THE STRUGGLE FOR TITLE*

Security of title in relation to the merchandising of goods on credit.

I. INTRODUCTION.

The purpose of this paper is to examine the questions which can arise locally in relation to the financing of the production and distribution of goods and, in particular, to examine the question of title to such goods from the point of view of the financier, the trader, the consumer and the purchaser for value without notice of any other title. The paper is not concerned with international transactions nor, except indirectly, with the raising of finance.

In the case of *Bishopsgate Motor Finance Corporation Ltd. v. Transport Brakes Ltd.*,[1] Lord Justice Denning (as he then was) said:

> "In the development of our law two principles have striven for mastery. The first is the protection of property. No one can give a better title than he himself possesses. The second is the protection of commercial transactions. The person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by common law itself and by statute so as to meet the needs of our own times."

The competing interests referred to by Lord Denning determine the field upon which the struggle for title is waged.

The modern financing of the production and distribution of goods revolves around security of title, because in many cases the best or the only security that can be offered to a financier is the goods themselves. A consumer wishes to buy goods but does not have the finance to do so otherwise than on terms. A manufacturer or producer or distributor (here called a trader) wishes to sell goods but does not have the finance to do so otherwise than for cash. It is at this point that the financier enters the field, as a financial entrepreneur. He can lend the money to the consumer upon the security of the goods purchased by the consumer with that money. This might require a multiplicity of separate securities in the nature of chattel mortgages, and raises problems of registration, notice of intention to register, generally

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1 [1949] 1 All E.R. 37, at 46.

keeping "tag" on the security, and stamp duties. He can, on the other hand, lend the money to the producer or trader, so enabling him to sell on his own terms to the consumer. This raises problems of the security which the financier can obtain, both as to the immediate goods and as to after-acquired goods and as to further advances—particularly having regard to the fact that the consumer will be in possession.

A more popular method of financing is therefore that the financier should acquire the legal title to the goods themselves; not as a chattel mortgagee with a condition for reassignment, but as an absolute assignee.

The nerve of the whole matter is the question of legal title. Any scheme should be designed with a view to securing to the true owner a clear legal title and the maintenance of such title, and minimising the possibility of the involuntary loss of such title.

II. THE ACQUISITION OF TITLE.

The property in—that is, the *legal title* to—*existing* chattels may be acquired in a number of ways. The commercially important methods are:—

(a) *Manufacture or production.* In commerce this is the most important root of title.

(b) *Sale and purchase—i.e.,* by contract of sale under the Sale of Goods Act. A contract of sale may amount to either a sale, in which case the property passes prima facie at the time of the making of the contract, or it may amount to an agreement to sell, in which case the property passes when the conditions have been fulfilled, subject to which the property in the goods is to pass. This is to be distinguished from the contract of sale of land. In the latter case the legal title does not pass upon the making of the contract nor upon the fulfilment of subsequent conditions, but only upon conveyance. The distinction is an important one.

(c) *Assignment by deed.* Neither delivery nor consideration is necessary, although the assignment may be accompanied by one or the other or both.

(d) *By mortgage—i.e.,* an assignment by deed with a proviso for redemption and a covenant that the mortgagor should remain in possession pending default in payment. A mortgage of chattels is simply a conditional sale of them, and may, at

common law, be made without deed and without writing. There is no necessity at common law for the proviso for redemption to be in writing.[2] The difficulties of proof of title, however, militate against verbal chattel mortgages except where it is desired for some reason to evade the Bills of Sale Act.

(e) (i) *By confusion—i.e.,* by mixture. This again is not unimportant in such cases as fluids, cereals, industrial gases, etc.
(ii) *Specificatio*—change in the nature of the thing.
(iii) *By accession or adjunction.* This, as distinct from confusion, is the adding of a chattel to another so that it becomes part of the latter chattel—e.g., repairs to a motor vehicle.
(iv) *By fixation,* as distinct from accession or adjunction. This is the fixation of a chattel to land so that it becomes part of the realty.

The above methods of acquiring title to goods relate to goods which are both existing and also ascertained. It is not possible at the date of the agreement or instrument to acquire legal title to unascertained or future goods. A simple assignment of future property, *i.e.,* property which does not exist or in which the assignor at the date of assignment has no proprietary interest, is completely nugatory at law. At law it is an assignment of nothing; in equity also, it is, at the time that it is made, completely ineffective.[3] Furthermore, the subsequent acquisition by the assignor of the goods will not of itself pass the property at law, as contrasted with equity.

Legal title in regard to future goods.

A contract may operate upon a future event so as to pass the property in goods not then owned by the promisor or if then so owned not then identified or appropriated, in four ways:—

(i) Where the assignor, upon becoming possessed of the future property, does *some new act which,* by virtue of the agreement, is analogous to delivery. For example, under a building contract, if the contract so provides, the bringing of the future materials on to the site by the builder may be such a new act as automatically to pass the legal property to the owner. The *Akron Tyre Company Case* is an example of where the title to motor tyres was passed in this way through the act of the assignor in attaching the tyres to a motor

2 WILLIAMS ON PERSONAL PROPERTY, (18th ed., 1926) 99.
3 See Akron Tyre Co. Pty. Ltd. v. Kittson, (1950-51) 82 Commonwealth L.R. 477, *per* Latham C.J. at 484.

vehicle, the title to which was in the assignee. This was not an example of accession.[4]

(ii) In the case of a *contract of sale of goods* the Sale of Goods Act 1895 provides[5] that where there is a contract for sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer.

(iii) Possibly a legal title to *future potential property* may be conferred—that is, property which is the potential product of property already existing and owned by the assignor.[6] An example would be an assignment of the wool to grow on certain existing sheep, or of all the crops to grow on particular land, or of the milk from a particular herd. Some old cases suggest that the legal title passes as soon as the wool or the crops grow, or the milk accumulates, severance not being necessary.[7] The more modern and perhaps better view, however, is that before severance, there is an equity only.[8]

(iv) Under section 7A of the Bills of Sale Act. By virtue of the section the legal title in after-acquired goods passes when the goods come into existence or are acquired, providing the assignment is contained in what is technically a bill of sale, and a bill of sale to which the Act applies.

This question of legal title is important. The title to goods can, of course, be acquired in equity but such a title is liable to be defeated by a subsequent legal title arising without notice of the equity.

The acquisition of equitable title.

A purported assignment, or a contract to assign after-acquired or future goods, passes no title at all at the time of the contract or assign-

4 See also Davidson v. Claffy Constructions Pty. Ltd., (1958-59) 60 West. Aust. L.R. 29 (building materials brought onto site).

5 By sec. 18, Rule 5 (1).

6 See BENJAMIN ON SALE, (8th ed., 1950) 136.

7 This notion is partly recognised in secs. 7, 39, and 42 of the Bills of Sale Act 1899-1957 (Western Australia) in relation to crops, progeny, and wool.

8 See Re Kirby, McLaren v. English, Scottish & Australian Bank Ltd., (1940) 42 West. Aust. L.R. 90, at 105 *per* Wolff J.; *cf.* Attorney-General for New South Wales v. Hill & Halls Ltd., (1923) 32 Commonwealth L.R. 112, at 126, and COPPEL, BILLS OF SALE, 37. In the case of sale this seems to be the result of the definition of goods in the Sale of Goods Act.

ment, but when the goods are acquired the equitable title passes provided the goods can be sufficiently identified.[9] The legal title will not pass unless there is a subsequent assignment of the goods after they have been acquired or unless and until the assignee gathers in the legal title by taking actual delivery of the goods. The equitable title arises out of the doctrine that equity will deem as done that which has been agreed to be done and will hold the assignor as a constructive trustee for the assignee. Whether the agreement must be one that a Court of Equity will specifically enforce is not entirely clear. This was the principle stated in *Holroyd v. Marshall*[10] but subsequent dicta impose no such limitation.[11] In any event, at common law any security over after-acquired goods is defective against a subsequent legal interest arising bona fide for value without notice.[12]

Whether any equitable title passes by virtue of a contract of sale of an unascertained part of a total mass of goods—*e.g.*, so many bushels of wheat out of a particular bin—so as to give to the purchaser an equitable interest sufficient to support a lien on the mass, is a question which is beyond the scope of this paper. It is fully and interestingly dealt with by Dean in *Equitable Assignments of Chattels*,[13] and is mentioned here because merchants dealing in bulk commodities could easily require advice on it.

III. THE BILLS OF SALE ACT 1899-1957.

Before considering the involuntary loss of title it is necessary to skirmish with a dragon, not for the purpose of killing or even wounding it, but for the purpose of establishing friendly relations with it. A dragon is a fabled and ferocious monster of myth which frightens young ladies of high birth, but which is less formidable when faced by a knight with a pure heart. That comical hybrid the Bills of Sale Act slobbers about the warehouses of merchants, the offices of lawyers, and the halls of the Courts of Justice, spreading fear of the unknown. Except insofar as it feeds on documents it does not create title, it does not destroy title, it does not protect title. It is not destructive of titles or of transactions but only destructive of documents or writings, and then only against a certain limited class of persons and

9 See Holroyd v. Marshall, (1862) 10 H.L.C. 191, 11 E.R. 999.

10 *Ibid.*

11 See the Akron Tyre case (note 3, *supra*), and Dean, *Equitable Assignments of Chattels*, (1931-32) 5 AUST. L.J. 289, at 292.

12 The whole question is discussed in Sykes, *Future Goods and the Bills of Sale Acts*, (1952-53) 26 AUST. L.J. 6.

13 Note 11, *supra;* the article is a commentary on King v. Greig, [1931] Argus L.R. 309.

under certain limited circumstances. If, for example, title has passed by delivery of possession, the question whether the transaction was accompanied by a bill of sale is irrelevant.[14] Nevertheless its technicalities, pettifogging requirements, inconsistencies, and obscurities have played a part in choking the development of mercantile law and in generating "sports" of various kinds.

The general purpose of the Act was expressed by Holroyd J. as follows:—

> "The policy . . . was to prevent frauds being committed upon creditors by the secret use of a class of written instruments transferring personal chattels, which were not delivered to the transferrees, but of which they were empowered to take possession. Thus the transferrors were able to keep up the appearance of being in good circumstances and obtain a credit which they did not deserve."[15]

Generally, our Act (and other Acts) operates in the situation where the property in goods and the possession of goods is in different persons.

The meaning of the term "Bill of Sale."

The term is not at first sight strictly defined in the Act. The definition in section 5 reads "a Bill of Sale *includes*[16] any document or agreement whatsoever, whether by deed or by parol and whether by way of sale, security, gift, or bailment." The primary meaning of "bill of sale" is set out by Barton A.C.J. in these words:—

> ". . . It meant nothing more than an assignment of personal chattels in existence, and therefore assignable at common law. . . . before the passage of the Acts requiring registration the term meant nothing more than an assignment of personal chattels in existence."[17]

At common law it must, of course, be a writing of some sort. This is the meaning of the word "bill", coming from the middle English "bille"—a letter or writing, and from the Latin "billa" or "bulla"—a writing.

