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PARLIAMENT

"The Speaker then passes into the Chamber. There his Chaplain has advanced to the Clerk's table, has looked at the Members and prayed for the Country."

Liverpool Echo (collected by Denys Parsons).

In the Parliamentary Session before an election the government of the day traditionally makes a special effort to convince us that it should be elected to govern again. This session, let us not be dazzled by the machinations of government. If Parliament is to have its proper place in the affairs of the nation we must look to the Members of Parliament, not to government.

From a Member of Parliament we expect more than that he should simply partake in the government of the country. Governing is the least onerous and demanding of his responsibilities. We expect that he should preserve Parliament as the prime forum for debating the affairs of the nation; that he should uphold the dignity of the foremost institution in the country; and most importantly, that he should ensure that Parliament acts as an effective guardian of our freedoms liberties and interests. These duties, which are owed to Parliament and to us, transcend all obligations to party.

These obligations must live vibrantly if a healthy balance between legislature, administration and judiciary is to be maintained. Yet they wilt before the party whip and after a brief exposure to caucus discipline and pressure, they die.

Must it be an essential feature of party government that the discipline needed for its conduct be so rigid as to destroy the effectiveness of the one institution intended to control it? That need not be so. Yet in the Superannuation case we saw a governmental affront to Parliamentary legislative Supremacy. Why did Parliament do nothing?

We see Parliament bypassed by regulation, buried by legislation, cut from public opinion by restrictive select committee hearings (when there are hearings) and hampered rather than aided by antiquated processes for inquiring into executive action. We also see that our Members of Parliament have done nothing about it.

Of those Members are some who have stature in government and some who have stature in opposition. But how do we answer when asked who has stature in Parliament? It is those with stature in Parliament who we should be seeking this session – for those who, with dedication, devotion and skill uphold the interests of Parliament despite party, despite politics and despite personal ambition. For those of the government caucus it will not be easy. That may be regarded as a burden of success and those who cannot shoulder it should not be there.

Opportunities there are aplenty. What does Parliament think of NAC, a body created by Parliament and charged with specific functions by Parliament, self-destructing by ministerial direction. The same could be said of the dissolution of the Monetary and Economic Council. What does Parliament think of two of its members being told to toe the line, and in one case to stop asking awkward questions, under the threat of disclosure of a confidential report. What, in retrospect, does Parliament think of the abuse of procedure that enabled a belated amendment to the Social Security legislation to be rushed through just before Christmas with minimum notice and debate; an amendment that places appeal procedures firmly under a ministerial thumb (see [1978] NZLJ 17). There are initiatives to be taken in reforming Parliamentary procedures. There is no shortage of opportunity for those who would shine – in Parliament. As for those

who do not — do they merit a vote?

There are sound constitutional reasons — balance of power, watchdog of the people — crying for a more assertive Parliament. For those with a shred of idealism and just a touch of feeling for the traditions of our democracy though, there is one simple reason. Parliament is our supreme law making institution. It is held in low esteem. It should not be.

If Parliament is to operate effectively — as it

COURTS

should — it is for us, the electors, to elect, not members of government, nor members of caucus, but members of Parliament.

Having opened with a prayer for the country let us close with the prayer attributed to Lyman Beecher in the 19th century "Oh Lord, grant the we may not despise our rulers; and grant, Oh Lord, that they may not act so we can't help it."

Tony Black

TERRORIST TRIALS IN GERMANY

The declared aim of the West Germany terrorists who style themselves the Red Army Faction is to destroy a society which they regard as capitalist, bourgeois, hypocritical and inhuman. Last year they made more, and more violent, attacks on it than ever before. True, the government thwarted the immediate aim of last year's attacks — to blackmail the release of about a dozen leading terrorists from West Germany's jails. But the terrorists cannot be said to have been entirely without success of a more insidious kind. Public opinion demanded, and political expediency wrought, certain changes in the administration of the system of justice that have at least the potential for moving Germany in the direction of the authoritarian state which the terrorists assert it already is. These changes may yet cause 1977 to be remembered in Germany as the year of the terrorists.

The year began with the assassination of the Chief Federal Prosecutor, Siegfried Buback. It continued with the murder of the country's leading banker, Jurgen Ponto, and the kidnapping and eventual murder of the "boss of the bosses", Hanns Martin Schleyer, President of both the Employers' and Industrialists' Associations. Next came the week-long hijacking of a Lufthansa jet and its 90 or so run-of-the-mill, not-in-any-way-remarkable passengers, which led to more visible public hysteria than the three murders combined. And finally Andreas Baader, jailed leader of the terrorists, was able to shoot himself in the country's most "secure" prison after the attempts of the hijackers and the Schleyer kidnappers to blackmail his release had failed.

All these events were exhaustively reported abroad, often — as in France and Italy, for example — with something approaching glee that, economic miracle notwithstanding, the essential instability of German society was being revealed. Less widely reported, but indubitably more significant than such snide remarks of envious neighbours, was a

MICHAEL CREW attended the trial of Klaus Croissant, the first of the "terrorist lawyers" to be brought to trial in Germany. He outlines his impressions.

hardening of opinion within Germany towards those suspected of having sympathies with the terrorists. Increasingly, the expression of even the mildest constructive criticism was sufficient to arouse such suspicions. The Nobel Prize-winning author Heinrich Boll, for example, had remarked several years ago that he could understand certain of the objections made by the terrorists to the state and direction of German society, although he rejected the violent means by which they expressed them. He found these remarks exhumed last year to brand him a "Sympathisant". This new and ugly coinage from, and with a meaning equivalent to, the English word "sympathiser" was even at one stage applied, ludicrously, to the former Chancellor Willy Brandt.

Such reactionary hysteria was not, regrettably, confined to the popular press. The Federal Government, in the very German belief that more law brings more order, found it necessary to pass laws permitting a complete insulation of terrorist prisoners from the outside world — including their lawyers — during times of crisis. An act was passed enabling police to search whole blocks of flats without a warrant if they suspect terrorist activity. Legislation is likely to refine further the already oppressive system by which every person living in Germany is required to register his address and extensive personal data with the city authorities. The government may yet take up a proposal that the police be given power, in the event of a terrorist attack, to "freeze" all traffic in a particular area by turning all traffic lights to red — although proponents of the scheme have yet to explain how the police are to make their way through

the resulting traffic chaos to the scene of the crime. And finally, very recently, legislation was enacted extending the state's right to bar defence lawyers from terrorist trials. At present the right may be exercised only in cases of proved involvement or conspiracy with terrorists. In future, mere suspicion of such involvement will suffice, according to newspaper reports of the new legislation.

The last measure indicates the extraordinarily low esteem in which lawyers are held in West Germany at present. This situation is the result of — mostly as yet only alleged — co-operation, not to say conspiracy — between imprisoned terrorists, a very few of their lawyers and still active terrorists outside prison. Even before last year, lawyers had a tarnished image because of the widely-held belief that delaying tactics on the part of the defence were responsible for the interminable nature of a number of terrorist trials. The Baader-Meinhof trial, for example, lasted about two years — although it should not be forgotten that the authorities held Baader and the others tried in custody for three years before bringing them to trial. The arrest of Siegfried Haag, lawyer in a number of terrorist trials, in possession of weapons and apparent coded plans for terrorist actions, provided the first real evidence of conspiracy between terrorists and defence lawyers. A raid on the offices of Klaus Croissant revealed much material characterised by the press as suspicious, if not damning. Croissant had during the Baader-Meinhof trial consistently denounced the conditions under which those being tried were held in prison as inhuman and the trial itself as unjust. It is perhaps worth noting that the Court in the Baader-Meinhof trial refused to accept that the proven "bugging" of defence conversations by the prosecution was inconsistent with the notion of a fair trial. Finally, it was revealed early this year that two defence lawyers had confessed to smuggling into Stammheim prison not only the pistol with which Baader killed himself, but also other weapons, radio equipment and half a pound of plastic explosive.

Klaus Croissant had been arrested following the raid on his office. He was released on bail on conditions which included the confiscation of his passport. He was able nonetheless to flee to France. The West German government immediately applied to extradite him, but the French professed themselves unable to find him — although doing so proved no problem to numerous newspapers and even a government-controlled television network, which screened an interview with him. Finally, it may be supposed, German pressure grew too great for the French to continue to allow themselves the luxury of Crois-

sant's presence. He was arrested and brought before a Court in Paris. His extradition followed in November after a distasteful episode in which the judgment ordering his extradition was delayed until all preparations for his delivery over the border had been made. It is even possible that he had been taken from Paris before it came into force. In any event, he was safely in German hands before his lawyers had had time to lodge an appeal and obtain a stay of execution.

Under the Franco-German extradition treaty of 1953, an accused extradited by one of the parties on the basis that sufficient evidence exists to justify bringing certain charges against him in its own Courts can be tried in his own country only on those charges, not on all charges which the authorities there may wish to bring against him. The French Court which ordered Croissant's extradition found insufficient evidence to justify the more serious charges against him, involving active participation in at least the planning of specific terrorist attacks. He stands accused "merely" of:

"having by the abuse of his privileges as defence counsel been a part of the communications system of the Baader-Meinhof Band and knowingly supported their aim of committing additional serious offences from prison". He faced a maximum prison sentence of five years.

I was present at the first day of Croissant's trial in Stuttgart on 9 March. It is being held in one of two Courtrooms built as a part of Stammheim prison — itself built specially to house the terrorists. Security precautions at the trial are incredible, in the original sense of that word.

The prison is situated about two kilometres from the centre of Stammheim, a suburb of Stuttgart. The first control is a roadblock on a residential street about half a kilometre from the prison. A perfunctory glance at my passport satisfies the two policemen, unarmed save for the usual holstered pistols, and they wave me on. The prison grounds begin at the end of the street; the buildings are perhaps a 100 metres from the last of the houses. The Courtroom building is separate, a squat, two-storey building, windowless, square and almost wholly featureless, surrounded by a high wire fence. A policeman armed with a submachine gun stands on the roof, scrutinising those waiting to enter. Incongruously, two policemen on horseback patrol the fenceline. Reporters and photographers surround the gate, but the queue of those waiting to enter is short. As I join it, a man is thrust out of the gate by two gentlemen in plain clothes, protesting volubly. He complains to the journalists, who cluster around him like blowflies on a piece of rotting meat, that he is a Judge from France; that one

of the two men who have just ejected him asked to see his passport inside the Courtroom, that he refused unless the other showed him an identity card to prove he was a policeman. Whereupon he was asked, and then made, to leave. Perhaps French Judges are different.

My passport is again checked at the gate, this time more thoroughly. Then I move forward to the door of the Courtroom building. A locking device ensures that only one person can enter at a time. At least three policemen patrol the foyer with submachine guns. A security man in plain clothes asks me at the door my reasons for visiting the trial. Professional interest seems an acceptable explanation. He takes my passport and asks me to accompany two of his colleagues, unarmed but for rubber batons at their belts and also not uniformed.

They lead me into a room possibly 10 feet square, peculiar for its lack of a handle on the inside of the door. They ask me to remove my coat and my jacket. One of them frisks me, slowly, thoroughly and painstakingly, while the other watches. Then he examines my coat and jacket, minutely, while the other continues to watch me. He pays particular attention to all buttons, and confiscates my keys, wallet and watch – anything which might be used as a weapon. My plastic ball point is opened, its anonymous refill solemnly checked. Finally, he scans me from head to toe with a metal detector – his colleague continues only to watch. As he reaches my belt-line, the detector emits the squeak of an annoyed guinea pig. I must undo my belt, and then my fly, to prove that it is the metal zip which causes the annoyance. And when the nails in my shoes upset the guinea pig still further I must take them off so that they too can be examined, inside and out.

