[HIGH COURT OF AUSTRALIA.]

CORNEY . . . . . APPELLANT;

AND

BRIEN . . . . . RESPONDENT.

ON APPEAL FROM THE FEDERAL COURT OF BANKRUPTCY.

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SYDNEY, *April* 9, 10; *June* 14.

Dixon, Williams, Webb, Fullagar and Kitto JJ.

Bankruptcy—Sequestration order—Judgment debt—Validity—Power of Court to go behind judgment—Bankruptcy Act 1924-1950 (*No.* 37 *of* 1924—*No.* 80 *of* 1950), *s.* 56 (2) (*a*).

The *Bankruptcy Act* 1924-1950 (Cth.), s. 56 (2) provides that "(a) At the hearing the court—(a) shall require proof of the debt of the petitioning creditor . . . ; and (b) if satisfied with the proof may make a sequestration order . . ." Under this section the Bankruptcy Court has jurisdiction to go behind a judgment obtained by default or compromise and to inquire whether the judgment is founded on a real debt. If the judgment is not so founded the Court ought not to make a sequestration order.

Decision of the Federal Court of Bankruptcy (*Clyne* J.) reversed.

APPEAL from the Federal Court of Bankruptcy.

John Cyril Brien petitioned the Federal Court of Bankruptcy, District of New South Wales and the Australian Capital Territory, that a sequestration order be made in respect of the estate of William Raymond Corney, of Viewland Street, Bundanoon, New South Wales, and the estate of Francis Joseph Irvine, of Law Street, Long Jetty, Ettalong, in the said State, on the ground that they had failed to comply with the requirements of a bankruptcy notice served upon them respectively in respect of the sum of £517 14s. 0d., together with interest at the rate of £5 per cent per annum, calculated from 19th January 1949, being the amount claimed by Brien as being the amount due on a final judgment

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obtained by him against Corney and Irvine in the Supreme Court of New South Wales.

The application was opposed by Corney. In affidavits he said that the judgment debt referred to was based upon an alleged agreement between Brien and himself for the purchase from Brien of one 1935 Cletrac tractor, whereas there never was any such agreement; that on or about 12th September 1946 he, together with Irvine, entered into an agreement with one Eric Newham of Lithgow for the hire of the tractor with an option for purchase thereof from Newham; that that agreement was rescinded by the mutual consent of all the parties thereto on or about 23rd October 1946 and the hiring was accordingly determined; that the sole reason why he did not enter an appearance to the writ of summons issued out of the Supreme Court was that after he had been served with the writ he was informed by Irvine that he, Irvine, had consulted a solicitor on the matter who had advised Irvine that the plaintiff in the action, Brien, had no claim whatsoever upon either Irvine or Corney and that it would not be necessary for either of them to take any steps in the matter; that after the time for compliance with the bankruptcy notice had expired he was advised by his present legal advisers that if further proceedings were taken against him in bankruptcy there would be available to him the opportunity of requesting the Federal Court of Bankruptcy to inquire into the circumstances under which the judgment was obtained so as to show that he never was at any time justly and truly indebted to Brien; and that he had been further advised by those legal advisers that he had at all times a good defence to Brien's claim.

On behalf of Brien it was claimed that a hire-purchase agreement, dated 3rd October 1946, had been made between Brien and Corney and Irvine. This document, which was put in evidence, was headed "To Reward Investment Company" in print, but these words had been crossed out in ink and the letters and word "J. C. Brien" written in ink above them. The date upon which the alteration had been made did not appear. The document, which was signed by both Corney and Irvine as "purchaser", provided for the hire of a second-hand Cletrac tractor, 1935 model, for eighteen monthly "rent payments" of £24 4s. 8d., the total purchase price being shown as £436 4s. 0d.

The Federal Judge in Bankruptcy (*Clyne* J.) thought it was fairly clear from the evidence that financial aid was required by Corney and Irvine, and he came to the conclusion upon the evidence that Newham was authorized to obtain a hire-purchase agreement

for Corney and Irvine and that he, Newham, did in fact do so. The Judge also found that the agreement between Newham and Corney and Irvine was not rescinded by mutual consent. He said that there was not any evidence that Brien was either the vendor or the owner of the tractor, but there was little doubt that Brien produced the money whereby Corney and Irvine were able to obtain the tractor. His Honour also said that the fact that a judgment is irregular and wrong in form was not sufficient ground for going behind it and he did not think that there had been any miscarriage of justice or any sufficient cause to go behind and disregard the judgment in this case.

A sequestration order was made against Corney.

From that decision Corney appealed to the High Court.

Further material facts and relevant statutory provisions appear in the judgments hereunder.

A. J. Moverley K.C. (with him *E. T. Perrignon*), for the appellant. This Court is asked to go behind a default judgment of the Supreme Court of New South Wales in favour of the respondent and against the appellant. The power to go behind such a judgment is more readily exercised (*Petrie* v. *Redmond* (1)). On the evidence there never was any binding agreement, resulting in the debt the subject of the bankruptcy petition, made between the appellant and the respondent. The hire-purchase agreement upon which the debt is alleged to have arisen was not an agreement but a mere offer to enter into an agreement. There is not any evidence of any acceptance by the respondent of the document signed by the appellant, nor is there any evidence of any oral agreement between the parties for the hire of the goods in question. In any event the respondent never was the owner of the goods within the meaning of the *Hire-Purchase Agreements Act* 1941. The respondent was merely substituted as owner, there not being any privity between him and the appellant in the transaction. If on the evidence there is any legal relationship shown between the appellant and the respondent the effect of such was to create a security taken by the respondent who, on the evidence, at the time of the transaction, was carrying on business as a moneylender and was not registered as such. The agreement, though in form a hire-purchase agreement, was accordingly void and no enforceable liability thereunder ever arose (*Lapin* v. *Heavener* (2); *Moneylenders and Infants Loan Act* 1941).

