[HIGH COURT OF AUSTRALIA.]

ROBERTSON . . . . . APPELLANT;
APPLICANT,

AND

GRIGG . . . . . RESPONDENT.
RESPONDENT.

ON APPEAL FROM THE COURT OF BANKRUPTCY.

H. C. OF A. 1932.

MELBOURNE, *March* 6, 7.

SYDNEY, *Aug.* 4.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Bankruptcy—Deed of assignment—Advances by one person to another—Advances made within six months of deed of assignment—Advances secured by charge on specific fund—"Ordinary course of business"—"Preference"—Person preferred not a creditor—"Book debts"—Bankruptcy Act 1924-1930 (*No.* 37 *of* 1924—*No.* 17 *of* 1930), *sec.* 95, *Part XI.—Bills of Sale Act* 1899-1925 (*W.A.*) (*No.* 45 *of* 1899—*No.* 41 *of* 1925), *secs.* 5, 25, 31.

A debtor who had made three contracts for road construction assigned his estate to a trustee for the benefit of creditors pursuant to Part XI. of the *Bankruptcy Act* 1924-1930 on 9th August 1930. More than six months before, namely, prior to 9th February 1930, he had obtained advances under agreements to repay the money lent and any further advances, with interest, out of progress payments becoming due to him under the road construction contracts. Within six months, further advances were made to him pursuant to these agreements. Also within six months, he gave in favour of the lender orders in writing upon the road authority for payment of the money due under the contracts and these orders were honoured. The trustee applied to set the orders aside and recover the money received thereunder on the grounds (*a*) that the orders dealt with "book debts" and were void under the *Bills of Sale Act* 1899-1925 (W.A.), and (*b*) that they constituted a transaction which was a preference and, therefore, upon the assumption that sec. 95 of the *Bankruptcy Act* 1924-1930 applied to assignments under Part XI., were void against the trustee.

Held, that the debts were not "book debts."

Held, also, that the orders and the payments thereunder were not affected by sec. 95 (1) of the *Bankruptcy Act*:

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By *Gavan Duffy* C.J., and *Starke* and *Evatt* JJ., on the ground that, assuming sec. 95 to be applicable to the case of a deed of assignment executed under Part XI. of the Act, the transactions in this case were taken out of the operation of sec. 95 (1) by sub-sec. 2 (*b*) of that section;

By *Rich*, *Dixon* and *McTiernan* JJ., on the grounds that, in relation to moneys lent before 9th February 1930, the transactions could not be affected by sec. 95 inasmuch as the respondent had obtained valid equitable assignments before the commencement of the period of six months specified in sec. 95 (1); and in relation to moneys lent within that period, the creation of a charge within the period could not be a "preference" within sec. 95, because it did not operate to prefer the respondent in respect of any debt existing when the charge was created.

Per Gavan Duffy C.J. and *Starke* J.: The test under sec. 95 (2) (*b*) of the *Bankruptcy Act* of the "ordinary course of business" is not whether the act is usual or common in the business of the debtor or of the creditor, but whether it is "a fair transaction, and what a man might do without having any bankruptcy in view."

Per Evatt J.: In sec. 95 (2) (*b*) of the *Bankruptcy Act* the expression "ordinary course of business" is not to be related to any special business carried on by either debtor or creditor, but is concerned with the character of the impeached transaction itself.

Decision of the Court of Bankruptcy affirmed.

APPEAL from the Court of Bankruptcy (District of Western Australia).

The appellant, Herbert James Robertson, trustee in the assigned estate of Benjamin Charles Miles, sought a declaration from the Court of Bankruptcy (District of Western Australia) that certain payments made by the Main Roads Board of Western Australia to the respondent, George Edward Grigg, were a preference within the meaning of sec. 95 of the *Bankruptcy Act* 1924-1930 and were void as against the trustee, or, alternatively, that certain orders given by the said Benjamin Charles Miles in favour of Grigg on the Main Roads Board under which the money was paid were fraudulent and void as against the trustee as being unregistered assignments of book debts and therefore unregistered assignments of chattels within the meaning of that word as defined by the *Bills of Sale Act* 1899-1925 (W.A.), and an order for repayment of the moneys paid to Grigg, and interest.

