STOCK-IN-TRADE FINANCING*

(AUSTRALIA & NEW ZEALAND)

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I. The Nature and Scope of the Survey

'Stock-in-trade is fugitive assets,' we were assured by one bank manager, 'and we would not regard it as really adequate security unless we were able to police it constantly.' Any retail dealer who is seeking a loan for his business, and who can offer no security other than the stock-in-trade that he hopes to acquire with the loan, faces this problem of the reluctance of lending institutions to extend the necessary finance or credit to him against the security of assets that he is in business to dispose of. For it is only by disposing of the security that he can be in a position to repay the loan. Banks therefore look primarily for security in fixed assets such as land, plant or equipment, and failing this they may well direct the would-be borrower to other sources of finance, such as finance companies or factoring agencies. Nevertheless, banks will frequently take stock-in-trade as security in conjunction with other assets, and frequently stock-in-trade is the only form of security left for secondary sources of finance such as the finance companies.

At the outset, therefore, one is faced with the question whether the objection to stock-in-trade as security for credit or finance arises from the inherent nature of the assets or from the inadequacy of the forms of security that can be taken over it. It has to be frankly conceded that stock-in-trade can never be regarded as the ideal form of security because of this characteristic of chattels that they are liable for one reason or another to disappear; but nevertheless, as stock-in-trade has to serve from time to time as security, it does deserve more sympathetic treatment at the hands of the law. It is the contention of this paper that the provision of finance for retail dealers is an important activity in the community, that those supplying such finance are entitled to a satisfactory security, and that much could

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be done to improve the attractiveness of stock-in-trade for that purpose if a security law could be designed and adopted with the needs of this type of finance in mind.

> In England and elsewhere in the Commonwealth there is a dearth of suitable wholesale financing techniques. This is due partly to the failure of the legislature to appreciate that security devices for retail instalment sales are wholly inappropriate to the acquisition of dealers' inventory and partly to the inertia of the financing agencies, who have shown little awareness of the importance of the problem.[1]

Modern wholesale financing techniques have all had to be designed within the framework of law that envisages consumer sales and situations in which the goods are 'at rest' in the borrower, and it is a matter of some surprise that financing institutions have not been more vigorous in pressing for laws more specifically aimed at the problems of wholesale financing. The differences between the problems of retail and wholesale financing are listed by Goode & Ziegel[2] as follows:

1. The retail purchaser is generally a 'one time' purchaser, whilst between dealer and financer there is usually a continuous flow of dealings. Hence requirements as to written contracts, registration, etc. that might be tolerable in the case of a retail sale are impracticable and oppressive in wholesale transactions.
2. In retail sales, there is a substantial down payment followed by regular instalments, and the purchaser is personally liable for the price. Hence the financer does not look exclusively to the goods as securing payment of the debt, the risk is well spread, and the profits high. In wholesale finance, there is generally no down payment or regular instalments; the dealer may be a limited company with few assets; the risks are highly concentrated, and the profits are generally small.
3. Most retail purchasers can be expected to retain the goods for personal use and are unlikely to dispose of them before they are paid for. In any event, the goods can generally be followed into the hands of and reclaimed from a third party. On the other hand, the dealer is expected to sell the goods so that he can repay the loan from proceeds, and the purchaser from him generally will (and should) get clear title to the goods.

Designing an effective security agreement under present law, therefore, involves picking a precarious path among a veritable jungle of statutes, none of which were framed with the problems of this sort of financing specifically in mind. The more important statutes

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[1] Goode and Ziegel: *Hire-Purchase and Conditional Sale—a Comparative Survey of Commonwealth and American Law,* 197.
[2] *Op. cit.* 190-191.

that need to be considered are the Bills of Sale Acts[3], the Property Law Acts,[4] the Companies Acts, the Bankruptcy Act,[5] the Sale of Goods Acts,[6] the Factors Acts,[7] the Moneylenders Acts,[8] and statutes imposing Sales Tax[9] and Stamp Duty.[10] However the Hire-Purchase Acts need not be considered, as the definition of 'hire-purchase agreement' in those Acts excludes agreements where the hirer is a person engaged in the trade or business of selling goods of the same description. Wholesale hire-purchase therefore falls to be regulated by the general law.

As a generalization, these statutes tend to impede rather than promote the provision of wholesale finance against the security of stock-in-trade. Financers have considered it important to design the forms of security so as firstly to avoid clumsy and impracticable registration requirements of the Bills of Sale Acts. The reluctance of dealers also to having their names gazetted as grantors of bills of sale is another factor tending to the avoidance of the Bills of Sale Acts. Further, in some jurisdictions, provisions preventing the granting of bills of sale over after-acquired property have made the bill of sale unacceptable as a form of security. Financers have also endeavoured to design their financing activities so as to avoid the machinery of 'loans' which would bring them within the restrictions imposed by the Moneylenders Acts. But the most important factor today governing the form of the security appears to be the desire to

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3 Bills of Sale Act 1900-1959, T.; Instruments Act 1958-1967, V.; Bills of Sale Act 1898-1938, N.S.W.; Bills of Sale Act 1886-1940, S.A.; Bills of Sale Act 1899-1966, W.A.; Bills of Sale and Other Instruments Act of 1955, Q.; Instruments Ordinance 1933-1949, A.C.T.; Chattels Transfer Act 1924-1963, N.Z.

4 Conveyancing and Law of Property Act 1884-1966, T.; Property Law Act 1958-1966, V.; Conveyancing Act 1919-1964, N.S.W.; Law of Property Act 1936-1966, S.A.; Conveyancing Ordinance 1951, A.C.T.; Law of Property (Miscellaneous Provisions) Ordinance 1958, A.C.T.; Property Law Act 1952-1965, N.Z.

5 References to the Bankruptcy Act in this paper are to the Bankruptcy Act 1966 unless otherwise stated. From the point of view of wholesale financing, the most important difference between the 'old' and the 'new' Act is the disappearance of the 'order and disposition' clause (s.91(iii) of the 'old' Act).

6 Sale of Goods Act 1896, T.; Goods Act 1958-1964, V.; Sale of Goods Act 1923-1953, N.S.W.; Sale of Goods Act 1895-1952, S.A.; Sale of Goods Act 1895, W.A.; Sale of Goods Act 1896, Q.; Sale of Goods Ordinance 1954, A.C.T.; Sale of Goods Act 1908-1961, N.Z.

7 Factors Act 1891-1958, T.; Goods Act 1958-1964, V.; Factors (Mercantile Agents) Act 1923, N.S.W.; Mercantile Law Act 1936, S.A.; Factors Act Amendment Act 1878, W.A.; Factors Act 1892, Q.; Factors Act 1899 (N.S.W.), A.C.T.; Mercantile Law Act 1908, N.Z.

8 Lending of Money Act 1915-1965, T.; Money Lenders Act 1958-1966, V.; Money-lenders and Infants Loans Act 1941-1961, N.S.W.; Money-lenders Act 1940-1966, S.A.; Money Lenders Act 1912-1962, W.A.; Money Lenders Act 1916-1962, Q.; Money Lenders Ordinance 1936-1956, A.C.T.; Moneylenders Act 1908, N.Z.

9 Sales Tax Acts (Nos. 1-9) 1930 (and amendments)—(Commonwealth); Sales Tax Assessment Acts (Nos. 1-9) 1930 (and amendments)—(Commonwealth).

10 Stamp Duties Act 1931-1965, T.; Stamps Act 1958-1967, V.; Stamp Duties Act 1920-1964, N.S.W.; Stamp Duties Act 1923-1967, S.A.; Stamps Act 1921-1966, W.A.; The Stamp Acts, 1894-1966, Q.; Stamp Duties Act 1898-1904 (N.S.W.), A.C.T.; Stamp Duties Act 1954-1965, N.Z.

avoid or minimize the impact of taxation statutes, particularly Sales Tax and Stamp Duty. Again, as a generalization, the other statutes become important only when something goes wrong and a dispute arises—and financers tend to rely chiefly on their knowledge of the dealer and the efficient policing of his activities, rather than on legal remedies. But tax considerations are ever present and therefore exert this dominating influence on form and practice.

It is under pressures such as these that the finance companies have recently experimented with the 'Offer to Buy' as a method of secured financing. Under this arrangement, the borrower submits to the financer a written offer to purchase goods of a specified description at a stated price. Acceptance is to be by the financer appropriating goods to the order and, until then, no legal relationship is to arise between the parties. The offer also provides that on acceptance, the invoice or other evidence of title is to be delivered to the financer and 'by that act' the goods shall be mortgaged to the financer as security for the price. In the recent Tasmanian case of *Universal Guarantee Pty. Ltd.* v. *Commissioner of Stamp Duties,*[11] Gibson J. held that the document, having no legal effect at the time of its execution, was not liable for stamp duty. In the Victorian case of *Roberts* v. *I.A.C. (Finance) Pty. Ltd.*[12] the document was a request from the borrower to the financer that the financer should pay to a supplier the price of a car that the borrower wished to buy from the supplier (but which had not yet been appropriated to the contract). In consideration of such payment, the borrower undertook to mortgage the car to the financer. Acceptance of the offer was to be *inter alia* by the financer paying the supplier. It was held by Adam J. that the document was not registrable as a bill of sale (i) because, the borrower having no property in the car at the date of the execution of the document, the document was not a bill of sale as defined in the Instruments Act 1958 and not registrable under s.35, and (ii) because 'it was not the chattel mortgage document itself which effected the assurance of the car, but the act external to it of the lending of the moneys by the defendant . . .'

One could wish that ingenuity such as this might be applied to reforming the law as well as to avoiding it.

