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## SOME REFLECTIONS ON HOLROYD v. MARSHALL — II

In a previous article<sup>1</sup> the question was discussed as to whether the efficacy of an equitable assignment of future property in a case where the consideration for the assignment has been executed depends on the availability of specific performance for the contract to assign. In the course of that article it was assumed that in such cases the transaction remains purely a matter of contract until the property comes to the assignor, and is then converted immediately to a conveyance in equity. There is, however, some authority against this proposition, and the chief purpose of this article is to discuss the validity of the assumption made earlier. At the same time, however, the opportunity will be taken to examine the extent to which the doctrines of specific performance and equitable assignment may at present be said to apply in cases of sale of goods, for it was a fundamental point in the earlier article that they do not apply to such cases, and there is more authority against that view than there was at that time room to discuss.

The assumption referred to in the previous paragraph rests, of course, on the commonly held view that "a contract which engages to transfer property, which is not in existence, cannot operate as an immediate alienation, merely because there is nothing to transfer"<sup>2</sup>. One line of cases<sup>3</sup>, however, appears to deny this proposition, and judges have referred to the assignee as having a "prospective interest" in the property even before its acquisition by the assignor. The basic structure of these cases is that after payment of a loan and the promise to give security over future property, the borrower (assignor) has been adjudicated bankrupt and has received his discharge in bankruptcy. The lender (assignee) has not proved either his debt or his security in the bankruptcy proceedings. The property has only come into the borrower's hands following the discharge. In such cases there are two obvious arguments in favour of holding him free from any liability to perfect the assignment or from any equitable assignment of the property. First, until the property actually comes into his hands, there can be no assignment of it either at law or in equity. Until that moment, therefore, his obligation can only rest in contract, and the discharge in bankruptcy should free him from his contractual liabilities. Secondly, the discharge in bankruptcy undeniably puts an end to the obligation to repay the loan; and since the security is ancillary to the loan, it should go along with the liability to repay. Moreover, if the object of proceedings in bankruptcy is to allow a debtor a new start in life, that object would be defeated

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1. "Some reflections on Holroyd v. Marshall" (1969) 3 *Adelaide Law Review* 360.
2. *Per* Lord Westbury L.C. in *Holroyd v. Marshall* (1862) 10 H.L.C. 191 at 211, 11 E.R. 999 at 1006.
3. *In re Lind* [1915] 1 Ch. 744, [1915] 2 Ch. 345 (C.A.); *Performing Rights Society v. Palace of Varieties* [1924] A.C. 1, *per* Lord Phillimore; *Palette Shoes Pty. Ltd. v. Krohn* (1937) 58 C.L.R. 1.

by enforcing a covenant relating to property which came into his hands only after the bankruptcy. All these reasons have been accepted by courts at various times. In *Thompson v. Cohen*<sup>4</sup>, the Court of Queen's Bench decided that where there was only a licence to seize after-acquired property the licence was merely ancillary to the debt, and was destroyed along with it. Alone of the judges who decided the case Blackburn J. distinguished cases in which there is a mere licence to seize from cases of equitable assignment; the views of his colleagues on the matter are best seen from the fact that Mellor and Lush JJ. held that the principles which governed *Thompson v. Cohen* were equally applicable in *Cole v. Kernot*<sup>5</sup>, decided at the same time, which was undoubtedly a case which concerned an equitable assignment, and were supported in this view by Cockburn C.J. Then in *Collyer v. Isaacs*<sup>6</sup>, Hall V.C. accepted the distinction drawn by Blackburn J., and held that an assignment of future goods to be brought on to a given property survived the discharge in bankruptcy; he ascribed the decision in *Cole v. Kernot* to the different views taken by Courts of Equity and Courts of Law as to the operation of instruments dealing with non-existent property. He was, however, promptly reversed by the Court of Appeal; and since the members of the court included Jessel M.R. and Baggallay L.J., it can scarcely be thought that their views were tainted with the heresies inspired by a strict common-law background. Jessel M.R. based his decision on each of the three reasons mentioned earlier: that the covenant to transfer future property was itself a contract giving rise to a liability provable in the bankruptcy, and so was destroyed by the order of discharge; that it would be strange if the debt were barred by the order, and yet the ancillary covenant were not; and that to hold the debtor bound by such covenant might lead to the consequence that he could never get free nor obtain a fresh start in life. He appears to have attached most weight to the second of these reasons, though clearly accepting them all; and it may be that his specific refusal to say that a covenant to settle after-acquired property contained in a marriage settlement or a definite covenant to settle a specific property non-existing at the time would similarly fail to survive a discharge in bankruptcy should be ascribed simply to the fact that such covenants cannot easily be construed as merely ancillary to an obligation which is itself destroyed by the discharge. If this is so, then such covenants might nevertheless be destroyed if they themselves could be described as liabilities provable in the bankruptcy. Baggallay and Lush L.JJ. both held that the covenant to assign the future-acquired property gave rise to a purely contractual obligation until the property came into existence and that, as such, it was destroyed by the discharge in bankruptcy of the assignor.

