only requires disclosure to the Board of Directors whereas disclosure to and ratification by the Company in general meeting is required by the general law.[52]

The holding of the Court of Appeal on this point is in accordance with the view taken by the New South Wales Court of Appeal in *Castlereagh Motels Ltd.* v. *Davies-Roe*,[53] where it was held that s.129 of the Companies Act, 1936 (N.S.W.) (the forerunner to s.123 of the Companies Act, 1961 (N.S.W.)) would not support an action brought by a company against one of its directors, claiming damages at common law for breach of statutory duty. The Court took the view that the only effect of a failure by the director to comply with s.129 was to make him liable to a criminal sanction.[54] This would seem to be the proper approach, in view of the fact that the section expressly preserves the operation of the rules of the general law.[55]

## CONCLUSION

It is submitted that the Court of Appeal failed to appreciate the nature of actual authority, and confused the distinction between actual authority and ostensible authority. In holding the case to be one of implied actual authority and not one of apparent authority, it avoided the important issue of who is an "insider" for the purposes of exclusion from the operation of the rule in *Turquand's Case*. If the Court of Appeal had dealt with the applicability of the rule in *Turquand's Case* it may well have reached the opposite conclusion to that reached by Roskill, J., and held that, on such authority as there was, and on considerations of the practical basis of that rule, the rule should not have been held to apply in the instant case. It would follow from this that the defendant company would not have been liable on the contracts and that the plaintiff would have had instead to rely on Richards' breach of warranty of authority.

However, if the rule had been held to apply, it seems that the plaintiff would be entitled to succeed against the defendant company, notwithstanding that he had failed to disclose his interest in the contract as required by s.199 of the Companies Act, 1948 (Eng.).

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# GOODS ON HIRE PURCHASE: MEASURE OF DAMAGES FOR "WRONGFUL" ASSIGNMENT

## *WICKHAM HOLDINGS LTD.* v. *BROOKE HOUSE MOTORS LTD.*[1]

This case is the latest pronouncement by the English Court of Appeal on the measure of damages obtainable by an owner of goods "sold" on hire-

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[52] See Gower, *op. cit.* at 482, 483.
[53] (1967) 66 S.R. (N.S.W.) 279.
[54] *Id.* at 284 (*per* Wallace, P.) and at 286-87 (*per* Jacobs & Asprey, J.J.A.).
[55] See s.129(5). *Cf.* Companies Act, 1961 (N.S.W.) s.123(8), and Companies Act, 1948 (Eng.), s.199(5).
[1] (1967) 1 W.L.R. 295. Waiver and estoppel questions arising from commercial practice were also involved but are omitted in this note.

purchase.[2] Though of mainly academic interest to lawyers in New South Wales, where the position is substantially governed by statute law,[3] the decision may be of great significance for English lawyers.

The facts in *Wickham's Case* were of a standard type for hire-purchase cases. The hirer of a motor car, who had it on hire-purchase, "wrongfully" sold it to someone else. The sale was "wrongful" because the hire-purchase agreement prohibited it.[4] The owner-finance-company claimed from the hirer's assignee the return of the car plus damages for detention, or alternatively for conversion. The car in question when bought by the hirer was originally worth £889; and at the time of the wrongful sale by the hirer, £615 had already been paid off, leaving a balance of £274 at the date of conversion. The value of the car at that date was £440. The owner-finance-company claimed £440 as the correct measure of damages in conversion, this being the value of the goods at that date. Reliance was placed on the case of *United Dominions Trust (Commercial) Ltd.* v. *Parkway Motors Ltd.*[5] to support this claim. Lord Denning, however (and also Danckwerts and Winn, L.JJ.), rejected the argument. In their Lordships' opinion the correct measure of damages was £274, the difference between the finance company's "interest" in the car and the assignee's "interest" in the same. Lord Denning, M.R. and Danckwerts, L.J., pointing out that on the basis of the *United Dominions Trust Case* the finance company would obtain as damages almost twice as much as they had lost (namely, £440 instead of £274), held that the *United Dominions Trust Case* was wrongly decided and should be overruled. Winn, L.J., however, "entertain(ed) more doubt about the suggested invalidity" of the *United Dominions Trust Case*, and reserved his opinion on this point.[6]

