Cons *Official Receiver* v *Klau; Ex parte Stephenson Nominees* 74 ALR 67

[HIGH COURT OF AUSTRALIA.]

PRICE . . . . . APPELLANT;
RESPONDENT,

AND

PARSONS . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE COURT OF BANKRUPTCY.

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SYDNEY, 1935, *Oct.* 30, 31.

MELBOURNE, 1936, *Feb.* 13.

Rich, Starke, Dixon and McTiernan JJ.

Bankruptcy—Bill of sale—Validity, as against trustee in bankruptcy—Chattels—Purported sale—Retention by vendor under hire-purchase agreement—Determination of agreement—Recovery of chattels—Further disposition—Bankruptcy of vendor—Title of trustee—Recovery of proceeds of sale—Bankruptcy Act 1924-1933 (*No.* 37 *of* 1924—*No.* 66 *of* 1933), *secs.* 25 (1), 90, 91—*Bills of Sale Act* 1898 (*N.S.W.*) (*No.* 10 *of* 1898), *sec.* 5.*

Sec. 5 of the *Bills of Sale Act* 1898 (N.S.W.) applies to a trustee of a bankrupt estate sequestrated under the *Bankruptcy Act* 1924-1933, so that a bill of sale which is not registered according to the provisions of the *Bills of Sale Act* has no validity against him.

Under the joint effect of sec. 5 of the *Bills of Sale Act* 1898 (N.S.W.), and secs. 90 and 91 (i) of the *Bankruptcy Act* 1924-1933, an unregistered bill of sale is, by relation back, avoided from the commencement of the bankruptcy when, but for the bill of sale, goods comprised therein would be the property of the bankrupt.

In connection with a business carried on by him G. purchased certain machinery from a company through its agent, the appellant, who guaranteed payment of fifty per cent of the purchase price. G. was unable to pay

* The *Bills of Sale Act* 1898 (N.S.W.) provides :—By sec. 3 :—"In this Act the following words and expressions shall, if not inconsistent with the subject matter or context, have the respective meanings hereby assigned to them, that is to say :— . . . 'Bill of sale' shall include bills of sale, assignments, transfers, declarations of trusts without transfer, and other assurances of personal chattels, and also . . . authorities, or licences to take possession of personal chattels as security for any debt, but shall not include . . . transfers of goods in the ordinary course of business of any trade or calling . . ." By sec. 5 :—"No bill of sale shall have any validity as against the official assignee or trustee of a bankrupt estate, unless it is duly registered in accordance with, and within the time prescribed by this Act . . . and unless such registration is renewed by the grantee, or his assignee, once at least in every twelve months."

the money and consulted the appellant, who thereafter purported to purchase from G. machinery to the value of the amount due by him to the company. This machinery was not removed from G.'s premises, but a document, which set forth certain items and their prices, totalling the exact amount owed by G. to the company, was, on 12th January 1934, drawn up by G. and handed to the appellant, who then gave G. a cheque for this amount. The cheque was indorsed by G. and handed back to the appellant, who handed it to the company. On 15th January G. and the appellant executed a hire-purchase agreement under which the appellant purported to let, and G. to hire, the machinery. The agreement provided that the appellant, in certain circumstances, could "terminate the hiring and retake possession of the goods," and that G. could "at any time determine the hiring by returning the goods to the owner." G. continued his business, but, again getting into difficulties, proposed to execute a deed of arrangement under Part XII. of the *Bankruptcy Act*. He again consulted the appellant, and then signed a letter requesting the appellant to take possession of the machinery as he wished to determine the agreement. The appellant caused the machinery to be removed, and later disposed of it to A. upon hire-purchase. G. then executed a deed of arrangement, and subsequently an order of sequestration was made against him. The instalments of hire-purchase were not paid by A. to the appellant until after the date of the deed of arrangement.

Held that the two documents executed in January 1934 together recorded the transaction between G. and the appellant, they constituted an assurance of personal chattels, and, not having been registered under the *Bills of Sale Act* (N.S.W.), they were invalid as against G.'s trustee in bankruptcy as from the execution of the hire-purchase agreement; and that the appellant was liable to account to the trustee in bankruptcy in respect of the proceeds of the machinery and under sec. 25 (1) of the *Bankruptcy Act* 1924-1933 the Court of Bankruptcy had jurisdiction to order him to do so.

Decision of the Court of Bankruptcy: *Re Green*; *Ex parte The Trustee*; *Price* (*Respondent*), (1935) 8 A.B.C. 1, affirmed subject to a variation.

APPEAL from the Court of Bankruptcy (District of New South Wales and the Territory for the Seat of Government).

An application on motion was made to the Court of Bankruptcy (District of New South Wales and the Territory for the Seat of Government) by Alfred John Rowland Parsons, the trustee appointed under an order of sequestration made on 31st October 1934, in respect of the estate of Cecil Charles Green, for a declaration that each of two documents, dated 12th January 1934, and 15th January 1934, respectively, was, or, alternatively, that they jointly constituted, a bill of sale, and that such bill of sale had no validity against the trustee in bankruptcy because it had not been registered, as required by sec. 5 of the *Bills of Sale Act* 1898 (N.S.W.), and, therefore, the goods mentioned in the bill of sale were not protected or excluded

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by sec. 91 of the *Bankruptcy Act* 1924-1933 from being divisible among the bankrupt's creditors as "the property of the bankrupt." The respondent to the motion was James Bridgeman Price, of 12 Robertson Street, Greenwich, New South Wales, the holder of the documents in question. Price was a commercial traveller who travelled principally for Messrs. Westcott, Hazell & Co. Ltd. in connection with the sale of, amongst other things, motor accessories.

The following statement of facts is substantially as taken from the judgment of Judge *Lukin* :—The evidence tendered in support of the motion was the evidence of Price, given on examination before the registrar, under sec. 80 of the Act, on 2nd August 1934, the evidence of Price taken before me on the hearing of this motion, and the documentary evidence referred to hereinafter. Green, under the name of "Reliance Motors," for some years had carried on, at Casino, New South Wales, the business of a motor garage proprietor, and had machinery on his premises used in connection with that business. He had known Price for many years, and had done business with him on many previous occasions. Some of the machinery on his premises had been bought through Price, and some directly from Westcott, Hazell & Co. On 12th January 1934 he was indebted to that company in the sum of £299 9s. for goods supplied. Price, to a certain extent, acted as a *del credere* agent for his principal, having guaranteed fifty per cent of the debts due from his customers, and he was, in fact, responsible to the company for half of Green's then indebtedness of £299 9s. Green had, in January 1934, got into financial difficulties, and he consulted Price. Price says in his evidence that he "entered into an agreement with the debtor (Green) on behalf of myself and Westcott Hazell Ltd." He said:—"I knew that I was involved in the debtor's liability to the company. I knew that I had to protect myself with regard to it and I did whatever I could in a proper manner. Westcott Hazell advised me that Green owed so much, and was not paying any money, and I went up and had a conversation with . . . Green. Green was averse to a bill of sale, so there was only one way that I could see in which I could help him out, and I proposed to buy portion of his plant and pay him cash for it which would enable him to pay Westcott Hazell's account and satisfy

