[HIGH COURT OF AUSTRALIA.]

O'CONNOR . . . . . APPELLANT;

AND

QUINN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1911.

MELBOURNE, *June* 8, 9, 12, 13.

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

*Bill of Sale—Validity—Consideration—Notice of intention to file—"Past debt"—Statement of consideration in notice—Interpleader summons—Decision of Supreme Court—Appeal to High Court—Jurisdiction—Instruments Act* 1890 (*Vict.*), (*No.* 1103), *secs.* 113, 134, 135, *Fifth Schedule—Rules of the Supreme Court* 1906, *Order LVII.*

Sec. 134 of the *Instruments Act* 1890 (Vict.) provides that no bill of sale shall be operative or have any validity at law or in equity until it is filed in a certain manner, and that no bill of sale shall be filed unless notice of intention to file the same be lodged at the office of the Registrar-General fourteen days before the filing thereof. Sec. 135 provides that every such notice shall be in the form in the Fifth Schedule. In the form there given is a column headed "consideration" with three sub-headings, "past debt," "present advance," "future advance."

*Held* that, if the consideration is sufficiently accurately stated in the notice either as to its legal effect or as to its mercantile and business effect, and substantially falls under the sub-heading under which it is placed, the notice is in that respect good.

*Held* also that the consideration stated in the notice must be substantially the same as that stated in the bill of sale itself.

A. in 1908 gave to B. a bill of sale over certain chattels and a mortgage of his interest under a will to secure an advance of £800 then made to him by B. with interest thereon, the principal money being made repayable under each instrument on a certain date in 1911. The bill of sale contained a provision that in case any caveat should be lodged against the filing thereof, it should

H. C. OF A. 1911.

O'CONNOR v. QUINN.

be lawful for B. to sell the chattels, and that whenever a right should arise under the bill of sale to sell the chattels the whole of the principal and other moneys secured and for the time being due and payable under the bill of sale should immediately become "due, payable and recoverable." Caveats were lodged against the filing of this bill of sale and it was not filed and became void. Three months afterwards A. gave B. a second bill of sale which recited that A. was indebted to B. in the sum of £800 and that "the same is now due and owing," and that A. had requested B. not no press for the immediate repayment thereof, which request B. had agreed to grant upon A. giving the bill of sale. The consideration was stated as being "the sum of £800 now due and owing" by A. to B., and the time for repayment of the principal was the same date in 1911 as under the first bill of sale and the mortgage. In the notice of intention to file the second bill of sale the consideration was stated under the sub-heading "past debt" as being "the sum of £800 now due and owing by A. to B., and in consideration of B. agreeing not to press for the immediate payment thereof." The second bill of sale was subsequently filed.

*Held*, that the consideration was sufficiently stated in the notice and in the second bill of sale, and that the second bill of sale was valid.

Decision of *à Beckett* J. reversed.

An appeal lies to the High Court from a decision of a Judge of the Supreme Court of Victoria on an interpleader summons given under Order LVII. of the *Rules of the Supreme Court* 1906.

APPEAL from the Supreme Court of Victoria.

On 29th May 1908 Gilbert Maw Barby gave to Felix O'Connor, the appellant, a bill of sale over certain chattels, and a mortgage of his interest under the will of his father, to secure repayment of the sum of £800 then advanced and paid by the appellant to Barby and interest thereon. By the bill of sale and by the mortgage the time fixed for the repayment of the loan was 30th June 1911. By the bill of sale it was agreed (*inter alia*) that "in case any caveat shall be lodged against the filing of these presents or in case" several other events should happen "it shall be lawful for the said mortgagee . . . to sell and dispose of" the chattels "by public auction" &c. and that "immediately upon a right arising under these presents to the said mortgagee to sell or dispose of the said premises the whole of the principal interest and other moneys hereby secured and for the time being due and payable under and by virtue of this security shall forthwith and immediately thereupon be and become due payable and recoverable."

