THE ORDINARY COURSE OF BUSINESS

By C. H. Bright*

The phrase "ordinary course of business" has a wide currency, but there appears to be some doubt both as to what is an "ordinary course" and as to what is "business". A transaction in the ordinary course of business may operate to protect a person acquiring goods as an honest buyer from a seller who had no title or a defective title. The two best known present day applications of the phrase are in bankruptcy and in mercantile law. A lesser known application occurs in bills of sale legislation.[1]

A person acquiring goods from a second person who has committed an available act of bankruptcy does not necessarily gain title. If bankruptcy supervenes the title of the trustee will relate back, and taint the title of the person so acquiring. But if the person acquiring the goods did so in good faith and in the ordinary course of business his title may be good against the trustee.[2]

A person acquiring goods from a second person who is solvent but is not the true owner does not necessarily gain title. If the true owner disavows the transaction the person so acquiring will usually not be able to keep the goods. But if the person who disposed of the goods was a mercantile agent entrusted with the goods as such, and if he disposes of the goods in the ordinary course of his business of a mercantile agent, then the acquirer gains a title which is good against the agent's principal, even although the agent does not account to his principal.[3]

The phrase "ordinary course of business" and cognate phrases appear to come into judicial use in the middle of the eighteenth century. The phrase is, however, not entirely a judicial invention.

An early report is *Cooper* v. *Chitty*[4] which was twice argued in 1756. It decided that the property in the goods of a bankrupt vests in the assignee from the date of the act of bankruptcy. Lord Mansfield speaking for the Court said:

"Till the making of 19 Geo. II C.2 if the bankrupt had, bona fide, bought goods, or negotiated a bill of exchange; and thereupon, or otherwise, in the course of trade, paid money to a fair creditor, after

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1. For an early reference in another branch of law see per Dixon C.J. in *Kavanagh* v. *The Commonwealth* 33 A.L.J.R. 38, 38.
2. The Bankruptcy Acts, 1914 and 1926, s.46 (Eng.). Bankruptcy Act 1924-1959, s.95 (Cth).
3. The Factors Act, 1889, s.2 (Eng.); Factors (Mercantile Agents) Act 1923, s.5 (N.S.W.); Goods Act 1928, s.65 (Vic.); Factors Act 1892, s.3 (Qld.); Mercantile Law Act 1936, s.4 (S.A.); Factors Act 1891, s.3 (W.A.).
4. 1 Burr. 20; 97 E.R. 166.

he himself had committed a secret act of bankruptcy; such bona fide creditor was liable to refund the money to the assignees, after a commission and assignment; and the payment, though really and bona fide made to the creditor, was avoided and defeated by the secret act of bankruptcy.

"This is remedied by that Act, in case no notice was had by the creditor (prior to his receiving the debt) 'that his debtor was become a bankrupt, or was in insolvent circumstances'."[5]

The statute referred to by Lord Mansfield seems to have been prompted by the same theory of protecting the freedom of persons to trade as was present in the judicial bosom.

In the following year (1775) Lord Mansfield decided *Pelly* v. *Royal Exchange Assurance*.[6] This was a case concerning a ship which had caught fire while being refitted on an island in the Canton River. The question was whether the fire was within the terms of the policy. The fire was held to be one of the perils insured against and Lord Mansfield in his judgment said:

"The mercantile law in this respect is the same all over the world. For, from the same premises, the sound conclusions of reason and justice must universally be the same.

"Hence, among many other, the following rules have been settled.

"If the chance is varied or the voyage altered by the fault of the owner or master of the ship, the insurer ceases to be liable: because he is understood to engage that the thing shall be done, safe from fortuitous dangers; provided due means are used by the trader to attain that end.

"But the matter is not in fault, if what he did was done in the usual course, or necessarily ex justa cause."[7]

Again in 1758 Lord Mansfield applied the doctrine in *Miller* v. *Race*.[8] This was an action of trover against the defendant upon a bank note. The bank note had been stolen by a highwayman and had been acquired by an innkeeper from a person with the appearance of a gentleman staying at his inn. The original owner of the bank note brought these proceedings to recover the bank note from the innkeeper. It was held that a bank note passes as currency. Lord Mansfield said: "After stating the case at large, he declared that at the trial, he had no sort of doubt but this action was well brought, and would lie against the defendant in the present case; upon the general course of business, and from the consequences to trade and commerce; which would be much incommoded by a contrary determination.

5. id. at 32; 172.
6. 1 Burr. 341; 97 E.R. 342.
7. id. at 347-348; 346.
8. 1 Burr. 452; 97 E.R. 398.

