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SUMMERS v. THE COMMONWEALTH.

Solicitor for the plaintiffs, *J. W. Dixon.*

Solicitor for the defendant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

MYERSON . . . . . APPELLANT;
DEFENDANT,

AND

COLLARD AND THE COMMONWEALTH . RESPONDENTS.
INFORMANT AND PROSECUTOR,

ON APPEAL FROM A COURT OF QUARTER SESSIONS OF NEW SOUTH WALES.

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SYDNEY, *July* 30, 31; *Aug.* 12.

Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

War Precautions—Offence—Seizing chattels of soldier's dependent—Mens rea—"Belonging to," meaning of—Goods held under hire-purchase agreement—Evidence—War Precautions Act 1914-1916 (*No.* 10 *of* 1914—*No.* 3 *of* 1916), *sec.* 6—*War Precautions* (*Active Service Moratorium*) *Regulations* 1916 (*Statutory Rules* 1916, *No.* 163 *and No.* 283), *reg.* 12.

Reg. 12 of the *War Precautions* (*Active Service Moratorium*) *Regulations* 1916 provides that "(1) No person shall, under a bill of sale, or writ of execution or other process issued by a Court, or by way of distress, or under the provisions of a hire-purchase agreement made prior to the first day of June 1916 or to the enlistment of a member of the Forces, whichever last happens, seize or take possession of—(*a*) any chattels which are used by any female dependent of that member of the Forces to support or assist in supporting herself or any of the family of the member; or (*b*) any furniture or wearing apparel belonging to any such member or female dependent."

Held, by the Court, that *mens rea* is not necessary to constitute an offence against the regulation.

Held, also, by the Court, that the words "belonging to" connote beneficial ownership by the member of the Forces or female dependent:

Held, therefore, that a person who seized by way of distress for rent chattels in the possession of a female dependent under a hire-purchase agreement by the terms of which the dependent had hired the chattels from a third person with an option of purchase, the property in the chattels remaining in the third person until the option was exercised, was not guilty of an offence against the regulation.

Held, also, by *Barton*, *Isaacs* and *Rich* JJ. (*Higgins*, *Gavan Duffy* and *Powers* JJ. dissenting), that on the evidence none of the chattels seized by way of distress for rent while in the possession of the female dependent were proved to belong to her.

Decision of a Court of Quarter Sessions of New South Wales reversed.

APPEAL from a Court of Quarter Sessions of New South Wales.

At the Central Police Court, Sydney, before a Stipendiary Magistrate, an information was heard whereby Elizabeth Marion Collard charged that Emanuel Myerson did by way of distress take possession of certain specified articles of furniture belonging to Elizabeth Marion Collard, wife of a member of the Australian Imperial Forces and a female dependent wholly for her support upon his pay, such furniture exceeding in value £50. The Magistrate convicted the defendant, and fined him £30, ordered him to pay £12 18s. to the informant and directed that the defendant should be imprisoned in default of payment. The Magistrate also ordered the defendant to pay to the informant £14, the value of the chattels taken possession of, and directed that the defendant should be imprisoned in default of payment of that sum. The defendant appealed to the Court of Quarter Sessions at Sydney from the conviction, and the Court confirmed the conviction, reduced the penalty to £15, and ordered that the order for imprisonment be deleted.

The defendant obtained special leave to appeal to the High Court from the decision of the Court of Quarter Sessions, the notice of appeal being directed to be served upon the Commonwealth, which had prosecuted the information.

The appeal now came on for hearing.

The material facts are stated in the judgments hereunder.

Armstrong, for the appellant. *Mens rea* is a necessary ingredient of an offence against reg. 12 of the *War Precautions* (*Active Service Moratorium*) *Regulations* 1916. Unless it is clear that an act is

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forbidden at all hazards, *mens rea* must be shown (*Ross* v. *Sickerdick* (1); *Bank of New South Wales* v. *Piper* (2)).

[RICH J. referred to *Mousell Brothers Ltd.* v. *London and North-Western Railway Co.* (3).]