In 1929 Miles desired to tender for certain road-making contracts with the Main Roads Board, and requested Grigg to finance him.

Grigg agreed to help him financially if he were the successful tenderer and obtained contracts with the Board. Miles tendered for various contracts and obtained three. On 1st September 1929 the following document was signed by Miles: "In consideration of George E. Grigg advancing me the sum of £1,000 to be used only and for the financing of main road contracts secured by me I agree to pay on same interest at the rate of 10 per cent calculated as from the date of each advance up to the above sum and from repayments to be made from progress payments as the work proceeds and the same are due from Main Roads Board"; and on 15th December 1929 Miles signed the following document: "In continuance of agreement of September 1st in consideration of George Grigg advancing to me the further sum of £1,000 to be advanced as and when required and to be used only and for the carrying out of the main roads contracts secured by me I agree to repay same from progress payments as and when received and to pay interest at the rate of 10 per cent same to be calculated as in agreement of September 1st." Further, it was verbally agreed between Miles and Grigg that any subsequent advances should be on the same terms, and carry interest at the same rate, as stated in the documents already mentioned. On 22nd May 1930 Miles, at the instance of Grigg, gave the following order to the Main Roads Board: "I hereby authorize you to pay George E. Grigg all sums of money that may now be due or may hereafter become due to me from the local Government until further notice, and his receipts shall be a full and sufficient discharge for the same." On and between 2nd September and 23rd December 1929 Grigg advanced to Miles £1,282, and on and between 14th February and 13th June 1930 a further sum of £1,582 6s. 11d., in all £2,864 6s. 11d. Under the order of 22nd May 1930 the Main Roads Board paid to Grigg, in June and July of that year, a sum of £3,521 5s. 11d. On 9th August 1930 Miles executed a deed of assignment of his estate pursuant to the provisions of Part XI. of the *Bankruptcy Act* 1924-1930 to the appellant Robertson as trustee. Out of the sum of £3,521 5s. 11d. Grigg paid to Robertson as such trustee the sum of £562 13s. 4d.; the balance, £2,958 12s. 7d., represented the amount due to Grigg in respect of his advances to Miles and interest thereon. The trustee claimed that Grigg should

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pay to him the sum of £2,958 12s. 7d., and interest on the sum of £562 13s. 4d. at the rate of 10 per cent per annum from 27th November 1930, when the trustee first made demand for payment, to 14th July 1931, the date of repayment, and interest on the sum of £2,958 12s. 7d. at the rate of 10 per cent per annum from 27th November 1930 until the date of repayment.

Northmore C.J. held that the moneys which were payable or to become payable under the contracts with the Main Roads Board were not book debts, and that the assignments of them were not void as against the trustee as unregistered bills of sale within sec. 25 of the *Bills of Sale Act* 1899-1925; and that the orders were given in such circumstances that Grigg was a payee in good faith, for valuable consideration in the ordinary course of business, and was, therefore, entitled to the protection afforded by sub-sec. 2 (*b*) of sec. 95 of the *Bankruptcy Act* 1924-1930.

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

Robert Menzies K.C. and *Lapin*, for the appellant. The assignments in this case were void under secs. 25 and 31 of the *Bills of Sale Act* 1899 as subsequently amended. The moneys that were payable or were to become payable to Miles under the contracts with the Main Roads Board were book debts and therefore chattels within the meaning of that word as defined in sec. 5 of the *Bills of Sale Act* of Western Australia (*Shipley* v. *Marshall* (1)). If a contractor had sold his book debts he would intend to include debts due to him under such contracts as these. Once these are found to be book debts, sec. 31 of the *Bills of Sale Act* invalidates the assignment as far as past advances are concerned. There is no conflict between sec. 31 of the *Bills of Sale Act* and the provisions of the Federal *Bankruptcy Act*. The payments to Grigg constituted a preference within the meaning of sec. 95 of the *Bankruptcy Act*. On the findings the Chief Justice should have come to the conclusion that Grigg either knew or had reason to know that the effect of the payment of these moneys to him would be to give him a preference over other creditors. Here the facts clearly show that Miles was not able to pay his debts as they became due with his own money (*Bank*

(1) (1863) 14 C.B. (N.S.) 566; 143 E.R. 567.

