CHATTEL SECURITY IN AUSTRALIA

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Introduction - The Causes of Disctontent

Those who resist law reform in commercial matters frequently do so on the ground that business requires certainty, and that drastic changes, however logically conceived, would produce commercial chaos. It is the contention of this paper that under our present system of laws governing chattel security there is no certainty and no stability, and that drastic reform is essential if these are to be achieved. The path to reform has been pointed by North American developments. The object of this paper is to depict the jungle as it exists in Australia.

Basically, the problem of chattel security in most common law jurisdictions is that no rational system of security, that achieves a proper balance of varying interests and needs, has ever been worked out as a comprehensive and logical system. Instead, the forms of security in use, whether at wholesale or retail levels, have been evolved piecemeal to avoid the apprehended 'dangers' of various situations. There is no such thing as a 'chattel security law'; but instead there are a number of statutes, often reflecting different policy considerations, that bear on the problem of chattel security, and through which the forms of security have had to pick a precarious path. These statutes include the Bills of Sale Acts, the Property Law Acts, the Companies Acts, the Bankruptcy Act, the Sale of Goods Acts, the Factors Acts, the Moneylenders Acts, the Hire-Purchase Acts, and statutes imposing Sales Tax and Stamp Duties. All or any of the statutes may be relevant to particular security problems that arise, and therefore play their part in determining the form of the security agreement.

The problem is rendered more acute in Australia by the fact that Australia is a Federation, and there may therefore be quite alarming disparities between the laws of the various States. Hence the Bankruptcy Act and the Sales Tax legislation are Federal enactments that apply throughout Australia; the Companies Acts and the Hire-Purchase Acts, although State enactments, are more or less uniform in their provisions (as, for historical reasons, is the Sale of Goods Act); but the remainder are purely State Acts that show astonishing diversity ranging from matters of principle to minor detail. This particularly affects Bills of Sale, Moneylending, and Stamp Duties Acts, and creates considerable problems because, whilst the powers of State legislatures may stop at the frontier, the flow of goods and the activities of traders do not. The other basic discontent with chattel security law in Australia is that most of the statutes listed above apply without discrimination to all forms of chattel security, whether at the retail or wholesale level. The major exception is the Uniform Hire-Purchase Act which is limited in its operation to retail transactions. But for the most part the law does not reflect the different policy considerations and the different needs, interests, and problems that arise in wholesale as opposed to retail financing.

These differences between retail and wholesale financing have been listed by Goode and Ziegel, in their comparative study of Commonwealth and American law relating to hire-purchase and conditional sale, as follows:

(i) The retail purchaser is generally a 'one time' purchaser, whilst between dealer and financer there is usually a continuous flow of dealings. Hence, requirements as to written contracts, registration, etc. that might be tolerable in the case of a retail sale are impracticable and oppressive in wholesale transactions.

(ii) In retail sales, there is a substantial down payment followed by regular instalments, and the purchaser is personally liable for the price. Hence the financer does not look exclusively to the goods as securing payment of the debt, the risk is well-spread, and the profits generally high. In wholesale finance, however, there is generally no down payment or regular instalment; the dealer is usually a limited company with few assets; the risks are highly concentrated and the profits generally small.

(iii) Most retail purchasers can be expected to retain the goods for personal use and are unlikely to dispose of them before they are paid for. In any event, the goods can generally be followed into the hands of and reclaimed from a third party. On the other hand, the dealer is expected to sell the goods so that he can repay the loan from proceeds, and the purchaser from him generally will (and should) get clear title to the goods.

Despite these important differences, wholesale finance has to operate under the same law, and utilize the same concepts and forms of security, as apply in retail transactions.

Financing Consumer Sales

The difficulties that arise through the absence of a rational security law, and the consequent need to wend a devious path through a number of interacting statutes, is clearly illustrated by the forms of chattel security used in financing retail sales in Australia.