(1) (1942) 13 A.B.C. 44; (1943) Q.S.R. 71.

(2) (1929) 29 S.R. (N.S.W.) 514 46 W.N. 164.

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R. J. M. Newton, for the respondent. The Court of Bankruptcy should not go behind a judgment, even a default judgment, unless there is something in the nature of fraud, collusion, or miscarriage of justice (*Petrie* v. *Redmond* (1)). Here there is not any such suggestion. The facts as found by the judge are that Corney and Irvine acquired from Newham a tractor worth £500 upon a deposit of £100 and an authority for Newham to arrange finance on their behalf for the balance of £400. Newham arranged such finance with Brien through Knox and Newham was credited with the sum of £400. There was nothing illegal in that commercial transaction and the court should give effect to it. Even if the hire-purchase agreement does not comply with the *Hire-Purchase Agreements Act* 1941 it will still operate as an oral hire-purchase agreement (*Guiliano* v. *Diggerman* (2)). There was ample evidence: that Newham was the authorized agent of Corney and Irvine to arrange finance on their behalf; that Knox was Brien's authorized agent; that a binding agreement was made by such agents for their respective principals; and that such agreement was in fact signed by Corney and Irvine, and it appears from the subsequent correspondence that they were well aware of it.

A. J. Moverley K.C., in reply.

Cur. adv. vult.

June 14. The following written judgments were delivered :—

DIXON, WILLIAMS, WEBB and KITTO JJ. This is an appeal by W. R. Corney from an order sequestrating his estate made by the Federal Court of Bankruptcy on 17th March 1950. The respondent J. C. Brien is the petitioning creditor, the debt alleged in his petition being the sum of £517 14s. 0d. and interest due under a final judgment signed by Brien on 19th January 1949. This judgment was obtained in default of appearance to a writ issued out of the Supreme Court of New South Wales on 25th October 1948 claiming that the sum of £496 4s. 0d. was owing by the appellant and one F. J. Irvine to Brien in respect of the purchase of a Cletrac tractor. On 5th April 1949 Brien served a bankruptcy notice on Corney with which Corney failed to comply, and it was in respect of this act of bankruptcy that Corney was made bankrupt. Corney opposed the making of the sequestration order on the ground that he was not indebted to Brien in the sum of £517 14s. 0d. or in any sum whatsoever. In his affidavit he stated that the

(1) (1942) 13 A.B.C. 44; (1943) Q.S.R., at pp. 75, 76.

(2) (1938) 55 W.N. (N.S.W.) 117.

debt alleged in the petition was based upon an alleged agreement between Brien and himself for the purchase from Brien of the tractor, whereas there never was at any time any such agreement between them giving rise to such indebtedness or any part thereof. He also stated in his affidavit that on or about 12th September 1946 he and Irvine had entered into an agreement with one Newham of Lithgow for the hire of the tractor with an option of purchase and that this agreement was rescinded by mutual consent on or about 23rd October 1946 and the hiring thereby determined.

Section 56 (2) (*a*) of the *Bankruptcy Act* 1924-1950 provides that the court at the hearing shall require proof of the debt of the petitioning creditor. Under this provision the Court of Bankruptcy has undoubted jurisdiction to go behind a judgment obtained by default or compromise or where fraud or collusion is alleged and inquire whether the judgment is founded on a real debt. In *Ex parte Kibble* (1) Sir *W. M. James* L.J. said : " It is the settled rule of the Court of Bankruptcy, on which we have always acted, that the Court of Bankruptcy can inquire into the consideration for a judgment debt ". Sir *G. Mellish* L.J. said : " It is quite clear that in the Court of Bankruptcy the consideration for a judgment may be investigated, particularly when the judgment has gone by default " (2). This case was discussed and followed in *Ex parte Lennox* (3), where the reasons why the Court of Bankruptcy will go behind a judgment debt are fully discussed. *Lindley* L.J. said that " the Court of Bankruptcy will not allow itself to be put in motion at the instance of a person who is not a real creditor " (4). In *In re Fraser* (5) *Kay* L.J. said : " It is old law in bankruptcy that, neither upon an attempt to prove a debt, nor upon a petition for an adjudication of bankruptcy or a receiving order against a debtor, is a judgment against him for the debt conclusive. In *Ex parte Bryant* (6) Lord *Eldon* said : ' Proof upon a Judgment will not stand merely upon that, if there is not a Debt due in *Truth and Reality*, for which the Consideration must be looked to '." In *In re Gooch* (7) *Scrutton* L.J. said : " The county court registrar held quite correctly that he was at liberty to go behind the judgment, and see whether there was a good debt to support it ". In *In re a Debtor* (8) *Astbury* J. said " True it is that the Bankruptcy Court may, upon a prima-facie case being shown, go behind a judgment for the purpose of satisfying itself that the

(1) (1875) L.R. 10 Ch. 373, at p. 376.
(2) (1875) 10 Ch., at p. 378.
(3) (1885) 16 Q.B.D. 315.
(4) (1885) 16 Q.B.D., at p. 329.
(5) (1892) 2 Q.B. 633, at pp. 637, 638.
(6) (1813) 1 V. & B. 211, at p. 214 [35 E.R. 83, at p. 84.]
(7) (1921) 2 K.B. 593, at p. 603.
(8) (1929) 1 Ch. 125, at p. 127.