of Australasia v. *Hall* (1)). The learned trial Judge took the view that the transaction had the effect of giving a preference. The expression " ordinary course of business " in sec. 95 (2) (*b*) means the ordinary course of business of the payer (*King* v. *Greig* ; *Rechner, Claimant* (2)). The borrowing of the money must be in the ordinary course of the business of the borrower. The words " in the ordinary course of business " add a further condition. The point of the section is that the person obtaining the money must prove not only that payment is made with no improper motive, but that it was such a payment that, being made in a business being carried on by the borrower, it would not arouse any suspicion in the mind of the lender. If the section means " in the ordinary course of business" of the lender, there is nothing to show that it was part of the business of the respondent to lend this money. [Counsel referred to *Tennant* v. *Howatson* (3).] Whether the respondent took " in good faith and for valuable consideration " depends on whether at the time of payment to the respondent he had reason to suppose that Miles would not be able to pay his debts as they fell due, and the evidence establishes that at the time Grigg obtained the orders and got the payments he knew that there were other creditors whom Miles had difficulty in paying. The question is, did Grigg's knowledge constitute a reason to suspect that Miles was unable to pay his debts, and that he would obtain preference over the other creditors. On that point there is no finding of fact at all. The rule followed so far is that a *de facto* preference is sufficient to be hit by the section (*Re Sanderson* (4) ; *Re Mazok* (5)). The cases are discussed in the *Australian Law Journal*, vol. III., at pp. 174, 211. The learned trial Judge was right in finding that there was here a preference within the first part of sec. 95, but where he dealt with sub-sec. 4 of sec. 95 he failed to take into account that the onus was on the respondent to prove that he was a payee in good faith, and he failed to make a finding that this transaction was made in good faith, and there is abundant ground for holding that it was not, as the respondent knew that the debtor could not pay his debts when they became due.

(1) (1907) 4 C.L.R. 1514, at pp. 1528-1530.
(2) (1931) V.L.R. 413 at p. 422.
(3) (1888) 13 App. Cas. 489, at p. 494.
(4) (1930) 2 A.B.C. 182, at p. 187.
(5) (1930) 2 A.B.C. 237.

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Wilbur Ham K.C. (with him *Davy* and *Coppel*), for the respondent. Where there is a bankruptcy the provisions of sub-sec. 2 (*b*) of sec. 95 apply to protect the rights of a payee, &c., who comes within the terms of the sub-section. The expression "ordinary course of business" means the ordinary course of business transactions in general, and is not limited to the payee's or the payer's business. The expression means business transactions and carries the matter further than bona fide transactions. In order to get the benefit of the sub-section the transaction must not only be bona fide, but must also be in the ordinary course of business (*Willmott* v. *London Celluloid Co.* (1); *Palmer's Company Precedents*, 13th ed., Part II., p. 714). This payment was for the purpose of carrying on business and was, therefore, protected. In any view the findings of the Chief Justice of Western Australia are sufficient to support the judgment. The Court of Bankruptcy, being a business Court, is invited to use its own knowledge to say whether this transaction is an ordinary business transaction or is a transaction of a suspicious nature. The fact that the order for assignment is in print points to its being an ordinary business transaction. Sub-sec. 2 (*b*) requires that the transaction should be in good faith. Being unable to pay his debts as they became due means that he was not able to pay from cash in the bank or able to borrow on ordinary security. It could not be suggested that the transaction was not in good faith if the debtor thought that he could get the money to pay. The effect of the contract must be that the payment would give a preference; otherwise it is not within the section. In this case everyone thought that there would be from £1,000 to £2,000 from the contract (*Bank of Australasia* v. *Hall* (2)). There is nothing in the evidence to show that in this case the creditor knew or suspected that, if he were paid out of moneys falling due, the other creditors would not be paid. The Chief Justice found that at the time the creditor took the order he had no reason to believe that the other creditors would not be paid. The verbal arrangement entered into, coupled with the order, constitutes a valid equitable assignment, and brings the transaction outside the period of six months mentioned in sec. 95. There is a distinction between a contract to pay a sum of

(1) (1886) 34 Ch. D. 147, at pp. 151-152. (2) (1907) 4 C.L.R., at p. 1530.

