SECURITIES OVER FUTURE GOODS

PART ONE

Introduction

The object of this article is to examine the extent to which the law should allow the utilisation of future goods for the purpose of present credit.[1] This problem mainly arises today in connection with the financing of dealer's stock-in-trade, and it is in this area that the writer's attention will focus. Some mention will, however, be made of the desirability of permitting the consumer to utilise his future goods for present credit.

Stock-in-trade can never be regarded as an ideal form of security, since it is usually only by disposing of the security that the dealer will be in a position to repay the loan. Nevertheless, it is often the only security of any value he can offer in return for a loan which is needed to finance his business operations. If the provision of this sort of finance can be regarded as a legitimate business activity that satisfies a real need, then the law must not be slow to afford the financer means of taking adequate security.

One of the desirable attributes of an effective security interest in stock-in-trade is that it be permitted to cover future stock, since existing stock will and must necessarily be disposed of in the course of the dealer's business. However, at present, the law is markedly deficient in that it fails to recognise the validity of a present security interest in after-acquired stock, and it is proposed in the course of this article to demonstrate in what respects the law is deficient, the desirability of reform and the form it should take.

It is necessary at the outset to outline the historical development of the common law and statutory provisions regulating the granting of securities over future goods, with particular emphasis on the policy considerations which influenced this development, for it may be that added weight will then be given to the case for reform. This will be the major concern of Part One of this article. In Part Two, the policy considerations which must be balanced when considering reform will be discussed, and this will be followed by an evaluation of the recent American and Canadian solution to the problem of future goods and the current proposals for reform in New Zealand.

It must be emphasised that the recognition of the dealer's ability to grant an effective security over his future goods is only one of the desirable attributes of an efficient law regulating the taking of securities over a dealer's stock-in-trade. It is, for example, essential that the security agreement give the financer some hold over the

1. Unless the context otherwise indicates, the term "future goods" is used as a convenient expression covering both goods in existence but not yet acquired and those not in existence at all.

proceeds of sale and, since most financing arrangements envisage a series of advances, also that the stock-in-trade secure "future advances". Indeed, the validation of both the after-acquired property clause and the provision for future advances would provide what is regarded as very desirable in stock-in-trade financing — the "cross-over" security; i.e. the stock held at any particular time would secure the whole of the financer's outstanding advances at that time. Nevertheless, no attempt is made in this paper to examine these related problems of "proceeds" and "future advances."

I. THE ENGLISH BACKGROUND — AN HISTORICAL PERSPECTIVE

Common Law

In the year 1600 one Pierce, a sheep raiser, had fallen into financial difficulties. He owed Twyne £400 and another creditor £200 but his total assets were only worth £300. The other creditor instituted proceedings against Pierce but in the meantime Pierce executed a "deep of gift" in Twyne's favour which purported to transfer to him all of Pierce's real and personal property in satisfaction of the debt. Pierce, however, remained in possession and continued to deal with property transferred. There was obviously good consideration for the transfer as Pierce's debt to Twyne exceeded the value of the property transferred. The other creditor subsequently got judgment and when the sheriff attempted to make a levy on Pierce's sheep, Twyne resisted on the ground that the deed of gift made him the owner of the sheep.

Criminal procedings were instituted against Twyne in the Court of Star Chamber founded on the statute of 13 Eliz. c.5 (1570) which provided in section 1 that conveyances of land or goods made with intent to delay, hinder or defraud creditors or others were void. Parties to the fraudulent conveyance were to be punished with six months' imprisonment and the whole of the chattels and one year's value of the land forfeited, one half to the Crown and one half to the aggrieved parties. Twyne was found guilty.

The effect of *Twyne's* case[2] on the development of the law relating to non-possessory chattels securities was quite significant. Prior to that case it was thought that property in goods could pass without transfer of possession. However, the Star Chamber, in holding that the deed was a fraudulent conveyance, had taken into account, inter alia, Pierce's continued possession as raising a presumption of fraud. — "The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them."[3] Though *Twyne's* case concerned an absolute transfer by way of sale, the implications of the decision for chattel mortgages were obvious for, in form, the traditional chattel mortgage was simply a conditional or defeasible sale.