The proviso to reg. 12 (1), which permits the seizure of chattels belonging to a dependent if chattels to the value of £50 are left, shows that the intention was not to prohibit the act absolutely. The fact that under sec. 6 of the *War Precautions Act* the penalty for an offence such as that which is created by reg. 12 may be a fine of £100 and imprisonment for any term of years, or even death, may be considered as a reason for saying that *mens rea* is an ingredient of the offence (*Murphy* v. *Kenny* (4)). It is only where a legislative enactment cannot be satisfactorily administered unless the particular act is absolutely prohibited that *mens rea* is not necessary. [Counsel referred to *Sherras* v. *De Rutzen* (5); *Stroud's Mens Rea*, pp. 30, 34; *Halsbury's Laws of England*, vol. IX., p. 234.] The words "belonging to" in reg. 12 mean that the chattels are the property of the member of the Forces or the dependent. That is the natural meaning of the words, and there is no reason for giving them any other meaning. As to the goods in respect of which the hire-purchase agreement is in evidence, the informant was merely a hirer with an option of purchase. As to the other goods, the evidence does not establish that they were the property of the informant.

Flannery (with him *H. G. Edwards*), for the respondents. Any argument based on the punishment which, under sec. 6 of the *War Precautions Act*, may be imposed is in favour of the respondents, for the section leaves to the adjudicating tribunal wide discretion, under which it may award punishment according to the gravity of the offence. If the contention for the appellant were right, sec. 6 would have the effect of limiting the general power of the Executive to prohibit an act absolutely. The object of reg. 12 is to afford protection to property of soldiers and their dependents, and that protection would be illusory unless the seizure of it were absolutely prohibited. [Counsel was stopped on this point.] The words

(1) 22 C.L.R., 197.
(2) (1897) A.C., 383.
(3) (1917) 2 K.B., 836.
(4) (1916) V.L.R., 335; 38 A.L.T., 1.
(5) (1895) 1 Q.B., 918.

"belonging to" include the interest of a person in possession of goods under a hire-purchase agreement, irrespective of whether that person is or is not bound to purchase them. The words must have the same meaning with regard to goods held under a hire-purchase agreement as they have in regard to goods held under a bill of sale. In the case of an ordinary bill of sale, when the holder seizes under it he merely takes possession of that which is his own in exercise of his contractual right. The regulation prohibits him from exercising his contractual right. "Belonging to" is not a term of art, and in this regulation it merely connotes the interest which a person is ordinarily understood to have in furniture which is in his house. Unless that is so, the regulation affords no protection except in the rare cases where the person in possession of goods under a hire-purchase agreement is the owner of the goods.

[ISAACS J. referred to *Belsize Motor Supply Co.* v. *Cox* (1); *McEntire* v. *Crossley Brothers Ltd.* (2).]

[RICH J. referred to *Hale* v. *Molloy* (3).]

Armstrong, in reply.

Cur. adv. vult.

Aug. 12.

The following judgments were read :—

BARTON J. This is an appeal from the Court of Quarter Sessions at Sydney, exercising Federal jurisdiction. That Court was itself acting on appeal from the decision of a Stipendiary Magistrate sitting in the Police Court. By agreement the appeal was heard on the depositions taken at the last-named Court. The Magistrate convicted and fined the now appellant on the information of the respondent of having during the continuance of the present state of war, that is, on 8th August 1917, taken possession, under a warrant to distrain, dated 1st August, of certain articles of furniture not exceeding in value £50 "belonging to" the complainant, the wife of a soldier on active service, she being a female dependent for her support upon the soldier's pay. In point of fact the seizure took place some days before the 8th. In the prosecution

(1) (1914) 1 K.B., 244. (2) (1895) A.C., 457.
(3) 4 N.S.W.W.N., 126.

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an order was made for payment to the complainant of £14 as the value of the articles of which possession had been taken. *Statutory Rules* 1916, No. 283, provide in reg. 8 a new regulation, No. 12, which runs as follows:—"12. (1) No person shall, under a bill of sale, or writ of execution or other process issued by a Court, or by way of distress, or under the provisions of a hire-purchase agreement made prior to the first day of June, 1916, or to the enlistment of a member of the Forces, whichever last happens, seize or take possession of—(*a*) any chattels which are used by any female dependent of that member of the Forces to support or assist in supporting herself or any of the family of the member; or (*b*) any furniture or wearing apparel belonging to any such member or female dependent: Provided that if the furniture and wearing apparel belonging to the member and his female dependents exceed in value £50, any articles may be seized and taken possession of under due authority of law if the articles remaining are not less in value than £50. (2) In any prosecution for an offence against this regulation an order may be made for the return of any articles seized or taken possession of in contravention of this regulation, or for payment of their value." The Chairman of Quarter Sessions, while confirming the conviction, reduced the penalty, which now stands at £15. The regulation in question was made under the *War Precautions Act* 1914-1916. In view of sec. 6 (3) of that Act it was a ground of appeal that "the clause of the regulation providing that the value of the goods seized might be ordered to be repaid is *ultra vires* and beyond the power to make this regulation." That ground was amended, by leave, so as to read, after the word "is," as follows: "not within the powers granted by the *War Precautions Act*." But, during the hearing of the appeal before us the whole ground of *ultra vires* was abandoned.

