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McPHAIL, C. ASPECTS OF THE LAW RELATING TO THE TRANSFER OF INSTRUMENTS BY WAY OF SECURITY.

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ASPECTS OF THE LAW RELATING TO THE TRANSFER OF INSTRUMENTS BY WAY OF SECURITY

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ASPECTS OF THE LAW RELATING TO THE TRANSFER OF INSTRUMENTS BY WAY OF SECURITY

INTRODUCTION

> "Resort to chattels or intangibles as an object of security transactions is still replete with uncertainties, pitfalls and outmoded limitations... In New Zealand the currently operative statutes are the Chattels Transfer Act of 1924 and the Companies Act of 1955. Unfortunately the interrelation and operation of these enactments is beset with obscurities and perplexities...."

This statement comes from Professor S.A. Riesenfeld in his introduction to an essay appropriately entitled The Quagmire of Chattels Securities in New Zealand. The object of this paper is to concentrate on that part of the quagmire which deals with the transfer of instruments by way of security, with particular emphasis on the case where the transferor of the instrument becomes bankrupt.

The vast growth in the use of the hire purchase system over the last century has been recognized in our Chattels Transfer Act by the exemption from the registration requirement of customary hire-purchase agreements[1]. Equally, the important role that certain corporations have to play in the financing of dealers entering into hire purchase agreements has been recognized in their exemption from the definition of "moneylender" and in the exemption from the registration requirement of assignments of hire-purchase agreements and the chattels which are comprised in them[2].

By reason of the sheer volume of the hire-purchase "industry", the law relating to dealings in hire-purchase agreements is, even if not particularly well-conceived, at least fairly well covered by a large amount of case law and legal articles. This is not so in the case where sales are financed by the taking out of a

1. s.57 Chattels Transfer Act 1924
2. s.2 C.T.A. Amendment 1931 and s.3(1) C.T.A. Amdt 1953

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chattels mortgage over the article sold in order to secure unpaid purchase moneys.

But in New Zealand at least, an interesting development has been taking place following the enactment of the Hire Purchase Act in 1971. Reports from Auckland indicate that used car dealers may be tending to move away from using the hire-purchase method of sale, and are instead giving customers immediate title to their cars, taking instruments by way of security over them in order to secure unpaid price "instalments". All this is for the specific purpose of evading the provisions of the Hire Purchase Act. While the dealer may still have to meet certain requirements under the Hire-Purchase and Credit Sales Stabilisation Regulations 1957 if the sale transaction is not to be voided, it is quite clear that his use of a chattels mortgage will keep him outside the ambit of the new Act, where s.2 excludes from the definition of "hire-purchase agreement" all transactions where the property in a chattel passes absolutely at the time of the sale.

Despite the difference in form of the sale transaction, the dealer who uses the chattels mortgage instead of the hire - purchase agreement has just as much need of finance as the dealer in hire-purchase goods. Just what effect do the present provisions of the Chattels Transfer Act have on such financing transactions, and how far are they in accordance with commercial needs in such situations?

To try to answer these questions is the purpose of this paper, and for the sake of organization of a rather unmanageable topic it has been divided into roughly six parts:

(1) Is the transfer of an instrument by way of security itself an instrument?
(2) Brief note on the equitable doctrine of notice.
(3) Position where transfer of a mortgage instrument is not itself an instrument.
(4) Position where the transfer is itself an instrument.
(5) Position where a company is the transferor of the instrument.
(6) Conclusions.

not necessarily! see s. 2 short form [illegible] contracts

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I. IS THE TRANSFER ITSELF AN INSTRUMENT?

Can the transfer of an instrument by way of security ever in fact be itself an instrument, despite the specific exclusion of such transfers from the definition of "instrument" in s.2 of the Chattels Transfer Act? It is submitted that it can.

The Act regards book debts as being chattels[1], and book debts are themselves defined as "debts owing to any person in the course of his trade or business"[2].

Purely on the language of this definition it seems fairly obvious that any money owed by a consumer to a dealer from the purchase of the dealer's goods would be a book debt, particularly where the goods are purchased by means of the dealer's habitual commercial practice. There is no direct authority on this point with regard to debts owing under hire-purchase agreements or chattels mortgages, but the strong implication from case law is that such debts are in fact book debts. For instance in Olds Discount Co. Ltd v. John Playfair Ltd (1938) 3 All E.R. 275 the amounts owing under conditional purchase agreements were accepted without question as book debts by the English Court of Appeal. The same point was assumed also in the earlier case of In re George Inglefield Ltd (1933) 1 Ch. 1 (C.A.). It is almost certain that New Zealand courts would take the same view should the question ever arise here.

So it seems that the transfer of an instrument by way of security would, in many cases, be the transfer of a chattel or an interest in a chattel, and thus would qualify as a registerable instrument under the initial definition of "instrument" in s.2 of the Act. Is this view compatible with the express exclusion of such transfers further down in the definition? How can a document be an instrument and at the same time not be an instrument?

This question is not as strange as it sounds when one realizes that it concerns not logic but law. Law is more concerned with the effects of definitions than with definitions themselves, and the problem here lies in deciding just which effects were meant to follow on from the registration or non-registration of the type of document in question.