2. Co. Rep. 80b; 76 E.R. 809.
3. Ibid., 81a, 812-813.

It was not clear from *Twyne's* case whether *all transactions* where a seller or mortgagor of goods was permitted to remain in possession were liable to be set aside as fraudulent conveyances. The transfer in that case was given to satisfy an antecedent debt. If new value had been given, would the retention of possession have rendered the transfer fraudulent? Were explanations to be allowed to rebut the presumption of fraud? Despite these and other unanswered questions, it would appear that the effect of *Twyne's* case was to cast a cloud of suspicion over the non-possessory chattel security throughout the seventeenth and eighteenth centuries. As a result, the chattel mortgage was little used for it ran the risk of being rendered a fraudulent conveyance, invalid against purchasers without notice and creditors alike.

Although it must be remembered that law reporting throughout the seventeenth and eighteenth centuries was often very poor, the few cases in point support the above conclusions. In 1697, it was held in *Meggot* v. *Mills*[4] that "permitting the vendor to continue in possession will in general make a sale fraudulent against creditors." In 1716, it was observed in *Copeman* v. *Gallant*[5] that "continuance of . . . possession is a strong presumptive evidence of fraud." Most of the eighteenth century cases in point were concerned with the "reputed ownership" clause of the statute 21 Jac. 1.c.19. Although it was often only necessary in this context to make passing reference to *Twyne's* case, the notion that retention of possession is a badge of fraud was never queried. In the leading case of *Ryall* v. *Rowles*[6] a chattel mortgagor was permitted to remain in possession of his mortgaged utensils, stock-in-trade and accounts and the reputed ownership clause was applied to make these goods and accounts part of the bankrupt's estate. However, it seems that the same result could have been justified on the basis of *Twyne's* case. It was observed by Burnet J., after referring to *Twyne's* case, that "it is difficult, unless in very special cases, to assign a reason, why an absolute or conditional vendee of goods should leave them with [the] vendor, unless to procure a collusive credit."[7] Such was the eighteenth century judicial suspicion of the chattel mortgage. Ten years later in *Wilson* v. *Day*,[8] it was held that "a mortgage by a trader, of his effects, is good, if he parts with the possession".

However, in the early part of the nineteenth century, the effect of *Twyne's* case was gradually whittled away. The first indication of a changing judicial attitude came in 1788 in *Edwards* v. *Harben*[9] where, although a chattel mortgagor's retention of possession was viewed as a fatal badge of fraud, much emphasis was placed on the fact that the

4. (1697) 1 Ld. Raym. 286; 91 E.R. 1088.
5. (1716) 1 P.WMS. 314, 317; 24 E.R. 404, 405.
6. (1749) 1 Yes. Sen. 348; 27 E.R. 1074.
7. (1749) 1 Ves. Sen. 348; 27 E.R. 1081.
8. (1759) 2 Burr. 827, 831; 97 E.R. 583, 586.
9. (1788) 2 T.R. 587; 100 E.R. 315.

mortgage itself had not provided for retention of possession. Later, instead of the mortgagor's continued possession of chattels raising a presumption in law of fraud, it became necessary to show that there had been fraud in fact, and the mortgagor's possession was held to be merely one of the circumstances from which fraud might be inferred.[10] Finally, retention of possession became no longer even *prima facie* evidence of fraud when that possession was consistent with the mortgage contract, which, of course, it nearly always was.[11]

To the forms of security safely available at common law was thus again added the chattels mortgage. No doubt one of the reasons behind the disappearance of the rule in *Twyne's* case was the industrial revolution, for as industrialisation proceeded, personal property, in addition to real property, became the principal source of wealth. The rapid expansion of industrial concerns created a greater demand by merchants and traders for credit, and the financing institutions which were the source of this credit needed security other than the mortgage of real property.

However, by the middle of the nineteenth century it became apparent that even the mortgage of goods was not an entirely satisfactory security device for all purposes. The greater part of a trader's assets usually comprised raw materials, manufactured or semi-manufactured goods, stock-in-trade and book debts "which commercially were [his] soundest potential for raising loans."[12] The difficulty was that, at common law, mortgages could only be of land or goods which were owned by the mortgagor and identified at the time the mortgage was executed. "Now this was a practical impossibility in the case of a class of assets the constituent items of which were constantly changing. If the precept of the common law were carried out, there would have to be a fresh mortgage . . . each time a new item was added to the class of assets, and a release by the lender each time an item was disposed of out of it."[13]

What was the basis of the common law's refusal to accommodate security interests in future goods and how did it respond to the new demands of the industrial revolution?

At common law property to be created or acquired in the future could not be transferred or encumbered. The reasoning upon which the rule was based was simple — "a man cannot grant or charge that which he hath not"[14] — "there cannot be a prophetic conveyance."[15].