Notice of intention to file this bill of sale was given, but several caveats were lodged against its being filed, and the bill of sale was not filed and became null and void. On 15th August another bill of sale of the same chattels was executed by Barby in favour of the appellant. In this second bill of sale it was recited that Barby was indebted to the appellant in the sum of £800, "and the same is now due and owing by the said mortgagor to the said mortgagee and the said mortgagor has requested the said mortgagee not to press for the immediate repayment thereof which request the said mortgagee has agreed to grant upon the said mortgagor executing these presents and entering into the covenants provisions and agreements hereinafter contained." It then stated that the consideration for the bill of sale was £800 "now due and owing" by Barby to the appellant, and it fixed 30th June 1911 as the date for repayment as in the first bill of sale. Notice of intention to file the second bill of sale was on 19th August 1908 given in the form provided by the Fifth Schedule to the *Instruments Act* 1890, and under the heading "Consideration" and sub-heading "Past debt," was inserted, "The sum of eight hundred pounds now due and owing by the said Gilbert Maw Barby to the said Felix O'Connor and in consideration of the said Felix O'Connor agreeing not to press for the immediate payment thereof."

The second bill of sale was on 14th September 1908 filed. Subsequently, default having been made by Barby in payment of an instalment of interest, the appellant seized the chattels through his solicitors and placed them in the hands of his agents.

In November the bailiff of the County Court at Camperdown seized the chattels under a warrant of execution issued out of the Supreme Court in an action by Michael Quinn, the respondent, against Barby and under the warrant purported to sell all the equity of redemption and right to possession of Barby of and in the chattels, and also all the interest (if any) of Barby in the chattels, and also all the equity of redemption of Barby in the interest under his father's will, and these were purchased by the respondent. On 22nd April 1910 the respondent demanded from the appellant's agents the immediate delivery of the chattels to

H. C. OF A. 1911.

O'CONNOR v. QUINN.

him, and on 28th April the appellant made a formal demand on his agents for the immediate delivery of the chattels to him.

An interpleader summons in the Supreme Court was then taken out by the appellant's agents, and was heard by *à Beckett* J., who held that the consideration for the second bill of sale was not truly stated in it, that, therefore, the bill of sale was void, and he directed the appellant's agents to give possession of the chattels to the respondent, and barred the claim of the appellant.

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

*McArthur* and *Arthur*, for the appellant. Part VI. of the *Instruments Act* 1890 which governs bills of sale contains no provision requiring that a bill of sale shall set forth the consideration for it. The only reference to the consideration is in the Fifth Schedule which sets out the form for the notice of intention to file a bill of sale required by sec. 135 to be adopted. The form of that notice must be strictly followed: *Danby* v. *Australian Financial Agency and Guarantee Co.* (1), and, if an untrue consideration is inserted, the notice is bad: *Yit Tie Chee* v. *Mee Shuey* (2); *Vaughan* v. *Wildon* (3); *Moore* v. *Heathcote* (4). The consideration is truly stated in the notice of intention to file the second bill of sale. The parties agreed that if the first bill of sale was not filed the debt should become presently payable. That agreement is valid although the document itself was ineffectual to convey the chattels: *National Bank of Australasia Ltd.* v. *J. Falkingham & Sons* (5); *In re Burdett*; *Ex parte Byrne* (6); *In re Isaacson*; *Ex parte Mason* (7); *Tidyman* v. *Collins* (8); *Williams Saunders*, p. 85. Even if the debt was not presently payable it was "due and owing" as those words are properly used: *Bullen and Leake's Precedents of Pleading* 3rd ed., p. 51; *Webb* v. *Stenton* (9). It is sufficient if the consideration is truly stated either from a legal or from a business point of view: *In re Smith*; *Ex parte Tarbuck* (10); *Ex parte Allam*; *In re Munday* (11).

(1) 18 V.L.R., 303; 14 A.L.T., 1.
(2) 21 V.L.R., 500; 17 A.L.T., 203.
(3) 12 A.L.T., 17.
(4) 27 V.L.R., 383; 23 A.L.T., 93.
(5) (1902) A.C., 585.
(6) 20 Q.B.D., 310.
(7) (1895) 1 Q.B., 333.
(8) 4 V.L.R. (L.), 478.
(9) 11 Q.B.D., 518, at p. 527.
(10) 43 W.R., 206.
(11) 14 Q.B.D., 436.

[GRIFFITH C.J. referred to *Credit Co.* v. *Pott* (1).]