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debt enforceable thereunder was a real debt." In *Petrie* v. *Redmond*, a case in this Court (8), *Latham* C.J. said: "The court (that is, the Court of Bankruptcy) is entitled to go behind the judgment and inquire into the validity of the debt where there has been fraud, collusion or miscarriage of justice. . . . Also the court looks with suspicion on consent judgments and default judgments."

It appears from the evidence in the present case that in September 1946 Corney and Irvine were negotiating with Newham at Lithgow for the purchase of the tractor for the price of £500. They said that they could not pay more than £100 in cash and Newham said he might be able to arrange finance for them. He telephoned an accountant named Knox in Sydney, who appears to have been managing the affairs of a number of companies engaged in the business of hire purchase. Corney and Irvine wanted possession of the tractor immediately and Newham, after ringing Knox, gave them possession upon their paying £100 deposit and signing an agreement in writing, which cannot now be found, to the effect that they would sign a hire-purchase agreement when Newham received it from the finance company. Soon afterwards Newham received a document in the form of a hire-purchase agreement from Knox and this document was signed by Corney and Irvine about a fortnight later. The document as it appears in evidence is headed "To Reward Investment Company" in print, but this name is crossed out in ink and Brien's name written in ink above it. It is dated 3rd October 1946. It provides for the hire of the tractor and payment of rent in eighteen monthly payments of £24 4s. 8d., that is, for payments totalling £350. The cash purchase price is shown at £350, to which is added the sum of £86 4s. 0d. for statutory charges, which include charges, insurance premiums and any other sums payable by the purchaser. The total price for which the tractor could be purchased is stated to be the addition of these two sums, that is, £436 4s. 0d.

This document, when signed by Corney and Irvine, was an offer in writing by them to enter into an agreement with either the Reward Investment Co., if the name of that company was not then crossed out, or with the respondent, if his name had then been substituted, for the hire purchase of the tractor on the terms therein mentioned. Clause 12 of this document is in the following terms: "This offer will be irrevocable for a period of seven days from the date hereof, but shall not be binding upon you until the memorandum of acceptance endorsed hereon shall have been

(1) (1942) 13 A.B.C., at pp. 48, 49; (1943) Q.S.R., at pp. 75, 76.

signed by you and the provisions of this clause shall not be affected or prejudiced by reason of any prepayment of any money by me or the delivery of the goods or any part thereof to me and any such delivery shall pending acceptance as aforesaid be deemed merely conditional." At the same time as Corney and Irvine signed the document they also signed a promissory note for £53 due on 6th January 1947. The document and promissory note were, after signature, returned to Knox by Newham.

Newham had told Corney and Irvine that the finance company would be N. B. Stewart & Co., of which Knox was the manager. But the name of this company does not appear on the document. Newham did not receive any cash from any finance company, but said that he was having dealings with Knox in trucks and that he received a credit of £400 in his account. He said the credit came from another finance company called Term Sales also managed by Knox. Brien said that he had never spoken to Corney or seen him until the hearing of the petition and that he had never previously seen the document. He had known Newham for two or three years, but had never had any business transactions with him. He had never seen the tractor. All he could say was that the document was held on his behalf by Knox and Alderton, who were his accountants, that he had nothing to do with the running of his finance business, and that he left this business wholly and solely to his accountants. Knox was not called by either side.

His Honour accepted Newham as a witness of truth, but Newham was unable to say whether or not the heading of the document had been altered from Reward Investment Co. to that of Brien before the document was signed by Corney and Irvine. His Honour found that Corney and Irvine requested Newham to obtain finance for them but did not stipulate that it should be obtained from any particular source. He said that he had come to the conclusion that Newham was authorized to obtain a hire-purchase agreement for Corney and Irvine and that he in fact did so. Presumably his Honour was referring to the document of 3rd October 1946 as this was the hire-purchase agreement Newham received from Sydney. His Honour proceeded to say that Brien in his writ alleged that his claim was for an amount owing to him in respect of the purchase of the tractor, but there was no evidence that Brien was either the vendor or owner of the tractor. On the other hand, there was little doubt that Brien produced the money, whereby the debtors were able to obtain the tractor. He thought that the claim was irregular, but that no injustice had been caused. Where a Court of Bankruptcy inquired into the consideration

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for a judgment debt, it usually did so where there was evidence that the judgment had been obtained by fraud or collusion or there had been some miscarriage of justice. The fact that a judgment was irregular and wrong in form was not a sufficient ground for going behind it. He did not think that in the present case there had been any miscarriage of justice or any sufficient cause to go behind and disregard the judgment.

