## "APPARENT POSSESSION" OF CHATTELS

## OFFICIAL ASSIGNEE OF CASEY v. BARTOSH, [1955] N.Z.L.R. 287.

In terms of s. 18 of the Chattels Transfer Act 1924 an unregistered instrument is void as against the Official Assignee so far as it comprises goods which at the time of the bankruptcy remain in the possession or apparent possession of the person giving or making the instrument.

What do the words "apparent possession" mean in this section? The expression is not defined in the Act. Faced with this problem in 1895 with regard to the Act of 1889 Williams J. in Official Assignee of Slattery v. Slattery (1895), 16 N.Z.L.R. 332, adopted the definition contained in the English Bills of Sale Act 1878, which reads as follows:

> Personal chattels shall be deemed to be in the "apparent possession" of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person.

This definition is identical with that contained in s. 3 of the Chattels Securities Act 1880 (N.Z.), but this clause was dropped from the Act of 1889. This is at least prima facie evidence that the legislature intended that this definition should no longer be used in New Zealand. But by merely dropping the definition without expressing any clear intention as to what the words "apparent possession" meant the legislature in fact left the matter to the Courts, and Williams J. was entitled to take advantage of the assistance afforded by the English cases in determining the meaning to be given to the words. In the event he went further: he used the English Act in pari materia as his statutory dictionary and imported the definition contained therein into the New Zealand Act. The adoption of the English statutory definition has been approved by Fair J. in Auckland Milk

Company Ltd. v. Levy, [1934] G.L.R. 798, and by the learned Chief Justice in Official Assignee of Casey v. Bartosh (supra).

It is submitted that the definition amounts to this: if goods mortgaged by A to B are left on premises occupied by A, or although not on premises occupied by A, are in his use or enjoyment, then they shall be deemed to be in A's apparent possession and this presumption shall not be displaced by the fact that B has taken formal possession.

It is submitted that the words "notwithstanding that formal possession thereof may have been taken by or given to any other person" were intended so that what Salmond has called "legal possession" could not be held to operate to end the apparent possession of the mortgagor.

In Official Assignee of Casey v. Bartosh (supra) the learned Chief Justice held that goods comprised in an unregistered instrument by way of security remained in the apparent possession of Casey, the grantor, and that consequently the instrument was void as against the Official Assignee. The goods comprised in the instrument were situated in a shop of which Casey was the tenant. Bartosh's solicitor went with Casey to the shop, checked over the goods, informed Casey that he was seizing the goods and locked the shop, retaining the key. The shop had been closed for some weeks before the seizure was made, and remained closed up to the time of the bankruptcy.

It is the purpose of this case note to examine this decision and to submit that the Chief Justice erred in that he applied a test which should not have been applied on these facts. The learned Chief Justice after quoting the English statutory definition went on to say that the definition must be read in the light of various decided cases both English and New Zealand. It is submitted, however, that in failing to distinguish the various decided cases the learned Chief Justice extracted and applied a test which was not applicable to the facts in Bartosh's case.

The learned Chief Justice quoted the following extract from 3 Halsbury's Laws of England, 3rd ed., p. 309, para. 378:

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

This statement of the law is based on a dictum of Mellish L.J. in Ex parte Jay, In re Blenkhorn (1874), 9 Ch.App. 697, 704, in which he said that in order to terminate apparent possession

> there must be something done which takes [the goods] plainly out of the apparent possession of the debtor in the eyes of everybody who sees them.

It is proposed to show that this dictum, which is a justifiable gloss on the statutory definition, is of limited application only, and was misinterpreted and misapplied in Bartosh's case.

First let us examine the dictum of Mellish L.J. in its original context. In Jay's case the holder of an unregistered Bill of Sale over the furnishings of a private school put two men into possession to hold possession on his behalf. But the school went on as usual and the Court rightly held that the men had taken a mere formal possession. Some days later, however, the grantee of the Bill of Sale sent men with vans and loaded the furniture on to the vans and carted it away. It was held that this act constituted more than a formal possession and ended the apparent possession of the grantor.

In the course of his judgment Mellish L.J. considered at length the judgments in the cases of Ex parte Lewis, In re Henderson (1871), 6 Ch.App, 626, and Ex parte Hooman, In re Vining (1870), 10 Eq. 63, and approved of the statement of the law in both decisions. In both of those cases men had entered into possession on behalf of the grantee of an unregistered Bill of Sale. In the former case the man had merely stayed in the house, sleeping in an upstairs room and had allowed the grantor and his family to continue using the furniture comprised in the Bill of Sale. Some days

later he had advertised a sale of the goods but there was nothing to show that the sale was not that of the grantor himself as he still had full use and enjoyment of the goods on premises in his occupation and nothing had been done which could be said to take the goods out of the apparent possession of the grantor.