money and a contract to pay a sum from a particular fund. In the latter case there is a hypothecation of the fund *pro tanto*: it does not rest merely on contractual rights; equitable rights are attached to it (*Palmer* v. *Carey* (1)). If this transaction were an equitable assignment it would come quite outside the period of six months mentioned in sec. 95. In order to come within sec. 95, *de facto* preference is not sufficient. There must be an intention to prefer as in the old fraudulent preference provision (*Bank of Australasia* v. *Harris* (2), *Nunes* v. *Carter* (3) and *Sheldrick* v. *Aitken* (4); but *Levy* v. *Smith* (5) and *Humphery* v. *McMullen* (6) are to the contrary). The effect of giving a preference implies that the debtor exercises discrimination. The word " preference " implies that the debtor weighs the claims, one against the other, and intentionally chooses to pay one and not to pay the other. The expression " having the effect of giving one creditor a preference over another " means that the intention must be carried into effect. These words indicate a conscious choosing of one over another. If preference under sec. 95 means fraudulent preference, then the provision in Part XI. which deals with deeds of assignment is in line with it. If it means *de facto* preference, then the position is different. If the provisions relating to preference under a deed of assignment are to be consistent with those under a compulsory sequestration under sec. 95, the preference must be fraudulent. On the other hand, if they are not consistent, the respondent is under Part XI., and is not necessarily bound by the construction of sec. 95. If the transaction is found to be fraudulent under Part XI., then the assignment will be set aside. The execution of the deed of assignment was an act of bankruptcy and therefore the question of preference will be considered under sec. 95. [Counsel referred to the *Bankruptcy Act*, secs. 166, 167, 168.] As to the *Bills of Sale Acts*—under the Constitution these Acts are not now applicable so far as they touch upon matters covered by the *Bankruptcy Act*.

[GAVAN DUFFY C.J. We think this is not a book debt.]

(1) (1926) A.C. 703, at p. 706.
(2) (1861) 15 Moo.P.C.C. 97, at p. 114; 15 E.R. 429, at p. 436.
(3) (1866) L.R. 1 P.C 342, at p. 348.
(4) (1869) 6 W.W. & àB. (L.) 59.
(5) (1865) 4 S.C.R. (N.S.W.) 329.
(6) (1868) 7 S.C.R. (N.S.W.) 84, at p. 94.

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Menzies K.C., in reply. The language of sec. 95 is as plain as language can well be. The expression " effect of giving a preference " points to a test of a purely objective character. The decision in *Bank of Australasia* v. *Harris* (1) was given on a different statute. *Humphrey's Case* (2) should be applied.

Cur. adv. vult.

Aug. 4.

The following written judgments were delivered :—

GAVAN DUFFY C.J. AND STARKE J. Benjamin Charles Miles, by deed of assignment dated 9th August 1930, assigned his estate, pursuant to the provisions of Part XI. of the *Bankruptcy Act* 1924-1930, to a trustee, namely Herbert James Robertson. Robertson moved in bankruptcy for a declaration that payments made to George Edward Grigg by the Main Roads Board of Western Australia had the effect of giving a preference to Grigg over the other creditors of Miles, and were void as against the trustee by reason of the provisions of sec. 95 of the Act. He also claimed a declaration that orders given by Miles in favour of Grigg on the Main Roads Board were fraudulent and void as against him by reason of the provisions of the *Bills of Sale Acts* of Western Australia. The consequential relief claimed was repayment of the moneys paid to Grigg, and interest.

The facts disclose that Miles in 1929 desired to tender for certain road-making contracts with the Main Roads Board, and requested Grigg to " back " him ; Grigg agreed to help him financially if he were the successful tenderer and obtained contracts with the Board. Miles tendered for various contracts, and obtained three. On 1st September 1929 the following document was signed by Miles : " In consideration of George E. Grigg advancing me the sum of £1,000 to be used only and for the financing of main road contracts secured by me I agree to pay on same interest at the rate of 10 per cent calculated as from the date of each advance up to the above sum and from repayments to be made from progress payments as the work proceeds and the same are due from Main Roads Board." And on 15th December 1929 Miles signed the following document :

(1) (1861) 15 Moo.P.C.C. 97 ; 15 E.R. 429. (2) (1868) 7 S.C.R. (N.S.W.) 84.