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1. s.2 "chattels"
2. s.6(4) Statutes Amendment Act 1939

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It is true that normally the express exclusion from a statutory definition of something which would be otherwise included in it settles the question definitively. There are two points, however, which tell against such an interpretation in the present case:

(1) The removal of transfers of instruments by way of security which are also transfers of book debts from the excluded category does not make the existence of that category meaningless. There will still be many transfers of chattels mortgages which are not book debts, generally where the transaction does not involve the sale of the stock in trade of a dealer in those chattels.

(2) The exclusion of transfers of instruments by way of security from the term "instrument" was present in the interpretation section of the 1889 Chattels Transfer Act. The inclusion of book debts in the definition of "chattels" was first enacted in the 1895 Chattels Transfer Act Amendment Act, and again in the 1939 Statutes Amendment Act. As later statutes dealing with a particular matter, the book debt amendment should be regarded as superimposing its particular intention over the earlier more general definition. This view also receives support from s.5(j) of the Acts Interpretation Act 1924: obviously Parliament wished to change the law concerning book debts, and to hold that the assignment of an interest in a book debt is not in fact the assignment of an interest in a chattel would be to deprive the amending Acts of the "fair, large and liberal" interpretation to which they are entitled. It is the superimposition of an amending provision which distinguishes the position of a transfer of a non-book debt mortgage, which equally qualifies as a transfer of an interest in a chattel within the instrument definition, from that of the more specific transfer of a book debt mortgage.

There is also the possibility that a conditional as opposed to an absolute transfer of a book debt has an even stronger claim to being an instrument, as not coming within the excluded category. This is based on the argument found further on in this paper that the word "transfer" in sections 55 and 56 of the Act, and thus by implication in s.2 as well, refers only to absolute transfers. While this may be regarded as a rather a weak point, it is buttressed somewhat by the fact that where there is an absolute

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transfer of a document there is generally no need for it to be registered, since there is unlikely to be any need for protection against later transferees.

It is submitted, therefore, that the transfer of a book debt which is also an instrument by way of security is in fact an instrument, and requires registration as such under the Chattels Transfer Act. For the sake of completeness, however, the rest of this paper will look at the effects of both possible views.

II. NOTICE RULE IN DEARLE v. HALL

Before looking at the statutory provisions concerning the transfer of instruments by way of security, it is necessary to have a knowledge of the position of assignments of choses in action at equity.

The rule laid down in Dearle v. Hall 27 E.R. 102 states that where there are successive assignments in equity of a chose in action, the priority of the assignees is determined prima facie by the order in which the assignees give notice of assignment to the debtor, and not by the order in which assignments are made. So where notice is given by the assignee of a debt to the original debtor, this will normally deprive the Official Assignee of any chance of claiming the benefit of the debt, since the debtor will obtain a good discharge where he pays the assignee directly.

The only situation which could create any problems where notice has been given is where the Official Assignee of the bankrupt transferor claims priority by virtue of registration of the debt instrument under s.56. With absolute assignments this must be a theoretical problem rather than a real one, since the Official Assignee is unlikely to be able to register an instrument which presumably, once assigned, is no longer in the bankrupt's possession. But where the assignment is by way of charge only and the assignee, without actually possessing the instrument, has the right to collect

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directly from the debtor, a strange anomaly arises. Once the Official Assignee, or indeed any other subsequent assignee, registers his transfer under s.56 without specifically notifying the debtor, this will give him priority over a prior assignee who has actually given the debtor notice of the transfer. And this is despite the fact that the debtor is not even fixed by the Chattels Transfer Act with notice of the registered transfer, for s.4(1) fixes notice only of instruments and their contents, not of non-instruments.

What is to happen where the debtor blithely pays off his debt to the first assignee of whose assignment he had notice? Will he be liable to pay all over again to the registered transferee, despite the fact that in equity his original payments would give him a good discharge? And will the prior assignee also be liable to disgorge the amounts already paid to him, despite his complete good faith and the fact that registration, in spite of the whole scheme of the Act, does not in any way fix anybody with notice of his interest?. The justice of this result is open to serious doubt.

While bearing this in mind, it will be assumed for the rest of this paper that no notice of the transfer of the debt has been given to the debtor. As an incidental practical point, the withholding of notification to the debtor is not as unwise as it might seem to the purely legal mind when one looks at commercial realities. In Olds Discount Co. Ltd v. John Playfair Ltd (supra), Branson J. stated at p.279 that "One can well see that the giving of notice to customers could seriously affect the business of the company."

III. WHERE TRANSFER NOT ITSELF AN INSTRUMENT[1]

Distinction between absolute and conditional assignments

If it is assumed that the transfer of an instrument by way of security is not an instrument itself, does anything turn on whether the transfer is absolute or by way of charge only?

Dealing first with the position under the Act, this question may affect the regiterability of the transfer under s.56.

1. It should be noted that this paper is not concerned with those cases where C's interests are subordinated to those of the Assignee in bankruptcy under particular provisions of the Insolvency Act.