On the other hand, it has also been held that the equitable assignment is effective despite the intervening discharge in bankruptcy. There is one reason for such a result being desirable: normally it is open to a secured creditor to rely on his security rather than to prove in the bankruptcy, and the creditor should not be adversely affected by the mere fact that his security has not become available before the discharge. This point has, of course, been made;

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4. (1872) L.R. 7 Q.B. 527.

5. (1872) L.R. 7 Q.B. 534n.

6. (1881) 19 Ch.D. 342 (V.C. and C.A.).

in *In re Lind*<sup>7</sup>, the most important of the cases in which an equitable assignment has been held to survive a discharge in bankruptcy, Swinfen Eady L.J. said that "the mortgagees . . . elected to rely upon their security, and not to prove, and therefore as mortgagees they stand outside the bankruptcy"<sup>8</sup>. The difficulty is to find a way of allowing the assignee to rely on his security in the light not only of the reasoning in *Collyer v. Isaacs* which has already been discussed, but also in the light of the fact that in the same case the Court of Appeal held that the section of the Bankruptcy Act which recognises the power of a secured creditor "to realise or otherwise deal with his security"<sup>9</sup> applies only to property existing before the date of the discharge in bankruptcy.

The first stage in such a process must clearly be to divorce the security transaction from the debt, so that it cannot be said that it is ancillary to the debt in such a way as to be destroyed along with it. This is less difficult than the judgment of Jessel M.R. in *Collyer v. Isaacs* might lead one to expect; for in the great majority of cases courts have separated the contract of loan from the covenant for security. The earliest case in which this was done was *Lyde v. Mynn*<sup>10</sup>, where Lord Brougham L.C. (affirming a decision of Shadwell V.C.) held that a did not fall in until after the convenator's discharge in bankruptcy, survived it, despite the fact that the discharge destroyed the liability to pay the annuity. The loan and the security aspects of a transaction were again distinguished in *Robinson v. Ommanney*<sup>11</sup>, a decision to which Jessel M.R. was himself a party. A Miss Bohn had borrowed money, and as security assigned to the lender her life interest under a will, covenanted that she would make a will exercising the general power of appointment which she possessed in the fund in his favour, and further covenanted that she would not revoke that will. She was discharged in bankruptcy in 1862, and between that time and her death in 1880 revoked the will she had made pursuant to the transaction. Kay J. and the Court of Appeal allowed the assignee of the lender to bring an action for damages for breach of the covenant not to revoke the will against her estate. It was argued that the discharge of the debt automatically involved the discharge of the ancillary security, but this was rejected; Jessel M.R. himself said that there was a mortgage of the life interest, which was perfectly good, and that the extra covenant was ancillary to the mortgage, and not to the debt. Finally, in *In re Lind*, Banks L.J. put it that the question of whether the security is ancillary to the debt is a question of construction; that in the case before him covenant for consideration paid to charge an annuity upon an expectancy, which (again an assignment of an expectancy with covenants for further assurance as security for a debt) the security was intended to be in addition to the personal covenant to pay, and that any covenant for further assurance was ancillary to the security and not to the debt<sup>12</sup>. If this be correct (and it is

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7. (1915) 2 Ch. 345 (C.A.).

8. *Id.* at 360.

9. 46 & 47 Vic. s.52 (Bankruptcy Act 1883 (U.K.)) s.37. See now 4 & 5 Geo. V c.59 (Bankruptcy Act 1914 (U.K.)) s.30; Bankruptcy Act 1966 (C'wth) s.82.

10. (1833) 1 My. & K. 683, 39 E.R. 839.

11. (1883) 23 Ch.D. 285.

12. Jessel M.R. said in *Collyer v. Isaacs* that he thought that "where there is a general liability in respect of a debt which is barred by a discharge in bankruptcy, and a liability in respect of a covenant to secure that debt, the bankrupt then is not only discharged from the principal liability to pay the debt, but also from the ancillary

submitted that it is) then the judgment of Jessel M.R. in *Collyer v. Isaacs* must be taken to refer to the construction of the particular deeds before him, and not to express any general principle wide enough to cover all security transactions.

If the security is thus separated from the debt, there remains the argument that where the security is to be over future property there can only be a contractual obligation until the property comes into the hands of the assignor, and that such an obligation is itself a liability provable in a bankruptcy and so a liability destroyed by the discharge of the assignor. Three ways of refuting this have been canvassed by the courts. First, in *Lyde v. Mynn*, decided in 1833, Lord Brougham L.C. held that a covenant to settle an expectancy is incapable of valuation, and so not provable in the bankruptcy. It is doubtful whether this was ever wholly valid: if the covenant is part of a security transaction then breach of the covenant may be worth nothing if the expectancy never falls into possession but can never be worth more than the value of the debt. The minimum and maximum value to be attached to the breach are thus known; even the Bankruptcy Act of 1825<sup>13</sup> instructed the Court to value debts payable upon contingencies; and it should have been possible to fix some value on the possibility of the covenant being broken. In any event, since the widening of the scope of liabilities provable in the bankruptcy brought about the Act of 1869<sup>14</sup> this argument does not seem to have been repeated; although if it is valid it would still prevent the discharge in bankruptcy from affecting the covenant. Secondly, it has been thought that a covenant to settle future-acquired property, particularly when entered into as part of a marriage settlement or security transaction, does not fall within the statutory definition of "liability"<sup>15</sup>. This view stems from the well-known statement of the Earl of Selborne in *Hardy v. Fothergill*<sup>16</sup> that some kinds of contract ought to be excluded from that definition "as having a different object from the payment of money in any contingency; although if they were broken a jury might award damages for their breach", and apparently equated with such contracts others "in which