"In continuance of agreement of September 1st in consideration of George Grigg advancing to me the further sum of £1,000 to be advanced as and when required and to be used only and for the carrying out of the main roads contracts secured by me I agree to repay same from progress payments as and when received and to pay interest at the rate of 10 per cent same to be calculated as in agreement of September 1st." Further, it was verbally agreed between Miles and Grigg that any subsequent advances should be on the same terms, and carry interest at the same rate, as stated in the documents already mentioned. On 22nd May 1930 Miles, at the instance of Grigg, gave the following order to the Main Roads Board: "I hereby authorize you to pay George E. Grigg all sums of money that may now be due or may hereafter become due to me from the local Government until further notice, and his receipts shall be a full and sufficient discharge for the same." On and between 2nd September and 23rd December 1929 Grigg advanced to Miles £1,282, and on and between 14th February and 13th June 1930 a further sum of £1,582 6s. 11d.; in all £2,864 6s. 11d. Under the order of 22nd May 1930 the Main Roads Board paid to Grigg, in June and July of that year, a sum of £3,521 5s. 11d., but, pursuant to an order in bankruptcy, Grigg paid to the trustee the sum of £562 13s. 4d. The balance, £2,958 12s. 7d., represented the amount due to Grigg in respect of his advances to Miles and interest thereon.

An equitable assignment of a chose in action supported by a valuable consideration may be made in any form, with or without deed or writing, expressing the intention to assign. An agreement between parties that advances shall be paid out of a specific fund coming to the person obtaining the advances, or an order given upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the person advancing moneys, operates as an equitable assignment of the debt or funds (*Palmer* v. *Carey* (1); *Rodick* v. *Gandell* (2)).

The agreement of 1st September is not well expressed, but, taken with the agreement of 15th December and the verbal evidence, it is clear enough that advances made by Grigg and interest thereon

(1) (1926) A.C. 703.
(2) (1852) 1 DeG. M. & G. 763, at p. 777; 42 E.R. 749, at p. 754.

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should be repaid out of moneys coming or payable to Miles under the road-making contracts with the Main Roads Board. The agreements thus operate as an equitable assignment of those moneys. The order of 22nd May also operates as an assignment, but in addition it amounts to notice to the Main Roads Board of an assignment to Grigg of the moneys becoming or falling due under the contracts. An assignment is valid between assignor and assignee without notice to the debtor, but notice binds the debtor, and precludes him from paying or settling with the assignor or anyone claiming under him. Thus the trustee of the deed of assignment, Robertson, only takes the choses in action of Miles to the extent of his beneficial interest and subject to any prior assignments. But the trustee suggests that he has a higher and a better title, based upon the *Bankruptcy Acts* and the *Bills of Sale Acts*. The argument based upon the *Bills of Sale Acts* rests upon the assertion that the moneys coming to Miles under the main roads contracts were book debts and therefore chattels within the meaning of that word as defined by the Act. All the Act says is—chattels shall include book debts. It points to debts owing to a business, of a kind usually entered in books of account of the business and in fact so entered. But moneys becoming payable under the main roads contracts to the contractor do not constitute an obligation of that sort.

The *Bankruptcy Act* raises some important questions, but it is unnecessary to express an opinion upon all the matters argued. One contention was that the provisions of sec. 166 do not apply those of sec. 95 of the Act to deeds of assignment made pursuant to Part XI. We assume, without deciding the question, that the provisions of sec. 95 do apply to deeds of assignment. Sub-sec. 2 of sec. 95 declares: "Nothing in this section shall affect . . . the rights of a purchaser, payee or encumbrancer in good faith and for valuable consideration and in the ordinary course of business." And sub-sec. 4 says: "For the purposes of this section a creditor shall not be deemed to be a purchaser, payee or encumbrancer in good faith if the conveyance, transfer, charge, payment or obligation were made or incurred under such circumstances as to lead to the inference that the creditor knew or had reason to suspect that the

