existence has been fraudulently concealed from the plaintiff by the defendant, lapse of time cannot prejudice the plaintiff until he discovers the true situation or could, with the exercise of reasonable diligence, have discovered it. Where the parties stand in a fiduciary relationship to each other it is insufficient for the defendant to show simply that the plaintiff had the means of discovering the fraud: he must prove that the plaintiff 's suspicions were aroused and that he determined not to investigate. This general rule that time does not count against the plaintiff until the fraud is or could be discovered applies, not only where the doctrine of laches is alone applicable, but also where the Statute is applied by analogy; and semble, where it applies directly as well. |  |

   In a footnote on the same page, the author makes the following statement, which is relevant to the situation in Ontario today:

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|  |    Since the 1939 Act has an express exception for fraud, this equitable rule is now only relevant (a) to actions under other limitation statutes, (b) to causes of action based on or concealed by fraud as yet undiscovered, which accrued prior to the commencement of the 1939 Act. |  |

   Mortimer's fraudulent concealment of his thefts by sending the income beneficiaries what purported to be interest, and by speaking in his letters as though the trust fund still existed, occurred for the most part after he had ceased to be a partner of Thomson, Rogers. But the Cracknells' claim that the limitation period had not commenced to run until August or September, 1974, does not depend on the fraudulent concealment, because the cause of action being concealed was itself a fraud. This is very important, because the acts of fraudulent concealment committed by Mortimer after he had left Thomson, Rogers could not, in my opinion, have made his former partners vicariously responsible.

   Mr. Andrews argued that the Cracknells ought to have known of Mortimer's fraud as far back as 1970, and that they remained unaware of it only because they failed to exercise reasonable diligence. He pointed out that Mortimer had never sent accounts for the estate to the Cracknells. Mortimer was asked in a letter dated March 16, 1967, from Messrs. Allen and Overy, the Cracknells' solicitors in London, England, to provide copies of the trust accounts as soon as they became available. He replied on March 22, 1967, saying that the executors' formal accounts would be sent as soon as they were prepared, but warned:

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|  | That may be upwards of three years, having regard to the delays which now occur in the Ontario Succession Duty Office. Thereafter, formal accounts will be prepared for passing at intervals of about five years each. |  |

About a year later, on March 12, 1968, Mortimer stated in a letter to Mr. Cracknell that the estate accounts were still in the course of preparation, and referred to certain complexities. In November, 1968, Mortimer sent to Mrs. Cracknell a list of the securities held by the Cooper estate as they were at December 31, 1966. In a letter dated October 17, 1968, he had listed the assets of the estate as at December 31, 1967, and October 15, 1968. Each list referred to substantial bank deposits which Mortimer admitted at trial did not exist.

   In a letter of July 10, 1969, Mr. Cracknell complained about delays in sending the income cheques, and asked for copies of the estate income tax returns, as had been promised. In a letter dated January 12, 1970, Mr. Plummer of Messrs. Allen and Overy wrote to Mortimer as follows:

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|  |    Mr. and Mrs. Cracknell and their family are gravely concerned that they have not been furnished with the executors' accounts of the above estate, and that the payments of income to them are made neither promptly nor regularly. They have accordingly asked me to write to you on their behalf. |  |
|  |    While I understood from your letter of 22nd March 1967 that the formal accounts were then not yet completed, you did indicate that full trustee income tax returns would be prepared annually and filed with the Canadian Department of National Revenue. Further you said you would arrange for Mr. and Mrs. Cracknell and myself to receive copies of these since they would contain detailed statements of the financial affairs of the estate. Neither I, nor, I understand, Mr. and Mrs. Cracknell have received copies of those statements. I should therefore be obliged if you would immediately supply Mr. and Mrs. Cracknell and myself with copies of all the returns filed to date. At the same time I should like to receive the formal executors' accounts as soon as they have been prepared. |  |
|  |    In your letter of 23rd August 1967 to Mr. and Mrs. Cracknell you stated that from your point of view it would be easier to arrange for payments of income to the Cracknell family to be made quarterly. In his letter to you dated 10th July 1969, to which, I believe, he has not yet had a reply, Mr. Cracknell pointed out that the quarterly payments were made either considerably after the due date or not at all. This causes considerable concern, not to mention hardship, and I must therefore ask that you make suitable arrangements for the remittance of income to Mr. and Mrs. Cracknell and their family as soon as possible and thereafter to establish payments at regular quarterly intervals as arranged. |  |
|  |    Would you also please let Mr. and Mrs. Cracknell have the relevant certificates of deduction of Canadian tax since they require these urgently to complete their United Kingdon tax returns. |  |
|  |    I am sorry to have to write to you in these terms, but I feel frankly that Mr. and Mrs. Cracknell's complaint is a reasonable one. As this is a matter which concerns not only you but your co-trustee, I am sending a copy of this letter direct to Mr. William Andrews. |  |