An unsecured sale with the purchase price being paid by instalments, or perhaps with the dealer retaining possession of the goods until all or a substantial part of the purchase price had been paid, would not have satisfied in the one case the need of the dealer for security in the goods themselves, or in the other case the need of the consumer for immediate use of goods for which he was unable to pay cash. These needs might however have been met simply, by analogy with the law of real property, through the device of a mortgage of the goods; i.e. by the transfer of title to the goods to the lender by way of security, with reservation to and protection of all the rights of the buyer compatible with that security. Although there is nothing in the field of sale of goods that would prevent a concurrent mortgage of the goods, such a transaction would need to be documented and registered in accordance with the onerous provisions of the Bills of Sale Acts, and it would also attract the restrictive provisions of the Moneylenders Acts.

In order to avoid these hazards, the 'chattel mortgage' was for a long time rejected as a means of financing consumer sales. Instead, the 'conditional purchase' was used, whereby although the buyer acquired immediate possession of the goods under the contract for sale, the seller retained title to the goods until the purchase price had been paid in full. The defect in this arrangement, however, was that although title remained in the seller, the Sale of Goods Act itself clothed the buyer with power to pass title to a third person buying from him in good faith, and this would defeat the seller's security in the goods themselves. For this reason, Australian practice has followed that in the United Kingdom of using the 'hire-purchase contract' under which the 'buyer' hires the goods from the 'seller', and has an option to purchase the goods by payment of the final instalment of a pre-ascertained amount. The transaction is usually effected by a tripartite arrangement under which the dealer sells the goods to a finance company which then delivers them under a hire-purchase contract to the consumer. Sometimes however the arrangement is bipartite; the dealer himself delivering the goods to the customer under a hire-purchase agreement, although the dealer may later assign the contract (and his title to the goods) to a finance company. Particularly with motor vehicles, it will be seen later in this paper, the dealer himself rarely has title to the goods but holds them 'on display' on behalf of a finance company or the motor manufacturer's sales subsidiary. In such cases he serves merely, in return for a 'commission', to introduce the customer to the company having title, and arranges the sale or hire-purchase from that company to the customer.

Although hire-purchase is cumbersome in nature, it does generally (except where, as in a 'sale and hire back', the courts hold the transaction to be a 'sham') avoid the registration requirements of the Bills of Sale Acts and the application of the Moneylenders Acts. Nevertheless, its form gives rise to many problems of its own. Most of these arise out of the ambiguous position of the finance company. Is its relationship to the customer that of seller to buyer, or of lender to borrower? What responsibility, if any, does the finance company incur for the quality of the goods (which it may never have seen and over which it has no control)? What responsibilities does it incur with regard to its right to supply the goods on hire-purchase at all? What are its responsibilities for representations concerning the goods made by the dealer to the customer? And what are the dealer's responsibilities for such representations? What is the position of the finance company if the customer terminates the hiring without exercising his option to purchase? Can the finance company in such circumstances fix a minimum hiring term or charge that will ensure its profit from the transaction? What are the finance company's powers of re-possession of the goods? Are there any safeguards to prevent their being exercised capriciously or oppressively? Is any recognition given to the 'equity' that the hirer acquires in the goods through payment of 'rental' (that is in fact instalments of the 'price')? Is the customer entitled to insist that the transaction be properly documented? And can he claim any reduction of rental or charges if he seeks early completion by exercising his option before the due date?

Most of these problems have now been resolved in Australia, and resolved fairly satisfactorily, by the uniform Hire-Purchase Acts enacted by the States in 1959 and 1960, which provide a reasonably comprehensive law governing hire-purchase transactions at retail, but not wholesale, level. In spite of this, however, recent years have seen a trend away from hire-purchase as a means of financing retail sales. It may be that this has been caused in part by the desire of dealers and financers to avoid many of the obligations that the Hire-Purchase Acts place on them, but the overriding cause has probably been the heavy burden of stamp duties that some States have imposed on hire-purchase agreements.