10. *Kidd* v. *Rawlinson* (1800) 2 B. & P. 59; 126 E.R. 1155; *Lady Arundel* v. *Phipps* (1804) 10 Ves. 139; 32 E.R. 797.
11. *Martindale* v. *Booth* (1832) 3 B. & Ad. 505; 110 E.R. 180.
12. Pennington, "The Genesis of the Floating Charge" (1960) 23 M.L.R. 630, 631.
13. Ibid., 631-632.
14. Perkins, *The Profitable Book* (1641) (tit. *Grants)* para. 65 cited by Tindal C.J. in *Lunn* v. *Thornton* (1845) 1 C.B. 379, 386; 135 E.R. 587, 590.
15. *Belding* v. *Read* (1865) 2 H. & C. 955, 961; 159 E.R. 812, 814 per Pollock C.B.

However, that such a rule was not entirely acceptable even to the seventeenth century business community when land and its produce was the principal source of wealth, would appear from the decision in *Grantham* v. *Hawley*[16] where the common law rule was first broken down. It was held that a man may grant a thing of which at the date of grant he is the owner not *actually,* but *potentially,* as, for example, where he is not possessed of the very thing granted, but merely of something from which it may proceed. This principle permitted the sale or encumbrance of future personal property having what was called a "potential existence" arising from the fact that the processes of creation had already begun, with the limitation, however, that the basic substance yielding the produce had to be owned by the vendor or mortgagor; e.g. crops already planted upon the land of the vendor or mortgagor and wool to be grown upon sheep already owned. The "potential existence" doctrine did, of course, rest upon the fiction that something may be owned which is not yet in existence but which in the ordinary course of events will come into existence, thus leaving inviolate the aforementioned rule that a man cannot grant or charge that which he does not own. Its effect was not only that legal title passed as soon as the future property came into existence, but also that this title related back to the time of the agreement.

The doctrine might have served as complete escape from the common law limitation; just as the owner or occupier of land had its fruits potentially, so it was arguable that a business concern had the goods which it would manufacture or acquire in the ordinary course of business potentially. The courts, however, rejected any such extension of the potential existence doctrine and confined it to the agricultural domain.[17] Consequently, a mortgage of other future goods remained void at common law even though they might be adequately described and easily ascertainable at the time they came into the mortgagor's possession. The doctrine did, however, represent the first step toward the solution of the problem the subject of this article — the extent to which the law should allow the utilisation of future property for present credit.

Although the common law courts refused to extend the fictional potential existence doctrine, they were able to engraft a second limitation on the common law rule. This exception first found expression in Lord Bacon's *Maxims of Law* published in 1596. After restating the common law rule, his fourteenth maxim continued:

> "But of declarations precedent before any interest vested, the law doth allow, but with this difference that there be some new act or conveyance to give life and vigour to the declaration precedent."[18]

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16. (1616) Hob. 132; 80 E.R. 281.
17. *Lunn* v. *Thornton,* supra n. 14.
18. For the full text of Lord Bacon's 14th maxim see Millar, *Bills of Sale* (4th ed. 1877) 37.

The courts interpreted the maxim as meaning that, although a disposition of future goods was ineffective to presently pass the legal title, such disposition might be considered a declaration precedent which would derive its effect from some "new act" of the grantor after the property was acquired.[19] Although it was clear that if the grantor's intention evidenced by the original transaction was confirmed by a new mortgage the grantee would thereby obtain a legal title, the difficulty with which the nineteenth century courts had to grapple was whether some other new act would suffice. It was evident that if only a fresh mortgage could transfer legal title there was no point in referring to the "declaration precedent", for legal title would be effectively transferred by that document alone.

It was held in *Lunn* v. *Thornton*[20] that the mere bringing of the goods on to the grantor's premises or his mere acquisition of the goods did not amount to a sufficient new act, whereas delivery to the grantee would be sufficient. Within these two extremes it was not clear what else could amount to a new act. However, in *Congreve* v. *Evetts*[21] it was held that where the original mortgage empowered the mortgagee to seize the future goods and that power was executed, the mortgagee was in the same situation as if the debtor himself had delivered them to him.[22] Then, in *Hope* v. *Hayley*[23] it was held that the mortgage of future goods in that case gave *implied* power to the grantee to seize them so as to perfect his title as against third parties.[24]

A further difficulty was whether the parties were free to select their own new act or whether they were limited to the type of act which was normally a significant incident in one of the ordinary recognised methods of passing title to personal property.[25] However, despite the aforementioned extensions to the "new act" doctrine, the common law security over future goods remained rather unsatisfactory from the mortgagee's point of view since execution creditors, purchasers, assignees for the benefit of creditors or assignees in bankruptcy would prevail unless the new act was executed prior to levy, purchase, assignment or bankruptcy. Indeed, since the mortgagee had no legally recognisable interest in the goods until the new act occurred, questions of notice were also irrelevant.