   Mortimer replied promptly to Plummer on January 19, 1970, giving reasons for the delay in the preparation of accounts, most of which related to his leaving Thomson, Rogers, and stating that his bookkeeper told him the Cooper estate accounts to the end of March, 1969, would be completed that week, and would be sent on to Plummer and the Cracknells as soon as Mortimer had perused them and had them typed. A month later, on February 26, 1970, he wrote the following letter to Mr. Plummer:

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|  | I refer you to my letter of February 4th last. I have been obliged to instruct my book-keeper to delay completion of the accounts in the Cooper Estate until some bookkeeping work with respect to the recently completed end of my financial year have been attended to, and until income tax returns have been prepared and filed. I would expect that that work will be completed by the end of March, and I understand that about a week's work remains to be done on the Cooper Estate accounts. I anticipate that the tax returns will be completed by about the end of March, and thereafter my book-keeper will complete the Cooper Estate accounts. I must be away on business for about three weeks from April 6th and I hope to take the accounts with me to peruse them. Promptly upon my having done so I will send a copies [sic] to you for yourself and for the members of the Cracknell family. |  |
|  | I have today received the Ontario statement of succession duty dated April 3rd, 1969. I enclose a copy for yourself and a copy for each member of the Cracknell family. I am distributing further copies to each person interested in the residue of the Estate. |  |

   The accounts were never sent, but Mortimer purported to distribute on January 19, 1970, the interest to December 31, 1969, and, according to Mr. Cracknell's evidence at trial, Mortimer thereafter made interest distributions promptly. This was apparently sufficient to cause the Cracknells to put off any further investigation of the affairs of the estate. Mr. Cracknell said he had been advised by Allen and Overy that the estate accounts were required to be passed by Mortimer in Canada without any action by the Cracknells. Mr. Cracknell also testified that he and his wife trusted Mortimer because of his respectable background, the trust that Mrs. Cooper had placed in him, and the impression that they had gained in meetings with him. They accepted his explanations for delays which they thought showed only mismanagement, and never suspected that anything was wrong until they heard that Mortimer had been arrested. They agreed that they likely would have been suspicious, were it not for the trust Mrs. Cooper had placed in Mortimer.

   The standard of diligence which the defrauded person needs to prove is a high one, except where the party defrauded is entitled to rely on the other party. The Cracknells were cestuis que trust for whom Mortimer was trustee under Mrs. Cooper's will. They were clearly entitled to rely on him, and I find as a fact that they did so without suspicion. That being so, it is clear on the authorities that they did not act without due diligence, and that the limitation period did not commence to run until they acquired knowledge of Mortimer's arrest: see the passage from Franks on Limitation of Actions quoted above.

   The evidence was that Andrews, as co-trustee, was sent a copy of Mr. Plummer's letter of January 12, 1970, expressing grave concern at the lack of executor's accounts, and complaining about delays in the quarterly payments. I find it highly significant that the information contained in the letter did not shake Mr. Andrew's implicit trust in the honesty of Mortimer, which, he testified, remained until 1974. If Mortimer's conduct did not arouse suspicion on the part of Andrews, a solicitor practising in Toronto, is it reasonable to suggest that it should have aroused the suspicions of the Cracknells in England? I think not.