The problem of stock-in-trade financing is rendered more acute in Australia by the considerable and surprising lack of uniformity among the States in many of the statutes listed above. Particularly is this so with the Bills of Sale Acts, Moneylenders Acts, and Stamp Duties Acts. Differing statutes among the States can be expected to produce differing practices; however it is thought that these differences in practice are to some extent reduced by reason of the fact that many financing institutions have head offices in one State, and

[11] No. 43/1966, unreported.
[12] [1967] V.R. 231.

head office issues standard form security documents for all its branches. In some but not all instances these are drawn with reference to the law of the jurisdiction of head office, and used without further amendment by the State branches. The immensity of the problem throughout Australia is such, however, that this paper cannot be regarded as more than an interim report in a larger survey. As such, its emphasis will be chiefly on the law and practice in Tasmania, although the position in other States will be noted wherever possible.[13]

It is proposed in this paper to proceed to consider firstly the extent of demand and forms of security taken in Tasmania, second the desirable attributes of an effective security agreement, and third to consider how far these attributes are attainable under present law.

Before doing this, however, a word of caution must be issued. The subject is further confused by its terminology which is still in the state of jargon and has not yet developed to terms of art. Hence expressions are frequently used with little consistency—and often little thought as to their aptness. For the purposes of this paper it is necessary therefore to define some of the more frequently encountered terms in the sense in which they will be used herein.

The term 'bill of sale' will be confined to an assurance of chattels which falls within the definition of 'bill of sale' in the Bills of Sale Acts and which is registrable under those Acts (the definition will vary somewhat therefore from State to State). 'Chattel Mortgage' will be used in relation to any other security based on an assurance or mortgage of chattels by the borrower other than a bill of sale as defined. Hence 'chattel mortgage' will refer in general to unregistrable bills of sale. 'Floor Plan,' 'Display Plan,' and 'Stocking Agreement' will refer to any security arrangement based on bailment rather than mortgage or assurance; 'Bailment Plan' and 'Consignment Plan' will refer to those plans that are based on simple bailment alone (*i.e.* no option to purchase), and 'Wholesale Hire-Purchase' will refer to those bailments under which the bailee is given an option to purchase the goods. It is stressed however that these terms are not always used consistently with these definitions either in the literature on the subject or in the actual plans of financers.

II. The Demand and Practice in Tasmania

The volume of stock-in-trade financing in Tasmania does not seem to be particularly large, at any rate in relation to stock-in-trade alone as security for finance. Probably the primary source of finance is the trading banks and, as has been explained above, these look chiefly for security in fixed assets such as premises, plant, and equipment although stock-in-trade may well be taken as additional security.

[13] The law and practice of New Zealand has been considered in more detail in 1 *N.Z. Universities Law Rev.* 371, Sher and Allan: 'Financing Dealers' Stock-in-Trade.'

However there is no binding rule of practice as to this, and decisions seem to be taken *ad hoc* in particular cases. If stock-in-trade is taken as security by a bank, then the usual machinery is a bill of sale or, if the borrower is a company, an 'equitable mortgage' giving a specific charge over fixed assets and a floating charge over stock-in-trade.[14] The degree of control exercised over the form of the security by the banks that were investigated in Tasmania varied considerably. In one case, the mortgage documents would be separately prepared for each loan by the bank's solicitors. But in other cases they were using standard form documents prepared by their Head Offices, in some but not all cases specially printed for Tasmania. The impression gained in these cases was that the discretion of local management was restricted to the financial aspects of the loan rather than the legal.

Finance houses too prefer fixed assets but are more ready than the banks to finance against the security of stock-in-trade, especially cars and other high unit cost durables. The machinery employed tends to be floor planning based on either simple bailment or wholesale hire-purchase, as this is more likely to avoid registration requirements, the application of the Lending of Money Act, and in particular provides opportunities for the deferment of the sales tax obligation.

Particular aspects of these plans will be considered in a later section of this paper, but at this stage some four comments can be made:

(i) Because of the preference for fixed assets, finance is tending to be applied (except in relation to motor vehicles) to an earlier stage in the merchandising chain—*i.e.* to manufacturers and wholesale distributors who can generally offer better security in the form of fixed assets than retail dealers are able to do. Retail dealers would then obtain much of their finance on normal (and frequently unsecured) trade credit terms extended to them by the manufacturers and wholesalers.

(ii) Where stock-in-trade financing does take place, it appears to be confined to high unit cost durables identifiable by serial numbers. Although there does not seem to be any insurmountable legal objection to other types of goods (*e.g.* all the stock at any time on the premises of a men's outfitters), financers are reluctant to regard *e.g.* neck-ties and handkerchiefs as furnishing adequate security for a loan.

(iii) Factoring of book debts is showing some increase. However opinions are divided as to its attractiveness. Whilst one school of thought encourages it as increasing the liquid-

[14] The Commonwealth Development Bank, where it provides this sort of finance, sometimes employs wholesale hire-purchase agreements as an alternative to bills of sale.

ity of the dealer, another thinks it cuts too far into the dealer's profit margin and therefore should be treated as a means of last resort.

(iv) Misconceptions abound among a number of financers as to what the law permits or requires. Legal aspects of financing tend to be governed by well-learned aphorisms, and often insufficient is done to utilize what flexibility exists in the law.

III. Desirable Attributes of Stock-in-Trade Security

In this section of the paper it is proposed to list those attributes that are desirable in any form of security over stock-in-trade, and which a security law designed for this type of financing should make attainable.[15] They are put forward objectively on the basis that it is necessary to give adequate protection to all those who engage in or may be affected by stock-in-trade financing. If the provision of this sort of finance is a legitimate business activity that fulfils a real need, then the financer needs to have effective security, but at the same time adequate protection must be given to the dealer and to those who deal with him. The desirable attributes suggested are as follows:

1. *Registration and Notice Filing*

As possession of goods is generally the best if not the only indicia of ownership, it is necessary to protect those who deal with the dealer, or who extend credit and finance to him, from secret charges created by the dealer. Hence the law should require that every security over goods should be registered unless the goods are promptly removed from the possession or apparent possession of the dealer. No security interest taken by a financer should be effective against third parties unless it is perfected in either of these ways.

It is important as a corollary however that registration should not place too heavy an administrative or financial burden on the secured party, and should involve the minimum of formality consistent with giving third parties who make enquiry all the information they need. In particular, requirements that all the security documents be registered, and that further documents be filed each time fresh stock is brought within the security or further advances are made, impose too heavy and costly a burden on the financer. Similarly requirements of frequent renewal of registration may prove onerous. Whilst it should be open to the parties to file the complete documentation if they wish, it is suggested that the interests of all parties are adequately met by a system of notice filing that simply places on record that the dealer is acquiring finance from a particular financer against the security of a particular line of stock. The names and addresses of dealer and financer should be included to inform third parties where to enquire for further information. The notice filed

[15] See also Goode and Ziegel, *op. cit.* 191-192; Sher and Allan, *op. cit.* 376-381.

might also contain prescribed particulars as to whether, for instance, the security includes proceeds of sale of stock, and whether the dealer is prohibited from creating other charges ranking in priority to or *pari passu* with the particular charge. Little else 'on file' seems either necessary or useful.

2. *After-Acquired Property*

As dealer finance, as opposed to consumer finance, generally involves a continuing series of transactions between financer and dealer, it should be possible for one master agreement entered into initially between financer and dealer to give the financer security, not merely in stock on hand at the date of that agreement, or even stock which the dealer proposes to acquire with the initial finance, but over all stock that the dealer may subsequently acquire during the term of the agreement and that falls within the general description of the secured property contained in the agreement. In other words, neither by express prohibition nor by a requirement of detailed description of the stock, should the law prevent security being taken in after-acquired property. The recognition of the 'after-acquired property clause' is essential to the system of notice filing described above, for otherwise separate registration will be required each time the dealer acquires new stock that it is intended to bring within the agreement.

3. *Future Advances and 'Cross-over' Security*

Similarly, as most financing arrangements envisage a series of advances from time to time by the financer to the dealer, it is important that the stock-in-trade should secure not merely the particular advance with which it was bought, but that it should whilst it remains on the dealer's floor secure all advances, past or future, made by the financer. The after-acquired property clause and the future advance provision together provide what is known as the 'cross-over security' that is highly desirable in this type of financing; namely, that the whole of the stock on hand at any given time secures the whole of the balance of indebtedness of the dealer to the financer at that time.

4. *Proceeds*

The dealer is in business to sell his stock-in-trade, and generally he can have little prospect of repaying his indebtedness to the financer until he has sold his stock. Each sale therefore by the dealer in the ordinary course of business will deplete the security of the financer. Accordingly it is important that the financer should be given some hold over the proceeds of sale, and the ideal security would give the financer a security interest in stock-in-trade until it is sold and thereafter in the proceeds of sale, at any rate to the extent of outstanding advances. This should be so whatever form the proceeds take—whether chattels traded-in, cash, negotiable instruments, book debts, or hire-purchase paper—as long as the proceeds remain traceable. Ideally, the dealer should apply proceeds in the acquisition of replacement stock, and if he does this would be picked up by the after-acquired property clause. The financer needs to be sure that the dealer will apply proceeds either in reduction of his indebtedness or in replenishing his stock, and for this purpose he needs a security interest in the proceeds of sale.

5. *Regulation of Priorities*

The ideal security law should also regulate simply and effectively questions of priority, instead of leaving them to be determined as at present by the often fortuitous circumstance of whether particular interests are legal or equitable, and the unpredictable application of concepts of notice and estoppel. Priority conflicts may arise between the financer's security interest in stock-in-trade on the one hand, and on the other the claims of the dealer's execution creditors, assignee for the benefit of creditors, trustee in bankruptcy, purchasers from the dealer in and out of the ordinary course of business, and other financers who also claim a security interest in the dealer's stock-in-trade. The priority point for any financer's security should be its date of perfection—*i.e.* the date of registration or of the taking of possession of the goods. This should be sufficient to determine most priority conflicts, except that two special categories of persons merit privileged treatment.

