[HIGH COURT OF AUSTRALIA.

H. J. WIGMORE & CO. LIMITED . . . APPELLANT;

AND

GEORGE HAROLD RUNDLE AND OTHERS RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1930.

PERTH, *Sept.* 8, 11.

Gavan Duffy, Rich, Starke and Dixon JJ.

Debt—Hire-purchase agreement—Bill of sale—Caveat—Creditor of grantors—"Debt due or to accrue due"—Promissory notes given as collateral security by hire-purchaser—Bills of Sale Amendment Act 1906 *(W.A.) (No.* 13 *of* 1906), *secs.* 8, 9 (3).

To be a creditor within secs. 8 and 9 (3) of the *Bills of Sale Amendment Act* 1906 (W.A.), and so entitled to caveat against the registration of a bill of sale, the caveator must be a person to whom the grantor is indebted in a debt which is owing whether payable immediately or at some future time.

An agreement of hire-purchase specified a term of hire, fixed the instalments of hire periodically payable, and provided that the hirer should have the option of determining the hiring by returning the chattel hired and by paying arrears of rental and a proportionate part of the current rental up to the date of determination.

Held, that it created no debt in respect of future rental, and that a debt arose under it in respect only of past hire whether the agreement ran its full course or was determined by the hirer.

The agreement contained a clause requiring the hirer to give promissory notes as collateral security for the payment of the rent or hire.

Held, that upon the true interpretation of the agreement the promissory notes so given did not create an immediate debt but were delivered subject to conditions precedent set out in the agreement, none of which had occurred.

Helby v. *Matthews*, (1895) A.C. 471, applied.

Decision of the Supreme Court of Western Australia (Full Court) affirmed.

APPEAL from the Supreme Court of Western Australia.

George Harold Rundle, Albert Percival Rundle and Albert Cecil Hall, the grantors of a certain bill of sale, applied to *Dwyer* J., in Chambers, to have a caveat removed which had been lodged by H. J. Wigmore & Co. Ltd. against the registration under the *Bills of Sale Amendment Act* 1906 (W.A.) of such bill of sale. The bill of sale was dated 21st February 1930 and made between the applicants of the one part and the Bank of New South Wales of the other part, and the caveat was lodged on 19th March. The caveator alleged in its notice that it was a creditor of the grantors of the bill of sale in respect of a debt of £56 17s. due to it for a binder sold and delivered to them. The agreement between the applicants and the Company relating to the binder contained (*inter alia*) the following provisions :—" To H. J. Wigmore & Co. Ltd., Perth.—You are hereby requested to send to me on hire the following machine or implement one 6 ft. Osborne Binder (hereinafter called the machine) to be delivered at Fremantle Railway Station, and the machine to be at my risk, from the time of delivery or consignment, consigned to me at Beenong or at your option to be delivered or consigned to me from any of your agencies or depots on the 1st day of September 19 or within a reasonable time before or thereafter ; and I hereby agree to pay freight from Fremantle, and that the machine is to be hired by me from you from date of delivery or consignment as aforesaid for a term until the last day shown in clause 1 hereof (determinable as hereinafter mentioned) on and subject to the terms and conditions following, that is to say :—(1) I shall pay you at your office in Perth as rental for the hire of the machine during the aforesaid term the total sum shown hereunder as follows, namely :—£ in cash for the period of the hiring terminating thirty days after delivery of the machine ; £28 5s. for the period terminating on the 1st day of February 1930 ; £28 5s. for the period terminating on the 1st day of February 1931 ; £28 5s. for the period terminating on the 1st day of February 1932 : £84 15s. total sum (hereinafter called ' the said total rental '). I will on delivery of the machine aforesaid pay you the cash instalment (if any) and as collateral security for the payment of the balance of the rental give or send to you at Perth my duly stamped promissory notes payable to your order on

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the New South Wales Bank of at Lake Grace on the last day of such respective periods of hiring. Such promissory notes are not conditional payments, and shall not prejudice your property in the machine or your rights under this agreement and shall not be considered discharges for the respective payments until they shall be honoured and the respective payments shall be considered as made on the respective dates on which the said promissory notes shall be respectively paid and not on the dates on which they shall be made payable. In the event of the determination of the hiring by seizure or otherwise, such of the said promissory notes as shall then be current shall be delivered up by you to me on demand and shall after such determination be void. You are at liberty to discount or mortgage such promissory notes but you must indemnify me against any liability in excess of the actual amount of rental payable by me in accordance with the provisions of this agreement. (2) If I fail to give or send to you the cash payment (if any) and promissory notes within fourteen days after the machine shall be delivered as aforesaid, you are to have the option either of seizing the machine without notice and repossessing yourself of the same, and recovering as liquidated damages the expenses properly incurred by you of and incidental to the delivery, carriage, seizure and return of the machine and also an amount equal to one-third of the said total rental or alternatively by notice to me of determining the hiring and treating the transaction as a cash sale to me of the machine at a price equal to the amount of the said total rental which notice may be given to me personally or sent to me by post by registered letter at my address stated below and thereupon the said total rental shall immediately become due and payable by me to you and may be sued for and recovered by you against me in any Court of law and the production of this agreement, proof of the delivery of the machine as aforesaid, and giving or sending such notice as aforesaid shall be conclusive evidence of the said total rental being due from me to you. (3) If I should countermand delivery of the machine or if I should fail or refuse to accept delivery thereof I hereby agree to pay you at Perth an amount equal to one-third of the said total rental as and by way of liquidated damages. (4) At any time after payment by me of the sum payable for the