debtor was unable to pay his debts as they became due, and that the effect of the conveyance, transfer, charge, payment or obligation would be to give him a preference over the other creditors." The learned Judge in Bankruptcy had no doubt, nor have we, that Grigg, when he made the agreements with Miles and gave the order of May 1930, was under the impression that Miles would be able when his contracts were completed to pay all his debts and have a profit for himself. It is clear that Grigg was a purchaser in good faith and for valuable consideration. But was he a purchaser " in the ordinary course of business " ? These words may be traced a long way back in bankruptcy law. Thus in *Alderson* v. *Temple* (1) and *Rust* v. *Cooper* (2), we find Lord *Mansfield* denying that acts in the ordinary course of business amount to fraudulent preferences. " If a bankrupt, in course of payment pays a creditor; this is a fair advantage, in the course of trade: or, if a creditor threatens legal diligence, and there is no collusion; or begins to sue a debtor; and he makes an assignment of part of his goods; it is a fair transaction, and what a man might do without having any bankruptcy in view." " If, in a fair course of business, a man pays a creditor who comes to be paid, notwithstanding the debtor's knowledge of his own affairs, or his intention to break; yet, being a fair transaction in the course of business, the payment is good; for the preference is there got consequentially, not by design." Again, Lord *Blackburn*, in *Tomkins* v. *Saffery* (3), says: " Now I think you must say that it is not with a view to give an undue preference, if a man makes a payment to a creditor in the ordinary course of business." And he instances the case of a man struggling on and making payments to keep his business going. See also *Nunes* v. *Carter* (4). Therefore, the test under sec. 95 of the ordinary course of business is not whether the act is usual or common in the business of the debtor or of the creditor, but whether it is " a fair transaction, and what a man might do without having any bankruptcy in view." The learned Judge in Bankruptcy found that the transactions between the parties in this case were in the ordinary course of business,

(1) (1768) 4 Burr. 2235, at p. 2240; 98 E.R. 165, at p. 168.
(2) (1777) Cowp. 629, at p. 634; 98 E R. 1277, at p. 1280.
(3) (1877) 3 App. Cas. 213, at p. 235.
(4) (1866) L.R. 1 P.C., at p. 348.

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and we entirely agree with him. The road-making contracts into which the debtor entered promised good profits, but the debtor required financial assistance in carrying them out mainly for the payment of wages and obtaining materials. Such assistance could be obtained, and, probably, only obtained, if the person rendering assistance were protected by an assignment of the moneys coming due under the contracts. The transaction was fair and reasonable, and such as any man might engage in without adverting even to the possibility of bankruptcy.

Other questions also arise upon sec. 95 of the *Bankruptcy Act* which were not argued in the Court below nor before this Court. Sub-sec. 1 provides: "Every . . . transfer of property, or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered, by any person unable to pay his debts as they become due from his own money, in favour of any creditor . . . having the effect of giving that creditor . . . a preference over the other creditors, shall, if the debtor becomes bankrupt on a bankruptcy petition presented within six months thereafter be void as against the trustee in bankruptcy." The payments made by the Main Roads Board all seem to have been made after 6th June 1930, but they passed to Grigg by operation of the assignments already mentioned and made six months and more before the execution of the deed of assignment of 9th August 1930. The case of *In re Rooker*; *Ex parte Rooker* (1), strongly supports the view that such a transaction cannot be attacked under sec. 95 and is, we think, decisive as to repayment of the sum of £1,282 advanced on or before 23rd December 1929. The reasoning also seems applicable to the case of assignments in consideration of specified advances and further advances, but argument might have assisted us on the whole matter.

In our opinion the result is that the appeal fails and ought to be dismissed.

RICH J. I agree with the reasons and conclusion arrived at by my brother *Dixon*. The appeal should be dismissed.

(1) (1916) W.N. 253, 293 (C.A.).