"It has been very ingeniously argued by Sir Richard Lloyd for the defendant. But the whole fallacy of the argument turns upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz. to goods, or to securities, or documents for debts.

"Now they are not goods, not securities, nor documents for debts, nor are so esteemed: but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. They are as much money, as guineas themselves are; or any other current coin, that is used in current payments, as money or cash. . . . A bank note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received, as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured."[9]

In this particular series of reports various references are made, of course, to the law merchant; for example in *Edie* v. *East India Company*,[10] Wilmot J. said: "Therefore a note endorsed over to A would enable him to endorse it over to B and so on. For the convenience and course of trade is to be attended to: the intention is to be regarded not the form.

"The custom of merchants is part of the law of England; and Courts of Law must take notice of it as such.

"There may indeed be some questions depending upon customs among merchants, where, if there be a doubt about the custom, it may be fit and proper to take the opinion of merchants thereupon; yet that is only where the law remains doubtful."[11]

Another example is the well-known case of *Pillans* v. *Van Mierop*.[12]

Lord Mansfield said: "This is a matter of great consequence to trade and commerce, in every light. . . . If there be no fraud, it is a mere question of law. The law of merchants and the law of the land is the same: a witness cannot be admitted to prove the law of merchants. We must consider it as a point of law. A nudum pactum does not exist, in the usage and law of merchants. . . . This is an engagement 'to accept the bill if there was a necessity to accept it; and to pay it, when due': and they could not afterwards retract. It would be very destructive to trade, and to trust in commercial dealing, if they could."[13]

The first "ordinary course" case in bankruptcy appears to be *Alderson* v. *Temple*.[14] Mr. Burrows said: "I was not present when

9. id. at 457-459; 401-402.
10. 2 Burr. 1216; 97 E.R. 797.
11. id. at 1227-1228; 803.
12. 3 Burr. 1663; 97 E.R. 1035.
13. id. at 1669-1670; 1038.
14. 4 Burr. 2235; 98 E.R. 165.

the Court pronounced this rule; being at that time confined with the gout." But he obtained a report of the case from "an eminent barrister and an excellent note taker".[15]

Lord Mansfield is reported as saying:[16] "A general question has been started, 'whether in any case, upon the eve of a bankruptcy, a man may do that which in consequence prefers a particular creditor': and that has been argued as a general question.

"But that will depend upon the act. As, if a bankrupt in course of payment pays a creditor; this is a fair advantage in the course of trade: or if a creditor threatens legal diligence, and there is no collusion; or begins to sue a debtor: and he makes an assignment of part of his goods; it is a fair transaction, and what a man might do without having any bankruptcy in view. Suppose such a case as Small and Oudley: there it was for the advantage of the creditors, and no fraud to them; and if part of the transaction were set aside as fraudulent, the whole must. But it never entered into the mind of any Judge to say 'that a man in contemplation of an act of bankruptcy, could sit down and dispose of all his effects to the use of different creditors': for that would be a fraud upon the acts of bankruptcy. But if done in a course of trade, and not fraudulent, it may be supported.

"This was not done in a course of trade: for, there never was any dealing between the parties in sending endorsed notes. There was no application made by the defendant. . . . Suppose in the course of trade, a bill is sent to Constantinople, and a bankruptcy happens in England before it arrives; yet it may be good. But here, it is done because they were resolved to commit an act of bankruptcy".

But trade means trade, not kindness of heart, as is shown by *Harman* v. *Fishar*[17]. Fishar had lent some money to Fordyce & Company who were shopkeepers. He borrowed a further £7000 which he lent to Fordyce & Company. Fishar did not charge any interest but merely lent the money as a kindness and not in the way of trade. Fordyce & Company gave him some bills which had the effect of giving him a preference and were intended to give him a preference. It was held that despite the meritorious act of the creditor the preference must be set aside.

The case usually bracketed with *Alderson* v. *Temple*[18] [supra] is *Rust* v. *Cooper*[19]. The bankrupts were clothiers. The defendant was a linen draper and banker. The bankrupts were in difficulty owing to the failure of Fordyce, a banker in London. The defendant lent the bankrupts £1000 upon their bond. The bankrupts made a

15. id. at 2237; 166.
16. id. at 2240; 168.
17. Lofft 472; 98 E.R. 753; 1 Cowp. 117; 98 E.R. 998.
18. Supra at
19. 2 Cowp. 629; 98 E.R. 1277.

preference to the creditor by delivering over goods to the creditor. The question was whether the assignees were entitled to recover the value of the goods.