Bennett and Wood (another creditor), and I did that." Asked what happened about the transaction Price said : " Well, he picked out the articles he would sell and he wrote them down and made up the account, and I gave him my cheque for the amount." In answer to his own counsel :—Q. " At the time you purchased the goods from Green what was the sole reason for your purchasing ? " A. " To help Mr. Green." Q. " And what else ? " A. " And to protect my guarantee with Westcott Hazell." Q. " Was that the sole motive for the purchase ? " A. " Yes." Q. " Was there any reason why you may not have sold to Mr. Green at that time after you had already purchased the goods ? What was the reason for the hire-purchase agreement ? " A. " If I had to help him by purchasing those goods it stood to reason that he had not the money to buy them back from me at the moment." The document of 12th January 1934," (which was headed " Mr. J. B. Price. Dr. to Reliance Motors ") set out thirteen items of machinery with the price totalling £299 9s., the exact amount of Green's indebtedness to the company. The words " Paid C. Green " appeared at the foot of the document. Price's cheque for that amount was drawn and made payable to Green or his order. It was indorsed by Green. Price first said in his evidence that Green " paid it to the company," but later, under pressure, admitted that he received it back from Green and paid it himself to the branch manager of the company at Lismore. It also appears that Price got the company to ask the Automobile Finance Co. to deposit the money to his account in connection with this transaction ; that that company did so, but that he knew nothing about any guarantee being given by the company therefor. Price says that before the sale note was made out, or the cheque given, he had made no agreement or arrangement with the debtor to enter into a hire-purchase agreement. He says, however, after referring to the document of 12th January and on being asked what happened after that :—" Well the only thing that happened after that was that Green had to have tools to carry on. He could not carry on his business without the tools, so I rehired them to him, or rather I hired them to him." Price says that, on 12th January, after the sale was concluded, the debtor expressed a wish to rehire the goods. Price assented thereto,

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and the debtor then gave his cheque for £5 as "deposit or rather a premium" until he signed the hire-purchase agreement. On 15th January the hire-purchase agreement was signed. It was expressed to have been made between Price, called the owner, of the one part, and Green, "Reliance Motors," Casino, thereinafter called the hirer, of the other part. It expressed that, in consideration as well of the sum of five pounds paid by the hirer as a premium to the owner as of the covenants and conditions thereinafter contained and by the hirer to be observed and performed, the owner agreed to let, and hirer agreed to hire, the goods described (which are identical with those in the sale note), valued at £317 8s. 5d., at the rent of £5 per week for a term of sixty-four weeks from 15th January 1934, provided that if the hirer did not duly observe the agreement, and for reasons specified, the owner, without any notice, "may terminate the hiring and retake possession of the goods." It was also provided, by clause 2 (*b*), that "the hirer may at any time . . . determine the said hiring by returning the said goods to the owner." The schedule attached set out the goods, making a total of £317 8s. 5d., which was obviously the £299 9s. and interest added for postponed payment. A further provision was as follows: "3. And it is agreed and declared . . . (*h*) that neither the provisions of the *Moratorium Act* 1930-1931 nor any amendment thereof nor any Act or Acts in lieu of or in substitution thereof nor any regulations issued under the said Act or under any such amending or substituted Acts shall apply to this agreement or limit abridge postpone or otherwise affect the rights remedies or powers of the owner hereunder." The debtor continued his business. About June 1934 he again got into difficulties and proposed to execute a deed of arrangement assigning his assets to his creditors. Before doing so he had an interview with Price. In consequence, Price had a document drawn by his solicitor in the form of a letter dated 15th June 1934 from the debtor requesting Price "to take possession of the goods covered by my hire-purchase agreement, it being my desire to determine such agreement under clause 2 (*b*)." An attempt was made by the debtor and Price to persuade the debtor's father to come to the debtor's assistance. The father failed to do so, and the document just referred to was then executed by the

debtor, and the goods were at the direction of Price removed by the debtor's three ex-employees from his premises and placed elsewhere on Price's account. Later Price entered into a hire and purchase agreement with the debtor's ex-employees. On 19th June 1934 the debtor executed a deed of arrangement under Part XII. of the Act. Consequently on the discovery of the incidents referred to above, proceedings were instituted against the debtor, and an order of sequestration was made against him on 31st October, 1934. It is admitted by Price that the transaction contained in the sale note was not one which is excluded by the words "transfer of goods in the ordinary course or business" from the definition of "bill of sale" in the *Bills of Sale Act* 1898. It is also admitted that neither of the documents in question here was registered as a bill of sale. It is also admitted that the goods in question were never in Price's possession before June 1934. Price gave evidence before Judge *Lukin* that he gave his cheque for £299 9s. to Westcott Hazell & Co. Ltd., and it was debited to his account. The amount was not refunded to him. He got the goods and disposed of them, obtaining £275 therefor, besides what Green had paid him on hire, that is, £45, making £320 in all.

Judge *Lukin* held that the document of 12th January 1934 was of itself, and that the two documents of 12th January and 15th January, jointly, constituted, a bill of sale and, being unregistered, were invalid as against the trustee and declared accordingly. He found the value of the goods covered by the bill of sale and seized by Price was £299 9s. Price was ordered to pay this amount to the trustee: *Re Green*; *Ex parte The Trustee*; *Price* (*Respondent*) (1).

From this decision Price now appealed to the High Court.

Moverley, for the appellant. The evidence before the Court of Bankruptcy consisted almost entirely of evidence taken before the registrar. This Court, therefore, in considering that evidence, is in exactly the same position as that Court. The evidence does not support the inferences drawn and the conclusions arrived at by Judge *Lukin*. In dealing with the evidence his Honor did not apply the principles laid down in *Jack* v. *Smail* (2). It is clear on

(1) (1935) 8 A.B.C. 1.

(2) (1905) 2 C.L.R. 684, at p. 695.

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the evidence that the transaction recorded in the document dated 12th January 1934 was a sale. On that date the property in the goods passed from Green to the appellant. The evidence establishes that the true nature of the transaction was a bona fide sale followed by a bona fide hire-purchase agreement (*In re Watson*; *Ex parte Official Receiver in Bankruptcy* (1)). It was not merely a colourable transaction. In view of the fact that the appellant gave evidence and, although available, was not cross-examined, the observations made in *Maas* v. *Pepper* (2) are important in this case. The real test is whether as between Green and the appellant it was understood that the money was repayable independently of the hire-purchase agreement. The fact that by the transaction the appellant sought financial protection does not prevent it from being a bona fide sale (*Yorkshire Railway Wagon Co.* v. *Maclure* (3)). The matter cannot be controlled by inferences. The hire-purchase agreement was a real letting out of the goods by the real owner (*In re Watson* (4)). In the circumstances the documents executed in January 1934 are sufficient to take the matter outside the operation of sec. 95 of the *Bankruptcy Act* (*Robertson* v. *Grigg* (5)). Whatever may be the nature of the document of 15th January 1934, the relationship thereunder between Green and the appellant was determined on 15th June 1934, that is, before the respondent's title, as trustee in bankruptcy, accrued. The transaction was then spent. The trustee's title could only appertain to the transaction if there were a bill of sale in existence at the time he had a title. In the absence of a bill of sale at that time sec. 5 of the *Bills of Sale Act* does not operate (*Re Wetherill*; *Ex parte Official Assignee* (6)). Sec. 5 of the *Bills of Sale Act* was excluded by the act of determination (*Cookson* v. *Swire* (7)). Sec. 5 is independent of sec. 4 of the Act. A bill of sale must be in existence before its validity can be impeached. The evidence shows that the appellant parted with his property in the goods long before the action and long before the act of bankruptcy. The goods

(1) (1890) 25 Q.B.D. 27.
(2) (1905) A.C. 102, at p. 104.
(3) (1882) 21 Ch. D. 309, at p. 317.
(4) (1890) 25 Q.B.D., at p. 39.
(5) (1932) 47 C.L.R. 257.
(6) (1907) 7 S.R. (N.S.W.) 337, at pp. 343-345; 24 W.N. (N.S.W.) 75, at pp. 75, 76.
(7) (1884) 9 App. Cas. 653, at pp. 661-664.

then ceased to be in his possession. Before any question of bankruptcy arose, either as to sequestration or to relation back from sequestration, the transaction was effectively cancelled between the parties. The cancellation was not contrary to the provisions of the *Moratorium Act*. The Court had no jurisdiction to order the appellant to pay a sum of money in respect of the value of the goods. It is not competent for that Court to order a person to pay moneys which in any other jurisdiction could only come by way of damages. If the Court finds in a stranger property which belongs to the trustee, all the Court can do is to order that the goods be delivered up (*Re Malthouse* (1); and see secs. 25 and 99 of the *Bankruptcy Act* 1924-1933). The trustee might conceivably have brought an action at common law.