First, a subsequent financer whose loan is made to enable the dealer to acquire specific items of stock-in-trade and who takes a security interest in those particular items, merits priority over an earlier financer with a security interest in the entire stock-in-trade or in a particular class into which these specific items fall. This is the 'purchase money security interest' recognized by Article 9 of the American Uniform Commercial Code.[16] It is in no way unfair to the earlier financer to accord this priority to the later purchase money security interest because otherwise no one would be prepared to finance the stock-in-trade of a dealer who had previously given a general security over his stock-in-trade, and accordingly these particular items might never have been acquired by the dealer.

Second, a buyer from the dealer in the ordinary course of business should get a clear title to the goods he buys, even though they are subject to a security interest which in fact restricts the right of the dealer to sell either at all or without the consent of the financer. This should be so even though the financer's security, including the restriction, is registered unless the buyer has actual notice of the dealer's lack of authority to sell. Any law that required a buyer 'over the counter' to search the register before completing his purchase or to buy at his peril would be completely unrealistic and disruptive of modern merchandising techniques.

16 See ss. 9-107, 9-301, and 9-312.

6. *Stamp Duty and the Moneylending Acts*

Whilst secured transactions must obviously be reckoned 'fair game' for the imposition of taxes, stamp duty legislation should be so framed as not to impose undue hardship on those who engage in these transactions and not to encourage a search for advantage by the employment of bizarre forms. Similarly, if special controls are to be imposed on moneylending activities, then these should recognize the important policy differences between personal and consumer loans, on the one hand, and commercial loans on the other. The various Stamp Duty Acts and Moneylending Acts must be included in any rationalization of the laws governing security in personal property.

Whilst, it is suggested, there can be no real doctrinal objection to any of the above objectives, the laws at present in force in Australia and New Zealand do not permit them 'to be attained in their entirety and in a straightforward and honest fashion. Instead one is met with an amazingly heterogeneous and largely fictitious collection of devices . . . by which financers seek to accomplish the same ends.'[17]

IV SECURITY INTERESTS IN COMMON USE

Although forms of security currently in use display tremendous variety and complexity—each financer having separately achieved through a process of guess-work and attrition the forms that he thinks most nearly accomplish his objectives—it is nevertheless possible to achieve a broad and fairly simple classification. The majority of security agreements employ either the concept of mortgage or that of bailment. In the former category are included all those plans under which title is or has been in the dealer and he has granted an assurance or conveyance of *his* property to the financer to secure a loan. In the latter category title is kept away from the dealer and is vested in the financer who then bails the goods to the dealer for display purposes—the retail sale may be made by the financer himself to purchasers introduced by the dealer, or the dealer may be permitted to buy the goods himself when he has arranged a re-sale, or may even have an option to purchase.

It is proposed therefore in this section of the paper to consider the adequacy of contemporary law to meet the desirable attributes in relation to four types of agreement: (1) bills of sale, (2) charges under the Companies Acts, (3) simple bailments, and (4) wholesale hire-purchase.

A. *FINANCING THROUGH (AND AROUND) THE BILLS OF SALE ACTS*

Although the various Bills of Sale Acts[18] of Australia and New Zealand all draw their inspiration from the Bills of Sale Acts of

[17] Goode and Ziegel, *op. cit.* 192.
[18] See note 3 *supra*.

the United Kingdom, they display such diversity, ranging from major policy aspects to detail, that it is difficult to say that today they reflect any real policy other than a broad appreciation of the need for protection against secret charges. And even in this, many of them fail to give complete or even adequate protection.

It is necessary to deal first of all with the ability of a bill of sale to give a security in after-acquired property, as the answers to other questions tend to turn on this.

1. *After-Acquired Property*

In principle there is no reason why future assets cannot be mortgaged so that equitable title passes to the mortgagee as soon as the mortgagor acquires them, so long as they can be sufficiently identified;[19] and general words of description will normally suffice.[20] However, this may be rendered impossible either by direct statutory prohibition or else by a requirement for more particular description in the bill of sale. Hence, in New Zealand on both scores a bill of sale (or 'instrument by way of security') over after-acquired property is impossible[21] except in relation to agricultural equipment, livestock, and crops.[22] In Queensland there is a general prohibition on after-acquired stock that renders the bill invalid even *inter partes*, but here the exception is wide enough to cover dealers' stock-in-trade.[23] For a bill over after-acquired stock-in-trade to be valid within the terms of this exception it is not clear whether it must be strictly a bill of sale as defined in the Act, in the sense that it must also include specific chattels.[24] Nor is it clear whether the section gives the mortgagee a legal or an equitable title.[25]

In Western Australia, s.7A recognizes the 'after-acquired property clause' and passes legal title when the property is acquired. As in Queensland however, it is not clear whether the section operates only if the document is a bill of sale and includes also specific chattels.[26]

However, in Tasmania, Victoria, and South Australia there appears to be no reason why a bill of sale cannot be given over after-acquired property and, unless it also included specific chattels, it would not be registrable in any of those States. In New South Wales, by virtue of the 1938 amendment, an equitable mortgage of future chattels is permissible but, as it falls within the Act's definition of a bill of sale, it is probably registrable.

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19 *Holroyd* v. *Marshall* (1862) 10 H.L.C. 191.
20 *Tailby* v. *Official Receiver* (1888) 13 App. Cas. 523.
21 Chattels Transfer Act, ss. 23 and 24. It is, however, valid *inter partes*.
22 *Id.* ss. 26 and 29.
23 s. 21.
24 See Sykes: *The Law of Securities*, 378.
25 See and *cp.* Sykes, *op. cit.*, 378 and Francis: *Mortgages and Securities* 320.
26 See and *cp.* Sykes, 377 and Wickham: 'The Struggle for Title,' 5 *U. of W.A. L. Rev.* 472, 482. And see *Re Kirby* (1940) 42 W.A.L.R. 90.

2. *Registration and Notice-Filing*

The policy consideration here, as explained above, is that any charge or security interest over goods should be perfected either by the taking of possession or by registration, otherwise the security interest should not prevail against third parties. However registration needs to be simple and should proceed on the basis that all that a third party needs to know is that particular items or lines of stock of a particular dealer are charged in favour of a particular creditor, and the address at which he can obtain further information as to the extent of the security and indebtedness.

In Tasmania, Victoria, and South Australia, the requirement of registration is not all-embracing as there is probably no need in these States to register instruments dealing exclusively with after-acquired property. In Tasmania, this turns on the definition of 'personal chattels' as being 'capable of complete transfer by delivery' and this has been held to refer to the time of execution of the instrument.[27] Tasmanian financers generally however do register bills of sale over after-acquired property, firstly because they are hesitant to believe registration is unnecessary and secondly because of an over-riding faith in the efficacy of registration. In Victoria it has been variously held that mortgages of future property are not registrable (i) because they are not assurances of existing chattels, (ii) because the mortgagee has no power to seize without the assistance of the court, and (iii) because the registration provisions themselves are inappropriate.[28] This is probably also the position in South Australia.[29]

Registration is probably essential however for all mortgages in New South Wales, Queensland and Western Australia, although in New South Wales, unless an express power to seize is conferred by the instrument, an unregistered instrument over future goods would be void only against the trustee in bankruptcy.[30]

The possibility in Tasmania, Victoria, and South Australia of creating unregistrable chattel mortgages does involve a serious weakness in the legislation and a failure to measure up to the desirable attributes.

A consequence of the availability of the after-acquired property clause over stock-in-trade in all jurisdictions except New Zealand is that, if the instrument is properly drawn in the first place, successive filing will be unnecessary and initial registration will suffice. However in other respects, the system of registration

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[27] *Thomas* v. *Kelly* (1888) 13 A.C. 506; *Malick* v. *Lloyd* (1913) 16 C.L.R. 483; *Ex parte Jones* (1912) 8 Tas. L.R. 36, 41.

[28] *King* v. *Greig* [1931] V.L.R. 413, 432; *Akron Tyre Co. Pty. Ltd.* v. *Kittson* (1951) 82 C.L.R. 477; *Roberts* v. *I.A.C. (Finance) Pty. Ltd.* [1967] V.R. 231.

[29] *Re John Coles & Sons* (1936) 9 A.B.C. 52; *contra, Re Grezzana* (1932) 4 A.B.C. 216.

[30] Sykes, 377.

generally falls far short of the ideal. Whilst a detailed account of the registration requirements and procedures of each State is not feasible within a paper of this nature,[31] some general comments may be made:

(i) In all States the registration requirements are extremely complex and record far more detailed information than is necessary. In all States the actual instruments themselves have to be filed or else authenticated copies, and accompanied by a varying assortment of attestations, statutory declarations, affidavits, and schedules. Moreover, all the recorded information is generally available to the public whereas much of it could safely be kept confidential to the parties except to the extent that they are prepared to reveal it to legitimate enquirers. In Tasmania, in addition, notice of intention to make or give the bill must be lodged not less than fifteen days before registration, and this notice in prescribed form in fact gives all the information that it has been suggested above is desirable or necessary. Similar notice, in the case of a security bill, must be given in Western Australia.

(ii) There is little uniformity as regards the time within which registration must be effected. In particular, it should be noted that Queensland imposes no time limit and permits registration at any time after execution.

(iii) In Tasmania, Victoria, New South Wales (traders' bills), and Western Australia (security bills), creditors (variously defined) may caveat against registration. Yet it is not clear what is the point of permitting caveating unless it be to enable the holder of a prior equitable bill to preserve priority against a subsequent legal one. As is submitted elsewhere, priority should not need to turn upon manoeuvrings of this nature.

(iv) All jurisdictions except Queensland and New Zealand provide for filing in a central registry. It may be asked whether within Australia some one central registry for all States would not be a desirable development. Goods do not necessarily stop at the frontier.

