Foll *Booth v FCT* 76 ALR 375

Appl *Booth v FCT* 19 ATR 514

Appl *Androma Pty Ltd, Re* [1987] 2 QdR 134

Dist *Walker v Corboy* (1990) 19 NSWLR 382

Foll *Puntoriero, Re; Ex parte Nickpack Pty Ltd* (1991) 104 ALR 523

Appl *McIntyre v Gye* (1994) 122 ALR 289

Cons *McIntyre v Gye* (1994) 51 FCR 472

Discd *Sun World Inc v Registrar of Plant Variety Rights* (1995) 33 IPR 106

Appl *Associated Alloys v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

PALETTE SHOES PROPRIETARY LIMITED (IN LIQUIDATION) . . . . . APPELLANT;
DEFENDANT,

AND

KROHN AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 21, 24, 26.

SYDNEY, *Aug.* 3.

Latham C.J., Rich, Dixon and McTiernan JJ.

Bill of Sale—Registration—Power to seize or take possession of property—Document not containing such power—Registration unnecessary—Instruments Act 1928 (*Vict.*) (*No.* 3706), *Part VI., secs.* 27, 28, 30.

Book Debts—Assignment—Registration—Written agreement—Moneys to be paid over from time to time on sale of goods—Agreement not registered as an assignment of book debts—Validity of agreement—" Person "—Company—Acts Interpretation Act 1928 (*Vict.*) (*No.* 3630), *sec.* 16—*Instruments Act* 1928 (*Vict.*) (*No.* 3706), *Part IX., sec.* 81.

The defendant company, which manufactured shoes, entered into an agreement in writing with the plaintiffs (described as the purchasers) whereby the company agreed to sell to the plaintiffs all boots and shoes manufactured by the company. The agreement also provided that the company should, on behalf of the purchasers, obtain orders from, and sell the boots and shoes to, the customers of the purchasers and that the invoice form should show that

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they were selling as agents. Each week the company was to render to the purchasers a statement in writing of the value of the boots and shoes supplied to the customers. The purchasers agreed to pay each week to the company the invoice value of the boots and shoes so delivered less 5½ per cent. The agreement also provided that the company should within forty-eight hours after receipt pay all moneys received by it on account of boots and shoes supplied by it to the credit of the purchasers' bank account. In an action by the purchasers to recover from the company the amounts received by it from the customers and not paid over to the purchasers, the company contended that the agreement was void as an unregistered bill of sale under Part VI. of the *Instruments Act* 1928 (Vict.), or, alternatively, as an unregistered assignment of book debts under Part IX. of that Act.

Held :—

(1) The agreement did not require registration as a bill of sale under Part VI. of the *Instruments Act* 1928, because it did not give the plaintiffs power to seize or take possession of any boots or shoes manufactured by the company.

(2) The agreement did not require registration as an assignment of book debts under Part IX. of the *Instruments Act* 1928 :—

By *Latham* C.J., because the moneys received by the company from the customers were moneys belonging to the plaintiffs, and no question of assignment of any debt arose. But, if, on the other hand, the moneys did not belong to the plaintiffs when the company received them, the fund which they constituted (but not the debts owing by the customers) had been assigned in equity to the plaintiffs for value, and they were entitled to receive the moneys as equitable owners thereof. In neither case was there any assignment of book debts.

By *Rich* J., because until a discount operation took place in respect of particular sales of shoes the agreement had no effect on the title to any debt, present or future. When a discounting took place the proceeds of the debt discounted became in equity the property of the respondents, but, if this was an equitable assignment, it was not effected by the agreement.

By *Dixon* J., because the agreement did not itself amount to an assignment or transfer of book debts, and, although the transactions under the agreement might involve assignments of the book debts to which they related, yet the transactions did not amount to written assignments requiring registration.

By *McTiernan* J., because the agreement did no more than bind the company to apply in a particular way the moneys which it received on account of the boots and shoes sold to the buyers, and was insufficient to create an equitable assignment of the debts to become due from the customers, even assuming them to be the debtors of the company and not of the plaintiffs.

Per Dixon J. : Part IX. of the *Instruments Act* 1928 applies to trading companies incorporated under the *Companies Acts* (Vict.), but it requires registration only of written assignments of book debts.

Decision of the Supreme Court of Victoria (*Lowe* J.) affirmed.

Appeal from the Supreme Court of Victoria.

The plaintiffs, Herman Hedges Krohn and Charles William Nodrum made an agreement with the defendant, Palette Shoes Pty. Ltd., which was a manufacturer of boots and shoes. In the agreement the plaintiffs were described as " the purchasers " and the defendant was described as " the manufacturer." The agreement provided:—" 1. The manufacturer agrees to sell to the purchasers who agree to purchase from time to time all boots and shoes manufactured by the manufacturer. 2. Such boots and shoes shall be manufactured in an efficient manner and of suitable materials. 3. The manufacturer shall on behalf of the purchasers obtain orders from and sell to the customers of the purchasers the said boots and shoes in compliance with the orders received by it and shall invoice the same to the customers on the invoice (in triplicate) in the form attached hereto and signed for identification and shall deliver one copy of such invoice to the purchasers on demand in writing and another to the customer and shall retain and file the remaining copy. 4. The manufacturer shall at least once in each week render to the purchasers a statement in writing of the value of all boots and shoes supplied by it to the customers of the purchasers during the preceding period. 5. The manufacturer shall also at least once in each week render to the purchasers a statement in writing showing the value of all boots and shoes returned by customers and allowance on invoice prices made to customers and shall in each case credit the purchasers therewith on the statements to be rendered in compliance with clause 4 hereof. 6. The purchasers shall at least once in each week or otherwise on demand by the manufacturer pay to the manufacturer the invoice value of all boots and shoes so delivered and supplied to customers as aforesaid during the preceding period less the amount credited in respect of the items mentioned in clause 5 and less a discount of £5 10s. per cent. 7. The manufacturer shall within forty-eight hours after the receipt thereof pay all moneys received by it on account of such boots and shoes supplied by it as aforesaid to the credit of such account and at such bank as the purchasers may from time to time appoint and shall at least once in each month render to the purchasers a statement in writing showing all moneys received by it as aforesaid during the preceding

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period. 8. The manufacturer shall on demand refund to the purchasers :—(a) all losses by way of bad debts ; (b) all moneys paid by the purchasers to the manufacturer for any boots or shoes comprised in any order which have been returned to the manufacturer by any customer and all moneys paid by the purchasers for the carriage of any such returned boots or shoes. 9. The purchasers or their representatives or auditors shall have the right at any time during ordinary business hours to inspect the books of account of the manufacturer with reference to its transactions with the purchasers and its customers. 10. The manufacturer shall not manufacture or sell boots or shoes for or to any person firm or company in Australia other than to the purchasers or as agent for the purchasers save and except samples, rejects, returns, damaged or inferior boots and shoes." Clause 11 provided for the termination of the agreement on breach. " 12. The manufacturer hereby guarantees to the purchasers the due payment to the purchasers of the amounts of all sales of boots and shoes made by it on the purchasers' behalf within six months of the delivery of the goods by the manufacturer to the customer on the purchasers' behalf." Clause 13 provided for the termination of the agreement on one month's notice.

By their statement of claim in an action in the Supreme Court of Victoria the plaintiffs alleged that the defendant had collected sums of money in respect of boots and shoes sold under the agreement, but since the date of the liquidation of the defendant it had failed to pay such moneys to the plaintiffs and had paid them into a trust account in its own name, and the plaintiffs alleged that the defendant held such moneys as trustee for the plaintiffs and claimed an order for the payment of such moneys to them. The defendant pleaded that the agreement was invalid as an unregistered bill of sale and that the plaintiffs did not at any time become entitled at law or in equity to the property in any boots or shoes manufactured by the defendant or to the proceeds of sale thereof ; that the customers became indebted to the defendant as vendor in respect of the price of the boots and shoes as principal ; that the plaintiffs had advanced money to the defendant and the agreement was intended to give the plaintiffs a charge on the boots

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and shoes manufactured by the defendant or to assign to the plaintiffs book debts due or to become due to the defendant from its customers in the course of its business, and that the agreement was void as being an unregistered assignment of book debts under Part IX. of the *Instruments Act* 1928 (Vict.) and as being unregistered under sec. 101 of the *Companies Act* 1928 (Vict.).