It is not clear what the definition gains by the addition of the word "agreement" to "document", but the intention may be to cover

14 Woodroffe v. Tindall, (1908) 10 West. Aust. L.R. 117.
15 In Bank of Victoria v. Langlands Foundry Co. Ltd., (1898-99) 24 Victorian L.R. 230, at 250.
16 Italics added by author.
17 In Malick v. Lloyd, (1912-13) 16 Commonwealth L.R. 483, at 489-490.

a series of writings which together record an agreement but which would not amount to a document in the conventional sense. In any event the whole scheme of the Act excludes the idea that it applies to oral agreements and for the purposes of this paper the term "bill of sale" will be taken as referring to a writing.[18] By the definition in section 5 it does mean more than at common law, because included in the meaning is an agreement *by way of* sale, security, gift or bailment. At the same time, it means less than that.

The Full Court has interpreted "includes" as meaning "means and includes" and thus given a restrictive effect to a verbally extensive definition. The four categories mentioned are exhaustive and exclusive, and if the writing does not fall within one of them it is not a bill of sale.[19] A bill of sale, therefore, within the meaning of the Act, is one of four things—a sale, a security, a gift, or a bailment (including, it is suggested, an agreement for any of these things)—contained in a writing.

It will be seen immediately that there will be a large number of writings which do not fall under any of these four headings. For example, an assignment by way of barter, a declaration of trust, a power of attorney, or a writing which passes property by a new act as in *Davidson's Case,* or a mere authority or licence to take possession. The definition is then considerably narrower than that contained in the Victorian and New South Wales Acts, which expressly include a bill of sale at common law and all those other things. These Acts also include "other assurances of personal chattels" and, under that term, a recital of proprietorship in a hire-purchase agreement has been held to be an assurance characterizing the document as a bill of sale because it operated as a transfer of title by estoppel.[20] It is conceived that, in this respect, that case has no application to our Act.

The definition is even further restricted because the document concerned, in addition to falling within one of the four classes mentioned, must have one or other of the attributes of (1) transferring, or intending to transfer, or being a record or evidence of the transfer of the property in or right to the possession of chattels, or (2) being a document by which a right, authority or licence to the possession of, or to seize any chattels, or to any charge or security thereon, is conferred or reserved.

18 See Elliot v. McBean, Bowker & Co., (1902) 4 West. Aust. L.R. 118, and Re Chidgzey, (1934) 37 West. Aust. L.R. 20, at 24.

19 Davidson v. Claffy Constructions Pty. Ltd., (1958-59) 60 West. Aust. L.R. 29.

20 See Price v. Parsons, (1935-36) 54 Commonwealth L.R. 332.

The first set of attributes will apply necessarily to a writing which is by way of a sale or a gift, or a bailment. A document of security might deal with the transfer of property or a right to possession, but not necessarily so. If it does not, then it will probably fall within the second group.A simple equitable charge would fall within the second group, because an equitable chargee has no right to possession unless such a right is expressly conferred. The words "any charge or security" are not in the Victorian definition, so that *Bank of Victoria v. Langlands Foundry Ltd.*[21] is not an authority here on this point.

It might be thought that a definition which is worded in the extensive form and is found in fact to be restrictive and is further circumscribed by the necessity of the presence of at least one character of two sets of somewhat vague attributes each partly contained one within the other, is not a promising start. There is worse to follow. Part 4 of the Act deals with the necessity of giving notice of intention to register a bill of sale by way of security and provides machinery for caveat.

Section 17A is as follows:—

> "*In this Part* the term "bill of sale" *means* a bill of sale by way of security, and *includes*[22] all assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for the payment of money or the performance of an obligation but does not include a debenture."

Our old friend the dragon is not now belching fire and brimstone. He is unhappily huffing hot air. All those things which have, by construction, been *excluded* from the primary definition of a bill of sale, have been *included* in the definition of a bill of sale by way of security. It is only for the purpose of Part 4 that this is the case. Section 17A does not, for example, convert a declaration of trust without transfer into a bill of sale. The section merely indicates roughly for what bills of sale notice must be given. On the other hand, why anybody would want to give notice of intention to register a document which is not a bill of sale, as primarily defined, is beyond comprehension. In this respect any rational exposition of this section is impossible.[23]

21 See note 15, *supra.*

22 All italics added by author.

23 Some related difficulties are discussed by Hodgekiss, *Traders' Bills of Sale—A Divergence of Law and Business,* (1955-56) 29 AUST. L.J. 12.

By section 3 the Act only applies to a bill of sale "whereby power is *given or conferred* . . . either immediately or at any future time to *seize or take possession of any chattels.*"[24] It is not necessary that the power to seize or take possession should be expressly set out in the instrument.[25] For example, a contract of sale which passes the property to the buyer would, without express mention and in the absence of any other provisions, give the buyer the right to take possession of the property and would constitute a bill of sale within the Act. The power to seize or take possession, however, must be a power to be exercised against the party in possession. The power concerned is to *take* possession, not to *retain* possession, and it is therefore conceived that under a simple hiring, the possession passing by delivery, the power of the hirer to remain in possession is not sufficient to constitute any document evidencing the transaction as one to which the Act applies, although of course it is, by definition, a bill of sale. Further, a hiring for a term which does not reserve to the owner a power to take possession before the end of the term in the event of default would not fall under the Act. The power to take possession at the expiration of the term operates independently of the document and is not given or conferred by the document. A hiring "*until* the owner takes possession" would be a hiring at will and not within the Act. Indeed, even an absolute assignment which would normally pass the right to take possession to the assignee is not a bill of sale if the right to take possession is expressly excluded. This was in fact the position in *Palette Shoes Pty. Ltd. v. Krohn,*[26] and it is easy to see that a bill of sale by way of security could be drawn in this manner so as to give to the grantee no right to take possession or to seize the goods in the event of default, but merely conferring on the grantee a power to require the grantor to sell the chattels and to pay him the proceeds. In the case of a bill of sale by way of security it would be necessary to negative the powers implied by section 17S of the Act so far as seizing or taking possession is concerned. These views have some support from the authorities cited by Coppel[27] and by the High Court of Australia in *Price v. Parsons.*[28] Doubtless a perpetual clog on the right of an assignee to enjoy his property in any form, whether

24 Italics added by author.

25 Fink v. Fink, (1946-47) 74 Commonwealth L.R. 127, at 145; Purcell v. Deputy Federal Commissioner of Taxation, (1920-21) 28 Commonwealth L.R. 77, at 84.

26 (1937) 58 Commonwealth L.R. 1.

27 BILLS OF SALE, 18.

28 (1935-36) 54 Commonwealth L.R. 332, at 351.

by taking possession or otherwise, would be repugnant to the grant, but a clog going to possession only is apparently not so.

Chattels. The Western Australian definition is even further circumscribed by the fact that the document, in whatever classification, must be one relating to chattels. There is a definition which states "chattels *include* any personal property capable of complete transfer by delivery including fixtures and growing crops when separately assigned, charged or bailed, and also book debts, but shall not include choses in action other than book debts." Presumably in this case the definition is not restrictive but enlarging.

Book debts are often an important part of a financier's security and it is sufficient here to define them "as debts owing to a business of a kind usually entered in books of account of the business whether in fact so entered or not."[29] Moneys due under a contract of service may constitute a debt, but not necessarily a book debt. An order on such moneys may amount to an equitable assignment of a chose in action, but not necessarily an assignment of a book debt so as to constitute the order a bill of sale.[30] The assignment of instalments of hire, due and to become due, by the owner of goods carrying on the business of letting out the goods on hire-purchase is an assignment of book debts and is a bill of sale.[31]

Assignment of Hire-Purchase Agreement. Whether this is also a bill of sale, for the reason that it passes the property in the chattels themselves to the assignee or gives the assignee the right to take possession, is the subject of judicial conflict but will depend, in the first instance at any rate, on the construction of the assignment: See *Australian Guarantee Corporation v. Balding*[32] and compare *Motor Credits Limited v. Wollaston Ltd.*,[33] where it was held that an assignment by way of security of instruments being hire-purchase agreements under which at the date of the assignment the goods were in the possession of the hirers who were not in default under the hire-purchase agreements, was an assignment of a chose in action only.[34] On the other hand, the document in *In re Le Cornu Ltd., The Liquidator v.*

29 Robertson v. Grigg, (1931-32) 47 Commonwealth L.R. 257, at 266; Plunketts Ltd. v. Harrods Ltd., (1942) 44 West. Aust. L.R. 1. See also Shackell v. Howe, Thornton & Palmer, (1908-09) 8 Commonwealth L.R. 170.

30 Robertson v. Grigg, note 29 *supra.*

31 Plunketts Ltd. v. Harrods Ltd. (note 29, *supra*), where it was held that instalments of hire under a hire-purchase agreement, though not yet due, could constitute book debts whether entered in the books of the trader or not.

32 (1929-30) 43 Commonwealth L.R. 140.

33 (1929) 29 State R. (N.S.W.) 227.

34 See also Blackwood's Ltd. v. Chartres, (1931) 31 State R. (N.S.W.) 619.

Federal Traders Ltd.,[35] was held to amount to an assignment of property in the specific chattels the subject of the hiring agreements, and, as such, to amount to a bill of sale.[36]

To constitute an equitable assignment at all there must be an obligation imposed in favour of the creditor to pay the debt out of the fund. The principles are set out by the Privy Council in *Palmer v. Carey*[37] and applied by the High Court in *Tooth v. Brisbane City Council.*[38]

After-acquired chattels. If the document does not deal in chattels as defined, it is not a bill of sale and this raises the question of after-acquired chattels. The reference "capable of complete transfer by delivery" does not prima facie extend the meaning of chattels beyond those in being and owned by the grantor at the date of the writing and therefore the term does not of itself apply to after-acquired chattels: *Malick v. Lloyd*,[39] and *King v. Greig.*[40] Ordinarily, therefore, the assignee could acquire an equitable title to after-acquired chattels, but so far as the bill related to after-acquired chattels, it did not require registration. Such a title was, of course, likely to be lost through a legal title arising for value and without notice of the equity after the chattels were acquired by the grantor.

On the other hand, the history of the Western Australian legislation, which has been fully traced by Wolff J. (as he then was) in *Re Kirby, McLaren v. E.S. & A. Bank Limited*,[41] indicates that the present Act requires the registration of a document which is otherwise a bill of sale for the purpose of protecting any interest conferred by the document in after-acquired chattels therein mentioned. This interest is, of course, now a statutory legal interest by virtue of the operation of section 7A once the chattels come into existence or are acquired. It is conceived, however, that the documents must deal with at least some chattels *in esse*, and owned by the grantor, before it becomes a bill of sale at all (except in the case of annual crops), and thus a naked assignment of future chattels probably still operates only in equity and still does not require to comply with the Act.

35 [1931] South Aust. State R. 425.

36 For further discussion of these cases see note by W. B. Meehan in (1939-40) 13 AUST. L.J. 313-315.

37 [1926] A.C. 703, (1925-26) 37 Commonwealth L.R. 545.

38 (1928-29) 41 Commonwealth L.R. 212, at 221, 229.

39 (1912-13) 16 Commonwealth L.R. 483, at 492.

40 [1931] Victorian L.R. 413.

41 (1940) 42 West. Aust. L.R. 90.

Exemptions. There is also in the Act a list of writings expressly stated not to be bills of sale (*e.g.,* transfers of goods in the ordinary course of business).