There has been some increase in the volume of sales by lay-by and credit-sales, both of which are regulated by statute in New South Wales; but the most interesting development has been the revival of the chattel mortgage. The 'new' chattel mortgage avoids the application of the Bills of Sale Acts, and in particular the registration requirement, by exploiting defects in the statutory definition of a bill of sale. Hence in some States, the badge of registrability of a bill of sale is the power that it confers on the grantee to seize the goods covered by the bill, and if this power of seizure is expressly with-held the bill is not registrable. Similarly, in a number of States (notably Victoria, Tasmania and South Australia) decisions of the courts establish that the Acts do not apply to bills entirely over after-acquired property - i.e. chattels to be acquired by the mortgagor after the execution of the chattel mortgage. These gaps in the legislation have recently been exploited to considerable effect. Two illustrations may be given.

In Universal Guarantee Pty. Ltd. v. Commissioner of Stamp Duties (Tasmania No. 43/1966 - unreported), the buyer submitted to the finance company a written offer to purchase goods of a specified description at a stated price. Acceptance of the offer was to be by the finance company appropriating goods to the order and until then no legal relationship was to arise between the parties. The offer also provided that on acceptance, the invoice or other evidence of title to the goods was to be delivered to the finance company, and 'by that act' the goods were to be mortgaged to the finance company as security for the price. It was held that, as the document had no legal effect at the time of its execution, it was not liable to stamp duty.

In Roberts v. I.A.C. (Finance) Pty. Ltd. [1967] V.R. 231, the document in question was a request from the borrower to the finance company that the finance company pay to a motor car dealer the price of a car that the borrower desired to purchase from the dealer (but which had not then been appropriated to the contract). In consideration of such payment, the borrower undertook to mortgage the car to the finance company. Acceptance of the offer was to be inter alia by the finance company paying the dealer. It was held that the document was not registrable as a bill of sale because (a) the borrower having no interest in the car at the date of execution of the document, the document was not a bill of sale as defined and therefore was not registrable, and (b) "it was not the chattel mortgage document itself which effected the assurance of the car, but the act external to it of the lending of the moneys by the defendant ...."

It seems clearly wrong, if the system of registration of bills of sale is to be maintained, that the legislation should be outflanked by means as simple and as blatant as this. However, it is suggested that what these developments in fact do is to raise the whole policy issue of whether security arrangements (whatever their form) covering the financing of consumer sales should be registrable or not - or in some limited cases only. The Australian and New Zealand experience on this matter is at variance.

Financing Dealers' Stock-in-Trade

The forms of security used in retail sales tend also to be used, with such modification as is both appropriate and possible, in sales at earlier levels in the distributive chain. To illustrate this, and the special problems that arise, it is proposed in this section of the paper to focus on the problems of the dealer who has inadequate funds to buy his stock-in-trade outright, and who has no security to offer in return for finance to acquire his stock other than that stock itself. As the dealer is in business to sell his stock, and as he can only repay the loan out of the proceeds of sale, the crux of the problem should be immediately apparent.

The volume of stock-in-trade financing in Australia is surprisingly small, and stock-in-trade because of its transient nature is not regarded by financing agencies as being a satisfactory form of security. Whether an improved chattel security law could increase the attraction of stock-in-trade is a matter of some speculation. Under present conditions, financers look to other forms of security; to land, to plant and equipment. Factoring of book debts is showing some increase, but opinions are divided as to its attractiveness. Whilst one school of thought encourages it as increasing the liquidity of the dealer, another regards it as cutting too deeply into the dealer's profit margin in what is generally already a highly competitive market, and therefore to be treated as a means of last resort. As a generalization it is thought that the trend is for finance to be applied at earlier levels in the distributive chain - to manufacturers and wholesale distributors who may be able to offer more attractive security in fixed assets and who then carry the dealers on normal (frequently unsecured) short-term trade credit.