This case is to be distinguished from Smith v. Wall (1868), 18 L.T. 182, in which a man who was put into possession by the grantee of an unregistered Bill of Sale locked the goods away from the grantor. The grantor, an infirm old man, could not get lodgings elsewhere and remained on the premises against the wishes of the man in possession, but he was not using the goods. Advertisements for the sale of the goods stated that the sale was under the Bill of Sale. The apparent possession of the grantor was held to have been terminated.

Now in effect this is a modification of the statutory definition in favour of the grantee of the Bill of Sale. In both cases the goods remained on premises occupied by the grantor, but the effect of a well-publicized act of possession in Smith v. Wall was to terminate the apparent possession of the grantor.

In Ex parte Hooman, In re Vining (supra), the man put in possession merely stayed on the premises, allowing the grantor to use the goods as before, and Bacon C.J. expressly held that the goods were used and possessed by the grantor on premises occupied by the grantor and that the goods consequently were in the apparent possession of the grantor.

In Gough v. Everard (1867), 2 H. & C. 1; 159 E.R. 1, the Court was concerned with three separate lots of goods in three different situations but comprised in one unregistered Bill of Sale: timber stored on a private wharf owned by the grantor, timber stored on a public wharf, and furniture situated in a house owned by the grantor. The grantor's apparent possession was held to have terminated with regard to all three, because (i) the grantee had the only key to the private wharf and so the wharf was not in the occupation of the grantor; (ii) the grantee occupied the house and paid the servant, whereas the grantor did not live there; (iii) the grantee had taken people to inspect the timber on the

public wharf in negotiating sales. In two situations the decision turned on occupation and in the third, in which the question of occupation of the premises could not arise, on publicity.

In each of these cases the Court first found that the goods were on premises occupied by the grantor or in his use and enjoyment. Only after determining this question did the Court direct its attention to the further enquiry (which it is submitted is a logical extension of the statutory definition) whether some act on the part of the grantee, plainly in the eyes of everybody who saw the goods, terminated the apparent possession of the grantor. It is submitted that this is the correct approach. But it was not the approach taken by the Court in Bartosh's case.

Dicta from cases on the doctrine of reputed ownership in the Bankruptcy provisions which were cited and quoted in Bartosh's case are applicable only at the second stage of the inquiry. The requirement that goods should remain either on premises occupied by the grantor or in his use and enjoyment is peculiar to the doctrine of apparent possession under the Chattels Transfer Act, and in this the two doctrines are different.

It is further submitted that not only was the wrong test applied in Bartosh's case but that that test was misapplied. The whole point of apparent possession is that the goods should be in such a situation "as to convey to the minds of those who know their situation the reputation of ownership": In re Couston, Ex parte Watkins (1873), L.R. 8 Ch.App. 520, per Lord Selbourne L.C. The doctrine is excluded "if the facts are such that those who deal with the bankrupts may see and know that the goods may not be the property of the bankrupts": per Sir James Mansfield in Thackthwaite v. Cock (1811), 3 Taunt. 487; 128 E.R. 193. "There must be something done which takes them plainly out of the apparent possession of the debtor in the eyes of everybody who sees them": per Mellish L.J. in Ex parte Jay, In re Blenkhorn (supra, at p. 704). [The emphasis is added.]

The tests in these cases are concerned with those who "know" or "know and see" or "see" the situation of the goods.

For goods to be in the apparent possession of A the goods must be in a situation in which A appears to be the owner.

The above tests deal with the situation where the goods have been in the possession of A but some act has been done by B to change that possession. The tests require that the possession taken by B should be complete, so that any appearance of ownership by A is ended. The act must plainly end that appearance of possession and not merely be equivocal as in cases like Ex parte Lewis, In re Henderson (supra).

But the inference must be drawn from the situation of the goods so that the goods must be seen. The Court is concerned with those who see the goods. It is submitted that no reliance can be placed on prior knowledge, i.e. if C sees the goods at A's on Monday and infers that they are A's he is not entitled to rely on that knowledge on Tuesday. If the goods have been seized and carried away by B on Monday night unknown to C, clearly C cannot rely on his prior knowledge, for at the time in question, i.e. after the seizure, the goods are not in the apparent possession of A.

In Bartosh's case (supra) the tests were applied as though the operative words were "known to the world". It is true that the learned Chief Justice quoted the following passage from Lord Selborne in In re Couston, Ex parte Watkins (supra, at 528):

> The doctrine of reputed ownership does not require any investigation into the actual state of knowledge or belief either of all creditors or of particular creditors, and still less of the outside world, who are no creditors at all, as to the position of particular goods.