Debentures. By an amendment to this list is also included: "Debentures issued by any Company or other corporate body and registered under the provisions hereinafter contained." Only a debenture which is "registered under the provisions hereinafter contained" is excluded from the definition of a bill of sale. Section 3 makes the Act apply to a debenture. It follows that if the document is a debenture and is unregistered, all the consequences follow of its being an unregistered bill of sale to which the Act applies. This is also recognised by section 52 which makes clear that the benefits of registration as a debenture are also applicable.

Sections 51 to 53 provide for the method of registration of a debenture. Notice of intention to register is not, by these sections, necessary. The Act defines a debenture in this way:—"Debenture—*means*[42] a document containing a floating charge over any of the chattels of a company or other corporate body."

A document in the form of a debenture also contains sometimes a specific charge and sometimes a specific legal assignment. This raises the question of whether a document which is primarily a specific charge or a legal assignment can qualify as a debenture by the device of including in it a floating charge over a limited description of goods; *e.g.,* book debts. If this is so, the necessity of giving notice of intention to register in the case of such a security given by an incorporated company would be avoided as it would be sufficient simply to register the document as a debenture. We are still, therefore, left with part of the problem that the amendment was designed to eliminate, namely, whether such a document should be registered both as a debenture and (after notice) as a bill of sale by way of security.

Section 54 provides another list of exemptions of indefinite denotation relating to goods held under hire or hire-purchase, the genus being generally those which are notoriously the subject of possession without ownership but omitting a lot of things—*e.g.,* industrial cake-mixers, which are within that genus: *Toledo-Berkel Pty. Ltd. v. Official Receiver.*[43]

It will be seen from what has been said that anyone seeking to enforce title or to attack title should, before becoming concerned

[42] Italics added by author.
[43] (1958) 56 West. Aust. L.R. 21.

about the requirements of the Bills of Sale Act, enquire as to whether the document concerned (a) is a bill of sale, and (b) if so, whether it is a bill of sale to which the Act applies, and it is also essential to enquire as to the correspondence with reality of the transaction as it appears on the surface of the document.

IV. PRACTICAL "FINANCE AGREEMENTS."

If an instrument is to govern the legal relations between parties and persons claiming through them, it should correspond substantially with what the parties actually do under the instrument, and for that reason any scheme should be workable. Some financial schemes today are so complicated that it is doubtful whether the ordinary trader has much hope of operating the machinery contemplated, and it may well be that if practice differs too much from precept the Court will go behind the instruments to see what the real transactions amount to.[44]

Let us take a *"display plan."* It is appropriate for a trader rather than a producer and, under it, a trader can both "buy" and "sell" as well as "show" without being the owner of the goods—*and can make profits as if he were the owner.* This authorizes the trader to buy goods (new or second-hand) on behalf of and as agent for the financier. In the case of new goods the financier pays the price (*i.e.*, the wholesale price) to the vendor, and in the case of second-hand goods (which, in the nature of things, will usually be "trade-ins") pays a percentage, usually 90% of the cost, to the trader in reimbursement of his outlay. The financier agrees to pay the balance when the goods are disposed of by the trader. That gives some margin of protection to the financier against exaggerated values which the trader may attach to second-hand goods, and in further protection the financier is sometimes authorized to substitute his own estimate of value. The trader undertakes to hire the goods from the financier for a fixed term at a rent which for a genuine hiring would be best described as a penal rent. He has authority to dispose of the goods on behalf of the financier, either by sale or hire-purchase, and if he disposes of them during the term of the hiring the penal rent is reduced. If he does not dispose of them within that term the penal rent continues until disposal or delivery of the goods to the financier. The trader has the right to deliver the goods at any time to the financier. On disposal the trader gets by way of "commission" the difference between the outlay by the financier and the sale price. The trader is required to keep a

[44] The principles are discussed by Coppel, *The True Nature of the Transaction,* (1932-33) 6 AUST. L.J. 430.

certain sum on deposit with the financier and this is really security for any possible indebtedness of the trader to the financier. It commonly carries interest against the financier.

This form of display plan contemplates that the goods, until disposed of, will remain on the floor of the trader in the same condition as when bought. A variation permits their use for demonstration purposes and introduces provisions for depreciation charges and insurance.

It is obvious that the display plan embodies an element of fiction. In an unreported decision one of the Judges of the Supreme Court of Western Australia had this to say:—

> "I am unable to resist the conclusion that the transactions contemplated by the agreements are in substance moneylending transactions, and that the relationship between the parties is that of borrower and lender, and not principal and agent, and that it should be so construed for the purposes of the Bills of Sale Act."

On the other hand, as Dixon J. (as he then was) said in *Palette Shoes Pty. Ltd. v. Krohn*:[45]

> "Care should be taken by a court to avoid the error against which *Cussen J.* gave a warning in *King v. Greig* and to guard against being "led to hold a document, or the assurance contained in it, invalid mainly by reason of the court's thinking that by a clever 'device' (as it is called, to give it a bad name), a party would get outside the Act unless the court by a liberal construction of the Act or the exercise of the court's ingenuity manages to prevent him." In the present case the provisions of the agreement have been pursued with exactness and there is no ground either for treating it as colourable only or for giving it any effect other than that which is the legal consequence of the conditions it contains."[46]

It is submitted that a "display plan" agreement is not a bill of sale under the Bills of Sale Act unless the financier is given the right to seize during the term. The motor "display plan" of a well-known finance house provides that the bailment of a "display unit" shall continue until (a) the expiration of the fixed term, (b) the trader's delivering up the unit to the financier, (c) the financier's taking or demanding possession of it, or (d) the disposal of it. It is considered that this clause simply defines the term of the bailment and does not

45 (1937) 58 Commonwealth L.R. 1, at 28.

46 *Cf.* Chow Yoong Hong v. Choong Fan Rubber Manufactory, [1961] 3 All E.R. 1163.

give the financier power to seize or take possession *during* the bailment. As will be seen, the hiring aspect of it protects the goods against the reputed ownership provision in the event of the bankruptcy of the trader, if the document is either not within the Bills of Sale Act or, alternatively, is within it and is registered.

This "display plan" can operated either alone or in conjunction with a *"trade agreement."* A trade agreement contemplates that the trader will submit offers of hire-purchase from prospective consumers of goods then owned by him or to be after-acquired and will sell the goods to the financier in order that the latter may let on hire-purchase to the customers. The submission by the trader to the financier of an offer to take on hire-purchase by the consumer is deemed also to be an offer to sell by the trader to the financier, and the acceptance by the financier of the offer to hire-purchase is deemed also to be acceptance of the trader's offer to sell to him. The trader is often appointed the agent of the financier for collecting the instalments and generally administering the scheme, and the goods are in fact never delivered to the financier. The trader receives a deposit from the hirer and the balance of the cash price from the financier. If the goods are of a type not favoured as security it is usually a condition that the transaction will be with "full recourse", in which event the trader really guarantees performance of the hire-purchase agreement by the hirer and to repurchase the goods from the financier in the event of default by the hirer or other early termination of the hiring. The financier sometimes has the right to retain out of the moneys otherwise payable to the trader a reserve against possible loss on future transactions. An example of how this sort of thing can come "unstuck" in the case of a trade-in deal, where the proper legal sequences are ignored, is the recent case of *City Motors v. Southern Aerial Super Service.*[47]

Is the trade agreement within the Bills of Sale Act? A typical one is worded as an agreement "by way of sale", transferring, or intending to transfer, the property in goods to the financier. It does not expressly give to the financier the right to take possession but neither does it negate such right. On the construction of the agreement it is the customer who is to have the immediate right to possession. The financier may have a right to seize under the hire-purchase agreement but this is not "given or conferred" by the trade agreement. It is suggested that it is not in this respect within the Act. On the other hand, as a result of the repurchase clause the trader in certain events expressly or impliedly has a right to take possession. If so, it seems that the

[47] (1961-62) 35 Aust. L.J.R. 206.

document is caught by the Act. On the other hand, on the authority of *Davidson's Case*[48] a court might hold that such a conditional agreement is not "an agreement by way of sale" so as to be a bill of sale at all.

This type of scheme applicable to the producer was ventilated in the High Court in *Palette Shoes Proprietary Limited v. Krohn.*[49] The agreement negatived the power of the financier to seize or take possession of the goods and it was held, therefore, that it did not require registration as a bill of sale. The goods remained in the exclusive possession of the trader, albeit as agent of the financier.

Another idea which applies between the financier and the consumer is *"the leasing plan."* Having acquired the property in the goods the financier either by himself or through his agent (who might be the trader under a "display plan" or a "trade agreement") disposes of the goods by a hiring agreement without an option to purchase, but with the amount of instalments of hire related to a hire-purchase transaction rather than a hiring; in other words the instalments in amount correspond with the instalments to be expected under a hire-purchase agreement except that there is no final instalment. A residual amount of approximately 10% of the cash price is left outstanding at the termination of the hire. The lessee then has the right to elect whether the goods will be put up for sale by private treaty or public auction, and of course there is nothing to stop him buying under either arrangement; that in fact is what is contemplated. In the unlikely event that there is a competitive buyer the lessee can safely outbid him as any excess over the residual value will be paid to him. One reason for this extraordinary complication is to achieve savings in income tax; payments of hire, pure and simple, are of course totally deductable from assessable income. The other reason is that a pure hiring agreement is not within the Hire-Purchase Act, with the result that the machinations of this Act are avoided. The "leasing agreement" is, of course, in law no different from any other hiring agreement so far as concerns the necessity for registration under the Bills of Sale Act and the other incidents of the hire of chattels. As to the former, a right in the owner "to seize or take possession" is the vital point. There often is one, but such is not essential.[50]

As a result of this preliminary meeting we can now conclude that the dragon is not as formidable as he seems and that the ambit of

48 See note 4, *supra.*

49 (1937) 58 Commonwealth L.R. 1.

50 Some further practical examples and their difficulties are mentioned by DEAN, HIRE-PURCHASE LAW IN AUSTRALIA, (2nd ed., 1938) 27 *et seq.*

the Bills of Sale Act can be considered as restricted to (a) written agreements which (b) evidence a transaction of sale, security, gift or bailment and (c) reserve or confer a right to seize or take possession of (d) book debts or choses in possession, or fixtures separately dealt with, at least some of which (except in the case of crops) (e) are in existence and owned by the grantor at the date of the agreement, and we are now in a position to consider involuntary loss of title.

V. INVOLUNTARY LOSS OF TITLE.

A legal title, once acquired, cannot be destroyed without the consent of the proprietor save under certain exceptional circumstances, and the reason for this is that no-one can give that which he does not have. The exceptions are, however, extensive and this presents a continual problem to the proprietor and financier. Distress, title passing by sale under execution of a judgment, the alienation of property upon a satisfied judgment for the value of a chattel, the operation of the Statute of Limitations, and alienation upon death are not matters which need concern us in a paper on commercial law.

