[HIGH COURT OF AUSTRALIA.]

SHACKELL . . . . . APPELLANT;
PLAINTIFF,

AND

HOWE, THORNTON & PALMER . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1909.

MELBOURNE, *March* 31; *April* 1, 2.

Griffith C.J., O'Connor and Isaacs JJ.

Book debt—Assignment—Future debt—Money to become payable by agent to principal on sale of goods—"On account of or in connection with . . . . . business"—Book Debts Act 1896 (*Vict.*) (*No.* 1424), *secs.* 2, 3.

Money which will become payable by an agent to his principal, a trader, as purchase money on the sale of goods of the principal consigned to the agent for sale, constitutes a debt to become due by the agent to the principal, but not a debt on account of or in connection with the business of the principal within the meaning of the *Book Debts Act* 1896 (Vict.), and is therefore not a "book debt" within the meaning of the Act.

A wool-grower consigned wool to a firm of wool-brokers to be sold. Before the wool was sold the wool-grower bought sheep from A., and in payment for them gave A. a written order directing the firm to pay to A. a certain sum when his wool should be sold and to deduct that sum from the proceeds of the sale of the wool. The wool having been sold, the wool-grower became insolvent, and subsequently the firm paid to A. the sum as directed by the order. In an action by the trustee of the wool-grower against A. to recover the money so paid—

Held, that the order given by the wool-grower to A. was an assignment to A. to the extent therein mentioned of the debt, which was not invalidated by its non-registration under the *Book Debts Act* 1896, and, therefore, that the trustee was not entitled to recover.

Decision of the Supreme Court (*Shackell* v. *Howe, Thornton & Palmer*, (1908) V.L.R., 698; 30 A.L.T., 104), affirmed, but on different grounds.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by Edward Herbert Shackell, as assignee of the insolvent estate of James Dillon, against Howe, Thornton & Palmer, whereby the plaintiff claimed a declaration that he as such assignee was entitled to a sum of £314 19s. 8d. belonging to the estate of the insolvent and paid to the defendants under an order from the insolvent. The parties stated the following case for the opinion of the Court:—

1. In the year 1903, and for several years previously, one James Dillon was buying and selling sheep and other stock. When he bought stock he did so with the object of selling again at a profit as soon as possible, and of shearing and selling the wool clip of such sheep as were in his possession at the shearing season. From August 1903 to August 1906 he rented and occupied the Yambla Station, near Albury, in New South Wales, on which he had from time to time varying numbers of sheep running as well as other stock. These sheep and stock were put on Yambla until the market proved sufficiently favourable to justify a sale, and were shorn at the usual season, and the clip sold in due course. He cultivated a portion of such station and sold the proceeds. He also rented from time to time other country for the purpose of grazing his sheep and other stock that he happened to have on hand. In 1906 he purchased for about £16,823, Marfield, a station or grazing property containing about 257,540 acres, principally leasehold, with the sheep thereon in wool, and after shearing the sheep thereon, he in the same year sold the station with the sheep thereon off the shears for about the same price that he gave for it, thus making a profit out of the wool.

2. During the years 1904, 1905 and 1906, he bought some 123,227 sheep besides cattle, and he sold some 119,943 sheep, the balance being lost, as he alleges, through drought. He shore the sheep from time to time in his possession pending sale and sold the wool through various wool-brokers carrying on business in Melbourne. This practice was adopted in respect of the sheep on Marfield.

3. He received in 1904 from Younghusband, Row & Co., one

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of such firms of wool-brokers, in connection with his 1903 clip of wool, some £387. His receipts from wool in 1904 were £2,112 7s. 11d. from 169 bales; in 1905, £4,491 17s. from 389 bales, and the wool from the Marfield sheep, 492 bales, realized sufficient to pay £6,767 12s. 8d., the advances made to him by the New Zealand Loan and Mercantile Agency Co. Ltd., and leave a surplus in the hands of such company of £314 19s. 8d.