Without my watch, I estimate that the whole process lasts 10 minutes. It is conducted with scrupulous politeness, but is nonetheless thoroughly distasteful. All who attend the trial are subjected to such a search. When it is over, a bell is pressed and the door of the room is opened from the outside. The potential weapons which have been confiscated from me are placed in a locker to which I am given the key. My passport is returned to me and I am handed an admission slip to the Courtroom. Immediately it is checked as I pass through a turnstile, a sophisticated version of that found at the gate of a zoo, into the foyer of the Courtroom. By the coat hooks provided there is a small sign, absurd, almost paranoid, in this hypersecure context: "No responsibility taken for coats etc left here".

My admission slip is checked again five yards later, at the door of the Courtroom, which is large, square and identifiable as a Court only by

the insignia of the Stuttgart *Landsgericht* (Provincial Court) behind the bench where the three Judges will later take their places. It is extremely well-lit. There is space for perhaps 200 journalists and spectators. I count 12 uniformed policemen, some armed, some not, and can recognise of the plain-clothes men undoubtedly there the two who had ejected the French Judge earlier. In addition, three men sit on a closed iron platform at first floor level at the rear of the Courtroom, constantly scanning those below. I suspect sharpshooters and ask a policeman if I am correct. He stares at me for a few moments – coldly or is it dully? – before he replies, slowly: "You shouldn't ask too many questions".

The trial itself does not, on the first day, reach even the reading of the charges against Croissant. At 9.30 appear the accused, handcuffed to a policeman, two prosecutors, three Judges, assorted Court staff – but none of the six counsel, half provided by the State and two French, who are to defend Croissant. In their absence, the President of the Court reads an explanation of the security measures which are to be in force during the trial. Not only the public, but also defence counsel, are to be subjected daily to a body search and may be asked to undo though not remove clothing by those conducting the search. All files may be searched, and must in any case be kept in clear plastic file covers supplied by the Court.

After five minutes, theatrically late, one defence lawyer enters. With studied discourtesy, he turns his back to the Court to shake hands warmly with his client. His success in his obvious aim of establishing hostile relations with the Court from the start is complete, to the enthusiasm of the gallery, which includes large numbers of observers from France.

After this interruption, the President completes his explanation. The defence counsel, Eberhard Kempf, from Frankfurt, immediately protests against it for himself and his five colleagues. Essentially, he argues that to search only the defence is to discriminate severely against the defence. Why, he asks, are the prosecutors not searched also? He emphasises the intimate and potentially humiliating nature of the search. He ridicules the lame observation of the President to the effect that these measures are necessary because something may have been planted on the defence lawyers without their knowledge with a sentence certainly unique in the history of jurisprudence: "You can be sure, Mr President, that we know what is in our underpants!" He asserts that he and his colleagues are unnecessarily disadvantaged by having to transfer their files from indexed holders to plastic covers which cannot satisfactorily be indexed. He draws attention

to the fact that only public opinion, not the charges against Croissant, associate him with acts of violence — the charges relate only to communication of information. Why then these measures, which can be appropriate only in the case of one accused of acts of violence? And finally he reaches the heart of the issue: "that these measures are to be applied to us merely because we choose to defend this client means that in the Court's eyes we are no more and no less than his accomplices".

Clearly anxious to avoid the international odium to which a boycott of the trial by the defence would give rise, the Court attempts to compromise, the Judges even, remarkably, offering to subject themselves to the same daily search during the trial. The prosecutors will, however, have none of this. Though themselves ready to submit to body searches, they regard it as intolerable that the Court should be blackmailed into doing so — and therefore refuse for themselves. Logic of a tenuous variety, which earns them the cool rebuke that the Court will ask their advice when they need it, thank you! Finally, the Court decides to seek the opinion of the Stuttgart equivalent of the Law Society as to what degree of control is compatible with the accepted special status of defence counsel, and the hearing is adjourned.

The impasse on the first day of the Croissant trial is by no means an isolated example of increasing judicial and governmental mistrust of lawyers in general, and of lawyers who defend terrorist clients in particular. The influential German news magazine *Spiegel* reported recently (*Der Spiegel*, September 1978, 83) that body searches of lawyers visiting clients in prison are being made more and more often in a number of German states — regardless of whether lawyer or client has had any connection with terrorist activities. In Hamburg, lawyer and client must if the justice authorities so decide, communicate by microphone from opposite sides of a pane of glass each in a separate room — hardly conducive to establishing the necessary atmosphere of trust between lawyer and client. In Berlin, the Justice Ministry has apparently circulated to prisons a list with the names of 20 lawyers who have in the past represented terrorist clients, with instructions that *any* clients they visit are to be closely searched after the visit — no matter why the clients are being held.

The implications of these various measures are not pleasant. Many a lawyer might hesitate before accepting a brief which would require him to open his fly for inspection every morning in the course of a long trial — and possibly brand him as a "Sympathisant". One does not need undue elasticity of imagination to see that the justice

authorities could well ensure that the daily search was consistently oppressive and humiliating in the case of a lawyer whose further participation in a trial they wished to discourage. It is only a short step from the situation in Berlin to the formulation of a list of approved lawyers who "may" defend terrorists; and a no longer one from there, possibly, to suspected terrorists having the right only to assigned counsel. Nor is it, perhaps, fanciful to regard matters such as compulsory use of non-indexable file covers as a first step towards the imposition of a separate, restrictive form of trial on those accused of "terrorist" offences. Which leads to what may become a central problem: are two persons accused of having committed what is objectively the same actus reus to be tried under different systems of law because the one is alleged to have been politically, the other merely financially, motivated?

Restrictions imposed on lawyers are important only in so far as they affect their clients. The decision in Stuttgart that lawyers defending Croissant must submit to a body search each morning of the trial is repugnant not only because it shows that the judiciary regards any lawyer who defends a terrorist as his possible accomplice — but also, and principally, because it indicates a predisposition to regard Croissant himself as guilty before he has been tried. Croissant is a lawyer. He is accused of having abused his privileges as defence counsel to aid his clients in ways that are illegal. If he is convicted, it seems certain that his conviction will be seen as proof of the necessity of the restrictions to which his counsel, along with counsel in other "terrorist" trials have been subjected — and a justification for further restrictions on all lawyers.

For all the theatre which the radical left, inside and outside Germany, will stage at Croissant's trial, it must therefore be recognised that it does raise serious questions as to the balance of justice in modern Germany between the individual and the State. A trial conducted at length with scrupulous fairness, under the same procedure used at any criminal trial, combats the terrorists far more effectively than any politically expedient kangaroo court could do, since it demonstrates that the democratic structure of German society is stable, and secure against their attacks. It would be a cruel paradox were the terrorists to succeed in transforming German justice into the biased farce which they insist that it is. One hopes that the Judges and the politicians — in whose hands the matter ultimately rests — recognise that wedges have thin ends, and that, in restricting even in minor ways the right of those accused of terrorist offences to a full and unrestricted defence, they may be inserting one between German Justice and the society which it serves.

FAMILY LAW

REMOVAL OF CHILDREN FROM THE JURISDICTION— SECTION 20 (2) OF THE GUARDIANSHIP ACT 1968

Publicity has recently highlighted the chances of one parent kidnapping his child and taking it out of New Zealand in order to defeat the custodial rights of the other parent. A variation on this theme is the decision of Somers J in *Williamson v Williamson* (M42/77 Supreme Court, Invercargill) delivered on 1 December 1977. The action of the parties in that case however, in comparison with the kidnapping situation, can only be described as laudable.

After almost seven years of married life, the parties separated. At that time, their only child, a son, was aged just over one year and at the time of the proceedings he was five. The mother had custody throughout, which was formalised by a consent order in 1975. The husband's access to the child was to be "generous and liberal" but was otherwise unspecified. During the early part of the separation he saw little of his son but had later exercised access rights much more regularly. A secondary aspect of the case, was the defining of these rights in rather greater detail.

The wife was a music teacher, who wished to improve her musical experience and teaching ability by going overseas for two years. She refused to go however unless she could take the child with her and for this purpose applied for leave of the Court to take the child out of New Zealand under s 20 (2) of the Guardianship Act 1968, which reads as follows:

"Any person who without the leave of the Court takes or attempts to take any child out of New Zealand knowing that proceedings are pending or are about to be commenced under this Act in respect of the child or that an order of any Court conferring custody of or access to the child or any other person is in force or with intent to prevent any order of any Court as to custody of or access to the child from being complied with commits an offence and shall be liable on summary conviction to a fine not exceeding \$500 or to imprisonment for a term not exceeding 3 months or to both."

Leave was refused in the Magistrate's Court and that decision was appealed to the Supreme Court.

There were four principal factors which Somers J considered before concluding that the wife should be granted leave. First, he was confronted with the approach adopted by the learned Magistrate, who in reaching his decision said:

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"But the question over-riding everything else in my mind is this — can the Court be certain that Scott would be brought back to New Zealand promptly, or at all? The answer is obvious, the Court cannot be certain that he would ever be brought back."

His Honour held that this approach was mistaken and that the first and paramount consideration in deciding these matters should be the familiar notion of the welfare of the child as specified in s 23 of the Guardianship Act 1968. His Honour did add however:

"That is not to say that the likelihood of return is not a factor. In some cases it may even be decisive. But in many cases I think return can be protected by undertaking or security or both."

The instant case belonged to the main line of cases.

The next factor was what may be termed the psychological effect on the mother of not being granted leave. It appeared that she would have been "considerably upset" if she had been unable to fulfil her desire to go overseas (a desire which Somers J regarded as "reasonable") and his Honour was concerned about the way that this might affect the home that the boy was being brought up in. In this context, the words of Sachs LJ in *P (LM) v P (GE)* [1970] 3 All ER 659, 662 (cited in the judgment of Somers J) are apt:

"... this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may ... produce considerable strains which would be unfair not only to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child. The way in which the parent who properly has custody of a child may choose in a reasonable manner to order his or her way of life is one of those things which the parent who has not been given custody may well have to bear, even though one has every sympathy with the latter on some of the results."

It is interesting to note that in that case the Court permitted a child to be taken out of England for the purposes of permanent emigration to New Zealand.

Thirdly, there was a suggestion by the husband that the whole matter be postponed until the boy was older and could make up his own mind. Although the child might gain greater benefit from travelling when he was a little older, on balance his Honour thought there was no point in delaying the matter. Against such a delay was the likelihood of lesser disruption to the child's education if the trip were made when he was five and also the possible psychological effect on the mother which has already been mentioned.

Finally, his Honour came to a matter which troubled him a good deal. The practical effect of granting leave was to render access by the father impossible for a period of two years "which is undoubtedly a lengthy span in the life of a boy aged 5 years". It will be recalled that the father had been exercising access rights on an increasing scale.

Nevertheless, Somers J felt that the close links between the custodial parent and child were such that the disappointment of that parent was bound to affect the question of access "and may even reflect strain upon the relationship between father and son". Although not expressly stated, his

Honour implies that a frustrated custodial parent will consciously or unconsciously raise barriers to effective access by the non-custodial parent.

Furthermore his Honour noted an incident of custody which permits a custodial parent to move freely within New Zealand and thus, depending on the geographical locations of the parents, cause access difficulties not unlike those encountered when the child is living abroad. Summarising he said that "custody is of itself no warranty that access will always be as readily available as at the moment in this case it is".

The learned Judge granted the wife leave as she had sought but put her on terms. She was required to give an undertaking to return within two years of departure and to offer \$3000 as security for returning, of which \$1000 represented the boy's return fares to New Zealand. On the question of the power to require security and undertaking, his Honour invoked s 33 (3) of the Guardianship Act 1968 which saves the powers of the common law not otherwise provided for in the Act. He cited *Jeffrys v Vanteswarstwarth* (1740) Barn C141; 27 ER 588, *Biggs v Terry* (1836) 1 My & Cr 675; 40 ER 535 and *Talbot v The Earl of Shrewsbury* (1840) 4 My & Cr 672; 41 ER 259 as authority for the existence of such a power at common law. In conclusion, the husband's access was fixed at every third weekend.