Lowe J. said that the defendant's counsel " strenuously contended that under the agreement in question the property in the boots and shoes manufactured by the defendant never at any time passed to the plaintiffs. If, contrary to his submission, such property did pass, then he contended that the agreement was void by reason of the provisions of Part VI. of the *Instruments Act.* In the alternative and on the assumption that the property in the boots and shoes did not pass, he contended that the agreement amounted to an assignment of book debts and that the assignment was void because of non-compliance with Part IX. of the *Instruments Act.* As an alternative to this branch of the argument he argued that a similar result follows by reason of non-compliance with sec. 101 (1) (*c*) of the *Companies Act.*" His Honour held that the arrangement was bona fide made and carried out and that the property in the boots and shoes passed to the plaintiffs before the defendant resold such goods to the customers, and continued :—" I have next to consider whether the agreement so construed is void for non-compliance with Part VI. of the *Instruments Act.* Without examining this question in detail for myself, I think that I should follow the opinions of other judges of this court which negative the contention, for at least two separate reasons. The defendant is an incorporated trading company and in *In re Chaffey Bros. Ltd.* (1) and *Bank of Victoria Ltd.* v. *Langlands Foundry Co. Ltd.* (2) *Madden* C.J. has held that the provisions of the *Instruments Act* now found in Part VI. do not apply to trading companies. These decisions have never been overruled, and in the course of forty years many instruments must have been entered into on the assumption of their correctness. If they are to be departed from, in my opinion that step should be left for a court of appeal and not taken by a primary judge. The second reason arises from the fact that the goods the subject matter

(1) (1896) 21 V.L.R. 727. (2) (1898) 24 V.L.R. 230; 20 A.L.T. 71.

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of the agreement are unascertained (future) goods, and the fact that in *King* v. *Greig*; *Rechner, Claimant* (1) two judges of the Full Court (*Cussen* A.C.J. and *Mann* J.) agreed after an exhaustive discussion of the question that a contract in relation to unascertained goods is not an assurance of personal chattels within the meaning of Part VI. of the *Instruments Act*. I think I should, in this court, without more, follow that opinion." His Honour accordingly gave judgment for the plaintiffs.

From that decision the defendant appealed to the High Court.

Fullagar K.C. and *Coppel*, for the appellant. The instrument is void either as an unregistered bill of sale or as an unregistered assignment of book debts. As soon as the goods are manufactured and appropriated the property passes. The real intention of the agreement is to create a proprietary right in the proceeds of sale and in order to accomplish this the agreement to buy is drawn up which never passes the property at all, and the court should not be astute to find that at some particular time the property in the goods has passed. Here there is no complete contract of sale and no complete sale passing the property unless and until there is an obligation on the buyer to pay the price. Clause 3 of the agreement adds nothing to the case so far as the passing of the property is concerned. The assumption made in that clause that the property passes is wrong. Assuming that the property does pass to the respondents before it passes to the customers, then this document is a bill of sale and being unregistered is inoperative to pass the property. The first question is whether the bills of sale legislation is applicable to documents made by a company; the second, whether it applies to future goods; and the third, whether there is in this case power to seize or take possession. These questions are considered in *Coppel, Bills of Sale* (1935), the first question at pp. 28-31, the second at pp. 34-37, and the third at p. 43. *In re Chaffey Bros. Ltd.* (2), *Bank of Victoria Ltd.* v. *Langlands Foundry Co. Ltd.* (3) and *In re Eggleston* (4) (s.c. *sub nom. In re South Melbourne and Albert Park Coffee Palace Co. Ltd.* (5)) should not be followed. They were

(1) (1931) V.L.R. 413.
(2) (1896) 21 V.L.R. 727.
(3) (1898) 24 V.L.R. 230; 20 A.L.T. 71.
(4) (1902) 28 V.L.R. 111.
(5) (1902) 23 A.L.T. 247.

based on the view that " person " in the *Instruments Act* did not include a company. *In re Standard Manufacturing Co.* (1) dealt with conditional bills of sale. " Person " includes a body corporate (*Leske* v. *S.A. Real Estate Investment Co. Ltd.* (2)) and it should be so construed in the *Instruments Act.* A decision to this effect would not be equivalent to upsetting decisions that have been long acted upon. The above cases all deal with debentures, and any decision by this court that the document should be registered would not overrule any previous decision, though it might be inconsistent with certain dicta. Part VI. of the *Instruments Act* applies to assurances of future goods. In *Lyons* v. *Graham* (3) the Act was held to apply to after-acquired property. The Act was amended in 1896 to alter the law as laid down in *Bruce & Sons* v. *McCluskey* (4). [Counsel referred to *Brantom* v. *Griffits* (5) ; *Malick* v. *Lloyd* (6) ; *Thomas* v. *Kelly* (7).] *Boucher* v. *Shire of Avon* (8) was correct, and the dicta in *King* v. *Greig* (9) cannot be supported on this aspect of the case. [Counsel referred to *Purcell* v. *Deputy Federal Commissioner of Taxation* (10) ; *Ex parte Montagu* ; *In re O'Brien* (11) ; *Ex parte Conning* ; *In re Steele* (12) ; *Goods Act* 1928 (Vict.), sec. 34 ; *Benjamin* on *Sales*, 7th ed. (1931), p. 717 ; *Millar* v. *Rowe* (13) ; *Williams* on *Personal Property*, 18th ed. (1926), p. 16.] Alternatively, this document operates as an assignment of book debts and should have been registered under secs. 80 and 81 of the *Instruments Act* 1928. There is a complete contract of sale between the company and the customer, and the debt is assigned to the respondents.

Hudson, for the respondents. Whether any property in the goods vested in the respondents or not, this company was a trustee

(1) (1891) 1 Ch. 627.
(2) (1930) 45 C.L.R. 22, at p. 25.
(3) (1892) 18 V.L.R. 491 ; 14 A.L.T. 75.
(4) (1895) 21 V.L.R. 262 ; 17 A.L.T. 84.
(5) (1876) 1 C.P.D. 349, at pp. 354, 355.
(6) (1913) 16 C.L.R. 483, at pp. 490, 491.
(7) (1888) 13 App. Cas. 506, at pp. 518, 519.
(8) (1922) V.L.R. 767 ; 44 A.L.T. 66.
(9) (1931) V.L.R., at pp. 445, 446, 454.
(10) (1920) 28 C.L.R. 77, at pp. 84, 86.
(11) (1876) 1 Ch. D. 554.
(12) (1873) L.R. 16 Eq. 414.
(13) (1921) V.L.R. 647 ; 43 A.L.T. 120.

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of the proceeds by virtue of the fact that it made the sale as agent for the plaintiffs, and the price payable for the goods as between the company and the respondents was money which belonged to them (*Henry* v. *Hammond* (1); *Cohen* v. *Cohen* (2); *Harmer* v. *Armstrong* (3)). There never was a debt which belonged to anybody and consequently there was no assignment. *Palmer* v. *Carey* (4) is in contrast with this. Part VI. of the *Instruments Act* is inappropriate to companies, because the Act uses the word "person" and requires the residence, name and addition of the person to be given (*Bank of Victoria Ltd.* v. *Langlands Foundry Co. Ltd.* (5)). *Australian Mutual Provident Society* v. *Geo. Myers & Co. Ltd.* (6) is distinguishable. There is no reason to distinguish between conditional and absolute bills of sale. The cases have long decided in Victoria that Part VI. of the *Instruments Act* does not apply to companies, and, even if this court regarded the cases as not satisfactory, it should not now overrule them, as they have been acted on in the meantime (*Bourne* v. *Keane* (7)). No right was given to the grantee to seize or take possession of the goods comprised in the document. On the true reading of the agreement all the goods which became subject to it were intended to be sold to customers. The company was to have the right to deliver to customers goods in fulfilment of orders it had obtained so that it might obtain the price to pay the respondents. The expressions used in the document show that the company should as a matter of obligation and could as a matter of right deliver these goods to customers. Moreover, if the property does not pass to the plaintiffs until the goods are delivered, then the plaintiffs cannot seize them (*In re Lovegrove* (8)). The agreement was not an assurance of personal chattels, or, if it was, it was within the *Companies Act* and was not within the *Instruments Act*, and it did not constitute an assignment of book debts.