first period of the hiring (including payment of any promissory note if given in payment or part payment for the first period of the hiring) I am to have the option of determining the hiring by returning the machine complete with all attachments as supplied, in good repair order and condition to you at Fremantle (carriage paid by me) and by paying as well all arrears of rental (if any) to you as an amount for further rental (if the machine shall be returned after the first period of the hiring) equivalent to a proportionate part of the amount of the sum payable for the second, third or fourth period of the hiring as the case may be calculated in respect of the part of the second, third or fourth period of the hiring which shall have elapsed at the date of such determination and you shall thereupon return to me any promissory note or notes then current. . . . (8) Until a breach by me of this agreement, or the occurrence of any other event terminating the same and entitling you to the immediate possession of the machine I am to be entitled at any time during the hiring to purchase the machine by paying to you the difference between the amount I have actually paid and the sum of £84 15s. for which amount you are to give me the option of purchasing the machine and such option may be exercised by my paying the said promissory notes as they respectively become due, or if my option be exercised during the currency of any of the promissory notes the amount of the notes shall not be taken into account, but I shall pay the said price, deducting only any payments then actually made, and you shall return to me all promissory notes not then due. (9) Clause 8 hereof is only inserted so as to fix the price at which I may purchase the said machine if I desire to do so, and shall not unless and until acted upon give me any property in or right to ownership whatever over the said machine, and I acknowledge that I will hold the machine solely as your bailee and shall not have any property or interest as purchaser in the machine until I have paid for it the whole of the said price in exercise of the option hereby given. . . . (15) . . . In this agreement 'I' is to be read as 'we' or 'it' if the context so requires." The instalment of hire for the period terminating on 1st February 1930 had been duly paid by the applicants.

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Dwyer J. found that the Company was a creditor of the applicants for the sum of £56 10s., and refused to grant the application.

On appeal by the said applicants from that decision the Full Court of the Supreme Court held that the application for the removal should have been granted, and allowed the appeal.

From the decision of the Full Court the Company now, by special leave, appealed to the High Court.

Sir Walter James K.C. (with him *E. Leake*), for the appellant. Under the *Bills of Sale Amendment Act* 1906 (W.A.), sec. 8, sub-sec. 1, any person claiming to be a creditor of the grantor may enter a caveat against the registration of a bill of sale. The primary Judge determined that the present appellant is a creditor of the respondents, and that no bill of sale shall be registered in pursuance of the notice mentioned in the caveat until the said debt be satisfied or the caveat withdrawn. The learned Judge must find there is a debt under sec. 10. The Full Court ordered the caveat to be removed. There was no right in the respondents to terminate the obligation by the return of the machine and by payment up to the time of the return (*Webb* v. *Stenton* (1); *Mack* v. *Commissioner of Stamp Duties* (*N.S.W.*) (2)). Certain moneys were to become payable under the agreement, but the conditions subsequent did not destroy the obligations. The agreement was still operative when the caveat was lodged, and there still existed the obligation to pay together with the option to return (see *Salmond and Winfield* on the *Law of Contract*, 1st ed., p. 36). The case of *Australian Guarantee Corporation Ltd.* v. *Balding* (3) is distinguishable from this case: the agreement was to take on hire for a certain time and for certain payments.

Keenan K.C. (with him *Negus*), for the respondents. The caveat purported to be lodged under sec. 8 of the *Bills of Sale Amendment Act*. Under this section the caveator must be a person claiming to be a creditor of the grantor. By sec. 9 a creditor is any person to whom the grantor is indebted on any account whatsoever at law or in equity

(1) (1883) 11 Q.B.D. 518. (2) (1920) 28 C.L.R. 373.
(3) (1930) 43 C.L.R. 140.

on the balance of account or otherwise, and whether the debt is due or to accrue due, secured or unsecured. The meaning of this definition is that there must be an actual present debt, and not one that might come into existence if the hiring continued. There must be *debitum in præsenti*. The cases on the subject of attachment of debts under the *Rules of the Supreme Court* are analogous (*Webb* v. *Stenton* (1)). Reading the agreement as a whole, there was no actual present debt. There was only a possibility that there would be a debt in the future (*Australian Guarantee Corporation* v. *Balding* (2)). The fact that promissory notes were given under the provision of the agreement is immaterial because the promissory notes were only conditionally delivered and were to be returned to the hirer if the hiring ever determined.