TAXATION

OPTIONS AND THE PURCHASE OF LAND FOR RESALE

The recent case of *Bath and West Counties Property Trust Ltd v Thomas (Inspector of Taxes)* [1977] 1 WLR 1423 is of interest to New Zealand taxation advisors, not because it has any direct bearing on the law of this country, but because of the problems that could arise in the interpretation of s 67 (4) (a) of the Income Tax Act 1976 if similar facts occurred here.

In 1939 the company had sold land to the War Department subject to the condition that if it ever ceased to be required by the government the company would have a right of pre-emption to purchase it on certain specified terms and conditions. By 1962 the government no longer needed the land and the company, in exercise of its rights, acquired it for £42,000; it then proceeded to sell it for £115,000, in circumstances that clearly showed that resale was its only purpose in purchasing. When the crown sought to tax this profit, the company submitted as one of its arguments that the profit should be calculated by deducting from the gross receipts,

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not only the £42,000 paid, but also an amount equal to the value of the right of pre-emption at the time that it was exercised. The respondent countered by adopting the reasoning of the special commissioners who had heard the objection at first instance, namely that the purchase and sale was a trading adventure starting with the actual purchase and not with the company's prior decision to exploit its pre-emptive right. Accordingly, it was contended that the value of the right had no effect on the computation of the profit, and in support of this the decision of *Goulding J in Clarke v Follett* (1973) 48 TC 677 was cited. That case had involved very similar facts but with the exception that the taxpayer concerned was an individual who had never previously indulged in land dealing. Despite this, however, *Goulding J* had refused to interfere

with the special commissioners' finding that the purchase and sale amounted to an adventure in the nature of trade and had gone on to say:

"Where such a right [of pre-emption] is exercised, I see no reason to include in a trading account anything except the price actually paid for the land, whether in fact agreed or settled by an arbitrator".

In deciding the *Bath and West Counties* case Walton J expressly disagreed with the earlier decision's logic, stating:

"[Counsel for the crown], too, said that the trading adventure started with the purchase of the land, and that therefore the value of the right of pre-emption does not fall to be taken into consideration. This is, to my mind, a quite astonishing proposition. At the start of the matter — just prior to the time when the land is acquired — the taxpayer company had a valuable asset in the shape of a right of pre-emption. At the end of the day, that right had gone, having been exercised in the purchase of the land, and yet no credit is given to the taxpayer for it

"The cost to the taxpayer company of acquiring the land was indubitably (i) the actual price paid to the War Office plus (ii) the value of the pre-emption rights, and I consider that for practical purposes the pre-emption rights must have been appropriated as trading stock at the time when the land was in fact purchased; and so appropriated at their then value, whatever that was".

At first glance this reasoning appears entirely reasonable, especially where there are indications (as in the *Bath* case) that the taxpayer's business is dealing in land, and it is therefore tempting to assume that the same result would be reached by a New Zealand court. But it is here that the different wording of our statute causes difficulties for, despite the fact that ss 65 (2) (a) and (f) and 67 (4) (a) and (b) speak of "profits and gains" (thereby indicating that they impose tax on net receipts), it is clear from s 101 that no deduction can be made unless expressly authorised by the legislation, and the only possible authorisation in the circumstances of this case is s 104. If the taxpayer spent money to acquire the pre-emptive rights, then that would of course be deductible as an expenditure incurred in the production of assessable income; if it merely suffered a reduction in the price it received when it sold the land, then that, it could be argued, would be a loss incurred in the production of assessable income, but this would not solve the problem of the amount of deduction (if any) to be allowed at the time of the right's exercise. Could there be said to be any expendi-

ture or loss incurred at that stage? Probably, the only argument that could be put forward with any chance of success at all would be that adopted by Walton J in the *Bath and West Counties* case, namely, that when the taxpayer decided to buy the land, it appropriated an existing asset to the scheme, in the course of time suffered the loss of that asset and could thus be said to have incurred a loss equivalent to its then value. It is after all well-established that an expenditure or loss need not be in cash form in order to be deductible.

However, although this argument seems reasonable where the taxpayer is engaged in the land-dealing business and the pre-emptive right can be regarded as trading stock, it leads to unusual consequences if applied to a situation where the taxpayer is being assessed under s 67 (4) (a), for in this event he would escape tax on the increase in the right's value occurring between the date of its acquisition and the date of its exercise. That hardly seems at first glance to be in accord with the intent of s 67 (4) (a) which makes no allowance for any inflationary increase in the value of land between its acquisition and disposal; it is for example hardly fair to distinguish between, on the one hand, a taxpayer who buys land outright for the purpose of sale and, on the other hand, one who purchases an option to acquire land knowing that he intends in the future to exercise that option and to sell the land at a profit, especially when it is realised that the latter would probably be liable for tax if he sold the option instead of exercising it. (He might perhaps escape tax on the profit from the option's sale by arguing that he did not acquire it for sale). There is, it is submitted, only one argument that can suggest any reasonable basis for such a distinction; it could be said that, because s 67 (4) (a) is intended to tax profits when land has been bought for the purpose or intention of sale, there must, before it can have any possible application at all, be two elements present, namely, a purchase of land and an intention or purpose to sell it, and that until these two exist together the section is not even in the running. Such co-existence is present in the case of the taxpayer who buys land directly, but it is not present in the case of a taxpayer who first buys on option until that option is exercised, and it is therefore entirely reasonable to value his input to the purchase and sale at that point only. It is, after all, accepted that a taxpayer's input to a scheme in terms of the third limb of s 65 (2) (e) must be valued at the time of the scheme's commencement (see *Gilmour v CIR* [1968] NZLR 136); under section 67 (4) (a) the "scheme" that is being taxed is the purchase and sale of land, and until a purchase takes place there can be no such scheme at all.

COMMERCIAL

CORPORATE PERSONAL PROPERTY SECURED TRANSACTIONS— CHATTELS TRANSFER ACT, COMPANIES ACT OR NEITHER?

I INTRODUCTION

Background

1.01 — There are few more perplexing areas of commercial law in New Zealand than that governing the taking of security over personal property. It is not too much of an exaggeration to say that the current legislation "bristles with inconsistencies, contradictory or outmoded policies, and haunting obscurities" (a). Certainly, the major definition and priorities sections of the Chattels Transfer Act 1924 are either unclear or riddled with outdated and irrational conceptual distinctions. Take, for example, the definition of "instrument" in section 2 of the Act. Originally, many of the express inclusions and exclusions were blindly adopted from the English Bills of Sale Act 1854. They were retained in our subsequent Chattels Transfer legislation beginning with the 1889 Act despite the difficulties experienced by the English courts in interpreting them and, more importantly, despite the fact that our Act differed fundamentally from the English Act in that it extended to instruments by way of bailment. It is difficult to determine, for example what is encompassed by the exclusion of "transfers of chattels in the ordinary course of business of any trade or calling" from the definition of "instrument". It is arguable that nowadays equipment leases granted by finance companies should be within this exclusion. However it would be difficult to establish that such transactions were intended to be covered. The exclusion was copied from the English Act which, as just noted, did not apply to instruments by way of bailment at all.

1.02 — Not all the difficulties in the area of personal property secured transactions stem from the uncertainties in the current legislation. Questions such as the permissible scope of the security, the rights and remedies of the parties inter se, the

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extent of the protection the security will ordinarily confer against third parties, whether it is subject to registration requirements and the consequences (if any) of non-registration may also depend on one or more of numerous other factors eg.,

- (a) the *form* of the security. (The basis of our system of secured transactions is conceptual — transactions are regulated according to their form rather than their substance and function (b). Sometimes essentially the same transaction can be carried out in different forms and the choice of one form as opposed to another may have important legal consequences as, for example, in the case of an advance on the security of an existing chattel effected by a sale and conditional sale back instead of a simple chattel mortgage.)
- (b) the type of personal property secured (eg consumer goods, stock-in-trade, farm produce or stock, choses in action).
- (c) whether the form of security is recognised at common law or only in equity.
- (d) whether the debtor is a company, firm or private individual.

While every system of law governing personal property security must, as a matter of policy, draw some of these distinctions and devise different rules applicable to, eg securities over a private individual's chattels and a retailer's stock-in-trade, some of the distinctions which permeate our current law based on the form of the security and the

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- (a) Riesenfeld, *The Quagmire of Chattels Securities in New Zealand*, (Legal Research Foundation, Occasional Pamphlet No. 4, 1970) at p.15.
 - (b) Unless, of course, there is proof that the form does not represent the parties' actual common intention. Recent cases have finally recognised that, since the law makes available different forms in which parties may choose to express

their transactions, the argument that a security document is a "sham" must be rejected so long as the parties, in effect, "do what they say they are doing". See *Bateman Television Ltd v Coleridge Finance Co. Ltd*, [1969] NZLR 794 and *Paintin and Nottingham Ltd v Miller, Gale and Winter* [1971] NZLR 164.

legal personality of the debtor (company or private trader) defy rational explanation.

1.03 — In this paper I propose to consider aspects of the law applicable to personal property secured transactions *where the debtor is an incorporated company*. Although the topic is limited in this way, and, furthermore, my principal aim is exposition of the law as it stands, I think that some of the justification for the above criticism and the case for reform will become readily apparent in the course of the paper.

1.04 — The question of which rules apply to company securities — in particular, whether they must be registered and, if so, where — has been a constant source of difficulty ever since the English Bills of Sale Act 1854. Company securities have been governed partly by the Bills of Sale/Chattels Transfer legislation and partly by the various Companies Acts. Despite the numerous revisions and patchwork amendments to the legislation over the last 90 years, the interrelation and operation of the current provisions contained in the Chattels Transfer Act 1924 and the Companies Act 1955 are still beset with obscurities and anomalies. Some of the anomalies have been highlighted by three decisions of the Court of Appeal in recent years. (c) Thus, it seems that the current situation is that some company securities have to be registered under the Companies Act, some under the Chattels Transfer Act and others do not have to be registered at all. Furthermore, for those securities that do require registration, the effects of registration and non-registration under each Act are markedly different. The position of a subsequent third party claimant can vary according to the largely fortuitous circumstance of which Act the prior security was governed by.

1.05 — A further consequence of the dual system is that the rules governing the permissible scope of company securities subject to the Companies Act as well as the effects of registration

and non-registration differ from those applicable to securities where the debtor is unincorporated. A number of examples of the different priority rules will be mentioned in the course of this paper. With respect to the rules as to the permissible scope of the security, the most important in the past has been that company securities could extend to future chattels, whereas those granted by private individuals or unincorporated traders could not, subject to a few exceptions, because of ss 23 and 24 of the Chattels Transfer Act. (d) Although the practical consequences of this distinction between company and other securities have been diminished by the Chattels Transfer Amendment Act 1974 which, inter alia, exempts stock-in trade from ss 23 and 24, it is important to bear in mind, as I have attempted to explain elsewhere, (e) that the new form of security now sanctioned in respect of an unincorporated dealer's stock-in trade differs significantly from the floating charge, which is still the security most commonly used to finance incorporated dealers. (f).

1.06 — It is perhaps not surprising, given the anomalous state of the law, that the respective spheres of operation of the Chattels Transfer and Companies Acts with respect to personal property securities where the debtor is an incorporated company have not always been appreciated by practitioners. It was stated by the Macarthur Committee (g) that

"it is common knowledge that many instruments over chattels are executed by companies and are nevertheless registered as chattel instruments in the Supreme Court Office of the appropriate district and that officials of the Supreme Court, deeming their duties merely ministerial, accept and register these instruments. The instrument may also be registered in the Companies Office and thus there will be dual registration, one of which is quite ineffective and unnecessary. We have not yet heard of a case where a chattels security given

(c) *Paintin and Nottingham Ltd v Miller, Gale and Winter*, *supra*; *Automobile Association (Canterbury) Incorporated v Australasian Secured Deposits Ltd* [1973] 1 NZLR 417 and *Waitomo Wools (NZ) Ltd v Nelsons (NZ) Ltd* [1974] 1 NZLR 484.