His Honour also held that the agreement between Newham and Corney and Irvine was not rescinded by mutual consent. From this finding there is not and could not be any appeal, for there never was any hire-purchase agreement between Newham and Corney and Irvine and so there never was any agreement between them capable of rescission. The crucial inquiry is whether any contract existed between Brien and Corney and Irvine which resulted in the judgment having a real debt to support it. With all respect to his Honour, there is no evidence from which it can be reasonably inferred that Brien produced the money whereby the defendants were able to obtain the tractor. This evidence, if it be a fact, could have been given by calling Knox but Knox was not called. Brien was unable to prove that his money had been used to pay Newham. All that Newham could say was that he had received the £400 in account. He could not say that he received it from Brien. On the contrary, he said that he believed that the source was the Term Sales Co. The document of 3rd October 1946 was not for £400 but for £350. The balance of £50 was secured by the promissory note signed by Corney and Irvine on 3rd October 1946 and produced in court from the custody of Knox. There is no evidence to prove on whose behalf Knox held either the document or the promissory note.

In the writ Brien claimed that the amount of £496 was owing to him by the defendants in respect of the purchase of one 1935 Cletrac tractor. He claimed that this amount was owing to him not on the common money counts but on the special contract contained in the document. Brien was never in fact the owner of the tractor. At all material times the tractor was owned either by Newham or by Corney and Irvine. The contract between Corney and Irvine and Newham was a contract for the sale of specific goods in a deliverable state. If it had been an unconditional contract, in the absence of a contrary intention, and there appears to be none, the property would have passed to Corney and Irvine at the date of the contract under rule 1 of s. 23 of the *Sale of Goods Act* 1923-1937 (N.S.W.). But the sale was conditional upon Newham arranging finance for the £400, so that it would appear

that the property did not pass from Newham at the date of the contract. Further, since Corney and Irvine were given possession of the tractor pending this arrangement, it would not appear that the property was intended to pass by delivery. Accordingly it would appear that Newham remained the owner of the tractor pending the arrangement of finance.

In these circumstances s. 16 (1) of the *Hire-Purchase Agreements Act* 1941 (N.S.W.) would be applicable. This provides that " If in connection with the sale of any goods the person by whom or on whose behalf the sale is negotiated (hereinafter called the ' owner ') arranges that some other person (hereinafter called ' the lender ') shall enter into a hire-purchase agreement in relation to those goods with a purchaser, the lender shall be in the same position as regards the hire-purchase agreement as if it had been made between the owner as vendor and the purchaser, and had been duly assigned to the lender by the owner ". This sub-section, however, would operate only where the seller of the goods, in this case Newham, arranged a hire-purchase agreement between a third party and the purchaser. In the present case the evidence does not prove that Newham arranged a hire-purchase agreement between Brien and Corney and Irvine. Assuming that Brien's name was at the head of the document of 3rd October 1946, when it was signed by Corney and Irvine, clause 12 expressly provides that the offer of the hirer is not to bind the letter until the latter has signed the memorandum of acceptance endorsed thereon. The document, therefore, prescribes the particular method by which the offer may be accepted and made to bind the offeree. " Acceptance means the assent of the person to whom an offer is made, signified in the mode required by the terms of the offer " (*Halsbury's Laws of England*, 2nd ed., vol. 7, p. 87). Here the mode so signified was the signature of the memorandum of acceptance by Brien. No contract would come into existence until the offer had been accepted in this manner, and the memorandum of acceptance was not signed by or on behalf of Brien.

In any event the document contains the material alteration in the name of the proposed letter from that of Reward Investment Co. to that of J. C. Brien. Corney and Irvine had agreed with Newham to sign the hire-purchase agreement Newham received from the finance company. The agreement Newham received was the document in question. The offer of Corney and Irvine contained in the document was not an offer to enter into a hire-purchase agreement with the world at large but with a particular letter. The document now bears the name of Brien as the letter. But it

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previously bore the name of the Reward Investment Co. The indebtedness of Corney and Irvine to Brien depends upon the offer being an offer to enter into a contract with him. The onus lies on Brien to show that the name of the letter had been changed from that of Reward Investment Co. to his own name when it was signed by Corney and Irvine and the evidence fails to satisfy this onus. In *Halsbury's Laws of England*, 2nd ed., vol. 10, at p. 249, it is stated that "a writing which is intended to be under hand only can be altered by erasure, or interlineation, or otherwise, before it is signed, but it lies upon the party who puts the instrument in suit (in this case Brien) to explain the alteration and show when it was made". See also *Taylor* on *Evidence*, 11th ed. (1931), p. 1214, where the law is stated to the same effect. The cases cited fully support the statements. Assuming that Brien, if he was the offeree, could, without the knowledge and consent of the offeror, accept an offer made to him in some other mode than that prescribed by the document, there is no evidence that Corney and Irvine offered to enter into a contract with him.