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Stout C.J. in Carson v. Fraser (1919) N.Z.L.R. 53 stated that the then equivalent of the present s.55 "only provides that an absolute transfer of a chattels security can be effected by the instrument set out in the schedule in the Chattels Transfer Act."[1]. The implication is that s.55, and by further implication s.56 and also the reference in s.2 to transfers of instruments, applies only to absolute transfers and therefore not to mortgages of instruments. The decision in Carson's case was more about the particular form provided in the Sixth Schedule than about the definition of "transfer", but prima facie it would lead one to conclude that it is in fact only absolute transfers which may be registered under s.56. On the other hand there are certain more general authorities which support the opposite view. For instance, in Re Combined Weighing Co 43 Ch.D. 99 (C.A.) Cotton L.J. stated that "'Transfer' does not mean necessarily absolute transfer, but a transfer of the debt by way of assignment, security or otherwise"[2]. Similarly it was held in Re Parker, Ex parte Turquand (1885)14 Q.B.D. 636(C.A.) that an agreement accompanying a deposit of a registered bill of sale by way of equitable sub-mortgage is "a transfer or assignment" of the bill of sale. The "logic" of the Act itself would seem to support this latter view when one considers that an absolute transfer, which presumably includes delivery of the original mortgage document, would preclude the transferor from making a subsequent assignment of the same document. So the only way in which s.56 can be given any real meaning is to interpret it as not applying solely to absolute transfers. Registration for protection against this would not be necessary, and nor would it be necessary for the creation of the transferee's powers in relation to the original grantor of the instrument: these are given to him by s.55 regardless of registration.

So despite the decision in Carson v. Fraser and the form of transfer set out in the Sixth Schedule, the better view would seem to be that a "transfer" in sections 55 and 56 can be either absolute or conditional, and that these sections will apply to the mortgaging of an instrument by way of security as well as to its outright assignment.

Dealing now with a question of fact, it is often rather hard to tell just when a chose in action has been absolutely

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1. at p.55
2. at p.104

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assigned and when it has been assigned by way of charge only, a distinction which is particularly important where the transferor is a company. This difficulty is evidenced by cases arising under s.130 of the Property Law Act 1952, which in providing for statutory assignments of choses in action has the requirement that the assignment must be absolute.

In Mercantile Bank v. Evans (1899) 2 Q.B. 613, E. contracted to pay $200 to A., who assigned the debt to the Bank in what purported to be a statutory assignment. The whole interest in the debt was assigned, but it was assigned purely as a security. The Court of Appeal held that it was not an absolute assignment, as when A. had repaid his loan the Bank would have no interest in the assigned debt whatsoever.

The later case of Hughes v. Pumphouse Hotel Co. (1902) 2 K.B. 190 (C.A.), however, seems to rather undermine the Evans position, in holding that the fact that an assignment is made for purposes of security does not mean that it cannot be absolute; it will be sufficient if the whole of the assignor's interest passes so as to vest complete control in the assignee. The facts in Hughes' case were as follows: A building contractor executed an instrument by which in consideration of certain bankers continuing a bank account with him, and by way of continuing security to them for present or future loans, he assigned to them all moneys due or to become due to him from the building owners under the contract. He gave the bankers power to give receipts for money paid, power to sue, plus the power to settle and adjust all accounts in connection with the work. Notice in writing of this assignment was given to the building owners. Despite all these powers, however, the assignment was clearly intended to be a security for the bank. The main ground of distinction from Evans'case appears to be that in Hughes the assignment did not purport, on its face at least, to be by way of charge only.

Probably the main case on this point is In Re George Inglefield Ltd (1933)1 Ch. 1. A retailer of furniture and drapery goods entered into a series of agreements with a finance company, under which any goods the subject of a hire-purchase agreement were assigned, subject to and with the benefit of the hire-purchase

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agreement, by the retailer to the finance company. The assignments were expressed to be absolute and not by way of charge, the operative clause being that the finance company received the property in the hired goods and the full and exclusive benefit of all rights under the hire-purchase agreements. The court found that the assignment was absolute, despite another clause in the agreement which provided that, after the finance company should have received from the hirer or dealer sums amounting in the aggregate to the purchase price paid by the finance company under the terms of the assignment, the company was to allow the dealer to retain all subsequent instalments of rent due from the hirer. This was in spite of the fact that once the company had got back the purchase price of the debts plus a "finance charge" it was not entitled to any further benefit from the hire-purchase rentals. In fact the whole case seemed to fall naturally as a mortgage within Romer J.'s comparison between sale and mortgage:

> "The only question that we have to determine is whether, looking at the matter as one of substance, and not of form, the discount company has financed the dealers in this case by means of a transaction of mortgage and charge, or by means of a transaction of sale; because, of course, financing can be done in either the one way or the other, and to point out that it is a transaction of financing throws no light upon the question that we have to determine.
>
> It appears to me that the matter admits of a very short answer, if one bears in mind the essential differences that exist between a transaction of sale and a transaction of mortgage or charge. In a transaction of sale the vendor is not entitled to get back the subject-matter of the sale by returning to the purchaser the money that has passed between them. In the case of a mortgage or charge, the mortgager is entitled, until he has been foreclosed, to get back the subject-matter of the mortgage or charge by returning to the mortgagee the money that has passed between them. The second essential difference is that if the mortgagee realizes the subject-matter of the mortgage for a sum more than sufficient to repay him, with interest and the costs, the money that has

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passed between him and the mortgagor he has to account to the mortgagor for the surplus. If the purchaser sells the subject-matter of the purchase, and realizes a profit, of course he has not got to account to the vendor for the profit. Thirdly, if the mortgagee realizes the mortgage property for a sum that is insufficient to repay him the money that he has paid to the mortgagor, together with interest and costs, then the mortgagee is entitled to recover from the mortgagor the balance of the money, either because there is a covenant by the mortgagor to repay the money advanced by the mortgagee, or because of the existence of the simple contract debt..." [1]