4. The transactions which passed through his bank book in the years 1904, 1905 and 1906 amounted to some £107,000, and his receipts from the business he carried on, including the sale of wool, were, in 1904, £34,932 0s. 4d.; in 1905, £41,486 3s. 5d., and in 1906, £34,293 13s. 9d., a total of £110,712 17s. 6d., while his payments amounted to about the same sums. He never held any particular lot of stock for any length of time unless prevented by bad seasons or falling markets from selling promptly. At the time when he gave the order the subject of these proceedings, he had no stock and held no land at all on any terms.

5. The New Zealand Loan and Mercantile Agency Co. Ltd. is a company carrying on the business, *inter alia*, of wool-brokers, that is to say, they sell wool for principals and account to them for the proceeds. When wool comes in for sale it is customary for the company to advance to the principal a portion of its estimated value pending sale. The said James Dillon employed *inter alios* the New Zealand Loan and Mercantile Agency Co. Ltd. for the purpose of selling his wool.

6. The wool shorn from the sheep on Marfield Station was consigned by the said James Dillon to the New Zealand Loan and Mercantile Agency Co. Ltd. for sale on his account, and the company made advances against it.

7. In November 1906 the said James Dillon bought some rams from Howe, Thornton & Palmer, of Terang, and in payment therefor gave them the following order:—

"Melbourne, 11th December 1906.—The Manager, New Zealand Loan & Mercantile Agency Co.—Dear Sirs, please pay to Messrs. Howe, Thornton & Palmer, £693 12s. 4d. when Marfield wool sold and deduct same from proceeds of sale of same.—Yours truly, James Dillon."

8. The said order was sent to the New Zealand Loan &

Mercantile Agency Co. by Messrs. Howe, Thornton & Palmer on 11th December 1906, and on 12th December 1906 the said company wrote to Howe, Thornton & Palmer as follows :—

"Melbourne, 12th December 1906.—Messrs. Howe, Thornton & Palmer, 127-129 William Street, Melbourne.—Dear Sirs,—Re Mr. James Dillon.—We are in receipt of your letter of yesterday's date covering Mr. Dillon's order on us for £693 12s. 4d. out of proceeds of sale of his Marfield wool. We expect to be selling balance of Mr. Dillon's clip in January, but at the present moment we have no funds in hand on his account. We therefore return his order meantime.—Yours faithfully, Manager."

9. On 17th January 1907 the said James Dillon voluntarily sequestrated his estate in the Court of Insolvency at Melbourne.

10. The Marfield wool above referred to was sold by the New Zealand Loan & Mercantile Agency Co. Ltd. about the months of December 1906 and January 1907, and after repaying themselves the moneys advanced against such wool the said company had a balance in their hands of £314 19s. 8d. which it paid to the defendants on 29th June 1907, pursuant to the order above referred to.

11. The said order was not registered under the *Book Debts Act* 1896.

The question for the opinion of the Court was, upon the facts above stated, were the defendants entitled to receive payment of and to retain the said sum of £314 19s. 8d. ?

The Full Court answered this question in the affirmative, holding that the sum which would become payable by the company to Dillon after the sale of the wool would be payable on account of or in connection with Dillon's business, but that it would not be a debt owing by the company to Dillon and, therefore, that there was no "book debt" within the meaning of the *Book Debts Act* 1896: *Shackell* v. *Howe, Thornton & Palmer* (1).

From this decision the plaintiff now appealed to the High Court.

Starke, for the appellant. The money which would become payable by the New Zealand Loan Co. to Dillon on the sale of

(1) (1908) V.L.R., 698; 30 A.L.T., 104.

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Dillon's wool was a book debt within the meaning of sec. 2 of the *Book Debts Act* 1896. Money received by an agent for goods sold by him on account of his principal is a debt due by the agent to his principal.

[ISAACS J. referred to *Harsant* v. *Blaine, Macdonald & Co.* (1).]

