H. C. OF A. 1930. COUNTRY ROADS BOARD v. NEALE ADS PTY. LTD.

Appeal allowed without costs. Order of the Supreme Court discharged and in lieu thereof order nisi discharged with costs. The sum of £15 paid into the Supreme Court by the respondent to be paid out to the appellant.

Solicitor for the appellant, *Frank G. Menzies*, Crown Solicitor for Victoria.

Solicitors for the respondent, *Maurice Blackburn & Tredinnick.*

H. D. W.

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN GUARANTEE CORPORATION LIMITED . . } APPELLANT;

AND

BALDING . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF BANKRUPTCY (DISTRICT OF VICTORIA).

H. C. OF A. 1930. MELBOURNE, *Feb.* 20. SYDNEY, *April* 14. Isaacs, Starke and Dixon JJ.

Debts—Future Debts—Book debts—Assignment—Registration—Future instalments of hire—"Future debts . . . although not incurred or owing at the time of the assignment"—Hire-purchase agreement—Non-registration as assignment of book debts—Invalidity of assignment—Assignee not entitled to general property in or to charge or equitable security over property assigned—Instruments Act 1915 (*Vict.*) (*No.* 2672), *secs.* 127, 180, 181—*Instruments Act* 1928 (*Vict.*) (*No.* 3706), *secs.* 27, 80, 81.

Traders, who afterwards made a deed of arrangement, obtained advances upon the security of assignments of hire-purchase agreements which were so framed that (i.) after the first period of hire the hirer's right to retain the

chattel during each successive period of hire depended upon him paying in advance the instalment of hire for that period and the traders' right to repossess the chattel depended upon the hirer failing to pay such instalment in advance; (ii.) the hirer was at liberty during any such period of hiring to return the chattel and terminate the hiring, but, if he entered upon any period of hiring without paying the instalment therefor in advance, he became liable for the instalment which was recoverable from him.

Held, (1) that future instalments of hire were assigned but they answered the description "future debts . . . although not incurred or owing at the time of the assignment" in the definition of "book debts" in sec. 80 of the *Instruments Act* 1928 (Vict.), and the assignments were accordingly void in respect of such instalments for want of registration; (2) the assignments of the agreements of hire-purchase did not operate to give the assignees of such agreements any property in the chattels to which they related nor to assign the right contained in such agreements to seize or repossess such chattels.

Held, further, that upon its proper interpretation a general agreement between the traders and the persons who made such advances gave the latter no legal or equitable right in or in respect of the chattels, which accordingly vested, subject to the hire-purchase agreements, in the trustee under the deed of arrangement.

Decision of the Court of Bankruptcy affirmed.

APPEAL from the Court of Bankruptcy (District of Victoria).

An agreement in writing dated 10th August 1922 was made between the Australian Guarantee Co. Ltd. (the predecessor of the appellant) and Turner Bros. On 3rd July 1925 such agreement was adopted by the appellant, the Australian Guarantee Corporation Ltd. It was thereby agreed that the Corporation should finance Turner Bros. in time-payment sales of motor vehicles made by Turner Bros. Clause 5 thereof provided: "In the event of default by any buyer or buyers in any way whatsoever you (Turner Bros.) undertake to indemnify this Company against any loss occasioned thereby, and if required by this Company so to do to take possession of the motor vehicle and to hold same on behalf of and generally to act as agents for this Company in connection with such vehicle." Pursuant to such agreement and the practice adopted by the parties the Corporation from time to time financed Turner Bros. in the sale of motor vehicles made by the latter under hire-purchase agreements. The practice adopted by the parties to give effect to the general intent of the agreement was that, when Turner Bros. made a hire-purchase agreement with and obtained such an agreement in writing

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from the hirer, they brought the agreement to the Corporation and agreed with it for a certain amount to be paid by the Corporation to themselves in respect of such agreement, the practice being to advance 91 per cent of the instalments of hire receivable during the next ensuing twelve months. Turner Bros. then indorsed the hire-purchase agreement and handed it to the Corporation, which, after the dispute arose, stamped an express assignment over the indorsement. It was not disputed, however, that this assignment was in conformity with the intention of the parties and the hire-purchase agreements were treated as assigned by writing. In exchange for the hire-purchase agreement so indorsed a cheque for the amount agreed to be paid by the Corporation in respect of such agreement was given by the Corporation to Turner Bros. In addition, Turner Bros. delivered to the Corporation their promissory notes as collateral security for the amount so paid by the Corporation. Turner Bros. then proceeded to collect from the hirer the instalments payable under such agreement, and at the end of every month made payments to the Corporation, a running account being kept of such payments made by and to the Corporation. On 26th February 1929, by deed of assignment under Part XII. of the *Bankruptcy Act* 1924-1928, Turner Bros. assigned their estates to the respondent, Edwin Gerald Balding, as trustee, and the deed was registered in the Court of Bankruptcy on 14th March 1929. Upon such deed being executed the respondent proceeded to collect from the hirers the amount of hire due by them under the hire-purchase agreements, and by his agents to take into his possession and control motor vehicles in respect of which hirers had made default under their agreements. The Corporation also served notices in writing on the hirers whose names appeared on the hire-purchase agreements held by it of the assignment of such agreements to it, and requiring the hirers to pay future instalments payable under such agreements to it, and the Corporation also took steps to repossess motor vehicles in respect of which hirers had made default under their agreements. No request under clause 5 of the above-mentioned agreement between the Corporation and Turner Bros. was ever made by the Corporation prior to the time of the deed of assignment. Owing to the complications caused by two parties