The debt was certainly a past debt as distinguished from a present advance or a future advance, the only two other headings in the Schedule under which the consideration may be put. The appellant having taken possession of the chattels, the validity of the bill of sale is immaterial: *Davidson* v. *Commercial Bank of Australia Ltd.* (2); *Cohen* v. *McGee* (3); *Ex parte Fletcher*; *In re Henley* (4). The grantor could not claim to get them back, and no one claiming through him has any right to get them. The only way a creditor could get at the chattels would be by proceedings in insolvency. Under the circumstances the sale by the bailiff conferred no title on the purchaser, even supposing the goods had been in the possession of the grantor. If there is an error in the statement of the consideration it was inadvertent and accidental and is curable under sec. 14 of the *Instruments Act* 1896: *Stearns* v. *Klug* (5).

*Watson*, for the respondent. The special leave to appeal should be rescinded. No appeal lies from a decision in an interpleader summons which is governed by Order LVII., of the *Rules of the Supreme Court* 1906: *Mercantile Finance Trustees and Agency Co. of Australia Ltd.* v. *Hall* (6). The jurisdiction under that Order is by consent and the Judge is practically an arbitrator.

[GRIFFITH C.J.—The jurisdiction is not by consent because the Judge may act on the request of one party.]

The decision is made final and conclusive and the parties agree that there shall be no appeal.

GRIFFITH C.J. We think there is no doubt that the order made by the Judge was a judicial order, that it was made by him as a Judge of the Supreme Court, and that it had effect as a judgment of the Supreme Court. An appeal therefore lies to this Court under the Constitution.

*Watson*. The notice of intention to file a bill of sale must state the true consideration. The second bill of sale was given as

(1) 6 Q.B.D., 295.
(2) 23 V.L.R., 257; 19 A.L.T., 6.
(3) 4 V.L.R. (L.), 543.
(4) 5 Ch. D., 809.
(5) 21 V.L.R., 164; 17 A.L.T., 76.
(6) 19 V.L.R., 233; 14 A.L.T., 291.

H. C. OF A. 1911.

O'CONNOR v. QUINN.

a substitute for the first invalid bill of sale, and was given in pursuance of an antecedent promise to give a bill of sale. It was therefore given for the same consideration as that for the original bill of sale, namely, a present advance: *Ex parte Allam*; *In re Munday* (1); *Ex parte Nelson*; *In re Hockaday* (2); *Credit Co.* v. *Pott* (3); *Carrard* v. *Meek* (4). A bill of sale which does not truly state the consideration cannot be validly filed: *Black* v. *Zevenboom* (5). The statement that the money was "due and owing" was untrue. No creditor reading that could come to any other conclusion than that the money was payable at that moment. The money being already secured by the mortgage of the interest under the will, the consideration for giving further security cannot be stated as is done here. The promise to forbear pressing for payment of a debt which is not yet payable is no consideration. The words "due and owing," especially coupled with a promise to forbear from suing, indicates that the creditor could then go to the debtor and demand payment: *In re European Life Assurance Society* (6). The word "due" means due and payable: *In re Stockton Malleable Iron Co.* (7). The money did not become payable under the first bill of sale on its becoming invalid. The provision that the money should become payable only takes effect upon a valid right to sell arising under the bill of sale, which could never arise unless that bill of sale was filed. [He referred to *Cochrane* v. *Moore* (8); *Richardson* v. *Harris* (9); *Mayer and Fulda* v. *Mindlevich* (10); *Vaughan* v. *Wildon* (11); *Ex parte Johnson*; *In re Chapman* (12).] Even if the consideration is put under the right sub-heading, it is wrongly stated. The possession of the appellant is referable only to the bill of sale, and as that is invalid the possession does not help the appellant: *Newlove* v. *Shrewsbury* (13); *Ex parte Parsons*; *In re Townsend* (14); *Furber* v. *Cobb* (15). [He also referred to *Anderson* v. *Watson* (16); *Cookson* v. *Swire* (17).]