   For the foregoing reasons, I find that the action against Andrews and the other partners of Thomson, Rogers was not statute-barred under the Limitations Act, because it was commenced less than six years after the time the Cracknells became aware of Mortimer's fraud.

   I must say that I have doubts about the justice of the foregoing conclusion. The confidence reposed in Mortimer by Mrs. Cooper and the Cracknells was unrelated to Mortimer's position as a partner of Thomson, Rogers. The will appointing him and Andrews as executors was signed before they joined Thomson, Rogers in 1965. When Mortimer left Thomson, Rogers early in 1969, they did not require him to pass his accounts, nor did they take any steps that would suggest they had lost any protection on which they relied. His partnership in Thomson, Rogers did not facilitate the thefts by Mortimer, and it seems reasonable to think they would have occurred if he had been practising alone. It really was a coincidence that they occurred during the three and one-half years that Mortimer was associated with Thomson, Rogers. The Cracknells remained unaware of the thefts because of Mortimer's acts of concealment that continued for five and one-half years after he ceased to be a partner.

   As Ms. Saxe pointed out in her opening remarks, however, this is one of those unfortunate cases in which the court must decide as to which of two innocent parties must bear a substantial loss. I doubt if such cases are often decided without misgivings. Some support for the conclusion I have reached may be derived from the fact that the partners of Thomson, Rogers were in a better position than the Cracknells to keep an eye on Mortimer's conduct. Mr. Outerbridge mentioned that the parting of the ways between Mortimer and the partnership occurred when the firm tried to collect accounts receivable of Mortimer and the clients said that they had never received statements of account. This might have put the firm on guard.

   There is also authority for my conclusion in the decision of Sir James Wigram, the Vice-Chancellor, in the High Court of Chancery in Blair v. Bromley (1846), 5 Hare 542, 67 E.R. 1026. It was there held that a solicitor was liable for the fraud of a former partner of which he had no knowledge, even though the partnership had been dissolved for 10 years before the fraud was discovered by the plaintiff. This decision was applied by Stirling J. in Moore v. Knight, [1891] 1 Ch. 547.

   I note also that the same result would have been reached in the case at bar if our law was as recommended by the Ontario Law Reform Commission, or was the same as the English Limitation Act, 1939 (U.K.), c. 21. Both provide that the limitation period in an action based on fraud shall not begin to run until the plaintiff has discovered the fraud, or could with resonable diligence have discovered it.

Res judicata

   Andrews pleaded that all issues of liability between him and the Public Trustee and the Cooper estate were res judicata because of the decision of the surrogate court judge on the passing of accounts, in which he was exonerated from misconduct, neglect or default and given the protection of ss. 33 and 35 of the Trustee Act, R.S.O. 1970, c. 470.

   In my judgment, the learned surrogate court judge had no jurisdiction on the passing of accounts to decide any issue as to the vicarious liability of Andrews as a partner under the Partnerships Act, and did not purport to do so. His decision could only have related to the liability of Andrews as an executor and trustee. The only remaining claim against Andrews in the action is that under the Partnerships Act, as is the case with the other defendants (except Mortimer), and I find that the doctrine of res judicata has no application to it.

Interest and damages for loss of interest

   As mentioned above, the principal amount stolen by Mortimer from the Cooper estate was $207,197.84. The plaintiff is entitled to recover from Mortimer that amount together with $757.45 for the cheque issued by Mortimer to James Cracknell that was returned unpaid in August, 1974. That cheque purported to be for interest to June 30, 1974. The cheques payable to the four other income beneficiaries for interest to that date were all honoured. The other defendants are liable for the capital stolen by Mortimer while he was a partner of Thomson, Rogers, which was $197,608.19.

   The remaining contentious issue is the extent, if any, to which the defendants should be liable for interest on the principal recoverable from them, or for damages for the loss of that interest.