endeavouring to collect instalments under the hire-purchase agreements it was arranged that, without prejudice to the rights of either party, the respondent should collect all instalments from time to time as they became due, and place the net proceeds of such collection to the credit of a separate account to be held by him until proceedings were taken to determine who was entitled to such instalments. The respondent also made sales of motor vehicles repossessed by him as aforesaid and held the proceeds under the same arrangement. At the date of the said deed of assignment the total sum payable by Turner Bros. to the Corporation in respect of their promissory notes aforesaid amounted to £12,518. Certain payments were also made to the Corporation by hirers under the hire-purchase agreements held by the Corporation amounting to £740 18s. 6d., which sum the Corporation still held.

The hire-purchase agreements which Turner Bros. took from hire-purchasers were in the following form :—" Turner Bros. Motor-cycle Department—Hire Contract for Motor-cycle Payments No. An agreement whereby the undersigned (hereinafter called the hirer) acknowledges to have received in good order and condition from Turner Bros. (hereinafter called the owner) motor-cycle, model frame No. engine No. equipped with value £ and that the owner has delivered the said motor-cycle to the hirer who has received the same from the owner on hire subject to the terms and conditions hereinafter mentioned that is to say :—(1) The hirer shall forthwith pay to the owner the sum of £ for the rent or use of the said motor-cycle for the term of from the date hereof. (2) If on the expiration of the said term the hirer shall desire to continue to have the further use of the said motor-cycle for a similar term or terms and shall intimate such desire to the owner by payment to the owner on or before the day of next of the sum of £ being rent in advance and thereafter shall continue to pay to the owner in advance the rent of £ always in advance on then the hirer may continue to have the use of the said motor-cycle while the hirer shall continue to make such periodical payments of rent in advance to the owner and shall otherwise comply with

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the conditions of this agreement. (3) The hirer may at any time after the expiration of the first term of hire determine the hiring by delivering the said motor-cycle in good repair order and condition to the owner at Melbourne free of railway and other charges and by paying to the owner all rent then accrued due for the hiring of the said motor-cycle up to the expiration of the then current term of hiring. (4) That until either a breach by the hirer of this agreement or the occurrence of any other event terminating this agreement and entitling the owner to immediate possession of the said motor-cycle the hirer is to be entitled at any time during the hiring to purchase the said motor-cycle by paying to the owner at Melbourne the difference between the amount or amounts the hirer has actually paid for its hire and the sum of £ for which amount the owner gives to the hirer the option of purchasing the said motor-cycle. (5) If the hirer shall give to the owner the promissory notes of the hirer specified on the back hereof the hirer may exercise his option of continuing the hiring by paying such promissory notes as they respectively become due. If the hirer shall elect to determine the hiring and return the said motor-cycle and shall pay for the hiring up to the expiration of the then current term of hiring as aforesaid the owner shall return to the hirer the said promissory notes then unpaid. The hirer may exercise his option of purchasing the said motor-cycle by paying all the said promissory notes as they respectively become due. (6) The hirer shall during the hiring and until he has either returned it to the owner or fully paid for it the price before mentioned keep the said motor-cycle in good order condition and repair and the hirer will indemnify the owner from the loss of the said motor-cycle by theft seizure for distress for rent or legal process loss or injury by fire or loss or accident of any description. (7) The hirer shall not during the hiring part with the possession of the said motor-cycle nor remove it outside the State of Victoria. (8) The hirer shall hold the said motor-cycle solely as bailee of the owner and shall not have any property in or title to the said motor-cycle as purchaser or owner until the hirer has paid to the owner the whole of the said price in exercise of the option to purchase hereby given. (9) If the hirer shall make any default

in payment of the said sum payable on the delivery to him of the said motor-cycle or in the due payment of any one of the payments for rent herein provided for or if the said motor-cycle shall be taken out of the State of Victoria or in case the said motor-cycle shall be levied or seized under any warrant of distress judgment or order of any Court of law or any proceedings against the hirer at the suit or instance of any person or the hirer shall become insolvent or assign his estate or effects for the benefit of any creditor then and in either of such cases the owner or any agent of the owner shall be at liberty to take possession of and retain the said motor-cycle and for that purpose to enter any land house room or place where the same may be of the leave and licence to do which this contract shall be conclusive to recover from the hirer all rents or moneys agreed to be paid for the hire thereof and which may be due and unpaid at the time of such seizure and the owner shall return to the hirer the promissory notes (if any shall have been given) unpaid. (10) The within-named hirer hereby promises to pay all moneys payable under the within agreement to the within-named owner in Melbourne. (11) The hirer agrees immediately on change of address to notify the owner.—Witness the hand of the hirer and dated the day of one thousand hundred and Signed and delivered by the said in the presence of agent Purchaser's full signature Postal address ." The indorsement above referred to by Turner Bros. to the appellant Corporation of the hire-purchase agreements was in the following terms :—" For valuable consideration we the within-named Turner Bros. hereby assign all our right title and interest in and to the within hire contract to the Australian Guarantee Corporation Limited. Dated this day of 192 Turner Bros. For and on behalf of Australian Guarantee Corporation Limited, James T. Owen."