The chief dangers against which a proprietor (who may be a financier) will desire to safeguard himself are—

(a.) *Sale in market overt.*

In England section 22 of the Sale of Goods Act preserves the concept of market overt.[51] In the City of London any open shop selling openly is a market overt. Outside the City a market overt is a place set apart by custom or local authority for the sale of particular goods, and an open market constituted by statute is a market overt.[52] It has been held in Victoria that a market established by a municipal council is a market overt.[53] It seems necessary that the market should be set up by custom, statute or at least some public authority.[54]

In Western Australia a title derived through a sale in market overt is expressly recognised by section 22 of the Sale of Goods Act. The produce market and any market constituted under the provisions of the Metropolitan Market Act 1926-1941 are, it is suggested, markets overt in this State.[55]

51 See 22 HALSBURY'S STATUTES OF ENGLAND, (2nd edn.) 1000.

52 See Bishopsgate Motor Finance Corporation Ltd. v. Transport Brakes Ltd., [1949] 1 K.B. 322, [1949] 1 All E.R. 37.

53 Ward v. Stevens, (1886) 12 Victorian L.R. 378.

54 See several old cases referred to in 18 AUSTRALIAN DIGEST 1825-1933, paras. 441, 442.

55 For the relevant regulations see *Government Gazette,* 14th June 1929 and 5th July 1960.

In Queensland it has been recently conceded that cattle saleyards constitute an open market.[56] The Queensland Act, however, does not expressly preserve a title so acquired, and in that case stolen goods so sold were ordered to be delivered back to the original owner. The Queensland Act is different from the Western Australian Act in this respect.

Section 24 of the Sale of Goods Act provides that where goods have been stolen and the offender is prosecuted to conviction, then the property revests in the owner of the goods notwithstanding any intermediate dealing, whether in market overt or otherwise. This does not apply where goods are obtained by fraud, as distinct from larceny.

(b) *Under the provisions of the Factors Acts 1823-1878.*[57]

These provide in effect that where a mercantile agent is, with the consent of his principal, in possession of goods or of the documents of title to goods belonging to the principal, the principal is bound by any sale, pledge, or other disposition of the goods made by the agent for valuable consideration in the ordinary course of business, provided that the taker acts in good faith and has no notice at the time of the disposition that the agent has no authority to make it. It is a statutory recognition of the principle of estoppel.[58]

The term "documents of title" is covered by a genus of document used in the ordinary course of business as proof of the possession or control of goods; for example, a bill of lading, dock warrant or warehouse-keeper's certificate, or an order for delivery.

A *mercantile agent* is one having, in the customary course of his business as such agent, authority either to sell goods or to consign goods for the purpose of sale or to buy goods or to raise money on the security of goods. An agent may be a mercantile agent although he has no general authority as an agent, or although his general occupation is that of an independent dealer in the commodity entrusted to him provided that he is not a mere servant.[59] Many traders will be mercantile agents within this definition; for example, a motor dealer.[60] The onus is on the person taking the disposition to prove

56 Sorley and Stirling v. Surawski, [1953] State R. (Queensland) 110.

57 (1823) 4 Geo. 4, c. 83; (1825) 6 Geo. 4, c. 94; (1842) 5 & 6 Vict. c. 39 (adopted in Western Australia in 1844 by 7 Vict. No. 13); and (1878) 42 Vict. No. 3. *Cf.* now the (U.K.) Factors Act 1889, 1 HALSBURY'S STATUTES OF ENGLAND (2nd edn., 1948) 29.

58 See generally 1 HALSBURY'S LAWS OF ENGLAND (3rd (Simonds) edn., 1952) 214.

59 See Oppenheimer v. Attenborough & Son, [1908] 1 K.B. 221.

60 Lewis v. Richardson, [1936] South Aust. State R. 502; *cf.* Schafhauser v. Shaffer, [1943] 1 W.W.R. 118.

that he acted in good faith and without notice of the agent's want of authority.[61]

The slight difference in wording between the Factors Acts of England and of the different States of Australia does not appear to be a difference of any substance.[62]

On the question of being in possession with the consent of the true owner there is in England a practice of keeping a car registration book. It is not a document of title[63] but is a sort of log book and vehicles are not usually dealt in without the delivery of such book: See *Bishopsgate Motor Finance Corporation Limited v. Transport Brakes Limited.*[64] In *Pearson v. Rose & Young Limited,*[65] a mercantile agent obtained possession of a car by means of larceny by a trick. It was held that he was in possession of the car with the consent of the true owner, following dicta in *Folkes v. King*[66] in preference to those in *Oppenheimer v. Frazer & Wyan.*[67] The agent had also obtained possession of the log book under circumstances held not to amount to consent. It was held that as the owner had not consented to the possession of the log book the fraudulent sale by the agent was not in the ordinary course of business. It is not considered that registration papers in Western Australia would be in the same category. Cars are often disposed of without them.[68] There are certain difficulties arising under our old and unconsolidated Factors Acts[69] but these need not be considered here.

(c) *Under section 25 of the Sale of Goods Act.*

Section 25 of the Sale of Goods Act provides in effect that where a person having sold goods remains in possession of the goods or documents of title thereto, delivery or transfer by the seller or by a mercantile agent acting for him of such goods or documents under any sale, pledge or other disposition thereof, to any person receiving them in good faith and without notice of the previous sale, shall have

61 Heap v. Motorists' Advisory Agency Ltd., [1923] 1 K.B. 577.

62 See Cook v. Rodgers, (1946) 63 W.N. (N.S.W.) 91, and note thereon in (1946-47) 20 AUST. L.J. 20.

63 Joblin v. Watkins and Roseveare (Motors) Ltd., [1949] 1 All E.R. 47.

64 [1949] 1 K.B. 322, [1949] 1 All E.R. 37.

65 [1950] 2 All E.R. 1027.

66 [1923] 1 K.B. 282.

67 [1907] 1 K.B. 519. See also R. v. Ward, (1938) 38 State R. (N.S.W.) 308, at 311.

68 See note in (1951-52) 25 AUST. L.J. 18-19; Sawyer v. Banks, [1950] Queensland W.N.1; and Cook v. Jenkins, [1947] Victorian L.R. 369.

69 See DEAN, HIRE-PURCHASE LAW IN AUSTRALIA, (2nd edn., 1938) 56.

the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make it. There is a corollary provision relating to making title through a buyer of goods or a person who has agreed to buy who, with the consent of the seller, is in possession of them or the documents of title thereto.

The word "delivery" relates to the goods and the word "transfer" relates to the documents of title. There must therefore be an actual delivery of the goods or an actual transfer of the documents before these sections operate. It follows that an assignment of the goods—for example, by way of bill of sale, without delivery—will not of itself vest title in the third party. Suppose S. agrees to sell goods to B. (the title remaining in S.), and B. takes possession with the consent of S. B. now gives to X. a bill of sale over his goods. It is suggested that X., at the best, obtains no title until he actually takes possession. The same would apply if the assignment to X. was by virtue of an after-acquired provision in a bill of sale given by B. to X. before B. agreed to buy, and this is so regardless of section 7A of the Bills of Sale Act.

In relation to a seller in possession, the possession must be that of a seller and must not be referable to any subsequent contract, for example, one of bailment. In *Staffs Motor Guarantee Limited v. British Wagon Co. Limited.*[70] A. sold a motor lorry to B. who let it to A. under a hire-purchase agreement. A. being in possession of the lorry then fraudulently sold it to C. who was not aware of the previous transaction. C. claimed the lorry as against B. on the ground that he had bought it from a person who, having sold goods, continues in possession of the goods. It was held that the case was not within the section.[71] It would seem therefore that the type of scheme operating in the *Palette Shoes Case*[72] is not within the section, so as to make the trader a seller of goods remaining in possession. In that case, although he was the seller to the financier, his possession was possession as an agent of the financier so that a fraudulent chattel mortgage of the goods by the trader would not override the title of the financier, even though the grantee takes possession.[73]

A person having only an option to buy (for example, a hire-purchaser in common form) is not, of course, a person who has

70 [1934] 2 K.B. 305.

71 See also Ahrens Ltd. v. George Cohen, Sons & Co., Ltd., (1933-34) 50 Times L.R. 411. These cases were on all fours with Mitchell v. Jones, (1905) 24 N.Z.L.R. 932; see note in (1934-35) 8 AUST. L.J. 263, and Telstead v. Economic Cash Buying Co. Pty. Ltd., [1937] Victorian L.R. 194.

72 (1937) 58 Commonwealth L.R. 1.

73 Olds Discount Co. Ltd. v. Krett, [1940] 2 K.B. 117, [1940] 3 All E.R. 36.

"agreed to buy" within the meaning of the section.[74] This is the main reason for the use of the hire-purchase agreement. The hire-purchase agreement must give power to the hirer to return the goods; otherwise it might be held to be a contract of sale.[75]

Notice.

The question does arise whether registration of an instrument as a bill of sale would amount to constructive notice to a purchaser under section 25, or under the Factors Acts or in market overt as recognised in the Sale of Goods Act. One might ask "Why should it?" The doctrine of constructive notice is an equitable doctrine, and in these cases we are dealing with the loss not of equitable interests but of legal interests, and further the ousting of the legal right is in each case a creature of statute and the meaning of notice depends therefore on the construction of the statute. The plain meaning of the word "notice" is "notice". There is no occasion for adding epithets such as "imputed", "constructive" or the like.

There is some authority on the point so far as equitable interests are concerned. Ashburner[76] says that the doctrine of constructive notice does not apply to commercial transactions; Atkins[77] agrees, citing the Victorian case of *Camplin v. Macnamara;*[78] Hanbury[79] also agrees. Millard and Helmore[80] for some reason disagree; perhaps their view turns on the construction of the New South Wales legislation.[81]

74 Helby v. Matthews, [1895] A.C. 471; for a recent reference see Braham v. Walker, (1960-61) 104 Commonwealth L.R. 366, *per* Dixon C.J. at 376.

75 Commonwealth Furniture Supply Co. v. Waterman, (1915) 18 West. Aust. L.R. 36. ELSE-MITCHELL & PARSONS, HIRE-PURCHASE LAW (3rd edn., 1961) suggest (at 194) that the Act, by including an instalment contract (where the property does not pass) in the definition of a hire-purchase agreement, has negated to that extent sec. 25 of the Sale of Goods Act. This is presumably based on the view that such an instalment contract no longer has the characteristics of an agreement to purchase. It is true that it no longer has *all* such characteristics, but it is questionable whether an agreement to purchase, although now included in another concept, has now changed its own legal character.

76 PRINCIPLES OF EQUITY, (2nd edn., 1933) 69. See also London Joint Stock Bank v. Simmons, [1892] A.C. 201, *per* Lord Herschell at 221; and Thomson v. Clydesdale Bank Ltd., [1893] A.C. 282.

77 BILLS OF SALE AND STOCK MORTGAGES, 193.

78 (1893) 19 Victorian L.R. 542.

79 MODERN EQUITY (5th edn., 1949), 37.

80 PERSONAL PROPERTY AND MERCANTILE LAW IN NEW SOUTH WALES (6th edn., 1957) 229.

81 There is an excellent discussion on the matter by F. P. Hennessy, *Chattel Mortgages in New South Wales: The "After-Acquired" Clause,* (1960-61) 34 AUST. L.J. 72.