(d) These sections are not included amongst those which do apply to company mortgages and charges; see s 59 of the Chattels Transfer Act.

(e) (1976) 7 NZULR 83.

(f) It seems that the 1974 amendment is being little used in practice and that dealers are still being required to incorporate in order to grant floating charges. This, no doubt, is in part due to the impossibility of complying with s 8 of the Moneylenders Amendment Act 1933 in the case of an instrument over stock-in-trade secur-

ing a continuing line of advances by a money-lender. Section 8 does not apply to loans to companies; *Re Mountain View Property Holdings Ltd* [1972] NZLR1 unfortunately, it does not seem to be generally known that, in view of section 2 of the Property Law Amendment Act 1975, s.8 can now be avoided easily by specifying in the instrument a "maximum amount" of advances. The problems caused by s.8 will disappear altogether if the recommendations in Chapter 8 of the recent report on *Credit Contracts* by the Contracts and Commercial Law Reform Committee are implemented.

(g) *Final Report of the Special Committee to Review the Companies Act* (1973), para. 181.

by a company has not been registered with the Registrar of Companies pursuant to section 102 but has been registered solely with the Registrar of the Supreme Court, and the efficacy of such last registration has been called in question."

There has, however, been at least one case in recent years where the efficacy of registration in the Supreme Court could have been questioned. In the important case of *Re Manurewa Transport Ltd* [1971] NZLR 909 the question to be decided was whether a debenture creating a floating charge over the assets of Manurewa Transport Ltd had priority over a subsequent chattel mortgage. The debenture was properly registered under the Companies Act. The chattel mortgage was registered in the Supreme Court office at Auckland. Although the debenture holder did ultimately win, it is remarkable that counsel did not take the short point that the chattel mortgage was required to be registered under the Companies Act and, therefore, was void against the company's creditors including the debenture holder.

An Overview of the Operation of the Chattels Transfer and Companies Acts with respect to Company Securities

1.07 — The Chattels Transfer Act applies to "instruments" as defined in s 2. The only exclusions particularly relating to company securities are to be found in clauses (i) and (j). They are as follows:

- "(i) Debentures and interest coupons issued by any company or other corporate body and secured upon the capital stock or chattels of such company or other corporate body:
- (j) Mortgages or charges granted or created by a company incorporated or registered under the Companies Act 1955"

No other company securities are excluded. Those securities that do not fall within exclusions (i) and (j) and are caught by the remainder of the definition of "instrument" are governed by the registration and avoidance provisions of the Chattels Transfer Act. It should also be noted that exclusion (j), unlike its predecessor, is not dependent for its application upon actual registration of the mortgage or charge under the Companies Act.

1.08 — The most important registration provisions of the Companies Act are contained in ss 102 and 103 (h). Essentially, s 102 provides for registration with the Registrar of Companies of the nine categories of "charge" mentioned in subs. (2). The term "charge" includes "mortgage". In the case of a charge registered under any other Act, it is sufficient to file particulars of the charge. The consequences of failure to register are governed by ss. 102 (10) and 103. Section 102 (10) provides that if a company fails to register a charge which is caught by s.102 (2) within the prescribed period of 30 days after the date of its execution then, unless registration has been effected by some other person, the company and every officer of the company who is in default is liable to a fine of \$100. Section 103 provides that unregistered charges, other than those

("registrable" under any other Act,) "shall, so far as any security on a company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company . . . but without prejudice to any contract or obligation for repayment of the money thereby secured . . ."

1.09 — It is important to realise that only the nine categories of charge specified have to be registered with the Registrar of Companies. If a particular charge is not covered it will not have to be registered at all because *all* company mortgages and charges are excluded from the operation of the Chattels Transfer Act.

1.10 — Like the Chattels Transfer Act, the registration provisions of the Companies Act apply only to securities created or evidenced by documents. (i). Thus, an oral chattel mortgage or other security created simply by act of the parties, such as a deposit of share certificates (which creates an equitable mortgage) (j), is effective without registration. (k)

1.11 — One fundamental difference between the Chattels Transfer Act and the registration provisions of the Companies Act should be noted at this stage. Registration under the Chattels Transfer Act is not mandatory. It is simply wise to register instruments subject to the Act in order to be protected from the partial avoiding provisions of ss 18, 19 and 22. There are no other sanctions. However, registration under the Companies Act is manda-

(h) Note also, however, s.108 which enables the Supreme Court to extend the time for registration in certain circumstances.

(i) *New Zealand Serpentine Co Ltd v Hoon Hay Quarries Ltd* [1925] NZLR 73.

(j) *Harrold v Plenty* [1901] 2 Ch 314.

(k) A further limitation on the registration provisions of the Companies Act may be that they apply only to instruments creating charges

which are *executed*, ie signed or sealed. The point was left open by the Court of Appeal in *Waitomo Wools (NZ) Ltd v Nelsons (NZ) Ltd* [1974] 1 NZLR 484, 494. The writer believes that the limitation would probably be upheld if it arose for decision. However, since it is unlikely to be invoked in practice, the justification for the limitation and its consequences will not be explained here.

tory in the sense that, as noted earlier, it is an offence for a company not to register. (1) The reason for this lies in the broader policy objectives behind the registration provisions of the Companies Act. The principal object of the Chattels Transfer Act is to protect general creditors and third party disponees of chattels subject to unregistered instruments. They are also protected, albeit to a different extent as will be noted later, by the Companies Act. However, the latter's registration provisions, apart from extending to securities over property other than chattels, are also designed to aid present and prospective shareholders and other investors. The policy is that all information as to the financial position of a company should be available to all investors, and that financial position is obviously affected if there are charges over its assets. Hence, we have the Companies Act placing the principal onus on the *company* itself to register charges it has granted, whereas invariably it will be the *creditor* who registers under the Chattels Transfer Act.

1.12 – With this general outline of the application of the Chattels Transfer and Companies Acts to company securities in mind, we are now in a position to consider the provisions of each Act in more detail.

II REGISTRATION UNDER THE COMPANIES ACT – ONLY INSTRUMENTS CREATING MORTGAGES OR CHARGES

Introduction

2.01 – As mentioned in para 1.08, for the registration provisions of the Companies Act to apply, the security must be

- (i) a "charge" or "mortgage", and
- (ii) one of the nine categories of charge/mortgage specified in s. 102 (2)

A company security that is not a charge or mortgage is either governed by the Chattels Transfer Act or does not require registration at all. A company security that is a charge or mortgage but is not within one of the nine categories will be outside both Acts.

What is a "Charge"? (m)

2.02 – It has been accepted that the term "charge" is used in ss.102 and 103 of the Companies

Act in its technical sense. (n) As such, a "charge" except to the extent that by statute it is deemed also to include a "mortgage", is a security whereby, without any transfer of or agreement to transfer ownership or possession, property is appropriated to the discharge of a debt or other obligation. Since the common law courts recognised only two kinds of security interest in personal property – those based on absolute ownership/title and possession – a charge at law conferred no proprietary rights and the creditor had only a personal action in contract. Equity intervened, however, and gave the chargee a right to have the property applied to the satisfaction of the debt in preference to all subsequent claimants except, of course, the bona fide transferee for value of the legal title without notice. Hence all charges, except those made "legal" by statute, are equitable securities.

2.03 – The essence of an equitable charge, otherwise commonly known as an "hypothecation", is that it is a mere encumbrance attaching to the property and does not convey any recognised ownership interest to the creditor. A charge on personal chattels, for example, not being an assurance of property, could not be a bill of sale/instrument without express statutory inclusion. (o) The remedies of the chargee in the event of a default, unless contract (p) or statute add others, are application to the court for a sale order (which order is of right and not discretionary) or the appointment of a receiver. Historically, the charge gave no right to take possession or foreclose the debtor's interest.

2.04 – No special form of words is necessary to create a valid equitable charge. The transaction will usually be expressed either in the form of an immediate grant ("I hereby charge") or an agreement to grant ("I agree to charge"). (q) The floating charge, for instance, the most common equitable charge albeit one having its own special features, is usually expressed as a "charge" on the whole of the company's undertaking and assets. However, transactions expressed as "charges" are not the only equitable charges. Thus, in *Brown v Bateman* (1867) LR 2 CP 272 a contractual term which gave the owner of land power to prevent the removal of his builder's materials from the land was held to have created a proprietary interest in the owner's favour amounting to an equitable charge. In addition, the banker's "letter of

- (l) Although I understand that, in practice, prosecutions are very rare.
- (m) Some of the following material has been explained in more detail by the writer in "The Concept of 'Change' in The Law of Chattels Securities" (1976) 8 VUWLR 283.
- (n) *Waitomo Woods (NZ) Ltd v Nelsons (NZ) Ltd* [1974] 1 NZLR 484, 490.

- (o) See clause (f) of the definition of "instrument" in s.2 of the Chattels Transfer Act.
- (p) Eg the company's lien over shares, which is essentially an equitable charge because it arises out of contract, usually enables the company to sell without application to the court.
- (q) See generally Sykes, *The Law of Securities* (2nd ed. 1973), 155-158.

hypothecation", which usually states that goods are held "on your account and under lien to you" or are "hereby hypothecated", creates a valid equitable charge. (*r*).

What is a "Mortgage"?

2.05 — The mortgage of personal property has the effect of transferring the debtor's title, whether legal or equitable, to the creditor subject to the debtor's equity of redemption and, in the case of chattels, his contractual right to retain possession. The essence of the mortgagee's security is his title to the property. The legal mortgage is the most common and requires little explanation. There are two classes of equitable mortgage. First, the equitable mortgage of legal property which arises, for example, where there has been an express contract to create a legal mortgage. Secondly, there is the equitable mortgage of an equitable interest. Examples are the second mortgage (the mortgage of the equity of redemption), the mortgage of one's equitable interest in a chattel held in trust and the mortgage of future chattels.

2.06 — Some writers (*s*) have distinguished the mortgage from other securities on the ground that it alone involves the transfer of proprietary rights but, as Sykes points out, (*t*) this does not serve as an adequate basis of characterisation because.

"all securities pre-suppose some proprietary right, though not necessarily an ownership right, in the holder of the security."

In his view, the distinguishing feature of the common law concept of mortgage is that the mortgagor "transfers all he has" — "he parts with his full armoury of ownership rights". (*u*). However, taking into account the intervention of equity and its conferral of proprietary rights on the mortgagor, he later states that

"the true view seems to be that the rights, powers and liberties which go to make up that phenomenon called 'ownership' are divided between the two parties and that such division is accomplished by the mere fact of the existence of the security." (*p* 824).

The essence then of the mortgage is that it

operates immediately as a "splitting or division of ownership rights", a description which covers the equitable mortgage as well. (*ibid* *p* 158).

The Charge/Mortgage Distinction

2.07 — The charge is clearly a conceptually distinct transaction from the mortgage, a point which has often been emphasised in various contexts by the courts. (*v*) In the case of a charge, there is no transfer or division of ownership rights. It is merely an encumbrance attaching to the property giving the creditor, on default, a right to resort to that property to satisfy his claim, normally by applying to the court for a judicial sale.