The *ratio decidendi* of the case, it is submitted, was stated by Lord Denning in the following passage:

> The finance company is only entitled to what it has lost by the wrongful act of the defendants (the assignees) . . . prima facie in conversion the measure of damages is the value of the goods at the date of the conversion. But that (rule) does not apply when the plaintiff (the owner-finance-company) immediately prior to the conversion has only a limited interest in the goods. . . .[7]

It is this *ratio* that is respectfully questioned in this note, and its possible bases examined.

### *Presumed Conflict between the Belsize Case and the United Dominions Trust Case*

Lord Denning simplified the legal issues to one of deciding between two conflicting decisions, namely that of Channell, J. in the *Belsize Case*[8] and that of McNair, J. in the more recent *United Dominions Trust Case*. For the moment, let it be assumed that the facts of these cases were the same as in *Wickham's Case*, with one difference, the wording of the prohibition clauses.

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[2] It is submitted that part of the confusion in this area of the law is due to the misleading phraseology "sale on hire-purchase". There is no "sale" of any kind until the option to buy has been exercised by the hirer. Thus, the House of Lords in *Helby* v. *Mathews* (1895) A.C. 471 regarded the true hire-purchase agreement as something midway between a lien and a sale (or agreement to sell: *Lee* v. *Butler* (1893) 2 Q.B. 318).

[3] Apart from certain special cases to which the Hire Purchase Act, 1960 (N.S.W.) does not apply, e.g. wholesale transactions or where the agreement has been terminated. See esp. s. 9 of the N.S.W. Act and corresponding provisions in other States.

[4] This was the language used by Lord Denning in *Wickham's Case* (1967) 1 W.L.R. at 300-1, and may appear to lead to circularity.

[5] (1955) 1 W.L.R. 719; (1955) 2 All E.R. 557.

[6] (1967) 1 W.L.R. at 302.

[7] *Id.* at 299.

[8] *Belsize Motor Supply Co.* v. *Cox* (1914) 1 K.B. 244.

As Lord Denning stated in *Wickham's Case*:

> In the *Belsize Case* the hire-purchase agreement contained a simple prohibition that the hirer "shall not re-let, sell or part with the possession" of the goods (without the consent of the owner). In the *United Dominons Trust Case,* it contained a prohibition that the hirer "shall not sell, offer for sale, assign or charge the goods or the benefit of the agreement". The only distinction is that in the *United Dominions Trust Case* the printed form contained the extra words "or the benefit of the agreement". This distinction, said McNair, J., made all the difference. . . .[9]

The writer respectfully submits that this is correct. A prohibition clause in this context may be classified as

(1) absolute (hirer shall not assign); or

(2) conditional (hirer may assign only with the owner's consent); and

it may operate in respect of assignment

(a) of the goods alone, or

(b) of the goods *and* of the hirer's rights under hire-purchase agreement, in particular his option to buy.

When Lord Denning stated that the "distinction drawn by McNair, J. is too fine for me",[10] he was saying that a prohibition of the type which is absolute and prohibits assignment both of the goods *and* of the hirer's rights under the hire-purchase agreement has the same effect in law as a prohibition of the type which is conditional and prohibits assignment of the goods only. The former type of prohibition was used in the *United Dominions Trust Case,* the latter in the *Belsize Case.* In deciding the *United Dominions Trust Case,* McNair, J. very carefully examined both forms of wording and concluded:

> There is nothing in *Belsize Motor Supply Co.* v. *Cox* in any way comparable with the words in clause 6 of the agreement in the present case which prohibit the hirer from assigning the goods *or the benefit* of this agreement. . . .
>
> That Channell, J. (in the *Belsize Case*) took the view that an assignable interest in the contract passed to the defendants in the case he was considering is . . . clear from the language . . . and from the cases noted in his judgment upon which he relied. In each of those cases . . . the defendant had a contractual interest in the goods and when sued . . . for conversion was able to say that as between him and the plaintiff he, the defendant, had an interest in the goods which had the effect of diminishing the value of the goods in his hands. In *Belsize Motor Supply Co.* v. *Cox,* also, the defendant Cox was in a position to say that he had an interest arising under the hire-purchase agreement . . . to obtain the ownership of the motor-vehicle on payment of the unpaid balance. *That can only be upon the footing that that contractual option was an assignable option* and had in fact in the circumstances been assigned to the pledgee (assignee).[11]

McNair, J. also referred to the case of *Whiteley* v. *Hilt*[12] and said:

> It was only because the Court of Appeal came to the conclusion, on the facts of that case, that the original hire-purchase agreement was assignable that they limited the plaintiffs' right to recover in the same way as it had been limited by Channell, J. in . . . the *Belsize Case.*[13]

But, as for the contract in the *United Dominions Trust Case,* he stated: ". . . it is quite clear that by its terms, the hirer is prohibited from assigning

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[9] (1967) 1 W.L.R. at 300.
[10] *Ibid.*
[11] (1955) 1 W.L.R. at 723 (Italics added).
[12] (1918) 2 K.B. 808.
[13] (1955) 1 W.L.R. at 724.

or purporting to assign either the goods *or the benefit of the agreement.*"[14] For this reason, in the *United Dominions Trust Case,* McNair, J. held that the assignee of the hirer had acquired no interest in the goods from the hirer. Consequently, the measure of damages could not be the difference between two interests (namely, of the owner-finance-company and of the assignee): therefore, the measure of damages was the full value of the goods.

This conclusion in the *United Dominions Trust Case* is strengthened by Lord Denning's own analysis of *Wickham's Case* where the prohibition clause was very similar to that in the *United Dominions Trust Case.* His Lordship regarded the hirer's right under a hire-purchase agreement as a "proprietary right". If this is so, then the maxim *Nemo dat quod non habet* is attracted.[15] The conclusion in the *United Dominions Trust Case* would then be correct, in that damages would have to be calculated as between an owner (the finance company) and a converter with no interest in the goods, since the hirer was prohibited from passing any interest. For if the act of assignment by the hirer is a breach of the agreement of a kind that terminates it, then it follows that there cannot have been an assignment of the contractual (and statutory) rights to purchase; because those rights, though assignable without breach, have been extinguished by the automatic termination of the hire-purchase agreement. "Yet the cases do not appear to require this conclusion".[16]

If they did, it would follow not merely that there was no conflict between the *Belsize Case* and the *United Dominions Trust Case* (so that the overruling of the latter in *Wickham's Case* was not necessary to the decision, and must be treated as mere *obiter dictum*), but that the *United Dominions Trust Case* must have been correctly decided. If that is so, then *Wickham's Case,* where the same type of prohibition clause is to be found in the hire-purchase agreement, must have been wrongly decided unless the two can be distinguished. The writer has assumed (and it is submitted) that the cases are not distinguishable in any relevant way.

The decision of the High Court of Australia in *Williams* v. *Frayne*[17] might also be used to support McNair, J.'s approach.[18] The High Court there held that if a covenant against assignment contained in an agreement for a lease has been broken, the agreement is not specifically enforceable. If this principle is applied to a hire-purchase agreement, then it follows that once the hirer has broken the covenant against assignment, he cannot sue for specific performance to enforce the hire-purchase agreement. Thus, he cannot force the owner-finance-company to allow him to exercise his option to buy. Since the finance company does not have to sell to the hirer, it follows that it is entitled to recover the goods.