Lord Mansfield said:[20] "There is a fundamental distinction between an act like this, and one done in the common course of business. The statutes have relation back only to the act of bankruptcy. And I consider here, that there is no act of bankruptcy till the 26th. If in a fair course of business, a man pays a creditor who comes to be paid, notwithstanding the debtor's knowledge of his own affairs, or his intention to break; yet, being a fair transaction in the course of business, the payment is good; for the preference is there got consequentionally, not by design: it is not the object; but the preference is obtained in consequence of the payment being made at that time.

"Suppose a creditor presses his debtor for payment, and the debtor makes a mortgage of his goods, and delivers possession; that is, and at any time, may be, a transaction in the common course of business, without the creditor's knowing there is any act of bankruptcy in contemplation; and therefore good."

Later in the judgment Lord Mansfield says:[21] "The present determination will not affect the case of a fair mortgage of goods delivered, arising out of a transaction in the common course of business. It will only affect cases, where there is no object but that of defeating the bankruptcy laws, and committing a fraud on all the other creditors."

Aston J. in the same case refers to the payment and says: "But this was done without demand; not in a common course of dealing."

He later says: "The present transaction is not in itself an act of bankruptcy; but not being a payment in the regular and common course of dealing and business, it is a fraudulent transaction, and therefore void with respect to the other creditors."[22]

With the foregoing as a background it will be interesting to see how the doctrine has been applied in recent years in bankruptcy and in cases concerning factors.

BANKRUPTCY

Bankruptcy practitioners are well aware of the impossibility of arriving at a stereotyped definition of "good faith and ordinary course of business". How frequently a supplier of goods to a bankrupt claims that the goods still held by the bankrupt at the date of sequestration were on consignment or on hire. And how frequently a supplier of goods repossesses them with the consent (or without the opposition) of the bankrupt shortly before the sequestration order

20. id. at 634; 1280.
21. id. at 635; 1280.
22. id. at 635; 1281.

and then claims that the business relationship between the parties contemplates such a repossession. Does the phrase "ordinary course of business" connote some enquiry into the ordinary or usual course of the business arrangements subsisting between the parties to the impeached transaction? The Australian Courts have answered this question "No" and it seems that the English Courts would give the same answer.

The principal English authority is a Privy Council decision *Tennant* v. *Howatson*[23]. The appeal was from the Supreme Court of Trinidad and the impeached transaction was an arrangement between the bankrupts and a merchant which purported to assign the property in certain goods to the merchant. The arrangement was not registered as a bill of sale. The Judicial Committee approached the problem as follows:[24] "It is contended that the transaction in question falls under the heads of 'Transfers of goods in the ordinary course of business of any trade or calling', which are excluded from the operation of the Act.[25] Several Trinidad merchants have made affidavits to shew that it is a common custom in Trinidad for the owner of a sugar estate to borrow money of a merchant for the expenses of getting the crop and making the sugar, upon an agreement to deliver to him the sugar when made, to sell on commission, and to retain his debt out of the proceeds. Such agreements, it is said, are known as working agreements, and are not usually registered as bills of sale.

"But three of these witnesses who were cross-examined explained that working agreements are usually joined with, or subsidiary to, mortgages, evidently meaning mortgages of the estates; and one said that mortgages are the rule, and working agreements the exception. Though therefore the working agreement, standing alone, is of frequent occurrence, it cannot be said to be the common practice. And their Lordships doubt very much whether the special arrangement made by the letter of November, 1885, is such an advance for the purposes of the estate as to make it an ordinary working agreement.

"If the evidence leaves it doubtful whether the agreement in question is a working agreement, and falls short of shewing that even a working agreement is the common practice in Trinidad, still further is it from shewing that the agreement is a transfer 'of goods in the ordinary course of business'."

It will be noted that the Judicial Committee was considering a statutory embodiment of the phrase "ordinary course of business". The Committee was not concerned to ascertain the particular relationship between the merchant and the bankrupts, but the prevailing course of business in Trinidad in the trade or calling of the bankrupt.

23. (1888) 13 A.C. 489 (P.C.).
24. id. at 493.
25. See Bills of Sale Act, 1886-1940, s.2 for the definition of "bill of sale".