Even assuming there was an agreement between Corney and Irvine and Brien on the terms of the document, a further objection exists to the proof of the judgment debt. Clause 9 of the document is in the following terms: "If I shall at all times duly comply with the terms and conditions of this instrument and duly pay all moneys which may become payable by me hereunder if this hiring continues for the full term I may upon the expiration of the said term of hiring, elect to purchase the goods by notifying you in writing of my election but until such election the property in the goods shall remain exclusively in you and I shall be bailee thereof only Provided that nothing herein contained shall affect or restrict my implied statutory right as purchaser to complete my purchase of the goods at any time in accordance with the provisions of the statute". Corney and Irvine did not at any time comply with the terms and conditions of the document. They did not pay any of the instalments of hire. They could not and did not elect to purchase the tractor by notifying Brien of their election. Accordingly the claim in the writ that they were indebted to Brien for the purchase money was wrong. They were indebted to Brien if at all for the instalments of hire and for interest on the overdue instalments. It is to be noted that in his reasons for judgment his Honour does not refer to the freedom with which a Court of Bankruptcy goes behind a judgment obtained by default. He refers only to the court inquiring into the consideration for a judgment debt that has been obtained by fraud or collusion or

where there has been some miscarriage of justice. Unless there was a sale of the tractor by Brien to Corney and Irvine there was no consideration for the purchase money. The fact that Corney and Irvine may have been indebted to Brien in a different sum for a different consideration, namely for the instalments for the hire of the tractor, is immaterial. It is clear that there was no consideration for the judgment debt. It was not a good debt irrespective of the judgment.

The appeal should be allowed, the sequestration order set aside and the petition dismissed.

FULLAGAR J. This is an appeal from the Court of Bankruptcy (*Clyne* J.). In January 1949 John Cyril Brien, the respondent, obtained a judgment in the Supreme Court of New South Wales against William Raymond Corney, the appellant, and one Irvine. The judgment was entered in default of appearance. The claim indorsed on the writ was for " amount owing by the defendants to the plaintiff in respect of the purchase of one 1935 Cletrac Tractor ". The judgment was for £517 14s. 0d., with interest thereon from date of judgment to date of payment. The amount was not paid, and in April 1949 the creditor issued and served a bankruptcy notice on Corney and Irvine. The notice not being complied with, a petition for a sequestration order was in August 1949 presented to the Court of Bankruptcy. Notice of opposition was given by Corney, but not by Irvine. The ground of opposition was that there was no debt to found the judgment. The petition came on for hearing before *Clyne* J. in December 1949. Oral evidence was adduced as to the transactions and events relevant to the question of the existence of a debt antecedent to the judgment. On 17th March 1950 *Clyne* J. made a sequestration order. It is against this order that Corney now appeals.

Generally speaking, a judgment at law for a sum of money creates an obligation of its own force. The pre-existing obligation, which the judgment is intended to enforce, merges in the new obligation so created, and, for most purposes as between the parties, it is conclusive evidence of the existence of the obligation which it creates. It may in some circumstances be set aside by the court which entered it, but, unless and until it is set aside that is, generally speaking, its effect. It has, however, been well settled for very many years that in a court having jurisdiction in bankruptcy a judgment has no such conclusive effect. The court will in many cases, as it is commonly said, " go behind " the judgment and inquire into the existence of the debt upon which

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it is said to be founded. It is sometimes put that the court will "go behind" the judgment for the purpose of inquiring into the consideration for it: see, e.g., *Williams' Law and Practice of Bankruptcy*, 14th ed. (1932), p. 58. There is a clear historical explanation for the statement of the rule in this form, but it may perhaps be thought an inaccurate and inadequate exposition of the general principle as nowadays understood and applied. Although the general power of the Court of Bankruptcy to investigate the foundation of a judgment is unquestioned and unquestionable, the circumstances of this case have seemed to me to be peculiar and difficult, and I have felt it necessary to examine with some care the nature and extent of the power.

The origin of the power is to be found in the days when the Lord Chancellor administered the bankruptcy law, and applied certain of the rules which had become established in the administration of the estates of deceased persons. One such rule was the rule that a voluntary debt, though upon a specialty, could not compete with a debt founded on a good consideration (see *Assignees of Gardiner* v. *Shannon* (1); *Ex parte Spurrier* (2)). The position is put succinctly by *Cotton* L.J. in *Ex parte Pottinger*; *In re Stewart* (3). His Lordship said:—"... the rule arose simply in this way: there being no statutory enactment applicable to such a case, the judges, in administering the bankrupt law, followed the rule which prevailed in equity. The Court of Chancery, in administering the estates of deceased persons, looked upon bonds, covenants, and judgments, if voluntary, in the light of legacies, and paid them only after all the debts for valuable consideration had been paid, paying simple contract debts before voluntary bonds."

It is to be noted that the rule applied in such cases as *Ex parte Spurrier* (2) did not exclude the voluntary creditor from proof. It merely postponed him to creditors for consideration. And, if, in its application to judgments, the court had not gone beyond inquiring whether the debt upon which the judgment purported to be founded was voluntary or upon consideration, the consequences might not have been very drastic. But it seems obvious that, when once a court was persuaded to "look behind" a judgment, a wide field might be opened up, and various grounds of impeachment of the judgment might appear and be pressed upon the court. The position may have been advanced too by the language of the Act, 5 Geo. II, c. 30, s. 23, which required a creditor to

(1) (1804) 2 Sch. & Lef. 228.
(2) (1831) Mont. 246.
(3) (1878) 8 Ch. D. 621, at p. 626.