The assignee's rights cannot be greater than the hirer's so that the finance company could recover the goods from the assignee as well. Therefore, the

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[14] *Ibid.*

[15] That doctrine is usually applied to the passing of title. But title is just an absolute form of proprietary interest. There is, in principle, no *a priori* reason why the rule should not apply to lesser types of proprietary interest. Moreover, the fundamental idea behind both the "*Nemo dat . . .*" maxim and the hire-purchase agreement is the protection of the owner from having his property dealt with by persons in an unauthorized manner. Therefore, if Lord Denning's analysis of the nature of the hirer's interest as being of a proprietary nature is correct, the "*Nemo dat . . .*" maxim should apply.

[16] R. Else-Mitchell and R. W. Parsons, *Hire-Purchase Law* (4 ed. 1968) 90. *Cf.* R. M. Goode, *Hire-Purchase Law and Practice* (1962) 280.

[17] (1937) 58 C.L.R. 710 at 730-1.

[18] This argument is perhaps reinforced by the unquestioning acceptance of *Williams* v. *Frayne* in G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract* (Australian ed. by J. G. Starke and P. F. Higgins, 1966) 298, and in R. M. Goode and J. S. Ziegel, *Hire Purchase and Conditional Sale* (British Institute of International and Comparative Law, 5 *Commonwealth Law Series,* 1965) 140-3.

correct measure of damages is the value of the goods at date of conversion (or return of the goods) with damages for their detention.[19] In the alternative, this case supports the proposition that even if the breach is not such as to terminate the agreement, so that an interest in the goods does pass to the assignee, still that assignee's interest may be defeasible by reason of the assignment having been in breach of the agreement.[20]

*Reliance on the Belsize Case*

Clearly, if a hire-purchase agreement contains no provision prohibiting the hirer from assigning his option to purchase, a purported disposition of the absolute property in the goods will be effective to pass the option to purchase. But the assignee acquires the option subject to the same restrictions as those imposed on the hirer; and since the hire-purchase agreement is determinable as against the hirer by reason of the hirer's breach in purporting to dispose of the absolute property in the goods it follows that the agreement is likewise determinable as against the assignee. In the much-quoted decision in the *Belsize Case*[21] this vital fact appears to have been overlooked.

In that case the plaintiffs argued that the hirer's breach in pledging the goods determined the bailment, with the result that the hirer's limited property in the goods immediately ceased, so that they had no interest capable of being transferred to the defendant. The defendant, on the other hand, contended that the breach did not *ipso facto* determine the agreement and that the pledge was effective to vest in him the hirer's limited interest in the goods; and that he was accordingly entitled to retain the goods upon tendering the balance due under the hire-purchase agreement and was not liable for the full value of the goods, since he would be given credit for the amount already paid by the hirers under the agreement.

The plaintiffs were held not entitled to the full value of the goods, but only to the sum remaining unpaid under the hire-purchase agreement. In the course of his judgment, Channell, J. said that an agreement of hire-purchase does not *ipso facto* determine on breach, unless the agreement itself provides for automatic termination in such event.[22]

At this juncture, however, the learned Judge directed his argument to a conclusion which is respectfully submitted to be quite unjustified by the premises. He stated: ". . . until it (the right to terminate the agreement) is exercised the right of the hirers subsists to pay all the purchase money and acquire the property in the cab."[23]

But this phraseology is misleading. The hirers might certainly have tendered the unpaid balance had they so desired, but the owners would have been under no obligation to accept it. They would have been quite within their rights in refusing to accept the sum tendered by reason of the hirer's breach and to terminate the agreement forthwith. Now since the defendant, as assignee of the hirers, could not acquire any greater rights than those possessed by the hirers themselves, it necessarily follows that the plaintiffs were entitled to say to the defendant, as they could have said to the hirers: "We refuse to accept the money you have tendered because there

[19] Though admittedly it is not clear from this decision whether credit could have been given for instalments paid or not, which is a crucial question.

[20] Else-Mitchell and Parsons, *op. cit. supra* n.16 at 87.

[21] *Supra* n.8.