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liability to give security for it on his after-acquired chattels . . ." Warrington J., at first instance in *In re Lind* thought that the assignment in *Collyer v. Isaacs* "was much in the nature of a debenture of a company, namely a floating security to be crystallised by seizure under the power of sale". In the Court of Appeal, Bankes L.J. was prepared to accept this, but Phillimore L.J. took the view that whether this was so or not, the case had not been decided on that basis. The discussion leaves the principal question as one of construction, but seems to accept a rule that a covenant to assign *all* the future property of a company could never be valid. It is submitted that this is wrong, and that every case depends whether, on construction of the relevant documents, the covenant is found to be independent of or ancillary to, the undertaking of a personal obligation. There may, however, be a principle of public policy preventing an individual from depriving himself of all means of subsistence (*In re D'Epineuil* (1882) 20 Ch.D. 758; *In Re Reis* [1904] 2 K.B. 769).

13. 6 Geo. IV c.16 s.56.

14. 42 & 33 Vic. c.71, s.32. But even should the argument retain any force it would not have assisted the assignee in any of the cases now under review, for the creditor who thinks his debt impossible to value must obtain a certificate from the Court that it is impossible to value it: see now Bankruptcy Act 1914 (U.K.) s.30(7); Bankruptcy Act 1966 (C'wth) s.82(7).

15. Now contained in Bankruptcy Act 1914 (U.K.) s.30(8); Bankruptcy Act 1966 (C'wth) s.82(8).

16. (1888) 13 App. Cas. 351.

an injunction or specific performance would be the most proper remedy". Presumably the reference to specific performance in this dictum is to the remedy of specific performance properly so-called rather than to the broader notion which includes the doctrine of equitable assignment or lien, but it does appear to embody a policy that where a contract is such that a court should enforce it specifically rather than award damages for its breach the contractual obligation is outside the definition of "liability". In any event, reliance has been placed on this dictum in cases of equitable assignment or lien, though the leading authority is a case concerning an after-acquired property clause in a marriage settlement rather than in a security transaction. The marriage settlement in *In re Reis*<sup>17</sup> contained a covenant by the husband to settle all his future property, other than business assets for the trusts of the settlement and the question before the Court was whether a house and furniture purchased by him after his discharge in bankruptcy were bound by the settlement. The Court of Appeal unanimously held that they were, Cozens-Hardy and Stirling L.JJ. on the ground that the appropriate remedy for breach of the covenant was specific performance and that the discharge did not bar the right to specific performance, and Vaughan Williams L.J. on the ground that the covenant had been made "with a different object from the payment of money in any contingency". It would seem right that this latter consideration be applied to covenants to give security; where there is a debt with a personal covenant to repay and an additional covenant to give security the covenant to repay looks to a payment of money; the additional covenant looks to the situation where payment is not or cannot be made and it is not worthwhile to contemplate payment at all<sup>18</sup>. The award of damages for the breach of such a covenant would scarcely be thought of by the parties, and hence specific performances or equitable assignment would be the only appropriate remedies. Yet in *In re Lind* Phillimore L.J. thought that the covenant to give security was not within the scope of contracts outside the Bankruptcy Act according to *Hardy v. Fothergill*, though Bankes L.J. found no difficulty in applying the view expressed by Cozens-Hardy and Stirling L.JJ. It is submitted that the views of the Court of Appeal in *In re Reis* and of Bankes L.J. in *In re Lind* are correct; if this is so there can be no substance in the problem which puzzled Phillimore L.J. in the latter case: "I do not understand . . . why, being still only a contract, [the assignment] is not discharged by a discharge of contracts".

The third way of denying that the discharge in bankruptcy bars all contractual obligations, including the obligation to assign the future property, involves a denial that the obligation which arises under the doctrines of *Holroyd v. Marshall* and *Tailby v. Official Receiver* is contractual at all. The assignment is regarded as complete as soon as the property reaches the assignor, and it is wholly unnecessary for him to enforce the assignment by action or in any other way. This method was espoused in various forms by all the judges who considered *In re Lind*. Warrington J. at first instance put the point thus: "In the present case I am of opinion that the trustees were at the time of the bankruptcy entitled not merely to the benefit of a personal obligation on the part of the mortgagor resulting in a claim for damages, but to a

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17. [1904] 2 K.B. 769.