make affidavit of "the Truth and Reality" of his debt. Thus Lord *Eldon* in *Ex parte Bryant* (1) says:—"Proof upon a Judgment will not stand simply upon that, if there is not a debt due in '*Truth and Reality*' ". It is true that he adds:—"for which the Consideration must be looked to", but the passage has often been quoted, and no limiting effect has ever been ascribed to the concluding words. In any case it is clear that more than a century ago, whether by attributing a very wide meaning to the word "consideration" or simply by a natural extension of an obviously elastic principle, the courts administering the bankruptcy law had assumed a very wide power of investigating a judgment to see whether a valid debt "lay behind" it. In *Ex parte Kibble*; *In re Onslow* (2) we find the court rejecting a judgment on the ground that the *Infants' Relief Act* 1874 would, if it had been raised, have afforded a good defence to the plaintiff's claim, and both *James* L.J. and *Mellish* L.J. treating the question raised as a question of "consideration". But in later cases the rule is stated in the widest terms and without any reference to "consideration". Thus in *Ex parte Lennox*; *In re Lennox* (3), *Cotton* L.J. treats *Ex parte Kibble*; *In re Onslow* (4) as having decided "that, for the purpose of deciding whether there ought to be an adjudication of bankruptcy, the court will, on the application of the debtor, enter into the question whether a judgment is sufficient evidence of a debt—whether, when the facts behind the judgment are known, there is sufficient evidence to satisfy the court that a debt really existed". In the same case (5), *Lindley* L.J. said: "The court will not allow bankruptcy proceedings to be had recourse to for the purpose of enforcing debts which are fictitious, and not real, even although they are in the form of judgment debts." And in *In re Fraser*; *Ex parte Central Bank of London* (6) Lord *Esher* M.R., referring to *Ex parte Lennox* (7), said:—"The decision is based upon the highest ground—viz., that in making a receiving order, the court is not dealing simply between the petitioning creditor and the debtor, but it is interfering with the rights of his other creditors, who, if the order is made, will not be able to sue the debtor for their debts, and that the court ought not to exercise this extraordinary power unless it is satisfied that there is a good debt due to the petitioning creditor. The existence of the judgment is no doubt prima facie evidence of a debt; but still the Court of Bankruptcy is entitled to inquire whether there really is

(1) (1813) 1 V. & B., at p. 214 [35 E.R., at p. 84].
(2) (1875) L.R. 10 Ch. 373.
(3) (1885) 16 Q.B.D., at p. 326.
(4) (1875) L.R. 10 Ch., at p. 373.
(5) (1875) L.R. 10 Ch., at p. 329.
(6) (1892) 2 Q.B. 633, at pp. 636, 637.
(7) (1885) L.R. 10 Ch. App. 315.

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a debt due to the petitioning creditor." In *Re Crum*; *Ex parte Noyes Bros. (Sydney) Ltd.* (1) *Lukin* J. stated the purpose of "looking behind" a judgment as being "in order to see whether the debt alleged against the debtor justifies the exercise by the court of its jurisdiction to make a sequestration order". But an inquiry into what lies behind a judgment may be undertaken either on the petition for sequestration or when, after sequestration, a judgment creditor comes in to prove a debt: see, e.g., *Ex parte Revell*; *In re Tollemache* (2).

If the rule that the court could go behind a judgment in bankruptcy proceedings had not developed out of all recognition and become a separate rule independent of that which was applied in such cases as *Ex parte Spurrier* (3), it could hardly, I think, have survived. At least it would have undergone grave peril of extinction or serious modification. For the *Bankruptcy Act* 1869 (Imp.) provided, by s. 32, that certain specified debts (e.g., rates and taxes and wages) should be paid in priority to all other debts and that "save as aforesaid all debts provable under the bankruptcy shall be paid pari passu"; and in *Ex parte Pottinger*; *In re Stewart* (4) it was held by the Court of Appeal that the old rule as to the postponement of voluntary debts had been abrogated by this legislation. And in *In re Hawkins*; *Ex parte Troup* (5), *Rigby* L.J., after referring to the origin of the rule as to "going behind" judgments, said that it would have to be considered, when the case arose, whether that part of the jurisdiction had not been "altogether displaced by subsequent legislation". And he referred to the *Bankruptcy Act* 1869 and to *Ex parte Pottinger*; *In re Stewart* (6). Nothing, however, has ever come of the suggestion of *Rigby* L.J., and the power has been exercised again and again since 1895. A good recent instance is *In re a Debtor* (7).

I have already quoted the statement of the principle by *Cotton* L.J. in *Ex parte Lennox*; *Re Lennox* (8). When the learned Lord Justice used the word "will", it is obvious that he did not mean "will always" or "will as a matter of course", and, with respect, I think that the whole trend of the cases before and since shows that he did not state the power, or the purpose for which the power might be used, too widely. No precise rules exist as to what circumstances call for an exercise of the power, but certain things are, I think, clear enough. If the judgment in question followed a full investigation at a trial on which both parties

(1) (1937) 9 A.B.C. 281, at p. 284.
(2) (1884) 13 Q.B.D. 720.
(3) (1831) Mont. 246.
(4) (1878) 8 Ch. D. 621.
(5) (1895) 1 Q.B. 404, at p. 414.
(6) (1878) 8 Ch. D. 621.
(7) (1927) 2 Ch. 367.
(8) (1885) 16 Q.B.D., at p. 326.