(1) 14 Q.B.D., 43.
(2) 35 W.R., 264.
(3) 6 Q.B.D., 295.
(4) 29 W.R., 244.
(5) 6 V.L.R. (L.), 473; 2 A.L.T., 96.
(6) L.R. 9 Eq., 122.
(7) 2 Ch. D., 101.
(8) 25 Q.B.D., 57.
(9) 22 Q.B.D., 268.
(10) 59 L.T., 400.
(11) 12 A.L.T., 17.
(12) 26 Ch. D., 338.
(13) 21 Q.B.D., 41, at p. 44.
(14) 16 Q.B.D., 532.
(15) 18 Q.B.D., 494.
(16) 17 V.L.R., 263; 12 A.L.T., 198.
(17) 9 App. Cas., 653.

[GRIFFITH C.J. referred to *Hopkins* v. *Gudgeon* (1); *Antoniadi* v. *Smith* (2); *Smith* v. *Whiteman* (3).]

*McArthur*, in reply.

GRIFFITH C.J. The question raised in this case is as to the validity of a bill of sale dated 15th August 1908 in favour of the appellant. The respondent claims to be entitled to the goods comprised in that document under a purchase from a bailiff of the County Court of all the grantor's right, title and interest in the goods which at that time were in the possession of the appellant. It is old law that a sheriff in the exercise of his powers under an execution may seize goods of the debtor in the possession of another person if they have been removed into that possession in order to avoid execution. But it is novel to me that a sheriff can, in the absence of express statutory provision, such as exists in some of the States, sell what is a mere right of action, that is, the right to recover goods in the possession of a stranger if that stranger has taken possession and keeps possession under a claim of right. That question, however, it is not necessary to determine in this case, but it is one by no means free from difficulty.

The objection to the bill of sale arises under the *Instruments Act* 1890. Before referring to the provisions of that Act it is necessary to remark that there is great danger in applying decisions upon particular words of one Statute to very different words of another Statute and treating those authorities as binding. It is necessary to consider the scheme of the Act. In England the first *Bills of Sale Act* was passed in 1854 and its scheme was to provide that an unregistered bill of sale should be void as to goods which remained in the possession of the debtor as against a judgment creditor. The first Act passed in Victoria was to the same effect. The law in England has been altered on more than one occasion and is now governed by the *Bills of Sale Act* (1878) *Amendment Act* 1882 upon which there have been many decisions. In particular I refer to secs. 8 and 9

(1) (1906) 1 K.B., 690.
(2) (1901) 2 K.B., 589.
(3) (1909) 2 K.B., 437.

H C. OF A. 1911.

O'CONNOR v. QUINN.

Griffith C.J.

of the Act of 1882. Sec. 8 provides, amongst other things, that every bill of sale shall truly set forth the consideration for which it was given, otherwise the bill of sale shall be void in respect of the personal chattels comprised therein. Sec. 9 provides that "a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the Schedule to this Act annexed."

The Act we are called upon to construe here was originally passed in Victoria in 1876 and proceeded on a different scheme, similar to that of the *Bills of Sale Act* 1854. The difference between the scheme of that Act and that of the English Act of 1882 is pointed out by Lord *Halsbury* L.C. in *Charlesworth* v. *Mills* (1), in the following passage:—"That the *Bills of Sale Acts* of 1854 and 1878 were intended to prevent false credit being given to people who had been allowed to remain in possession of goods which apparently were theirs, the ownership however of which they had parted with, is manifest enough by the language of those Statutes. The Acts intended, in a case with creditors, that if people were allowed to remain in possession of goods, of which nevertheless the ownership was no longer theirs, those goods and chattels should be subject to the execution of *bonâ fide* creditors who ought not to have been induced to give credit by the apparent ownership of the goods being in those persons, and who were therefore entitled to have their debts satisfied when by the default of the assignees of those goods they had been allowed to continue in the possession of persons to whom the property in them no longer belonged. That was the intended policy; and for such purposes it is manifest that the legislature would desire to give the widest possible interpretation to every one of the documents by which the ownership was really intended to be practically charged, while the goods still remained in the apparent possession and dominion of the persons from whom the ownership had nevertheless really passed away.