The Assimilation of The Mortgage and Charge

2.08 — Although the mortgage and the charge are conceptually distinct transactions, there will not be too many situations nowadays involving chattel or other personal property securities where it is important to make the distinction. In practice, it will usually be a question of distinguishing mortgages and charges from other secured transactions. This is because in all the relevant provisions of the Chattels Transfer and Companies Acts looked at earlier mortgages and charges are lumped together. Thus, both mortgages and charges granted by companies are excluded from the Chattels Transfer Act and the term "charge" in s 102 of the Companies Act includes "mortgage". In addition, the remedies of the chargee and mortgagee have largely been assimilated. Not only can the instrument of charge confer wide powers on the chargee, but also the covenants and powers in the fourth schedule of the Chattels Transfer Act will be implied in both mortgages and charges, although some of the covenants are inappropriate for charges in that they talk about "the chattels hereby assigned". Accordingly, if a person executes an instrument "charging" say, his car, as security for a debt, the chargee will in most respects be in the same position as a mortgagee for he is entitled to take possession and sell on default. (*w*)

2.09 — However, it would be wrong to suggest that

of possession and the right of enjoyment, but even such divesting . . . leave(s) him some residue, the kernel of which is probably to be found in the right of disposition, the right of transferring or "willing" away what is one's own".

(*v*) *Stainbank v Fenning* (1851) 11 CB 51, 88, 138 ER 389, 403; *Burlinson v Hall* (1884) 12 QBD 347, 350; *Tancred v Delagoa Bay and East Africa Ry.* Co (1889) 23 QBD 239, 242; *London County and Westminster Bank v Tompkins* [1918] 1 KB 515, 528.

(*w*) See cl 7 of the implied covenants.

- (*r*) See *In re Hamilton Young & Co* [1905] 2 KB 722; *O A of Madras v Mercantile Bank of India Ltd* [1935] AC 53, 65; and *Ladenburg & Co v Goodwin, Ferriera & Co Ltd* [1912] 3 KB 275.
- (*s*) Waldo, *The Law of Mortgages* (2nd ed 1950) 4; Fisher & Lightwood, *The Law of Mortgages* (8th ed, 1969) 3.
- (*t*) Note q at p.12.
- (*u*) Sykes, note q at p.14. As Sykes states (*p* 6), "when a person has ownership of a *res* he has a collection or aggregation of rights in *re*, such as the rights of possession and of enjoyment and the right of transfer or disposal of the *res* . . . The owner may divest himself of the right

the distinction is now devoid of all practical significance and that the holder of an equitable charge can be regarded as akin to a mortgagee for all purposes. In the context of certain priority conflicts, the distinction will still be vital. Take the following example. X Ltd gives an ordinary legal chattel mortgage over its car to A which is not registered under the Companies Act. X Ltd later fraudulently sells the car to B, a bona fide purchaser for value without notice. A can reclaim the car because there are no applicable exceptions to the *nemo dat* rule and s. 103 of the Companies Act does not avoid unregistered mortgages/charges against purchasers. However, if A's security were a charge, B would prevail because X Ltd has retained legal title and B has no notice of A's equitable interest. Similarly, if B was not a purchaser but a mortgagee of X Ltd's legal title, although here he would have the added protection of s 103.

Secured Transactions that are neither Mortgages nor Charges – Instruments by way of bailment.

2.10 – The secured transactions in common use which fall within the category of instruments by way of bailment are conditional sale agreements, hire purchase agreements and consumer and business equipment leases. They differ in legal form from other secured transactions in that, instead of the debtor granting an interest in his own property to his creditor, they involve the debtor *acquiring* an interest. It is the *creditor* who is the grantor of the instrument and the immediate interest granted to the debtor is the right to possession whilst ownership is *retained*. The chattel mortgage, for example, on the other hand, involves the debtor granting ownership to the creditor whilst retaining the right to possession.

2.11 – Thus, it is clear that the grantee of a conditional sale, hire purchase or lease agreement does not mortgage, let alone charge, his assets. Nor, for that matter, does the grantor. He is a seller or bailor and is obviously not charging his assets as security for a debt.

2.12 – That the instruments by way of bailment are neither mortgages nor charges and are, therefore, outside the registration provisions of the Companies Act was upheld by the Court of Appeal in *Paintin and Nottingham Ltd v Miller, Gale and Winter*, [1971] NZLR 164, an important decision worth discussing in a little detail.

Paintin's case

2.13 – The appellants (Paintins) built a dredge for Owers Bros Ltd (Owers). At the time of delivery and ownership passing to Owers, Paintins were still owed a considerable amount for the dredge and discussions ensued as to the kind of security Paintins should have. What then happened was the subject of some dispute, but the Court of Appeal found that Owers orally agreed to sell the dredge to Paintins and Paintins orally agreed to resell it to Owers pursuant to a conditional sale agreement. More particularly, the terms of the oral contract were that the dredge was to become the property of Paintins in consideration of the amount owed by Owers being postponed and becoming payable by instalments. Paintins then agreed to resell it to Owers under a conditional sale agreement at a price equal to its cost. Owers were to be given credit in this agreement for the amount they had already paid to Paintins with the balance to be paid by instalments. Once the instalments were completed title would pass back to Owers. In pursuance of this oral contract a formal conditional sale agreement (x) was executed and registered under the Chattels Transfer Act, not the Companies Act. No instalments were paid by Owers and eventually Paintins seized the dredge under its power of repossession on default and hired it to a third party. Three years later, a bailiff acting on behalf of the respondents (execution creditors of Owers) seized the dredge. Their entitlement to it depended principally on whether the conditional sale agreement was a security which should have been registered pursuant to s.102 of the Companies Act.

2.14 – Having determined that the conditional sale agreement was not a sham (in reality a chattel mortgage granted by Owers), the question then arose whether it was a charge caught by s.102. Turner J., who delivered the leading judgment on this point, had

"no doubt that the conditional purchase agreement, under which a company *buys* as conditional purchaser, is not a charge . . ."

His Honour thought that

"the word 'charge' must signify the giving of a security by way of mortgage, lien, or encumbrance or to like effect over property the ownership of which is and remains in the grantor" (p 179)

which was not the case here. Clearly, this decision

(x) Turner J stated (at p. 175) that "this agreement, as was necessary if it were to survive the defeasances contained in the Companies Act and the Chattels Transfer Act, was in writing". However, there are no such "defeasances" in

either Act. As noted in para 1.10, both Acts apply to "instruments" only. The need to register arises only where a transaction is reduced into writing.

is right. A company buying a chattel pursuant to a conditional sale agreement is not charging its property. It is not creating rights over its own assets. Title is in the vendor. It is the latter who grants the instrument, not the company.

2.15 — Turner J's definition of "charge" does, however, require some comment. The major problem (y) with the definition lies in the last words "or to like effect over property the *ownership of which is and remains in the grantor*". This description is capable of catching the pledge, where ownership is in and remains in the pledgor. Yet, as will be explained shortly, the pledge is clearly not a charge. In addition, the mortgage, which is included in the first part of the definition no doubt because "charge" includes "mortgage" for the purposes of s.102, is not normally described as a security whereby *ownership remains* in the grantor. "Ownership" is, of course, an ambiguous word. It is most commonly used as synonymous with title or the right to dispose of the property. Turner J. cannot have meant title because, in the case of a mortgage, title is transferred to the mortgagee. It is the essence of his security. What then did His Honour mean? As noted earlier, (z) the true position is that when a person has ownership of property he has a bundle of rights, such as the rights of possession and of enjoyment and the right of disposal. He may transfer some of these rights but retain others. In the case of a mortgage, the mortgagor parts with his right of disposal, but retains rights to possession and to restore full ownership. Since ownership rights are divided between the two parties, it cannot truly be said that the mortgagor remains the owner or that the mortgagee is the owner. As a result, Turner J's definition can be sustained only if the word "ownership" is used in the sense of a retention by the grantor of some residue of proprietary rights and, in the case of the mortgage, this is the right of redemption, the right to get title back and to assume full ownership rights.

Possessory Securities are not Mortgages or Charges

2.16 — The recognised "possessory" securities are the pledge and contractual possessory lien. The pledge is a transaction whereby possession of personal property, usually goods or in some cases "documents of title" representing goods, (aa) is

delivered to the creditor by way of security. Although the creditor's security is his possession of the property, and title remains in the debtor, he does receive what is usually termed a "special property" which enables him to sell the goods in the event of default. The pledgee/creditor has an assignable interest in the property unless the parties' contract expressly stipulates to the contrary. However, once possession is redelivered to the pledgor, unless for a limited or specific purpose, the pledgee's rights are lost.

2.17 — The pledge is obviously a conceptually distinct transaction from the chattel mortgage and this has often been emphasised by the courts. (ab). In the case of the mortgage there is a transfer of title but no delivery of possession, whereas the pledge is the opposite. As stated by Sykes, (ac) the pledge differs from the mortgage (as originally conceived) in that

"the debtor does not part with his full armoury of ownership rights at all; he merely parts with one right in that armoury, viz. the right of possessing."

If, however, on a broader view, it is now more accurate, taking into account the mortgagor's beneficial ownership and equitable proprietary rights, to regard the mortgage as itself involving a division of ownership rights, the essential difference is that, in the case of the pledge, "only one of the ownership rights, viz. that of possession, passes to the creditor . . ." (ad)

2.18 — The possessory lien is a true possessory security in that normally the creditor's right is a mere right to detain his debtor's goods until his claim is satisfied, without a power of sale or an assignable interest. (ae) The above comments with respect to the pledge/mortgage distinction apply, of course, a fortiori to the possessory lien.

2.19 — The distinction between the charge and the possessory securities is also clear cut. The pledge and the contractual possessory lien both involve the bailment of a chattel as security for a debt. The debtor transfers to his creditor one out of his bundle of ownership rights, the right to possession. The creditor's security is his *actual possession* and, in the case of the pledge, his right to sell the chattel on default. On repayment it remains for possession to be restored to the debtor. In the case of a charge, however, as seen earlier, there is no such splitting of ownership

(y) The suggestion that "the giving of a security by way of . . . lien" is a charge is wrong and it was corrected in the *Waitomo Wools* case considered in para 2.20

(z) In note u.

(aa) Certain documentary choses in action, eg bearer debentures, share warrants, and other negotiable instruments, which are capable of transfer

by delivery can also be pledged.

(ab) Eg in *Halliday v Holgate* (1868) LR 3 Ex 299, 302 and *Ex parte Hubbard* (1886) 17 QBD 690, 698.

(ac) Note q at p 14.

(ad) *Ibid*, at p 825

(ae) *Donald v Suckling* (1866) LR 1 QB 585, 604.

rights. The chargee has no actual "enjoyment" rights but mere potentially exercisable rights which automatically cease on repayment, there being nothing to restore to the debtor. The distinction was recognised and implemented in the early New Zealand case of *The Mayor of Karori v AMP Society* (1911) 30 NZLR 438 but not fully by the Court of Appeal in the recent case *Waitomo Wools (NZ) Ltd v Nelsons (NZ) Ltd*. [1974] 1 NZLR 484.

2.20 – In the *Waitomo Wools* case a company granted a contractual possessory lien which, when the company went into receivership, was claimed, inter alia, to be void as an unregistered charge under s 103 of the Companies Act. The claim was rejected by the Court of Appeal. Clearly for the reasons mentioned above, this decision is right. There is, however, in the judgment of Richmond J, some support for the view that a pledge is a charge. I believe this is contrary to the principles of personal property security law outlined above. However, the point is not of sufficient practical significance to justify an extended treatment here. (af) This is because even if a pledge by a company were to be categorised as a charge, it is unlikely that it would fall within one of the categories of charge specified in s.102 (2). The only possibility is s.102 (2) (c), viz:

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

Although a document accompanying a pledge may in New Zealand technically constitute an "instrument", it will not "require" registration in terms of s.102 (2) (c). Its validity will not be impaired through non-registration because the subject matter or the pledge will not be in the possession of the debtor/grantor. (ag).