18. Horak, "Insolvency and Specific Performance" (1918-19) 31 H.L.R. 702.

prospective interest in the distributive share in question taking effect automatically on the death of [the testatrix]<sup>19</sup>. Bankes L.J. agreed with this, saying that in equity there is an enforceable security as against the property assigned quite independent of the personal obligation of the assignor arising out of his imported covenant to assign; the security might not be enforceable until the property comes into existence, but the security is there, "the assignor being the bare trustee of the assignee to receive and hold the property when it [comes] into existence". Swinfen Eady L.J. did not go quite so far as to consider prospective conveyances, but nonetheless thought that the fact that the property is bound as soon as it comes into existence and the assignor regarded as a trustee indicates that the right of the assignee does not merely rest in, and amount to, a right in contract. Phillimore L.J. also considered that the right of the assignee is a higher one than simply that of being entitled to specific performance of a contract. All these views were repeated by Dixon J. in *Palette Shoes Pty. Ltd. v. Krohn*<sup>20</sup>, where he summarised the effect of *In re Lind* in these words: ". . . 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."

Whether the rule that the equitable right to the property on its coming into existence may survive a discharge of the assignor in bankruptcy is better justified by the use of the reasoning in *In re Reis* or by the notion that the right of the assignee is a higher right than a merely contractual one is open to doubt. The view that the assignee has a "prospective interest" in the property to be assigned runs perilously close to the forbidden concept of the "prophetic conveyance"<sup>21</sup>, a point that caused Phillimore L.J. some concern in *In re Lind*. The safest method of justifying the rule might perhaps be that, accepting that specific performance and equitable assignment are different remedies, they are nevertheless both remedies whereby a contractual obligation is specifically enforced. If it is right that a contract which is most appropriately enforced by a decree of specific performance is not barred by a discharge in bankruptcy, then it should equally be right that if it is most appropriately enforced by an equitable lien or assignment it should again not be barred. So far as transactions to convey future property as security for a debt are concerned, this result is desirable because the lender has at all times contracted on the basis that he is to be a secured creditor and it would be wrong to put him in the position of the general creditors of the bankrupt's estate, and because a contract to give security is not a contract for breach of which damages can be regarded as a suitable remedy and their payment is not contemplated even as a possibility by the parties. *Collyer v. Isaacs* should consequently be considered either as wrongly decided or as a decision reached on the construction of the particular documents under review, though this does not imply that Jessel M.R. was wrong in holding that until the future property comes into existence there

19. [1915] 1 Ch. 744 at 758.

20. (1937) 58 C.L.R. 1. See also *Norman v. Federal Commissioner of Taxation* (1963) 109 C.L.R. 9 at 24-25 *per* Windeyer J.

21. The phrase belongs to Pollock C.B. (*Belding v. Reed* (1865) 3 H. & C. 955 at 961, 159 E.R. 812 at 814.)

can only be a contractual obligation binding the assignor: this view is at any rate more comprehensible than the alternative one that the effect of the agreement is more than contractual without amounting to a conveyance, and is so preferable as a basis for the law.

The second matter for discussion is the applicability of the doctrine of equitable assignments or liens to cases of sale of goods; it has already been mentioned that it was basic to an earlier article to maintain that it did not so apply (which is the orthodox view). Nevertheless, the authorities which accept it have been subjected to severe criticism<sup>22</sup>, and a word should perhaps be said in their defence. The principal cases which establish the point are *Re Wait*<sup>23</sup> and *King v. Greig*<sup>24</sup>. Each concerned the sale of property which was not future property at all, but unascertained in the sense that they were sales of an unseparated part of a larger bulk: in *Re Wait* five hundred tons of wheat out of a cargo of a thousand tons and in *King v. Greig* seven thousand tons of cut timber from a particular estate on which there were at the time of the contract nine thousand tons of timber. In each case the full purchase price had been paid, but the seller had gone bankrupt before the buyer's purchase had been separated from the bulk, and so before the property in the goods sold had passed. In *Re Wait* the buyer claimed a right to specific performance under the Sale of Goods Act or alternatively an equitable lien over the whole cargo for his purchase; in *King v. Greig* the contract was outside the provisions of the Goods Act<sup>25</sup> and the question in issue was whether the buyer had a right to specific performance or held an equitable lien over the whole of the timber. In each case it was held that the buyer did not have a right to specific performance because the goods were not sufficiently identified for the remedy to be available; Atkin L.J. in *Re Wait* considered that the doctrine of equitable liens rested on the availability of specific performance, so that the conclusion that that remedy could not be granted also solved the issue of the equitable lien; Lord Hanworth M.R. in *Re Wait* and Cussen A.C.J. in *King v. Greig* thought that the doctrines of *Holroyd v. Marshall* and *Tailby v. Official Receiver* could not be applicable to cases of the sort before them because there is no ". . . identification of the thing or one of the things assigned, and because clearly in a contract such as this something remains to be done to define the rights of the parties"<sup>26</sup>. The crucial matter, then, appears to have been the question of identification rather than the fact that the contracts concerned were of sale of goods; this is particularly true of *King v. Greig*, where Cussen

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22. Pollock: (1927) 43 L.Q.R. 293; Dean, "Equitable Assignments of Chattels" (1932) 5 A.L.J. 289.