The two major sources of finance for dealers are the trading banks and the finance companies. The banks are reluctant to take security over stock-in-trade, (at any rate without accompanying security over land or fixed assets) although they may do so in particular cases. Finance companies do carry a considerable amount of business secured against stock-in-trade, but in view of high risks and small profit margins, this may well be with a view to establishing a hold on the dealer's retail hire-purchase. Even the finance companies generally limit their activities to the financing of motor vehicles, although some also handle certain types of electrical goods. But, unless the stock consists of high unit cost goods easily identifiable as by serial number and not easily concealed, it would not be regarded as suitable for this type of financing.

Where banks lend money against the security of stock-in-trade the usual form of the security is a bill of sale, or, if the borrower is a company, an equitable mortgage which gives a specific charge over fixed assets and a floating charge over stock-in-trade. Finance companies, on the other hand, tend to employ floor-planning techniques based on either the simple bailment or wholesale hire-purchase. One of the problems encountered by both banks and finance companies is again the tremendous differences in relevant State legislation. Most lending institutions have a head office in one State and branches in other States, and it is usual for head office to try to standardise its procedures and to issue forms for use by all its branches. Whilst some do try to come to grips with the differing laws of the States, many issue the same forms to all their branches.

It is the contention of this paper that no form of security used in Australia for this type of finance, whether operating under the Bills of Sale Acts or the Companies Acts, or based on notions of bailment, is completely effective to give a thoroughly desirable security. In recent years in a number of jurisdictions much thought has been given to the desirable attributes of a stock-in-trade security arrangement. These may be listed as follows.

1. Registration and Notice Filing

Because possession of goods is generally the best if not the only guide to ownership, it is necessary to protect those who deal with the dealer, and who extend credit and finance to him, from secret charges affecting the goods in the dealer's possession. Accordingly, whilst a security agreement properly concluded between dealer and financer may bind the parties to it, it should not affect strangers to the agreement unless steps have been taken to 'perfect' it. The obvious method of achieving this sort of perfection is by removing the goods from the dealer's possession, but as this defeats the object of this type of finance, the law should require perfection by public notification or registration. No security taken by a financer should be effective against third parties unless the goods are removed from the dealer's possession or the security is registered.

It follows however that registration should not place too heavy an administrative or financial burden on the parties, and should involve the minimum of formality consistent with giving third parties who make inquiry all the information they need. Hence, requirements for the registration of all the security documents, and of further documents each time fresh stock is brought within the security or further advances made, invite evasion of the registration provisions; similarly with requirements for frequent renewal of registration. Whilst there is no objection to the parties filing the complete documentation if they wish, all that is really necessary is the filing of a notice that a particular dealer is acquiring finance from a particular financer against the security of a particular line of stock, and the addresses from which further information can be obtained.

2. After-Acquired Property

As this type of finance usually involves a continuing series of transactions between financer and dealer, it should be possible for one initial master agreement to give the financer continuing security over all stock of the specified description which the dealer subsequently acquires and which at any time during the continuation of the agreement is on the dealer's floor. Neither by express prohibition nor by a requirement of an itemised description of the stock, should the law prevent security being taken over after-acquired property. This recognition of the after-acquired property clause is essential to the proper working of a system of notice filing as described in the previous paragraph.

3. Future Advances and "Cross-Over" Security

Similarly, as most financing arrangements envisage a series of advances from time to time by the financer to the dealer, the stock-in-trade at any time should secure not merely the particular advance with which it was bought, but whilst it remains on the dealer's floor should secure the balance of the dealer's indebtedness. The after-acquired property clause and the future advance provision together provide what is known as the "cross-over" security.