Coppel, in reply. There can be no proprietary right in the proceeds of sale unless there is a proprietary right in the goods

(1) (1913) 2 K.B. 515, at pp. 520, 521.
(2) (1929) 42 C.L.R. 91, at p. 99.
(3) (1934) Ch. 65, at p. 79.
(4) (1926) A.C. 703.
(5) (1898) 24 V.L.R. 230; 20 A.L.T. 71.
(6) (1931) 47 C.L.R. 65, at p. 77.
(7) (1919) A.C. 815, at pp. 858, 921.
(8) (1935) Ch. 464, at pp. 472, 482, 485.

themselves, or unless there is a declaration of trust of the proceeds or an assignment of the proceeds. A declaration of trust is an equitable assignment and as such is within the *Instruments Act* (*Savage* v. *Thompson* (1)). The agreement must be construed as a whole, but the court can look beyond the agreement. The whole course of dealing between the plaintiffs, and the defendant may be considered and is consistent with the agreement (*Price* v. *Parsons* (2)). According to the agreement the company sells its goods to retailers, and the respondents advanced to the company the retail price charged to the purchasers less 5½ per cent for cash. The plaintiffs did no more than pay money and receive it back with what may be called interest. This does not constitute an agency. If it appears on the face of the agreement that there is any agency, it must be a *del credere* agency in which the company guarantees the solvency of its purchasers and for which the company receives nothing. The company, consequently, retains the risk of the bad debts in its own business. Consequently, if this is not a bill of sale it is an assignment of book debts.

Cur. adv. vult.

The following written judgments were delivered :— Aug. 3.

LATHAM C.J. This is an appeal from a judgment of *Lowe* J. declaring that certain moneys collected or received by the appellant-defendant company, now in liquidation, which have been collected or received by it since the liquidation as the proceeds of the sale of boots and shoes manufactured by the company, including a sum standing to the credit of the defendant in a trust account established by the liquidators in respect of such proceeds, are held by the defendant as trustee for the plaintiffs.

The plaintiffs made an agreement with the defendant company which, as the learned judge found, represented the real agreement between them, and according to which the parties have in fact regulated their conduct. The defendant company manufactured boots and shoes. An agreement was made between the defendant company and the plaintiffs whereby (clause 1) the company agreed to

(1) (1903) 29 V.L.R. 436 ; 25 A.L.T. 165. (2) (1936) 54 C.L.R. 332, at p. 349.

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sell to the plaintiffs, who agreed to purchase, from time to time, all boots and shoes manufactured by the company. The company was described as the manufacturer and the plaintiffs were described as the purchasers. The agreement provided (clause 3) that the manufacturer should on behalf of the purchasers obtain orders from and sell to the customers of the purchasers the said boots and shoes and that it should invoice the boots and shoes on a form which showed that the manufacturers were selling "as agents." Each week (clause 4) the manufacturer was to render to the purchasers a statement in writing of the value of boots and shoes supplied to the customers and (clause 5) allowances were to be made for boots and shoes returned by customers. The purchasers agreed (clause 6) to pay each week to the manufacturer the invoice value of the boots and shoes so delivered less any amounts credited in respect of returns and less $5\frac{1}{2}$ per cent. Clause 7 of the agreement was in the following terms : "The manufacturer shall within forty-eight hours after the receipt thereof pay all moneys received by it on account of such boots and shoes supplied by it as aforesaid to the credit of such account and at such bank as the purchasers may from time to time appoint and shall at least once in each month render to the purchasers a statement in writing showing all moneys received by it as aforesaid during the preceding period." The manufacturer also guaranteed the payment of customers' accounts.

The substance of this arrangement, which, as I have already said, was an arrangement found to have been bona fide made and carried out, was that the purchasers paid to the manufacturer promptly the amounts which the customers owed for boots and shoes less $5\frac{1}{2}$ per cent, and then, when the customers paid the manufacturer, the purchasers were to receive all the moneys paid by the customers to the manufacturer.

It is contended on behalf of the appellant that the agreement is invalid on two grounds : first, that it ought to have been registered as a bill of sale under Part VI. of the *Instruments Act* 1928, and, secondly, that it should have been registered as an assignment of book debts under Part IX. of that Act.

In my opinion it is not necessary in order to determine this appeal to decide some difficult questions which have been argued before this court—such questions, for example, as to whether the agreement constituted an assurance of personal chattels within the meaning of that phrase in Part VI. of the *Instruments Act* 1928, or whether Parts VI. and IX. of the Act apply to bills of sale and assignments of book debts respectively made by corporations, or whether Part VI. applies to assurances of future property.

The provisions of the *Instruments Act* which require the registration of a bill of sale in order to save it from invalidity are to be found in secs. 28 and 30. These sections relate to bills of sale "whereby the grantee or holder has power either with or without notice and either immediately after the making of such bill of sale or at any future time to seize or take possession of any property and effects comprised in or made subject to such bill of sale." These words are quoted from sec. 28. Similar words appear in sec. 30, though they are not verbally identical. In sec. 30 the words "or giving" are inserted after the words "the making," but the addition of these words does not appear to me to make any difference in the meaning of the two sections. Even if a document is a bill of sale so as to fall within the definition of bill of sale contained in sec. 27 of the Act, registration is not required under the Act unless the document gives to the grantee a power to seize the property and effects comprised in the bill of sale. It is clear, in my opinion, that the document constituting the agreement between the parties in this case does not confer upon the plaintiffs a power, either immediately after the making of the bill of sale, or at any future time, to seize or take possession of any of the boots and shoes manufactured by the defendant company. The express provisions of the agreement negative the existence of any such power. The agreement explicitly provides that the boots and shoes manufactured by the company shall be sold on behalf of the plaintiffs to customers. A seizure of the boots and shoes by the plaintiffs would make the performance of such contracts of sale impossible and would be a breach of the agreement. The boots and shoes are to be paid for by the plaintiffs only after they have been actually delivered and supplied to customers. I am unable to think of any state of facts which would, consistently with the terms of the agreement, entitle the plaintiffs at any time to seize any boots and shoes manufactured by the

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defendant company. For this reason I am of opinion that the document is not a bill of sale which requires registration under the *Instruments Act* in order to be valid and that therefore the first objection of the defendant cannot be sustained.

The second objection raised by the defendant is that the document is an assignment of book debts within sec. 80, and, not being registered under sec. 81, is a document which has no effect in law or in equity. The transactions of sale between the company and the customers were transactions into which the company expressly entered "as agents." There is no evidence that it was ever disclosed to the customers that the plaintiffs were the principals of the company. If, however, it ought to be held that as between the company and the plaintiffs the contracts between the company and the customers should be regarded as made on behalf of the plaintiffs, then the moneys owed by the customers in respect of the boots and shoes should be regarded as moneys owed directly to the plaintiffs. Upon this view of the nature of the transactions the customers have never owed any moneys to the company and therefore it cannot be said that there was an assignment by the company of book debts owed to it. The position then would be that the company has simply collected moneys belonging to the plaintiffs in which the company has no interest of any kind. Such moneys would clearly be held by the company in trust for the plaintiffs and could not be dealt with by the liquidator as assets of the company. Upon this view of the case the order of *Lowe* J. was rightly made.

On the other hand it has been contended that, although the words "as agents" appeared on the invoice sent to the customers before or upon delivery of boots and shoes to them by the company, there was never any real and operative agency as between the company and the plaintiffs so far as the making of the contracts of sale of boots and shoes with customers was concerned. As I have already said, there is no evidence that the identity of the supposed principals (the plaintiffs) was ever disclosed to the customers. Accordingly it is urged that, whatever may have been the position if such disclosure had taken place, and whatever may have been the rights of the plaintiffs to intervene as principals and to take the benefit and assume the liability of the contracts, in fact the contracts of sale to customers, as they were actually made and carried out, were contracts to which the only parties were the company on the one hand and the customers on the other hand. Upon this view of the facts (which, as to the parties who made these contracts, is the only alternative view to that which I have already discussed) the moneys due for boots and shoes were due to the company, not to the plaintiffs, and it is argued for the defendant that the agreement constitutes an assignment to the plaintiffs of these debts, which were plainly book debts of the company within the meaning of the definition of book debts in sec. 80 of the *Instruments Act* 1928.