(v) All jurisdictions require periodic renewals of the registration. The frequency varies from twelve months in Victoria to five years in New South Wales, South Australia, Queensland and New Zealand. The consequences of failure to renew range from total invalidity to invalidity against the trustee in bankruptcy only. The machinery for renewal also varies from jurisdiction to jurisdiction. Some jurisdictions require on renewal, a statement of the amount still owing on the bill. Where a bill secures a continuing line of advances this statement may be out of date within a short period, and seems to serve little purpose. If renewals of bills are desirable

31 See generally, Francis, 300-311.

(and there is no requirement for renewal of registration of company charges), there is obvious need for rationalization of the system.

(vi) Tasmania encounters special problems because the Act requires registration of full or partial satisfactions and of re-loans, and enables any creditor to enforce this requirement.[32] Tasmanian bankers were somewhat alarmed by the suggestion that, where they have taken a bill of sale to secure a current account, any unsecured creditor might insist that payments into the account since the date of the bill be aggregated to satisfy the loan and discharge the bill, leaving the bank to prove as an unsecured creditor for any further overdrawing of the account. However, an examination of eighty bills of sale in the Tasmanian registry revealed only three cases in which certificates of satisfaction had been lodged. Apparently only banks register satisfactions and the registry staff could recall only one partial satisfaction in the last two years and only one release as long as they could remember.

3. *Future Advances and Cross-over Security*

As explained in an earlier section of this paper, it is desirable that the bill of sale should secure not merely the initial advance but also future advances that may be made from time to time by the financer to the dealer. If this can be done, and if the bill can also include an after-acquired property clause, we then have the desirable cross-over security feature whereby all stock on hand at any given time secures the balance of indebtedness at that time. If the bill does secure further advances, a separate problem will arise as to whether, if a different financer takes a second charge over the stock-in-trade between the making of the initial loan and future advances against the original security, these future advances can still be 'tacked' to the original security in priority over the second charge.

The Bills of Sale legislation of all States and of New Zealand recognizes that a bill of sale may validly secure further advances. However, where the bill specifies the maximum amount of further advances to be covered (and this must be done in South Australia and Western Australia), there is the danger if the bill secures a current account that payments in might have the effect of discharging the security whilst further advances are still being made. This danger is particularly acute in Tasmania where any creditor can require registration of partial satisfactions. Only Queensland appears to have legislated effectively against this danger.[33]

[32] Ss. 29-31. *cf.* Companies Act s. 105 where entry of satisfaction or release is at the discretion of the borrower and is useful where it is desired to clear title to particular assets.

[33] Sections 19(2) and 37. It has been submitted in Sher and Allan, *op. cit.* 416 that the New Zealand provision in s.33(2) is not completely effective to achieve its purpose.

As regards the ability to 'tack' future advances to the original security in priority to the claims of an intervening mortgagee of the same property, no question of 'tacking' will arise unless the earlier mortgage does according to normal principles rank in priority over the later mortgage. Where this does arise, equity permits the first mortgagee to tack further advances to his security in two cases:[34] first, where a prior legal mortgagee makes a further advance without notice of the second mortgage, and second, where the first mortgage (whether legal or equitable) envisages[35] or requires[36] further advances and the first mortgagee has no notice of the subsequent mortgage at the time he makes his further advance. It is doubtful whether the first mortgagee would have constructive notice of the later mortgage merely because it was registered, but in most cases the second mortgagee would give all prior mortgagees express notice of his interest, and this would effectively prevent the tacking of further advances without his consent. As the weapon of the first mortgagee is to call in his advance as soon as he receives notice of a later charge, it is not unusual for the parties (both mortgagees and the debtor) to enter into an agreement regulating priorities and the permissible extent of tacking.

This general law position governs the ability to tack in New South Wales, South Australia, Western Australia, and Queensland. However, in Tasmania[37] and Victoria,[38] a statutory right to tack further advances in priority to subsequent mortgages (whether legal or equitable) is given in three cases:

(i) by arrangement with the subsequent mortgagees;

(ii) where the first mortgagee had no notice of the subsequent mortgage when making the further advance; and

(iii) where the mortgage imposes an obligation to make further advances, whether or not the mortgagee had notice of the subsequent mortgage.

In respect of case (ii), it is expressly provided that, if the prior mortgage is expressed for the purpose of securing a current account or further advances, the mortgagee is not deemed to have notice of a mortgage merely from the fact that it was registered if it was not registered at the date of the original advance or the last search, whichever last happened.

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[34] *I.e.* two cases that are relevant to this problem. See Sykes, 255 and Francis, 399.

[35] *Hopkinson* v. *Rolt* (1861) 9 H.L.C. 514.

[36] *West* v. *Williams* [1899] 1 Ch. 132.

[37] Conveyancing and Law of Property Act, s. 38—following Law of Property Act, s.94 (U.K.).

[38] Property Law Act, s. 94. The statutory provisions in New Zealand have been considered, and criticised, in Sher and Allan, *op. cit.* 415.

Bearing in mind that subsequent mortgagees will generally give express notice to prior mortgagees, these statutory provisions are therefore effective to permit tacking only by agreement between the parties or if the mortgage imposes an obligation to make further advances.

4. *Proceeds*

Little attempt seems to be made by financers, at any rate in Tasmania, to acquire a security interest in the proceeds of sale of stock. It is doubtful whether a claim on the basis that the dealer held his stock as agent for the financer would have much prospect of success, at any rate where the security is a bill of sale. The dealer cannot be mortgagor and agent at the same time.[39] It has been suggested that a prohibition (absolute or without consent) on the dealer selling his stock could give the financer a claim to proceeds on the authority of cases such as *Taylor* v. *Plumer.*[40] Most of the bills of sale examined do contain such a prohibition and, as such a prohibition could not be effective to prevent such a sale at any rate in the ordinary course of the dealer's business, it is likely that it was originally inserted with this purpose in mind. Nevertheless we know of no case in which the financer has based a claim to proceeds on this prohibition, and the courts are likely to be reluctant to admit such a claim at any rate as against third parties claiming an interest in the same proceeds.

The most likely method of catching proceeds is by means of a specific proceeds clause in the bill operating by way of mortgage, charge, assignment or declaration of trust. There is no reason in principle why this should not be effective unless the instrument covering proceeds is registrable *and* the statute prohibits after-acquired property clauses.[41] It should be effective in all States over cash and negotiable instruments, except as against a holder in due course, over chattels traded in where the after-acquired property clause is recognized, and over hire-purchase paper and book debts. An assignment or transfer of book debts would require registration in Victoria, and Western Australia, and registration is optional in New South Wales and Queensland. With the abolition of the reputed ownership clause in bankrutcy there is little practical advantage to be gained from registration of an assignment of book debts, but the policy of preventing secret charges obviously makes it desirable. No bill so far examined contains such a proceeds clause.

5. *Priorities*

It is now necessary to consider the effectiveness of a bill of sale over stock-in-trade against other possible claimants to that

[39] *Joseph* v. *Lyons* (1884) 15 Q.B.D. 280, 282.
[40] (1815) 3 M. & S. 562.
[41] As is the case in New Zealand. See Sher and Allan, *op. cit.* 398.

stock-in-trade. The position could combine simplicity with justice if the legislation were to provide

(i) that an unregistered bill, through failure to perfect, was invalid against competing claims of third parties however arising;

(ii) the unregistered bill might nevertheless remain valid *inter partes* unless *ex abundanti cautela* absolute invalidity were employed to encourage registration;

(iii) two unregistered bills might rank *inter se* according to dates of execution; and

(iv) the priority point of a registered bill were to be its date of registration, so that it would be subject to registered and unregistrable interests arising before that date and have priority over all interests arising after that date (except a purchase money security interest and the title of a buyer in the ordinary course of business).

The Bills of Sale Acts however do not work that way, and the position differs considerably from jurisdiction to jurisdiction.

Registration generally does not confer priority, at any rate as against unregistrable instruments. However, failure to register a bill may destroy the priority that it would otherwise have had. In other words, normal priority rules apply subject to the following special considerations—

(i) is the bill effective, or has non-registration destroyed or restricted its validity?

(ii) if it is effective, does it take effect from execution or from registration?

(iii) does registration of a bill give constructive notice of either its existence or its contents?

(iv) are there any special rules relating to priorities and tacking?

As to notice, there appears to be some uncertainty whether registration of a bill of sale gives rise to constructive notice.[42] There seems to be no reason why in principle the doctrine of constructive notice should apply to commercial transactions. However, in Queensland[43] and New Zealand[44] registration of a bill of sale is notice of its contents except to prior encumbrancers. In Tasmania, New South Wales, Victoria and South Australia, the property legislation[45] gives constructive notice of such matters as would have been discovered 'if such enquiries and inspections had

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42 See *Joseph* v. *Lyons* (1884) 15 Q.B.D. 280, 286, 287; and Wickham, *op. cit.*, 492, and Hennessy, 34 *A.L.J.* 72.

43 Section 8.

44 Section 4(1).

45 T.: Conveyancing and Law of Property Act s.5; N.S.W.: Conveyancing Act s.164(1); V.: Property Law Act s.199(1); S.A.: Law of Property Act s.117(1).

been made as ought reasonably to have been made,' and it has been suggested that this would affect registration of bills of sale. However, the sections further provide that nothing in the section affects a purchaser with notice in any case in which he would not have been so affected if the sections had not been enacted. The question therefore remains whether registration under the Bills of Sale Acts gave notice independently of those statutory provisions, because if it did not then these sections cannot affect the position.

A study of the priority position of bills of sale, therefore, needs to consider the validity of (a) an unregistrable bill, (b) an unregistered registrable bill, and (c) a registered bill against

(i) execution creditors

(ii) assignees for the benefit of creditors

(iii) the trustee in bankruptcy

(iv) the bona fide purchaser or mortgagee

(v) the bona fide purchaser in the ordinary course of business.

(a) *unregistrable bills:*

Bills of sale over after-acquired property are valid without registration in Tasmania, Victoria, and South Australia. In these States therefore they would be valid against the grantor's execution creditors, assignees, and trustee in bankruptcy. However, as the lender's interest is only equitable it would be defeated by a subsequent legal title acquired for value and without notice.