Three questions were raised in argument. The first of them may be discussed without particular quotation of the evidence. It was, to put it shortly, that proof of *mens rea* was essential. It had been practically admitted by the respondent that such proof did not exist. The seizure and sale were conducted by an agent of the now appellant and in his absence. There was nothing to show that the appellant either knew or had good grounds for knowing

that the facts constituting the offence existed. In the case of *Duncan* v. *Ellis* (1), in considering sec. 226 of the *Factories and Shops Act* 1915 (Vict.), we adopted the principle laid down by *Wright* J. in *Sherras* v. *De Rutzen* (2), namely, that the presumption that *mens rea* is an essential ingredient in every offence "is liable to be displaced either by the words of the Statute creating the offence or by the subject matter with which it deals," and that both must be considered. In the three classes of cases which are exceptions to the presumption the first, says his Lordship, is a class of acts "which . . . are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty." I do not discuss the second and third classes, because this case seems to me to come very clearly within the first. So far from being criminal, the acts prohibited are such as in times of peace are in general lawful. It is in the public interest that it has been prescribed that the belongings of absent soldiers and their female dependents should be protected from certain processes and proceedings which otherwise would be within the power of creditors. The object of the regulation is perfectly obvious, and it is impossible to say that it was not made in the public interest. Also the intention of the supplementary legislature is made plain by the second paragraph of the regulation. If there could be no "contravention" unless the person charged took possession with knowledge that the furniture belonged to the dependent, then only a person with such knowledge could be ordered to return the goods or their value, and a taker without such knowledge could not be ordered to return the dependent's goods. It is inconceivable that the supplementary legislature had any such intention. Without discussing the matter at length, I am of opinion that the appeal fails as to this ground.

The second question argued was as to the meaning of the word "belonging" in par. (*b*) of the new reg. 12 (1). It was contended for the appellant that this word must be read in its ordinary sense, and for the respondent that it holds a special sense which is satisfied by the proof of any interest, or at any rate, of some interest entitling the dependent to possession of the goods. I see nothing in the phraseology of the regulation to justify the respondent's contention

(1) 21 C.L.R., 379. (2) (1895) 1 Q.B., 918, at p. 921.

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on this head, and no context was cited which expanded the ordinary meaning of the terms used. The words relating to a "hire-purchase agreement" have not that effect. The expression is indefinite, and to alter the natural and usual meaning of "belonging" it would have to be read as a definite protection of articles the property in which has not passed under such an agreement. I am unable to give it that definite meaning in a provision which should be strictly construed. Besides, an ambiguous expression cannot be held to control the otherwise clear meaning of the term to be interpreted. When pars. (*a*) and (*b*) are compared, it is seen that the supplementary legislature has drawn a distinction between the terms used to denote the respective causes of possession. In the one case it is the use of chattels as a means of livelihood. Ownership is not there prescribed. Mere use is sufficient. In the other—which is the present case—it is required that the goods belong to the dependent. "Use" is a term evidently employed here in its ordinary sense, and "belonging" must, I think, be read in its ordinary sense too, as denoting goods of which the dependent has the beneficial ownership.