"My Lords, the Act of 1882 was directed to a totally different subject matter. It was thought by the legislature, rightly or wrongly, that a great number of impecunious debtors might be induced to sign documents the legal effect of which those per-

(1) (1892) A.C., 231, at p. 235.

sons did not understand. It was therefore intended by the legislature, in order to protect them, to give a particular form of words which should plainly express the nature of the contract as to the loan and the security for the loan. The legislature accordingly, in order to effect the object, gave a form of bill of sale, and made every bill of sale void unless it was in accordance with the form given by the Statute. It seems to me that the legislature neither intended to interfere, nor is it the effect of the legislation to which I have referred to interfere, with other transactions than those which the legislature has expressly pointed out."

The provision in the Act on which the argument for the respondent, and the judgment of the learned Judge was founded in the present case, is sec. 134, which first became law in 1876. Sec. 133 is the old provision requiring registration, and providing that if the bill of sale be not registered within the time appointed it shall be void as against certain persons as to goods in the apparent possession of the grantor. Sec. 134 is as follows:— "No bill of sale executed on or after the 22nd day of December, 1876 shall be operative or have any validity at law or in equity until the same shall be filed in manner provided by the last preceding section of this Act, and no such bill of sale shall be so filed unless notice of the intention to file the same be lodged at the office of the Registrar-General fourteen days before the filing thereof." Sec. 135 provides that the "notice shall be in the form in the Fifth Schedule hereto or to the like effect, and shall contain a statement of the particulars in such form mentioned."

It has been contended for the appellant that the provisions of that section do not necessarily make a bill of sale which is not registered void as between the parties to it, that the object of the Act was merely to give additional security to the same persons who were protected by the earlier Act by giving them an opportunity of preventing the registration of the bill of sale by lodging a caveat, and, apart from that, was not to alter the validity of the bill of sale as between the parties to it. Whether that is so or not is a question upon which there are conflicting decisions in the Victorian Courts in the cases of *Black* v. *Zevenboom* (1), decided by *Stawell* C.J. and *Stephen* and *Higinbotham* JJ. and

(1) 6 V.L.R. (L.), 473; 2 A.L.T., 96.

H. C. OF A. 1911.

O'CONNOR v. QUINN.

Griffith C.J.

*Anthoness* v. *Anderson* (1), decided by *Higinbotham* C.J. and *Holroyd* and *Kerferd* JJ. But it is not necessary to express an opinion upon the point.

I return to the only point which the learned Judge decided. He thought that it was necessary that the consideration for the bill of sale should be truly stated in the bill of sale, and he appears to have applied, in effect, the same rules for determining whether the consideration was truly stated or not as have been applied in cases arising under sec. 8 of the English Act of 1882. Those cases were not cited to the learned Judge, but he said that he understood it to be a "well-established rule that a bill of sale is bad if it does not truly state the consideration, a rule which is quite independent of any special provisions of our law as to giving notice of intention to file." Here I think, with respect, the learned Judge fell into error. There is, however, nothing in the Statute law of Victoria bearing on the point. Then the learned Judge went on to say:—"I think it is clear that, if a document states that a debt is due and that forbearance to enforce immediate payment of that debt, as to which a right to immediate payment is indicated by the statement that it is due, is the consideration upon which the document is based, it cannot be said that that consideration is truly stated when there is no right to immediate payment. If there is only a sum due at a future time which is stated to be due *in præsenti*, and a forbearance to sue for that sum which is treated as due at once is stated as the consideration, that is not a true statement of the consideration." Then the learned Judge proceeds to apply that rule to the facts of the case.

As I have said before, the provisions of this Statute are merely that the bill of sale is not to be filed unless notice of intention to file the same has been given fourteen days before the filing thereof, and that the notice shall be in the form in the Fifth Schedule.

The Fifth Schedule requires information to be given as to the consideration. The column headed "consideration" is divided into three sub-headings—"past debt," "advance at time of giving bill of sale," "future advances"—and the information to be given

(1) 14 V.L.R., 127; 9 A.L.T., 175.

is to be put under one of those sub-headings. I will read a passage from the judgment of *Bowen* L.J., in *Ex parte Johnson*; *In re Chapman* (1). He said:—"The *Bills of Sale Act* of 1878 requires that a bill of sale shall set forth the consideration for it. That has been held, and it seems to me with unquestionable good sense, to mean that it must truly set forth the consideration, because a person does not set forth the consideration who instead of it sets out something which is not the consideration. Therefore the Act itself means—though it does not say so in words, it says so impliedly—that the consideration must be truly set forth.