The actual decision in this case would probably have had a more logical basis if the test for determining what type of transaction it was had been based on that put forward in the recent New Zealand case of Paintin& Nottingham Ltd v. Miller Gale & Winter (1971) N.Z.L.R. 164 (C.A.) rather than on the pure substance test put forward by Romer J. In Paintin's case Turner J. stated that:

" The word 'sham' has no applicability to transactions which are intended to take effect, and do take effect, between the parties thereto according to their tenor, even though those transactions may have the effect of fraudulently preferring one creditor to others, and notwithstanding that they are deliberately planned with this in view. If such is their effect, there are statutes and rules of law designed to thwart the intentions of those who enter into them, but the fact that the law discountenances such transactions as these does not render them 'shams'". [2]

I don't see the connection!

The only basic principle to be culled from all these cases is that in most circumstances it will not matter a jot that all that the financing company is interested in is the return of its capital plus a certain amount of interest or "finance charge". The assignment can still be held to be absolute wherever the finance company is given the powers of a normal absolute transferee, at least up until the time when its "purchase" money plus an extra charge is paid off by the dealer.

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1. atp.27
2. at p.175

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Position where transfer is absolute

Quite apart from the question of registration under s.56 of the Chattels Transfer Act, certain important results may well turn on whether the transfer of an instrument by way of security is absolute or by way of charge only. Take the following situation:

> A buys a car from B. Property passes immediately to A, and B takes out a chattels mortgage on the car in order to secure the remaining unpaid purchase money. B then transfers the chattels mortgage outright to C. Neither B nor C notifies A of the transfer.

Complications are going to arise where A pays the money due on the mortgage to B and B goes bankrupt before passing that money on to C. As A has received a good discharge from his debt by paying B, C has the problem of recovering the debt from B's bankrupt estate. Will registration under s.56 help C in this case? It is submitted that it does not:

(1) Registration will not fix A with notice of the transfer. Section 4(1) only gives notice of an instrument and its contents, not of a non-instrument. Without such notice, A's payment of the debt to B is sufficient to absolve him from any further liability to C.

(2) Section 56 gives priority only over another transferee. B's Assignee in bankruptcy may be an assignee of all B's property, but he is not the assignee of an instrument which belongs to C. The Official Assignee will be assignee of the instrument only where B has retained property in it.

So registration will not help C at all, either in giving him a claim against A or a clearcut priorities claim against B's estate. His only remedy will be in trying to show that B, in accepting the money from A, was acting as his agent or is trustee for the money.

In most cases of agency, since the agent has duties to perform which involve the placing of confidence in him by the principal, when he gets possession of money or other property in this character, he holds it as trustee: 14 Halsbury's Laws of England 625. On the other hand an agency is not necessarily

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fiduciary; for instance a solicitor or other agent who receives money merely for transmission to his principal is not a trustee of it[1], and it seems likely that this would be very close to the relationship between B and C. But where there is an express agreement between B and C similar perhaps to that in Re George Inglefield (supra), where the transferee discount company undertook not to give notice of the assignment to the hirer of the goods except in case of default by the hirer or the dealer, B would then be required to collect the amounts due under the instrument as agent of C, which would be an obvious placing of B in a position of trust and confidence.

Independently of a trust established by agency, however, can C establish a trust on normal principles over the money retained by B?[2] If he can then the money will pass to him in its entirety, instead of to the Assignee in bankruptcy of B's estate.[3]

Halsbury states that "The facts and dealings between parties may be such that in equity a fiduciary character is imposed on one of them towards the other in relation to property held by the former, who may then be said to hold it on a constructive trust, the extent and obligations of the trust depending on the relationship between the parties."[4]

It is submitted that this principle is sufficient to create a trust in the example given. There is no direct English or New Zealand law on the point, but American cases have tended to say that a certain equitable interest is created which is sufficient to give the transferee of the debt a good claim for the whole debt as against the assignee in bankruptcy of the transferor.[5] There are however two cases which do have some bearing on the matter.

In Bank of New South Wales v. Cook (1894) 12 N.Z.L.R. 545 the Supreme Court held that where a bank had a mortgage on certain debts and property of its debtor, R, the debts in question were held by R in trust for the bank within the ~~xxxx~~ meaning of the then equivalent of s.42(3) of the Insolvency Act. It is true that in that case R executed a deed which, among other things, declared

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1. Re Hindmarsh (1860) 1 Drew & Sm. 129 — I doubt if this is so!
2. It should be noted perhaps that any claim against B in contract could only put him in the position of a general creditor.
3. s.42(3) of the Insolvency Act 1967
4. 38 Halsbury 855
5. Riesenfeld: Creditors' Remedies and Debtors' Protection — page? whereabouts?

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that he held the debts as trustee for the bank. But reference was made in the judgment wa to the case of Ex parte the North-western Bank, In Re Slee (date) L.R. 15 Eq. 69, where a letter to the same effect was sufficient to create a trust. It is hard not to take the point further and say that it is the situation itself which creates the trust: if B accepts the payment of the debt from A knowing that it should be paid to C, then surely C has a good equitable claim to that money. This is especially so as he cannot base a claim in contract, since the handing over of the mortgage instrument was good consideration for whatever he paid for it.