(b) *registrable bills:*

(i) *against execution creditors, assignees, and the trustee in bankruptcy*

The validity of the bill, registered or unregistered, turns on State law which prescribes the extent of validity or invalidity of the bill, and the date from which it operates. As from that date, if the bill is valid, normal principles of priority apply in the absence of special statutory modification. The trustee in bankruptcy will not be able to claim the property if, according to State law, it falls within a valid bill of sale. Under the old Bankruptcy Act he might have claimed the property under the order and disposition clause unless, under section 91 (e), it was subject to a registered bill of sale. Now that there is no order and disposition clause the question for the trustee in bankruptcy is the same as that for execution creditors and assignees—namely, whether under the provisions of the Bills of Sale Act the bill in question is valid against him.

In Tasmania,[46] unregistered registrable bills are absolutely null and void unless the goods are taken out of the grantor's possession and apparent possession within twenty-one days, but

[46] Section 5.

they are valid until the expiration of that time. The bill therefore is valid against execution creditors, assignees, and the trustee in bankruptcy unless, at the expiration of twenty-one days from its execution, the goods are still in the possession of the grantor and the bill is unregistered. If the bill is registered, normal priority rules apply from the date of execution of the bill. It is therefore valid in a bankruptcy arising after that date,[47] and as against a subsequent assignee for creditors.[48] As against execution creditors, it will prevail provided it was granted before the writ was delivered to the sheriff.[49]

In Victoria, the bill is completely invalid until registered, and, unless it is registered within thirty-five days, it is invalid against the trustee in bankruptcy, assignee, and execution creditors as regards goods which at the time of the bankruptcy, assignment or execution and at the expiration of the time for registration are in the possession or apparent possession of the grantor.[50] If the bill is duly registered the position is the same as in Tasmania except that the effectiveness of the bill dates from its registration.

In New South Wales, a trader's bill of sale is completely invalid until registered, and takes its validity from the date of registration.[51]

In South Australia, an unregistered bill is invalid against the assignee and execution creditors if the goods are still in the apparent possession of the grantor at the expiration of the time for filing.[52] As against the trustee in bankruptcy, the bill will be invalid if at any time within three months before the insolvency the grantor was in apparent possession of the goods *and* if that possession continued for twenty-one days after the execution of the bill *and* if the bill is not registered within thirty days.[53] There is no invalidity before the expiration of time for registration, and registered bills are effective as from execution.

In Western Australia,[54] unregistered bills are fraudulent and void against the assignee, execution creditor, and trustee in bankruptcy. As against the trustee in bankruptcy it is necessary that the grantor was in apparent possession within three months before the presentation of the petition *and* at some time after the expiration of the time for registration. Bills are valid

47 Subject to Bankruptcy Act 1966, s.122 (avoidance of preferences).
48 Bankruptcy Act 1966, Part X, Division 4.
49 Sale of Goods Act 1896, s. 31(1) (Tas.).
50 Sections 33 and 35.
51 Section 5C(1); *Franov* v. *Deposit & Investment Co. Ltd.* (1962) 36 A.L.J.R. 163.
52 Sections 28 and 41. Section 17a prevents the device of a series of unregistered bills to defeat execution creditors.
53 *I.e.* if the grantee does not acquire possession within 21 days, he has a further nine days in which to perfect his interest by registration. *cp.* Tasmania where both periods are 21 days.
54 Sections 25, 27 and 35.

until the time for registration expires and, on registration, are effective from the date of granting. However, under section 32, a registered bill is void against an execution creditor if the warrant or writ is issued within three months of registration *and* judgment is for a liquidated debt incurred before registration. (An exception exists in respect of money advanced or paid by the grantee).

The Queensland position is unusual in two respects; firstly registration is notice,[55] and second there is no time limit on registration of bills. Hence, while s.7(1) makes an unregistered bill invalid against all except the parties, s.7(2)(a) gives retroactive effect to registration. Accordingly, against the trustee in bankruptcy, the bill is invalid while unregistered but subsequent registration will validate it against him provided only that the bill was made before the commencement of the bankruptcy. It follows therefore that as the bill may be registered at any time, the grantee of an unregistered bill is in a position to defeat any subsequent creditors. The combination of retroactive effect, absence of a time limit for registration, and repeal of the order and disposition clause means that there is now little point in registering a bill in Queensland unless and until something goes wrong.

In New Zealand,[56] unregistered bills are invalid against execution creditors, assignees, and the trustee in bankruptcy, but as invalidity arises only on the expiration of the time for registration the priority point is presumably the date of execution.

(ii) *registrable bills against other bona fide purchasers and mortgagees*

In Tasmania, as has been explained above, unregistered bills are completely void after the expiration of time for registration unless the goods have been removed from the apparent possession of the grantor. If they are registered, they are governed by normal principles from the date of execution, so that if it is a legal bill it will normally prevail, if it is equitable it will normally be defeated by a later legal title acquired without notice. As indicated earlier in this paper, it is not clear whether registration alone gives constructive notice to subsequent purchasers and creditors. As between two competing bills, if only one is registered that one will have priority once time has expired on the other. Until then, however, priority continues to turn on execution, so that if the grantee of a first unregistered bill obtains possession within twenty-one days he will preserve his priority.

In Victoria, the bill is a nullity until registered, but once it is registered normal priority rules apply, treating the date of registration as the priority point of the bill. This too is the position of trader's bills in New South Wales. In South Australia

[55] Section 8.
[56] Section 18.

an unregistered bill is not invalid against a bona fide purchaser and therefore is subject to normal principles from execution. However two competing registered bills rank according to date of registration.[57] As between a registered and an unregistered bill, s.18 gives priority to the former.[58]

In Western Australia, s.27 makes an unregistered bill void against a *bona fide* purchaser without notice, but otherwise the position appears to be the same as in South Australia.

In Queensland, as has been observed, an unregistered bill is a complete nullity except *inter partes,* but registration at any time avoids the invalidity so that normal priority principles then apply from its execution. By s.7(2)(b), registered instruments rank for priority according to the time of registration. Perhaps the only merit of registration in Queensland is that it prevents subsequent purchasers and mortgagees gaining priority by being first on the register or by acquisition of legal title without notice. New Zealand, like Queensland, makes registration notice, and s.19 makes an unregistered instrument invalid against a bona fide purchaser or mortgagee without actual notice, after the time for registration has expired.

(iii) *registrable bills against the buyer in the ordinary course of business*

In those jurisdictions such as Tasmania, Victoria, New South Wales and Queensland, where an unregistered bill is either wholly invalid or invalid against all third parties, the buyer in the ordinary course of business will get good title to the chattels. The same applies in Western Australia[59] and New Zealand[60] by special statutory provision, at any rate where the buyer is without notice of the bill. In South Australia the buyer would have to rely on the Mercantile Law Act 1936, s.4(1) to obtain title.

Where the bill is registered, title will normally be obtained by the buyer in the ordinary course of business under the provisions of the Factors Act of all jurisdictions[61] provided the dealer is (as he usually will be) a mercantile agent and the buyer has no notice of the dealer's lack of authority to sell. The only unsatisfactory position occurs in Queensland and New Zealand, where registration of an instrument is notice of its contents. Accordingly, if the instrument contains a prohibition on re-sale by the dealer, and if the instrument is registered, the buyer would be precluded from obtaining title under the Factors Acts.

[57] Section 18.
[58] *Shepherd* v. *Brown Bros.* [1935] S.A.S.R. 177.
[59] Section 27.
[60] Section 19.
[61] See n. 7 *supra.*

6. *Stamp Duties and Moneylending*

In Tasmania, mortgages (defined to include 'any instrument whereby any security is given over any such property for the payment of any moneys') carry *ad valorem* stamp duty payable by the mortgagor. Special provision is made by the Stamp Duties Act 1931, s.14 for the case of unlimited mortgages taken by banks. In such cases duty may be paid on the amount certified by the bank as the amount for the time being intended to be secured. The mortgages must be reviewed annually, and excess duty is payable if the certified amount is exceeded. The excess duty may be added by the bank to the moneys secured.

As regards the Moneylenders Acts,[62] it is proposed to consider these more thoroughly in a later section of this paper. A bill of sale or mortgage over stock-in-trade secures what is obviously a loan, and therefore the transaction will be caught by the Acts if the grantee is a moneylender within the statutory definition and is not able to bring either himself or the transaction within any of the exceptions. In Tasmania, however, Part I (re-opening of transactions) and Part II (limitation of interest rates) of the Lending of Money Act 1915 apply to all loans whether made by moneylenders or not. The limitation of interest, by s.4, to 10 per cent. where the principal exceeds $100 is unrealistic in modern conditions, and has caused even the banks some difficulty in keeping within it. The question was raised by one bank, whether s.4 could apply to loans by banks whose rates of interest are prescribed under Commonwealth authority by the Reserve Bank.

B. *FINANCING UNDER THE COMPANIES ACT (THE 'FLOATING CHARGE')*

Where a bank is financing a dealer who is incorporated, the usual form of security taken by the bank is an 'equitable mortgage' which operates as a fixed charge on fixed assets and a floating charge over stock-in-trade. The floating charge provides a present equitable charge on the company's assets, present and future, which permits the company to continue to deal with its property, notwithstanding the charge, in the ordinary course of its business as by buying and selling, and also by creating further specific charges that may rank in priority to the floating charge.[63]

In many respects, the floating charge provides the ideal security, but it does suffer from some peculiar weaknesses.

1. *Registration and Notice Filing*

The requirement for registration is all-embracing and catches all charges created by companies. The penalty for non-registration under Companies Act s.100 (1) and (2) is invalidity

[62] See n. 8 *supra.*

[63] See *Evans* v. *Rival Granite Quarries Ltd.* [1910] 2 K.B. 979, 999 *per* Buckley L.J., and Gower: *Modern Company Law* 2nd ed. 73.

against the liquidator and any creditor, but the contract for repayment remains valid and the money is immediately due on the expiration of the time for filing.