4. Proceeds

The object of the financing arrangement is that the dealer should sell his stock so as to be able to repay the loan with the proceeds. But unless the agreement gives the financer some hold over the proceeds of sale, each sale by the dealer depletes the financer's security. Accordingly the ideal arrangement gives the financer a security in stock-in-trade until it is sold, and thereafter in the proceeds of sale, whatever form they may take, to the extent of outstanding advances.

5. Regulation of Priorities

The ideal security law should regulate simply and effectively questions of priority that may arise between conflicting claims to the goods. Such conflicts may arise between the financer's security interest on the one hand, and on the other the claims of the dealer's execution creditors, assignee for the benefit of creditors, trustee in bankruptcy, purchasers in and out of the ordinary course of business, and other financers claiming a security interest in the same stock. The priority point of any security interest should be its date of perfection i.e. the date of registration or of taking possession of the goods. Hence the position could combine simplicity with justice if the law were to provide:

(i) that an unregistered security interest, through failure to perfect, is invalid against competing claims of third parties however arising;

(ii) the unregistered interest might nevertheless remain valid inter partes;

(iii) two unregistered security interests should rank inter se according to dates of execution of the instruments; and

(iv) the priority point of a registered security interest should be its date of registration, so that it would be subject to registered and unregistrable interests arising before that date, and would take priority over all interests arising after that date.

Only two claims deserve favoured treatment. The first is that of a subsequent second financer whose loan is made to enable the dealer to acquire specific items of stock and who takes a security in those particular items. Without his loan, those particular items would not have been acquired by the dealer, and it is therefore in no way unfair to give the subsequent financer priority over an earlier financer with a general security interest in the stock-in-trade. The second case deserving preferential treatment is that of the buyer from the dealer in the ordinary course of business. It is unrealistic to expect the ordinary buyer to search a register; he expects to get clear title to the goods, and he should do so even though they are subject to a security interest which restricts the dealer's right to sell, and even if that interest is registered, unless he has express notice of the restriction.

6. Taxation and Moneylending Controls

Whilst the imposition of stamp duties on security transactions is obviously a legitimate means for a State to raise revenue, nevertheless the legislation should be so framed as to impose no undue hardship upon those who engage in these transactions and not to encourage a search for advantage through the employment of bizarre forms. Similarly, if special controls are to be imposed on moneylending activities, these should recognize the differing needs on the one hand of personal and consumer loans, and on the other hand commercial loans. For this reason, taxing statutes and the Moneylending Acts should be included in any rationalisation of chattel security law.

There is no space in this paper for a complete evaluation against these criteria of all the forms of security in use in Australia, but some few general comments can be made on the major ones.

The Bill of Sale

The validity and effect of bills of sale fall to be determined entirely by State law, and, as explained above, there is an astonishing diversity between the Bills of Sale legislation of the various States that confounds any argument that particular provisions reflect considered or essential policy.

In Victoria, Tasmania, and South Australia, the requirement of registration is not all-embracing and, as has been explained, a bill over future goods, or one which denies to the grantee a power to seize the goods, would not be registrable in these States. This involves a serious weakness in the legislation and enables the creation of charges the existence of which can not readily be discovered on reasonable investigation. In all States it is possible for a bill of sale to include after-acquired stock-in-trade (although with varying effects), and the result of this is that successive filing of instruments as new stock is acquired is unnecessary.

However in all States the requirements of registration are complex and cumbersome. All States require filing of the actual instruments themselves, or authenticated copies, together with various affidavits, attestations, declarations, and schedules. Access to this information is generally available to the public, whereas much of it could be kept confidential to the parties except to the extent they are prepared to disclose it to legitimate inquirers. In some States, notice of intention to make or give a bill must also be filed. The time limits for registration vary from State to State; and Queensland imposes no time limit at all. Provisions for caveating against registration exist in some but not all States. In all States except Queensland, registration is in a central registry. All States require periodic renewal of registrations, although the periods range from one to five years, and the machinery for renewal and the consequences of failure to renew differ greatly. Tasmania alone requires registration of full or partial satisfactions and of reloans, which could have alarming consequences in a priority conflict if the requirement were regularly obeyed. The legislation of all States recognizes that a bill may validly secure further advances, but only Queensland appears to have legislated completely effectively against the dangers of payments in to a current account discharging the security whilst the account is still overdrawn. As regards the ability of a secured financer to tack further advances to his security in priority over the interest of a subsequent mortgagee, Victoria and Tasmania provide a statutory right to tack that in practice permits it either by agreement between all parties or where the security imposes an obligation to make further advances. In the other States, the general law position prevails so that in effect a subsequent mortgagee can prevent further tacking by prior mortgagees simply by giving them notice of his interest.