There is the further case of Berwick v. Matthews (date) 66 L.T. 564, where one creditor agreed to postpone his debt to that of another. In the debtor's bankruptcy both creditors claimed and received a dividend. Day J. in his decision stated: "The effect of the agreement is to make him a trustee of any money of the Wrights which he may receive for the benefit of the plaintiffs until the whole of their claim is satisfied."[1] In other words there was a prior agreement without any express declaration of trust, and this was held by the court to give rise to a constructive trust. The situation is very similar to the example under analysis.

It is therefore submitted that C will in fact have a good claim against B's estate for the whole amount, regardless of non-registration under s. 56. Registration will not strengthen this claim, since it arises quite separately from the provisions of the Chattels Transfer Act.

One further point, however. Obviously, in the above example, if B makes an express statement that he holds the money received from A on trust for C, then C's claim of the existence of a trust will be strengthened. The problem arises when one returns to s.2 of the Act, which includes in the definition of "instrument": "(d) Declarations of trust without transfer".

Assuming that this definition is fulfilled, it would appear on first sight that lack of registration of the instrument would render C's interest in the money void as against the persons mentioned in s.18. But fortunately for C, the reference in that section to chattels in connection with instruments negatives the voiding effect of the section, since money is not a chattel.[2]

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1. at p.565
2. s.18(1)...deemed fraudulent and void...sofar as regards the property in or right to the possession of any chattels comprised in or affected by the instrument....

resulting trust?

who are they?

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Transfer by way of charge only

Assuming that the transfer of the debt is established to be by way of charge only, is the position in the A-B-C example earlier cited any different from that where C is an absolute transferee?

The main difference in the legal position is that if B, the bankrupt dealer, retains the title to the mortgage instrument itself, then his Assignee in bankruptcy will become a subsequent assignee of it: Lloyd v. Banks (1868) 3 Ch. App. 488, unlike the position where if the transfer is absolute the instrument itself will not pass to the Official Assignee.

If C does not register the transfer under s.56 then registration, or earlier registration, by the Official Assignee will certainly give him priority and extinguish C's chance of claiming the full amount due to him under the instrument: s.56 states that a registered transfer shall have priority over an unregistered one, and where two or more transfers of an instrument are registered priority is given to them in the order of their time of registration.

A weak argument could be put forward that the words in s.56 " transfers..... may be registered.... in like manner as instruments are registered" imports the proviso in s.22, that where a grantee under a second or subsequent instrument claims priority by virtue of prior registration he must prove that at the time of the execution of the instrument under which he claims, he had no notice of any existing unregistered instrument. This argument has little chance of success on the straight wording of the statute, as s.22 applies only to "instruments". The better view, it is submitted, is that "in like manner" in s.56 refers merely to the machinery area of registration, and the results of registration of a transfer are to be limited to those specifically stated in s.56.

What is the position where neither C nor the Official Assignee registers the respective transfers? It is clear that if C has any claim at all on the instrument itself then his interest will not be voided under s.18. That section applies only to "instruments", and it is only unregistered instruments that are deemed to be fraudulent and void, not unregistered transfers of

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instruments. In any case, s.18 would apply only where it is the original debtor who is bankrupt: "...the person whose chattels or any of them are comprised in any such instrument..."

This leaves the whole position in the hands of equity and the common law. As with an outright assignment, if A pays B without notice of the assignment then that discharges him completely from the debt, and it is left to C to recover what he can from B's estate.

As C has an equitable mortgage that is not avoided by any statute(assuming that it will not be caught under any of the provisions in the Insolvency Act), he will be in the position of a secured creditor for the amount outstanding under the chattels mortgage, and will have a better claim than the other general creditors proving in B's bankruptcy.

But what happens where A has already paid the money owing on the mortgage to B before his bankruptcy? Would the position be the same as that where the assignment is an absolute one and a trust is created over the money? C's security over the paid up instrument itself would be worthless. Section 55 of the Chattels Transfer Act gives C the same rights, powers and remedies as B, and these rights, powers and remedies are of little use when there is no money still outstanding under the mortgage. And while it seems likely that a trust is created where B receives money that in fact belongs completely to C, there is clearly a difference between this situation and one where B himself is the legal owner of the debt, although subject to an equitable claim. It is hard to avoid the view that all C can be is a general creditor. He is in exactly the same position as a normal secured creditor whose security turns out to be worthless; there is nothing else to which he can attach his claim. He cannot claim that he is the owner of the money that was used to pay off the chattels mortgage: his only right was to seize the instrument and enforce it against A following B's default, and not before. This type of right would not seem to be sufficient to fix the moneys received by B with the character of a trust, and thus there is no bar to the Official Assignee taking them over as part of B's estate.

Would the position have been any different if C had

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registered his interest under the mortgage under s.56? It is submitted that it would not. Section 56 states that "a registered transfer shall have priority over an unregistered transfer", but priority to what? The most logical answer would seem to be priority of interest in the transferred instrument itself, but C's right to exercise his interest will, in the stated circumstances, "crystallize" only after the instrument itself has become worthless by being paid off. A parallel could be drawn with the legal mortgagee of a piece of wasteland on which there was believed to be a goldmine. If the goldmine proves to be a myth and the land itself is worth next to nothing, it may be true that the mortgagee will still have priority over the Official Assignee, but the asset over which he holds his security is completely worthless, and therefore so is his priority. If any money has been made out of the "false" goldmine prior to the bankruptcy the mortgagee can have no claim on it: it is the mine-land itself that is mortgaged, and not the proceeds made from it prior to the mortgagee's exercise of his rights.