The remaining question is the third. The appellant contends that the respondent, who had to prove ownership of at least some part of the goods, had not done so. We have to deal with the facts by way of review, forming our own judgment as to their weight. There is no question as to credibility. The furniture was as to part covered by an agreement with a firm of S. J. Hale & Co. Ltd. This is in evidence. It was plainly a letting on hire with an option to purchase; for the option a sum of ten shillings was to be paid, and the agreement said: "such sum shall not be credited to the rent payable hereunder until and unless a purchase of the said chattels be effected hereunder." See *Belsize Motor Supply Co.* v. *Cox* (1). The rent payable was for the hire to the respondent, she being designated "the hirer" and Hale & Co. being designated "the owners." Throughout the agreement there is no sign of any other relationship. There was provision for retaking possession on default in payment of any of the weekly instalments of "rent or hire," or on bankruptcy, or on any execution or distress, or on

(1) (1914) 1 K.B., 244.

failure to perform the hirer's stipulations, or on the hirer's suffering any act, including a judgment, which might prejudice the owners' rights of ownership. The chattels were only to become the property of the hirer when the amount of rent received by the owners, together with the ten shillings for the option to purchase, should equal the total value of the chattels as set out in the schedule. Until then the chattels were to remain the property of the "owners." It is not contested that this agreement was still current at the time of the seizure under warrant to distrain. No doubt a document may be called a hire-purchase agreement when its terms as written really amount to a purchase by instalments. But in this instance there is obviously only a hiring unless and until the hirer becomes the purchaser by her own act. It is clear that no ownership was proved in respect of this portion of the goods.

The remainder of the goods consisted of a green leather suite obtained from a firm of Davidson & Co. The respondent said:—"Some of the furniture was my own, and some I had under a hire-purchase agreement. The green leather suite—a seven-piece suite—belonged to me—a dining-room suite I bought at Davidson & Co.'s, and paid £7 12s. 6d. for it. I also had some goods from S. J. Hale & Co. on a hiring agreement." A Mr. Crowe, secretary to Davidson & Co. Ltd., gave evidence on behalf of the respondent, then complainant. He said:—"I know Mrs. Elizabeth Collard, to whom we sold a seven-piece dining-room suite on the time-payment system, but it was fully paid up on the day of the sale, the 8th August I think. . . . That seven-piece suite would cost anyone £7 12s. 6d. to buy, and that is what she paid for it." As to the day of the sale he said:—"I went to our office in Oxford Street with Mrs. Collard, and then I went back to the sale. She had some money with her, a ten pound note. . . . She told me she had borrowed that money . . . and I suggested that she came along and pay our account, but she did not tell me what she had borrowed it for. We did not leave to go to the office until Levy" (the auctioneer) "had said he intended to sell. I brought Mrs. Collard back; we were away only a very short time." It appears, then, that when the intention to sell was announced Mr. Crowe took the respondent to Davidson's office, she having a ten pound note with her, and then they went back to the sale. It is also

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plain that Crowe's principals had an account against her in respect of the green leather suite on the day of the sale and before it. There is no evidence that the £7 12s. 6d. had all been paid before the seizure, and the sale took place several days after the seizure. Then was she at the time of the seizure the owner of these goods which she had procured "on the time-payment system"? Crowe says "it," that is, the price, was fully paid up on the day of the sale, and therefore not till then. Is the word "bought" used by the respondent, or the word "sold" used by Crowe, sufficient to show that the property in these goods had passed to the respondent before the seizure? I am much inclined to think that when Mrs. Collard said she had "bought" them she was referring to the transaction after the seizure—in fact on the day of the sale—when she accompanied Crowe to his office. What does "the time-payment system" mean as a colloquial term? Is it used to denote a system under which ownership begins at the time of the agreement, or a system under which ownership begins when the time payments are completed? It may mean either. I confess that I am left in doubt on this point. It is obvious that there was an agreement, but its terms, which were most likely written, were not disclosed by the respondent in her evidence in chief. In fairness it must be said that they were not elicited on cross-examination. But it was for her, as the complainant, to disclose them. If I felt myself at liberty to say what I take "the time-payment system" to mean in the great majority of such transactions, the task would be less difficult. But I am not sure that I am at liberty to do so. The matter seems to me to be evenly balanced. An inference is open in either direction. On the whole I cannot say that the inference in one direction outbalances that in the other. But the proceeding on which the evidence was taken was a quasi-criminal one, and the evidence for the prosecution must be plain and clear, or the prosecution cannot succeed. I cannot conclude that the respondent has proved property so as to satisfy me on this portion of her case. But if the Davidson suite did not belong to her at the time of the seizure, she fails altogether, and I feel myself driven to conclude that she has failed. I am unable to say that when a person declares that he bought on the time-payment

system it is in any way clear that he shows that he acquired the property at the time of the agreement.