The High Court of Australia considered the phrase in *Burns* v. *McFarlane*[26] where a bill of sale given by a grantor who shortly afterwards became bankrupt was under discussion. The Court said[27] [at p. 125], "That it (i.e. the transaction) was made in the ordinary course of business is a finding upon which we have felt more difficulty. But the expression as used in the Bankruptcy Acts is a wide one. See Sievwright v. Hay & Co. Ltd.; Robertson v. Grigg, per Gavan Duffy C.J. and Starke J. Unlike the expression found in the bills of sale legislation, viz., 'transfers of goods in the ordinary course of business of any trade or calling',[28] it does not require an investigation of the course pursued in any particular trade or vocation and it does not refer to what is normal or usual in the business of the debtor or that of the creditor. See Robertson v. Grigg, per Evatt J., and cf. Halsbury's Laws of England, 2nd Ed., vol. 3, p. 20. Possibly the application of the expression in bankruptcy is not so wide as in relation to floating charges: cf. Halsbury's Laws of England, 2nd Ed., vol. 5, p. 482, and Palmer, Company Precedents, 13th Ed. (1927), Part III, Debentures, p. 72. But the meaning has more analogy."

And in *Downs Distributing Co.* v. *Associated Blue Star*[29] Rich J., referring to the phrase in the Bankruptcy Acts "ordinary course of business" said,[30] "This last expression it was said 'does not require an investigation of the course pursued in any particular trade or vocation and it does not refer to what is normal or usual in the business of the debtor or that of the creditor'. It is an additional requirement and is cumulative upon good faith and valuable consideration. It is, therefore, not so much a question of fairness and absence of symptoms of bankruptcy as of the everyday usual or normal character of the transaction. The provision does not require that the transaction shall be in the course of any particular trade, vocation or business. It speaks of the course of business in general. But it does suppose that according to the ordinary and common flow of transactions in affairs of business there is a course, an ordinary course. It means that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation."

It is not in the ordinary course of business to recoup a person who has in good faith and for valuable consideration expended money on null and void arrangements such as prohibited betting transactions.[31]

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26. (1940) 64 C.L.R. 108.
27. id. at 125.
28. Compare with *Tennant* v. *Howatson*, supra at
29. (1948) 76 C.L.R. 463.
30. id. at 476, 477.
31. *Re Jones decd.* (1949) 15 A.B.C. 56.

Nor is there an ordinary course if payments are received in consideration of some process of execution or in unusual circumstances as dictated by the creditor.[32] In all the reported cases in Australia, except one, where the ordinary course of business has been examined there has been a business relationship in fact between the parties to the transaction. The exception was re Linde[33], where Lukin J. upheld a transaction in which the creditor had for years been in the habit of lending money to the debtor. No interest was charged, the lender knew nothing about the business, and was actuated solely by motives of personal friendship. It is submitted that the judgment is erroneous and that a transaction cannot be in the ordinary course of business if there is no "business" element in it. "Business" means "business" as was demonstrated in *Harman* v. *Fishar*[34] [supra]. It is used in a literal sense and not in the metaphorical sense exemplified in the famous phrase "the ordinary plain common sense of the business".[35]

FACTORS CASES

In the Factors Acts[36] the phrase "ordinary course of business in any trade or calling" has been particularized as "ordinary course of business as a mercantile agent". It is suggested that the three ideas embraced by this phrase are:

(a) the person disposing of the goods received them as a mercantile agent.
(b) the transaction was a business transaction.
(c) the disposition was in the ordinary course of the business of a mercantile agent.

The first proposition is established by *Cole* v. *N.W. Bank*[37] and *Staffs. Motor Co.* v. *British Waggon Co.*[38]

The second proposition is self evident.

The third proposition is the one of interest to this discussion. As in the bankruptcy cases the Courts both in England and in Australia have refrained from an investigation of the business methods ordinarily employed by the particular disponor of the property (in this case the factor) and have had regard to what may be considered to be proper business methods in general.

In *Person* v. *Rose & Young Ltd.*[39] the facts were that one Hunt was a mercantile agent. Plaintiff left a car with him for sale or for offers. Hunt fraudulently got the log book from the plaintiff and

32. *Re Bailey* (1952) 16 A.B.C. 80; *re Nink* (1952) 17 A.B.C. 16.
33. (1935) 8 A.B.C. 158.
34. Supra at
35. *The Volute* [1922] A.C. 129 at 145.
36. See the statutory references at the beginning of this article.
37. (1875) 10 C.P. 354.
38. [1934] 2 K.B. 305.
39. [1951] 1 K.B. 277.

sold the car to an innocent purchaser. The Court of Appeal held that sale of a car without a log book was not in the ordinary course of business of a car salesman and that, as this was the only kind of sale that Hunt was legitimately able to make, ownership of the car did not pass to the purchaser.

This case may be compared with two Australian cases.