Although Turner Bros. had undertaken to deliver to the Corporation the promissory notes of the hirers, they did not do so because as a fact the hirers gave no promissory notes to Turner Bros. It was admitted that the hire-purchase agreements in question were taken as part of the ordinary business of Turner Bros., and likewise so was the method of financing by the Corporation. There had been

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no registration of the assignment of any book debts, and no registration of any document as a bill of sale.

In these circumstances the appellant Corporation gave notice of motion to the Court of Bankruptcy asking (1) for the determination of the question whether the appellant Corporation was entitled to the motor vehicles and the instalments of hire above referred to; (2) for a declaration that (*a*) the appellant Corporation was entitled as against the respondent to the motor vehicles or the proceeds of the sale thereof and to the proceeds of the hire thereof, (*b*) all the right, title and interest of the owner in the said hire-purchase agreements and in the motor vehicles therein referred to at all material times belonged to the appellant Corporation, (*c*) the moneys collected and received by Turner Bros. and by the respondent for or in respect of the sale or hire of the motor vehicles or under the hire-purchase agreements belonged to and were received in trust for the said Corporation and that the said Corporation was entitled to such moneys; (3) for an order for delivery up of such of the said motor vehicles as were still in the possession of the respondent; (4) for an order for payment of all moneys received by (*a*) Turner Bros., (*b*) the respondent, for or in respect of the sale or hire of the motor vehicles to the appellant Corporation.

Judge *Moule*, before whom the motion came on for hearing, was of opinion that all instalments payable until the contract was determined were debts, and that any assignment thereof must be registered as an assignment of a book debt under Part IX. of the *Instruments Act*. As to the machines which had been repossessed by Turner Bros. he held that the respondent was entitled to hold the same and that the proceeds of the sale of such machines must be held by the respondent for the benefit of creditors generally, and this applied to the moneys in the hands of the appellant. He held that the machines were not assigned to the appellant, which obtained no proprietary rights in the same; that the assignment to the appellant was not of the goods themselves but was an assignment of contractual rights.

From his Honor's decision dismissing the motion the Corporation now appealed to the High Court.

Robert Menzies K.C. (with him *Eager*), for the appellant. Two objections were raised to the validity of the assignments to the appellant—one, that they were assignments of book debts and were not registered under Part IX. of the *Instruments Act* 1915 ; the other, that they were assignments of bills of sale and were invalid for want of registration under Part VI. of that Act. The question, however, is whether there was anything that could be described as a debt. When the hire-purchase agreement was assigned, Turner Bros. indorsed it and actually gave it to the appellant, and the only way in which the agreement could be continued was by the payment of rent by the hirers in advance. The moneys payable at the option of the hirers are not book debts (*Motor Credits Ltd.* v. *W. F. Wollaston Ltd.* (*In Liquidation*) (1)). If instalments that will be paid from time to time could be regarded as debts so that they will fall within the definition of " book debts " in Part IX. of the *Instruments Act*, it would be very difficult to distinguish between a hire-purchase agreement and a sale on terms. If each instalment is paid, then the element of obligation will be negatived. There is no binding contract of hire after the deposit has been paid. The hirer was not under an obligation to pay any instalments, and consequently the Corporation was not entitled to recover any further payment. The assignment was of contractual rights only. There never could be a debt under this contract. If the hirer does not pay his instalments the hiring ceases and the only right the owner would have would be to sue him in detinue at common law. It may be desirable to require the bicycle to be retained in Victoria so long as the hiring continues so that if it ends it can be more conveniently seized. If the hirer pays his instalments they are not paid as a debt. If he does not pay he cannot be sued for use of the machine under the contract, as the agreement has terminated. Full effect cannot be given to both clauses 2 and 9 of the agreement. There might be a fresh agreement to keep the machine and to pay for its hire under which a debt would arise, but that would not be a debt arising under the hire-purchase agreement. There is no implication under this agreement that if the hirer keeps the machine after the time on which his payment should have been made in the ordinary course that he

(1) (1929) S.R. (N.S.W.) 227.

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will pay for such use, though a new agreement may be made under which a debt would arise. No debt arises, as it is entirely optional to the hirer whether he pays or not. There is a distinction between payments made on the due date and those not made on the due date. The assignment by Turner Bros. to the appellant included an assignment of the assignor's proprietary interest in the machines and of their right to possession of them in the events provided by the hire-purchase agreements. The assignment is not required to be registered as a bill of sale under Part VI. of the *Instruments Act*, and at the date of the assignment the bicycle was not in the possession or apparent possession of the assignors. The assignment was of a chose in action, which is expressly excluded from the definition of personal chattels in sec. 127 of the *Instruments Act* 1915 (*Motor Credits Ltd.* v. *W. F. Wollaston Ltd.* (*In Liquidation*) (1)). The purpose of the *Bills of Sale Acts* is not defeated by the non-registration of the assignment here in question (*Stephenson* v. *Thompson* (2)).