DIXON J. In August and October 1929 the debtor made three contracts with the Main Roads Board for road construction. After he had entered into two of these contracts he arranged with the respondent for a loan of £1,000. The debtor executed a short agreement by which, in consideration of the respondent advancing this sum to be used only for the financing of main road contracts secured by the debtor, he agreed to pay interest at 10 per cent calculated from the date of each advance and promised (correcting a verbal slip) that repayments should be "made from progress payments as the work proceeds and same are due from Main Roads Board." This document was dated 1st September 1929, and advances were made under it which by 3rd December 1929 amounted to £1,032. The respondent consented to make further advances and on 15th December 1929 the debtor executed another agreement. This document was expressed to be in continuance of the agreement of 1st September, and said that, in consideration of the respondent advancing the further sum of £1,000 to be advanced as and when required and to be used only for the carrying out of main roads contracts secured by the debtor, he agreed to repay the same from progress payments as and when received with interest at 10 per cent calculated as in the prior agreement. The respondent made advances from time to time, and according to the uncontradicted affidavit of the respondent, the debtor and he verbally agreed that any further advances in excess of the sum of £2,000 covered by the written agreements should be on the same terms and carry interest at the same rate. A loan made on 22nd May 1930 brought the principal sum lent over the amount of £2,000. In the end the total sum lent appears to have amounted to £2,864 6s. 11d. On 30th April, 22nd May and 3rd June 1930 the debtor gave to the respondent formal authorities directed to the Chairman of the Main Roads Board authorizing him to pay the respondent all sums that might then be due or might thereafter become due to the debtor from the local Government. The order of 22nd May 1930 alone seems to have been sent on by the Board to the Treasury, by which all payments were made in respect of the contracts. The Treasury repaid to the respondent at various dates on and after 6th June 1930 sums due to the debtor under his roads contracts which in all amounted to

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£3,521 5s. 11d. On 9th August 1930 the debtor, pursuant to a resolution adopted at a meeting of his creditors, executed a deed of assignment under Part XI. of the *Bankruptcy Act* 1924-1930. The sum of £3,521 5s. 11d. exceeded by £562 13s. 4d. the amount owing to the respondent for principal and interest, and this surplus the respondent paid over to the trustee of the deed. The trustee, however, took proceedings in the Supreme Court of Western Australia in bankruptcy to recover the full sum on the ground that the debtor in authorizing the payments to the respondent had done what had the effect of giving a creditor preference over the other creditors, and upon the further ground that the orders upon the Main Roads Board were void under the *Bills of Sale Act* 1899. These proceedings came before *Northmore* C.J., by whom they were dismissed. In my opinion his order was right and should be affirmed.

The second ground upon which the transaction was impeached by the trustee was disposed of during the argument of this appeal. The definition of chattels in sec. 5 of the *Bills of Sale Act* 1899 includes " book debts " but excludes choses in action other than book debts. This Court held that the sums accruing to the debtor under his three contracts of road construction at the time when he gave the orders were not book debts. Accordingly the orders are not within the *Bills of Sale Act*. A number of answers was given by the respondent to the appellant's contention that the transaction was hit by sec. 95 of the *Bankruptcy Act* as a preference; but I find it unnecessary to deal with many of them. In my opinion the agreements in writing of 1st September and 15th December 1929 and the subsequent oral agreement applying the terms of the second of those instruments to further advances constituted valid equitable assignments. There could be no room for doubt as to the contracts to which they referred and therefore the fund to be resorted to was identified. The agreement to repay the advances from progress payments as and when received appears to me to fall within the very words of Lord *Truro* in *Rodick* v. *Gandell* (1), which have been so often cited, and to be " an agreement between a debtor and a creditor that the debt shall be paid out of a specific fund coming to the debtor," and therefore it creates a valid equitable

(1) (1852) 1 DeG. M. & G., at p. 777; 42 E.R., at p. 754.

charge on such fund. Inasmuch as the agreements were for valuable consideration, it is unimportant that the fund was not in existence but was to arise in the future. No doubt the assignment or charge was by way of security and would operate in respect of each separate advance only from the date when it was in fact made. The period of six months within which preferences must be made to be affected by sec. 95, could not on any view be considered to commence earlier than 9th February 1930, and £1,282 had been lent before that date. In respect of this sum the respondent obtained a good equitable charge before the period of six months commenced. Within the period £1,582 6s. 11d. was lent in various sums. A charge was created in favour of the respondent in respect of each such advance as it was made, but the creation of the charge cannot be a preference within sec. 95 because it did not operate to prefer him in respect of any then existing debt. Upon the terms of sec. 95 the transfer of property or charge thereon made must be in favour of a creditor of the person unable to pay his debts as they became due, and it must have the effect of giving that creditor, or a surety for his debt, a preference. The relationship of debtor and creditor was for long the very foundation of the provisions of the bankruptcy law affecting preference, and, although exceptions have been introduced, the old rule otherwise remains and nothing can amount to a preference unless the person preferred is a creditor. Sec. 95 does not depart from this general principle. In making each separate advance on the faith of the agreement and thereby obtaining a charge in respect of the advance, the respondent did not obtain any benefit or advantage in relation to the past indebtedness. He did not deal with the debtor in his capacity of creditor. No pre-existing debt was better secured or otherwise affected by reason of any subsequent advance. There was, therefore, no preference to him as a creditor.