I think therefore that the appeal ought to be allowed, and the conviction and order quashed.

Isaacs J. Rich J.

ISAACS AND RICH JJ. The validity of par. 1 of the regulation was at first challenged, but, that objection having been withdrawn, it is unnecessary to say anything about it formally. It must not, however, be assumed that as at present advised we entertain any doubt on the matter.

Then, assuming the whole regulation valid, the next question is its interpretation. Does it require that there shall be what is sometimes called *mens rea*, before an offence is committed? In other words, did the Governor-General in Council, as the legislating authority, intend that no one should be deemed to contravene its provisions so long as he was honestly ignorant, that is (with reference to this case for example), that the goods seized were those of a soldier's dependent? The answer to that question, to quote the words of Lord *Atkinson* speaking for the Judicial Committee in *Bruhn* v. *Rex* (1), "depends upon the terms of the Statute or ordinance creating the offence." In the present instance, having regard to the terms of the regulation itself, to its subject matter, to the difficulty, amounting in many cases almost to impossibility, of proving guilty knowledge prior to seizure, to the futility, if such proof were necessary, to which the regulation would probably be reduced, and having regard also to the fact that the enacting authority knew of the statutory provision prohibiting any prosecution without the consent of the Government authorities, the regulation should be read as a simple prohibition of the act itself. The absence or presence of knowledge as an element in the act might influence the Crown as to instituting a prosecution, or in the event of a prosecution might affect the mind of the tribunal in awarding the punishment.

The next question is as to whether on this reading of the regulation there was in fact a breach of its provisions. The material

(1) (1909) A.C., 317, at p. 324.

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portion for this purpose consists of the words any furniture "belonging" to any female dependent. Mrs. Collard was a female dependent, that is, of a member of the Forces, and the articles seized were furniture. The problem is, were they furniture "belonging to" her? What this part of the regulation speaks of are "furniture" and "wearing apparel" later on in par. 2 grouped together under the generic term "articles." Now these are physical objects, and not juristic rights in respect of them. When we speak of physical objects as belonging to a person, without any qualifying expressions, the primary natural meaning is that they are his own absolute property, and not that he has, instead of the objects themselves, a mere option which he may never exercise or a mere contractual right to own them on conditions which he may yet elect not to undertake. This is stated in unequivocal language by Lord *Macnaghten* in *Heritable Reversionary Co.* v. *Millar* (1). The reference to "bills of sale" and to "hire-purchase agreements" is not a qualification of this meaning. In the case of a "bill of sale" the property is in truth the property of the mortgagor, and the mortgagor is under a fixed liability to pay the debt and clear the property. A hire-purchase agreement of the *Lee* v. *Butler* (2) type is analogous; but one of the *Helby* v. *Matthews* (3) type is not. The expression "hire-purchase agreement" is certainly not conclusive in favour of enlarging the meaning of the words "belonging to." If it has any definite meaning it tends the other way, because "hire-purchase agreement," strictly interpreted, would mean an agreement by which the parties agreed as definitely to "purchase" as to "hire." But without giving it that strict meaning, and treating the phrase as equivocal, it leaves the words "belonging to" untouched by any restrictive context. They must therefore be given their primary natural meaning. The result is that unless the facts show these articles of furniture or some of them to have been Mrs. Collard's, the regulation was not infringed.

The furniture in question consisted of two groups, one of which may be called the Hale group, and the other the Davidson group. The Hale group is shown to have been hired by Mrs. Collard on a

(1) (1892) A.C., 598, at p. 621.
(2) (1893) 2 Q.B., 318.
(3) (1895) A.C., 471.

hire-purchase agreement, which gave her a mere option to purchase and which did not bind her to purchase, and which, moreover, expressly provided that until she did elect to purchase and did pay the full price the property remained in Hale & Co. Clearly these chattels did not "belong to" Mrs. Collard (*Belsize Motor Supply Co.* v. *Cox* (1), and cases there cited, and also *McEntire* v. *Crossley Brothers Ltd.* (2)). As to the Davidson chattels it is not so clear. The actual written agreement is not in evidence, and there are some expressions which are to the effect that Mrs. Collard "bought" the goods from Davidson. But the evidence also shows that it was on "the time-payment system," which, as is well known, is at least consistent with the ownership remaining in the so-called "seller" until payment in full. The payment in full did not take place till 8th August, the day of the sale. The seizure or taking possession occurred on 2nd August. The act of seizure was not a continuous act, but an act done once and for all (*Jones* v. *Biernstein* (3), per *Channell* J.—which decision was affirmed (4)).