In order to ascertain whether this contention is sound or not, it is necessary to look to the actual terms of the agreement between the parties. The important provision is to be found in clause 7 of the agreement, which I have already quoted in full. It will be seen that the obligation undertaken by the company is to pay to the plaintiffs within forty-eight hours after receipt thereof " all moneys received by it on account of such boots and shoes supplied by it as aforesaid " (i.e., supplied to customers).

In my opinion this clause does not constitute an assignment of any debt. There can be an assignment of a debt only when there is intended to be an assignment of the right of the creditor against the debtor. If it is clear, upon the terms of an agreement, that the obligation created by the agreement is an obligation which comes into operation only after a debtor has paid his creditor, then the creditor in undertaking that obligation does not assign or agree to assign the debt. In this case the agreement does not purport to assign any rights of the company against the customers. The agreement does not deal with the debts owed to the company at all. It deals only with moneys which are actually received by the company from the customers. The plaintiffs could not, consistently with the terms of the agreement, prevent the customers from paying their debts direct to the company. In no circumstances would this agreement entitle the plaintiffs to sue the customers upon the footing that the debts due by the customers to the company had been assigned to them (the plaintiffs). Thus, in my opinion, the agreement does not amount to an assignment of book debts and is not invalid by reason of non-registration of such assignment.

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This view of the facts, however, makes it necessary to consider whether the liability of the company to the plaintiffs is merely a contractual liability creating a debt for which the plaintiffs have a right to prove in the liquidation, or whether, on the other hand, it constitutes the company a trustee of the moneys received by the company from the customers so that the plaintiffs became entitled to claim such moneys as against the liquidator, not being bound to prove for a mere debt in competition with other creditors. In my opinion, although the matter is not free from difficulty, I think the latter is the true view.

The moneys in question represent the proceeds of boots and shoes which, under clause 1 of the agreement, were sold to the plaintiffs, and then, under clause 3, sold on behalf of the plaintiffs by the company, under the authority conferred upon the company by the agreement, to the customers. Under clause 6 the plaintiffs were bound to pay for the boots and shoes when they were delivered and supplied to the customers. The mechanism of delivery and supply was left by the agreement in the hands of the company so that the company must, I think, be taken to have appropriated goods to the agreement (the contract of sale with the plaintiffs constituted by clause 1) when the company selected goods for such delivery and supply. At that time the property in the goods passed to the plaintiffs. When the goods were actually delivered to the customers the property would, in the normal case, pass to the customers under sec. 23, rule 5, of the *Goods Act* 1928. When the company received payment from the customers, such payment would be received as the proceeds of the plaintiffs' goods. Under clause 7 of the agreement the company was bound to pay all such moneys to the plaintiffs within forty-eight hours of the receipt thereof. The whole proceeds were to be paid to the plaintiffs. There was not to be any subsequent adjustment as in *Palmer* v. *Carey* (1). It is evident that the moneys were to be kept separate from the moneys of the company, and in fact they have been kept separate and can immediately be identified. There is authority to support the proposition that, in such circumstances, the beneficial interest in the moneys, when received by the

(1) (1926) A.C. 703.

company, belonged to the plaintiffs and never to the company and that the company held the moneys in trust for the plaintiffs.

In *Burdett* v. *Willett* (1) A employed B as his factor to sell cloth. B sold the cloth on credit and, before the money was paid, died, being indebted by specialty to an amount more than his assets would pay. Thus, if A had been held to be merely a simple contract creditor of B, he would have got nothing. But it was held that the money should be paid to A (less an allowance for commission) and not to the administrator of B as part of his assets, and it was said that the factor was " in nature of a trustee only ; and although he has the right at law, yet he is in equity but a trustee." In *Burdick* v. *Garrick* (2) the question was whether a defendant could rely upon the Statute of Limitations or whether he was a trustee who could not successfully plead the statute : *Giffard* L.J. said :—" I do not hesitate to say that where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it " (3). This statement was approved by Lord *Macnaghten* in *Lyell* v. *Kennedy* ; *Kennedy* v. *Lyell* (4). In *In re Hallett's Estate* ; *Knatchbull* v. *Hallett* (5) *Jessel* M.R. examines and explains the rule that where an agent has disposed of goods for his principal upon terms, as between himself and the principal, of paying the proceeds over to him, the moneys belong to the principal, and, so long as they can be identified, should be paid to the principal, who is entitled to them as against the assignee in bankruptcy of the agent. See also *Henry* v. *Hammond* (6).

Upon the view of the facts which I take, no question of assignment of a chose in action or of a fund arises. The moneys which the company received from the customers are the plaintiffs' moneys, representing the proceeds of the plaintiffs' goods which the company was authorized to sell. There was no assignment of those moneys to the plaintiffs by the company. They became the moneys of the plaintiffs as soon as the customers paid them to the company.

(1) (1708) 2 Vern. 638; 23 E.R. 1017.
(2) (1870) 5 Ch. App. 233.
(3) (1870) 5 Ch. App., at p. 243.
(4) (1889) 14 App. Cas. 437, at p. 463.
(5) (1879) 13 Ch. D. 696, at pp. 713 et seq.
(6) (1913) 2 K.B. 515.

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If, however, this view be wrong, and the property in the goods never passed to the plaintiffs, then the matter must be dealt with on the basis that the company agreed, for value, to pay to the plaintiffs the moneys to be received from the customers, but that such moneys did not represent the proceeds of the sale of goods which belonged to the plaintiffs and which were entrusted to the company for sale. The question which then arises is whether there was a good assignment of these moneys by the company to the plaintiffs or whether the company was merely a debtor to the plaintiffs in an amount equal to the amount of such moneys.

The first matter to be observed is that the agreement does not contemplate the company incurring a debt to the plaintiffs which is to be satisfied by the payment to the plaintiffs of the proceeds of sales. The only obligation of the company to pay money to the plaintiffs is the obligation to pay over such proceeds. The payment of the proceeds cannot be regarded as accomplishing the discharge of a debt existing independently of the obligation to pay over the proceeds. Thus the agreement cannot be regarded as an agreement to pay a debt out of a future fund. It was an agreement to transfer a future fund within forty-eight hours after receipt. This agreement was made for consideration. If, contrary to what I have said, the moneys did become the property of the company upon receipt from the customers, the agreement, being made for consideration, constituted a good equitable assignment of the fund. No particular form is required to constitute an assignment of future personal property. A promise for consideration to assign future property, such property being capable of ascertainment or identification, operates to bind the conscience of the assignor and to bind the property itself from the moment when the contract becomes capable of being performed. The principle that is applied is not a principle depending upon the possibility of a court of equity decreeing specific performance, as had been stated by Lord *Westbury* L.C. in *Holroyd* v. *Marshall* (1). The relevant principle is that equity considers as done that which ought to be done. See *Tailby* v. *Official Receiver* (2), per Lord *Macnaghten*, and the discussion of the question in *In re Lind*; *Industrials Finance Syndicate Ltd.* v. *Lind* (3), especially

(1) (1862) 10 H.L.C. 191; 11 E.R. 999.

(2) (1888) 13 App. Cas. 523.

(3) (1915) 2 Ch. 345.

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by *Swinfen Eady* L.J. (1): "The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for" (2). There is no reason why this principle should not be applied to money where it is clear that the money is to be kept separate by the assignee from his own moneys and where it can be identified.

Thus if, as I think, the moneys received by the company from the customers were moneys belonging to the plaintiffs, no question of assignment of any debt arises and the plaintiffs are clearly entitled to the moneys. If, on the other hand, the moneys did not belong to the plaintiffs when the company received them, the fund which they constituted (but not the debts owing by the customers) had been assigned in equity to the plaintiffs for value, and they are entitled to receive the moneys as equitable owners thereof. In neither case is there any assignment of a book debt and Part IX. of the *Instruments Act* is not applicable.

In my opinion the appeal should be dismissed.

RICH J. I have had an opportunity of reading the reasons for judgment of the other members of the court and, in view of the full treatment the case receives therein, I think it is unnecessary to do more than briefly indicate the grounds in which I think the appeal fails.

First, I think the document did not require registration as a bill of sale because it is an executory agreement, operating to assign nothing in law or in equity until an actual discount took place in respect of particular sales of shoes, and giving in no event a power to seize or take possession of any property or effects comprised therein or the subject thereof.