An Absolute Assignment is not a Mortgage or Charge

2.21 – An absolute assignment or sale of property, although sometimes it may be essentially a secured financing transaction, is a conceptually distinct transaction from a mortgage and a charge. Thus, the courts have consistently distinguished between the absolute assignment of book debts, eg book debts represented by conditional sale agreements, and the assignment by way of mortgage and charge

on book debts, often with important legal consequences. (ah) As explained by Romer L J in *Re George Inglefield Ltd*, (ai) a sale differs from a charge (and mortgage) in a number of respects, the most important being that on a sale the vendor is not entitled to get back what he has sold by returning the purchase price, whereas in the case of a charge, the chargor is entitled to get back full unencumbered ownership by discharging the debt or obligation secured. He has what may be loosely described as an equity of redemption.

2.22 – Often the only difference between the form of the absolute assignment of book debts and the assignment by way of mortgage is that the latter contains the qualifying words "by way of mortgage only". These words in theory give a right of redemption but in practice neither party envisages that the debts will be reassigned. The assignment by way of mortgage is the most common form in New Zealand. The reasons for this are that it is not liable for stamp duty and, where the subject matter of the assignment is one or more *customary* hire purchase agreements, is exempt from the Moneylenders Act 1908 and the Chattels Transfer and Companies Acts, (aj) rather than assignors wishing to reserve rights to redeem.

2.23 – The radically different and irrational legal consequences which can flow from the choice of one form rather than the other, where the subject matter of the assignment is book debts other than those represented by customary hire purchase agreements, will be discussed in Part VII of this paper.

III THE CATEGORIES OF CHARGES REGISTABLE UNDER THE COMPANIES ACT

Introduction

3.01 – The principal problems have arisen in determining the scope of s.102 (2) (a) and (c) which, potentially, embody the two most wide-ranging categories of charges requiring registration. Section 102 (2) (f) also merits some discussion.

The Scope of S.102 (2) (a)

3.02 – This paragraph refers to

"a charge for the purpose of securing any issue of debentures".

If it were given a liberal interpretation, this paragraph would catch virtually all company charges.

(af) I hope that I have adequately dealt with it in my article mentioned in n. m at pp 296-298.

(ag) See the discussion of s 102 (2) (c) in paras 313 to 322.

(ah) See *Re George Inglefield Ltd* [1933] Ch 1; *Ashby, Warner & Co Ltd v Simmons* [1936] 2 All ER 697; *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 25; *Re Kent & Sussex Sawmills Ltd*.

[1947] Ch 177; and *Re An Application by Tileman NZ Ltd* (1973) 14 MCD 70.

(ai) [1933] 1 Ch 1, 27-28. See also *Stonleigh Finance Ltd v Phillips* [1965] 2 QB 537, 568, 574.

(aj) See the Chattels Transfer Act 1924, s.57 (3) and the Chattels Transfer Amendment Act 1931, s.2 (3) and (8).

This is because the word "debenture" has been defined widely as "a document which either creates a debt or acknowledges it" (ak) Ordinarily, company charges will be contained in a document creating or acknowledging a debt.

3.03 – However, para (a) does not simply refer to "a charge securing a debenture or debentures" but

"a charge for the purpose of securing *any issue of debentures*"

This prompted Gower (al) to comment that

"presumably 'issue of debentures' means 'issue of a series of debentures'"

In other words, the paragraph is limited to obligations incurred to *a series of lenders* secured by the one charge and does not extend to a charge securing a debenture given to one person upon a single contract of loan.

3.04 – Pennington, (am) the only textwriter to give detailed attention to the words

"charge for the purpose of securing any issue of debentures"

goes further and suggests an even narrower interpretation. In his view, para (a) should be confined to large scale issues and not include issues by private negotiation. He regards the problem as unresolved.

"whether an issue of debentures for the present purpose means a large scale issue, such as an issue to the public at large or a rights issue to the existing shareholders and debenture holders of the company, or whether it includes the issue of one or a few debentures by private negotiation, such as the issue of a single debenture to secure a bank overdraft. The first interpretation seems the more acceptable for two reasons. The expression "an issue of debentures" is derived from the vocabulary of issuing houses and stockbrokers; to them it means a large scale issue, allotments by private negotiation being known to them as private placings. When an expression is capable of two meanings, one general and vague, the other technical and precise, it seems preferable to adopt the technical meaning. Furthermore, if an issue of debentures in the present context included all methods of issue, large scale and private, the other groups of registrable charges would be otiose; they would merely particularize types of charges which were already registrable under the present group."

The Automobile Association Case

3.05 – The problem as to the scope of para (a) arose for decision for the first time in *Automobile Association (Canterbury) Incorp v Australasian Secured Deposits Ltd (In Liquidation)*. [1973] 1 NZLR The Court of Appeal, in effect, adopted Gower's restrictive interpretation and thus exposed a serious loophole in the registration provisions of the Companies Act. The facts of the case, for present purposes, were as follows. The Automobile Association had, on a number of occasions, deposited sums of money with the respondent company. On each occasion, it received in exchange a numbered contract note and certificates of title for Government or Local Body stock owned by the company having a like or slightly higher face value, as well as signed transfers in blank. A number of payments were also accompanied by vouchers and receipts which described the sums as "short term deposits". Not until the company went into liquidation did the association complete any of the transfers or attempt to register them pursuant to s.9 of the Reserve Bank of New Zealand Act 1964.

From time to time repayments were made when requested by the association. On each such occasion the association surrendered certificates of title for stock having the appropriate face value, the signed transfers therefor and the contract note affected by the repayment. The sum of \$40,000 had not been repaid at the time when the company went into liquidation and the liquidator took steps to prevent the association from registering transfers of the stock then held. He then brought an action seeking a declaration that the contract notes and the accompanying documents were given to the association by way of security only and that, being unregistered, the charges were void against the liquidator under s.103 (2).

3.06 – The Court of Appeal accepted the first argument and held that, on the occasion of each deposit by the association, the company "charged" the relevant stock certificates. It then had to consider the "real issue" whether each of the "charges" should have been registered pursuant to s.102 being "for the purpose of securing any issue of debentures". It was rightly conceded that the charges were not covered by the other types of charge referred to in s.102 (2). In particular, s.102 (2) (c) – "a charge created or evidenced by an instrument which, if executed by an individual, would require registration under the Chattels Transfer

(ak) *Levy v Abercorris Slate and Slab Co* (1887) 37 Ch. D 260, 264 per Chitty J. The definition of "debenture" in s.2 (1) is expressed in equally wide terms. It states that "debenture" includes "debenture stock, bonds and any other securi-

ties of a company, whether constituting a charge on the assets of the company or not".

(al) *Modern Company Law* (3rd ed. 1969), 427n.

(am) *Company Law* (3rd ed. 1973), 408-409.

Act 1924" — did not apply. Section 2 of the latter Act excludes from the definition of "chattels", "shares and interests in the stock, funds, or securities of any Government or local authority".

3.07 — The association argued that "any issue of debentures" encompassed only a borrowing of money by means of several debentures issued as a group but all supported by the same charge. However, the liquidator invoked s.4 of the Acts Interpretation Act 1924 whereby, if not inconsistent with the context, words importing the plural number include the singular number, and argued therefrom that s.102 (2) (a) should be read as follows — "a charge for the purpose of securing any issue of a debenture".

3.08 — The court rejected the latter argument. The difficulty arose from the fact that the word "issue" was capable of two distinct meanings in the present context. It could mean either the *act* of issuing a number of debentures or the *group* of debentures which are issued. The latter meaning was preferred. The phrase "issue of debentures" was commonly used in a collective sense descriptive of the debentures themselves rather than the act of issuing the debentures. The form of a debenture will often begin with the words "Issue of (twenty) debentures..." If the company's argument was accepted the word "issue" could only bear the first of the two suggested meanings and it would be strange "to describe a charge as one for the purpose of securing the act of the company in delivering over a debenture to the person who has the charge. The security is not given to secure the "issue" of the debenture in that sense whereas it is meaningful to speak of securing a debenture or a group of debentures". (p 425) Accordingly it was held that the word "issue" must be interpreted as referring in a collective sense to the aggregate of a number of individual debentures issued by a company so that none of the charges in the present case required registration.

3.09 — It should be noted that the decision has not finally settled the scope of s.102 (2) (a). The Court of Appeal has merely decided that a single secured debenture does not amount to a charge for the purpose of securing any issue of debentures. The question whether, as Pennington suggests, the paragraph is confined to a large scale issue of debentures was left open, although it was recognized that this was probably Parliament's intention. The court was content to say that it "may well be capable of application even to an issue of two debentures secured by one charge". (p 426). Although it was also recognised that there is little reason for a different

requirement in such a case from that of a single secured debenture, the court was not prepared to take the matter any further.

3.10 — The effect of the *Automobile Association* case is that a mortgage or charge by a company of Government stock, Local Body stock, shares held in another company (including a subsidiary), or other choses in action not included in the other paragraphs of s.102 (2), such as convertible notes, will not require registration where the mortgage or charge is contained in a single debenture.

3.11 — With respect to securities over Government and Local Body stock certificates, however, it should be noted that s.72 (3) of the Local Authorities Loans Act 1956, which applies to Government stock by s.9 (2) of the Reserve Bank of New Zealand Act 1964, provides:

"The transfer, whether by delivery or otherwise, of any such certificate of title shall not operate as a transfer of the legal or equitable interest of the holder in the stock to which it relates."

Surprisingly, this provision was not relied on by counsel for the liquidator in the AA case. He could have argued that it is not possible to take a valid security over Government or Local Body stock. A contrary argument for the association might have been that s.72 (3) does not preclude a *charge* on, as opposed to a mortgage of, such stock.

3.12 — Finally, the Macarthur Committee on Company Law, (an) has recommended that para (a) be amended so as to include a charge contained in a single debenture. I suggest that implementation of this and the other recommendations of the Committee with respect to company charges, notably that instruments by way of bailment should be registered at the Companies Office, (ao) should only be considered in the context of a complete overhaul of the law relating to personal property secured transactions.

The Scope of s.102 (2) (c)

3.13 — This paragraph refers to

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

In determining whether para (c) applies one must first assume that the grantor is an individual and then ask

- (a) is the security a charge? If so,
- (b) Is it an "instrument" over "chattels" as those terms are defined in the Chattels Transfer Act? If so,

(c) can it be said to "require" registration under that Act.

I believe that the problems with the paragraph have been exaggerated somewhat. Thus, the Macarthur Committee commented that

"it is not clear whether the instrument given by the company must still comply with the various provisions of the Chattels Transfer Act 1924 such as mode of execution, provision of an inventory, and the like." (para 181)

In fact, s.59 of the Chattels Transfer Act clearly specifies the sections of that Act which apply to company mortgages and charges.

3.14 — The only real problem stems from the unfortunate use of the word "require" for, strictly speaking, as explained in para. 1.11, registration is not required by the Chattels Transfer Act. The only New Zealand case in point is *Carncross v Wilson's Motor Supplies Ltd (In Liquidation)* [1924] NZLR 327 This case is singled out for special treatment by Professor Riesenfeld in his paper entitled *The Quagmire of Chattels Securities in New Zealand*, (ap) but I believe the difficulties arising out of it are not as great as he suggests.

3.15 — The essential facts of the *Carncross* case, for present purposes, were as follows. Wilson's Ltd (the company) wanted to acquire some Maxwell cars from John Burns and Co., a supplier of such cars. Carncross agreed to guarantee the company's account with John Burns & Co. In consideration of this guarantee the company executed an agreement which, inter alia, purported to transfer property in the cars to be ordered in the future to the guarantor Carncross and gave him power to seize any cars in the company's possession in the event of default. The agreement was not registered under the Chattels Transfer Act 1908 or the Companies Act 1908. Subsequently, the company got into financial difficulties and resolved to wind up. Carncross demanded possession of the two Maxwell cars then held by the company but the liquidator refused, saying that he was entitled to retain them for the benefit of the general creditors. Carncross brought an action claiming possession of the cars or damages.