In *R. v. Canterbury Farmers Co-Operative Association Ltd.*,[82] it was held that notice of the registration of a bill of sale was not constructive notice of its contents or the property it secured. It seems to follow *à fortiori* that the registration itself could not be constructive notice of the registration. This case had the support of *Joseph v. Lyons*[83] and *Hallas v. Robinson*.[84] The New Zealand case was followed in that country's Court of Appeal in *Dempsey and the National Bank of New Zealand Ltd. v. Traders' Finance Corporation Ltd.*[85] Dwyer J. (as he then was) has come down *obiter* on the side of the majority: *Owens v. Harris Bros.*[86] Of course, if it can be shown that the second grantee's suspicions were aroused to such an extent as almost to amount to actual notice then he might not have taken "in good faith."

The position might be otherwise in relation to a company debenture or floating charge. Authorities from other jurisdictions indicate that registration of a debenture is at least notice that there is a floating charge, although not necessarily notice of any other provisions. It might depend upon the construction of the relevant registration provisions and other authority should therefore be considered critically here. This is, however, outside the present field.

(d) *By operation of the doctrine of estoppel.*

Although mere parting with possession of a chattel or of a document of title (other than a negotiable instrument) does not estop the owner from setting up his title against a purchaser for value, it is otherwise where an owner either by giving authority to some person to deal with the goods as his own or by neglect of some duty of precaution which he owes to those who may deal with that person enables that other to hold himself out as having not the possession only but also the property in the goods.[87] The doctrine is expressly recognised by section 21 of the Sale of Goods Act.

However, as said by Lord Wright in tendering the advice of the Privy Council in *Mercantile Bank of India v. Central Bank of India*,[88] "It is only in special conditions of fact that an estoppel by representation can be established." For example, in that case the mere leaving of railway receipts, held to be documents of title, with other than the person entitled to the property in the goods did not raise an estoppel

82 [1924] N.Z.L.R. 513, [1924] Gazette L.R. (N.Z.) 243.
83 (1884) 15 Q.B.D. 280.
84 (1885) 15 Q.B.D. 288.
85 [1933] N.Z.L.R. 1258. Mr. Hennessy (see note 81, *supra*) also notes the Canadian case of Whynot v. McGinty, (1912) 7 D.L.R. 618.
86 (1932) 34 West. Aust. L.R. 110, at 118.
87 See 15 HALSBURY'S LAWS OF ENGLAND (3rd edn.), 239.

in favour of the third party taking from the holder of the receipts. If this were not so the special protection provided by the Factors Acts would not be required. (See also *Jerome v. Bentley & Co.*,[89] where the actual goods, namely a ring, had been entrusted to an agent (not a mercantile agent) for sale within a certain time and at a certain price, and the agent sold for himself beyond the scope of his express authority, it was held that there was no estoppel against the proprietor). Indeed, it seems that the representation to found an estoppel will have to go as far as to indicate that the party in possession not only has the right to deal with the goods but has the right to deal with them in the actual way in which he did deal with them, or alternatively actually had the property in the goods.

This is illustrated by *Tobin v. Broadbent.*[90] In that case a stockbroker was given a power of attorney with very wide powers to deal in the proprietor's shares. He also rightfully had possession of the share scrip, and rightfully under the power of attorney signed, on behalf of the proprietor, transfers in blank. He raised money for himself on a pledge of the shares. The proprietor was not estopped against the lender. Latham C.J. said:—"The fact that a servant or other person is entrusted with the possession of goods does not involve a representation to any person that he is entitled to pledge or sell them."[91] The principle is also discussed by Dixon J. (as he then was) in *Thompson v. Palmer.*[92] The party alleging the estoppel must, of course, have been influenced by the representation and have acted upon it.

(e) *By confusion, specificatio, accession, adjunction or fixation:*

(i) *Confusion.*

Confusion is an inextricable mixing of goods so that the goods of one person cannot be identified. The usual illustration here is that of grain or wine mixed. In English law a common case is when bales of the one commodity during a voyage become unidentifiable as a result of the markings having been removed. A modern example is the "pooling" of commodities for marketing purposes. The principles generally are that if the mixture be made by consent or accidentally, the mass appears to belong to

88 [1938] 1 All E.R. 52, at 60.
89 [1952] 2 All E.R. 114.
90 (1947) 75 Commonwealth L.R. 378.
91 *Ibid.*, at 387.
92 (1933) 49 Commonwealth L.R. 507, at 545; see also Curtis v. Perth and Fremantle Bottle Exchange Co. Ltd., (1914) 18 Commonwealth L.R. 17 (branded bottles).

the owners of its parts in common, except perhaps where the owner of the bulk *negligently* mixes a small quantity of the goods of another, when he will be held to have converted such quantity. In this case the owner of the small quantity would lose his title and be left with an action in tort. If the mixture be made by one intentionally without the other's consent, the mass belongs to the latter.[93]

There is a divergence of opinion as to the proportionate shares of the participating parties in the case of an accidental (not negligent) or consensual mixture. Blackburn J. in *Buckley v. Gross*[94] (following KENT'S COMMENTARIES) considers that the prior owners would be tenants in common in equal shares. In *Spence v. Union Marine Insurance Co.*,[95] the parties were held to possess the mixed mass in proportion to the probable amounts of their contributions to it. This is the better view and was adopted as the law by Latham C.J. in *Farnsworth v. Federal Commissioner of Taxation.*[96] Where the amount of contribution cannot be ascertained doubtless equality is equity.

On the other hand, not every case of mixture is a case of confusion. In the case of pool marketing arrangements the legal property in the bulk, subject to any special provisions, is in the marketeer. The trader might have an equitable charge on the bulk.[97] The charge (if it exists) is not over chattels and does not give a right to seize and is therefore not a bill of sale or within the Act. In the case of the marketeer (for example, a co-operative company) giving a legal security to a third party, the trader's position is weak. It is non-existent once the mass has been sold and the money spent or unidentifiable. Some commodity co-operatives secure the grower's equity by the issue of debentures at least for "final" payments.

(ii) *Specificatio.*

There has apparently been only one case in the common law of the Roman specificatio, and one case has also arisen in Scotland. Specificatio was the name given to the process of bringing into existence a thing of a new kind out of existing material, for

93 See Sanderson & Sons v. Tyzack & Branfoot Steamship Co. Ltd., [1913] A.C. 680, *per* Lord Morton at 694-695.

94 (1863) 3 B. & S. 566, at 575; 122 E.R. 213, at 216.

95 (1868) L.R. 3 C.P. 427.

96 (1949) 78 Commonwealth L.R. 504, at 510.

97 See Dixon J. in Farnworth's Case (dried fruits), at 518.

example, wine out of grapes, a ship out of timber, a goblet out of gold. Justinian's solution to this problem was a compromise; if the product could be reduced to its original state—as, for example, the goblet could be reduced to a lump of gold, there was no change in ownership. If it could not be so reduced, specificator became the owner. So far as they go, both the English and the Scottish cases follow this view. In *International Banking Corporation v. Ferguson Shaw & Sons,*[98] A. turned B.'s oil into lard; B. was entitled to compensation, not to the lard; and in *Thorogood v. Robinson,*[99] A. took possession of the land of B., dug out chalk, and converted it into lime. B. succeeded in an action of ejectment and A. then claimed his lime which B. refused to give. Had the proper claim been brought, A. would have succeeded in recovering the lime.

French law in the case of specificatio takes account of the respective values of material and work.

Commercially, such problems are rare but there is scope for them; for example, a cloth merchant supplies cloth in bulk, under registered bill of sale, to a manufacturing clothier who becomes insolvent.

(iii) *Accession, and Adjunction.*

Accession is a joining together of goods alone as distinct from a joining of goods to lands. The common illustration is that of a tailor working thread into a coat. The essence is that one becomes merged in the other. Adjunction is the creation of a new thing by the joining of distinguishable things and is not regarded separately from accession.

Cases of accession are also rare.[1] It is normal and prudent to insert into a hire-purchase agreement a provision that any accessories or goods supplied with or for or attached to, or repairs executed to the hired goods, shall become part of the hired goods. Such an agreement was held effective in *Akron Tyre Co. Pty. Ltd. v. Kitson*[2] to pass the legal title in new tyres to the owner of the truck to which they were fitted and which was the subject of a hire-purchase agreement, but this was by virtue of the contract and was not a case of accession.

98 [1910] Sess. Cas. 182.

99 (1845) 6 Q.B. 769; 115 E.R. 290.

1 See G. Sawer, *Accession in English Law,* (1935-36) 9 AUST. L.J. 50.

2 (1951) 82 Commonwealth L.R. 477.

The problem is more acute when the party attaching the things is not the owner of them. In *Bergougnan v. British Motors Ltd.*,[3] new tyres were acquired under a hire-purchase agreement and fitted to a truck which was already under hire-purchase agreement from a different owner. The owner of the tyres sought to recover them from the owner of the truck and was held entitled to succeed on the ground that the tyres were detachable. In *Lewis v. Andrews & Rowley Pty. Ltd.*,[4] A. owned a trailer. He granted a bill of sale over it to B. and then hired it to C. the plaintiff, who attached new tyres to it. The defendant took possession of the trailer, including tyres, on behalf of B.; C. was held entitled to recover. The majority held that the "rules relating to accession" (whatever they may be) apply only when it would be impracticable to employ the general rule (that ownership does not shift). It had to be impracticable to detach the articles in question. As the dissenting judge (Manning J.) pointed out, however, detachability is a question of degree only. An engine could be detached. Manning J. preferred rule that accession results when the annexation results in the chattel ceasing to exist as a separate chattel. This is the rule preferred also in Canada, although it is hardly an improvement because "change" also is a matter of degree: See *Regina Chevrolet Sales Ltd. v. Riddell.*[5]

It is suggested that the principles stated in the two New South Wales cases are the law here. The position of the true owner of the attached article will not be protected by section 27 of the Hire-Purchase Act, because this only refers to affixation to land.

(iv) *Fixation.*

"Fixtures are such movable articles or chattels personal as are fixed to the ground or soil, either directly or indirectly, by being attached to a house or other building."[6]

If a chattel is in fact fixed, it is a fixture. If not in fact fixed it still may be deemed a fixture if that is the intention, such intention to be gleaned objectively from the criterion of permanent or temporary purpose.[7]

3 (1930) 30 State R. (N.S.W.) 61.
4 [1956] State R. (N.S.W.) 439.
5 [1942] 3 D.L.R. 159.
6 WILLIAMS ON PERSONAL PROPERTY (18th edn.), 151.
7 See Australian Provincial Assurance Co. Ltd. v. Coroneo, (1938) 38 State R. (N.S.W.) 700, *per* Jordan C.J. at 712; and Reid v. Smith, (1905) 3 Commonwealth L.R. 656, *per* Griffith C.J. at 667.

As between the parties there can be an enforceable agreement that the owner may retake fixtures. We are concerned with the case where a third party without notice acquires an interest in the land either as owner or as mortgagee. In this case, normally the right of the owner of the fixture to retake it would be extinguished: *Hobson v. Gorringe*,[8] where the mortgage is equitable or there is merely a contract to purchase, then the normal rule of equitable priority prevails because the owner of the fixture has an equitable interest in the land sufficient to support an equitable charge: *Re Samuel Allen & Sons Ltd.*,[9] and *Re Morrison, Jones and Taylor Ltd.*[10] On this basis, the crucial time so far as the owner of the fixture is concerned is probably not the time of the hire-purchase agreement itself, but the time at which the chattels are affixed to the land. These rules apply where a hirer of chattels affixes them to his own land. Where he affixes them to another's land there is an equity between himself and the owner, but it does not bind the owner of the land: *Craven v. Geal*.[11]

On the other hand, a person becoming registered as proprietor of land under the Transfer of Land Act (i.e., "Torrens" title) is not bound by any equity in the absence of fraud, and whether he has notice or not. A caveat could, however, be lodged which could hold up the dealing pending a decision on equities.