There is no reason in principle why bills of sale in any of the Australian States should not cover proceeds, but no attempt seems to be made by financers to extend their security in this way except over trade-ins and replacement stock.

The most serious defect of bills of sale in Australia concerns the priority position. Broadly, registration of itself confers no priority on a bill, but the failure to register a registrable bill may deprive it of priority it would otherwise have had. In the first instance therefore, priority conflicts are to be answered by reference to the general law, turning on the nature of the competing interests as legal or equitable, questions of notice, and questions of estoppel. But this is subject to special considerations arising out of the legislation. Is the bill effective or has non-registration wholly or partially destroyed its validity? If it is effective, does it take effect from its date of execution or of registration? Does registration of a bill give constructive notice of either its existence or its contents? Are there any special statutory provisions relating to priorities and tacking?

The answers to all these questions vary considerably from State to State, and in many isntances are not open to a clear and unequivocal answer. In Queensland, the absence of a time limit for registration, the fact that registration when made operates retroactively to the date of execution, and the omission from the new Australian Bankruptcy Act of the "order and disposition clause", combine to deprive registration of any real point other than to guard against the possibility that subsequent purchasers or mortgagees might gain priority by being first on the register or by acquiring a legal title without notice. In Queensland also a provision making registration of an instrument notice of its contents can defeat the title of the buyer in the ordinary course of business.

In all States bills of sale will attract stamp duty, and also the application of the Moneylenders Acts if the grantee is a moneylender within the statutory definition and is unable to bring himself or the transaction within any of the exceptions. However, once again the incidence of stamp duty and the effect of the Moneylenders Acts will differ from State to State. In Tasmania the limitation of interest rates to 10 per cent. where the principal exceeds $100 is unrealistic and causes difficulties even for the trading banks.

The Floating Charge

The floating charge under the Companies Acts provides in many respects the ideal form of chattel security for stock-in-trade financing, although it does suffer from some peculiar weaknesses of its own.

The requirement for registration of the charge is all-embracing, and there is no need for successive registration, as fresh stock is picked up and future advances secured without further filing. Nor is there any requirement for renewal of registration. Prescribed particulars of the charge must be filed - and to this extent there is a system of notice-filing - but the instrument itself must also be filed or a copy together with affidavits of execution and verification. The prescribed particulars do not contain information as to whether the charge contains e.g. any prohibition on further charges or provision for automatic crystallization and, although these can be discovered from the filed instrument itself, the question remains open whether a person who had perused the particulars but not the instrument would be affected with notice of these matters.

Although the charge covers after-acquired property, it does not, like the bill of sale, give a specific equitable charge over each item of stock as the grantor acquires it, but it remains inchoate and does not attach to particular items until crystallization. The difference is important in determining the priority point of the grantee's security.

The floating charge secures future advances and therefore provides the cross-over security. The ability to tack future advances turns on State law as in the case of bills of sale. If the charge is framed wide enough, it will cover proceeds of sale in all its forms, as well as the actual stock.

The major vulnerability of the floating charge as a security arrangement turns on the priority problems involved in the notion of crystallization. The charge does not attach to specific assets until crystallization, and until then the company has a licence to deal with its assets in the ordinary course of business. Crystallization is generally said to occur when either winding-up commences or default is made <u>and</u> the company takes steps to enforce its security as by appointing a receiver. The result is that the security may well be considerably depleted before the lender is entitled to enforce it against particular assets or assert it against other claimants.