3.16 — The liquidator's argument that the agreement between the company and Carncross was void for non-registration because it was caught by s.130 (11) (c) of the Companies Act 1908,

(ap) Supra n, a

(aq) Professor Riesenfeld has commented (*The Quagmire of Chattels Securities in New Zealand*, p 17) that "it is surprising that Hosking J totally failed to examine the question whether the agreement in issue could have been considered a floating charge and therefore valid under the Companies Act 1908, s.130 (11) (d), although not valid, if executed by an indi-

vidual". In fact, even if the agreement did create a floating charge, it would still have been void against the liquidator for non-registration.

the equivalent of s.102 (2) (c) of the 1955 Act, was rejected by Hosking J. Even on the assumption that the agreement created a charge, para (c) did not apply because the agreement was not an instrument which, if executed by an individual, would require registration under the Chattels Transfer Act. Hosking J. noted that, strictly speaking, "registration is optional" (p 329) but held that

"the language really means to describe a mortgage or charge whose validity may be impaired if it is not registered" (p 329)

In the present case, the validity of the charge would not have been impaired through lack of registration under the Chattels Transfer Act 1908 if it had been executed by an individual because, even if registered, it would still have been absolutely void. Section 21 of the Act provided that

"... an instrument shall be void in respect of any chattels of which the grantor was not the true owner at the time of the execution of the instrument"

Thus, registration of an instrument applying only to after acquired property could not better it. Nor could want of registration impair its validity.

3.17 — The rejection of the liquidator's argument that the security was caught by para (c) did not, however, result in judgment being entered for the plaintiff. It was held that the security was still an "instrument" subject to the Chattels Transfer Act 1908 and was therefore void under s.21 of that Act (aq) At this time, the exemption of mortgages and charges granted by companies from the definition of "instrument" applied only to those actually registered under the Companies Act, (ar) a condition which was not met in *Carncross*. Accordingly, judgment was entered for the defendant.

3.18 — It is interesting to note that if the facts of *Carncross* had occurred a year later and the case fell to be decided under the Chattels Transfer Act 1924, Hosking J would have been obliged to reach the opposite conclusion and find for the plaintiff. As noted in para 1.07, s 2 excludes all company mortgages and charges from the operation of the Act irrespective of whether or not there has been registration under the Companies Act. (as)

3.19 — However, if the facts of *Carncross* arose again today, it is suggested that the security would

dual". In fact, even if the agreement did create a floating charge, it would still have been void against the liquidator for non-registration.

(ar) Chattels Transfer Amendment Act 1919, s.3.

(as) It is worth noting also a further, although less certain, reason why Hosking J would have been obliged to find for the plaintiff. Unlike s.21 of the 1908 Act, s.24 of the 1924 Act avoids in-

be caught by s.102 (2) (c) of the Companies Act because

- (a) the agreement, being essentially a transfer of future chattels by way of security, would be an equitable mortgage and therefore a "charge"; and
- (b) it would also be an instrument which, if executed by an individual, would require registration under the Chattels Transfer Act. Section 3 of the Chattels Transfer Amendment Act 1974 exempts stock-in-trade from the avoidance provisions contained in ss.23 and 24 of the principal Act. Presumably, in *Carncross* the company was a motor vehicle dealer and the Maxwell cars stock-in-trade.

But there might still be an argument available to the plaintiff that the security was not void for non-registration. Section 103 (2) of the Companies Act seems to envisage only charges securing the "repayment" of money. In *Carncross*, the agreement did not secure an advance by the plaintiff, but his guarantee of the company's account with the supplier.

3.20 — Although the actual agreement in *Carncross* would now be registrable under s 102 (2) (c), Hosking J's interpretation of the word "require", if followed, does result in there being a further limitation on the scope of the registration provisions of the Companies Act. A mortgage of future chattels which are neither stock-in-trade nor fall within the other categories exempted from s.24 of the Chattels Transfer Act would not need to be registered. An example would be a mortgage by say, a carrying company, of "cars and trucks to be acquired hereafter in substitution for or in addition to the cars and trucks presently owned by the company".

3.21 — There is, however, an argument against Hosking J's interpretation of "require" which, if accepted, would close the loophole. In support of his view that a particular instrument can only be said to require registration if its validity may be impaired through lack of registration, his Honour cited the case of *Dublin City Distillery v Doherty* [1914] AC 823 and, in particular, the speech of Lord Parker. The relevant passage, which Hosking J does not set out in his judgment, is as follows:

"In the next place, assuming the warrants to

struments over future chattels only to the extent and as against the persons mentioned in ss. 18 and 19, and a company liquidator is not mentioned in either section; see *Re Marine Mansions Co* (1867) LR 4 Eq 601, 610 and *Re Asphaltic Wood Pavement Co Ltd* (1883) 49 LT 159.

(at) An argument against this conclusion might be

have been bills of sale, would they, if executed by an individual, have required registration as bills of sale? If bills of sale, they would, if executed by an individual, have been totally void under the Irish Bills of Sale Act of 1883 for at least three reasons: they are not in the statutory form required for all bills of sale by way of security for money; they are not attested; and they do not state the consideration for which they were given. They would be no more valid if registered than if unregistered. They could not, therefore, require registration in any ordinary sense of the word. At the same time it is hardly conceivable that (para (c)), was intended to refer only to instruments which fulfilled these statutory requirements. I think, therefore, that the provision therein contained must be construed as applying to all instruments which, if executed by an individual, would for their validity require registration, apart from any other ground upon which they would be invalid under the Irish Bills of Sale Act of 1883. If this be so the warrants, if bills of sale at all, would be within (para (c)) . . ." (p 854)

It seems that Hosking J overlooked the words "*apart from any other ground upon which they would be invalid under the Irish Bills of Sale Act*". Applying Lord Parker's approach to the facts of *Carncross* it is arguable that the security in question, despite its invalidity under s 21, did "require" registration because it was an "instrument" over "chattels". (at)

3.22 — Given the uncertainty as to the meaning of "require", it would be wise to register mortgages of the type mentioned in para 3.20. However, although Lord Parker's interpretation is more in accord with the probable intention of the framers of para (c), I believe it is likely, should the question arise again, that Hosking J's more restrictive interpretation will be adopted, especially in view of the Court of Appeal's decision in the AA case that "real" ambiguities in s.102 of the Companies Act should be resolved in favour of the secured creditor. (au)

The Scope of S.102 (2) (f)

3.23 — Para (f) refers to

"A charge on book debts of the company"

Book debts are debts owing to a company which

that one must distinguish between provisions avoiding instruments for non-compliance with formal requirements as in the Irish Act (of which incidentally, there are none in our Chattels Transfer Act) and those prohibiting certain types of instrument altogether, such as s 21 in *Carncross*.

(au) See [1973] 1 NZLR 417, 426.

have arisen out of the normal carrying on of its business. They include sums owing under hire purchase agreements, credit sales and leases. Thus, the common assignment by way of mortgage of hire purchase agreements, to the extent that it constitutes an assignment of matured or unmatured instalments, is *prima facie* registrable under para (f). There is, however, an important exception for customary hire purchase agreements. (av)

3.24 — It seems that para (f) applies to assignments of *future*, as well as existing, book debts, (aw) ie debts to become owing under contracts to be entered into in the future.

3.25 — The question has been posed (ax) whether para (f) may be redundant in view of para (c) and the inclusion of "book debts" within the definition of "chattels" for the purposes of the Chattels Transfer Act. (ay) The answer to this question should be in the negative because para (c) does not catch assignments by way of mortgage of *future* book debts. The reason for this is not the rule of the *Carncross* case (az) but that future book debts are not chattels. (ba)

IV THE EFFECT OF REGISTRATION UNDER THE COMPANIES ACT

Notice of Existence of the Security

4.01 — Apart from avoiding the consequences of non-registration, the effect of registration is to give constructive notice of the existence of the security. (bb) This will enable the holder of a registered equitable mortgage or fixed charge to gain priority over a subsequent bona fide purchaser or legal mortgagee for value.

Notice of the Contents of the Security

4.02 — The combined effect of s.102 (12) of the Companies Act and s.4 (2) of the Chattels Transfer Act is that registration under the Companies Act will constitute notice of the contents of the security *so far as it relates to chattels*. These provisions enable a floating charge containing the usual clause prohibiting the creation of addi-

tional mortgages and charges without the holder's consent to take priority over a subsequent chattels mortgage, (bc) unless the latter is a "purchase money security, ie it secures an advance with which the chattels are purchased or credit allowed by the vendor. (bd)

Priorities between Competing Registered Securities

4.03 — In the case of competing securities registered in time, the ordinary common law and equity priority rules apply. Thus, for example, in the case of *chattels* (other than book debts)

- (i) competing equitable securities and legal securities rank in the order of their creation;
- (ii) an equitable security will be defeated by a subsequent transferee of legal title for value and without notice.

It is important to note that the Companies Act does not contain a provision equivalent to s.22 of the Chattels Transfer Act whereby the grantee of a "junior" instrument can prevail over the grantee of a "senior" instrument if he registers first and he did not have notice of the senior instrument at the time his instrument was executed. This has the following odd result:

Suppose X Ltd grants successive chattel mortgages over the company car to A and B respectively. Both A and B register in time but B registers first without notice of A's security. A has priority. If the grantor had been X, an *unincorporated* trader, and both mortgages were registered under the Chattels Transfer Act, B would have priority.

V THE CONSEQUENCES OF NON-REGISTRATION UNDER THE COMPANIES ACT

5.01 — As noted in para 1.08, unregistered charges are by s.103 "void against the liquidator and any creditor of the company". It has been held that the term "creditor" includes "*secured creditor*" and that, in the case of a *subsequent* secured creditor, his priority does not depend on lack of notice

tion is the same with respect to an assignment, whether absolute or by way of mortgage, of future book debts by an *unincorporated* trader.

- (bb) *Wilson v Kelland* [1910] 2 Ch 306.
- (bc) *Re Manurewa Transport Ltd* [1971] NZLR 909. It may be possible, depending on the terms of the debenture creating the floating charge, for the subsequent creditor to gain priority over the floating charge by arranging the transaction as a sale and conditional sale back instead of a chattels mortgage.
- (bd) *Wilson v Kelland* *supra*; *Re Connolly Brothers Ltd* (No 2) [1912] 2 Ch 25.

(av) Chattels Transfer Amendment Act 1931, s.2 (8).

(aw) *Independent Automatic Sales Ltd v Knowles & Foster* [1962] 1 WLR 974.

(ax) Riesenfeld, *op cit* (t).

(ay) See Statutes Amendment Act 1939, s 6 (2).

(az) As suggested by Riesenfeld, *op cit*, (t)

(ba) In view of the terms of s.6 (3) and (4) of the Statutes Amendment Act 1939. An interesting consequence of this is that an *absolute* assignment of future book debts by a company is not affected by s.24 of the Chattels Transfer Act and does not need to be registered. The posi-

of the unregistered charge. (be)

5.02 — Section 103 differs markedly from the avoidance provisions of the Chattels Transfer Act. For the most part, the differences cannot be justified.

5.03 — Under s.18 of the Chattels Transfer Act, the property must be in "the possession or apparent possession" of the grantor at the time of the intervention of the Official Assignee or other creditor representatives. There is no such requirement in s.103 of the Companies Act.

5.04 — The position of a subsequent secured creditor under the Chattels Transfer Act differs in two main respects from his position under the Companies Act. He is better protected in that, as noted in para 4.03, he may sometimes gain priority under s.22 by registering first. However, he is worse off in the sense that his priority does depend on lack of notice. The one advantage of the simple Companies Act provisions is that, since notice is irrelevant, the circular priority problems that can arise under the Chattels Transfer Act are avoided.