[22] *Id.* at 252. Note that the bailment is terminated by the breach though not the agreement of hire-purchase—a further illustration of the non-contractual basis of bailment. See A. E. Tay, "The Essence of a Bailment: Contract, Agreement or Possession?" (1966) 5 *Sydney L.R.* 239.

[23] (1914) 1 K.B. at 252. *Cf.* Goode, *op. cit. supra* n.16 at 275-6.

has been a breach of the hire-purchase agreement and we propose to exercise our right to treat the agreement as at an end."

The defendant's interest in the goods, like that of the hirers, would thereupon determine and they could thus recover the goods or their value as at the date of conversion.

It may be noted that in the *Belsize Case* the plaintiffs had in fact demanded the return of the goods by the defendant, and this clearly evidenced an intention on the part of the plaintiffs to treat the agreement as at an end. That being so, the defendant's interest in the goods cannot possibly have continued to exist later than the demand made against him by the plaintiffs. It must follow that at the date when proceedings were instituted against the defendant, he had ceased to have any interest in the goods and was liable to pay their value in full without being given credit for the sums paid by the hirers under the agreement. For these reasons it is submitted that the *Belsize Case* was wrongly decided.

Four years after the *Belsize Case* came the decision in *Whiteley Ltd.* v. *Hilt*.[24] This case, a leading authority in hire-purchase law, is sometimes cited in support of the proposition enunciated by Channell, J. in the *Belsize Case* that where the hirer wrongfully purports to sell the absolute property in the goods the assignee is entitled, if the agreement did not prohibit the assignment of the hirer's interest, to retain the goods upon payment of the balance outstanding under the hire-purchase agreement. This, in fact, is far from the case. Closer examination of the judgments delivered in *Whiteley Ltd.* v. *Hilt* reveals that although the facts were in many respects similar to those obtaining in the earlier case, the decision turned on a quite different point. The circumstances giving rise to the proceedings were as follows:

The plaintiffs let a piano to a Miss N. under a hire-purchase agreement which contained (*inter alia*) a provision that the hirer should not remove the piano from her flat. In the event of any breach by the hirer of the provisions of the agreement (including the provision above referred to and the terms as to payment of the hire-rent) the plaintiffs were empowered to resume possession of the piano, but if they did so the hirer would be entitled to resume the hiring on payment of the arrears of hire-rent. Subsequently, the hirer, not having previously committed any breach of the agreement, sold the piano to the defendant, a new tenant of the flat, where the piano continued to remain. Some while after, the payment of the hire-rent having fallen into arrear, the plaintiffs discovered the sale and demanded the return of the piano. This being refused they instituted proceedings against the defendant claiming the return of the piano or alternatively its full value by way of damages. The Court of Appeal, reversing the decision of the Divisional Court, held that the plaintiffs were not entitled to the specific delivery of the piano, nor to its full value, but only to damages representing the plaintiffs' interest in the piano, namely the amount still required to be paid for the exercise of the option to purchase.

It will be observed that in this particular case the sale by the hirer did not constitute a breach of any express provision of the agreement. It was, of course, an act inconsistent with the bailment part of the contract in that by implication it constitued a denial of the plaintiff's title, but the Court held that although this entitled the plaintiffs to terminate the agreement if they so desired, the breach did not *ipso facto* determine the agreement. To this extent the decision supports the judgment of Channell, J. in the *Belsize Case*.

There is, however, one vital fact which distinguishes this case: namely, the absence of any prohibition against the assignment of the right of the hirer to resume possession of the goods after seizure by the owners, upon

[24] *Supra* n.12.

payment of the outstanding arrears. This right of "redemption" was held to be assignable. Accordingly the defendant, as assignee of the hirer's rights, was entitled to retain possession of the piano on tendering the balance due under the agreement; and it is for this reason that the plaintiffs were held disentitled to recover the full value of the goods. Had there been no redemption clause the plaintiffs would have been entitled to immediate possession, and upon their electing to treat the hirer's breach as terminating the agreement the interest of the hirer—and therefore of the assignee also—would immediately have come to an end, thereupon entitling the plaintiffs to specific delivery of the goods or payment of their full value.