Ham K.C. (with him *Reynolds*), for the respondent. The hire-purchase agreement must be read as a whole. The substance of it, so read, is a hiring of the machine for a continuous period, the hirer having an option of purchase, with a right to determine the hiring in the manner provided in clause 3 of the agreement, the owners only having the right to determine the agreement on a breach by the hirer. Either the agreement subsists until somebody brings it to an end or else it is for one month's or one week's hiring or separate contracts are entered into for each succeeding month or week. All that the respondent has to show is that there was an obligation to pay for one other month. If that obligation existed, such a liability would be a book debt and an assignment of it, unless registered under Part IX. of the *Instruments Act*, would be invalid. As soon as the hirer has held the machine beyond the expiration of the first term, there is an obligation on him to pay for the second term; and so on. Either this is an accruing or contingent debt or it is not a debt at all. The hiring subsists until it is terminated under the rights created by the contract, and there is a legal obligation

(1) (1929) S.R. (N.S.W.), at pp. 227, 241 (quoting *Blackstone's Commentaries*, bk. II., pp. 389, 396).

(2) (1924) 2 K.B. 240, at pp. 242, 243.

on the hirer to pay the hire until he determines the hiring. Not only is there an obligation to pay hire for the second period, but the obligation to pay continues until the hiring has been terminated according to the contract. The monthly payments were obligations under the contract, though the hirer was not under an obligation to continue the hiring unless he chose to do so. It is sufficient if there is a contract in which there are accruing debts, and it does not matter if the debts are only contingent (*Mortimore* v. *Commissioners of Inland Revenue* (1)). The contract is intended to provide for a continuing state of affairs and gives both parties rights to terminate that arrangement on certain conditions, and that is such a matter that ordinary traders should and would enter in their books, and is therefore a book debt (*Buckley* on the *Companies Acts*, 10th ed., p. 242). Once the hirer starts on a particular period then the rent for that period has accrued, but as to all subsequent periods the rent for them is liable to be defeated by the hirer terminating the agreement. Prospective book debts payable in advance are within the definition. Until either party had terminated the hiring under the agreement, Turner Bros. could sue under the agreement and were not limited to a right of action in detinue only (*Shipley* v. *Marshall* (2)). Any rights which were outside the hiring agreement did not pass by the assignment and would vest in the trustee of the assignor's estate. The hirer agreed to pay rent so long as he retained the machine, and until he exercised his option of returning it the obligation was a chose in action (*Helby* v. *Matthews* (3)). It is a contingent, future and accruing obligation to pay the future rent. *Motor Credits Ltd.* v. *W. F. Wollaston Ltd.* (*In Liquidation*) (4) differs from the present case. The assignment did not include an assignment of the assignor's proprietary interest in the machines. The indorsement on the hire-purchase agreements is of contractual rights only. If there is an assignment of proprietary rights in machines repossessed, it would be void for want of registration as a bill of sale. Such machines would have been in the possession or apparent possession of the person making the bill of sale

(1) (1864) 2 H. & C. 838, at pp. 853, 854; 159 E.R. 347.
(2) (1863) 14 C.B. (N.S.) 566, at pp. 571, 573; 143 E.R. 567.
(3) (1895) A.C. 471, at pp. 475, 479, 483, 484.
(4) (1929) S.R. (N.S.W.) 227; see pp. 229, 245, 247.

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at the date of the execution of the assignment for the benefit of creditors. The proprietary right in the chattels is something quite distinct from the proprietor's right of action to recover them in certain events, and is not a mere chose in action; anything in the judgment in *Motor Credits Ltd.* v. *W. F. Wollaston Ltd. (In Liquidation)* (1) conflicting with this view is unsound.

Robert Menzies K.C., in reply.

[DIXON J. referred to *Timmins* v. *Gibbins* (2) and *De Nicholls* v. *Saunders* (3).]

Cur. adv. vult.

April 14.

The following written judgments were delivered:—

ISAACS J. The argument gives rise to several interesting and important considerations. The hiring agreement on which the question at issue arises is in a form which introduces considerable complication, because, read literally as isolated provisions, several of its clauses are irreconcilable. What is the proper course for the Court to take in such a case? In *Helby* v. *Matthews* (4) it is distinctly stated that the substance of the agreement must be looked at as a whole. That is true of every agreement. But we have to come a little closer to the point here, which is, how far are we to depart from the literal sense of a particular clause, if read by itself, when we find the effect of the literal sense of another clause, similarly segregated, inconsistent with the first? There are two cases of supreme authority which settle this point. One is the case immediately preceding *Helby* v. *Matthews*, namely, *McEntire* v. *Crossley Bros.* (5), and is the converse of the first-mentioned case. One question there, was whether a written agreement respecting a gas engine was one of hire or one of sale. The respondents were described as "owners and lessors," the other party to the agreement was described as the "lessee." The agreement declared it was to "take and hire" the engine; certain payments were described as "rent"; a provision was made that on full payment the engine should become

(1) (1929) S.R. (N.S.W.) 227.
(2) (1852) 18 Q.B. 722, at p. 726; 118 E.R. 273.
(3) (1870) L.R. 5 C.P. 589.
(4) (1895) A.C. 471.
(5) (1895) A.C. 457.