[DIXON J. referred to *Cain* v. *Allen* (2).]

The jurisdiction of the Court as regards strangers was dealt with in *Ex parte Anderson*; *In re Anderson* (3) and in *Ellis* v. *Silber* (4), and was discussed in *Williams* on *Bankruptcy*, 14th ed. (1932), pp. 409-411.

[STARKE J. referred to *Ex parte Cohen*; *In re Sparke* (5) and *Ex parte Macdonald*; *Re Beveridge* (6).]

Prima facie a trustee has no rights against a stranger to the bankruptcy unless it is apparent that he is in possession of goods of the bankrupt. By virtue of sec. 91 (iv) of the *Bankruptcy Act* 1924-1933, the only claim or right which the trustee had in this case was a right to property comprised in the bill of sale upon the trustee paying the amount due to discharge the bill or discharge the liability. The effect of sec. 91 (iv) was considered by this Court in *Lawrence* v. *Keenan* (7). The meaning of the word "property" is exhaustively defined in sec. 91 (cf. *Dilworth* v. *Commissioner of Stamps* (8)). Sec. 5 of the *Bills of Sale Act* 1898 is a bankruptcy provision within the meaning of sec. 6 (*a*) of the *Bankruptcy Act* 1924-1933 (*Rofe* v. *Grant* (9)). In the event of a conflict between the State legislation and Federal legislation in this matter the latter must prevail.

(1) (1931) 3 A.B.C. 126.
(2) (1873) 4 A.J.R. 130.
(3) (1870) L.R. 5 Ch. 473.
(4) (1872) L.R. 8 Ch. 83.
(5) (1871) L.R. 7 Ch. 20.
(6) (1871) 24 L.T. 475.
(7) (1935) 53 C.L.R. 153; 8 A.B.C. 49.
(8) (1899) A.C. 99, at pp. 104, 105.
(9) (1931) 32 S.R. (N.S.W.) 354; 4 A.B.C. 168.

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[DIXON J. referred to *Wurm* v. *Richardson* (1).]

The proceeds from the sale of the goods amounted to £275 only; not the amount specified in the order of the Court of Bankruptcy. In the circumstances the Court had no jurisdiction to order the payment by the appellant of that or any other amount.

Badham, for the respondent. The two documents of January 1934, taken in conjunction with the surrounding circumstances, bring the matter within the definition of a " bill of sale " as contained in sec. 3 of the *Bills of Sale Act* 1898, that is, those documents alternatively amount to a transfer or a licence to take possession of a security for a debt. Judge *Lukin's* deduction from the evidence, that the arrangement was a scheme for the purpose of enabling Westcott Hazell & Co. to become a secured creditor, was entirely justified. The Court is entitled to look at the real nature of the transaction. On this aspect of the matter the case is indistinguishable from *In re Watson* (2).

[DIXON J. referred to *Beckett* v. *Tower Assets Co.* (3).]

Although the transaction was in form a sale, it was not so actually.

RICH J. We think the transaction was a security. You may pass to the other question in the case.

Badham. Upon the assumption that the documents constitute a bill of sale, the right to possession of the goods was clearly referable to a document or documents which come within the *Bills of Sale Act*, and the fact that the holder of the bill of sale parted with those goods cannot relieve him from liability (*Re Wetherill* (4)). He is liable for either the goods or the proceeds thereof. The appellant's possession of those proceeds is referable, so far as he is concerned, to the bill of sale, which, being unregistered, is wholly invalid under sec. 5 of the *Bills of Sale Act*. In *Jack* v. *Smail* (5) the jury found that the transaction between the creditor and the holder of the bill of sale was a bona fide transaction; here the transaction is not bona fide.

(1) (1932) 46 C.L.R. 301; 4 A.B.C. 193.
(2) (1890) 25 Q.B.D. 27.
(3) (1891) 1 Q.B. 638, at pp. 644, 645.
(4) (1907) 7 S.R. (N.S.W.) 337; 24 W.N. (N.S.W.) 75.
(5) (1905) 2 C.L.R. 684.

Re Wetherill (1) was followed by the Supreme Court in *In re Catip* (2), which was not reversed on this point by this Court in *Malick* v. *Lloyd* (3); see also *In re Tooth*; *Trustee* v. *Tooth* (4). In the circumstances of this case *Cookson* v. *Swire* (5) does not apply. The clause in the document dated 15th January 1934 relating to moratorium legislation expressly excludes the provisions of the *Moratorium Act* 1930-1931. That Act was repealed. The clause does not operate to prevent the application to the matter of the provisions of the *Moratorium Act* 1932, which is not "in lieu of or in substitution" for the 1930-1931 Act. This affects the effectiveness of the document of 15th June 1934, which purports to cancel the "agreement" set forth in the document of 15th January. Under sec. 25 of the *Bankruptcy Act* the Court has power to do complete justice between the parties and to make a complete realization and distribution of property in a particular case (see *McDonald, Henry and Meek's Australian Bankruptcy Law and Practice* (1928), pp. 34-36). Sec. 91 (iv) of the *Bankruptcy Act* applies only to a valid bill of sale. It could not have been intended to interfere with the invalidity provision of sec. 5 of the *Bills of Sale Act*, because otherwise there would be no provision whatever, the rights conferred upon the official assignee would be gone. Here the goods were wrongfully taken; the receiver had no rights whatever in them, and, therefore, the official assignee would be entitled to them.

Moverley, in reply. A bill of sale transaction can become spent (*Cookson* v. *Swire* (5)). Sec. 5 of the *Bills of Sale Act* strikes at documents, not transactions. After the cancellation of the transaction between Green and the appellant the latter entered into another transaction with other persons in regard to the goods whereby he divested himself of any interest in them. That divestment was concluded before there was any act of bankruptcy on the part of Green. A mere licence to take possession in the abstract is not a form of assurance of chattels; it must be correlated with something

(1) (1907) 7 S.R. (N.S.W.) 337; 24 W.N. (N.S.W.) 75.
(2) (1912) 12 S.R. (N.S.W.) 552, at pp. 561, 562; 29 W.N. (N.S.W.) 146, at p. 150.
(3) (1913) 16 C.L.R. 483.
(4) (1934) 1 Ch. 616.
(5) (1884) 9 App. Cas. 653.

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to show that it is a licence to take possession as security for a debt. The question is: Is the document a bill of sale?