23. [1926] Ch. 962, reversed [1927] 1 Ch. 606 (C.A.).

24. (1931) V.L.R. 413 (F.C.). The case is not strong authority on any question relating solely to sale of goods: although Cussen A.C.J. apparently approved the majority judgments in *Re Wait*, his judgment is concerned principally with security transactions.

25. Goods Act 1928 (Vic.) s.5. The principal question in *King v. Greig* was whether the document recording the transaction should have been registered as a bill of sale under the Instruments Act 1928 (Vic.) Part VI. Section 5 of the Goods Act enacts that the Sale of Goods provisions are not to affect enactments relating to bills of sale. Moreover, in the Supreme Court it had been held that the transaction, though framed as a sale, was in fact one of security: section 5 would again except such a transaction from the provisions of the Goods Act.

26. (1931) V.L.R. 413 at 438-439.

A.C.J. treated contracts of sale and of mortgage as equivalent. But Lord Hanworth M.R. discussed the principle that specific performance would not normally be granted for a contract of sale of goods, where the goods were of an ordinary description; and Atkin L.J. placed considerable weight on the facts that the contract under review was one of sale of goods, and that the goods concerned were an ordinary commercial commodity.

Most of the criticism of these cases has been based on the view that the property in each case was sufficiently identified for a decree of specific performance to have been granted; apart from this it seems to have been considered a sufficient answer to the argument based on the non-availability of specific performance in ordinary mercantile contracts to assert that the doctrine of equitable lien does not depend on the availability of specific performance<sup>27</sup>. It is suggested that this is wrong, and that the mere fact that the purchase price has been paid should not increase the rights of the buyer, particularly when he is competing against other creditors in the bankruptcy of the seller. There seems to be no good reason why a buyer who has paid the purchase money should be treated as a secured creditor, or as otherwise outside the bankruptcy, while a buyer who has not should have to prove in the bankruptcy; each has entered into the same sort of commercial transaction with the seller; the difference in their loss is a difference in amount rather than in kind and is adequately reflected in the sum for which each person may prove in the bankruptcy. Again, as Atkin L.J. pointed out in *Re Wait*, there is no good reason why a buyer who has paid the price of goods should have any better right in the bankruptcy than the seller who has supplied them, and there is little doubt that the latter may only prove in the bankruptcy for the price. There are, however, two authorities which suggest that the right to specific performance and the doctrine of equitable assignments may be applicable even in the case of ordinary mercantile contracts for the sale of goods, and on these the critics of *Re Wait* and *King v. Greig* rely. One of these is *Holroyd v. Marshall*<sup>28</sup>. Lord Westbury began his judgment with the proposition that "a contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a Court of Equity will decree specific performance", and deliberately included contracts for the transfer of personal property within its scope, for he used as his illustration the following: "... a contract to sell five hundred chests of the particular kind of tea which is now in my warehouse at Gloucester is a contract relating to specific property and which would be specifically performed"<sup>29</sup>. Several points may be made about this passage. First, it does not distinguish between the case of specific performance (properly so called) of an executory contract and that of an equitable assignment where the consideration has been paid; so long as the former remedy is available, a sale of any specific personal property will amount to an equitable assignment of the goods, immediately upon the conclusion of the contract. Secondly, it is clearly obiter dicta: *Holroyd v. Marshall* was a case of a mortgage of future property, and not one of a sale of existing property. Thirdly, it was criticised in *Fry on*

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27. See particularly Ashburner, *Principles of Equity* (2nd ed., ed. Browne) at 257-259:

Dean (*loc. cit.*).

28. (1862) 10 H.L.C. 191, 11 E.R. 999.

29. *Id.* at 210-211.



*Specific Performance*<sup>30</sup> because it ignores the rule that specific performance is not normally granted of contracts for the sale of ordinary goods: it is there suggested that Lord Westbury's views on specific performance were not only in advance of his own, but of future times. (This criticism of Lord Westbury was repeated by Cussen A.C.J. in *King v. Greig*.) The passage cannot, therefore, be taken as being of great authority on the question of the specific assignment of goods which are the subject of a contract of sale, and may, on that point, be safely disregarded.