For these reasons the appeal should be dismissed with costs.

EVATT J. The judgment of *Northmore* C.J. has been attacked upon two grounds. The first contention of the appellant is that the moneys which were to become payable to the debtor by the Main Roads Board were " book debts " and therefore " chattels " belonging to the debtor; with the consequence that the charges over such

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moneys, given by the debtor to the respondent, are "bills of sale," void as against the appellant by reason of secs. 25 (1) and 31 of the Western Australian *Bills of Sale Act* 1899. During the hearing of the appeal the Court rejected this contention, upon the ground that the moneys payable under the contracts between the debtor and the Board were not "book debts" within the meaning of the Act mentioned. In my opinion the moneys payable under the elaborate conditions of these contracts to the debtor cannot be described as "book debts." The debtor's main business had been that of a storekeeper. The road-contracting enterprise lasted for a short time only and ended disastrously. The moneys in question bore no relation to the debtor's storekeeping business, and I agree with the learned Chief Justice's observation that "they certainly were not book debts in the ordinary acceptation of the term and I see no reason for attaching an artificial meaning to the words."

The second contention is that both the debtor's agreement to charge, and the charge upon, the Main Roads Board's contract money, and the payments made thereunder, are void as against the appellant because of sec. 95 (1) of the Federal *Bankruptcy Act* 1924-1928. For the purposes of this appeal, it may be assumed that sec. 95 (1) does apply to the case of the deed of assignment which was executed by the debtor under Part XI. of the *Bankruptcy Act*, without sequestration, upon the view that secs. 166 and 168 of the Act operate to make the sub-section applicable.

There may be other answers to the appellant's second contention, but the one found by the Supreme Court was that the respondent was a "payee or encumbrancer in good faith and for valuable consideration, and in the ordinary course of business" within sec. 95 (2). So far as the question of "good faith" is concerned, *Northmore* C.J. said :—

> "I am satisfied that the respondent when he took the orders was under the impression that the debtor would be able when the contracts were finalized to pay all his debts and to have a profit for himself. He was assured such was the case by the debtor himself and by his accountant, and it is difficult to believe that if he was under any other impression he would have so readily advanced moneys, as in fact he did, whenever the debtor requested him."

This finding of fact was reached after the deponents to the numerous affidavits were cross-examined, and I do not think it should be disturbed.

But the respondent must also show that his rights were obtained " in the ordinary course of business " (sec. 95 (2) (*b*)). The appellant relies chiefly upon the absence of positive evidence as to what securities would ordinarily be given or taken as part of such a transaction as was entered into between the debtor and the respondent. The respondent was a hotel-keeper, and the debtor, before he took on the contracts with the Main Roads Board, a storekeeper. The " ordinary course of business " is not, I think, to be related to any special business carried on by either debtor or creditor but is concerned with the character of the impeached transaction itself. In the present case the respondent was financing the debtor so as to enable him to carry the contracts through to completion. He was, for the nonce, a money-lender. I do not think that a Court of Bankruptcy requires affirmative evidence that, where money is advanced in order to finance a contract with a Department of Government, the lender may, as an ordinary business precaution, take a charge over the money payable by the Department under the contract. In any event clause 26 of the general conditions of contract of the Western Australian Main Roads Board, requiring the consent of the Board to any assignment by its contractor of moneys payable or to become payable under the contract, sufficiently evidences the fact that such assignments are ordinary business transactions.

In my opinion the judgment appealed from is right and the appeal should be dismissed.

McTiernan J. I agree with the judgment of my brother *Dixon*.

Appeal dismissed with costs.

Solicitors for the appellant, *Dwyer & Thomas*.
Solicitor for the respondent, *Morris Crawcour*.

H. D. W.