[DIXON J. referred to *Ex parte Hubbard*; *In re Hardwick* (1).]

In the circumstances no question arises under the moratorium legislation, but, if it did, the matter would be covered by sec. 8 (*d*) of the *Moratorium Act* 1932.

Cur. adv. vult.

1936, Feb. 13. The following written judgments were delivered:—

RICH, DIXON AND MCTIERNAN JJ. This is an appeal from an order of the Federal Court of Bankruptcy declaring that two documents constitute an unregistered bill of sale invalid as against the trustee in bankruptcy and ordering the appellant, as grantee of the alleged bill of sale, to pay to the trustee an amount of money declared to be the value of the goods covered thereby.

The order of sequestration was made on 31st October 1934 as on a debtor's petition. But the bankruptcy appears to have commenced, by relation back, on 19th June 1934, when the debtor executed a deed of arrangement under Part XII. of the *Bankruptcy Act* 1924-1933. The deed was not formally put in evidence, but the learned Judge of the Court of Bankruptcy, who, no doubt, had the document before him, says in his judgment that it was an assignment for creditors generally. Its execution was, therefore, an act of bankruptcy.

In January 1934 the appellant learned that the debtor owed a sum of £299 9s. on an account for which the appellant was under a qualified *del credere* responsibility as agent for the creditor. His responsibility to his principal was limited to half the amount of the debt. In the discussions with the debtor which ensued, a proposal was made that the appellant should find the whole amount of the debt and that the debtor should give him a bill of sale. But the debtor, as the appellant expressed it in his depositions, "was averse to a bill of sale; so," the deposition goes on, "there was only one way in which I could help him out and I proposed to buy portion of his plant and pay him cash for it which would enable him to pay" the "account . . . and I did that." Accordingly, on

(1) (1886) 17 Q.B.D. 690.

12th January 1934, the articles were picked out; the appellant made out a cheque in favour of the debtor for £299 9s., the debtor indorsed it and the appellant paid it on his behalf to the creditor. The debtor made out a list of the articles on an account form and the price of each, showing them as debits to the appellant, and receipted it. But the buyer did not take possession of the goods. The deposition proceeds to say that the debtor had to have tools to carry on; that he could not carry on his business without tools, so the appellant rehired them to him, or rather hired them to him. The hire-purchase agreement was executed on 15th January 1934, but on 12th January the debtor paid the appellant a cheque for £5 "as a deposit until he signed the hire-purchase agreement or rather a premium." The hire-purchase agreement was of the ordinary character. It described the appellant as owner of the goods which it enumerated in a schedule. The debtor was described as "the hirer." It provided for payment by the latter of weekly instalments of rent or hire, and on his default, or his bankruptcy, or his assigning his estate, or suffering an execution, it authorized the owner to terminate the hiring and retake possession of the goods. It enabled the hirer to purchase the goods by paying all the instalments of rent or hire, but gave him an option of terminating the hiring by returning the goods to the owner. It provided that, until the hirer should exercise and complete his option of purchase, the goods should remain the property of the owner and the hirer should be a bailee thereof. Finally, it contained a clause excluding the *Moratorium Act* (N.S.W.), a clause which it will be necessary to describe more fully. The instalments of hire, £5 a week, were not regularly met, and, by the middle of June, only £45 had been paid. The financial difficulties of the debtor had increased. The appellant consulted his solicitor, who prepared a document in three lines for the debtor's signature, if it could be obtained. It was a request addressed to the appellant to take possession of the goods, stating that it was the debtor's desire to determine the agreement under the clause enabling him to do so. The appellant then discussed with the debtor the state of his affairs and he announced his intention of assigning his estate. On 15th June 1934, a Friday, the debtor signed the request, and, on the following afternoon, three men, who in fact were in his employment, but

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Rich J. Dixon J. McTiernan J.

who acted on the appellant's instructions, took the goods to a place of storage. Before doing so, they arranged with the appellant that they should hire the goods from him and set up in business with a view of obtaining the connection of the debtor upon his giving up his business. This arrangement was completed on Monday, 18th June, by the three men entering into a hire-purchase agreement with the appellant. On the following day, the debtor executed the deed of arrangement. When, on 12th January 1934, the appellant found the £299 9s., he borrowed it from a finance company with which he deposited the debtor's hire-purchase agreement as security. The appellant's deposition is not at all distinct upon the subject, but there is reason to suppose that the second hire-purchase agreement was likewise deposited with the finance company. Under the second agreement, the appellant received payments amounting to £275.

The documents declared by the order under appeal to constitute a bill of sale are the list of goods dated 12th January and the hire-purchase agreement dated 15th January 1934. They have been held void as against the trustee in bankruptcy under sec. 5 of the New South Wales *Bills of Sale Act* 1898, and the appellant has been held liable to him for the value of the goods, an amount declared by the order to be £299 9s.

A number of questions arises in considering whether this order was rightly made.

(1) Sec. 5 of the *Bills of Sale Act* 1898 is a provision of State law invalidating against the official assignee or trustee of a bankrupt estate, and not against anyone else, a bill of sale registration of which has not been effected and regularly renewed in accordance with its requirements. Does it operate in favour of a trustee in bankruptcy under the Commonwealth Act ?

The question depends, in the first place, upon the interpretation of the section, and, in the next place, upon sec. 109 of the Constitution. Unless, upon its proper interpretation, it is applicable to a bankruptcy under the Federal statute and is not confined to bankruptcy under the superseded State legislation embodied in the *Bankruptcy Act* 1898 (N.S.W.), it cannot be relied upon by the trustee, the respondent.

If it is so applicable, then a question arises under sec. 109 as to its consistency with the Federal *Bankruptcy Act* 1924-1933.

Whether sec. 5 of the *Bills of Sale Act* is applicable to a Federal bankruptcy turns, we think, on the descriptive nature of the expression " the official assignee or trustee of a bankrupt estate." Is appointment under the State statute a characteristic essential to the description ? No doubt when the statute was passed this characteristic was assumed, unless indeed the provision extends to a foreign bankruptcy under the law of the bankrupt's domicil. But this appears to be accidental, not essential. The true purpose of the section is to avoid unregistered bills of sale in favour of the trustee appointed by law to liquidate the affairs of a bankrupt on his acquiring that status. It is true that, under Federal law, there is no officer called " official assignee," but that does not seem important. The expression " trustee " suffices to cover not only the Federal trustee in bankruptcy but also the official receiver as such (see sec. 16 (1) (*a*) of the Commonwealth *Bankruptcy Act* 1924-1933). We think the provision is capable of including trustees of bankrupt estates under the Federal legislation. This view was adopted by the Full Court of South Australia in *Inglis* v. *Dalgety & Co. Ltd.* (1) and by *Harvey* C.J. in Eq. in *Rofe* v. *Grant* (2).

It is necessary next to consider whether to give such an operation to the State provision involves an inconsistency with the Commonwealth Act. When State legislation invalidates in favour of his creditor a disposition by the bankrupt which, otherwise, would form part of his estate, what it in substance does is to nullify, in the event of bankruptcy, a transaction which depends for its efficacy entirely upon State law. The State legislation, in other words, withdraws from the transaction the support of the law lying within the State legislative power contingently upon an adjudication of bankruptcy. By doing so, it makes way for the vesting provision of the Federal law to operate upon property which, otherwise, would have been alienated by the bankrupt. It thus swells the assets which it is the policy of the bankruptcy law to make available for debts. There is nothing in such an enactment prima facie repugnant to a general law of bankruptcy. In the United States validity is

(1) (1930) 2 A.B.C. 194. (2) (1931) 32 S.R. (N.S.W.) 354 ; 4 A.B.C. 168.