The whole problem with s.56 is that it is directed purely at the situation where it is the original debtor and chattel mortgagor who goes bankrupt, not the transferor of the mortgage.

So it seems that in the case of a transfer by way of charge, as with an absolute transfer, registration by C of his interest under s.56 will not affect the result of any contest between him and the Assignee in bankruptcy of B's estate. But where C is absolute transferee of the instrument he will at least have a claim in equity to any money received by B in payment of A's debt, a claim which is not open to C where the transfer is by way of charge only.

IV. POSITION WHERE TRANSFER ITSELF IS AN INSTRUMENT

Where the transfer of an instrument by way of security can be regarded as not coming within the s.2 exclusion from the term "instrument" by being the transfer of a book debt, i.e. a chattel, the transfer itself becomes an instrument, and is registerable under the normal provisions of the Chattels Transfer Act

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rather than under s.56

What effect does this have on the rights of the various parties to the instrument and to its transfer? Take again the example where C, the Assignee of an instrument by way of security, is in competition with the Assignee in bankruptcy of the transferor of the instrument.

What happens where B has transferred the instrument outright to C and C has possession of the instrument? Non-registration by C would prima facie not avoid the transaction as against the persons mentioned in s.18, since the instrument evidencing the book debts would not be in the possession or apparent possession of B as required by the section. But here reference must be made to s.6(2) of the Statutes Amendment Act 1939, which provides as follows:

> (2) For the purposes of the principal Act book debts shall be deemed to be situate in the place where the grantor of the instrument comprising them longest resided or carried on business during the period of six months next before the execution of the instrument.

The effect of this provision can only be to keep the book debts comprised in the mortgage instrument within the possession or the apparent possession of the bankrupt B, despite the fact that the instrument evidencing them is no longer in his actual possession.

This conclusion notwithstanding, however, s.18 will still not extinguish C's interests in the book debts due to the wording in s.18(1)(a), the effect of which is also carried into paragraphs (b) and (c):

> s.18(1) Every instrument, unless registered...shall...be deemed fraudulent and void as against: -
>
> (a) The Assignee in Bankruptcy of the estate of the person <u>whose</u> chattels or any of them are comprised in any such instrument.

The 'whose' can here refer only to C, since B has passed to him complete property in the book debts. It is only where B himself possesses the property in the chattels that s.18 can operate to avoid C's interest in them.

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The only remaining difficulty will occur when A, the original debtor, having no notice of the assignment, pays his debt off to B and bankruptcy intervenes before B passes the money on to C. As submitted earlier in this paper, it seems that where there is an absolute assignment the money paid to B is fixed with a trust in favour of C, so C will be able to recover the amount owed him in full. It must be seen, however, that where there is any doubt about the creation of a trust in such circumstances, C's position would be greatly strengthened by the registration of his instrument of transfer. Section 4 of the Act would then fix the original debtor with notice of the transfer, and if necessary C could recover the money directly from A rather than from B's estate.

Will the position be any different where the transfer of the book debts is by way of charge only? Almost certainly yes, since C will no longer have the protection of the phrase "whose chattels" in s,18(1)(a) mentioned above. The chattels now belong to B, so s.18 can take its full voiding effect against C, who will be reduced to the position of a general creditor if he has not registered his interest in the book debts.

Supposing that C has registered his charge on the book debts and, again, that A has paid the money due on them to B before bankruptcy intervenes, what are C's rights against A and B?

By s.4(1) A is deemed to have notice of the registered instrument and its contents, and he must act in accordance with this imputed knowledge. With an outright assignment this means that he could not obtain a good discharge of his debt by simply paying B, but where the assignment is a conditional one his liabilities in this respect must be determined by the terms appearing in the instrument granted by B to C . Where these do not provide for direct collection of the debt by C but rather, say, for collection by B as his agent, then it is submitted that A can receive a good discharge by paying B. It is only once C has realized his security over the book debt that A is put under any duty to pay him directly. Thus where A pays off the debt to B before C realizes his security, C will not be able to claim against both parties as with an outright assignment; he can claim against B only.

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It is also doubtful that C could claim the whole amount of the money paid to B, apart from proving as a general creditor. His security is on a particular chattel, a book debt, but once that debt has been paid off it is no longer a debt, and therefore no longer a chattel. It is similar to a wasting asset, such as a goldmine: once all the gold has been removed the mine is valueless, and a mortgagee can have no claim to any moneys earned by it prior to his realization of his security.

Finally, it should be noted that where the assignment is by way of charge only, it is irrelevant whether the original mortgage document is in B's hands or C's hands, since s.6(2) of the 1939 amending Act will always deem the book debt to be situate in the grantor's, i.e.B's, hands. Non-registration by C will mean in either situation that the transaction is voided by s.18, and registration will still not protect him where A has justifiedly paid off the debt to B, apart from where the instrument itself provides for direct payment to C.

V. POSITION WHERE TRANSFEROR IS A COMPANY.

So far we have been dealing only with the position where the transferor of the chattels mortgage is an individual. But in many cases he will be trading as a company, so any registration requirements will have to be studied in the light of sections 102 and 103 of the Companies Act 1955 as well as of the provisions of the Chattels Transfer Act.