In *Busby* v. *MacLurcan & Lane*[40] a motor car was entrusted to a mercantile agent for sale. The agent found a fictitious buyer and then purported to assign the interest of the fictitious buyer to a finance company which then financed the fictitious buyer. The sale was held not to be in the ordinary course of business and the finance company did not get title.

In *McKenzie* v. *Payne*[41] a motor car was entrusted for sale to one Bailey, a car salesman, who sold to one O'Brien, who resold to one Payne. Kinsella J., following Lush J. in *Heap* v. *Motorists Advisory Agency*[42] held that the onus of establishing ordinary course of business was on the plaintiff and that the onus had not been discharged. The original owner therefore recovered his car.

In a later New South Wales case *Buckland* v. *Clarke*[43] which also arose out of the Bailey and O'Brien association referred to in *McKenzie* v. *Payne*[44] (supra) plaintiff entrusted his car to Bailey for sale. Bailey was a mercantile agent. Bailey sold to his partner in fraud O'Brien. O'Brien then entrusted the car to another mercantile agent who sold it to the defendant. Roper C.J. in Equity held that the onus of establishing ordinary course of business had not been discharged. An attempt was made to persuade the Court not to follow *Heap* v. *Motorists Advisory Agency*[45] on the ground that there was an over-riding presumption of innocence and therefore there could not be an onus on a plaintiff to establish the propriety or innocence (i.e., ordinary course) of a transaction. The Court did not decide the point as there was in the case at bar ample evidence of the bad faith of Bailey and O'Brien.

From the above review it appears that the validity of the title to goods acquired from a person who subsequently goes bankrupt or from a factor may depend to a large extent on circumstances quite outside his knowledge. If, when the transaction is impeached, he manages to satisfy the Court that the transaction was in the ordinary course of business he will succeed. But he will have a carried on business, and he may be faced with the necessity of difficulty in determining what evidence to adduce, for it will not avail him to show how the particular debtor or factor usually

40. (1931) 48 W.N. (N.S.W.) 2.
41. (1952) 69 W.N. (N.S.W.) 266.
42. [1923] 1 K.B. 577.
43. (1956) S.R. (N.S.W.) 185.
44. Supra at
45. Supra at

persuading a Judge who is not familiar with the particular type of business that a certain way of conducting that business is usual. And if Lord Mansfield was right in *Pillans* v. *Van Mierop*[46] he will not be allowed to adduce evidence relating to general usage in the trade.

But Lord Mansfield's comment to this effect is not consistent with the historical background and is not accepted by later authorities.[47]

The owner of a motor car who has the ill luck to entrust it for sale to a rascally salesman is in an equally anomalous position. If the salesman sells the car to an innocent purchaser and pockets the proceeds presumably the original owner loses his car. But if the salesman finds a dummy who contrives a sale through another salesman to an equally innocent purchaser the original owner can get his car back.

By way of contrast, if an assignee of goods claims title under a document not registered as a bill of sale he may have to demonstrate the ordinary course of business either at large or in a particular trade or calling, for the common definition of bill of sale uses two phrases, "transfer of goods in the ordinary course of business of any trade or calling" and "any other documents used in the ordinary course of business".

The first phrase is specific and the second is general. The first phrase is the phrase in issue in *Tennant* v. *Howatson*[48] and referred to in *Burns* v. *McFarlane*.[49] It does not in terms speak of a document. The second phrase does in terms speak of a document, and seems to be in line with the bankruptcy and factors cases.

It is perhaps not going too far to assert that the protection given to persons acquiring goods in the ordinary course of business, either originated, or at any rate came to be spoken of judicially as forming part of the law merchant embodied in the common law, at a time when British subjects were expanding their trading relationship with each other and with citizens of foreign powers. A consequence of this expansion was that the two parties to business transactions were frequently strangers to each other and dealing in goods whose origins could not be readily ascertained. A rigid adherence to strict proof of title would have stifled trade. The necessities of the situation demanded a relaxation. The doctrine of protection of certain transactions carried on in the ordinary course of business afforded the relaxation required.

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46. Supra at
47. *Bacon's Abridgement* (7th ed., 1832) V, 382-383; Holdsworth: *History of English Law* (1st ed., 1903) vii, 527; Plucknett: *Concise History of the Common Law* (4th ed., 1948), 625-626; *Goodwin* v. *Robarts* (1875) L.R. 10 Ex. 337. For a recent illustration of evidence of a trade custom see *Mount* v. *Jay* [1960] 1 Q.B. 159.
48. Supra.
49. Supra.