Tenants' fixtures, *i.e.*, trade or ornamental fixtures, erected by a tenant for the better enjoyment of the tenancy, may be removed by him during the term. It is, therefore, necessary to bear in mind the relationship of the parties.[12] It is considered that the true owner from a hiring tenant would have the same right as the tenant.[13]

In the case of bills of sale over chattels which subsequently become fixtures, or bills of sale of fixtures separately assigned, the position is the same, although in the case of competing equities the first on the register would prevail, as later indicated. It is considered that a registered estate under the Transfer of Land Act would still prevail over a registered bill of sale, with or

8 [1897] 1 Ch. 382 (hire-purchase of a gas engine bolted down). This was a case of subsequent legal mortgage.
9 [1907] 1 Ch. 575.
10 [1914] 1 Ch. 50.
11 [1932] Victorian L.R. 172.
12 See generally on this topic VOUMARD, SALE OF LAND, 274 *et seq.*
13 See DEAN, HIRE-PURCHASE LAW IN AUSTRALIA (2nd edn.), 203-204.

without notice, and *any* legal estate for value without notice would prevail over a registered bill of sale because in the case of fixtures the bill would give an equity to remove only. If the bill was unregistered then express notice only would preserve the equity.

This was broadly the position until these complex problems were made considerably more difficult by the "simplifications" introduced by the Hire-Purchase Act 1959.

Section 27 (1) provides that "Goods comprised in a hire-purchase agreement which, at the time of the making of the agreement, were not fixtures to land shall not, in respect of the period during which the agreement remains in force, be treated as fixtures to land." The section does not say what they are to be treated as, but presumably they are to be treated as, goods in respect of "the period during which the agreement remains in force." Does this mean that an owner who determines the hire-purchase agreement for breach automatically turns any fixed goods into fixtures again? If so, has he any equity? What is the position of the bona fide purchaser of the land without notice who buys all "improvements and fixtures?" If the structure is a factory it is conceivable that the tile roof, and perhaps even the steel frame and the floor structure, might be under hire-purchase agreement; the purchaser has not even bought these things, let alone established a legal title. Furthermore, a caveat by the owner on the title is neither required nor would it be registrable, because the assets are "goods" only. In this situation the bona fide buyer could not take over the hire-purchase agreements because his contract says nothing about choses in action. What is more, the owner, as against the bona fide buyer, need not even register under the Bills of Sale Act because the buyer has simply not bought these things. The same applies to a mortgage of the freehold.[14]

The section is even more remarkable when it is realised that any sale by instalments where the property does not pass is a hire-purchase agreement within the meaning of this Act.

That this is a likely result of section 27 (1) is illustrated by section 27 (2) which attempts to save these consequences when the structure is a dwelling house. It provides:—

See also ELSE-MITCHELL & PARSONS, HIRE-PURCHASE LAW (3rd edn.), 168 *et seq.*

"Notwithstanding anything contained in subsection (1) of this section, the owner is not entitled to re-possess goods which have been affixed to a dwelling-house if, after the goods have become so affixed, any person other than the hirer has *bona fide* acquired for valuable consideration an interest in the land without notice of the rights of the owner of the goods."

The owner is not entitled to "repossess the goods." It seems that he remains the owner of them and if a subsequent buyer took with notice, he could then repossess. It also seems that he could sue the first buyer in conversion. Furthermore, can it be said that bricks are "affixed to a dwelling house?" Suppose a quarry master takes hire-purchase agreements over foundation stone—house buyers beware!

Of course the exercise of the right to repossess might involve the prior termination of the agreement, thus ending its period, but this is not necessarily so. It depends partly on the wording of the agreement and partly on whether the owner acts under it. If the owner rescinds under a "rescission clause", not saving other remedies, then the agreement is rescinded and "terminated" for all purposes. If, on the other hand, the owner treats the agreement as repudiated by fundamental breach at common law, then the agreement remains on foot for the purpose of remedies: *cf.* the position under an executory contract for sale of land. If the hire-purchase agreement is paid out then the innocent buyer will succeed to the title, thus made good, of *anything that he has bought.*[15] Enthusiasm for this section will, perhaps, depend upon whether one is a "real property" man or a "personal property" man.

(f) *Against the Official Receiver by reputed ownership in bankruptcy and apparent possession under sections 25 and 26 of the Bills of Sale Act: And against the Sheriff.*

Section 91 of the Bankruptcy Act 1924-1959 provides that the property of the bankrupt divisible among his creditors includes:—

"(iii) all goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, with the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof."

[15] *Ibid.*, at 194.

This section is aimed at property rather than documents and consequently is actually a title-shifting provision. *The doctrine of "reputed ownership"* has as its object to prevent persons from obtaining false credit by the possession or control of goods not their own so as to get a repute of ownership. The true owner must consent to the existence of the factual situation which enables the section to operate.

"Goods" are defined in the Act simply as including all chattels personal. A proviso to the foregoing part of section 91 enacts that "things in action, other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of the paragraph." The meaning is in some respects narrower than that of "chattels" in the Bills of Sale Act—for example, fixtures separately assigned are not included. Section 27 of the Hire-Purchase Act, as we have seen, provides that goods comprised in a hire-purchase agreement which at the time of the making of the agreement were not fixtures to land shall not in respect of the period during which the agreement remains in force be treated as fixtures to land. It is suggested that this section can in no way broaden the scope of the Bankruptcy Act. If at the date of the commencement of the bankruptcy the object is not properly described as "goods" within the meaning of the word in that Act, the fact that for the purposes of State law it would not be treated as a fixture is immaterial. In the absence of special provision such as will be found in section 91 (e) it is for the Commonwealth legislation, not for State legislation, to determine what falls within the scope of the Bankruptcy Act. It follows that section 27 provides no help to the official receiver in the event of bankruptcy of the hire-purchaser of goods which have become fixed, even if the Hire-Purchase Act is not valid as against him.

The words *"possession, order, or disposition"* are disjunctively used and not conjunctively as was the case in earlier bankruptcy legislation. Although as Darling J. stated in *Sharman v. Mason,*[16] the words "order or disposition" necessarily enlarge the word "possession" so as to include something beyond the visible occupation by the reputed owner, it is conceived that "possession" will cover practically all the ground necessary, for only when goods are in the possession of the bankrupt will it usually be possible to show reputed ownership.

It is sole possession which is required. It is not sufficient if the bankrupt is one of two partners who possess goods. It does not have to be what may be termed "personal" possession. It suffices if someone

[16] [1899] 2 Q.B. 679, at 687.

else possesses on the bankrupt's behalf—if he has possession through someone else as by a servant, agent, manager, depositee or carrier.

There must be a real consent of the true owner before he can be divested of his rights. So, if the bankrupt obtained possession by fraud, the owner will not be taken to have consented.[17] It seems that consent here has a more restricted meaning than in the Factors Acts. The consent must subsist at the time of the bankruptcy even if at that time the goods are still in the possession of the bankrupt. This is illustrated by *Re Chidgzey*,[18] where the consent had been withdrawn but the goods were left in the temporary possession of the bankrupt. This case related to consignment stocks, *i.e.*, a typical case of simple bailment at will. Had the consent not been withdrawn before the bankruptcy the owner would have lost title to the official receiver.

"True owner" is used in contrast to the reputed owner—the statutory owner. Effectively the true owner is the one who has the right to determine the appearance of ownership in the bankrupt, and his title to do may be either legal or equitable, and either absolute or by way of mortgage or charge.[19] In this case a legal title is not necessary—an equitable title is enough.

"Under such circumstances that he is the reputed owner" is the decisive phrase. The factual situation must be such that the inference which would be drawn by any disinterested observer is that the goods must belong to the bankrupt.[20] However, the "disinterested observer" here is like the "reasonable man"; the test is objective.

If it is clear that there is a well-known custom in the bankrupt's trade to hold a certain kind of goods when the holder is not necessarily the owner of them, the bankrupt will not be taken to be the reputed owner. Thus, hotelkeepers have been held in Victoria not to be the reputed owners of the hotel furniture.[21] The custom must be one generally known and not known merely to persons dealing in a particular market or district. When goods are held by the bankrupt as factor he will not be the reputed owner if the relationship of principal and factor is notorious. The title of a motor financier might be saved

17 See McDONALD, HENRY & MEEK, AUSTRALIAN BANKRUPTCY LAW AND PRACTICE, 302.

18 (1934) 37 West. Aust. L.R. 20.

19 See BALDWIN, LAW OF BANKRUPTCY (11th edn.), 398.

20 See In re Fox, [1948] 1 Ch. 407, at 416; and Re Miller, (1937) 39 West. Aust. L.R. 77 (motor car owned by debtor's wife).

21 Danby v. Colonial Bank of Australasia, (1893) 19 Victorian L.R. 586.

by this.[22] Again, a notorious custom in the trade concerned of the purchaser's leaving the property purchased in the Seller's hands will not lead to reputation of ownership in the seller. Similarly, where there is a notorious custom in the trade to send goods on sale or return, proof of that custom will exclude the reputation of ownership in the prospective purchaser. The principles are discussed in *Maxwell v. Official Assignee of Gillespie,*[23] in which it was held that no reputation of ownership can arise in the case of stock upon a farming property where there is a well established custom of taking in stock for agistment, and this is so even in a case whether there is no contract of agistment. Whether "floor plans" and "trade agreements" are sufficiently notorious is doubtful—it would certainly be unsafe for the owner to rely on it.

An example of a case where goods have been caught by the section is *In re Fox.*[24] A builder had contracted with a local authority to erect two houses for it and had in his possession loose building materials lying in his own yard although they were the property of the local authority, having been paid for under an interim certificate given by the architect, who had, however, authorized the builder to keep them in his yard. It was then held that as anyone seeing building materials standing in a builder's yard would naturally suppose they were the builder's own property, all the conditions of the section were fulfilled. The situation would be otherwise if the materials were on site.

Section 91 (e) of the Act excepts from the bankrupt's property *inter alia* goods hired under a *valid* contract for letting and hiring of chattels in respect of which *a valid bill of sale has been registered.* The Commonwealth Act leaves the determination of the validity of the bill of sale or of the contract for letting and hiring to State law. If it is valid by that law, then the goods or chattels comprised therein will, subject to the Act, be protected. The bills of sale and hire-purchase legislation must accordingly be read together with the Bankruptcy Act.

Section 25 (1) of the Bills of Sale Act provides, in effect, that every bill of sale not duly registered or not complying with the Act is fraudulent and void against the official receiver, trustee or liquidator or the assignee of the creditors of the grantor so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at any time within three months before the time of the presentation of the petition, etc., and after the expiration

22 Re Miller (note 20, *supra*).
23 Maxwell v. Official Assignee of Gillespie, (1909) 8 Commonwealth L.R. 553.
24 See note 20, *supra.*

of the time and extended time allowed for registration or renewal shall have been in the possession or apparent possession of the grantor.