Sir Walter James K.C., in reply.

Cur. adv. vult.

Sept. 11.

THE COURT delivered the following written judgment :—

The appellant entered a caveat against the registration of a bill of sale lodged by the respondents. The question for decision is whether the appellant is a creditor of the respondents, and so entitled under sec. 8 of the *Bills of Sale Amendment Act* 1906 of Western Australia to enter such a caveat. Sub-sec. 1 of this section provides that any person claiming to be a creditor of the grantor may enter a caveat against the registration of the bill of sale. Sec. 9 (2) provides that "the grantor may summon the caveator before a Judge of the Supreme Court in Chambers to show cause why his caveat should not be removed, and upon the return of such summons the Judge shall hear and determine whether the caveator is a creditor of the grantor." Sec. 9 (3) provides that "any person to whom the grantor is indebted on any account whatsoever, at law or in equity, . . . whether the debt is due or to accrue due . . . shall be deemed to be a creditor within the meaning of this section." The Full Court of the Supreme Court of Western Australia were of opinion that this definition included only debts which were owing whether payable

(1) (1883) 11 Q.B.D. 518. (2) (1930) 43 C.L.R. 140.

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immediately or at some future time, and did not include inchoate debts or debts the title to which was in process of accruing. We agree in this opinion. The word "due" is not unequivocal. It is capable of referring to the time of payment or to the existence of indebtedness (see per *Griffith* C.J., *David* v. *Malouf* (1); see also *Ex parte Sturt & Co.*; *In re Pearcy* (2)). In *Jones* v. *Thompson* (3), *Wightman* and *Crompton* JJ. construed the words all debts "owing or accruing" in sec. 61 of 17 & 18 Vict. c. 125 as applying only to cases in which there is *debitum in præsenti solvendum in futuro*. In *Webb* v. *Stenton* (4) the Court of Appeal gave this meaning to the words "debts owing or accruing" in Order XLV., r. 2. In our opinion the same construction should be given to the words "debt due or to accrue due" in sec. 9 (3).

The question remains whether the respondents at the time of the caveat were indebted to the appellant in any sum payable then or at some future time. This question depends upon the effect of a hire-purchase agreement under which the respondents hired from the appellant an agricultural implement. By this agreement the respondents hired the implement from the date of delivery for a term determinable as afterwards in the agreement mentioned. Among other things, the agreement provided that after payment by the respondents of the sum payable for the first period of the hiring, they were to have the option of determining the hiring by returning the machine to the appellant, and by paying to it all arrears of rental, and an amount for further rental (if the machine should be returned after the first period of hiring) equivalent to a proportionate part of the sum payable for the period current calculated in respect of so much of that period as might have elapsed at the date of such determination. The caveat was in fact entered nineteen days after the termination of the period for which the first instalment of hire was payable and after it had been paid. It follows that even if the hiring were determined upon the day when the caveat was entered, hire for nineteen days would become due and payable. The sum, however, which would be payable for

(1) (1908) 5 C.L.R. 749, at pp. 752-754.
(2) (1871) L.R. 13 Eq. 309, at pp. 310-311.
(3) (1858) E. B. & E. 63; 120 E.R. 430.
(4) (1883) 11 Q.B.D. 518.

nineteen days hire amounts to only 29s. 5d., and the parties agreed that it might be neglected. Accordingly our judgment is confined to the question whether instalments of future hire constitute a debt; a debt payable at a future time.

The considerations which affect this question have been lately discussed in this Court in *Australian Guarantee Corporation* v. *Balding* (1). In this case it is sufficient to say that no substantial distinction can be drawn in any material respect between the agreement now in question and that upon which *Helby* v. *Matthews* (2) was decided. We are of opinion that the agreement construed as a whole does not contain a promise whether absolute or defeasible to pay future instalments of hire. The provision enabling the hirer to determine the hiring is not a resolutive condition attached to a present obligation to pay future hire, but it is inconsistent with the existence of such an obligation. In other words, a debt arises only in respect of past hire, and this is so whether the agreement runs its full course or is determined by the hirer.

The hire-purchase agreement contained a clause requiring the hirer to give promissory notes as collateral security for the payment of the balance of the rent or hire. Elaborate provision was made both as to the disposition and as to the effect of these instruments. In our opinion, upon the true interpretation of the agreement, these promissory notes did not create an immediate debt but were delivered subject to conditions precedent none of which occurred.

For these reasons we are of opinion that the appeal should be dismissed.

Appeal dismissed with costs. Appellant to pay the costs pursuant to the undertaking given on application for special leave.

Solicitors for the appellant, *Jackson, Leake & Co.*

Solicitors for the respondents, *Parker & Parker.*

(1) (1930) 43 C.L.R. 140.

(2) (1895) A.C. 471.