appeared, the court will not reopen the matter unless a prima-facie case of fraud or collusion or miscarriage of justice is made out. In *In re Flatau*; *Ex parte Scotch Whisky Distillers Ltd.* (1) *Fry* L.J. said: "This power has never, so far as I am aware, been extended to cases in which a judgment has been obtained after issues have been tried out before a court". Where judgment has been entered in pursuance of a compromise, ground must be shown for challenging the compromise as such before the subject matter of the judgment will be reopened. But in *In re Hawkins*; *Ex parte Troup* (2), it was held that such a judgment should be reopened in circumstances which fell far short of fraud and merely persuaded the court that the compromise was unfair and unreasonable because one party knew certain relevant facts of which the other was ignorant. Lord *Esher* M.R., who was possibly prepared to go a little further in those matters than some other judges, said: "I myself should say that the question for the court is whether there is, or is not, a reasonable doubt that the judgment has been obtained by one side or the other fairly" (3). But *Lopes* L.J. agreed with him in the result, though *Rigby* L.J. dissented. Where the party challenging a judgment entered on a compromise has acted on the advice of counsel, the judgment will not generally be reopened (see *In re a Debtor* (4)), but in *Ex parte Banner*; *In re Blythe* (5) a judgment entered in pursuance of a compromise was reopened although counsel had advised the compromise. It was held that there had been a yielding to an unjust claim through fear of disclosures which were likely to be made if the "debtor", by resisting the claim, necessarily submitted himself to cross-examination as to credit. In *In re Fraser*; *Ex parte Central Bank of London* (6) the "debtor" had entered an appearance to a specially indorsed writ. He did not, however, appear on a summons under Order XIV, and judgment was entered against him on the summons. He applied to have the judgment set aside, but his application was dismissed. He appealed to the Court of Appeal, but his appeal was dismissed. It was nevertheless held by the Court of Appeal that a creditor's petition for sequestration was rightly dismissed because, on a reopening of the matter, it appeared that the "debtor" was not in law indebted and the judgment was not soundly based in law. This case perhaps goes as far as any. But, wherever the judgment in question is a judgment by default, it appears that the court will always "go behind" the judgment

(1) (1888) 22 Q.B.D. 83, at p. 86.
(2) (1895) 1 Q.B. 404.
(3) (1895) 1 Q.B., at p. 409.
(4) (1929) 1 Ch. 125.
(5) (1881) 17 Ch. D. 480.
(6) (1892) 2 Q.B. 633.

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if there is what it regards as a bona-fide allegation that no real debt "lay behind" the judgment.

The question whether the judgment is to be reopened or "gone behind" at all will, of course, often involve some preliminary investigation of the merits of the attack on the judgment. But, when once the court decides that it will "go behind" the judgment, the cases which I have cited show, in my opinion, that the whole matter is open. When once it is considered proper to "reopen", the only question will be whether there was, in fact and in law, a debt which could legally found the judgment—whether there was in "Truth and Reality" an obligation not of record before there was an obligation of record. If the case should be one of those rare cases (I have not actually found one in the Reports since 1888, when *Fry* L.J. said that he knew of none) where it is legitimate to "go behind" a judgment entered after trial in court, there would be, I think, no alternative but to re-try the whole case. The matter to be decided is the existence or non-existence of a debt antecedent to the judgment. It has been said on several occasions that the judgment is prima-facie evidence of the antecedent debt. But, when once the inquiry is undertaken, I think that the ultimate burden of proof rests on the person claiming to be a creditor. As Lord *Esher* M.R. said in *In re Fraser*; *Ex parte Central Bank of London* (1): "The existence of the judgment is no doubt prima-facie evidence of the existence of a debt; but still the Court of Bankruptcy is entitled to inquire whether there *really is a debt* due to the petitioning creditor".

I have spent some time in trying to ascertain the proper approach to cases of this kind, because I think that everything turns on it. The judgment debtor made an affidavit in which he said:—"I say that the judgment debt referred to in the said paragraph 2 of the petition herein is based upon an alleged agreement between the petitioning creditor and myself for the purchase from the petitioning creditor of one 1935 Cletrac Tractor, whereas there never was at any time any such agreement between the petitioning creditor and myself giving rise to such indebtedness or any part thereof. I say that on or about the 12th day of September 1946 and together with the above-named Francis Joseph Irvine I entered into an agreement with one Eric Newham of Lithgow in the State of New South Wales for the hire of the aforesaid tractor with an option for purchase thereof from the latter person named and that the said agreement was rescinded by the mutual consent of all the parties thereto on or about the twenty-third day of October 1946

(1) (1892) 2 Q.B., at pp. 636, 637.

and the aforesaid hiring was accordingly determined." The judgment being by default, and these statements having been made on oath, I do not think that the Court of Bankruptcy could, consistently with principle, have declined to go behind the judgment. And it followed, I think, that it could not properly make a sequestration order unless it appeared that there was a real debt to found the judgment. The court did proceed to investigate the position, and several witnesses were called by the parties.

It is not, I think, necessary to state or discuss the evidence in any detail. There was a conflict on some points, and his Honour disbelieved Corney's allegation that an agreement for the sale of the tractor had been rescinded by mutual consent. I regard this, however, as of no importance, and I think that the strictly relevant facts were, for the most part, not seriously in dispute. What was proved may be summarized as follows.