The essential difference between the two Acts in this area is that s.102 of the Companies Act requires registration of charges only, as opposed to instruments generally in the Chattels Transfer Act, so here the distinction between absolute transfers of an instrument by way of security and transfers by way of charge only acquires an added importance.

So just what is the law relating to companies?

Where transfer of mortgage debt is absolute

Where the company transfers a mortgage debt outright to

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a third party the property in it passes completely, and prima facie the transaction does not give rise to a charge at all. But problems of definition may arise from the wording of s.102(2)(c), which requires to be registered

> "A charge created or evidenced by an instrument which, if executed by an individual, would require registration under the Chattels Transfer Act 1924."

The transfer of the instrument of mortgage securing A's debt is clearly an outright transfer of money still outstanding under the debt, but the argument can at least be put forward that where the debt has been justifiably paid off to the transferor, some sort of interest of the transferee in the money paid can be regarded as creating a charge on those moneys in the hands of the company. But on further study this argument is untenable. If the transfer of an instrument is regarded as not being itself an instrument, then this "charge" is not one which is "created or evidenced by an instrument ....which would require registration under the Chattels Transfer Act".

If the transfer is regarded as being itself an instrument, then the debt in question will be a book debt, and s.102(2)(f), which requires registration of charges on book debts of the company, will apply. But the "charge" in the present case is not in fact on the book debts of the company but on money no longer a part of the debt; any entitlement to moneys already paid arises from the quite separate operation of equity in creating a trust over the money.

But if absolute it is not a "charge"

So the outright transfer of an instrument by way of security need not be registered under the Companies Act, and the relative positions of the company and its transferee will depend on the principles discussed earlier in relation to individual transferors.

Where transfer by way of charge

If the debt transferred is not regarded as being a book debt it will not require registration under s.102(2)(f). Will it require registration under any other paragraph in s.102? Section 102(2)(c) cannot impose this requirement, since the transfer will not be regarded as an"instrument" requiring registration

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under the Chattels Transfer Act. The only other relevant paragraph in the section 15(a), which defines as a registerable charge "a charge for the the purpose of securing any issue of debentures". It is submitted that this definition covers the transaction in question, both under the definition of "debenture" in s.2 of the Companies Act[1] and under Wilson J.'s definition of the term in Australasian Secured Deposits Ltd v. A.A.(1972) N.Z.L.R. 458 as "a document which either acknowledges or creates a debt, and any document which fulfils either of these conditions is a debenture".

The transfer will therefore require to be registered under the Companies Act, and non-registration will render it void as against the liquidator under s.103 of the Act.

Where the debt is regarded as being a book debt then the conditional transfer will require to be registered as a charge on the book debts of the company.

The position where the assignee does in fact register the transfer will be the same as was discussed earlier with reference to an individual assignor of the debt.

"Declarations of trust without transfer"

Earlier in this paper the question arose of whether money paid to the assignor of a mortgage was fixed with a trust in favour of the assignee, and the conclusion reached was that probably this would be so. This view would almost certainly be correct where the assignor makes an express declaration that he holds such funds on trust[2].

Section 2 of the Chattels Transfer Act includes in the definition of "instrument" declarations of trust without transfer, and while non-registration of such an instrument can have no effect under the Chattels Transfer Act where the trust property is money, since s.18 voids instruments concerning chattels only, the wording of s.103 of the Companies Act has no such limitation. If the declaration of trust is indeed a charge created or evidenced by an instrument which if executed by an individual would require registration under the Chattels Transfer Act, then non-registration will mean that C's interest in the money will be void as against the liquidator.

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1. "Debenture" includes debenture stock, bonds, and any other securities of a company, whether constituting a charge on the assets of the company or not.
2. Bank of New South Wales v. Cook (1894) 12 N.Z.L.R. 545

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Fortunately for C, however, even if this interest in the trust is assumed be a "charge", it is not one which "would require registration" under the Chattels Transfer Act, this on the authority of Carncross v. Wilson's Motor Supplies Ltd (1924) N.Z.L.R. 327. In that case an agreement concerning certain motor cars to be after-acquired by the company was held by the Supreme Court not to be an instrument which would "require to be registered" under s.102, since its registration under the Chattels Transfer Act would be of no effect because of the prohibition in s.24 against the creation of registrable interests in after-acquired property.

So in this situation the registration or non-registration of the declaration of trust can have no effect on the relevant law outside the Companies Act and the Chattels Transfer Act.

As a final point on the position of a company in this area of law, it is interesting to note that where registration of something which is not a charge may seem to be necessary under the Chattels Transfer Act, it is quite possible that failure to register will not lead to avoidance of the transaction by the company's liquidator. This is because s.18 refers only to avoidance by the Assignee in Bankruptcy, and on the plain reading of the section this mistake in title will not mean avoidance of an unregistered instrument by the liquidator of an insolvent company.

VI. CONCLUSION

Whether the various submissions put forward in this paper are correct or not, it must by now be quite clear that the law relating to the transfer of instruments by way of security can indeed be described as a quagmire. Wherever one goes there is trembling legal ground, and in some cases the use of registration adds to the swamp rather than supplies a secure plank on which to cross it. What conclusions can be drawn from this study?