It may be that a trust would exist between the principal and his agent so that the principal could follow the money if it was misappropriated, but nevertheless the relation of debtor and creditor would exist between them. Being a debt, it is a debt "on account of or in connection with" Dillon's business. It would arise in the ordinary course of his business.

Duffy K.C. (with him *Sanderson*), for the respondents. The *Book Debts Act* 1896 contemplates that when a trader makes an assignment of the whole or a portion of the debts due to him by his customers in the ordinary way of his business, that assignment shall be registered. That is for two purposes, first, to enable those dealing with the trader to know what his financial position with regard to those customers is, and, secondly, to enable any person who has any claim against the trader to stop the registration until his claim is settled. The definition of "book debts" in sec. 2 is made very wide in order that a man may not escape from the provisions of the Act by not keeping books. The legislature only intended to deal with what are usually known as book debts, such as those referred to in *Tailby* v. *Official Receiver* (2), and not to affect every assignment of particular debts or of specific portions of them. No provision is made in the Schedules for an assignment of particular debts. The order given by Dillon was in law in the same position as a charge given by the owner of goods which are in his own possession upon the proceeds of them when sold. The company were factors for Dillon and occupied a fiduciary position towards him. Where an agent in a fiduciary position is employed to sell goods for his principal, the goods remain the property of the principal until sold, and when sold the proceeds belong to the principal: *Foley v. Hill* (3). It is only if

(1) 56 L.J.Q.B., 511.
(2) 13 App. Cas., 523.
(3) 2 H.L.C., 28.

the agent makes default in paying over the money to the principal that a debt arises. See also *Ex parte Kelly & Co.*; *In re Smith, Fleming & Co.* (1).

[*Starke* referred to *Kirkham* v. *Peel* (2).]

That was a case of a commission agent and there was no fiduciary relationship.

[ISAACS J. referred to *Holmes* v. *Coxon* (3), as to the meaning of "book debts."]

When the money was paid to the agents there was no longer a debt due on account of or in connection with Dillon's business.

Starke, in reply. The argument that this was not a debt to become due in connection with Dillon's business gives a most artificial construction to the Act. "Book debt" is not a term of art, and is only used to refer to the particular kinds of debts which are referred to in the definition. See *Stroud's Judicial Dictionary*, tit. "Book debt."

GRIFFITH C.J. I think this appeal must fail, but not for the reasons assigned by the Judges of the Supreme Court. The sum in question was a sum which was to be received by the New Zealand Loan and Mercantile Agency Company as agents for Dillon from a person who was Dillon's debtor in respect of wool sold to that person.

The *Book Debts Act* 1896 provides by sec. 3 that:—"No assignment or transfer, made after the commencement of this Act, of book debts due or to become due to any person, whether such assignment or transfer be absolute or conditional, shall have any validity in law or in equity until such assignment or transfer has been registered by the Registrar-General." "Book debts" are defined as meaning "any debt due or to become due at some future time to any person on account of or in connection with any profession trade or business carried on by such person whether entered in any book or not." The Judges of the Supreme Court were of opinion that the money in question, which was owed by the company to Dillon, was payable to him in connection with and

(1) 11 Ch. D., 306, at p. 311. (2) 28 W.R., 941.
(3) 16 V.L.R., 25.

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on account of his business, but thought it was not a debt within the meaning of the Act. I confess I am unable to entertain any doubt that the relation of debtor and creditor existed between the company and Dillon, but whether the amount was due "on account of or in connection with his business" is another question. The purpose of the Act is apparent on its face. It is entitled "An Act relating to the assignment or transfer of book debts." "Book debts" is a term well known in commercial use, and its meaning is sufficiently discussed in *Tailby* v. *Official Receiver* (1). In *Prideaux's Precedents in Conveyancing*, 5th ed., vol. I., p. 344, I find a form of what is called "An assignment of the goodwill and property of a business," and in it is included an assignment of "all the book and other debts now due and owing to him" (the vendor) "on account of the said trade or business." I think that this money when it was received by the company was no longer a "book debt" within the meaning of the Act, and it is only with the assignment of "book debts" that the Act deals.