The other case which suggests that there may be an equitable assignment where there has been a contract of sale of ordinary commercial goods is *Hoare v. Dresser*<sup>31</sup>. In that case the plaintiff was a *del credere* agent who had undertaken to sell two thousand loads of timber for a Norwegian principal. He arranged contracts of sale and purchase of one thousand five hundred loads with buyers in London, Gloucester and Bristol; and he advanced £1000 to his principal on account of the purchase prices. After some delay, the principal loaded sufficient timber on to two ships to meet the contracts made with the purchasers in London and Gloucester, wrote to the plaintiff informing him of this fact, and sent him copies of the charterparties of the ships; but he sent the bills of lading in respect of the cargoes to the defendants, with instructions to deliver them to the plaintiff only if he accepted a bill of exchange for £1312, a condition which he had no right to impose. The plaintiff claimed that from the time of the loading of the two ships he had an equitable title to their cargoes, and that the defendants took the bills of lading subject to that title. The Lords Justices of Appeal upheld his claim<sup>32</sup>; the House of Lords refused it, but on the ground that the defendants took the bills without notice of his equitable title. All members of the House of Lords accepted the view that the plaintiff might have held an equitable title to the cargoes, though only Lord Chelmsford held that on the facts he had one; all held that the loading of the cargoes did not amount to a sufficient appropriation of them to a contract to pass the property in them at law. The nature of the equitable title received by the agent is difficult to discover. It can scarcely have arisen under the doctrine of *Tailby v. Official Receiver*, because the agent had made advances of £1,000, and that was much less than the whole purchase price. Nor can it have arisen under the lien often available to agents who have expended money on behalf of their principals, partly because an agent's lien is possessory, and the agent had never had possession of the cargoes, partly because a *del credere* agent is not allowed a lien on the goods for advances made in respect of the purchase price, because he has guaranteed payment<sup>33</sup>, and lastly because the Lords contemplated an equitable title to the whole of the cargoes, and not merely a lien on them for £1,000. It is difficult to see how an agent can obtain a legal title to the goods whose sale he is negotiating, and it is scarcely orthodox to suppose that he obtains an equitable one. The only possibility is that the contract contemplated receipt by the agent of the bills of lading and payment by him on receipt of them, followed by delivery of the goods by him in return

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30. 6th ed. (1921) s.82.

31. (1859) 7 H.L.C. 290, 11 E.R. 116.

32. (1857) 26 L.J. Ch. 51.

33. *Bowstead on Agency* (12th ed., 1959, ed. Griev) Art. 68, citing *Graham v. Ackroyd* (1852) 10 Hare 192.

for payment of the purchase price. Although such a course of dealing need not make him liable to the ultimate purchaser in respect of such matters as a breach of the implied warranty of fitness of the goods and the like, it might be considered to put him in a position vis-a-vis his principal which could be regarded as analagous to that of a purchaser of the goods. Some support for this view may come from the dicta of Lord Cranworth that have been used in criticism of *Re Wait*, for in them he refers only to contracts of sale: "The difference between law and equity I take to be this: that if there has been an engagement to appropriate a particular cargo, or an engagement to satisfy a contract out of a particular thing, such as to appropriate a part of a larger cargo, in either of those cases equity will interfere in the one case, to decree what is a specific performance, or something very like a specific performance of the contract to appropriate a particular cargo; and, in the other, to give the purchaser a lien upon the larger cargo, in order to satisfy him of the smaller demand . . ." <sup>34</sup>, and he goes on to give an illustration of a contract of sale of wheat. From this judgment, and from that of Lord Chelmsford, it appears that the basis of the equitable interest created in the agent was that the loading of two ships with timber precisely sufficient to meet two of the contracts of sale, coupled with the notification of their loading and the sending of copies of the charterparties to the agents amounted to an equitable appropriation of those cargoes to the contract for delivery of timber to the agent; and that somehow—perhaps as a consequence of the availability of specific performance, perhaps in some other unspecified way—the appropriation led to the transfer of an equitable title to the agent. If this is so, two points should be made. First, the concept of equitable appropriation has not reappeared in the cases since, and Atkin L.J. in *Re Wait* could not comprehend it. It is suggested that his bewilderment is justified. The facts in *Hoare v. Dresser* were much the same as those in *Wait v. Baker* <sup>35</sup>, which all members of the House of Lords accepted as binding on the point that there had been no appropriation at law. The reason for that decision was given by Parke B. in the Exchequer Chamber as being that there had only been an appropriation in the sense that the vendor had chosen some corn to offer to the purchaser; he rejected an argument that the facts had shown that both parties had agreed on the specific article in which the property was to pass, and that nothing had remained to be done in order to pass it. If that argument had been maintainable, then presumably the property would have passed unless the parties had agreed otherwise, and there would have been no question of independent equitable titles passing. On the other hand, granted that there is no agreement by the parties on the specific goods in which the property is to pass and that something remains to be done in order to pass it, it is hard to see what justification there can be for equity to transfer a title to the purchaser: any doctrine akin to that of *Tailby v. Official Receiver* could not operate, because that depends on nothing remaining to be done to define the rights of the parties, nor could any doctrine based on specific performance, because (at any rate since the passing of the Sale of Goods Act) that remedy can only be granted where the goods have been "identified and agreed upon". Secondly, neither before the Lords Justices nor before the House of Lords was it argued that the fact that

34. (1859) 7 H.L.C. 290 at 317-318, 11 E.R. 116 at 127.