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allowed to a law of a State producing this effect (*Stellwagen* v. *Clum* (1); *International Shoe Co.* v. *Pinkus* (2); *Moore* v. *Bay* (3)). Unless, therefore, an intention can be found in the *Bankruptcy Act* 1924-1933 to state exhaustively the antecedent transactions which are to be avoided on bankruptcy, or to prescribe in what circumstances bills of sale are to be invalid against the trustee, or to provide in some other way for the matter dealt with by sec. 5 of the *Bills of Sale Act* 1898, its application to Federal bankruptcies is not inconsistent with the Federal law. Sec. 91 (*e*) of the *Bankruptcy Act* 1924-1933 provides that the property divisible amongst creditors shall not include goods hired under a valid contract for letting and hiring, or chattels in respect of which a valid bill of sale has been filed or registered under any Act or State Act, except as provided in par. iv of the section. That paragraph includes in the property divisible amongst creditors the claim or right of the bankrupt to property under any contract, bill of sale, hire-purchase agreement, and the like. It assumes validity against the trustee but ensures that he succeeds to the rights of the bankrupt under the instrument. These provisions, so far from exhaustively stating what bills of sale, or hire-purchase agreements, shall be valid, appear to us to indicate an intention to allow State law to operate upon that question. The word "valid" means valid according to State law, and we see no reason why it should be confined to absolute validity. It is, at least, consistent with an annihilation by State law confined to the event of bankruptcy.

We are of opinion that sec. 5 of the *Bills of Sale Act* 1898 (N.S.W.) applies to a trustee of a bankrupt estate sequestrated under the *Bankruptcy Act* 1924-1933, so that a bill of sale which is not registered according to the provisions of the *Bills of Sale Act* has no validity against him.

(2) It then becomes necessary to decide as from what date a bill of sale becomes void as against a trustee in bankruptcy. Is it to be regarded as void as from the commencement of the bankruptcy, or from the making of the order of sequestration? If the deed of

(1) (1918) 245 U.S. 605; 62 Law. Ed. 507.

(2) (1929) 278 U.S. 261; 73 Law. Ed. 318.

(3) (1931) 284 U.S. 4; 76 Law. Ed. 133.

arrangement executed on 19th June 1934 was for creditors generally, as no doubt it was, it amounted to an act of bankruptcy, and, by relation back, the bankruptcy commenced from that date. Before that date possession of the goods had been obtained by the appellant and he had made the second hire-purchase agreement. But the hirers thereunder did not pay the instalments of hire until after that date, nor did the appellant hypothecate that hire-purchase agreement with the finance company. These facts may make the distinction important. In our opinion, under the joint effect of sec. 5 of the *Bills of Sale Act* 1898 (N.S.W.) and secs. 90 and 91 (i.) of the Commonwealth *Bankruptcy Act* 1924-1933, an unregistered bill of sale is avoided from the commencement of the bankruptcy, that is, by relation back, when, but for the bill of sale, goods comprised therein would be the property of the bankrupt. Sec. 90 provides that the bankruptcy of a debtor shall be deemed to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within six months next preceding the date of the presentation of the bankruptcy petition. Par. (i.) of sec. 91 makes the property divisible among the creditors include all property which belongs to or is vested in the bankrupt at the commencement of the bankruptcy.

The effect of avoiding a disposition by the bankrupt of his property as against the trustee is to leave the property for the trustee's purposes in the same situation as if no such disposition had been made. It thus passes to the trustee as if property of the bankrupt. We think his title to it is given a relation back, just as his title to what is in truth the bankrupt's property. This conclusion is supported, we think, by the decisions in *Heslop* v. *Baker* (1) and *In re Gunsbourg* (2).

(3) The question must now be considered whether the receipted list of goods of 12th January 1934, or the hire-purchase agreement of 15th January 1934, or both together, constitute a bill of sale.

The case is one in which parties, in order to avoid the necessity of registering a document as a bill of sale, have thrown the transaction into a form which, otherwise, it would not assume. The change from the original proposal, that the appellant should lend the money

(1) (1853) 8 Ex. 411 ; 155 E.R. 1408. (2) (1920) 2 K.B. 426.

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on the security of a bill of sale, into a transaction taking the shape of a sale followed by a hiring back with an option of purchase, was probably regarded by both parties as one of form only. But this does not mean that the form was false. A desire to avoid the legal incidents attending the direct and natural way of carrying out the business object which parties have in view may well lead them to a genuine change in the character of the transaction. In the present case, there appears to be no reason to doubt that both the debtor and the appellant intended that their mutual rights and their relative situation should be as described by the hire-purchase agreement. They intended, we should suppose, that the appellant should have the general property in the goods, that he should retain it until he was paid or repaid in full, that the repayment should be by instalments, and that, until default or bankruptcy or the like, the debtor should have possession of the goods. But, at the same time, we think both parties treated the transaction as primarily one of loan and that they regarded the hire-purchase agreement as a means of securing repayment of the money lent. There is no reason to think they meant that the loan should be repayable otherwise than by the instalments prescribed by the agreement, or that it should remain a debt though the goods were all seized or surrendered under the agreement and became the absolute property of the appellant. In other words, the main object of the transaction was an advance of £299 9s. to the debtor and the repayment by him of that sum and interest in sixty-four instalments of £5 each. The means for securing this was the hire-purchase agreement, which there is no reason to regard as not intended by the parties to have effect according to its terms, even although it should mean that the appellant might take the goods in complete satisfaction of the debt, which would, in that event, be discharged. It is unnecessary to consider whether in equity the agreement would be allowed to have effect according to its tenor, or whether an equity of redemption would be preserved to the debtor. For, in any case, we think the rights and remedies given to the appellant by the hire-purchase agreement in relation to the goods may be properly described as a security for a debt. No doubt the obligation of the debtor is reduced by the terms of the hire-purchase agreement to a liability to pay hire unless and until the chattels were seized

or surrendered. How far future instalments of hire can be described as debts is considered in *Australian Guarantee Corporation Ltd.* v. *Balding* (1) and *H. J. Wigmore & Co. Ltd.* v. *Rundle* (2). It must be remembered, however, that in the present case primarily there is an advance amounting to a loan and that the terms of the hire-purchase agreement operate, not to create a liability otherwise non-existing, but to qualify what would be an absolute and immediate debt independently arising.

The importance of the question whether the instrument affords a security for a debt is more limited here than in England. For, since 1882, in England a bill of sale made or given by way of security for the payment of money by the grantor is void unless made in accordance with a statutory form (sec. 10 of 45 & 46 Vict. c. 43). In New South Wales, however, it is necessary to inquire whether the instrument gives a security for the purpose only of applying that part of the definition of " bill of sale " which includes " powers of attorney, authorities, or licences to take possession of personal chattels as security for any debt." This difference ought not to be neglected in applying English decisions. The marked tendency which they show to look through or outside the documents to the substance of the transaction, although the question is whether the documents themselves fall within the statutory definition of " bill of sale," is in some degree to be accounted for by the requirement that every written security over personal chattels shall pursue a statutory form. It may be necessary here to look at the substance of the transaction in order to discover whether the document operates to give a licence to take possession of goods as a security for a debt. For the existence of the debt may not appear from the document: also it may not appear where the property in the chattels resides. The question who, apart from the document, is entitled to the property in the goods may determine whether it is an assurance of personal chattels and whether it is a licence to take possession. Further, it may be necessary to consider facts outside the documents in order to ascertain whether two or more writings combine in their operation or should be considered as separate instruments, whether the transaction is constituted by writings or

(1) (1930) 43 C.L.R. 140. (2) (1930) 44 C.L.R. 222.