Section 26 provides, in effect, that until the expiration of the time or extended time for registration, and so long as the bill of sale continues registered, the chattels comprised therein shall not be deemed to be in the possession, order or disposition of the grantor within the meaning of any Act relating to bankruptcy.

Section 3 (5) of the Hire-Purchase Act 1959 provides:—"A hire-purchase agreement that is not in writing is not enforceable by the owner."

In *Re Miller*[25] (heard before Dwyer J. as he then was), a motor car owned by the wife of a debtor was kept at the matrimonial home and occasionally used by the debtor for business purposes. He executed a bill of sale over the car as security for money lent and the bill of sale was duly registered; the debtor then assigned his estate under Part XI. One reason for finding against the trustee was that as there was a registered bill of sale, by virtue of section 26 of the Bills of Sale Act the car could not be deemed to be in the possession, order or disposition of the debtor, and it was immaterial whether the debtor did or did not have any title to the car when he executed the bill of sale. On the other hand, it is the Bankruptcy Act and not the Bills of Sale Act which determines what property is available for distribution; the Bills of Sale Act is only auxiliary. It is suggested that there is an inconsistency between section 91 (e) of the Commonwealth Act and section 26 of the State Act and thus the Commonwealth provision must override the State provision, at least to the extent of the inconsistensy.[26] The differences are these:—

(a) Section 91 (e) refers to a *valid* bill of sale; section 26 refers to *any* bill of sale. If Dwyer J. is correct, the protection of section 26 could extend to chattels comprised in a bill of sale which was not enforceable—for example, because the grantor had no title—and thus not "valid" upon the accepted construction of the Commonwealth provision.

(b) Section 91 (e) only protects chattels in respect of which a valid bill of sale *has been registered* at, it is submitted, the commencement of the bankruptcy. Section 26 purports to protect such chattels until the expiration of the time for regis-

[25] See note 20, *supra*.

[26] Because of the operation of sec. 109 of the Commonwealth Constitution.

tration, *i.e.*, before registration. This may be contrasted with the Victorian Instruments Act 1928 which, by section 30 (1), provided that no bill of sale should have any validity until it has been filed. Could the State Parliament enact that bills of sale could be registered within a year and so claim to extend the scope of section 26 and, it is suggested, restrict the application of section 91? It is suggested that it could not, and that section 26, since the coming into force of the Commonwealth Act, either has no application or must be read down to match the federal section.[27]

The position is otherwise with section 25 which is complementary[28] and constitutional.[29]

The criteria of a valid contract of letting and hiring, or of a valid bill of sale, are to be found in State law, *i.e.*, whether there is a contract binding on both parties sufficient in form and substance and complying with all relevant State statutory requirements.

Section 25 (1) of the Bills of Sale Act provides that failure to register a bill of sale renders it void (*i.e.*, presumably, not valid) to the extent mentioned as against the official receiver, trustee, and assignee. The receiver can take advantage of this and similar provisions in other States (see, for example, *Price v. Parsons*[30]). It is submitted that there is no constitutional issue which can arise here by virtue of section 25 avoiding the bill of sale for a period of three months prior to bankruptcy, etc. Section 91 does not purport exhaustively to state what bills of sale or hiring agreements shall be valid. It allows State law to operate on this question, and this is the function, inter alia, of section 25.[31] Thus the State can safely determine the extent of the validity—as, for example, the time from which the avoidance operates; but the time for registration will again be read out of the section. It can also determine upon what documents the State provision operates; for example, it can include (as it does) a hiring agreement within the category, and this notwithstanding that the federal Act does not make registration necessary for a hiring agreement. The State Act, of course, only operates on a hiring agreement that is a bill of sale to which the Act applies.

The title of the true owner must depend upon a bill of sale caught by the Act and not complying with the Act before he can be

27 *Cf.* Cussen A.C.J. in King v. Grieg, [1931] Victorian L.R. 413, at 427-428.
28 Re Kirby: See note 41, *supra.*
29 Price v. Parsons, (1936) 54 Commonwealth L.R. 332.
30 (1936) 54 Commonwealth L.R. 332.
31 The position is stated in Price v. Parsons, at 345.

affected by section 25.[32] If the document is not so caught, or he can prove title without its help, then section 25 does not affect him. On the other hand, if the document is not a bill of sale within the Act and the goods are in the reputed ownership of the bankrupt, he will in any case lose title under the federal Act because he will not be protected at all by section 91 (e). This is so *except* in the case of a hiring agreement which is *not* a bill of sale caught by the Act.

In contrast to section 91 of the Bankruptcy Act, section 25 does not require any reputation of ownership in the grantor, nor does the possession have to be with the consent of the true owner. As was said in *Ancona v. Rogers*,[33] "In the Bills of Sale Act the words "with the consent of the owner" have been purposely omitted, and the Act is applicable if at the time the grantor of the bill of sale becomes bankrupt the goods are in his possession or apparent possession, whether with the consent of the true owner or not. We think it was intended that if a man chooses to lend money upon a bill of sale, and does not register it, he should run the risk arising from his not being able to obtain possession of the goods before the grantor of the bill of sale commits an act of bankruptcy."

Section 25, unlike section 91, extends to chattels in the apparent possession of the grantor; apparent possession is defined in section 5 of the Bills of Sale Act. This does not require elaboration otherwise than to say that the Act here disregards both the legal position and repute; it looks only to appearances.

To terminate the grantor's apparent possession, there must be more than formal possession on the part of another. Something must be done which, in the eyes of everybody who sees the goods or who is concerned in the matter, plainly takes them out of the possession or apparent possession of the grantor.

Section 25 (3) provides, in effect, that where in accordance with section 25 any document whereby chattels are let on hire (with or without a right to purchase) or otherwise bailed by the owner becomes void as against any person, then the chattels shall as between the owner and such person be deemed to be the property of the person to whom they have been so let on hire or bailed. The rights of the parties between themselves are saved. This, of course, goes much further and in cases where it applies—hiring and other bailment—provides that the chattels shall be deemed the property of the person to whom they have been let or bailed. This subsection again actually

[32] Cookson v. Swire, (1884) 9 A.C. 653, at 663.
[33] Ancona v. Rogers, (1876) L.R. 1 Ex. D. 285, at 291-292.

shifts title, and oral evidence, even when available, will not help the owner.

The question will sometimes arise whether oral evidence can be given to maintain title when evidence of title is contained in an instrument that is void. This will depend primarily upon whether the instrument itself is the only root of title and this could be so even although there was a valid verbal agreement. For example, if a binding verbal agreement for the sale of goods is embodied in a formal written document, there are not now two agreements with the same subject matter—one verbal and one written—but only one agreement, namely the written agreement. This is so because of the doctrine of merger, the verbal agreement having merged in the written.[34]

On the other hand, there are circumstances where the writing is not the agreement itself but is merely evidence of the agreement; for example, letters passing between the parties. The matter will be decided by looking at the writings, and it is the same distinction as that which arises under the Statute of Frauds in considering whether the document is an agreement or whether it is a note or memorandum thereof. Further, it is possible for a written agreement to fail as being void but for title to be traced under an independent verbal agreement. For example, if A. sells goods to B. by verbal agreement, A. remaining in possession, and B. then lets the goods on hire-purchase to A. for an amount equivalent to the price, the hire-purchase agreement being in writing, it would be possible for B. to establish title under the verbal agreement for sale, notwithstanding that the hire-purchase agreement is void for non-registration. This, it is apprehended, is the reason for section 25 (3), the section being aimed at preventing just this course. The Victorian Act has for a different reason a special provision dealing with this situation. It is designed to block the borrowing of money on the security of goods by means of a sale and a hire-purchase agreement back to the seller without registration.

It will be seen that the protection given by section 91 (e) is, to some extent, taken away by the requirements of the State Act for a "valid" bill of sale. This is a matter of State definition which, it is suggested, is incorporated into the federal Act—and for that reason is constitutional.

In the case of bankruptcy where the goods *are* in the reputed ownership of the bankrupt the position is as follows:—

1. If title depends on a valid hiring agreement which is *not* within the Bills of Sale Act, for example, an oral agreement, or a hiring

34 See NOAKES, INTRODUCTION TO EVIDENCE, 194.

at will or of a chattel under section 54, the owner is protected and this is so whether the agreement is verbal or in writing and whether it complies with the Act or not. This is only so in the case of a hiring agreement—not *any* bailment.

2. Where the hiring agreement *is* within the Bills of Sale Act, the owner loses title unless it complies with the Act, *i.e.,* is valid. This is by virtue of section 25 (3) which actually shifts title to the hirer. "Apparent possession" under the Bills of Sale Act is enough. This section also extends to *any* bailment.

3. Where the chattels are subject to a bill of sale which is (a) valid, and (b) registered, the owner is protected by section 91 (e).

   To be a valid bill of sale the instrument must:—

   (i) Be a bill of sale as defined by the Act. If it is not a bill of sale, *i.e.,* a sale, security, gift or bailment, or not over chattels as defined, it is outside section 91 (e). A "floor plan" includes an element of bailment. Therefore it must comply with the Act on the one hand to prevent the shift of title under section 25 (3) and, on the other, to receive the benefit of section 91 (e).

   (ii) Be a bill of sale to which the Act applies, *i.e.,* it must give a power to seize or take possession. A "floor plan" therefore must include this power if it is to be a "valid bill of sale." If not, the protection of section 91 (e) will be lost.

   (iii) Comply with the Act as to registration and otherwise *if* the property is in the possession or apparent possession of the grantor within three months before the presentation of the petition.

   In this respect—if registered but otherwise not complying—

   (a) the bill is good under section 91 (e) if the property is not in the possession or apparent possession of the grantor-bankrupt.[35]

   (b) the bill is good under section 91 (e) if the goods are not in the apparent possession of the grantor within the three months period.

[35] See Nicholson v. Newman, (1901) 3 West. Aust. L.R. 28 (goods in common household not in apparent possession of assignor); and Fidock v. Westralian Master Butchers, (1922) 24 West. Aust. L.R. 126 (second seizure under *fi. fa.*—goods then in possession of sheriff).

The title of the trustee can relate back as far as six months, but, in the case of a registered non-complying bill, the owner's title is saved outside three months by the joint operation of section 25 (1) and section 91 (e).

If the goods are *not* in the reputed ownership of the grantor-bankrupt then it is necessary only to look at the Bills of Sale Act to see whether the instrument is a bill of sale and void or not,[36] and if it is void then to determine whether title can be traced without reference to it.

Section 25 (2) relates to overreaching of title by the sheriff and it refers to "the chattels of the grantor." It follows that where the grantee under an unregistered bill of sale sells the goods comprised in it to a bona fide purchaser, at a time when no execution has issued against the grantor, the purchaser will get a good title as against an execution creditor of the grantor who later issues execution, though the goods may remain in the possession of the grantor. It is only where execution issues against "the goods of the grantor" that the absence of registration avoids the transfer or affects the right of possession.

(g) *By operation of section 27 of the Bills of Sale Act.*

This section provides that no bill of sale shall be valid or effectual against any purchaser bona fide and for valuable consideration without *express* notice unless duly registered.[37] The first enquiry will be, of course, whether the writing is a bill of sale within the meaning of the Act. If not, the section has no application.