I express no opinion upon the question whether an order given to a particular customer to pay to some one else a debt owing by the customer is an assignment of a book debt within the meaning of the Act. It may operate at law or in equity as an assignment in favour of the person to whom it is given, but I reserve my opinion upon the question whether it is within sec. 3.

O'CONNOR J. I am of the same opinion. The Act as it seems to me was never intended to apply to a debt of this kind. There is no doubt that in one sense a debt to a pastoralist principal from his agent who is carrying on a different business, viz., that of selling wool, is a debt in connection with the trade or business of the principal. The usual way in which the pastoralist's business is conducted is that his wool should be sold through agents of that kind. But I do not think that is the kind of debt which is aimed at by the Act. The Act deals with a certain well known class of debts, viz., "book debts."

Whether that phrase may be described as having acquired a technical meaning or not, it has certainly acquired a well known

(1) 13 App. Cas., 523.

meaning in trade which is recognized in Statutes and in law in Australia. I think the generality of the definition must be controlled by the objects of the Act itself. In the operative section, sec. 3, the expression is used in the plural—"book debts due or to become due to any person." I think it is quite clear that refers to the well known class of debts which are ordinarily described as "book debts." This debt, I think, was only a book debt until the purchase money for the wool was paid to the agents by the person who bought it. After it had been paid over, when the money came to the hands of the agent—at which time the assignment began to operate—it was no longer a book debt within the meaning of the Act, though certainly a debt in another sense.

ISAACS J. I agree. I think this was a debt owing by the company to Dillon. I think *Harsant* v. *Blaine, Macdonald & Co.* (1) is an authority amongst others that money received by one person to the use of another is a debt. The question then is whether this was a debt "on account of or in connection with" Dillon's business. Perhaps in a remote sense it was. But I am clear in my mind that is not the sense in which the words were used in the Act. The trade or business of Dillon was that of selling wool, and when his wool was sold and the purchaser paid for it, that business transaction was ended. Then the company carried on a totally distinct business, including that of agents for persons carrying on the trade of selling wool, and it was a totally different kind of business, a different vocation, with a different sort of contract. When they received this money from Dillon's purchaser the obligation that they were under to Dillon did not arise out of his trade but rather out of theirs, and it was an obligation which then existed independently of Dillon's carrying on his business of wool seller, but rested on the personal relation between the two of them. If, for instance, a solicitor who had done work for his client were paid by the client paying the money to the solicitor's managing clerk, it would hardly be said that the obligation of the managing clerk to pay the money over to the solicitor would be a book debt of the solicitor. Certainly it would not be so within

(1) 56 L.J.Q.B., 511.

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the meaning of this Act. For that reason I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellant, *Nunn, Smith & Jeffreson.*
Solicitors, for the respondents, *Blake & Riggall.*

B. L.

[HIGH COURT OF AUSTRALIA.]

CURLEY . . . . . PLAINTIFF;

AND

THE COMMONWEALTH . . . . . DEFENDANTS.

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MELBOURNE, *March* 23.

Griffith C.J., Barton and O'Connor JJ.

Public servant—Salary — Officer in corresponding position — "Any Australian Colony," meaning of—Public Service Act 1900 (*Vict.*) (*No.* 1721), *sec.* 19.

In sec. 19 of the *Public Service Act* 1900 (Vict.), which provides that "From the commencement of this Act every officer of the Trade and Customs Defence and Post and Telegraph Departments shall be entitled to receive a salary equal to the highest salary then payable to an officer of corresponding position in any Australian Colony," the words "any Australian Colony" do not include Victoria.

DEMURRER.

John Michael Curley brought an action in the High Court against the Commonwealth wherein the statement of claim was as follows:—

1. Prior to and from 27th December 1900 to 28th February 1901 the plaintiff was an officer of the Post and Telegraph Department of the Public Service of the State of Victoria within the meaning of sec. 19 of the *Public Service Act* 1900 (Vict.) and