It will thus be seen that the judgment in *Whiteley Ltd.* v. *Hilt* in no way supports the decision of Channell, J. in the *Belsize Case*, which continues to stand alone.

The decision in *North Central Wagon and Finance Co. Ltd.* v. *Graham*[25] has, it is submitted, established the rule which ought to have been applied in the *Belsize Case*: namely, that the owner of goods let out on hire purchase is entitled to recover from the hirer's assignee the goods themselves or their value in full, without giving credit for sums paid under the hire-purchase agreement, if the owner can establish that at the time he instituted proceedings against the assignee he had as against the hirer a right to immediate possession, and that all conditions precedent to the exercise of such right have been fulfilled.

*Reliance on Pledge Cases*

It is submitted that it is wrong to rely on pledge cases as being in any way analogous to the hire-purchase cases, and that the pledge cases should thus be disregarded in the context of hire-purchase cases if the question is the assignment of rights under such agreement by means other than a pledge. There are three general reasons for this.

The first arises from the weakness in Lord Denning's approach in treating the rights of the hirer as a "proprietary interest". Accepting Lord Denning's approach, a hirer under a hire-purchase agreement is assigning a "proprietary interest"; but a hirer who pledges the goods (or his interest therein) is not dealing with any "proprietary interest" because the Privy Council has ruled in *The Odessa*[26] that "the special property it [the pledge] is said to create is in truth no property at all". Thus, if the hirer pledges the goods, and no proprietary interest passes to a pledgee, then the hirer has not parted with any proprietary interest. If the pledgee is in possession of the goods in which he has no proprietary interest then he is a converter *vis-à-vis* the owner; in such cases there are no conflicting interests between the owner and the pledgee; and consequently, the measure of damages is the full value of the goods. Thus, the *Belsize Case* was wrongly decided.[27]

The second point is that an essential element of a pledge is the pledgee's right to sell or assign (on default by the pledgor); if this element is excluded from the pledge agreement by a prohibition against sale or transfer by the pledgee then the agreement is no longer a pledge.[28] However, in a hire-purchase agreement the essential element is the hirer's option to buy, *not* his right to sell or assign the goods. Without this latter right, the agreement is still one of hire purchase. Thus, words prohibiting selling or assigning of the goods can be given their full effect while in a pledge agreement they cannot.

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[25] (1950) 1 All E.R. 780. See Goode, *op. cit. supra* n.16 at 279.
[26] (1916) 1 A.C. 145 at 159 (Lord Mersey).
[27] It follows that *Johnson* v. *Stear* (1863) 15 C.B. (N.S.) 330, 143 E.R. 812, and *Donald* v. *Suckling* (1866) L.R. 1 Q.B. 585, were also wrongly decided.
[28] It is then a lien only.

The third point is that, in a pledge case, the person with possession whose right to assign may be prohibited by an agreement is the *creditor;* in a hire purchase agreement this position is occupied by the debtor. Policy would dictate a limitation on a *debtor's* right to assign the goods rather than on the *creditor's* right to do so.

For all the above reasons, a pledge case like the *Belsize Case* should not be relied on in a hire-purchase situation. Therefore, it is submitted that it ought not to have been relied on in *Wickham's Case.*

*Possible Justification of Wickham's Case*

The cases referred to in *Wickham's Case,* as well as the judgments in that case itself, made no attempt to analyse the situation in terms of the assignability of the hirer's rights or the assignment of a legal chose in action. Now, a legal chose in action is inherently assignable (by the mode laid down in s. 12 of the Conveyancing Act), apart from those which public policy prohibits.[29] Thus, despite a clause in a contract prohibiting assignment of the legal chose in action created by such contract, the chose is assignable although this will make the assignor liable to the other contractual party in damages for breach of contract.