In the next place, I think that for a like reason registration of the document as an assignment of future book debts was unnecessary. At its inception the agreement assigned nothing. It was wholly executory, a mere contract *in fieri*. Until a discount operation took place it had no effect on the title to any debt present or future. When a discounting took place, the proceeds of the debt discounted

(1) (1915) 2 Ch., at pp. 358-360.

(2) (1915) 2 Ch., at p. 360.

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became in equity the property of the respondents, that is, in anticipation of payment by the customers, became the respondents' future property. I am not prepared to say this does not involve an equitable assignment of the debts before payment, but the equitable assignment is not effected by the instrument. It all arises from operations under the instrument.

The reasons which support these grounds are sufficiently discussed by the other members of the court.

Dixon J. The contest upon this appeal is between the general creditors in the liquidation of a shoe-manufacturing company and the parties to a special transaction with the company who have successfully asserted a claim to the book debts owing at the date of liquidation by customers buying shoes of the company's manufacture.

The general creditors are represented by the liquidator of the company, which appeals from a judgment of *Lowe* J. establishing the claim. The shoes manufactured were almost invariably sold on credit and, on the part of the company, the evident purpose of the transaction was to obtain regular cash payments in respect of the sales made.

The respondents, who are the other parties to the transaction, paid to the company once or twice in each week the amount of the sales effected, less $5\frac{1}{2}$ per cent. The course of business was for the company to present a list of the sales made and a debit note for the total amount after deducting the $5\frac{1}{2}$ per cent and sales tax, a charge which was assessed upon and paid by the respondents. Their cheque for the amount of the debit note was immediately paid to the company.

On its side, the company collected the accounts and paid the proceeds to the credit of the respondents at their bank and forwarded to them the pay-in slip and a regular statement showing the state of the account. The company had carried on its business in this way for many years before the winding up, which commenced on 19th May 1936. At that date, a sum of about £14,200 appears to have been outstanding as uncollected book debts.

The question for our decision is whether these book debts form part of the general assets of the company or belong to the respondents.

The answer to the question depends upon the legal effect produced by a carefully drawn agreement under which the parties pursued the course of business I have briefly described.

The agreement is framed upon a plan which attempts to give to the respondents the character of purchasers of the entire output of the factory, other than samples and defective shoes, and to place the company, when it sells its products and receives the proceeds, in the position of an agent acting for and on behalf of the respondents as unnamed principals. The agreement expressly requires the respondents at least once in each week on demand to pay to the company the invoice value, less the discount of $5\frac{1}{2}$ per cent, of the shoes delivered and supplied to customers, and, although the agreement does not say so in so many words, that is the price at which the manufactured shoes are, according to the agreement, bought by the respondents. The payments by the respondents do not take the form of loans to the company and there is no ground for treating the form in this respect as a disguise and the transaction as an attempt to secure a loan. Under the agreement the respondents assert what may be regarded as a double title to the book debts. They rely upon the title which would arise from their position as the real, although unnamed, creditors of the customers buying the shoes, and also upon the title which would arise from the ownership by them of the goods sold to the purchasers.

As will appear later, I think they have a title to the book debts, but a title I should state in a somewhat different way. In particular I think that the respondents' reliance on the latter ground is misconceived; but it inevitably evoked the objection that the claim that property in the shoes, legal or equitable, vested in them before passing to the customer gives the agreement the complexion of an absolute bill of sale, and, therefore, invalidates it for want of registration.

To this objection the respondents make a number of answers. They rely upon the decisions of *Madden* C.J. that the bills of sale legislation does not apply to incorporated trading companies (*In re Chaffey Bros. Ltd.* (1); *Bank of Victoria Ltd.* v. *Langlands Foundry Co. Ltd.* (2), confirmed, as they are, by the observations made by

(1) (1896) 21 V.L.R. 727.
(2) (1898) 24 V.L.R., at pp. 240-248; 20 A.L.T. 71, at pp. 74-78.

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a'Beckett J. in *In re Eggleston* (1) (s.c. *sub nom. In re South Melbourne and Albert Park Coffee Palace Co. Ltd.* (2))). They say that lapse of time has so strengthened these decisions that their correctness ought not to be examined. But, even if the bills of sale provisions of the *Instruments Act* 1928 (Vict.) (Part VI.) do apply to absolute bills of sale granted by incorporated companies, as distinguished from mortgages or charges which under sec. 101 (10) of the *Companies Act* 1928 (Vict.) need be registered only under that section, then the respondents maintain that the agreement when executed did not amount, at law or in equity, to an assurance of personal chattels, because it was no more than an agreement to sell and buy future goods to be manufactured from time to time (Cf. *King* v. *Greig* (3)). In any case, they contend that under the agreement the respondents obtained no power, at any time or in any contingency, to seize or take possession of the shoes when manufactured. Registration of a bill of sale is not required unless it is one " whereby the grantee or holder has power, either with or without notice and either immediately after the making or giving of such bill of sale or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale " (sec. 30 (1)). It is said that the agreement does not fulfil this condition. I am clearly of opinion that this contention is correct, and, holding that opinion, I do not propose to decide upon the validity of either of the two other grounds which are said to exclude the application to the agreement of Part VI. of the *Instruments Act* 1928.

It must be very rare for an instrument which amounts at law to an assurance of personal chattels to leave the grantee of the property without the right to seize or take possession of the chattels, that is, unless the chattels are delivered to him, or an obligation to deliver them to him is undertaken. Perhaps it is less rare if it is an equitable assignment of after-acquired property by the grantor or seller. But the agreement in the present case is of a very special character, and, even if it be assumed that it can be brought within the description of an assurance of chattels personal, it possesses one feature

(1) (1902) 28 V.L.R., at p. 114. (2) (1902) 23 A.L.T., at p. 248.
(3) (1931) V.L.R. 413.

which, in my opinion, prevents the respondents from obtaining under it a right to seize or take possession. That feature is that it imposes upon the respondents an obligation to pay only for those shoes which are, in the language of one clause, " supplied by the manufacturer, the company, to the customers," or, in the language of another clause, " delivered and supplied to the customers." The agreement appears to me to imply that the customers shall always, and the respondents never, become entitled to possession of the shoes manufactured which the respondents agree to " purchase." It is not, of course, impossible that, notwithstanding the absence of any obligation to pay for shoes until they are sold to customers, the agreement should nevertheless enable the respondents to seize shoes before the property in them passed to the customers. But it is a strong indication to the contrary and the plan of the agreement is against conceding to the respondents the right to intervene and take shoes out of the possession of the company, still more against conceding the right to do so without paying for them. It is, no doubt, a question involving many of the considerations that affect the determination of the time, if any, at which property in shoes manufactured would pass to the respondents. But it is necessary to discuss the general interpretation of the agreement in dealing with the next and, as I think, most important question in the case. There is, therefore, nothing to be gained from a separate examination of the instrument for the purpose of supporting the reasons I have given for the conclusion that the agreement need not be registered as a bill of sale. What appears to me to be the decisive question in the case is whether the agreement amounts to or contains a transfer or assignment of future book debts, void for want of registration under Part IX. of the *Instruments Act* 1928 (Vict.).

The provisions of that Part are an extension of the policy which is seen in the Victorian legislation with respect to bills of sale of chattels personal. It applies to assignments of trade debts the policy of giving creditors an opportunity of exacting payment before the debtor can validly make over to others assets upon which his credit may be supposed to depend, and also the policy of requiring public registration of such an alienation. Whether the assignment or

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transfer is absolute or by way of security, it is invalid unless registered. It cannot be registered unless fourteen days' notice has been lodged with the Registrar-General, and any creditor may caveat against registration of the assignment or transfer as prejudicial to his interests. The expression "assignment or transfer" is used to describe the transaction struck at. In the forms of notice and of caveat prescribed by the statute these words are treated as descriptions appropriate to different transactions and not as synonymous, but the nature of the distinction is not stated. Apparently the purpose was to cover every alienation *inter vivos* of trade debts which is not involuntary, at any rate if made in writing. The choses in action included in the enactment are called "book debts," and the expression is very widely defined. It must be a debt and must be one which is due or is to become due on account of or in connection with a profession, trade or business carried on by the creditor. But it may be due at any future time, and future debts are included although not incurred or owing at the time of the assignment or transfer. A doubt exists whether the provisions apply to assignments or transfers by incorporated companies, but, subject to this doubt, it seems clear that the agreement in the present case would require registration if, regarded as at the time of its execution, it amounted to an assignment or transfer of the future indebtedness of customers who might buy shoes from the company. It is better to dispose of the doubt before dealing with the difficult question whether the agreement so operates as to fall within the description "assignment or transfer."