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it has an independent existence, and, generally, in order to apply the instrument and discover what would be its actual legal operation.

The facts in the present case show that the receipted list and the bill of sale were intended to record the transaction. The list shows nothing except that £299 9s. was paid by the appellant to the debtor in reference to the chattels it enumerates and in itself, probably, it could not amount to an assurance of personal chattels. But the hire-purchase agreement must be read with it, and that agreement contains an express acknowledgment of the appellant's ownership of the goods. The provision that the goods should remain the property of the "owner," which is the description adopted in the agreement to identify the appellant, and that the hirer should be bailee, until he exercises and completes his option of purchase, operates as a contractual allocation between them of the general and special property in the goods. It estops each from denying that the general property is vested in the appellant. "If the effect of the document is that the lender of the money, and supposed lessor of the goods, can make a title to them by means of the document by estoppel or otherwise, then the document will amount to an assurance within the *Bills of Sale Act*" (per *Lindley* L.J. in *In re Watson* (1)). This is precisely what the document does. It enables the appellant to make a title to the goods certainly by estoppel, if not otherwise. Moreover, together with the receipt, it constitutes his title. There was not, in our opinion, any independent antecedent sale by the debtor to the appellant. The transaction between them was entire, and, although it included an intended transfer of ownership, the transfer was attended by all the conditions described in the hire-purchase agreement. We do not think the parties meant on 12th January 1934 that the property in the goods should pass unconditionally to the appellant. If it passed at all then, it did so conditionally subject to the execution later of the proper hire-purchase agreement. But the better analysis of their dealing appears to us to make the passing of the property await the completion of the entire transaction by the execution of the hire-purchase agreement. It is difficult to see how it could be otherwise with the equitable or beneficial ownership. In either event, the hire-

(1) (1890) 25 Q.B.D., at pp. 39, 40.

purchase agreement becomes the assurance. (See *Beckett* v. *Tower Assets Co.*, per *Fry* L.J. (1) and per *Bowen* L.J. (2).)

The power of seizure given by the hire-purchase agreement to the appellant would amount to a licence to take possession as security for a debt within the meaning of the definition of bill of sale, if the general property in the goods were not vested in him. That part of the definition is generally understood as relating to powers, authorities or licences given by a grantor, who retains both possession and property in the chattels, to seize them for the purpose of obtaining payment of a debt. But when a document gives the general property to the creditor and gives a special property to the debtor until default and then confers upon the creditor a licence or authority to seize the goods which the debtor otherwise is entitled to retain, there is a good deal to be said for the view that the licence itself falls within the definition of bill of sale. But, in any event, we think that the hire-purchase agreement constitutes a bill of sale because it includes an assurance of personal chattels.

(4) The result is that, as against the trustee, it ceased to be valid as from the commencement of the bankruptcy. If the bankruptcy commenced on 19th June 1934, as it appears to have done, the appellant would be unable to withhold from the trustee any chattels comprised in the bill of sale which at that date remained under his control. But in fact all the chattels had before that date been delivered to the three persons who gave the second hire-purchase agreement. The appellant has not been ordered to deliver up any of the goods. The order, in effect, recognizes that, by this transaction, he parted with them. Accordingly it requires him to pay their value.

At the date when the second hire-purchase agreement was made, there was no act of bankruptcy and the appellant had a title which had not become retroactively defeasible. If, therefore, on 18th June 1934, he had transferred the property in the goods to the three men, he would have given them a good title and could not afterwards have been considered retrospectively as having done any wrongful act. We do not think there is any principle upon which the appellant could, in that event, be held liable to account to the

(1) (1891) 1 Q.B., at pp. 645, 646.

(2) (1891) 1 Q.B., at p. 648.

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trustee either for the value or for the proceeds of the goods. But he did not on 18th June 1934 transfer the general property in the goods. What he did was to make a contract of bailment with an option of purchase superadded. The three men obtained a right to possession of the goods and a contractual right by paying the hire in full to become owners. The right to possession arose from a special bailment which could not be put an end to by the bailor. It does not appear whether, before the order of sequestration on 31st October 1934, the instalments of hire had all been paid. But, until that date, there was no trustee, no one, that is, who could even claim to terminate the bailee's right to retain the chattels. If, after the date when the bankruptcy commenced by relation back, the appellant had transferred the goods for value, the purchaser would have obtained, as against the trustee, an indefeasible title (*In re Hart*; *Ex parte Green* (1); *In re Gunsbourg* (2)). But the appellant would have dealt with property to which he had only a title that turned out to be void. He would, we think, have been liable to account for the proceeds of the property to the trustee when appointed (see *In re Goldburg* [*No.* 2]; *Ex parte Page* (3)).

The question which arises upon the actual facts lies between these two positions. It is whether the appellant is liable to account when the disposition was inchoate at the time of the commencement, by relation back, of the bankruptcy. The general property in the goods, subject to the bailment, must be taken to have vested in the trustee. Retroactively the trustee is treated as having succeeded to the bailor's title. This consideration, in our opinion, is enough to render the appellant accountable, that is, assuming that he can make no better title himself to the chattels he had bailed than the void bill of sale.

(5) But he contends that he need not depend upon the void bill of sale for his title. He relies upon the request of 15th June 1934 prepared by his solicitor and signed by the debtor. That request was that the appellant should take possession of the goods. Possibly, if the hire-purchase agreement had not been an assurance of chattels and had been a bill of sale only in so far as it contained a licence

(1) (1912) 3 K.B. 6.
(2) (1920) 2 K.B., at p. 441.
(3) (1912) 1 K.B. 606.

to take possession, the written request might have served the purpose of rendering it unnecessary for the appellant to rely upon that part of the agreement. But the request expressly refers to the clause enabling the debtor to terminate the hiring and thus indicates an intention to pursue the provisions of the agreement. It does not affect to confer upon the appellant a right to the chattels independent of the hire-purchase agreement. It does no more than deal with the possession of the chattels, which it asks the appellant to assume.

The operation of sec. 5 of the *Bills of Sale Act* 1898 is not affected by a change of possession (see *Re Wetherill* (1)). The request by the debtor and the appellant's action upon it were not separate and independent transactions giving a right to possession of the goods. They were attributable to the original transaction (see, per *Lindley* L.J., *Ex parte Parsons* ; *In re Townsend* (2) and *Re Wetherill* (3), per *Street* J.)

(6) The appellant also contended that, by reason of the surrender of the chattels and their subsequent disposal by him on the second hire-purchase agreement, the documents constituting the bill of sale were exhausted or spent before the commencement of the bankruptcy. He relied upon *Cookson* v. *Swire* (4). In that case a bill of sale void, under 17 & 18 Vict. c. 36, only against assignees in bankruptcy, assignees for the benefit of creditors and execution creditors in respect of chattels in the apparent possession of the grantor, contained a power of sale. Before any execution creditors existed the power was exercised and the property in the goods transferred. Possession of the goods was delivered to the transferees, although, possibly, the original grantor remained in apparent possession. A creditor levied execution. It was decided that the bill of sale had run its course and the property had been transferred under it before any person against whom it was invalid came into being. Accordingly the goods were not exposed to the execution creditor's process.