" the property of the lessee as purchaser," and that until full payment the engine should " remain the sole and absolute property of the owners and lessors," and " let on hire . . . until all sums of money due under this agreement are paid." But then there were other provisions which had a different aspect. Lord *Herschell* L.C. said (1):— " Coming then to the examination of the agreement, I quite concede that the agreement must be regarded as a whole—its substance must be looked at. The parties cannot, by the insertion of any mere words, defeat the effect of the transaction as appearing from the whole of the agreement into which they have entered. *If the words in one part of it point in one direction and the words in another part in another direction, you must look at the agreement as a whole and see what its substantial effect is.* But there is no such thing, as seems to have been argued here, as looking at the substance, apart from looking at the language which the parties have used. *It is only by a study of the whole of the language that the substance can be ascertained.*" Lord *Watson* (2) expressed the same views, and said : " The duty of a Court is to examine every part of the agreement, every stipulation which it contains, and to consider their mutual bearing upon each other." The House held that, notwithstanding the language already quoted, the rest of the document showed that it was a transaction of sale and not of hiring. The other case is more recent. In *Forbes* v. *Git* (3) the Judicial Committee, speaking by Lord *Wrenbury*, stated very distinctly the principle of construction where repugnant provisions exist in a contract. If a later clause cannot be reconciled with an earlier one creating an obligation, then if it altogether destroys the obligation it must be treated as void, but if it only qualifies the former the two are to be read together and effect given to the intention of the parties as disclosed by the instrument as a whole.

That, then, is the principle of construction to be applied, and it leads me to reject the contention, so forcibly presented by Mr. *Menzies*, that clause 2 of the present agreement must be given its own independent force, regardless of the equally distinct language of clauses 3 and 9. Those clauses are qualifications only, and must be

(1) (1895) A.C., at pp. 462-463. (2) (1895) A.C., at p. 467.
(3) (1922) 1 A.C. 256.

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reconciled so far as possible with clause 2. When, therefore, the agreement is so approached, we find that the initial and dominant statement in the document is that "the owner has delivered the said motor-cycle to the hirer, who has received the same from the owner *on hire* subject to the terms and conditions hereinafter mentioned, that is to say," &c. The basis of the transaction, therefore, is declared to be the familiar bailment on hire. There is an option of purchase given on certain conditions, but that is immaterial here.

The first point to observe is that the agreement in itself does not confer any property or interest in the motor-cycle upon the hirer. As was said by *Shearman* J. in *Lewis* v. *Thomas* (1), "the position of Hoff" (the hirer) "under both the hiring agreements was that of a bailee with an option to purchase, and nothing more." Consequently, the agreement of itself created no debt. It is true that clause 1 provides: "The hirer shall forthwith pay to the owner the sum of £ for the rent or use of the said motor-cycle for the term of from the date hereof." But that does not mean an instant obligation to pay the sum, irrespective of whether he receives the machine or not. Plainly, when read with the rest of the document, and particularly the introductory words already quoted, it means that the sum mentioned is to be paid forthwith after the delivery of the machine on hire. The payment is only as "rent" for the actual use of the machine. This is very distinctly shown by the case of the *National Cash Register Co.* v. *Stanley* (2), particularly in the judgment of *Sankey* J. (3) It is also definitely stated in *Brooks* v. *Birnstein* (4). The word "forthwith" is to overcome the normal common law doctrine that rent is payable only at the end of the term prescribed. Until the Apportionment Act rent was entire. Apart from the word "forthwith" there would be, arising out of the contract followed by delivery of the machine, a debt accruing and payable at the end of the prescribed period. But the word "forthwith" advances the date of payment by making the rent accrue due at the beginning of the period instead of at the end (see *Ellis* v. *Rowbotham* (5)). On the sale of goods,

(1) (1919) 1 K.B. 319, at p. 323.
(2) (1921) 3 K.B. 292.
(3) (1921) 3 K.B., at p. 296.
(4) (1909) 1 K.B. 98, at pp. 102, 103.
(5) (1900) 1 Q.B. 740, at pp. 743-744.

apart from special agreement, delivery of possession and payment are concurrent conditions. But, as shown by cases of which *Bloxam* v. *Sanders* (1) is the leading example, that assumes the *property*, that is, the *title*, has passed, so as to make it the duty of the buyer to pay concurrently with his receiving possession. In *McEntire* v. *Crossley Bros.* (2) Lord *Herschell* pointedly alludes to this by saying: "The distinction is as well settled as it possibly can be between *a debt* for the price of goods the property in which has passed, and an action for damages for breach of a contract to buy and pay for the goods." That refers to the distinction between a "sale" and an "agreement to sell." Where there is a true sale, then instantly there is an obligation to pay, in other words, a "debt," which if not discharged may be enforced by an action of debt. The distinction is therefore apparent in the case of the contract of hiring, and on this distinction is founded the decision of *National Cash Register Co.* v. *Stanley* (3). The agreement itself recognizes this, because clause 9 begins by saying: "If the hirer shall make default in payment of the said sum payable *on the delivery* to him of the said motor-cycle" &c. It is therefore a definite result of the law applied to the circumstances of the case, that on the mere making of the contract there was a contractual obligation to perform clause 1 (*inter alia*), and that was to pay at the first instant of the first period of actual use the debt that normally would accrue when the full delivery of *the consideration* took place, namely, at the last moment of that period. That normally is the only moment when delivery of consideration and payment therefore can be concurrent.

I have dwelt on the first clause because *a fortiori* the payments for subsequent periods are open to the same observations. The contract left the hirer free to continue the hiring for second and subsequent periods—but only on paying rent in advance. Now, if he did so elect and paid in advance, he was only paying in advance a debt which normally would accrue due only at the end of the current period. If he did not so pay, he would break his agreement to pay "in advance," but he could not escape the hiring liability. It is

(1) (1825) 4 B. & C. 941; 107 E.R. 1309.
(2) (1895) A.C., at pp. 464-465.
(3) (1921) 3 K.B. 292.