Lenders frequently endeavour to guard against this danger by providing in the instrument for automatic crystallization of the charge in certain events, e.g. if execution or other process is sued out against the company. In some cases the lender reserves the right to 'fix' the charge simply by service of notice on the company. Whether these devices are effective is doubtful. The question in every case is whether the company's licence to deal with its assets has been effectively revoked, and it is submitted that some form of public notification of this is essential before the lender can assert priority over subsequent claimants.

The priority of the registered floating charge depends, as in the case of bills of sale, on normal general law principles, and turns on the two factors (a) that until crystallization the company has implied licence to deal with its assets in the ordinary course of business, and (b) that the charge is necessarily equitable. It is an open question whether a restriction in the instrument on the company's licence to deal can affect a third party dealing with the company. Clearly it can not do so unless he has notice of the restriction, but it is doubtful if registration of the instrument would of itself give constructive notice. However these two factors considerably weaken the legal effectiveness of the floating charge as a security.

The floating charge, like the bill of sale, attracts stamp duty and would normally also attract the application of the Moneylenders Acts. However in Victoria loans to bodies corporate are entirely exempt from the Moneylenders Act, and in New South Wales partially exempt. In Western Australia the borrowing company can agree in writing that the Act does not apply to its loan. In Tasmania, Victoria, and South Australia, the effect of the High Court decision in Motel Marine Pty. Ltd. v. I.A.C. (Finance) Pty. Ltd. (1964) 110 C.L.R.9 is that the contract note requirements of the Moneylenders Acts are inapplicable when the borrower is a company. In Queensland and the A.C.T. there is no contract note requirement. Generally throughout Australia therefore the floating charge escapes the worst features of the Moneylenders Acts; and this is realistic as the policy of these Acts was not aimed at protecting commercial borrowers of this nature.

Bailments and Hire-Purchase

The types of floor-planning arrangements used by finance companies vary in detail very considerably. Certain basic common features do however emerge. The dealer and financer usually enter initially into a master agreement governing the conditions on which the financer is prepared to accommodate the dealer and establishing the procedures. The dealer is usually required to maintain a deposit of funds with the financer. Items of stock as they are acquired by the dealer are brought under the master agreement by a simple form of acknowledgment. In some cases the financer may purchase the goods from the manufacturer or other supplier at the request of the dealer and allow delivery to be made to the dealer who holds as bailee to display the goods. In other cases, particularly that of used cars, the dealer may be permitted to buy as agent for the financer, notifying the financer that he holds under the agreement. The financer then reimburses the dealer with a percentage of his outlay. The agreement may authorise the dealer simply to display the goods and introduce retail purchasers to the financer, making it clear that he is not the agent of the financer to negotiate sales. In such a case, the dealer receives the difference between the wholesale and retail prices as his commission for introducing the buyer. In other cases the dealer may be authorised to sell the goods direct and may even be given an option to purchase. If he is to make the sale himself he will usually be required to pay out the financer by purchasing the goods himself before completing the retail sale, although it is likely in practice that he will first sell and then account.

The advantages of this type of plan from the point of view of the finance company are:

(a) by keeping title away from the dealer, it avoids priority conflicts with earlier charges created by the dealer, such as floating charges to secure a general indebtedness to a bank;
(b) in most jurisdictions no question of registration arises;
(c) it probably does not attract the application of the Moneylenders Acts;
(d) in most States it does not attract stamp duty;
(e) it provides opportunities for minimizing the impact of sales tax; and
(f) since the repeal of the order and disposition clause, it is effective in the dealer's bankruptcy.

