

SECURITIES OVER FUTURE STOCK-IN-TRADE AND THE S.A. BILLS OF SALE ACT 1886-1940

"My Lords, to say that the Bills of Sale Act . . . is well-drawn, or that its meaning is reasonably clear, would be to affirm a proposition to which I think few lawyers would subscribe . . ."¹. So said Lord MacNaghten in 1888 of the English Bills of Sale legislation then in force. The South Australian Bills of Sale Act, which is largely modelled on this legislation, in some matters almost certainly justifies the same comment. One of the most vexed questions which arises under the South Australian Act is whether securities granted over future stock-in-trade are bills of sale within the Act and require registration to be fully effectual.

This question raises several issues:

(1) "Bill of Sale"

In considering existing case-law on the meaning of "bill of sale", it is most important to bear in mind subtle but often crucial differences in the legislation under interpretation.

The English Bills of Sale Act of 1854 defined "bill of sale" around the terms "assurance" and "transfer" and many State Acts in Australia have adopted similar definitions². It is now well-settled that an assignment of future stock-in-trade is not an assurance of personal chattels within these definitions because on the execution of the document, no interest at all in the goods is or can be transferred³. Only when the goods in question come into the assignor's hands can an interest of any kind pass to the assignee. This is not, of course, to deny that assurances within the Act are confined to assurances passing property at common law. It is well-established that an immediately operative assurance of an equitable interest in goods is within these definitions⁴. This proposition has even been applied to the situation where A agrees to execute a bill of sale on a given future date over goods which he presently owns, in the event of a debt not being paid by that date⁵. The view appears to have been taken that the agreement in this case passes an immediate equity in the goods to the creditor in that he has a right from the moment the agreement is executed to apply to a Court of Equity for an injunction to restrain an unauthorised disposition of the goods⁶. However, even this wide interpretation of the term "assurance" cannot embrace the situation where A grants a security of future stock-in-trade i.e. stock-in-trade

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1. *Thomas v. Kelly* (1888) 13 App. Cas. 506, 517.
 2. See generally Sykes: *The Law of Securities* (1962) Part III, Chap. I.
 3. See, e.g., *Akron Tyre Co. Pty. Ltd. v. Kittson* (1951) 82 C.L.R. 477; *Roberts v. I.A.C. (Insurance) Pty. Ltd.* [1957] V.L.R. 231.
 4. E.g., *In re Jeavons* (1873) 8 Ch. App. 643, 649; *Edwards v. Edwards* (1876) 2 Ch. D. 291, 297; *Shears & Sons Ltd. v. Jones* [1922] 2 Ch. 802; *The Bank of Victoria Ltd., v. Langlands Foundry Co. Ltd.* (1898) 24 V.L.R. 230, 255.
 5. *Edwards v. Edwards* (supra n. 4); *Shears & Sons Ltd. v. Jones* (supra n. 4); *In re Jeavons* (supra n. 4); *In re Steele* (1873) 16 Eq. 414.
 6. See per Russell J. in *Shears & Sons Ltd. v. Jones* supra n. 4 at 808.

which he does not at present own; obviously he cannot pass an interest of any kind in something he does not have⁷. Thus, if the definition of "bill of sale" in the South Australian Act rested there, it would be clear that the typical assignment of future stock-in-trade by way of security for a debt would not fall within the Act. The argument for regarding such an assignment as a bill of sale derives from a further limb of the definition of "bill of sale" which was apparently taken from an amendment to the English Bills of Sale Act in 1878 but which is to be found, amongst the Australian States, only in the South Australian Act. This limb provides that "any agreement, whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred" shall be a bill of sale. The scope of this limb of the definition of "bill of sale", particularly in relation to securities over future stock-in-trade, unfortunately has scarcely been a live issue in England because amendments to the Bills of Sale Act in 1882 provided that bills of sale by way of security for a debt (most bills of sale), firstly, must be in accordance with a prescribed form and describe the goods in question "specifically" and, secondly, are void, except as against the grantor, in respect of any personal chattels of which the grantor was not the true owner at the time of the execution of the bill of sale. These provisions make it clear that after-acquired chattels cannot be the subject of a bill of sale by way of security for a debt under this Act. The English amendments of 1882 have never been adopted in South Australia and the position as regards assignments of future stock-in-trade whether by way of security or not remains as under the English Act of 1878.

How then have the Courts interpreted this limb of the definition of "bill of sale" i.e. "any agreement . . . by which a right in equity to any personal chattels . . . shall be conferred"?

Probably the earliest case that bears on this provision is the decision of the House of Lords in *Thomas v. Kelly*⁸. Unfortunately, in final result, the decision is somewhat equivocal. Lord Fitzgerald on the one hand expressed the view that the 1878 amendment included as bills of sale instruments which professed to assign after-acquired property⁹. Lord Macnaghten on the other hand appears to have taken the view that neither the 1878 Act nor the 1882 Act extended to after-acquired property. He appears to have based the view entirely on the statutory definition of "personal chattels" which requires that they be "capable of complete transfer by delivery". This definition, he said, required that the goods be capable of such transfer at the time when the bill of sale was executed¹⁰. He did not however advert in his judgment to the limb in the definition of "bill of sale" which refers to agreements creating equities. In any event, the views of both Lord Fitzgerald and Lord MacNaghten were obiter as the transaction in question fell within the 1882 Act.