"Now, as soon as you have got that far, you have got, it seems to me, as far, or as nearly as far, as you can usefully get towards laying down a legal definition. I always feel a great difficulty about laying down, as if they were definitions of law, what are really canons or cautions as to the way in which you should draw inferences of fact. We have the Act of Parliament, which says that you must state the consideration truly, and how far, then, are we to go on inquiring what is the definition of truth? I think we may usefully go a little further, but perhaps not very much. It seems to me that that which is true, in a bill of sale as everywhere else, is that which conveys a true impression, or which is likely to convey a true impression, to those who are about to be affected by or to act on the document.

"Now who are going to be affected by this bill of sale or to act on it? It is drawn up for present purposes, it is not for posterity. It is intended, not for special pleaders, or conveyancing counsel of the Court of Chancery, or for ingenious lawyers in the Court of Bankruptcy. It is drawn up for business purposes, and business men, for traders, bankers, and people who lend money—in fact for the world at large.

"If that is so, I cannot help thinking that the Courts have taken the true point of view when they have said, You must take a broad and business view of the transaction, and not look at it with that minute accuracy which persons would use who were examining into it, after the event, in a Court of Justice. It is sufficient if the statement is substantially accurate, to use

(1) 26 Ch. D., 338, at p. 348.

H. C. OF A. 1911.

O'CONNOR v. QUINN.

Griffith C.J.

the words of the Lord Chancellor—if its true legal effect or its true business effect is stated, to use the language of Lord Justice *Brett*. That is what has been said in the cases on the point. In *Credit Co.* v. *Pott* (1), Lord *Selborne* L.C. cited with approbation the language of Lord Justice *James* in *Ex parte National Mercantile Bank* (2), where he said 'In my view, the real considera-ation, as between the grantor and grantee, the consideration which would have been properly stated in the deed if the Act had not been passed, is the consideration which ought now to be stated,' and Lord Justice *Brett* said (3), that he thought it sufficient if the facts are accurately stated, 'either as to their legal effect or as to their mercantile and business effect, although they may not be stated with strict accuracy.' So that, although it is not necessary to go back to principle, I cannot help saying that I should myself agree with that view of the law. But, whether that is or is not the true view, it is the established view."

I proceed to apply that doctrine to this section and Schedule. First of all the grantor is to give notice of what the consideration for the bill of sale is. He is to state it truly, but he is to do so by saying whether it is a past debt, a present advance or a future advance. In ninety-nine cases out of a hundred it is quite easy to say under which of these descriptions the consideration falls. If the consideration substantially falls under the subheading under which it is placed, then the notice is true. If so, it also follows that the consideration stated in the notice must be substantially the same as that stated in the bill of sale, because otherwise it would not be a notice of that bill of sale but of a different one. These being the principles I seek to apply them in the present case.

It appears that in May 1908 the appellant had agreed to lend Barby £800, to be secured by a bill of sale of the chattels now in question and a mortgage of Barby's interest under a will. A bill of sale was accordingly executed, under which and under the mortgage the debt with interest was to be payable on 30th June 1911. The bill of sale contained a stipulation that "in case any caveat shall be lodged against the filing of these presents"—refer-

(1) 6 Q.B.D., 295.

(2) 15 Ch. D., 42, at p. 54.

(3) 6 Q.B.D., 295, at p. 299.