   Ms. Saxe took the position at trial that the plaintiff 's claim was for a liquidated sum, so that prejudgment interest could be awarded under s. 36 of the Judicature Act, R.S.O. 1980, c. 223, from the date the cause of action arose. Such interest would be at the prime rate existing for the month preceding the month on which the action was commenced (July, 1980: 12.25% to 12.50%), but could not be awarded for any period prior to November 25, 1977, because of s-s. (7) of s. 36. She then asked that "interest by way of additional damages for the breach of trust be awarded in the amount of $25,000 for the period July 7, 1966, to June 30, 1974, and at the rate of 12.5% thereafter, with annual rests". This claim for additional interest was added by an amendment at trial to the prayer for relief in the statement of claim.

   I am satisfied that Mortimer, and his former partners vicariously, are liable to make good not only the capital sum stolen, but also the interest that would have been earned on that sum and distributed to the income beneficiaries after June 30, 1974. That date is the end of the last period for which Mortimer made what purported to be interest payments to the income beneficiaries. Except for the sum of $757.45 for the dishonoured cheque to James Cracknell, for which both the former partners and Mortimer are liable, I do not think that any recovery in respect of lost interest or income prior to that date should be awarded, because of the payments that were made by Mortimer during that period, presumably out of his own funds or the money he had stolen, and were accepted by the income beneficiaries. No evidence was led to establish whether the payments they received during that period were less than the payments that would have been made if the estate had been honestly administered.

   The liability of Mortimer and his former partners for loss of income after June 30, 1974, follows from the words of ss. 11 and 12 of the Partnerships Act, and from the general law respecting the liability of a trustee. The extent of Mortimer's liability as trustee is stated as follows in 48 Hals., 4th ed., p. 528, para. 951:

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|  | Restoration of loss. The extent of the liability incurred by a trustee who is responsible for a breach of trust is measured by the extent of the loss or depreciation which his act or omission has caused to the trust estate; and he is liable to restore to the estate the property which it has thereby lost or its value, and to make good any depreciation and damage which the estate has thereby suffered. |  |

Section 11 of the Partnerships Act provides that the firm is liable for loss or injury caused to a person not a partner to the same extent as the partner whose wrongful act or omission has caused the loss.

   I do not think, however, that the liability for the lost income should be assessed in the way proposed by Ms. Saxe. In the first place, I do not think the plaintiff 's claim is for a liquidated amount. The amount of principal stolen may be liquidated, but the loss of income thereon since June, 1974, is not liquidated. Secondly, if I award the plaintiff interest by way of damages, or interest because it is equitable so to do in the case of a breach of trust, then I cannot award interest under s. 36 of the Judicature Act. Subsection (5) of s. 36 reads, in part, as follows:

      (5) Interest under this section shall not be awarded,

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|  |  (f)  where interest is payable by a right other than under this section. |  |

   In my judgment, the plaintiff is entitled to recover on behalf of the income beneficiaries the amounts which the capital would have earned if conservatively invested throughout the period, together with compensation for having been deprived of that income from the various times at which it would have been received until judgment. The only evidence before me as to interest rates during the period was a chart showing the chartered bank prime business loan rate from 1960 to 1983. That rate was 11.50% in July, 1974, and 11% in December, 1983. It reached a high of 22.75% for one month in August, 1980. The lowest rate was 8.25% from June, 1977, to February, 1978. The money in the estate, if conservatively invested, would not have earned as much as the prime rate. In addition, it would have been subject to deductions for the compensation and expenses payable to the trustee. Having regard to the prime rate during the period in question, and taking the other factors I have mentioned into consideration, as well as the direction against awarding interest on interest contained in s. 36(5)(b) of the Judicature Act, which is inconsistent with the concept of annual rests, I have decided to award the plaintiff simple interest at the rate of 10% per annum from July 1, 1974, until February 15, 1985, as compensation for the loss of income on the capital sum stolen by Mortimer.

   There will be judgment against Mortimer for $428,207.93, being the principal sum of $207,197.84, together with $757.45 for the cheque to James Cracknell, and subsequent interest of $220,252.64. There will be judgment against the other defendants for $408,426.03, being the principal sum of $197,608.19, together with $757.45 for the cheque to James Cracknell, and subsequent interest of $210,060.39. Costs will follow the event, but there will be only one set of costs against all defendants.