7. *Per* Latham C.J. in *Akron Tyre Co. Pty. Ltd. v. Kittson* (1951) 82 C.L.R. 477 at 484.

8. (1888) 13 App. Cas. 506.

9. *Id.*, at 515.

10. *Id.*, at 518, 519; as to this argument, see *infra*.

The only other English decision which seems to have dealt with this provision is *In re Reis*¹¹. This case concerned a covenant in a marriage settlement to settle after-acquired property. Vaughan Williams L.J. said that but for the express statutory exclusion of marriage settlements from the definition of "bill of sale" this transaction would have required to be registered under the 1878 Act as falling within the "agreements conferring equities" limb of the definition¹².

Australian cases for the most part tend in the same direction. In *Malick v. Lloyd*¹³, Barton A.C.J. in dealing with the N.S.W. Bills of Sale Act then in force, which did not include this limb in its definition of "bill of sale", said¹⁴:

"The insertion of this amendment in the definition section is strong to show that the framers of the English Act of 1878 thought that the section, as it had stood since 1854, did not include a document purporting to assign after-acquired property. If the legislature of this State had desired to include assignments of after-acquired property as proper subjects for the requirement of registration, it would have been easy to make an amendment in the law similar to that which the Parliament of the United Kingdom thought necessary to effect that purpose in 1878."

In *King v. Greig*¹⁵, Cussen A.C.J. said that the 1878 amendment to the English Bills of Sale Act seemed to him "very like an echo of *Holroyd v. Marshall*" and had probably been inserted to meet the decision in *Brantom v. Griffit*¹⁶ which had held that under the 1854 Act, only immediately operative assurances fell within the definition of "bill of sale"¹⁷.

A similar view was taken of the 1878 amendment by Paine J. in the South Australian Court of Bankruptcy in *Re Grezzana*¹⁸ where the extract from the judgment in Barton A.C.J. in *Malick v. Lloyd* set out above was quoted and followed. Curiously enough, some four years later, the same judge in the case of *Re John Coles & Son*¹⁹, without reference to his earlier decision or to *Malick v. Lloyd*, came to the contrary conclusion. He said that in his view, section 10 of the S.A. Act exhausted the situations in which assignments of future property were caught by the Act²⁰.

This section provides that growing crops, and progeny coming into existence during the operation of any bill of sale, of any horses or cattle comprised therein, may be assigned by bill of sale, "and shall be deemed to

11. [1904] 2 K.B. 769.

12. *Id.*, at 788.

13. (1913) 16 C.L.R. 483.

14. *Id.*, at 492.

15. [1931] V.L.R. 413.

16. (1877) 2 C.P.D. 212.

17. *Id.*, at 440.

18. (1932) 4 A.B.C. 216.

19. (1936) 9 A.B.C. 52.

20. *Id.*, at 73.

have been assigned at law as well as in equity". The section concludes by stating: "The assignment by bill of sale of all other after-acquired property shall, subject to the other provisions of this Act, have the same effect as before the passing of the Bills of Sale Act 1885". The 1885 Act was the first S.A. Bills of Sale Act. Paine J. held that there were no other provisions in the current Act relevant to after-acquired property and that the assignment of after-acquired property there in issue took effect as a valid equitable assignment under *Holroyd v. Marshall*²¹ and *Tailby v. Official Receiver*²².

It is doubtful whether very much weight can be attached to this decision. The amended definition of "bill of sale" in section 2 was not mentioned nor was any of the previous case-law dealing with it. Section 10 can readily be explained as concerned only to make assignments of certain future property effective not only in equity but also at law. In any event, at worst, the decisions in *Re Grezzana* and *Re John Coles* as authoritative holdings on the present question can be regarded as self-cancelling.

It is a fair conclusion from this survey of the authorities that the weight of the cases is in favour of regarding the clause referring to agreements conferring equities in our definition of "bill of sale" as embracing the *Holroyd v. Marshall* and *Tailby v. Official Receiver* type of equity.

One minor difficulty, on the wording of the Act, in the way of this interpretation is that the definition of "bill of sale" refers to "agreements . . . by which a right in equity to any personal chattels . . . shall be conferred". On any reading of this clause, "shall" is grammatically incorrect, but if one regards it as simply an instance of the common misuse of "shall" for "will", one is still in difficulties because with the typical security over future stock-in-trade, there is nothing inevitable about the acquisition of the stock, and therefore nothing inevitable in the conferring of an equity. To cover the standard type of assignment of future property, one would have to read "shall" as "may be". If this is the sense of the legislation, then this does not seem to be doing too great a violence to its wording.