The application of this doctrine to hire-purchase agreements was first tentatively adopted in an *obiter dictum* by the Court of Appeal in the case of *Spellman* v. *Spellman.*[30] In that case, a wife alleged that her husband had assigned to her by way of gift a car which he had bought in his own name on hire-purchase. The Court held that the agreement between the husband and wife was not intended to create legal relations between them and so any (oral) contract of assignment between them was unenforceable. Nevertheless, Danckwerts, L.J. in an *obiter dictum* in that case considered the effect of the prohibition clause in the hire-purchase agreement against assigning rights thereunder, and considered that the clause by itself would not have been fatal to the wife's claim.

> It is possible . . . that if such an equitable assignment had been made, there would have been (as between husband and wife) an assignment of the benefit of the hire-purchase agreement with, perhaps, the obligation to indemnify the husband against the various liabilities which have to be carried out in order to comply with the terms of the hire-purchase agreement.[31]

The authority relied on to establish this proposition was the case of *Re Turcan.*[32] The facts of that case, however, are somewhat far removed from hire-purchase agreement cases. There a marriage settlement contained a covenant by the settlor to settle all after-acquired property. Later the settlor effected a life insurance policy which contained a prohibition clause against "assignability" of the same. The Court of Appeal held that this clause prohibited assignment at law though not in equity. Not only are the facts far removed from hire purchase, but the *ratio decidendi* (that the clause prohibits assignment only at law, not in equity) had not been at issue in the hire-purchase cases. In *Wickham's Case* the assignment was held valid (despite the prohibition clause) at law. Further, Willmer, L.J. in *Spellman* v. *Spellman* was not persuaded that it was possible to overlook the specific provision in the hire-purchase agreement whereby the husband had covenanted that he would not assign or charge the goods or the benefit of the agreement.

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[29] Such as a bare right to sue. This does not apply to an option under hire-purchase agreement.

[30] (1961) 1 W.L.R. 921, discussed in A. G. Guest, Note (1962) 78 *L.Q.R.* 30.

[31] (1961) 1 W.L.R. at 925.

[32] (1888) 40 Ch. D. 5.

In support of the chose in action argument, it has been stated that a hire purchase agreement is a "complex contract", in which it does not follow that because the bailment part of the contract is at an end "the other part of the contract, which confers a proprietary interest (*viz.* the chose in action), is also at an end".[33] That is, this approach treats the hire-purchase agreement as if it were two contracts, namely Contract (1), a bailment, and Contract (2), the grant of a "proprietary interest" or chose in action to the hirer. It is argued that breach of the contract of bailment does not terminate the contract granting the proprietary right. This approach may be open to criticism since in effect there is only one contract (no matter how "complex" it may be).

*New South Wales Legislation*

The issues discussed above do not arise in New South Wales. By s. 9(1) of our Hire Purchase Act, 1960, the "right title and interest of a hirer under a hire-purchase agreement may be assigned with the consent of the owner or, if his consent is unreasonably withheld, without his consent".

It is submitted that this provision overcomes all the problems discussed above. If the hirer's rights and interest under the agreement are "proprietary interests" (as Lord Denning seems to think), then this provision excludes the "*Nemo dat*" principle. If the interest of the hirer is regarded as a legal chose whose assignment, it is submitted, may be prohibited as in *United Dominions Trust*, then s. 9 overcomes this since such prohibition is void under s. 36(1)(i), and the owner prohibiting assignment as in the *United Dominions Trust Case* would be guilty of an offence against the Hire Purchase Act (s. 36(2)) by trying to exclude one of its provisions (namely, s. 9 as to assignability of right, title and interest under a hire purchase agreement). It is submitted that the acceptance by the English legislature of the Law Society's recommendations in its May 1963 Memorandum on Hire-Purchase submitted to the Board of Trade, with a clause very similar in wording to our s. 9, would solve the above problems in England.[34] In New South Wales, therefore, the results of the *Belsize Case* and *Wickham's Case* apply by force of s. 9 of the Hire Purchase Act.