35. (1848) 2 Ex. 1.

the cargoes concerned were of timber, an ordinary mercantile commodity, was of any significance<sup>36</sup>, the whole of the argument was devoted to showing that the timber had not become sufficiently specific for any sort of interest in it to pass and that even if an equitable title had passed it had subsequently been overborne; this clearly weakens its authority on the point that equity may interfere in ordinary contracts for the sale of goods<sup>37</sup>. It may, then, be suggested that *Hoare v. Dresser* was a much less considerable authority in favour of equitable intervention in contracts of sale of goods than the critics of *Re Wait* and *King v. Greig* allow, even before the passing of the Sale of Goods Act. Since that Act has been passed, there is clearly much to be said in favour of Atkin L.J.'s view that the Act provides a comprehensive account of all the legal and equitable relations arising out of a contract of sale, particularly in relation to the proprietary effects of the contract. If this is so, then such weight as could be attached to *Hoare v. Dresser* before the Act must have been taken from it.

*Holroyd v. Marshall* and *Hoare v. Dresser* may thus be regarded as inadequate to establish that the doctrine of equitable assignment applies to contracts of sale as well as to contracts for the provision of a security. The other criticism of *Re Wait* and *King v. Greig* based on them is that they provide authority establishing that a contract for the transfer of a smaller quantity of goods out of a larger quantity makes the goods sufficiently specific for the doctrines of specific performance and equitable assignment or lien to operate. The "Gloucester warehouse" dictum of Lord Westbury is one of the authorities relied on for this criticism; the other is the dictum of Lord Cranworth in *Hoare v. Dresser* which has already been cited, together with the following example, which he gave immediately afterwards: ". . . if a merchant were to order from the Black Sea a cargo of a hundred quarters of wheat, and the correspondent were to say: 'I have sent a cargo containing five hundred quarters, with directions out of it to let you have a hundred quarters'; when the five hundred quarters arrive, unless there be some legal or equitable right in the holder to interfere, equity will give the merchant a lien upon the larger cargo, just as it would, out of a large fund of money, give a lien on the appropriation of a smaller sum to any person who was equitably entitled to it"<sup>38</sup>. It is clear that at best both of these can only be accounted *obiter dicta*, since in the one case what was in question was the assignment of all the machinery brought on to a particular mill and in the other assignment of whole cargoes. Lord Westbury's dictum may not have even that authority, for only one report<sup>39</sup> of *Holroyd v. Marshall* gives him as saying: "a contract to sell the five hundred chests of the particular kind of tea which are now in my warehouse at Gloucester is a contract relating to specific property", while at least three others<sup>40</sup> give him as saying: "a contract to sell five hundred chests of a particular kind of tea which 'are now in my warehouse at Gloucester' is a contract relating to

36. Counsel for the plaintiffs (respondents) was Sir Richard Bethell, so this is perhaps not so surprising at it would otherwise appear.

37. Cf. Lord Reid in *Davie v. New Merton Board Mills* [1959] A.C. 604 at 644-645 (discussing *Thomson v. Cremin* (1956) 1 W.L.R. 103n.).

38. (1859) 7 H.L.C. 290 at 318, 11 E.R. 116 at 127.

39. 10 H.L.C. 191, 11 E.R. 999.

40. 33 L.J. Ch. 193 at 196; 9 Jur. (N.S.) 213 at 215; 7 L.T. 172 at 174. According to Cussen A.C.J. in *King v. Greig* the report at 11 W.R. 171 is to the same effect.

specific property". The courts in *Re Wait* and *King v. Greig* preferred the latter reading as being the more likely to be correct, and there seems no strong reason for disputing their choice<sup>41</sup>. If that is right, then the dictum in *Hoare v. Dresser* stands alone in supporting the creation of an equitable lien over a larger mass when there is an agreement to assign part of that mass, for despite the opinion of Pollock that the decision to the contrary effect in *Re Wait* would be surprising to the Equity Bar, neither he nor Sargant L.J., who dissented in *Re Wait* and to whose opinion Pollock refers the reader for details of a criticism of the majority, manages to cite a single case in which such a lien has been enforced<sup>42</sup>.

If the question is regarded as one of principle, it is again hard to see how such a lien can be found to exist. Although in *Tailby v. Official Receiver*, Lord Macnaghten referred to the doctrine of "equitable assignment or specific lien" he only considered cases such as *Holroyd v. Marshall* and *Tailby v. Official Receiver* itself, where the agreement was to assign the whole of identified property and cases such as *Metcalf v. Archbishop of York*<sup>43</sup> where the agreement was to charge the whole of the identified property. There is nothing in his judgment which countenances the imposition of a charge where the contract is to assign; and to impose a charge for a smaller amount over a larger one where no such charge was intended would, as Lord Hanworth and Cussen A.C.J. saw, accord ill with a doctrine which is based on the intention of the parties, on the precise identification of the property subject to the agreement, and on the fact that nothing remains to be done in order to define the rights of the parties. If the dictum from *Hoare v. Dresser* is to be justified, it cannot be on the basis of the doctrine approved in *Holroyd v. Marshall* and *Tailby v. Official Receiver*. The only other reasons which have been offered in its favour are one which is based on an analogy with the rules governing the equitable assignment of debts<sup>44</sup> and one based on the view that a direction to deliver a quantity of goods out of a larger mass gives rise to a lien for the smaller amount over the whole mass in favour of the person in whose favour delivery is ordered, and that there is no proper distinction between a contract to assign part of a larger mass and a direction to deliver part of one. Although the first argument seems on occasion to have appealed to the courts (it is used in *Hoare v. Dresser* in the dictum presently under consideration) it was expressly rejected by Cussen A.C.J. in *King v. Greig*, on the ground that although part of a debt might be considered just as much ascertained as the whole, this does not apply to a case of the assignment of part of a mass of ordinary chattels. This reasoning is unconvincing; it is hard to see in what sense part of a debt (which in any event does not attach to any particular property