But it is respectfully submitted that he then proceeds to ignore this passage by embarking on an investigation of the actual state of knowledge of the adjoining shopkeepers and the likelihood of knowledge of the seizure by the populace in general. This enquiry, it is submitted, is irrelevant. It is for the Court to look at the facts and to say whether a man dealing with the bankrupts and seeing the goods would be likely to be misled as to the ownership of them.

This is an inference to be drawn by the Court and does not involve any inquiry as to anybody's actual state of knowledge, particularly that of the public in general.

It is submitted that the first question to be determined in Bartosh's case was whether the shop was in the occupation of Casey. If it was not, the goods were not in the apparent possession of Casey and the Act did not apply.

Let us examine the decision in Robinson v. Briggs (1870), L.R. 6 Exch. 1, a decision of the Court of Exchequer Chamber, decided on the express words of the English statutory definition. Goods the subject of an unregistered Bill of Sale were stored in rooms of which the grantor, one Coundon, was the tenant. The grantor did not reside there but his wife visited the premises from time to time. On demand the grantor surrendered the key to the grantee, who entered the rooms, checked the goods, locked the rooms and retained the key. The Court said:

> Coundon remained tenant of the Ward Street rooms, but he had ceased to be in actual occupation, and the mere continuance of his tenancy was not sufficient. The occupation pointed at in 17 and 18 Vict. c. 36, s. 7, must be an actual de facto occupation. There was nothing of the sort here, and the plaintiff had done all he was called upon to do to reduce the goods into his own possession. He, if anyone, was the actual occupier of the premises.

Robinson v. Briggs was cited in Bartosh's case, but it was thought to be distinguishable on the ground that the mere handing over of the keys was not sufficient. The authority for this distinguishing the previous case was the passage from Halsbury quoted earlier in this article. But that passage must be read in conjunction with a passage from the preceding paragraph 577:

> The possession of the grantor may either be actual or apparent . . . where chattels are on the premises occupied by him, which means de facto occupation.

Halsbury cites Robinson v. Briggs as authority for this proposition.

It is submitted that the learned Chief Justice has failed to give full effect to the requirement that the goods be on premises occupied by the grantor. Robinson v. Briggs did not turn on the effectiveness of the act of handing over a key, but on the question who was the de facto occupier. It is submitted that the decision in Robinson v. Briggs is in no way affected by the passage cited from Halsbury by the learned Chief Justice and that this case cannot be distinguished from Bartosh's case. In both of these cases goods subject to an unregistered charge were on closed premises tenanted by the grantor. The grantee entered, checked the goods and took possession, and then departed, locking the door and retaining the key. Quite clearly Casey was no longer in de facto occupation of the shop. He was locked out and had no access to the premises.

Let us suppose that when Mr Ongley went to the shop to take possession of the goods he had loaded them on to a lorry in that same back alleyway and carried them away, and that nobody had seen him do so. Would it be possible to hold that the goods were still in the apparent possession of Casey, even after having been seized and carried a hundred miles away by the person entitled to them? And yet what notorious act has been done? The people who occupy adjoining shops, the citizens of Taihape, do not know that a seizure has taken place.

Alternatively, let us suppose Mr Ongley had moved some of the goods to nearby premises of which Bartosh was the tenant, and nobody but the parties knew. Can it be contended that the goods on the premises tenanted by Bartosh are in Casey's apparent possession? They are not on premises occupied by the grantor, and a complete and exclusive possession has been taken. To hold that these goods remain in the apparent possession of the grantor is to lay down a new doctrine of apparent possession.

What then of the goods remaining in Casey's shop? Wherein does the difference lie between the goods situated in premises occupied and tenanted by the grantee, from which the grantor has been excluded, where the goods cannot be seen by people dealing with him, on the one hand, and on the other hand goods on premises tenanted by the grantor but

occupied by the grantee, from which premises the grantor has been excluded, where the goods cannot be seen by persons dealing with the grantor? The only difference is in the fact that the grantor is tenant of the second premises. But the definition speaks of "occupation" which in Robinson v. Briggs was held to be de facto occupation, a decision with which no one has seen fit to disagree.

It is submitted that in determining whether goods remain in the apparent possession of the grantor of an instrument by way of security inquiries should be directed as follows:

1. Whether the goods remain on premises of which the grantor has de facto occupation;

2. Whether the goods though stored elsewhere can be said to be in the use or enjoyment of the grantor.

If the answer to both these questions is in the negative s. 18 of the Chattels Transfer Act does not apply.

3. Do the goods remain in such a situation that anyone seeing those goods could infer that they were the property of the grantor, or has something been done which plainly terminated his apparent possession in the eyes of all who see the goods?

If this approach had been taken in Bartosh's case the decision would have been different and would have conformed with the long line of decisions on the doctrine of apparent possession. As it stands, it lays down a new doctrine which requires that, in order to terminate an apparent possession, the act relied on must be known to the world in general.

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