In the text of the sections contained in Part IX. I can find nothing inconsistent with the application of the provision to corporations, and no indication of an intention that they should not apply, except, perhaps, that sec. 90 speaks of the name, addition and description of the person making the transfer. The form of notice of intention to register prescribed by the Tenth Schedule may be said to show at least that natural persons rather than corporations were before the attention of the legislature. The form of notice of intention to register is expressed in the first person singular and marks a place for "Signature of assignor or transferor." The form of register given in the Twelfth Schedule repeats the requirement of sec. 90

that the "addition" as well as the name and description of the transferor or assignor shall be recorded. I do not think that these matters amount to an inconsistency or repugnancy within sec. 16 of the *Acts Interpretation Act* 1928, which directs that the expression "person" shall include a corporation unless there is something repugnant to or inconsistent with that interpretation. The argument for excluding incorporated companies from the necessity imposed by Part IX. of the *Instruments Act* 1928 of registering assignments of their book debts depends less upon the interpretation of the text of the enactment than upon the history of the treatment of the question whether the bills of sale legislation applies to corporations. Some statement of that history is necessary.

In *In re Standard Manufacturing Co.* (1) the Court of Appeal held that the English *Bills of Sale Act* 1878 did not apply to bills of sale given by trading companies. The grounds given for the decision were that the purpose of the legislation was to prevent frauds upon creditors by secret bills of sale over assets which gave a false appearance of credit, that under the *Companies Clauses Act* 1845 and the *Companies Act* 1862 provision had been made for the registration of mortgages and charges created by incorporated companies, and that in some sections of the *Bills of Sale Act* language was used which showed that such companies were not present to the mind of the draftsman. When the first Victorian statute (No. 141) requiring registration of bills of sale was passed in 1862, there was no law for the registration of mortgages and charges given by companies. The *Companies Act* (No. 190) was passed in 1864. In 1876 *Service's Act* (No. 557) was passed dealing with bills of sale given by way of security. Its purpose was not the same as that ascribed to the earlier legislation. Its effect and apparent policy were to prevent a person indebted from mortgaging his chattels personal if any creditor objected. It empowered a creditor to lodge a caveat which, unless removed, prevented the filing of the bill of sale, although filing was made a condition precedent to its validity. If the caveator was not in truth a creditor, the caveat might be removed, but if he was a creditor, the Act apparently intended to enable him to prevent his debtor giving a valid mortgage without

(1) (1891) 1 Ch. 627.

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his consent. This was something quite distinct from the previous legislation, which dealt only with apparent ownership and registration of the bill of sale for the purpose of making it efficacious in spite of the appearance of ownership. No change in apparent ownership would answer the objection that by Act No. 557 a debtor could not make a valid mortgage of chattels if by caveat a creditor forbad his doing so (per *a'Beckett* J. in *McCarthy* v. *Nicholls* ; *Stutt* (*Claimant*) (1)). Although in the consolidated *Instruments Act* 1890 the provisions originating in Act No. 141 and in Act No. 557 were not kept separate, it was decided that the distinction between them remained, and those coming from No. 557 operated only upon bills of sale by way of security (*Askew* v. *Danby* (2)). The view that corporations were not affected was first expressed by *Madden* C.J. in 1896 (*In re Chaffey Bros. Ltd.* (3)). The instrument before him had been given by way of security so that the decision, which applied *In re Standard Manufacturing Co.* (4), extended it to the somewhat different provisions coming from Act No. 557, which, no doubt, inspired the *Book Debts Act* 1896, the original of Part IX. of the *Instruments Act* 1928. In the *Companies Act* 1896 (No. 1482), passed in the same year as the decision, provisions were introduced governing securities given by companies over their assets. They were modelled on those of Act No. 557. In 1898, in *Bank of Victoria Ltd.* v. *Langlands Foundry Co. Ltd.* (5), *Madden* C.J., as a member of the Full Court, based his own decision upon the same view, the reasons for which he elaborated. He placed no express reliance upon the enactment in the *Companies Act* 1896 of provisions similar to those of Act No. 557, although during the argument counsel had done so. But, in 1902, *a'Beckett* J. in *In re Eggleston* (6) (s.c. *sub nom. In re South Melbourne and Albert Park Coffee Palace Co. Ltd.* (7)) said that he thought that when the *Companies Act* 1896 stated that " a document which, if executed by an individual, would require registration as a bill of sale " should in the case of a company be registered as that Act prescribed, it amounted to an

(1) (1887) 8 A.L.T. 180, at p. 181.
(2) (1892) 18 V.L.R. 335 ; 13 A.L.T. 255.
(3) (1896) 21 V.L.R. 727.
(4) (1891) 1 Ch. 627.
(5) (1898) 24 V.L.R. 230 ; 20 A.L.T. 71.
(6) (1902) 28 V.L.R., at p. 114.
(7) (1902) 23 A.L.T., at p. 248.

affirmation that a corporation is not subject to the requirements of the bills of sale provisions of the *Instruments Act*. In the following year the *Companies Act* 1903 (No. 1886) introduced an amendment into the provisions of the Act of 1896 providing that no mortgage governed by the Act of 1896 should require registering under the provisions of the *Instruments Act* 1890 or the *Book Debts Act* 1896, anything contained in such Act to the contrary notwithstanding. The making of the amendment betokens no confidence in the view that, in any case, corporations fell outside the bills of sale legislation, and is moreover remarkable for its express limitation to mortgages as distinguished from absolute assurances and assignments. In the revision of the companies legislation of 1910 (Act No. 2293) the provisions adapted from Act No. 557 were dropped and instead those now standing in sec. 101 of the *Companies Act* 1928 were taken from the English Act of 1908. Sub-sec. 10 of sec. 101 is as follows : " No mortgage or charge requiring registration under this section shall require to be filed or registered under the provisions of the *Instruments Act* 1928 anything contained in such Act to the contrary notwithstanding."

Absolute assignments or transfers of book debts are obviously not mortgages or charges and, therefore, are not within the exclusion made by this sub-section and they are not registrable under the *Companies Act* at all. The registration provisions of that Act are framed upon the analogy which the book-debts legislation embodied in Part IX. of the *Instruments Act* 1928 follows. Few or none of the considerations relied upon in *In re Standard Manufacturing Co.* (1) are present in that legislation. I think, therefore, that there is no sufficient justification for interpreting Part IX. as having no application to corporations or to trading companies incorporated under the *Companies Act* 1928.

Thus, to be valid, the claim of the respondents to the debts outstanding at the commencement of the winding up must rest upon a title which does not amount to an assignment or transfer of future book debts of the company not incurred at the time of such assignment or transfer within the meaning of secs. 80 and 81 of the *Instruments Act* 1928.

(1) (1891) 1 Ch. 627.

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An assignment of future debts obtains its efficacy from the doctrines of equity. In *Tailby* v. *Official Receiver* (1) Lord *Macnaghten* stated the principles, which he described as well known. "It has long been settled," he said, "that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding on the subject matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified." He expounds, explains and exemplifies this statement in a way that has made his speech the chief source of guidance upon the subject. In a later passage he says : "Long before *Holroyd* v. *Marshall* (2) was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord *Thurlow* said he took to be universal, 'that whenever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him, voluntary or with notice, raises a trust': *Legard* v. *Hodges* (3)" (4). Again :—"The truth is that cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done if that principle is applicable under the circumstances of the case" (5).