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quite apparent that the owners endeavoured to achieve two inconsistent legal results:—They tried to avoid registration as a bill of sale by making the transaction one of hiring, and in this they were successful. They also tried to avoid registration of book debts under the *Instruments Act*. In this they were, in my opinion, unsuccessful for two reasons. First, because as already shown the law regards the stated obligations to pay as "debts," and next, because the rest of the agreement shows the parties regarded them as debts. Clause 3, in referring to "all rent then accrued due for the hiring of the said motor-cycle up to the expiration of the then current term of hiring," necessarily contemplated retention of the cycle by the hirer for a term, without actually paying the rent in advance. Similarly in clause 9, in which the words "recover from the hirer all rents or moneys agreed to be paid for the hire thereof and which may be due *and unpaid* at the time of such seizure." It is clear that the agreement treats the obligation to pay for the first and each successive term as a debt. I include the first beyond question, because, as already stated, clause 9 includes the possibility of default of payment of the first period rent.

There only remains one further contention, namely, that at the time of the assignment there was no existing obligation to pay for any period beyond the first. I assume the assignment took place before the commencement of the second period. Even so, there are two answers. First, there was then a contractual obligation that on the happening of an event, namely, the *non-determination of the hiring*, which meant necessarily the *continuance of the hiring*, it would be paid for at the rate stipulated. The relation was that of hiring, determinable in either of two ways. It was determinable *by the hirer* under clause 3, but only in the manner therein prescribed. If that was not followed, then the hiring being undetermined necessarily continued. But it continued without any right *in the hirer* that it should continue. The *owner* in that case had the right to determine it under clause 9, and if he did he had the right to recover all accrued rent unpaid. This is the true reconciliation of clause 2, on the one hand with clauses 3 and 9 on the other; and that is the first answer to the objection as to future debts. The next answer is:

See *Tailby* v. *Official Receiver* (1), and apply it to the words of sec. 180 of the *Instruments Act*.

As to the motor-cars themselves I have had the advantage of reading the observations of my learned brothers *Starke* and *Dixon*, and I entirely agree.

This appeal fails and should be dismissed.

Starke J.

STARKE J. Turner Bros. carried on business as dealers in motor vehicles, and, as owners, made a number of hire-purchase agreements in respect of such vehicles with their customers as hirers. An agreement was also made, on 10th August 1922, with the Australian Guarantee Corporation Ltd. to finance these hire-purchase agreements. The Corporation arranged to advance the total amount of the instalments payable during the ensuing twelve months after deducting therefrom 9 per cent on the total sum. Turner Bros. agreed to deliver to the Corporation the hire-purchase agreements, and, in the event of default of the hirers, to indemnify the Corporation against any loss, and, if required by the Corporation so to do, to take possession " of the motor vehicle and to hold the same on behalf of and generally to act as agents for the Corporation in connection with such vehicle." The hire-purchase agreements were delivered over to the Guarantee Corporation and there was indorsed on them an assignment in the following words: " For valuable consideration we the within-named Turner Bros. hereby assign all our right title and interest in and to the within hire contract to the Australian Guarantee Corporation Ltd." It was not disputed that this indorsement operated to transfer all the rights, obligations and moneys accruing or becoming payable to Turner Bros. under the hire-purchase agreements. The hire-purchase agreements were real hire-purchase agreements and not bills of sale (see *Helby* v. *Matthews* (2); *McEntire* v. *Crossley Bros.* (3); *Lee* v. *Butler* (4)). Consequently, the provisions of the *Instruments Act* 1915 of Victoria relating to bills of sale are inapplicable. And it is equally clear, in my opinion, that the assignment indorsed on these hire-purchase agreements did not operate as the assignment of any proprietary

(1) (1888) 13 App. Cas. 523, at pp. 543 *et seqq.*
(2) (1895) A.C. 471.
(3) (1895) A.C. 457.
(4) (1893) 2 Q.B. 318.

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rights, but of contractual rights—the benefits of the hire-purchase agreements (*In re Davis & Co.*; *Ex parte Rawlings* (1); *In re Isaacson*; *Ex parte Mason* (2)).

But the Court below held that the assignment indorsed on the hire-purchase agreements has no validity at law or in equity, by reason of the provisions of the *Instruments Act* 1915 relating to book debts. That Act, in sec. 181, provides that no assignment or transfer of book debts due or to become due to any person, whether such assignment or transfer is absolute or conditional, shall have any validity at law or in equity until such assignment or transfer has been registered by the Registrar-General. "Book debts" mean 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, and *include future debts of the same nature although not incurred or owing at the time of assignment or transfer*. The assignment indorsed on the hire-purchase agreements was not registered pursuant to the Act. Whether it falls within it depends upon the nature of the obligations created by these agreements. The operative words of the agreements, it is said, create no obligation to pay any money on the part of the hirer, and the various periods of hire are made dependent upon an antecedent and non-obligatory payment of money; consequently, the argument concluded, no assignment of the rights of the owner under the agreements could or did operate as an assignment of any book debts. But the basis of the agreements is the payment of hire for the use of motor vehicles. The payments mentioned in the agreements are referred to as rent, and the hirer promises to pay all moneys payable under his particular agreement to the owner, in Melbourne. All this is wholly inconsistent with the argument presented to us, and completely destroys it.