5.05 — Under s.19 of the Chattels Transfer Act unregistered instruments are void against bona fide purchasers. Astonishingly, there is not similar protection under the Companies Act (bf). Consider the following situation:

X Ltd executes a legal chattel mortgage of the company car to A which is not registered under the Companies Act. X Ltd later fraudulently purports to sell the car to B, a bona fide purchaser for value and without notice of A's security.

B does not get good title. There is nothing in s.103 of the Companies Act to help him. If the facts were different and the grantor was X, an unincorporated person, B would prevail.

VI COMPANY SECURITIES REGISTRABLE UNDER THE CHATTELS TRANSFER ACT

Introduction

6.01 — As noted in para 1.07, the only company securities excluded from the definition of "instrument" in the Chattels Transfer Act are "debentures... issued by any company... and secured upon the... chattels of such company" and

"mortgages or charges granted or created by a company". (bg) The principal securities not within these exclusions are instruments by way of bailment (hire purchase agreements and leases) and absolute assignments of book debts.

Hire Purchase Agreements

6.02 — They are clearly instruments, being documents transferring the right to possession of chattels. There is, however, an important exception for "customary hire purchase agreements" as defined in s.57 of the Chattels Transfer Act.

6.03 — Non-customary hire purchase agreements (common examples being agreements comprising caravans, floor coverings, pleasure craft or outboard motors, which are not "customary" chattels, and non-retail agreements within s 2 (5) of the Chattels Transfer Amendment Act (1931) are usually registered in the appropriate Supreme Court Office. However, whether they *need* to be registered is another matter. There are few, and in some cases *no*, advantages to be gained from registration.

6.04 — Thus, it is well-settled that the principal avoidance provision of the Chattels Transfer Act, s.18, is ineffective to deprive the conditional vendor or bailor of his rights to the chattel upon the insolvency of the bailee or intervention by the other creditor representatives. For s.18 to apply, *inter alia*

- (a) the debtor must be the "pre-instrument" owner and grantor, and
- (b) the chattels must be in the possession or apparent possession of the grantor

These requirements cannot be satisfied in the case of a hire purchase agreement. The debtor is the *grantee* and it is he who is in possession. (bh) Furthermore, even if s.18 did apply to hire purchase agreements, it, like the rest of the Act, affects *instruments* only and does not impeach rights held independently of such instruments. (bi). In the case of a hire purchase agreement, the grantor/creditor does not need to rely on the validity of the agreement for his title. Avoidance of the agreement still leaves him with the title to the chattel he held before the agreement came into existence.

6.05 — Where the bailee is an incorporated company, there is probably yet another rea-

(be) *Re Monolithic Building Co* [1915] 1 Ch. 643.

(bf) Cf the limited protection against both registered and unregistered securities under s 18A of the Chattels Transfer Act (inserted by s 2 of the Chattels Transfer Amendment Act 1974).

(bg) See s.2, exclusions (i) and (j) from the definition of "instrument".

(bh) *Booth, Macdonald and Co Ltd v Official Assignee of Hallmond* (1913) 33 NZLR 110. See

also Dugdale, *New Zealand Hire Purchase Law* (2nd ed. 1965) 63. The assumption to the contrary expressed in *Paintin and Nottingham Ltd v Miller, Gale & Winter* [1971] NZLR 164, 178 cannot be supported.

(bi) *New Zealand Serpentine Co Ltd v Hoon Hay Quarries Ltd* [1925] NZLR 73; *Carmine v Howell* (1924) 19 MCR 103.

son why s.18 cannot apply on the winding up of the company. This is simply that the section does not include the company *liquidator* as one of the persons against whom an unregistered instrument is avoided. It has been held that a liquidator is not within the description "Assignee in Bankruptcy" in view of his wider functions and the different rules governing bankruptcy and winding-up proceedings (*bj*).

6.06 — The other relevant provisions of the Act governing the consequences of non-registration are ss.19 and 22. Section 19 avoids unregistered instruments against bona fide purchasers. However, despite the dicta to the contrary in *General Motors Acceptance Corporation v Traders Finance Corporation Ltd*, [1932] NZLR 1, 32 s 19, like s.18, avoids instruments only and, in the case of hire purchase agreements, leaves the grantor/owner's title to the chattel in question unaffected (*bk*). Similarly, s 22, which enables a registered instrument to take priority over an earlier unregistered instrument, cannot defeat the grantor's title in a case where the bailee has purported to grant a mortgage of the chattel. (*bl*)

6.07 — The only benefit to be derived from registration is that it will constitute notice to all persons of the agreement (*bm*) and thus preclude the grantee/debtor from passing good title to a bona fide purchaser under s.27 (2) of the Sale of Goods Act 1908. Of course, s.27 (2) applies only to the conditional sale (*Lee v Butler*) form of hire purchase agreement and, as a result, if the "true" (*Heiby v Matthews*) form of hire purchase agreement is used, there is nothing to be gained from registration.

Chattel Leases

6.08 — The volume of chattel lease transactions has increased markedly over recent years. Business equipment worth millions of dollars is currently being leased from finance companies. I spoke to representatives of many of these companies in the Wellington area last year and discovered that a majority make it their general practice to register chattel leases in the Supreme Court. Those that do not register have been advised by their solicitors that there is no need to. I share this latter opinion. While chattel leases are prima facie "instruments", there do not appear to be any adverse consequences likely to flow from non-registration.

(bj) *Re Marine Mansions Co* (1867) LR 4 Eq 601, 610; *Re Asphaltic Wood Pavement Co Ltd* (1888) 49 LT 159.

(bk) See generally Cain (1959) 35 NZLJ 104, 105-106

(bl) See the writer's discussion of s 22 in [1977] NZLJ 118, 120.

(bm) Chattels Transfer Act, s 4.

(bn) See the writer's note on registration of leases in [1976] NZLJ 195.

The position is exactly the same as that outlined in the previous section for non-customary "true" hire purchase agreements. (*bn*).

Absolute Assignments of Book Debts

6.09 — An absolute assignment of book debts by a company is registrable under the Chattels Transfer Act because an absolute assignment is not a mortgage or charge (*bo*) and book debts are chattels for the purposes of the Act (see para 3.24). The book debts most commonly assigned are the sums owing under hire purchase agreements and leases. In practice, the absolute assignment form is used less often than the assignment by way of mortgage, principally because it incurs stamp duty at the rate of 40c per \$100 of consideration.

6.10 — An absolute assignment by a company of book debts (other than those represented by customary hire purchase agreements) (*bp*), should be registered under the Chattels Transfer Act because otherwise it would run the risk of being avoided against subsequent assignees from the company under either s.19 or s.22 of the Act. However, it is unlikely that the validity of an unregistered assignment will be affected on the winding-up of the assignor company. Although most of the section's other requirements can be satisfied, (*bq*) the liquidator faces the problem, noted in para 6.05, that he is not one of the persons mentioned in the section.

VII THE ANOMALIES FURTHER ILLUSTRATED

7.01 — In the course of this paper it has been seen that the law applicable to personal property secured transactions can often vary markedly, without real justification, depending on

- (a) whether the debtor is incorporated or unincorporated, and/or
- (b) the form in which the parties have chosen to express and carry out the transaction

In this final section it is proposed to highlight in the context of one fact situation, plus variations, the anomalous state of the current registration and priority rules.

7.02 — The base fact situation is as follows:

Dealer grants a hire purchase agreement of

(bo) See para s.2.21.

(bp) Assignments of customary hire purchase agreements are exempted by s.57 (3) of the Chattels Transfer Act.

(bq) Note, in particular, s. 6(2) of the Statutes Amendment Act 1939 which, in effect, deems the book debts to be in the grantor's possession.

a non-customary chattel say, a caravan, to *Consumer*. Dealer then assigns the agreement and his title to the caravan to *Finance Company*.

In considering this example and the following suggestions as to the applicable registration and priority rules, it should be noted that the same rules currently apply to assignments of chattel leases, which are not uncommon in practice, and will possibly apply to assignments of *all* hire purchase agreements in future if the recommendation of the Contracts and Commercial Law Reform Committee that the *customary* hire purchase agreement be abolished is implemented. (*br*)

7.03 — The greatest anomalies arise in the event of the assignment to Finance Company not being registered and Dealer becoming insolvent. Depending on the circumstances, Finance Company may lose both its title to the caravan and the book debt represented by the hire purchase agreement, it may lose only its claim to the book debt, or it may lose *neither*. The legal position seems to be as follows:

(a) If Dealer is unincorporated, the assignment is an "*instrument*" and the Chattels Transfer Act applies. Finance Company's claim to the book debt can be defeated by the Official Assignee. He can satisfy all the terms of s.18, particularly that requiring the chattel to be in possession or apparent possession of the grantor. (*bs*) However, Finance Company retains its title to the caravan because it is in the possession of Consumer.

(b) If Dealer is *incorporated* and the assignment to Finance Company is *absolute*, the Chattels Transfer Act still applies but Finance Company's claim to the book debt is no longer defeated if it is accepted that the term "Assignee in Bankruptcy" in s.18 does not include a company liquidator.

(c) If Dealer is incorporated and the assignment is *by way of mortgage*, it is registrable under s.102 (2) (c) of the Companies Act and Finance Company's claims to the book debt and title to the caravan are *both* defeated under s.103. There is no "possession" requirement in s.103.

7.04 — Similar anomalies arise if the assignment to Finance Company is unregistered and

(a) Dealer repossesses the caravan from Consumer and purports to sell it to *Third Party*, a bona fide purchaser for value otherwise than at retail, (*bt*) or

(b) Dealer executes a subsequent absolute assignment of the book debt to *Third Party*, a bona fide purchaser, and it is duly registered.

The legal position seems to be as follows:

(a) If Dealer is *unincorporated*, Third Party prevails in both instances under s.19 of the Chattels Transfer Act. With respect to the book debt, Third Party also has the added protection of s.22 of that Act.

(b) If Dealer is *incorporated* and the assignment to Finance Company is *absolute*, the position is the same as in (a).

(c) However, if Dealer is incorporated and the assignment to Finance Company is *by way of mortgage*, the Companies Act applies and Third Party does not get good title because that Act contains no provision equivalent to s.19 of the Chattels Transfer Act.

7.05 — Other possible situations can also be envisaged where the priority rules will differ according to the legal personality of Dealer and the form of the assignment to Finance Company. Thus, suppose Finance Company's assignment is properly registered and Dealer subsequently executes an assignment by way of mortgage to Third Party which is also registered. If Dealer is *unincorporated*, Third Party can prevail if he registers first and did not have notice of the earlier assignment. However, if Dealer is *incorporated*, Third Party cannot prevail by registering first under the Companies Act irrespective of the form of the assignment to Finance Company. If the latter is absolute (and therefore registered under the Chattels Transfer Act), s.22 does not apply because there is only one registered "instrument". If it is by way of mortgage (and therefore registered under the Companies Act), there is no equivalent of s.22 in the Companies Act.

7.06 — The above anomalies, and the others noted in the course of this paper, should be remedied in the course of a complete overhaul of the Chattels Transfer Act and the registration provisions of the Companies Act. What is really needed is an entirely new code regulating security interests in personal property, models for which are to be found in Article 9 of the United States Uniform Commercial Code and the Ontario Personal Property Security Act 1967. I believe that they could be effectively adapted to New Zealand conditions. Unfortunately, this seems unlikely to happen in the foreseeable future as the Contracts and Commercial Law Reform Committee has stated that it prefers piecemeal reform at this stage (*bu*) The Committee's view cannot, however, reasonably be criticised. The task of preparing a new code is too onerous and time-consuming for our part-time, virtually unpaid, law reformers.

(*bu*) First Report on chattels Securities (1973), pp2-4.

(*br*) First Report On Chattels Securities (1973), pp 8-12.

(*bs*) See Statutes Amendment Act 1939, s.6 (2).

(*bt*) A bona fide retail purchaser acquires good title irrespective of whether or not the assignment to Finance Company is registered; Chattels Transfer Act, s 18A.