For the purpose of deciding in the present case whether the respondents' title to the book debts depends upon what amounts to

(1) (1888) 13 App. Cas., at pp. 543, 546.
(2) (1862) 10 H.L.C. 191 ; 11 E.R. 999.
(3) (1792) 1 Ves. Jun. 478 ; 30 E.R. 447.
(4) (1888) 13 App. Cas., at p. 546.
(5) (1888) 13 App. Cas., at pp. 547, 548

an assignment, it is important to notice the essential elements upon which Lord *Macnaghten* dwells. As the subject to be made over does not exist, the matter primarily rests in contract. Because value has been given on the one side, the conscience of the other party is bound when the subject comes into existence, that is, when, as is generally the case, the legal property vests in him. Because his conscience is bound in respect of a subject of property, equity fastens upon the property itself and makes him a trustee of the legal rights or ownership for the assignee. But, although the matter rests primarily in contract, the prospective right in property which the assignee obtains " is a higher right than the right to have specific performance of a contract," and it may survive the assignor's bankruptcy because it attaches without more *eo instanti* when the property arises and gives the assignee an equitable interest therein (*In re Lind*; *Industrials Finance Syndicate Ltd.* v. *Lind* (1)). In that case *Swinfen Eady* L.J. describes the effect of the decisions thus:—" It is clear from these authorities that an assignment for value of future property actually binds the property itself directly it is acquired—automatically on the happening of the event, and without any further act on the part of the assignor—and does not merely rest in, and amount to, a right in contract, giving rise to an action. The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for " (2).

It is apparent that the agreement between the respondents and the company is framed to take advantage of the doctrines of agency, and it is not improbable that this has been done in the hope of securing a right to the book debts without taking an assignment which would be registrable. By contracting also to purchase the company's output, the respondents strengthened their position as principals authorizing a resale of the company's manufactures and, at the same time, laid the foundation for an independent claim to the book debts, as the proceeds of their property. But, after all, the essence of the transaction consisted in the discounting of book debts and, except at the expense of great interference with the course of

(1) (1915) 2 Ch., at pp. 364, 365, 366. (2) (1915) 2 Ch., at p. 360.

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the company's business, the agreement could do no more than provide a legal complexion for the acquisition of the customers' debts at a discount.

Care should be taken by a court to avoid the error against which *Cussen* J. gave a warning in *King* v. *Greig* (1) and to guard against being "led to hold a document, or the assurance contained in it, invalid mainly by reason of the court's thinking that by a clever 'device' (as it is called, to give it a bad name), a party would get outside the Act unless the court by a liberal construction of the Act or the exercise of the court's ingenuity manages to prevent him." In the present case the provisions of the agreement have been pursued with exactness and there is no ground either for treating it as colourable only or for giving it any effect other than that which is the legal consequence of the conditions it contains. But it remains necessary to examine the true nature of the consequences it produces and to determine whether its legal operation, when properly understood, is of that description which falls under the necessity of registration as an assignment or transfer of book debts. When the agreement is considered for this purpose, the feature which is most striking is the evident intention that the company, in selling the shoes it manufactures, should not act as the avowed agent of a named principal. It is true that there is an express provision that the company, called in the agreement the manufacturer, shall on behalf of the respondents, called the purchasers, obtain orders from and sell to the customers, who are always described as the customers of the respondents. There is, too, an express undertaking by the company not to sell shoes otherwise than to or as agent for the respondents ; and in the provision by which the company guarantees, as it does, payment by the customers of their accounts within six months of delivery to them of the goods bought by them, the sales are described as sales on the respondents' behalf and what is guaranteed is due payment to the respondents ; though this may mean no more than payment by the company. But the agreement prescribes a form of invoice for use by the company in dealing with the customers and the form contains in small letters under the name of the company the words "as agents", but no reference to the

(1) (1931) V.L.R., at p. 442.

respondents. The basis of the provisions regulating the monetary dealings of the parties is that the company should receive payment from the respondents of the discounted amount of its sales and then should collect the accounts of the customers who buy and should pay the proceeds into the respondents' bank. In practice the company alone dealt with the customers and there can be no doubt that, in accordance with the parties' understanding of the agreement, it incurred as seller a direct responsibility to the customers, who on their part as buyers became liable to the company for the price. This differentiates the case entirely from *In re Lovegrove* (1). An undisclosed or unnamed principal can, as a rule, step in and enforce an agreement to sell goods, notwithstanding that the authority he has conferred upon the agent was intended to be exercised by making a contract the rights and obligations of which would attach to the agent personally. But, in the present case, the relations between the party that assumed the character of principal and the party that undertook the character of agent were very special. Throughout the agreement it plainly appears that, while the agreement continued, the business of selling the manufactures should be conducted by the company and that this should include the collection of the book debts. I think that it would have been inconsistent with the nature of the arrangement embodied in the agreement, if, without terminating it, the respondents had stepped in and taken the collection of the book debts out of the hands of the company. In fact they never did so. From all these considerations it follows that, in point of law, the book debts were those of the company. This means that the agreement contemplated a course of business between the company and the buyers of its shoes in which the company dealt with the buyers as a principal to whom they might look and to whom they would be responsible and that in fact such a course of business was followed. The description upon the invoice " as agents " would not prevent it. Apart from the smallness of the type and the uncertainty as to the significance of the description, it is quite consistent with the assumption of a personal responsibility. Indeed, in many cases the agreement to sell must have been made before the invoice was sent to the customer.

(1) (1935) Ch. 464.

The real effect, therefore, of the provision that the company should sell on behalf of the respondents was, during the life of the agreement, to place the company in the relation of agents towards them, rather than to enable the respondents to claim as creditors of the customers. What additional effect it had after the termination of the agreement needs, perhaps, separate consideration.

In equity the relation of agent would carry with it a duty to account, and, as a rule, a duty, if moneys are received in the course of the agency, to hold them specifically for the principal. At law the relation would be that of debtor and creditor. Even when the agent received under the authority of the principal the price of the latter's property, his obligation to pay it over was at law a personal liability only. The importance which has been given to the question whether property in the manufactured shoes vested in the respondents before it passed to the customers who bought them seems to me to be mistaken. As I have said, even if the goods sold were their property at law, the respondents would gain no property in the proceeds. The company would at law still be no more than their debtor. In equity, for a different reason, it seems immaterial. Upon the very terms of the agreement, the respondents incurred no obligation to pay for goods unless and until they had been "delivered and supplied to customers." That is to say, until shoes had been converted into a book debt, no money became payable in respect of them on the part of the respondents. The reason why in equity the proceeds of property may be followed by the owner and treated as a fund held upon a constructive trust in his favour is that his beneficial ownership of the thing gives him prima facie an equitable interest in its proceeds. But until the goods are paid for by the respondents it is not they but the company who would be entitled to the beneficial interest both in the goods themselves and the proceeds. The same reasoning shows also that there could be no foundation for the contention that the agreement amounted to an equitable assignment of shoes to be manufactured. Until they were not only manufactured but also sold and delivered, no value would be given by the respondents for the assignment, and without value there can be no equitable assignment of a subject yet to be brought into existence.

It is convenient now to turn back to the date of the agreement and consider upon what grounds its registration could then be necessary and, having done so, to trace the progress of one supposed transaction carried out according to its terms for the purpose of discovering when and by what title the respondents would become entitled to the debt incurred by a customer buying a parcel of shoes, or to the proceeds of that debt. As at the time when the agreement was entered into and before any payment under it was made by the respondents, it was wholly executory. It could not operate to transfer anything or create any present right to any future thing, be it goods or chose in action. It could not do so for the simple reason that so far the respondents had given no value. Registration under Part IX. of the *Instruments Act* 1928 therefore was not a condition of its validity. When the first out-turn of completed shoes took place after its execution, it may be asked, in whom did they vest ? For the reason I have given I regard the question as of little importance. But I think that, at least until they were boxed, they could not become the property at law of the respondents. The respondents do not, under the agreement, contract to buy every shoe turned out. Defective and rejected shoes and samples are excluded. Moreover, the respondents are to pay only for those sold to customers. The company usually carried a large stock of shoes. If the agreement was brought to an end under the clause providing for its determination, it is scarcely credible that these would be the property of the respondents. I think that, if property passed at all to the respondents, it could not be earlier than an appropriation of the shoes to answer some sale to a customer. It is apparent that whether there was room for property so to pass would depend upon the terms of that sale. For the same appropriation might have the effect of passing the property to the customer. But, whatever may be the fate of the legal property in the shoes, no equitable interest could be acquired at that stage.