There is no need for successive registration, and fresh stock is picked up and further advances secured without any further filing. Nor is there any provision for renewal of registration.

Although prescribed particulars of the charge have to be filed—and to this extent we have the concept of notice-filing—it is necessary also to file the instrument itself or a copy together with affidavits of execution and verification. The Registrar enters in the register the date of creation of the charge, the amount secured, the property charged, and the person entitled to the charge.

An investigation was conducted at the Companies Registry in Hobart to test whether a person searching for charges against a particular company could readily ascertain whether the registered charges imposed any restriction on the company's right to grant further charges. On making initial enquiry, the search clerk is given information from a book containing an index of charges. He will be told for example that there are certain charges registered against the company, and the names of the lenders. If he enquires further he is entitled to the information on the prescribed form of particulars of the charge. If he still persists, he is entitled to examine the instrument itself, but it is unusual for anyone to carry his enquiries this far. Fourteen out of nineteen charges examined did contain prohibitions on the right of the company to grant further charges. However there is no item on the prescribed particulars for recording this information, and it had been recorded on the particulars in only one case.

Our conclusion was that not only is there a need for notice-filing, but it is important that the notice gives vital information. From the point of view of priorities it is important that information as to prohibitions on further charges be readily available. Likewise, any provision for automatic crystallization or crystallization by notice should be shown. It is a matter of speculation whether a person who had perused the particulars but not the instrument would be affected by notice of matters contained only in the latter. It would be unrealistic to aver that he is.

2. *After-Acquired Property*

The floating charge is clearly capable of covering all stock at any time owned by the company. It should be noted however that whereas the after-acquired property clause in a bill of sale gives a specific equitable charge over each item of stock as the dealer acquires it, here the grantee's security is incapable of attaching to particular items until crystallization. The difference is important in determining the priority point of the lender's security.

3. *Future Advances and Tacking*

The floating charge secures future as well as original advances, and therefore provides the cross-over security that is desirable.

The right to tack future advances in priority over intervening charges turns on State law and is the same as in the case of bills of sale.

4. *Proceeds*

If the charge is drawn wide enough to cover the various forms that proceeds of sale of stock could take, the grantee's security will cover these proceeds.

5. *Priorities*

(a) *unregistered charges*

Before liquidation the unregistered charge is good against the company and purchasers from the company, but it is void against the execution creditor who completes execution. After liquidation it is invalid against the liquidator and against any creditor even with notice of it.[64] Non-registration has no consequence in respect of conflict between two unregistered securities over the same property.

(b) *registered charges*

A floating charge is peculiarly vulnerable as a security because it does not attach to specific assets until crystallization, and until then the company has a licence to deal with its assets in the ordinary course of business. Crystallization generally occurs when either winding-up commences or default is made *and* the mortgagee takes some steps to enforce his security as by appointing a receiver.

Equitable mortgages, however, frequently provide that the charge is to crystallize automatically without further action by the mortgagee in certain events; *e.g.* if execution or other process is sued out against the company, if the company 'threatens to cease to carry on its business,' if the company purports to create a further charge ranking in priority to or *pari passu* with the equitable mortgage.[65] One equitable mortgage examined permits the mortgagee at will to serve notice on the company determining the floating character of the charge and converting it into a fixed charge. The standard form of notice used in such cases, after determining the floating character of the charge, continues 'save and excepting the company shall have the right to continue in the normal course of its business and for such purpose shall have the right to sell its stock. . .' One may have legitimate doubts about the effectiveness of a notice that purports to crystallize the

[64] Companies Act, s.100(1) and (2).
[65] See discussion in Sher and Allan, *op. cit.* 417-418.

charge and at the same time extend the licence to deal. It is arguable that all such notice achieves is to prevent the charge picking up replacement stock and proceeds.

As in any case it is for the courts to say whether a charge created by the company floats or is fixed,[66] it is submitted that something more than a provision for automatic crystallization or crystallization by notice is required. The mortgagee must take positive action to cancel publicly the company's licence to deal, and unless this is done the charge must still float. Therefore these provisions in the mortgage deed probably do no more than indicate the circumstances in which the mortgagee is entitled to crystallize the charge and the manner in which he may do so. The question remains in every case whether the licence to deal has been effectively cancelled, and mere notice to the company without some element of public notification should not be sufficient if the crystallization would enable the mortgagee to assert priority over those who subsequently claimed title to the property.

Priority of the floating charge is governed by two factors: first, the charge is necessarily equitable, and second, until crystallization is effected the company has implied licence to continue to deal with its assets in the ordinary course of its business. As regards the latter point, the question arises whether the mortgagee can restrict the company's licence to deal, as by a prohibition in the instrument against the company creating any other charge having priority over or ranking *pari passu* with the floating charge. Such a restriction can not affect a subsequent chargee (as opposed to the company itself) unless the subsequent chargee has notice of it;[67] and it is doubtful if there is any doctrine of constructive notice.[68] Even if the later charge is equitable, it will probably still take priority as the company has been allowed to represent that it is free to deal with its assets.

The practice in the United Kingdom is to include a reference to the restriction on the particulars of registration that are filed, even though this is not prescribed by the Act. This is probably effective to give express notice to a subsequent mortgagee who does in fact search, but it is doubtful if it can give notice to a mortgagee who does not search of something which he had no reason to expect to be there.[69]

Broadly, then, the position as to priority of the floating charge is as follows:

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[66] *Re Yorkshire Woolcombers Association Ltd.* [1903] 2 Ch. 284, 295.

[67] *E.S.&A. Bank* v. *Brunton* [1892] 2 Q.B. 700.

[68] *Ibid.* 707-711; and see *Brunton* v. *Electrical Engineering Corporation* [1892] 1 Ch. 434, *Robson* v. *Smith* [1895] 2 Ch. 118.

[69] *Wilson* v. *Kelland* [1910] 2 Ch. 306.

(i) *unsecured creditors:*

The charge is generally good against unsecured creditors from the date of crystallization, even though the debt arose before crystallization, unless they have actually been paid before that date.[70] However certain classes of creditors rank as preferred claimants under s.196.

(ii) *execution creditors:*

The charge has priority over unsecured creditors who proceed to execution unless execution is completed before crystallization.[71]

(iii) *subsequent specific charges:*

Subsequent legal charges take priority under the normal rules, and equitable charges under the licence to deal theory, in both cases even if they have notice of the floating charge, provided they are created before crystallization.[72] But they would not take priority if they have notice of a restriction on the company's right to create other charges except where the later specific charge secures an advance to enable the company to acquire the specific property charged—*i.e.* a purchase money security interest.[73]

(iv) *subsequent floating charge:*

Normally the prior charge has priority unless the first charge is over the whole of the undertaking and the subsequent charge over a particular class of assets.[74]

(v) *bona fide purchasers in the ordinary course of business:*

The company has authority under the floating charge to sell and pass title in the ordinary course of business until crystallization. Dispositions otherwise than to a bona fide purchaser in the ordinary course of business could be set aside in a winding-up under s.293.

(vi) *the liquidator:*

Winding-up makes the charge crystallize and therefore it will be good against the liquidator except—

(a) under s.293 (undue preference);

(b) under s.294 (winding-up within six months of the creation of the charge); and

(c) under s.292 (preferential claims).

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70 *Re General South American Co.* (1876) 2 Ch. D. 337.

71 *Norton* v. *Yates* [1906] 1 K.B. 112.

72 *In re Hamilton's Windsor Iron Works* (1879) 12 Ch. D. 707; *Government Stock Co.* v. *Manilla Railway* [1897] A. C. 81; *Wheatley* v. *Silkstone & Haigh Moor Coal Co.* (1885) 29 Ch. D. 715.

73 *Wilson* v. *Kelland* [1910] 2 Ch. 306; *Re Connolly Bros. Ltd.* [1912] 2 Ch. 25.

74 *Re Benjamin Cope & Co.* [1914] 1 Ch. 800; *Re Automatic Bottle Makers Ltd.* [1926] Ch. 412.

6. *Stamp Duties and Moneylending*

Floating charges, as mortgages, attract stamp duty in the same way as bills of sale. Also, similar considerations as in the case of bills of sale arise under the Moneylenders Acts. There is however one important difference in the case of moneylending. It was held by the High Court in *Motel Marine Pty. Ltd.* v. *I.A.C. (Finance) Pty. Ltd.*[75] that the requirement that the contract note be signed 'personally' by the borrower, meant that the contract note requirements of the Act were not intended to apply to incorporated companies. Hence, in Tasmania, Victoria, New South Wales, South Australia and possibly New Zealand, this part of the Moneylenders legislation will not apply where the loan is to a company, as it must be when a floating charge is employed. The Western Australian legislation[76] does not use the word 'personally,' and there is no contract note requirement in Queensland or the A.C.T. Further, in Victoria section 3(4)(a) now exempts loans to bodies corporate entirely from the Act; and in New South Wales section 3B provides a partial exemption. In Western Australia, section 3A permits a borrowing company to acknowledge or agree in writing that the Act shall not apply to new or existing loans.

This exemption of the borrowing company seems realistic as it would be unusual for a company to fall within the policy considerations on which the Moneylenders Acts are based. It seems, however, in Tasmania that financers do still in fact furnish the contract note even when making loans to companies.