If O. is the owner, and P. is the person in possession, and X. is the bona fide purchaser, the position of X. will depend on the character of P.'s possession. If P. is holding as a person who has agreed to buy from the owner within section 25 of the Sale of Goods Act, and X. obtains delivery, then X. overreaches O.'s title, and this is so whether O. is relying on a written instrument or not, or whether he has registered it or not. Registration is certainly not express notice.

If, in this situation, X. has not obtained possession but is a buyer under a purchase from P., and O. needs to rely on the written instrument to establish his title, O. will fail unless the instrument has been made "valid or effectual" by registration.

On the other hand, in this type of case O. should be able to establish his title externally to any written instrument. The same

[36] See In re Lovegrove, (1935) 51 Times L.R. (a "trade agreement" held not to be a bill of sale).

[37] See, for example, Millman v. Dalgety & Co. Ltd., (1932) 35 West. Aust. L.R. 21 (a case decided before the 1932 amendment).

would apply if P. was holding as a hirer or pledgee from O. It is only where it is necessary to trace title through the instrument that oral evidence of O.'s title is excluded.[38]

Where P. holds as a grantor by way of security to O., and there is a written security in the usual form, X. will obtain a good title unless the security is registered, because O. can only establish his title through the security. It is theoretically possible for O. to have an oral security only, constituted by his having taken the property in the goods and orally bailed them back to P. with an oral defeasance in favour of P. The proof of this sort of arrangement, however, depends on the co-operation of P. It is not a common form of security.

(h) *The loss of title to a prior registered title by over-riding under section 34 of the Bills of Sale Act.*

In the case of competing interests, sections 33 and 34 give priority according to the date of execution, providing the bill is presented for registration within the time or extended time provided by the Act; if not, priority is according to date of registration. The purport and function of this section seem to be to encourage registration within the time provided.

The section does affect title. It actually refers to priority "of title to or right to possession."

A somewhat different section in the English Act has been interpreted as giving an over-riding effect to the instrument first on the register.[39] It is suggested, however, that if a first proprietor, failing to register within time, could establish his title without reference to the registrable unregistered (or late registered) instrument, then his title would be good on the principles previously discussed; but even this is open to question.

For practical purposes it must be assumed that even a *legal* unregistered or late registered title will be bad against a subsequent title with priority on the register. Section 34 says nothing about notice, but presumably the later interest would be affected by express notice—at least if the notice was extant at the time of the execution of the second instrument.[40]

Let us take the facts similar to those in the *Palette Shoes Case*.[41] If T. a trader, enters into such an agreement with a financier F.1 and

38 See p. 475 *supra*, and the cases referred to in COPPEL, BILLS OF SALE, 11.
39 Lyons v. Tucker, (1881) 7 Q.B.D. 523; Conelly v. Steer, (1881) 7 Q.B.D. 520.
40 On the point generally see 3 HALSBURY (3rd edn., 1953) LAWS OF ENGLAND, 332.
41 (1937) 58 Commonwealth L.R. 1.

subsequently concludes the same type of agreement with a financier F.2, the latter taking for value and without notice, then:—

(i) As neither document is caught by the Act, neither section 27 nor section 34 applies and F.1 maintains title whether one or both documents are registered or not.

(ii) Supposing both documents give the grantees a right to seize and are therefore caught by the Act. If neither is registered, it seems that neither is "valid or effectual" against the other under section 27. If neither can establish title other than by attempting to give verbal evidence of the writings (which is prohibited) there will be a stalemate. It is suggested, therefore, that section 27 should be interpreted as if it referred to *subsequent* purchasers—purchasers subsequent to the execution of the first instrument. Thus, although F.1's bill of sale is not valid against F.2, the section does not operate to avoid F.2's against F.1.

(iii) On the facts in (ii) above, suppose F.2 registers and F.1 does not, or F.2 beats F.1 to the register after F.1's time has run out. It is suggested that F.1 loses title to F.2 by virtue of section 27 in the former case, and by virtue of section 34 in the latter.

(iv) Supposing F.1's document is caught by the Act and F.2's is not. If F.1 registers within time he will maintain title. If he does not, he will lose title under section 27, and this is so whether F.2 registers or not.

(v) Supposing F.2's document is caught by the Act and F.1's is not. It is suggested that F.1 maintains title whether F.2 registers or not.

The proposition is that section 34 only applies where there are competing instruments, *both* of which are caught by the Act. Where a legal title is lost in this way the proprietor would maintain an equity but would be postponed to the springing legal title. This would be immaterial in the case of an executed sale but would still be a valuable right if the legal title is by way of security only.

Now supposing T. is not a manufacturer of shoes but is a dealer in second-hand motor vehicles in such a way as to make him a "mercantile agent." Then in (i) above F.1 loses title whether one or both documents are registered or not. In (ii) F.1 likewise loses title, and again in the case of (iii) because registration is irrelevant. In (iv), if F.1 registers he will still lose title because registration is not notice and is otherwise irrelevant; and this is also the case in (v).

The proposition is that registration is irrelevant in relation to title passing under section 25 of the Sale of Goods Act, the Factors Acts or in market overt.

CONCLUSION.

Let us, in conclusion, look at a hypothetical, but not fanciful, commercial situation from producer to consumer and see where and how the financier cuts across title at different points, and other interests compete for such title.

P., a producer, wishes to "tool up" for production; F.1, a financier, lends him money on the security of his plant, movable and fixed, book debts, materials on hand, present and after-acquired, and his future products. F.1 can take security, either by way of legal bill of sale or by way of equitable floating charge. Except in the case of a floating charge over the chattels of a company or corporation a notice of intention to register will be necessary. F.1 must make sure his bill of sale is "valid" if he is to protect himself against the bankruptcy of P., *i.e.,* as well as complying with the formalities it must *be* a bill of sale *and* one to which the Act applies.

P. holds the freehold on a long lease. F.1 should make sure that P. is not prohibited from removing trade fixtures; he could also, and should, register a caveat on the title to protect his interest in fixtures (an equity only) against a mortgage or sale of the freehold. He should search for prior bills of sale. If none are registered he will have priority and this is so even over hired goods, presently assigned to him, if the hiring agreement is within the Bills of Sale Act. Suppliers of machinery, etc., to P. on hire-purchase agreement will, of course, also protect themselves by registration.

P. wishes to distribute his products through T., a trader, and in order to meet overhead and his commitments to F.1 he wants cash at 30 days, property not to pass till payment. He has a licence from F.1 to sell his products in the ordinary course of business.

Here is a problem. How does this permission shift title from F.1 to T.? F.1 is in no contractual relationship with T. and as T. may be ignorant of the existence of F.1 it is not an estoppel situation. Is P. an agent of F.1 for this purpose? Is the charge in this respect floating only? Whatever the answer is, T. himself requires finance to pay for P.'s goods, and he goes to F.2 who, seeing P.'s goods on T.'s floor, offers T. a "trade agreement", *i.e.,* F.2 will take the property in the goods and T. will act as his agent to hire-purchase them out to customers—or he might offer him a "display plan", or perhaps a combination of both.

Here is a title conflict. T. is in possession under an agreement to buy, but without title as yet. Is he in possession with the consent of F.1? Probably not. F.1 might be ignorant of P.'s 30 days terms arrangement. F.2 omits to search and carries on under the "trade agreement"; alternatively he does search, sees the licence F.1 has given to P., and assumes P. is acting in the ordinary course of business under the licence. Is F.2 right in this assumption? Possibly not. In either case when does title pass to F.2 if at all? The parties will be unconcerned unless financial troubles follow.

Suppose T., in financial difficulties, fraudulently purports to charge or sell the goods to another, struggles on for a while, and then goes bankrupt. The official receiver, F.1, and F.2, and perhaps a "bona fide purchaser" for value, are all laying siege to the title. On the outside of the ring is a bewildered customer who has paid to T. a substantial deposit on a valuable article and left it with T. for some temporary purpose, together with his old article by way of trade-in as part of the deposit. Some of the goods on T.'s floor have been paid for by T. to P. Do they now fall under the "trade agreement" and pass to F.2 at common law? This would be the intention, but is F.2's agreement caught by the Bills of Sale Act? If so, and if it does not comply, the official receiver holds the field—he also holds the field if it is not caught by the Act. Which goods are whose?

Can the customer point to "his" article? If so, is it still owned by F.1 or has it passed to F.2? If he has signed and registered his hire-purchase agreement he might be safe from the official receiver *if* F.2 in fact was the owner. He might be able to show that T. was a factor and he was a buyer from T., not a hire-purchaser from F.2, but is the article in the possession of T. with the owner's consent and, if so, whose?

What has happened to the title to his trade-in? It might or might not have passed to F.2 under the display plan. F.2 then alleges that the terms agreement between P. and T. is itself a bill of sale *not* being a transaction in the ordinary course of business, and F.1's title is ineffectual against him under section 27 because the terms arrangement as to these goods has taken the place of the original security and has not been registered. F.1 retorts that the terms agreement does not confer on him or P. a right to seize and is not caught by the Act, and further that most of the transactions were oral only and can be proved without reference to any writing. The official receiver points out that, to that extent, they are unenforceable anyway under the Hire-Purchase Agreement Act. F.1 then threatens, with some justifica-

tion, that he will, if necessary with the co-operation of P., sue anyone who touches the goods, in conversion. The customer consults a lawyer.

There are, of course, legal problems but these are likely to be child's play compared with the difficulty of ascertaining the facts. Because T. has for some time been short of money he has probably been doing some trading with "his own goods" and his grandfather's money "on the side." The principal documents, ancillary papers, such as invoices, advice slips, etc., and records, might be in apple-pie order —might be! More probably there will be hopeless confusion—papers undated, serial numbers of goods muddled or not recorded, carbons altered, journals not properly written and ledgers not posted, etc.

In this situation the consumer—the little man—will probably decide to lose his hard-earned money and leave the field to the official receiver and the financier—and to us.

If any conclusion is to be drawn from this analysis of the problems of title it is that the commercial community and the private citizen are ill served by the law. The struggle for title resolves itself into a lottery depending in part on the opinion the court will give in a branch of the law where principle has been reduced to a chaotic statutory mess, and partly on the keenness and "cleverness" of counsel in appreciating the "nice" points and eliciting evidence to fit the points—not to mention the skill of the conveyancer in drafting "schemes" and "plans" which no ordinary person can either understand or operate.

The dilemma posed by Lord Justice Denning in the *Bishopsgate* case cannot be resolved by further poking at this mouldering mass of statutory compost. To start with, the notions of apparent possession and reputed ownership serve no rational purpose in the modern community. It is universally known that possession of a chattel does not now imply ownership. A creditor who has extended credit on an "appearance" of ownership only has no just claim to carve up some third party's property to alleviate the consequences of his own greed and folly. Sections 25 and 26 of the Bills of Sale Act and section 91 (iii) of the Bankrupty Act should be repealed holus bolus. This gets rid of the official receiver, trustee and assignee, liquidator, and sheriff, in one shovelful, and should ventilate the heap sufficiently to lead to a new "Personal Property Act" based on the common law of caveat emptor but providing some protection for the bona fide purchaser or encumbrancer for value without notice.

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