The truth is that the draughtsman, appreciating the dangers lurking in a sale, or an agreement for the sale, of goods, has made the hire of the motor vehicles in successive periods optional on the part of the hirer. But if that option be availed of, then obligations arise to pay various sums of rent or hire, under and by force of the several agreements and in accordance with their terms. Such obligations

(1) (1888) 22 Q.B.D. 193, at p. 197. (2) (1895) 1 Q.B. 333.

would pass under any assignment by Turner Bros. of book debts due and owing, or which might become due and owing, to them in connection with their business as dealers in motor vehicles. (See *Tailby* v. *Official Receiver* (1).) And they pass under the assignment to the Guarantee Corporation of all Turner Bros.' right, title and interest in and to the hire-purchase agreements. But they are not debts due or to become due : they are future debts, or debts which might become due or owing to the assignors in connection with their business. And they fall, in my opinion, within the words "future debts of the same nature although not incurred or owing at the time of the assignment or transfer" mentioned in the *Instruments Act* 1915, sec. 181. Consequently, the assignment by Turner Bros. to the Guarantee Corporation of these obligations has no validity owing to its non-registration.

Lastly, some reliance was placed upon the finance agreement between Turner Bros. and the Guarantee Corporation as an assignment in equity of the motor vehicles to the Corporation. Clause 5 of that agreement, however, which provides for an indemnity to the Corporation in the case of any default by the hirers and a promise, if so required, to take possession "of the motor vehicle and to hold the same on behalf of and generally to act as agents for the Corporation in connection with the vehicle," confers no proprietary rights upon the Corporation in respect of any vehicle, but simply contractual rights as between the parties to the finance agreement, which were unexercised on 26th February 1929, the date of the assignment to Balding as trustee for the benefit of creditors.

The appeal in my opinion fails and ought to be dismissed.

Dixon J. Turner Bros. carried on a business in the course of which they disposed of motor-cycles upon hire-purchase agreements. They entered into an arrangement with the Australian Guarantee Corporation Ltd. for a supply of ready money in advance of the instalments of hire which should be received under the hire-purchase agreements. The practice was for Turner Bros. to indorse these instruments for the purpose, as counsel agree, of assigning to the Corporation all their right, title and interest in and to the contract

(1) (1888) 13 App. Cas. 523.

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therein contained, and in exchange for the documents, so indorsed, the Corporation paid Turner Bros. a sum equal to 91 per cent of the instalments of hire receivable during the then next succeeding twelve months. The transactions were not registered under Part IX. of the Victorian *Instruments Act* 1915 (now 1928), which avoids unregistered assignments of book debts, and the question is whether registration was necessary. The answer depends upon the further question whether the instalments receivable under the hire-purchase agreements were " book debts " within the statutory definition contained in sec. 180 (now sec. 80). By this definition the phrase " book debts " means 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 and includes future debts of the same nature although not incurred or owing at the time of the assignment (subject to some exceptions not presently material).

The hire-purchase agreements all followed one form. This form commenced with an acknowledgment by the hirer that he had received the motor-cycle from the owner, Turner Bros., on hire, subject to the terms and conditions thereinafter mentioned. The first of these terms and conditions required the hirer forthwith to pay a specified sum for a stated term from the date of the agreement. The second said that if, on the expiration of that term, the hirer should desire to continue to have the further use of the motor-cycle for a similar term or terms, and should intimate such desire to the owner by payment on or before a specified day of a stated sum, being rent in advance, and should continue to pay a stated sum at specified times, then he might continue to have the use of the motor-cycle, while he should continue to make the periodical payments and comply with the conditions. The third of the terms and conditions enabled the hirer, after the expiration of the first term of hire, to determine the hiring by delivering up the vehicle and paying all rent then accrued due for the hiring up to the expiration of the current term of hiring. The fourth clause entitled the hirer at any time during the hiring to purchase the motor-cycle by paying the difference between a specified sum and the amount of hire which the hirer had already paid. The ninth of the terms and conditions

said that if the hirer should make any default in payment of the sum payable upon delivery to him of the vehicle or in the due payment of any one of the (periodical) payments for rent therein provided for and in certain other events, the owner should be at liberty to retake the bicycle and to recover from the hirer all rents or moneys agreed to be paid for the hire thereof and (*sic*) which might be due and unpaid at the time of seizure. The tenth of the conditions contains a promise by the hirer to pay all moneys payable under the within (*sic*) agreement to the within-named (*sic*) owner in Melbourne. Among the remaining clauses, one (the fifth) provides for promissory notes, which, however, in practice, were never given.

The first object of such a contract as this is to prevent the property in the goods passing to the hirer before he pays the specified sum in full. The next object is to avoid imposing any obligation upon the hirer to buy the goods and thus making him a person who has agreed to buy goods within the meaning of the provisions which stand in England as sec. 9 of the *Factors Act* 1889; and sec. 25 (2) of the *Sale of Goods Act* 1893, and in Victoria as sec. 31 of the *Goods Act* 1928. To avoid making the hirer a person who has agreed to buy, it is necessary to abstain from expressing in the agreement a promise by him to pay future instalments of hire, because, in the aggregate, they amount to the sum which entitles the hirer to the property in the chattel and by promising to pay the price of the goods he would "agree to buy them" (*Lee* v. *Butler* (1); *Suttons Pty. Ltd.* v. *Richards* (2); and see *Taylor* v. *Thompson* (3)). And it is none the less an agreement to buy if it is defeasible (*Yule Bros.* v. *Sims* (4)). But a provision enabling the hirer to terminate the hiring at his will is no mere condition subsequent or resolutive condition, defeating an agreement. It is inconsistent with the existence of any agreement to buy at all (*Helby* v. *Matthews* (5); *Yule Bros.* v. *Sims*).