This being a case where, apart from credibility, this Court must exercise its own mind upon the facts, we are not satisfied with the proof of ownership. Criminal responsibility should be established beyond reasonable doubt. The purchase, no doubt, was by written agreement, and it should have been produced or accounted for by the prosecution. That would have been the best evidence, and so vital a fact should not be left to conjecture where direct proof is possible. To say that goods are "sold" or "bought" does not settle the matter, even if believed. Those words do not necessarily connote immediate transfer of property. It is all a question of intention as appearing from the terms of the contract. The contract of sale may stipulate that property is not to vest in the purchaser —that is, even where it is a real purchase and not a mere option of purchase — until payment in full (see per Lord *Chelmsford* in *Shepherd* v. *Harrison* (5), approving *Moakes* v. *Nicolson* (6)). And when to this serious doubt are added the admission that the sale was on "the time-payment system" and the circumstance of haste and unusual circumspection in obtaining payment while

(1) (1914) 1 K.B., 244.
(2) (1895) A.C., 457.
(3) (1899) 1 Q.B., 470.
(4) (1900) 1 Q.B., 100.
(5) L.R. 5 H.L., 116, at p. 127.
(6) 19 C.B. (N.S.), 290.

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the sale was in progress, we are very far from being satisfied that the property legally " belonged to " Mrs. Collard at the moment it was seized. To say the least, the ownership of the goods is certainly left in reasonable doubt.

On the whole we are of opinion that this appeal should succeed on the one ground, that the property was not shown to be property " belonging to " Mrs. Collard at the time of seizure.

HIGGINS J. Myerson let a house to one Schumack at 14s. per week. Schumack left, and Mrs. Collard, wife of a soldier on active service, who had occupied a room, took possession and put in furniture. On 2nd August, rent being in arrear, Myerson authorized Ward to distrain on the goods in the house for £3 10s. rent due; and Ward distrained on certain of the furniture. On 8th August the goods distrained were sold. These acts were done in pursuance of the legal right of Myerson, except so far as reg. 12 of the *War Precautions (Active Service Moratorium) Regulations* 1916 made them illegal.

The defendant has been prosecuted by Mrs. Collard under reg. 12 for taking possession of the furniture, the summary prosecution having been authorized by the Attorney-General under sec. 6 (3A) of the *War Precautions Act*. The regulation has been set out in the judgment of my brother *Barton*. It must be construed strictly, as being in derogation of the ordinary legal rights of the landlord. Having regard to this principle, and to the provision for an order for the " return " of articles seized or payment of their value, and to the context, I am of opinion that the words " belonging to " in sub-sec. 1 (*b*) connote full property—that the articles (not a mere interest therein) have passed to the soldier or to his female dependent.

Mrs. Collard is a female dependent of her husband within the meaning of the regulations. Some of the furniture did not " belong to " her. Under the letting and hiring agreement of 19th October 1916, Hale to Elizabeth Collard, the property was not sold, was not to pass to Mrs. Collard until the weekly payments of rent, added to ten shillings paid for a mere option to purchase, should amount in value to £21 5s. 9d, the scheduled value of the chattels. Reg. 12, therefore, does not apply to these chattels.

But, in my opinion, the position is different with regard to the other furniture seized. Not only has the Magistrate treated it as Mrs. Collard's, but on the meagre evidence he was bound to so treat it if he believed her. After describing the visit of Ward, the bailiff authorized by Myerson to distrain, and his leaving the warrant and inventory, she said :—" Some of the furniture was my own, and some I had under a hire-purchase agreement. The green leather suite—a seven-piece suite—belonged to me—a dining-room suite I bought at Davidson & Co.'s, and paid £7 12s. 6d. for it. I also had some goods from S. J. Hale & Co. on a hiring agreement." This latter agreement was put in evidence ; and, as I have said, it did not vest Hale's goods in Mrs. Collard. The agreement with Davidson (if there was one in writing) was not put in ; the evidence that this furniture was her own was received without objection ; and there was no cross-examination on the subject of her ownership. Davidson's secretary was called and said : " I know Mrs. Elizabeth Collard, to whom we *sold* a seven-piece dining-room suite on the time-payment system, but it was fully paid up on the day of the sale, the 8th August." The secretary attended the sale under the distraint, and managed to get the balance of the purchase money paid out of money which Mrs. Collard had borrowed. There is nothing to show that payment of the balance of the purchase money was made by the contract of sale a condition precedent to the vesting of the property in the purchaser ; and, in the absence of such evidence, the property in the goods " sold " must be treated as having passed to the purchaser to whom they had been delivered. At the time of the distress, 2nd August, they " belonged to " Mrs. Collard—on the evidence ; and, if we follow literally the words of reg. 12, Myerson committed an illegal act in taking possession.