In our opinion, the facts of the present case are inconsistent with the application of the principles upon which *Cookson* v. *Swire* (4) rests. Here, at the time of the commencement of the bankruptcy,

(1) (1907) 7 S.R. (N.S.W.) 337 ; 24 W.N. (N.S.W.) 75.
(2) (1886) 16 Q.B.D. 532, at p. 547.
(3) (1907) 7 S.R. (N.S.W.), at pp. 344, 345 ; 24 W.N. (N.S.W.), at p. 76.
(4) (1884) 9 App. Cas. 653.

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the general property in the goods had not been effectually disposed of but, subject to the invalidity of the hire-purchase agreement, lay in the appellant.

(7) Although it is not necessary to decide the matter, it is, perhaps, desirable to notice an argument advanced on behalf of the respondent based upon the *Moratorium Act* 1932. It was to the effect that the instrument was, within the meaning of that Act, not a hire-purchase agreement, but a mortgage of chattels and that leave had not been obtained to proceed under it. A provision occurs in the document purporting to exclude moratorium legislation. It was in an old form, however, and did not correctly refer to the Act of 1932. It was as follows :—" That neither the provisions of the *Moratorium Act* 1930-1931 nor any amendment thereof nor any Act or Acts in lieu of or in substitution thereof nor any regulations issued under the said Act or under any amending or substituted Acts shall apply to this agreement or limit or abridge postpone or otherwise affect the rights remedies or powers of the owner hereunder." The argument could not succeed if this amounts to a " condition or covenant expressly excluding the provisions of this Act " within sec. 8 (*d*). We are disposed to think that it does so. It specifically refers to the legislation by an unequivocal description.

(8) The final contention relied upon by the appellant in answer to the claim is that no jurisdiction existed in the Court of Bankruptcy to make a personal order upon him, a stranger to the bankruptcy, for the payment of money, as distinguished from the restoration of property of the bankrupt. The jurisdiction rests upon sec. 25 (1) of the *Bankruptcy Act* 1924-1933. The liability of the appellant is not, we think, for unliquidated damages for a tort that is independent of the bankruptcy. It is a liability to account for the proceeds of property which formed part of the assets which must be considered, retrospectively, as belonging to the estate. This liability is, in our opinion, enforceable under sec. 25 (1) (see *In re Hawke*; *Ex parte Scott* (1)).

(9) The form of order made by the Court of Bankruptcy is for payment of the value of the goods assessed at £299 9s. No evidence of this exact value was given and the appellant objects that it is

(1) (1885) 16 Q.B.D. 503.

not the estimated value of the goods for which he is liable, but, at worst, the proceeds, and, in any case, there is no evidence of value.

Without deciding that in no circumstances would he be liable for the value of the goods, we think that upon the evidence his liability was for the proceeds and no more. The proceeds arising in his hands were £275.

The order should be varied by substituting this amount for £299 9s. and by deleting from the first declaration the words "of itself." Otherwise the appeal should be dismissed with costs.

STARKE J. Appeal from an order of the Federal Court of Bankruptcy declaring two documents, dated 12th and 15th January 1934, respectively, invalid against the trustee of the bankrupt estate of Cecil Charles Green, because they had not been registered pursuant to the provisions of the *Bills of Sale Act* 1898 of New South Wales. The appellant, Price, was also ordered to pay to the trustee the sum of £299 9s., the value of the goods covered by the documents.

Green had carried on the business of a garage proprietor at Casino in New South Wales, under the name of "Reliance Motors." In January 1934 he was indebted to Westcott Hazell Ltd. in the sum of £299 9s. for goods supplied, and the appellant Price was under liability to the company in respect of half that amount as a *del credere* agent. The company advised Price of the amount of Green's indebtedness and that he was in default. Price saw Green about the matter. Price deposed :—"He" (Green) "was averse to a bill of sale so there was only one way that I could see in which I could help him out, and I proposed to buy portion of his plant and pay him cash for it." "He picked out the articles he would sell and wrote them down and made the account up and I gave him my cheque for the amount." The account is dated 12th January 1934. It debits to Price the value of particular items of machinery, amounting in the aggregate to £299 9s., and is receipted "Paid, C. Green." This is one of the documents that have been declared invalid. The cheque for £299 9s. found its way to Westcott Hazell & Co. Ltd. Price did not take possession of the goods. After the account was made out, Green suggested that he should hire the goods from Price, otherwise he could not carry on his business. Price agreed,

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and Green paid him £5 " as a deposit until he signed the hire-purchase agreement, or rather a premium." On 15th January a hire-purchase agreement was executed. It is in the usual form. Price is described as " owner " and Green as " hirer." The owner agrees to let and the hirer to hire the particular items of machinery set forth in the account of 12th January 1934 at a rent of £5 per week for a term of sixty-four weeks. It provides that the hirer may purchase the goods for the total amount of the rent and premium payable under the agreement. It stipulates that until the hirer exercises and completes his option to purchase, the goods shall remain the property of the owner and the hirer shall be a bailee thereof. It enables the owner to retake possession of the goods of the hirer if the hirer make default under it or become bankrupt. It also enables the hirer to determine the hiring by returning the goods to the owner. This is the other document that has been declared invalid.

It is said, truly enough, that " an ordinary . . . hiring agreement, containing a licence on default to retake goods which are not the property of the hirer until all the instalments are paid, is not a bill of sale " (*Ex parte Crawcour*; *In re Robertson* (1); *McEntire* v. *Crossley Brothers Ltd.* (2); *Baldwin's Law of Bankruptcy*, 10th ed. (1910), p. 402). And further, that " an agreement to hire back with an option of repurchase after a bona fide sale, independently complete apart from any document " does not fall within the Act (*Manchester, Sheffield, and Lincolnshire Railway Co.* v. *North Central Wagon Co.* (3); *Baldwin's Law of Bankruptcy*, 10th ed. (1910), pp. 402, 403). But the manifest purpose of the parties in the present case was to secure a sum of money. The sale to Price, though in terms absolute, was always subject to the right of Green to hire back the goods with an option to repurchase or perhaps one may say to redeem them. There was never any intention to give Price any right of property in the goods independently of the terms of the hiring agreement. The sale and hiring were all part of one transaction. Still, as *Bowen* L.J. observed in *North Central Wagon Co.* v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (4), the *Bills of Sale Act* has not struck at transactions but at documents which constitute

(1) (1878) 9 Ch. D. 419.
(2) (1895) A.C. 457.
(3) (1888) 13 App. Cas. 554.
(4) (1887) 35 Ch. D. 191.