(1) McKay in his article on the Assignment of Hire-Purchase Agreements[1] states of the Chattels Transfer Act that

"The rationale behind the registration requirement is to

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1. McKay: Law and Practice of Assignment of Hire Purchase Agreements (1970) 5 V.U.W.L.R. 321

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give notice to the lending and buying public that certain goods in a person's possession or assets under his control are encumbered with a prior interest. The reason for excluding transfers of instruments by way of security from the term "instrument" would appear to be that since the instrument by way of security must itself be registered, notice is given to the lending public of a grantee's interest, but that the particular identity of the grantee is unimportant.... assignment does nothing but alter the xxxxxxxxxxxxxx identity of the secured party; it does not alter the fact that goods in a purchaser's possession are not his to freely dispose of."

It is submitted that this reasoning is quite adequate when applied to the situation in which it is the original mortgagor-debtor who goes bankrupt. But it is hardly satisfactory when it is the mortgagee who, after assigning his mortgage, is the one who gets into financial difficulties. If a book debt is a chattel, it is just as important to know whether a third party has an interest in this chattel apparently owned by a dealer in consumer goods as it is to know if the dealer has an interest in a car owned by a consumer.

For these reasons it is submitted that the law should state clearly that the transfer of book debts evidenced in an instrument by way of security should itself be classified as an instrument for the purposes of the Chattels Transfer Act.

(2) Some of the greatest problems concerning the transfer of mortgages arise where no notice has been given to the original debtor of the assignment of his debt. One way of overcoming this problem would be to require the signature of the debtor as a prerequisite to the registration of an instrument comprising an interest in book debts. This could, however, be unpopular in a commercial world where the appearance of success and financial stability can have an effect on business: public knowledge that a dealer is in constant need of outside finance may lead to a loss of confidence in his firm, and dealings with it may be avoided. Another alternative must be found.

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(3) A finance corporation is generally unwilling to lend a dealer money unless it is well secured, but at the same time it has no desire to have to go through the cumbersome registration process on every financial transaction it carries out. This has already been realized in the provisions exempting from registration assignments of customary hire-purchase agreements. How is this desire for security to be reconciled with the dealer's wish that his customers be unaware of his financing arrangements?

One of the main obstacles in the way of reconciling these two objectives is s.6(2) of the Statutes Amendment Act 1939, which deems book debts to be situate in the dealer's place of business for the purposes of the Act. Whether intentionally or not, this provision seems to leave no room for the argument that where a book debt is comprised in an instrument then transfer of the instrument removes the book debt from the apparent possession of the dealer. The common practice at present is for the transferee to hold the documents evidencing the debt, whether the transfer is outright or, in substance, by way of charge only. The aims of both the dealer and the finance corporation could be met by allowing such a transfer of the relevant documents to take the book debts out of the possession or apparent possession of the dealer. If this were so, then the transaction could not be avoided by s.18.

(4) The rights of the consumer-mortgagor should also be protected. If the transfer of a book debt which is also a mortgage is to be regarded as an instrument, and is registered as such, then by s.4(1) of the Act "all persons" are deemed to have notice of it and its contents. It is submitted that such notice should not be fixed on the purchaser of goods by way of mortgage, but only upon possible subsequent assignees of the debt owed by him to the dealer. Reference was made at the beginning of this paper to the injustice involved in expecting a purchaser to know by some strange prescience the exact moment at which a transfer of his debt is registered, and to thereafter switch his payments from the dealer from whom he bought the goods to the dealer's assignee. Here the rule of equity, that notice to a debtor must be actual, should not be abrogated by the statute.

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(5) Another problem frequently cited in this paper is the question of what happens when moneys owing on the debt are paid to the dealer and bankruptcy intervenes before the money is transferred to the assignee of the debt. Should the assignee have a right to the whole amount, or should he only be able to prove as a general creditor? Taking the general scheme of the Act into consideration, registration is a major justification for the creation of a "safe" security, because it provides notice to the commercial world that certain apparent assets of a dealer cannot be relied on in dealings with him. On this reasoning, so long as the assignee has registered his interest, there can be no objection to his recovering moneys paid to the dealer purely because of lack of actual notice to the debtor, as well as recovering amounts outstanding on the instrument he possesses. On the same reasoning, failure to register should place him in the same position as a general creditor vis-avis the paid up money.

So long as the legislature sees the necessity for registration of certain hidden interests in goods which are in the apparent possession of another, then some penalty will have to be paid for non-registration, and the decision not to register will be an accepted commercial risk.

(6) At some time, however, a decision will have to be made on the point just mentioned. At present, the incidence of hire-purchase agreements is so widespread that the registration requirement has been dispensed with for simple reasons of commercial convenience: the time and expense involved in the registration of instruments and searches of the Register are not worth the small number of cases where either of these actions would produce any worthwhile result. There seems to be no reason why the same principle should not apply to transactions concerning sales by way of mortgage. There is little use in attaching certain benefits to registration of an interest in chattels when on the whole it is more commercially practical not to take advantange of these benefits.

(7) Finally, the question of whether it is generally more desirable for the New Zealand community that "credit" sales be carried out by hire-purchase rather than mortgage transactions has no place

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in the Chattels Transfer Act. The use of the sale by chattels mortgage appears to be growing, and if such sales are not to be completely banned as undesirable, then the law relating to them should be as clear as possible and should create the best possible framework in which a consistent commercial practice which is both efficient and fair to all parties can grow up. At present our law relating to the transfer of instruments by way of security is sadly lacking in this respect.

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