It is urged, however, for Myerson, that there should be implied in reg. 12 a condition that there must be a *mens rea*—a knowledge of the facts which under reg. 12 would make the seizure illegal. At the time of the seizure, Myerson did not know that Mrs. Collard was a soldier's dependent, whatever his bailiff knew as to the claim of Mrs. Collard in respect of the goods ; but at the time of the sale on 8th August the agents of Myerson knew of Mrs. Collard's claim to be a soldier's dependent. The offence, however, consists of seizing—

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Higgins J.

not of selling; and the seizure took place before Myerson or his agents knew anything of Mrs. Collard's position as a dependent. Apart from the authorities, I should think it inconsistent with our duty to import into the regulation a condition which is not either stated or suggested. The regulation seems to have been drawn with a reckless disregard of the problems which it creates, and to have been thrown, like a bomb, among the differing and complicated systems relating to bills of sale, writs of execution, distraints, hire-purchase agreements. A landlord levies a distress for rent on a defaulting tenant, seizing the goods in the tenant's possession, and without the slightest idea that the goods belong to some soldier's dependent; and he becomes liable under sec. 6 of the Act to a penalty not exceeding £100 or to imprisonment for six months, or both, and to return the goods (to the owner) or to pay the value. This seems unjust, no doubt; but it is not for us to improve on legislation by inserting words which would make it as we think just. Besides, if knowledge of the landlord has to be proved, the protection designed for a soldier's wife is practically worthless. Landlords do not usually know the domestic history of those who occupy their houses; and even if knowledge of the fact that the woman in possession of the furniture is the dependent of a soldier come to the landlord after distraining, it comes too late, for the act of seizing or taking possession is over; and the landlord may proceed to sell without disobeying reg. 12. So that if we read the regulation without the implied condition that the landlord must know before seizure, we put on the landlord the hardship of having to inquire before seizure; whereas if we treat the condition as implied, the protection supposed to be given to a soldier's wife becomes nugatory. It is surely fitting that, under such circumstances, we should not, by conjecture, add to the words of the regulation. The cases on the subject of *mens rea* are in an unsatisfactory state. Primarily, the meaning of *Non est reus nisi mens sit rea* would seem to be clear. An assault, when one strikes another, is an offence; but if one man be pitched into another by the violent impact of a railway collision, it is not an assault. The case before us, however, is one, ultimately, of the construction of a Statute, or rather an Order in Council under a Statute. What does reg. 12 mean? What does it say? The

case in which publicans are charged with selling liquor to a drunken person, or butchers are charged with selling meat unfit for human consumption, are analogous; and in these cases it has been held that in the absence of the word "knowingly" or its equivalent, the publican or the butcher is liable to the penalty, even if knowledge has not been shown (*Cundy* v. *Le Cocq* (1); *Hobbs* v. *Winchester Corporation* (2)). The answer to the argument that a man should not be convicted in such cases unless he have a guilty mind is suggested in *Blaker* v. *Tillstone* (3)—that "the Act of Parliament would be nugatory if such proof" (of knowledge) "were insisted on, for it would then always be open to the defendant to say that he was not aware of the condition of the article sold, and that it was not his duty under the Statute to make any inquiries on the point."

A point was taken that the part of reg. 12 which provides for repayment of the value of the goods seized is not within the powers granted by the *War Precautions Act*; but it has been abandoned.

According to my view, the £14, as for the value of the goods seized, should be reduced to £7 12s. 6d., the value of the furniture seized so far as it "belonged" to the respondent; and the conviction should be affirmed. I concur with all my learned colleagues on all the points raised, I think, except on this—that some think there is no satisfactory proof that the furniture "sold" by Davidson to Mrs. Collard belonged to her.