C. *FINANCING THROUGH BAILMENTS AND HIRE-PURCHASE*

Finance companies financing businesses against the security of stock-in-trade appear generally to avoid security in the form of mortgage, and prefer instead to employ plans based on bailments. Floor-planning of this nature provides an attractive security for finance, particularly of a secondary nature, because—

(a) by keeping title away from the dealer, it avoids priority conflicts with earlier charges created by the dealer, such as floating charges to secure a general indebtedness to a bank;

(b) in most jurisdictions no question of registration arises;

(c) it probably does not attract the application of the Moneylenders Acts;

(d) in Tasmania, at any rate, it does not attract stamp duty;

(e) it provides opportunities for minimizing the impact of sales tax; and

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[75] (1964) 110 C.L.R. 9; *aliter, Re British Games Ltd.* [1938] Ch. 240.

[76] Section 9.

(f) now that the order and disposition clause is gone, it is effective in the dealer's bankruptcy.

As a preliminary question, it is proposed to examine whether finance companies can avoid the application of both the Bills of Sale Acts and the Moneylenders Acts, by disguising what is essentially a loan against security as a bailment or hire-purchase contract.

Application of Bills of Sale Acts

In Western Australia, the statutory definition of 'bill of sale'[77] includes instruments by way of bailment. In Queensland,[78] hire-purchase agreements are deemed to be bills of sale except where the *owner* is a person who ordinarily sells or hires chattels of the same class, and the agreement is made in the ordinary course of his business. Unless finance companies can be regarded as ordinarily selling or hiring chattels, this produces the odd result that retail but not wholesale hire-purchase is registrable.[79] In New Zealand, the Chattels Transfer Act applies to instruments by way of bailment, and special provision for hire-purchase agreements is made in s.57 and its amendments.

Elsewhere, hire-purchase agreements and bailments are generally not bills of sale as title does not vest in the hirer during the currency of the agreement, and he is therefore not granting any assurance of or power to seize his own chattels.[80] Where the dealer first purchases the goods himself, then sells them to the finance company, and takes them back on hire-purchase, the courts may hold the form of the transaction to be a sham, and its true nature a loan against security.[80a] The test seems to be whether there is one transaction or two independent transactions between the parties; whether the parties with intent to evade the Bills of Sale Act executed documents designed to conceal the true nature of the transaction.[81] It is suggested by Goode[82] that, whether the transaction is a sham or not, the sale part of the transaction might be impeached as a bill of sale. The fact that the seller remains in possession as bailee and not as seller is, since *Pacific Motor Auctions Pty. Ltd.* v. *Motor Credits (Hire Finance)*

[77] Section 5.

[78] Section 6(5).

[79] 'Hire-purchase agreement' is defined in the Bills of Sale Act as having the same meaning as in the Hire-Purchase Agreements Act 1933, which did not exempt from the definition cases where the hirer was a dealer, as does the uniform Act. However, the Acts Interpretation Act 1954, s.8 has probably written the new definition, including this exception, into the Bills of Sale Act.

[80] See cases in Goode: *Hire-Purchase Law and Practice*, 33-34.

[80a] In Victoria a 'sale and hiring back' is void unless the contracts of sale and hiring are registered—Instruments Act, s. 54.

[81] Goode, *op. cit.*, 34-35; Sykes, *op. cit.* 381; and see too *Bennett* v. *Griffin Finance* [1967] 1 All E.R. 515;*Snook* v. *London & West Riding Investments Ltd.* [1967] 1 All E.R. 518. See also Diamond, [1960] *M.L.R.* 399.

[82] Goode, *op. cit.*, 38-39.

Ltd.,[83] probably irrelevant unless the goods are actually taken from his possession and then restored to him, or the sale is not effected by documents.

Where the finance company itself buys the goods from a supplier and then hires them to the dealer, this is probably not a bill of sale if it is an ordinary routine transaction.[84] There is a danger that if the dealer has already entered into a binding contract to purchase the stock before the finance company is approached, then the company is not properly regarded as buying the goods but as advancing the price on behalf of the dealer in return for a licence to seize. As this would be a bill of sale, it is important that the company before advancing the price obtains the dealer's acknowledgment that all negotiations have been cancelled, and that he has no interest in the goods.

Application of the Moneylenders Acts

In general, the Moneylenders Acts will apply if the lender is a moneylender and if the transaction is a loan.[85] The question whether the hire-purchase or bailment transaction should be regarded as a loan probably turns on the same considerations that determine whether it is a bill of sale—*i.e.* is it a sham? It should be noted that the legislation in Victoria,[86] New South Wales,[87] and New Zealand[88] that exempts hire-purchase from the Moneylenders Act, does not apply to wholesale hire-purchase but only hire-purchase as defined in the Hire-Purchase Act. The extended definition of moneylending in the legislation of Victoria, New South Wales, South Australia, Western Australia, Queensland, and A.C.T. includes contracts which in substance or effect are loans, whatever their form or terms may be. It is suggested by Pannam,[89] and his view is adopted in this paper, that this definition adds nothing to the existing power of the court to go behind the form of the agreement and declare it a sham.

In all jurisdictions, a finance company will be a moneylender if it is carrying on, or holding itself out as carrying on, the business of moneylending. However there is some possibility that it may be able to avail itself of the definitional exception in favour of persons *bona fide* carrying on a business not having for its primary object the lending of money but in the course of which and for the purposes of which they lend money. All jurisdictions recognize this exception, although some impose a limitation on

83 [1965] A.C. 867.

84 But see *Maas v. Pepper* [1905] A.C. 102; *Motor Trade Finance Ltd.* v. *H.E. Motors Ltd.* (cited at [1933] 1 Ch. 1, 20); *G.M.A.C.* v. *Traders Finance Corporation Ltd.* [1932] N.Z.L.R. 1.

85 *Chow Yoong Hong* v. *Choong Fah Rubber Manufactory* [1962] A.C. 209.

86 Money Lenders Act 1958, s. 3(4)(b).

87 Money-lenders & Infants Loans Act 1941-61, s. 3A (a) and (b).

88 Chattels Transfer Amendment Act 1931, s. 2(3).

89 *The Law of Money Lenders in Australia and New Zealand,* Ch. 2.

the interest rate ranging from eight per cent. in Queensland to 12½ per cent. in Western Australia. Whether a lender can take advantage of this is a question of fact in each case; but a wholesale distributor might well do so, and also a finance company which makes loans to a dealer in order to acquire his retail hire-purchase paper (as distinct from making profits on the loans).[90]

It is doubtful in Australia if a finance company could successfully allege that it was exempt as being a banker, but insurance business has been successfully used as a cloak.[91]

Accordingly, it is submitted that whether floor-planning through simple bailments or hire-purchase attracts the Bills of Sale and Moneylenders Acts involves separate consideration in each case.

The types of floor-planning arrangements in use vary in detail very considerably. Certain common features, however, emerge. It is usual at the inception of the arrangements for dealer and financer to enter into a master agreement governing the conditions on which the financer is prepared to accommodate the dealer, and setting out the procedures. The dealer is usually required to maintain a deposit of funds with the financer. Particular items of stock as they are acquired by the dealer are brought under the plan by a simple form of acknowledgment. Under the agreement, the financer may purchase goods from the manufacturer or other supplier at the request of the dealer, and allow delivery to be made to the dealer who holds as bailee to display the goods. Or, particularly in respect of second-hand goods, the dealer may be permitted to purchase the goods as agent for the financer, and is required to notify the financer that he holds them under the plan. The financer then reimburses the dealer a percentage of his outlay. The agreement may authorise the dealer simply to display the goods, and require him to introduce retail purchasers to the financer (generally making it clear that the dealer is not agent of the financer to negotiate sales). In this case the dealer will receive the difference between the wholesale and retail prices as his 'commission,' for introducing the buyer. Otherwise, the dealer may be authorised to sell the goods direct, and may be given an option to purchase the goods. Whether he has an option or not, if he is to make the sale he will usually be required to pay out the financer by purchasing the goods himself before he completes the retail sale. However, it is likely in practice that he will first sell and then account.

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90 See *Austin Distributors Ltd. v. A. H. Paterson Car Sales Pty. Ltd.* (1941) 65 C.L.R. 118; *Frank H. Wright (Constructions) Ltd.* v. *Frodoor Ltd.* [1967] 1 W.L.R. 506. Compare *Premor Ltd.* v. *Shaw Brothers* [1964] 1 W.L.R. 978 where the Court of Appeal considered there was insufficient nexus between the particular loans and the retail hire-purchase business.

91 *Walton* v. *Regent Insurance Ltd.* [1962] N.S.W.R. 466. The exception for insurance business was deleted in Victoria by Act No. 6598 in 1959.

The decision whether to employ a simple bailment plan or a wholesale hire-purchase agreement turns largely on the question of sales tax. Rates of sales tax on certain types of goods can be as high as say 25 per cent., and there are therefore considerable advantages to be obtained if, firstly, the 'price' of the goods on which sales tax is calculated can be kept down as far as possible to basic costs free of service and delivery charges, and secondly, if the date for payment of sales tax (the date of the sale by a manufacturer or registered wholesaler to an unregistered dealer) can be deferred to coincide with the date of the retail sale. The financer seeks to avoid 'freezing' considerable capital in payment of sales tax. The first of these objectives is attained by interposing in the distributive chain of manufacturer-financer-dealer, a manufacturer's sales subsidiary. The second is attained by interposing a financer's (registered) wholesale subsidiary which holds title until the retail sale is arranged and then feeds it either through the sales subsidiary or dealer (or possibly direct) to the retail buyer.[92] This technique, however, will not work if the dealer is given an option to purchase the goods, as the Taxation Department treats hire-purchase as a sale and would therefore levy tax as soon as the goods fell subject to such a contract.

Evaluation of the Simple Bailment

Bailment plans are probably not registrable in any jurisdiction, except in Western Australia if they give the financer power to seize the goods during the term of the bailment. They include after-acquired property only in the sense that, there being no requirement for registration, a master plan can control a whole course of transactions, and particular chattels are brought under the plan as acquired—usually by simple acknowledgment. However, each item of stock 'secures' only the price of that item, so that there is no possibility of securing further advances or providing a cross-over security. So far as proceeds are concerned, it might be possible to give the financer a claim to proceeds if the dealer sells as agent or, having no power of sale, sells. Usually, however, the dealer is expected to account first or to negotiate a sale direct from the financer to the retail buyer. In practice it seems that no attempt is made to pick up proceeds, and efficient policing of the dealer's activities is relied on instead.