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41. Pollock ((1927) 43 L.Q.R. 293) suggests two reasons: first, that 10 H.L.C. is the official report, and secondly that the majority version would make the statement a truism, and Lord Westbury was not prone to utter such. To these objections it may be answered (1) that in 1862 the system of official reporting was not organised as formally as it became later; and (2) that Lord Westbury expressly said that he was dealing with elementary principles and it would have been inappropriate for him to use as an elementary example an illustration containing a complication not raised by the facts before him.
42. Sargant L.J. suggested that *Hayman v. McLintock* [1907] S.C. 306 might lend some support to the view that such a lien might arise (confining his comments, however, to the security transactions therein under review). But that case depended on the delivery of the bills of lading to the goods over which the lien was claimed.
43. (1836) 1 My. & Cr. 547, 40 E.R. 485.
44. See, e.g., *Burn v. Carvalho* (1839) 4 My. & Cr. 690. 41 E.R. 265.

of the debtor) is more specific or better ascertained than five hundred tons of wheat out of a particular cargo of a thousand tons. If the analogy is doubtful, it is only on historical and perhaps procedural grounds. Courts of equity intervened in cases concerning the assignment of debts because debts were not assignable at law (as parts of debts still are not); consequently they developed their own rules unhindered by legal concepts and principles. Personal property has always been freely assignable at law, however, and there has been no need for equity to develop independent doctrines: there are remarkably few cases in the books which concern equitable assignments of personal property at all (even of future property<sup>45</sup>). In such cases, although equity has dispensed with such legal formalities as delivery or the execution of a formal deed of assignment, it does not appear to have gone to the lengths of abandoning separation of the property to be assigned from a mass. This may be connected with the fact that specific performance has always been irrelevant in cases of the assignment of debts, though it has not always been thought to be so in relation to assignments of personalty. Moreover, a well defined procedure for ensuring that all interested parties were represented in court was early well-established in cases of the assignment of a debt, but no equivalent procedure seems to exist in cases of the assignment of personalty<sup>46</sup>. The result of this is that although the analogy between the assignments of debts and that of personalty is not necessarily invalid, it is a much looser analogy than has often been supposed, and it is not surprising that there is no equivalent of such a case as *Brice v. Bannister*<sup>47</sup> in the cases on the assignment of personalty. The other argument—that based on the view that a direction to a person holding a larger mass of goods to deliver a smaller quantity to or to hold one on behalf of a third person gives rise to a lien on the larger mass, and that the contract may be treated as equivalent to delivery<sup>48</sup>—stands or falls on whether a direction has the effect of creating such a lien, and there is no evidence that it does so. Certainly it is hard to see that Atkin L.J. (who suggested that Lord Cranworth's example of the Black Sea cargo might be explicable on the basis of a direction given after the conclusion of the contract of sale) would have reached a different decision in *Re Wait* had the initial contract been one for the sale of any five hundred tons of Western White wheat, and the seller had subsequently agreed that the contract would be met from the cargo of one thousand tons of wheat ex "Challenger". It would thus appear that the arguments based on principle in favour of the imposition of a lien on a larger mass of goods where there is an agreement for a consideration paid to transfer a smaller quantity from it are almost as tenuous as those based on *Holroyd v. Marshall* and *Hoare v. Dresser*; and it may safely be said that as yet equity has established no such doctrine and would have to develop new principles (possibly by analogy with the assignment part of a debt) before it could do so.

45. Apart from the cases of future property, *London and Yorkshire Railway v. White* (1895) 11 T.L.R. 570 seems unique, In *Burn v. Carvalho* (supra) it seems that the subject of the assignment was personalty, but the court held the assignment effective by treating it as an assignment of a fund.

46. Marshall, *The Assignment of Choses in Action* (1950) 72-80.

47. (1878) 3 Q.B.D. 569.

48. The chief protagonist of this view is Dean ((1932) 5 A.L.J. 289), citing in support a dictum by Atkin L.J. in *Re Wait* to this effect, and a reference by Cussen A.C.J. to that remark without disapproval in *King v. Greig* (1931) V.L.R. 413 at 433.