ring to the provisions of the *Instruments Act* 1890 allowing a creditor to lodge a caveat against the registration of the bill of sale—" . . . it shall be lawful for the mortgagee . . . . to sell." Finally it was agreed that " if and whenever the said mortgagor shall make default in the payment of any moneys hereby secured . . . . or in case of the death of the said mortgagor then and immediately thereon or immediately upon a right arising under these presents to the said mortgagee to sell or dispose of the said premises the whole of the principal interest and other moneys hereby secured and for the time being due and payable under and by virtue of this security shall forthwith and immediately thereupon be and become due and payable and recoverable." That is a stipulation in terms that if a caveat should be filed against registration the debt should become immediately due. A caveat was filed and was not removed and the bill of sale was not registered, but in August, two and a half months later, the bill of sale now in question was executed and registered. The notice of the intended registration, under the sub-heading " past debt," described the consideration as " the sum of £800 now due and owing by the said Gilbert Maw Barby to the said Felix O'Connor and in consideration of the said Felix O'Connor agreeing not to press for the immediate payment thereof." Those words are quoted from the bill of sale itself. It is contended by the appellant that the description was sufficiently accurate within the meaning of the Fifth Schedule. As between the meanings of the three categories " past debt," " advance at time of giving bill of sale," and " future advance," it clearly fell within the first. I can see no answer to that argument. It certainly was not a present advance, for the money had been advanced two and a half months before.

Cases were relied upon by Mr. *Watson* in which the Courts in England, in interpreting sec. 8 of the Act of 1878, have endeavoured to bring together the two classes of transaction so as to allow a transaction similar to that in the present case to be described as a present advance, but that was not because that was the accurate way of describing it, but because, as *Bowen* L.J. said in *Ex parte Johnson*; *In re Chapman* (1), that descrip-

(1) 26 Ch. D., 338, at p. 348.

H. C. OF A. 1911.

O'CONNOR v. QUINN.

Griffith C.J.

tion would not deceive anyone, or, as *Brett* M.R. said in *Credit Co.* v. *Pott* (1) it was sufficiently accurately stated as to its legal effect, or as to its mercantile and business effect. But it cannot be wrong to state the exact truth, and as a matter of fact this was the accurate truth. It was a past debt, and not an advance at the time of the sale, or a future advance. It is said, however, that although the placing under the sub-heading "past debt" of the words "£800" and nothing more might have been sufficient, yet that is vitiated by the words which follow, viz., "due and owing," and "and in consideration of the said Felix O'Connor agreeing not to press for immediate payment thereof." I should think, as a matter of common sense, and within the rule laid down by *Bowen* L.J. and *Brett* M.R., that it was a debt due and owing when the relation of debtor and creditor existed between the parties. It was a sum of money *debitum in præsenti solvendum in futuro.* As I have said, the first bill of sale contained a stipulation that the mortgage debt, with interest, should be payable on 30th June 1911. It was a debt in the sense in which that term was used by *Cave* J. in *Ex parte Allam*; *In re Munday* (2), and it was a past debt, and it was owing, although not immediately payable.

If that answer is not sufficient, there is another answer arising upon the stipulation in the first bill of sale that, if a caveat should be filed against its registration, the right to seize the goods should come into operation at once, and that in that event the debt should become immediately payable.

The argument for the respondent in respect of that is that in the stipulation that, upon a right to seize the goods arising the debt should become immediately payable, the words "right to seize" mean a valid right to seize, and that there could be no valid right to seize until the bill of sale was registered. That is to say, when the parties said that if a caveat should be lodged the right to seize should come into existence, and thereupon the debt should be payable, they meant that the debt should only become payable if a valid right to seize should come into operation before registration, which of course is absurd, assuming that an unregistered bill of sale is void between the parties. In con-

(1) 6 Q.B.D., 295, at p. 299. (2) 14 Q.B.D., 43, at p. 47.

struing any document we must try to see what the parties meant. It is obvious that the stipulation that on a caveat being lodged a right to seize should arise was put in because the parties thought they were making a valid agreement. They thought they could make an agreement that if a caveat were lodged there should be an immediate right to seize and an immediately payable debt. It turns out that they could not give the right to seize; but that does not alter the meaning of the words they used. So that, if it were necessary to rely on that point, I think the statement in the notice that the debt was due and owing was not only substantially true, but literally true.

The same point was dealt with in another way by Mr. *McArthur*. He said that, when a man advances money to another who promises to give a security, and gives a security including a covenant to repay the money at a future date, and it turns out that the security is absolutely void, the debt becomes immediately payable. I think it does. There is in such a case, I think, an implied promise to repay the money at once. I think that, if the creditor sued the debtor and it was pleaded that the debt had merged in the higher obligation of the covenant, a Court of Equity would prevent any such defence from being set up, if it appeared that the security had become invalid.