*Conclusions*

1. The result achieved in *Wickham's Case* is more equitable than the result achieved in *United Dominions Trust Case*.[35]
2. On legal principles, however, the reasoning of the Court of Appeal is, with respect, questionable. The unanalytical disposal of the *United Dominions Trust Case* has little to recommend it, while reliance on a pledge case (such as the *Belsize Case*) is, it is submitted, wrong.
3. It is respectfully submitted that the *United Dominions Trust Case* was correctly decided; and this was assumed by the English Law Society in its 1963 recommendation. Further, the chose in action approach begun in *Spellman* v. *Spellman*, at least insofar as it is based on the old case of *Re Turcan*, has little merit.
4. In New South Wales, however, the situation appears to be clear[36] owing to the statutory power to assign which changes the original position as it existed from the days of *Helby* v. *Matthews*[37] through to the *United Dominions*

[33] *Whiteley* v. *Hilt supra* n.12 at 822 (Warrington, L.J.).
[34] See Cheshire and Fifoot, *op. et loc. cit. supra* n.18.
[35] This may be the reason for the High Court's adoption of a similar approach to that of Lord Denning in *Healing Sales Pty. Ltd.* v. *Inglis Electrix Pty. Ltd.* (1968) 42 A.L.J.R. 280. However, that was not a case on hire-purchase law.
[36] At least where s. 9 of the Hire Purchase Act, 1960 applies. *Supra* n.3.
[37] *Supra* n.2.

*Trust Case.* Nor would conditional sale agreements lead to any different results since these, in New South Wales, are caught by the Hire Purchase Act (subject to certain qualifications) through its definition of "hire-purchase agreement" in s. 2 as including a bailment coupled with an agreement to buy.[38]

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## FREEDOM OF INTERSTATE TRADE AND JUDICIAL DISCRETION

### *FREIGHTLINES & CONSTRUCTION HOLDING LTD.* v. *NEW SOUTH WALES*

### THE PROBLEM

Twenty years ago, Dixon, C.J., commenting on the fact that not every statute which interfered with inter-State trade, commerce and intercourse was obnoxious to the "absolute freedom" guaranteed by s.92 of the Commonwealth Constitution, said:

> But there has not been worked out a logical distinction between the restrictions and burdens which may not be imposed upon inter-State commerce and the directions which may be given for the orderly and proper conduct of commerce. It is this which I think accounts more than any other consideration arising from s.92 for the widely divergent conclusions that have been reached as to the application of the provision in specific cases.[1]

The same may be said of charges levied by States as a compensation for the wear and tear to facilities provided by them and used by inter-State traders. In 1955 the High Court said that "if a charge is imposed as a real attempt to fix a reasonable recompense or compensation for the use of the highway and for a contribution to the wear and tear which the vehicle may be expected to make it will be sustained as consistent with the freedom s.92 confers upon transportation as a form of inter-State commerce".[2] Yet it is not clear how such a charge may be adjudged a real attempt to fix a recompense for wear and tear, and not "an exaction for the privilege of carrying on a transaction of inter-State trade"[3] which is invalid by reason of s.92.

In short, the above two types of law, and perhaps others *ejusdem generis* with them, are outside the prohibition of s.92, if they conform to a certain standard. But what that standard is has not been carefully scrutinized; and existing *dicta* tend to be circular and only beg the question.

### THE PRESENT CASE

In *Freightlines & Construction Holding Ltd.* v. *State of New South Wales*[4] the appellants challenged the validity of the Road Maintenance (Contribution) Act, 1958-65 (N.S.W.) on the ground that it infringed s.92.

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[38] I.e., the situation in *Lee* v. *Butler supra* n.2.

[1] *Bank of N.S.W.* v. *The Commonwealth* (1948) 76 C.L.R. 1 at 389.

[2] *Hughes & Vale Pty. Ltd.* v. *State of N.S.W. (No. 2)* (1955) 93 C.L.R. 127 at 175 (*per* Dixon, C.J., McTiernan and Webb, JJ.).

[3] *Id.* at 174.

[4] (1968) A.C. 625; (1967) 116 C.L.R. 1.