Corney and Irvine agreed to buy from Newham, a garage-keeper at Lithgow, a second-hand Cletrac tractor. The price was £500. Corney and Irvine were only able to raise £100, and they said that they would want finance for the balance. Newham said that he would arrange finance with some persons in Sydney, and he mentioned the name of N. B. Stewart & Co. The name of Brien was at no time mentioned. He told Corney and Irvine that they would have to sign a hire-purchase agreement with the financier in Sydney, and they promised to do this. The sum of £100 was paid, and the tractor was delivered. A document embodying the terms agreed upon was signed, but it had been lost and was not produced. I mention in passing that the tractor, which was in very bad order, seems to have been ultimately abandoned in despair by Corney and Irvine, after which some person took possession of it and sold it for £50. It does not appear who took possession, but Brien was prepared to give credit for this £50.

It would appear that Newham had business relations with a Mr. Knox, a Sydney accountant, who handled funds for investment for a number of clients. Those clients included certain firms or companies which specialised in the financing of dealings in motor vehicles, and they included Brien. Newham communicated with Knox, who agreed to " finance " the transaction with Corney and Irvine to the extent of £400 from the funds of one of his clients. Newham said :—" When I rang through, Mr. Knox said, speaking on behalf of N. B. Stewart, that they would take them on pending the signing of the agreement ". Shortly afterwards a document in the form of a hire-purchase agreement was forwarded

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from Sydney to Newham, and some three weeks after the delivery of the tractor this document was presented by Newham to Corney and Irvine and signed by them. I will refer to this document again later. Newham received nothing in cash from Knox or any of his clients, but he said that he was "credited in account" with £400. He was not at all clear about this credit. In examination-in-chief he said, "I was having dealings with Knox in trucks, and they passed me a credit in my account". In cross-examination he was asked: "Who did you get your money from?" He answered: "From Term Sales, the finance company that Mr. Knox manages". A little later he said that Knox "credited my account with £400". Later still he said that Knox "would credit me with the finance company". Asked "Which one?", he said: "I should say it would be Term Sales". He said that he had accounts, through Knox, with several finance companies. Some were with Term Sales, some with Reward Investments, and some with Universal Credits. At the end of his cross-examination he said that he could easily find out, by looking at his records, which finance company had credited him. Finally he said that up to that stage he had had no transactions with Brien.

Brien was called as a witness, but he knew nothing relevant to the transaction. All he could say was that he had placed money in Knox's hands with authority to lend it out. Knox was not called, nor were any of his books or records produced.

Now it seems to me that not only was there no evidence whatever that Brien had paid any money to Newham or credited Newham with any money in connection with the transaction with Corney and Irvine, but there was actually evidence, at the end of Newham's cross-examination, that he had not. And, unless there was a payment by Brien to Newham, or at least the equivalent of a payment, no action for money lent or money paid could be maintained, and there was no consideration for an express promise by Corney and Irvine to pay Brien. This is, in my opinion, fatal to the petitioning creditor. I agree with *Clyne* J. that he ought not to be held strictly to the cause of action actually alleged in the writ, but on the evidence *no* cause of action was shown.

In the view which I take it is not really necessary to consider the document to which I have referred above. But I would add that, in my opinion, it is not sufficient evidence of a promise by Corney and Irvine to pay money to Brien. At the head of the document appear in typewriting the words "To Reward Investment, Sydney", followed by the printed words "12 O'Connell Street, Sydney". The words "To Reward Investment, Sydney"

have been struck out, and under the words " 12 O'Connell Street, Sydney " appears in manuscript the name " J. C. Brien ". There is no other reference in the document to Brien. A more material alteration, therefore, cannot be imagined. The document, not being a deed but an instrument under hand only, the rule applicable is that the party relying on the instrument must prove that the alteration was made before the execution of the instrument by the party to be charged on it. See *Henman* v. *Dickinson* (1); *Knight* v. *Clements* (2); and *Clifford* v. *Parker* (3). There was no evidence that the vital alteration of the instrument was made before it was signed by Corney and Irvine. It is true that Newham in examination-in-chief said that, when it was signed, it was " just as it is now ", but it seems clear that he was not adverting to the alteration of the name but merely denying the assertion of Corney and Irvine that the document was entirely blank when signed. For in cross-examination he admitted quite clearly that he had not noticed whether, at the time of execution, the name of a company, struck out or otherwise, was there, or whether the name of Brien was there. The learned Judge of the Bankruptcy Court said that he accepted the evidence of Newham that the document was not in blank when signed, but the point about the alteration does not appear to have been brought to his notice.

His Honour said :—" There is little doubt that Brien produced the money, whereby the debtors were able to obtain the tractor ". But there was no evidence that Brien did produce the money. His Honour proceeded to say that he did not think that there had been any miscarriage of justice or any sufficient cause to " go behind " the judgment. But his Honour had already—rightly, as I think—" gone behind " the judgment, and investigated the question whether there was a debt to support it. The investigation of what lay " behind " failed to reveal such a debt, and, unless such a debt was revealed, I do not think that it was right to make a sequestration order.

In my opinion this appeal must be allowed.

Appeal allowed with costs. Sequestration order set aside. Petition dismissed with costs.

Solicitors for the appellant, *J. A. Meagher & De Coek.*

Solicitors for the respondent, *Remington & Co.*

J. B.

(1) (1828) 5 Bing. 183 [130 E.R. 1031].

(2) (1838) 8 Ad. & E. 215 [112 E.R. 819].

(3) (1841) 2 Man. & G. 909 [133 E.R. 1012].