an assurance of personal chattels. "If a person could make his transaction complete and effective in law or in equity without the document, the Act could do nothing to affect his rights, and did not purport to do anything to affect his rights" (1). Now it is argued that the documents of 12th and 15th January 1934 do not, nor does either of them, constitute an assurance of personal chattels within the meaning of the *Bills of Sale Act*. It may be open to question whether the document of 12th January 1934 would itself have required registration as a bill of sale (see and cf. *Ex parte Cooper*; *In re Baum* (2); *Woodgate* v. *Godfrey* (3); *Marsden* v. *Meadows* (4)). But the answer to the argument is contained in a judgment of *Lindley* L.J. in *In re Watson*; *Ex parte Official Receiver in Bankruptcy* (5):— "If the conclusion is arrived at that the hiring agreement was a real letting out of goods by the real owner of them, then it is not a bill of sale; but if, as in this case, the supposed hirer is the real owner of the goods, then it has at least the effect of a licence to seize the goods of the borrower of the money as a security for the loan. If the effect of the document is that the lender of the money, and supposed lessor of the goods, can make a title to them by means of the document by estoppel or otherwise, then the document will amount to an assurance within the *Bills of Sale Act*. The document either amounts to a licence to seize the goods, or, if the lender can make a title to them by the document, then it is an assurance of goods, so that either way it is a bill of sale within the Act." The receipted account of 12th January 1934 and the hire-purchase agreement of 15th January 1934 record the transaction between the parties, and the only title that Price, the appellant, can make to the goods, is by means of and through these documents. They constitute, for the reasons given by *Lindley* L.J. (5), an assurance of personal chattels or a bill of sale within the meaning of the *Bills of Sale Act*. The fifth section of the Act provides that no bill of sale shall have any validity as against the official assignee or trustee of a bankrupt estate unless it is duly registered in accordance with the Act. The documents here were not registered in accordance with the Act. The learned Judge in bankruptcy states that on

(1) (1887) 35 Ch. D., at p. 207.
(2) (1878) 10 Ch. D. 313.
(3) (1879) 5 Ex. D. 24.
(4) (1881) 7 Q.B.D. 80.
(5) (1890) 25 Q.B.D., at pp. 39, 40.

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19th June 1934 Green executed a deed of arrangement under Part XII. of the Federal *Bankruptcy Act* 1924-1932, assigning to a trustee his assets for the benefit of his creditors, and that on the 31st October 1934 his estate was sequestrated in bankruptcy under that Act. It was suggested during the argument, though but faintly pressed, that the *Bills of Sale Act* of New South Wales did not avoid documents that were not registered in accordance with the Act as against an official assignee or trustee appointed under the Federal law. But the words are wide enough to include any assignee or trustee of a bankrupt estate lawfully appointed (see *Williams* v. *Lloyd* (1) and the American cases there cited).

The provisions of sec. 5 of the *Bills of Sale Act* 1898 of New South Wales, prima facie, therefore, avoided the documents of 12th and 15th January 1934 as against the trustee in bankruptcy appointed under the Federal law. The title of the appellant, Price, to the goods particularized in these documents is destroyed as against the trustee in bankruptcy, and prima facie vests in the trustee in bankruptcy by force of that law (see *Bankruptcy Act* 1924-1933, secs. 66, 90, 103). The provisions of sec. 91 (*e*) of the Act would be inapplicable.

Some other facts, however, require consideration. In June of 1934 the appellant, Price, discussed with Green his financial position. Green's creditors were pressing him. The upshot of the discussion was that Green gave leave to the appellant to take or seize the goods particularized in the documents of 12th and 15th January 1934. On 15th June 1934 Green gave a written authority to the appellant as follows: "I hereby request you to take possession of the goods covered by my hire-purchase agreement with you, it being my desire to determine such agreement under clause 2 (*b*)." The appellant took possession of the goods accordingly and had them removed to other premises. Employees of Green (who had removed the goods for the appellant) desired however to start on their own account another motor business. They requested the appellant to hire the goods to them, which he agreed to do. The appellant and the employees of Green accordingly executed within a few days a hire and purchase agreement in the ordinary form.

(1) (1934) 50 C.L.R. 341, at pp. 362, 363.

According to the appellant, he got the goods and disposed of them. He got £275 for them, besides what Green had paid him on hire, that is £45. The evidence, however, does not make it clear whether the appellant received the £275 from the employees of Green or from some other disposition of the goods. But I take it that the money was paid by the employees of Green. It was argued that in obtaining possession of the goods the appellant acquired a title to them which he could maintain without reliance on the documents of 12th and 15th January 1934. But he acquired such possession under and by virtue of the documents which are avoided : possession so obtained creates no independent source of title (*Re Wetherill* (1) ; *In re Catip* ; *Malick* v. *Lloyd* (2) ; *Kent* v. *Parer* (3) ; *King* v. *Greig* ; *Rechner, claimant* (4)). Further, *Cookson* v. *Swire* (5) was relied on. In that case, the bill of sale contained a power of sale, and the mortgagee sold under the power, whereby the property was transferred free from any equity of redemption. The mortgagees had also taken possession of the goods and delivered them to the purchaser in a manner which, as between those parties, was sufficient to transfer the possession. It was held that the bill of sale was spent and at an end, that the purchaser took a title " not dependent upon the continued subsistence or efficacy of the bill of sale " and " at a time when there was no execution and no bankruptcy in respect of which the title of the person selling to him was liable to be impeached." In the present case, though the sequestration order was made on 31st October 1934 the bankruptcy apparently related back to and commenced on 19th June 1934, when Green executed a deed of arrangement under Part XII. of the *Bankruptcy Act* (see Act, sec. 90). But, whenever the bankruptcy commenced, the documents of 12th and 15th January 1934 were not spent or exhausted. They constituted the appellant's title to the goods—the operative documents, governing the title so far as they were effective (*Ex parte Turquand* ; *In re Parker* (6)). The hire-purchase agreement with Green's employees gave them no

(1) (1907) 7 S.R. (N.S.W.) 337 ; 24 W.N. (N.S.W.) 75.
(2) (1913) 16 C.L.R. 483 ; (1912) 12 S.R. (N.S.W.) 552 ; 29 W.N. (N.S.W.) 146.
(3) (1922) V.L.R. 32 : 43 A.L.T. 128.
(4) (1931) V.L.R. 413, at pp. 425, 426.
(5) (1884) 9 App. Cas. 653.
(6) (1885) 14 Q.B.D. 636, at p. 644.

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absolute title to the goods. The goods had been let out on hire to them, and the appellant had agreed that the same should become their property on making a certain number of payments known as instalments. But there is no suggestion in the evidence that these instalments were paid before the commencement of the bankruptcy or before the date of the order of sequestration. Consequently there is nothing in these considerations which destroys the prima facie title of the trustee in bankruptcy to the goods.

The *Moratorium Act* 1932 of New South Wales was also relied upon. But the provisions of the hire-purchase agreement of 15th January 1934 are sufficient to exclude the provisions of that Act.

Finally the jurisdiction of the Bankruptcy Court was attacked. But the provisions of the *Bankruptcy Act* are wide enough to include this case (*Ex parte Brown* ; *In re Yates* (1) ; *In re Hawke* ; *Ex parte Scott* (2) ; *Re Crook* ; *Ex parte Collins* (3) ; *Baldwin's Law of Bankruptcy*, 10th ed. (1910), pp. 18-20).

The order under appeal finds the value of the goods covered by the documents of January 1934, and seized by the appellant, to be £299 9s. The appellant asserts he only got £275 for them, besides £45 which Green paid him for hire. In the absence of any countervailing evidence, I think it should be assumed that the proceeds of the goods represented their value ; the price or sum obtained is in this case the only reliable evidence of value. The order against the appellant should be reduced to £275, but otherwise the appeal should be dismissed.

Order appealed from varied by substituting the amount of £275 *for the amount of* £299 9*s., and by deleting from the first declaration the words "of itself" ; otherwise appeal dismissed.*

Solicitors for the appellant, *Clayton, Utz & Co.*

Solicitors for the respondent, *Dawson, Waldron, Edwards & Nicholls.*

J. B.

(1) (1879) 11 Ch. D. 148. (2) (1885) 16 Q.B.D. 503.
(3) (1892) 66 L.T. 29.