Sales tax advantages can be obtained under these arrangements as long as the dealer is not given an option to purchase the goods. Rates of sales tax on certain types of goods can be as high as 25 per cent; and it is therefore desirable, to avoid 'freezing' considerable capital in payment of sales tax, if the price of the goods on which tax is calculated can be kept down to basic costs, and if the date for payment of tax (the date of sale by a manufacturer or registered wholesaler to an unregistered dealer) can be deferred to coincide with the sale at retail. The first of these objectives is attained by interposing in the distributive chain of manufacturer-financer-dealer, a manufacturer's sales subsidiary. The second is attained by interposing a financer's (registered) wholesale subsidiary which holds title until the retail sale is arranged and then feeds it to the retail buyer through the sales subsidiary or (if consumer finance is desired) through its parent finance company. This system however does not work if the dealer is given an option to purchase the goods as the Taxation Department treats this as a sale and would levy sales tax immediately.

Whether bailment arrangements such as these should be regarded as bills of sale and as moneylending transactions, turns in Australia, as in most common law jurisdictions, on whether the arrangement is an ordinary routine transaction or a sham. In Victoria, New South Wales, South Australia, Queensland, Western Australia and the A.C.T. the statutory definition of moneylending is extended to include transactions which in substance or effect are loans, whatever their form or terms may be; but it is considered doubtful whether this adds anything to the common law position.

Provided they are not shams, bailment plans are probably not registrable in any Australian jurisdiction except possibly Western Australia, and are valid without registration against all competing interests except that of the buyer in the ordinary course of business. Furthermore, as there is no requirement for registration, they can include after-acquired property in the sense that the master plan can control a whole course of transactions, and subsequently acquired chattels can be brought under the plan by simple acknowledgement. However, each item of stock secures only the 'price' of that item, so that there is no possibility of securing further advances or providing a cross-over security. No attempt is made in practice to pick up proceeds of sale, although this is theoretically possible if the dealer sells as agent or sells without having power in that regard. Although 'rental agreements' usually are liable to stamp duty, stamp duty is generally assessed on the rent received. Therefore as long as the financer demands no rent but takes his profit in other forms (as by adjustment of the dealer's commission) no stamp duty will be payable.

The non-registrability of these agreements should, it is suggested, be regarded as a weakness of the scheme, but for the impracticability of most current forms of registration. Although the creditors of the dealer should under modern conditions expect that the dealer does not necessarily have title to his stock, they are at the disadvantage that there is no effective means by which they can discover the truth if the dealer wishes to conceal it. The other weaknesses are that

(a) it leaves the risk of non-sale of the stock on the financer; and any attempt by him to pass the risk to the dealer may jeopardize the whole basis of the scheme;

(b) it is clumsy and complicated in concept and practice, and invites departures from the procedures established in the agreement, that again may destroy the basis of the plan;

(c) it is not well-designed for continuing lines of finance.

Conclusions

The history of chattel security and of secured financing in Australia, as in most common law countries, is a history of evasions - of forms of security designed to evade the rigours of statutes that were not framed with the needs of modern financing in view. Evasion of the Bills of Sales Acts, evasion of the Moneylenders Acts; but the most important determining factor today is the impact of taxing legislation. Complex schemes have been designed, and designed effectively although at some cost, to mitigate the rigours of sales tax; and minor amendments to stamp duty legislation can provoke an immediate search for new forms becoming more and more remote from what should be a commercially simple transaction.

The situation presents a challenge to lawyers, businessmen, and legislators to design a new chattel security law that will adequately satisfy all competing interests and measure up to all desirable attributes. If the law applied uniformly to all transactions, whatever their form, if their purpose is to provide security for finance or credit, the search for advantages through new forms would be ended. In Australia, there is the added problem that this new law should not vary from State to State, but must be tackled on a uniform basis. Unfortunately Australia lacks a law reform agency capable of tackling these problems really effectively. But if our present chattel security laws are the best we can do, then we need not merely better laws but better lawyers.

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