When these considerations are applied in examining the hire-purchase agreement in the present case, it appears that the hirer took the chattel upon a continuous bailment terminable when he

(1) (1893) 2 Q.B. 318.
(2) (1904) 29 V.L.R. 743; 25 A.L.T. 240.
(3) (1929) 169 L.T. Jo. 101.
(4) (1918) V.L.R. 670; 40 A.L.T. 151.
(5) (1895) A.C. 471, particularly at p. 476.

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chose, after the expiration of the first period : that by paying instalments in advance he became entitled to retain the motor-cycle for each successive period, but that upon his failure to do so, the owner became in his turn entitled, if he chose, to terminate the bailment and recover the chattel. It further appears that the hirer did not contract in advance to pay the full specified sum, whether by way of hire or otherwise. On the other hand the language of clauses 3, 9 and 10, considered with the rest of the agreement, leaves no doubt that the hirer did contract to pay an instalment of hire for every separate period or term of hire during any part of which he retained the chattel and to pay it in advance. Thus as soon as he successively entered upon each of the periodical terms of hire he would become liable for the rent or hire for that term or period. But if the hire agreement were strictly performed, payment in advance would discharge this liability as and when it arose. The case may therefore be considered as if all that was assigned was a right to future periodical payments of hire due in advance by a bailiee at will. In such a case there would be no *debitum in præsenti*, no "future debt incurred or owing at the time of the assignment." But why are not the instalments "future debts not incurred or owing at the time of assignment" ? The agreement treats the sums as potential debts which may be recovered and in respect of which there may be default. The only answer available seems to be the contention that if payment were made in advance according to the tenor of the agreement no debts would arise. This answer is not accurate. As Lord *Campbell* said in *Timmins* v. *Gibbins* (1), "it is difficult to say that there be any case in which the debt is not antecedent to the payment. Even where the money is paid over the counter at the time of the sale, there must be a moment of time during which the purchaser is indebted to the vendor." The payment is made in advance to await application in discharge of an indebtedness which arises under the agreement *eo instanti* when enjoyment of the consideration commences. The substance of the matter is that the benefit of probable future debts is assigned whether they be paid in advance or arrear, and this is fairly within the words and the

(1) (1852) 18 Q.B., at p. 726; 118 E.R. 273.

policy of the definition of "book debts." The assignment of the future payments of hire or purchase-money was therefore void.

A further question arose in the Court below. It appears that after the deed of arrangement was made the trustee, the respondent upon this appeal, took possession of some motor-cycles in the hands of persons who had received them from Turner Bros. under hire-purchase agreements but who were in default. The Corporation contended that it was entitled to the general property in motor-cycles so seized or alternatively to a charge or other equitable security thereover. The first of these alternatives is founded upon the suggestion that the assignment by Turner Bros. to the Corporation of a hire-purchase agreement involved a transfer of the ownership of the motor-cycles to which it related. This suggestion is erroneous in fact. The subject of the assignment was the contract; the benefit of rights arising from the engagement into which the hirer had entered with Turner Bros. and not the latter's proprietary rights in the goods which were in course of disposal under the agreement. It is true that each hire-purchase agreement contains a clause authorizing Turner Bros. to repossess the motor cycle upon the hirer's default. But this bare right of seizure is not assignable without the property in the goods, and an assignment of that property cannot be inferred or implied from an attempt to assign the right of seizure.

The second alternative upon which the Corporation relies depends upon the meaning and effect of a general agreement made between Turner Bros. and the Corporation on 3rd July 1925 incorporating the terms of an arrangement made with the Corporation's predecessor in title on 10th August 1922. This stipulates for an assignment by way of security of hire-purchase agreements and policies of insurance. It then provides that in the event of default by hire-purchasers Turner Bros. are to indemnify the Corporation "and if required by" the Corporation "so to do to take possession of the motor vehicle and to hold same on behalf of and generally to act as agents for" the Corporation "in connection with such vehicle." These provisions are purely contractual in their character and did not operate to create in the Corporation an equitable interest in the chattels. If before the deed of arrangement a request had been made, pursuant to the clause last stated, in respect of a specific

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motor-cycle or cycles, an equitable interest therein might have arisen. But no such request was made, and therefore, at the time of the deed of arrangement no equity existed which could affect the title of the trustee.

Whether registration as a bill of sale would have been necessary if an assignment of property in the motor-cycles which were on hire or the creation of some equitable interest therein had been in fact attempted, is a question which does not call for decision.

The decision below should be affirmed.

No point was taken either here or below as to the ambit of sec. 206 of the *Bankruptcy Act* 1924-1929 under which the application was made to the Court in Bankruptcy, and we have not felt called upon to consider the extent of that section or the effect of *In re Ellis* (1).

Appeal dismissed with costs.

Solicitors for the appellant, *Lynch & MacDonald.*

Solicitors for the respondent, *Moule, Hamilton & Derham.*

H. D. W.

(1) (1925) Ch. 564.