GAVAN DUFFY J. I agree in the conclusion at which my brother *Higgins* has arrived.

POWERS J. At the hearing of the appeal several questions were raised which my learned brothers have fully referred to in the judgments just delivered. We agree on all questions to be considered by us in this appeal except one important one, namely, whether the prosecution proved that some part of the furniture seized "belonged to" Mrs. Collard at the date of the seizure, in the sense in which we all interpret those words. I cannot see my way to come to any other conclusion on the evidence than that Mrs. Collard

(1) 13 Q.B.D., 207.
(2) (1910) 2 K.B., 471.
(3) (1894) 1 Q.B., 345, at p. 348.

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did prove that part of the property "belonged to" her, and therefore that the appeal against the conviction should be dismissed.

The following is the evidence on that point:—Mrs. Collard said: "Some of the furniture was my own, and some I had under a hire-purchase agreement. The green leather suite—a seven-piece suite—belonged to me—a dining-room suite I bought at Davidson & Co.'s, and paid £7 12s. 6d. for it. . . . The green leather suite was also sold." The witness was not cross-examined on the statements referred to. No evidence called by the defendant contradicted the statements made by Mrs. Collard. The evidence was, in my opinion, confirmed by Thomas Leslie Crowe, called by the informant. Crowe said:—"I am secretary to Davidson & Co. Ltd., house furnishers. I know Mrs. Elizabeth Collard, to whom we *sold* a seven-piece dining-room suite on the *time-payment system*, but it was fully paid up on the day of the sale." Other evidence was given to show that the full purchase money was not paid until the date of the sale, and the circumstances under which it was paid, but it did not in any way refer to the payment being made under the terms of any hiring agreement.

The uncontradicted evidence, therefore, is that some of the furniture was Mrs. Collard's *own*, and she shows clearly that she knows that property held under a hire-purchase agreement is not her own, because she distinguishes between the two. She further added the words, "the property *belonged to me*, I *bought* it at Davidson & Co.'s"—in contradistinction to holding it under a hiring agreement. It is said that by using the words "belonged to me" Mrs. Collard could not affect the legal position. That is, of course, true; but after showing that she knew that property held under a "hiring agreement" was not her property, full effect should, in the absence of evidence to the contrary, be given to her words.

She also used the word "bought" in respect of the goods in question, when she referred to her own goods, in contradistinction to the words "held under a hiring agreement." I do not feel justified on that evidence in drawing an inference that she was talking about property under a hiring agreement when she said the property bought from Davidson & Co. was her own. It is more difficult for me to draw such an inference when Crowe, the

secretary to Davidson & Co. Ltd., house furnishers, corroborates Mrs. Collard and swears that they *sold* the property to Mrs. Collard on the time-payment system. It surely cannot be inferred against a furniture dealer also that when he swears to property being *sold* he does not mean it, and that he refers to goods not sold, but only hired with a right of purchase.

It is common knowledge that property of all sorts is *sold* on the time-payment system and becomes the property of the purchaser—furniture, men's suits, women's clothes, and almost every sort of goods; and the evidence submitted here, by the prosecution and the defence, as to the particular goods in question, is that these goods were sold by the seller and bought by the purchaser, Mrs. Collard, and belonged to Mrs. Collard at the time of the seizure although the full price had not been paid to the seller before the day of the sale.

I agree with my brothers *Higgins* and *Gavan Duffy* that the order to pay the sum of £14—the value of the articles taken possession of—should be reduced to £7 12s. 6d., and that the appeal against the conviction and penalty should be dismissed.

[BARTON J. I desire on behalf of the Court to suggest to the proper authorities that the regulation we have had under consideration falls short of providing protection in circumstances that frequently arise. Besides the two cases of user and ownership already provided for, there are two others unprovided for in case of distress or execution, namely, purchase where ownership is stipulated to be contingent on full payment, and hiring where only an option to purchase is given as with respect to the Hales' goods here, and in both of those cases considerable sums of money may be paid without title being acquired.

We say nothing more than that we invite the attention of the Executive to the gap that exists.]

Appeal allowed. Conviction quashed. Money paid into Court to be repaid to the appellant.

Solicitors for the appellant, *Harold T. Morgan & Morgan.*

Solicitor for the respondents, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.