So far as priorities are concerned, title remains throughout in the financer so that, now that there is no order and disposition clause, the security is effective against all. Nevertheless, a buyer in the ordinary course of business will normally obtain clear title as long as he does not have actual notice of a restriction on the dealer's right to sell.

92 For a more complete description of this machinery, see Begg, [1965] *Law Institute Journal*, 305-307.

The bailment plan does however suffer from two peculiar disadvantages:

(i) The origin of the bailment plan lies in the earlier practice of manufacturers and distributors, wishing to promote markets for their goods, who supplied goods to dealers 'on consignment.' Under these arrangements, the dealers held the goods for display and sale simply as agents for the suppliers, and risk of non-sale remained throughout with the suppliers. When adapted by finance companies as a stock-in-trade security device, it has the obvious disadvantage that the finance company will be reluctant to carry this risk of non-sale. To some extent it is guarded against by the practice of requiring the dealer to maintain a deposit (almost as a guarantee), but any attempt to force the dealer to purchase unsold goods, as by charging exorbitant rentals, would expose the whole basis of the transaction to challenge.

(ii) There is the very great danger that the scheme as set out in the master agreement may not be commercially realistic. In such cases the practice of the parties may well depart from the written word, thereby inviting the courts also to ignore the writing. The *Pacific Motors Case*[93] gives a strong warning.

Evaluation of Wholesale Hire-Purchase

The wholesale hire-purchase contract is less frequently encountered today than the simple bailment, because of the sales tax aspect. Where it is used, the Hire-Purchase Acts (and in particular the formal requirements of Part II) will not apply because the definition in those Acts excludes the case where the hirer is a trader in goods of that description. The position as regards registration, after-acquired property, further advances, proceeds, and priorities is similar to that under the simple bailment. In particular, as regards priorities, the agreement will take priority as against all except the buyer in the ordinary course of business.[94]

Summary

It has been suggested above that all forms of security not protected by possession should be registrable. Nevertheless the validity of the hire-purchase and bailment agreements, without registration, against all other interests except that of the buyer in the ordinary course of business should not be regarded as too strong a ground of criticism of bailment and hire-purchase financing. In modern trading conditions any appearance of credit worthiness arising from the dealer's possession of chattels is not realistic. The real disadvantage is that the enquirer has no means of ascertaining whether the dealer has title, except by asking the

93 [1965] A.C. 867.
94 *General Distributors Ltd.* v. *Paramotors Ltd.* [1962] S.A.S.R. 1.

dealer himself. However, the buyer in the ordinary course of business expects to get clear title no matter what means the dealer uses to finance his stock. In fact he will get clear title as long as he has no actual notice of any limitation on the dealer's right to sell. From the point of view of priorities, floor-planning meets all requirements and is therefore particularly useful as a purchase money security interest.

Its disadvantages are that it is not well-designed for continuing lines of finance, it is clumsy in concept and practice, and it invites departures from the formal scheme that may endanger its whole operation.

V. Digression on Moneylending

Dominating the whole of stock-in-trade financing today are the twin gremlins of stamp duties and the Moneylenders Acts. Considerations of time and space have prevented a thorough discussion of the impact of stamp duties in this paper, but it is proposed at this point to make a few general comments on the Moneylenders Acts.

1. The Acts are uncertain both as to the persons and the transactions to which they apply. Doubts of this nature, which can affect the whole validity of the loan and security, should not exist in the law affecting commercial transactions.

2. The limitation of interest rates in some jurisdictions is unrealistic. This is particularly so in Tasmania where the limitation to ten *per centum* per annum applies to each and every loan of money. This either discourages the availability of risk capital or forces the lender to adopt cumbersome and technical devices to conceal the character of the transactions as a loan.

3. The requirement that the borrower personally sign a note or memorandum of the contract before the money is lent or the security is given,[95] is difficult in many situations to comply with and is capable of defeating its own purpose.

   (a) It may well be impossible to comply with the requirement in respect of progress payments and further advances. This is firstly because it may not be possible to specify the dates in the contract note, and second because, insofar as the further advance is a fresh loan,[96] the giving of security would have preceded the fresh loan and therefore the contract note (if there is one). It may be that every cheque drawn on an overdrawn current account is a fresh loan.

[95] This requirement does not exist in South Australia, Queensland, and the A.C.T. In New South Wales it is limited to cases where there is no security document containing all the terms.

[96] This is probably a constructional problem turning on the nature of the lender's obligation in the original contract.

(b) Variation of loans becomes difficult, at any rate without fresh documentation which in turn may be invalid if the effect of the variation is to provide some further advantage for the lender—as when interest rates have increased since the original loan. In such a case, the mere specification of the new rate would not be sufficient if the original term had not expired.

(c) The length and multiplicity of security documents which have to be incorporated in or annexed to the note defeat the object of the requirement—namely, to inform the borrower before he commits himself and to furnish him with an intelligible record of the transaction.[97] In most cases the contract note will be signed, unread, contemporaneously with the contract and security documents.

4. Other provisions of the Acts which impose restrictions on the method of carrying on the business of moneylending may be irksome to moneylenders, but are not otherwise directly relevant to stock-in-trade financing.

5. The provisions in some jurisdictions, which authorise the courts to relieve moneylenders from the consequences of non-compliance with the Acts or parts of them, do not adequately protect the honest moneylender who has innocently fallen into the traps. This is firstly because the lender is obliged to await the uncertain outcome of frequently prolonged litigation; second, because the order may not validate the security retrospectively. Thus the lender, whose non-compliance is excused by the court, might have no remedy if in the meantime the borrower has disposed of the security.

6. The extent of dissatisfaction with the Moneylenders Acts is naturally lessened in those jurisdictions in which all or parts of the Act have been held or declared not to apply to loans to companies. Proposals for reform have stressed that the policy of the Acts, which is to protect private borrowers seeking personal loans from oppressive and unfair treatment, has no application to commercial transactions.

   Accordingly it is proposed—

   (a) that loans to companies should be outside the Acts completely;
   (b) that the Acts should not apply to loans in excess of, say, $2000;
   (c) that the Acts should not apply to any loans if the borrower is separately advised by a solicitor.

VI. Conclusions

This survey, even to the extent that it has been carried in this paper, demonstrates one thing clearly. Only where the statutes in the jurisdictions examined have been enacted as uniform Acts is there any degree of real correspondence. In all other cases, even though the

[97] *Jaques* v. *Pacific Acceptance Corporation Ltd.* [1963] N.S.W.R. 1377, 1383.

statutes bear the same name from State to State, and acknowledge a common ancestry, there is scarcely a point of significance on which a uniform approach will be found. This astonishing diversity confounds any argument that the present law reflects either considered or essential policy.

The time seems long overdue for a re-appraisal. The law appears quite inadequate at present to deal with very real problems; and legitimate business activities are being impeded rather than assisted by the law. The real mystery is why the commercial community itself (businessmen and lawyers) has tolerated this state of affairs for so long.

As a basis for such a re-appraisal, the following points are suggested:

1. Any re-appraisal and preparation of new laws dealing with the problems of personal property security should be done on a uniform Australia-wide basis. Where distinctions may need to be drawn, they will not be on a geographical basis, but will depend on the type of commodity involved and the purpose of the finance. Financing stock-in-trade may raise different problems from financing plant and equipment, or consumer sales. Financing cars may raise different problems from financing agricultural produce. But the problems should be the same throughout Australia.

2. The new law should not vary according to the form of security agreement selected by the parties. It should apply to any transaction, whatever the form, if its purpose is to provide security for finance or credit. The law should then prescribe various requirements and consequences for that security, as appear hereunder.

3. To perfect the security against third parties, the secured party should either take possession of the property or register a security interest. Registration should be permissible simply by filing a notice containing certain prescribed particulars, that would serve as a warning to third parties that a security interest exists in certain assets of the borrower, and place on them the onus of making further enquiries. The danger in the present system arises not merely from secret unregistered security interests, but also from semi-secret ones; that is, matters that might be discovered by third parties on a diligent search but which would not normally be discovered on the type of search that is reasonable. The prohibition on further charges, and provisions enabling a floating charge to be crystallized by notice are examples.

4. It should be possible for the security interest to attach to proceeds of sale of stock, but where this is desired it should be disclosed in the particulars of registration.

5. It should be possible for the security agreement to provide that all stock whenever acquired secures all advances whenever made.

6. Questions of priority should not depend on whether the interest of the secured party is legal or equitable. This is an artificial distinction without foundation in policy and could with profit be erased at any rate from this branch of the law. Nor should priorities depend upon the manipulation of a doctrine of notice. Similarly the concept of crystallization that weakens the effectiveness of the floating charge should disappear. Instead of being an inchoate charge over shifting assets, the new security interest should give a fixed charge but over changing items of stock. The statute itself should prescribe priorities, and any security interest should take priority according to its date of perfection except as against subsequent purchase money security interests and the title of a buyer in the ordinary course of business.

7. Special restrictions on moneylending, designed to safeguard personal borrowers against oppression, should not apply to commercial transactions.

8. Stamp duty should attach, as a necessary evil, uniformly to documents which create security interests as defined by the law.

That it is possible to design a relatively simple statute giving effect to most of the above points has been demonstrated by Article 9 of the American Uniform Commercial Code, now adopted in forty-eight States, and by the Draft Ontario Personal Property Security Act.[98] The pre-requisites are a determination to tackle a real problem, and a willingness to abandon out-moded concepts entrenched only in the inherited wisdom of the past.

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[98] For a review of the Ontario draft, see Ziegel, (1966) 44 *Can. B. Rev.* 104.