(2) "Personal Chattels"

The agreement conferring a right in equity within the definition of "bill of sale" must do so in relation to "personal chattels" which are defined as "chattels . . . capable of complete transfer by delivery". Despite the contention occasionally advanced in early cases that this requires that the grantor of the bill of sale be legally in a position to make delivery at the time of execution of the bill of sale, later cases have consistently held that the definition refers to the physical attributes of the chattels themselves and not a legal relation between them and any person²³. On the other hand, courts in jurisdictions where the Bills of Sale legislation does or did not include the equities limb in its definition of "bill of sale" have tended to insist that this

21. (1861) 10 H.L.C. 191.

22. (1888) 13 App. Cas. 523.

23. *Akron Tyre Co. Pty. Ltd. v. Kittson* (1951) 82 C.L.R. 477, 495; *In re W. F. Le Cornu Ltd.* [1931] S.A.S.R. 425, 433-434; *Motor Credits Ltd. v. Wollaston Ltd.* (1929) S.R. (N.S.W.) 227, 239-241; *In re Isaacson* [1895] 1 Q.B. 333.

quality of physical deliverability must be present at the time of execution of the bill of sale²⁴. If this interpretation were to be applied to the S.A. Bills of Sale Act, assignments of future property would be excluded from its ambit. However, once it is accepted that the equities clause in the definition of "bill of sale" is intended to embrace assignments of future property, then, as the courts in the decisions cited earlier on this question must necessarily have assumed, the definition of "personal chattels" must be construed accordingly. Probably the most satisfactory construction is to say that if the personal chattels included in an assignment of future property are of a *kind* i.e. are *by their nature* capable of transfer by delivery, the definition is satisfied.

(3) Description Requirements

In jurisdictions which lack the equities clause in their definition of "bill of sale", courts have sometimes reinforced their conclusion that assignments of future property are not within the legislation by pointing out the difficulties of complying with description and situation requirements in relation to the goods²⁵. However, in *Wurm v. Richardson*²⁶, the High Court held in relation to the S.A. Act that if an assignment of after-acquired property falls within the Act at all (which they did not decide), then a liberal interpretation must be placed on the description and situation requirements set out in section 9. These, therefore, are not necessarily an impediment to treating assignments of future property as within the Act.

(4) Policy

It is submitted that, other considerations aside, the whole policy behind Bills of Sale legislation as reflected in the preamble to the first English Bills of Sale Act of 1854, requires the conclusion that assignments of future property should fall within the Act. As Wolff C.J. of the Western Australian Supreme Court pointed out in *Re Kirby*²⁷, secret assignments of future property are just as undesirable, from the point of view of outside creditors, as assignments of present property. This consideration supports those already dealt with in justifying the conclusion that assignments of future property fall within the S.A. Bills of Sale Act and require to be registered to be fully effectual²⁸.

24. See *e.g.*, *Brantom v. Griffiths* (1877) 2 C.P.D. 212; *Thomas v. Kelly* (1888) 13 App. Cas. 506 at 518-519 *per* Lord MacNaghten; *Malick v. Lloyd* (1913) 16 C.L.R. 483 at 488 ff. *per* Barton A.C.J.; *Bruce & Sons v. McCluskey* (1895) 21 V.L.R. 262.

25. See, *e.g.*, *Akron Tyre Co. Pty. Ltd. v. Kittson* (1951) 82 C.L.R. 478 esp. *per* Latham C.J. at 486, *Thomas v. Kelly* (*supra* n. 1) in relation to the requirements of the 1882 Act.

26. (1931) 46 C.L.R. 301.

27. (1940) 12 A.B.C. 127 at 134.

28. This conclusion apparently accords with practice in South Australia. Sykes *op. cit.* at 375 comes to the contrary conclusion mainly on the ground that goods must be capable of complete transfer by delivery at the time of the execution of the document (this argument is dealt with *supra*). Sykes argues that the equities limb of the definition of "bill of sale", in England at least, has not been regarded as over-throwing this requirement. As authority for this latter proposition he cites *Thomas v. Kelly* (*supra* n. 1). But, as we have seen, this is an equivocal decision, and there is in any event considerable other authority for the view that the equities limb of the definition of bill of sale does embrace after-acquired property.

(5) *Effect of Registration*

One point worth noting in conclusion is that even following registration of such an assignment, the grantee's security, because of what seems to be another anomaly in the legislation, is not fully protected. The S.A. Act does not contain a provision, as do some similar Acts, providing that registration constitutes notice to all parties dealing with the goods in question of the grantee's interest under the bill of sale. English decisions have held that in the absence of such a provision a doctrine of constructive notice is not to be implied²⁹. While a grantee under any registered equitable assignment would be protected against subsequent registered bills of sale (priorities being then determined by the order of registration³⁰) he would not be protected against an unauthorised sale by the grantor to a bona fide purchaser for value without notice, who in accordance with normal equitable doctrines, would take the legal estate in the goods free of the grantee's equity.

These various difficulties again demonstrate the need for an overhaul of our personal property security law in order better to adapt it to modern methods of inventory financing.

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29. *Joseph v. Lyons* (1884) 15 Q.B.D. 280, 286; *Re Ginger* [1879] 2 Q.B. 461; *Hollinshead v. Egan* [1913] A.C. 564 (Ir.).

30. S.A. Bills of Sale Act 1886-1940, s.18.

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