In my opinion the notice was substantially true, and was a substantial compliance with the *Instruments Act* 1890. That is the only objection that is taken to the appellant's title, although he may have other answers to the respondent's claim. I think that the appeal should be allowed.

BARTON J. I entirely agree.

O'CONNOR J. I am of the same opinion and have very little to add. A number of interesting questions were raised during the argument, but it is really only necessary to determine one question which was decided by the learned Judge in the Court below, that is, whether the bill of sale is or is not valid. Apart from the rights which may exist in a creditor or assignee in insolvency to set aside transactions of this kind under various provisions of the law, the transaction between the parties cannot become null and void except under the provisions of a Statute,

H. C. OF A. 1911.

O'CONNOR v. QUINN.

O Connor J.

and there is no statutory requirement which would make this bill of sale void unless it comes within the words of the *Instruments Act* 1890. The error into which the learned Judge in the Court below, with all respect to him, seems to have fallen, is that he assumed that there was a law in force in Victoria which invalidated a bill of sale if the considerations were not truly stated in it. He seems to have been misled by the analogy of the English cases. It must be borne in mind that all those cases referred to by Mr. *Watson* and Mr. *McArthur* were cases decided on the English Acts of 1878 and of 1882. Sec. 87 of the Act of 1878 requires the consideration to be stated, and that has been interpreted to mean truly stated. The Act of 1882 expressly requires the consideration to be truly stated. If the requirement of the *Instruments Act* 1890 were that the consideration should be truly stated, I should be very much disposed to agree with Mr. *Watson* that the consideration was not truly stated, even allowing the most benignant interpretation that could be put upon the statement of the consideration. But it is not necessary to go into that matter. Neither is it necessary to go into the question whether, upon the transaction as it appears from the two bills of sale, the whole £800 was or was not actually payable at the time the second bill of sale was made. I express no opinion upon that, because it appears to me that the scheme of the legislation in the *Instruments Act* 1890 is entirely different from that in the English Act. The Act of 1890 does not require a statement of the true consideration in the bill of sale itself, but it does require that the notice which is to precede the filing of the bill of sale shall contain a statement which appears to me to mean a true statement of the consideration in so far as that consideration can be stated in the terms of the Fifth Schedule. The object of sec. 135 no doubt is that a creditor who receives this notice may be able to determine what course he will pursue, whether to lodge a caveat against the registration or not. The information which the Schedule requires to be given is not a statement of the consideration merely, but a statement of the consideration in so far as it can be embraced in the three headings which are given—past debt, advance at time of giving bill of sale, and future advances. Whether it is accurate or not from a legal

point of view to describe the consideration for this bill of sale as a past debt, there is certainly no question that having regard to the provisions of the Schedule there is no other way to describe it. It certainly was not an advance at the time of the sale, nor was it a future advance. In substance it was a past debt. The statement of the consideration as "the sum of £800 now due and owing" is substantially a true statement. The money might or might not have been then payable, but it certainly was a past advance and the money was then due and owing. I think there can be very little doubt that, if the statement of the consideration had been confined to that, no fault could have been found. But there is the addition of another kind of consideration which seems to imply that the money was then immediately payable, and the only ground upon which there was any basis for argument seems to me to be whether that addition affected the validity of the notice in any degree. I do not think it did. I do not think it was a necessary statement, but being there it is quite evident that as far as the evidence informs us it was absolutely true. The only evidence we have as to what the consideration was is contained in the documents themselves, and the second bill of sale recites that there was an agreement to forbear as a consideration just as is stated in the notice.

I am therefore of opinion that the Act was complied with in that there was a substantially accurate statement of the consideration as required by the Fifth Schedule. That being so, the bill of sale is valid and passed title to the appellant. In these circumstances I agree that the appeal should be allowed.

*Appeal allowed. Order appealed from rescinded. Respondent's claim barred. Respondent to pay the cost of the interpleader summons, including the stakeholder's costs, and to pay the costs of this appeal.*

Solicitors, for the appellant, *Roberts & Elliott.*
Solicitor, for the respondent, *A. E. George.*

B L.