Suppose next that the shoes of the first out-turn are supplied to a customer in fulfilment of an order. The debt which he incurs is owing to the company. As between the respondents and the company, the former, according to the view of the agreement I have already expressed, are not at liberty to step in and demand

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the debt, as undisclosed principals entitled to the benefit of the contract. It may be that if they did so, in spite of the breach of contract with the company that would be involved, the debtor could not overcome the effect of the authority contained in the agreement. But it is clear that up to that stage the beneficial right to the proceeds of the debt would not belong to the respondents. For on the supposition made, so far they had not discounted the debt. Until they paid the discounted amount of the price payable by the customer for the shoes, they would obtain no beneficial interest in the debt. For the same reason the fact that the company accepted the situation of agent, would, up to that stage, place no fiduciary duty upon it. The contract of sale which it had entered into and the shoes which it had supplied in performance of the contract stood at that point solely to the company's charge. It is the next step which produces the change. Immediately the sale is included in a debit note which the company renders to the respondents and they pay the discounted amount to the company, then they become beneficially entitled to the debt owing by the customer. The company becomes a trustee for them of its right to recover the debt and when it receives payment it is bound to pay that specific money to the respondents' credit at their bank. The act of discounting the book debt operates, in virtue of the executory agreement, to effect a transfer of the beneficial interest in the book debt. Why is this not a transfer of a book debt within the meaning of sec. 81 of the *Instruments Act* 1928 ? The answer is that it is not a transaction in writing. Sec. 81 speaks of a true copy of the assignment and from this, as well as from the general scope of the Part, it is evident that what is struck at are instruments embodying assignments. No doubt equitable assignments even if in writing are generally ineffective unless and until value is given, but, when value is given, the instrument operates to make over the debt.

In the present case there is nothing in writing but an executory agreement regulating the relations of the parties in a continuous course of business. It is the individual transaction in that course of business which effects the assignment or transfer.

In *Muntz* v. *Smail* (1) *Isaacs* J. (dissenting) said that verbal assignments were not within the *Book Debts Act* 1896, and, although

(1) (1909) 8 C.L.R. 262, at p. 305.

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Barton J. expressed the contrary view (1), he did not deal with the difficulty caused by the word " copy " in the provision corresponding to sec. 81.

The consequence of what I have said is that the written agreement, being at its execution wholly executory and amounting to no assurance of future chattels whereby a grantee is empowered to seize and no assignment or transfer of book debts, needs no registration, and that, although the transactions under the agreement may or do involve an assignment of the book debts to which they relate, yet the transactions do not amount to written assignments requiring registration.

There is a second ground upon which the respondents might succeed even if the transfer or assignment of the beneficial interest, effected in the manner described, were void for want of registration. Upon the termination of the agreement, the objection to the respondents stepping in and asserting, as against the debtors, their rights as undisclosed principals seems to disappear. The objection depends upon the implication of the agreement that the collection of book debts will during the continuance of the agreement remain under the control of the company as part of its ordinary business in relation to its customers. But the implication cannot, I think, extend to the winding up of the company when the agreement has terminated. Once the respondents claim against the debtors as undisclosed principals, they would rely upon a legal right which does not depend upon transfer or assignment. Some difficulty exists in applying this view of the case, because it does not appear exactly what has been done by the respondents and under what precise arrangement the liquidator has been allowed to proceed in the collection of the debts.

But for the reasons I have given I think the appeal should be dismissed.

McTiernan J. It was clearly proved before *Lowe* J., who heard the action, that the appellant and respondents governed themselves by the terms of the agreement of 15th February 1935. His Honour decided that the boots and shoes, the proceeds of which were claimed

(1) (1909) 8 C.L.R., at p. 278.

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by the respondents, were, by force of the agreement, the respondents' property, and had been sold and delivered by the appellant as the respondents' agent. The judgment declares the appellant to be a trustee for the respondents of the proceeds of the sales of the boots and shoes. The contents of the agreement are fully entered into in the statement of the reasons for judgment of other members of the court. The validity of the agreement is questioned on the ground that it is within the scope both of Part VI. and Part IX. of the *Instruments Act* 1928 of Victoria, and that the provisions of these Parts respectively requiring that bills of sale, and assignments and transfers of trade debts should be registered, have not been complied with. The provisions of Part VI. do not apply to any bill of sale unless the instrument gives power to the grantee or holder to seize or take the goods comprised in it or made subject to its provisions. There is no express power of this nature in the agreement and to imply it would be inconsistent with its provisions. For this reason the agreement is not within the scope of Part VI. of the *Instruments Act* and its validity is not affected because it has not been filed pursuant to those provisions. If consistently with the terms of the agreement it may be validly assumed that the appellant was the creditor of the customers who bought the boots and shoes, the question arises whether the debts due or to become due in the future to it by the customers were assigned or transferred to the respondents. By the fifth article of the agreement, the respondents promised to pay weekly or otherwise as demanded by the appellant the invoice value of boots and shoes delivered and supplied by it to customers less certain allowances and a discount of $5\frac{1}{2}$ per cent. The appellant on its part agreed by art. 7 to pay, within forty-eight hours after receipt, to the credit of the respondents at a bank all moneys received by it on account of such boots and shoes. The latter article does no more than bind the appellant to apply the moneys which it receives, on account of the boots and shoes sold to the buyers, in a particular way. It is insufficient to create an equitable assignment of the debts to become due from the customers, even assuming them to be the debtors of the appellant and not of the respondents. In *Palmer* v. *Carey* (1) Lord *Wrenbury*, speaking for the Judicial

(1) (1926) A.C. 703.

Committee, said :—" An agreement for valuable consideration that a fund shall be applied in a particular way may found an injunction to restrain its application in another way. But if there be nothing more, such a stipulation will not amount to an equitable assignment. It is necessary to find, further, that an obligation has been imposed in favour of the creditor to pay the debt out of the fund. This is but an instance of a familiar doctrine of equity that a contract for valuable consideration to transfer or charge a subject matter passes a beneficial interest by way of property in that subject matter if the contract is one of which a court of equity will decree specific performance " (1). Art. 7 of the agreement, therefore, does not bring it within the scope of Part IX. of the *Instruments Act*, and its validity is not affected because it has not been registered under those provisions.

The question which now arises is whether the agreement has contrived to impose a duty on the appellant to account to the respondents for all moneys collected by it from the customers, although the respondents did not become equitable owners by way of assignment of the debts due by the customers. In my opinion the appellant has a duty to account to the respondents for these moneys as trustee on the footing that they are the proceeds of the respondents' property sold by the appellant as its agent. The agreement expressly makes the appellant the respondents' agent. It also makes the boots and shoes, the proceeds of which were to be paid by the customers to the appellant, the respondents' property. They became the purchasers of these goods under the agreement, but it is not clearly provided at what time the property in them passed to the respondents. But it is clear that the property in the goods bought by the customers was not intended to pass direct from the appellant to them. In my opinion *Lowe* J. was correct in deciding that the intention of the parties, which is to be presumed from the agreement, is that the property in each parcel of boots and shoes passed to the respondents when it was appropriated to an order, if it did not pass at an earlier stage. The contract between the customer and the appellant was for the sale of unascertained or future goods by description, and in accordance with the rules in the *Goods Act* the

(1) (1926) A.C., at pp. 706, 707.

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property in the parcel of boots and shoes forwarded in fulfilment of the order did not pass until accepted by the customer. It was not until then that the parcel was appropriated to the contract with the assent of the buyer (*Goods Act* (Vict.), sec. 23, rule 5). In my opinion the judgment of *Lowe* J. was right, and the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Arthur Phillips & Just.*
Solicitors for the respondents, *Williams & Matthews.*

H. D. W.

Expl *WMC Resources Ltd v Leighton Contractors* (1998) 15 BCL 49

[HIGH COURT OF AUSTRALIA.]

KIRSCH . . . . APPELLANT;
DEFENDANT,

AND

H. P. BRADY PTY. LTD. . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Mar.* 2, 3.

SYDNEY, *May* 6.

Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.

Contract—Building contract—Construction—Payments dependent on architect's certificates—Form of certificates.

The conditions of a building contract contained provisions as a result of which payment to the builders was to be made, first, by payments of eighty per cent of the value of the work shown to be done by progress certificates by the architect until £2,000 was retained by the building owner; secondly, upon a certificate that the building was practically completed, by a payment making up ninety-nine per cent of the full certified value of the work done; thirdly, upon a certificate that the building had been completed to the entire satisfaction of the architect, by payment of the remaining one per cent. The