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19. See *Lunn* v. *Thornton*, supra n. 14.
20. Supra, n. 14.
21. (1854) 10 Exch. 298; 156 E.R. 457.
22. (1854) 10 Exch. 308; 156 E.R. 461-462.
23. (1856) 5 El. & Bl. 830; 119 E.R. 690.
24. See also *Allatt* v. *Carr* (1858) 27 L.J. Ex. 385.
25. It has been seen that *Lunn* v. *Thornton* held the mere bringing of the property on to the grantor's premises was not enough to constitute a new act. Yet, in *Reeves* v. *Barlow* (1884) 12 Q.B.D. 436, it was held that such bringing on would be enough when it was the new act that had been expressly agreed upon. The reasoning in the latter case is questionable but it was adopted by the High Court of Australia in *Akron Tyre Co Pty Ltd* v. *Kittson* (1951) 82 C.L.R. 477.

The Intervention of Equity

Fortunately for the commercial community of the mid-nineteenth century, Equity intervened and remedied some of the defects of the common law regarding securities over future goods. The Courts of Chancery recognised that future property could be the subject of a valid assignment for value. An assignment of the freight of a ship in respect of a voyage not yet undertaken was good in equity.[26] So also was an assignment of the future cargo of a ship[27] and even the assignment in general of freight to be earned.[28]

These cases were sustained by the House of Lords in *Holroyd* v. *Marshall*,[29] where a debtor mortgaged certain machinery in his mill to a trustee for his creditor, the deed providing that all the machinery which should be placed in the mill either in addition to or in substitution for the original machinery should be subject to the mortgage. The debtor sold some of the original machinery and bought new machinery to replace it. Subsequently a judgment creditor seized some of the new machinery and the question arose whether the secured creditor, who had never taken possession, had a prior claim. It was held that although there had been no "new act", he did have a prior claim on the ground that "immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees."[30]

The rule was thus finally established that in equity an assignment for value of future goods, although it cannot operate as an *immediate* assignment, operates as a contract to assign the goods when later acquired, and at the time of such acquisition the equitable title passes which will prevail over all except purchasers for value without notice.[31] To this, however, must in view of the later decision in *Tailby* v. *Official Receiver*[32] be added the requirement that the property should be initially described with sufficient particularity to enable identification of the property when it is acquired. It was not a stringent requirement since it was sufficient that the future property fell within general descriptive words, e.g. "all future stock-in-trade".

The equitable doctrine remedied some of the defects of the common law regarding securities over future goods, but the protection given to the secured lender was not complete. A subsequent purchaser or mortgagee of the legal title who had no notice of the equitable interest

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26. *Curtis* v. *Auber* (1820) Jac & W. 526; 37 E.R. 468; *In re Ship Warre* (1817) 8 Price 270; 146 E.R. 1200.
27. *Langton* v. *Horton* (1842) 1 Hare 549; 66 E.R. 1149.
28. *Douglas* v. *Russell* (1831) 4 Sim. 524; 58 E.R. 196.
    Lindsay v. *Gibbs* (1856) 22 Beav. 522; 52 E.R. 1209.
29. (1862) 10 H.L.C. 191; 11 E.R. 999.
30. 10 H.L.C. 211; 11 E.R. 1007 per Lord Westbury.
31. The grounds upon which the decision in *Holroyd's* case rested were not very clearly stated and have given rise to some difficulties; see, e.g. Keeler, "Some Reflections on *Holroyd* v. *Marshall*" (1909) 3 Adel. L. Rev. 360.
32. (1888) 13 App. Cas. 523.

would prevail over the equitable mortgagee,[33] and since, before the property was acquired by the mortgagor, the mortgagee's rights were purely contractual, they would be defeated by the mortgagor becoming bankrupt before the goods were acquired.[34] Of course, the legal title could only be obtained by the mortgagee after some "new act" of the type outlined earlier.

Effect of the Early Bills of Sale Acts

One of the serious dangers which resulted from the erosion of the rule in *Twyne's* case was that even a bona fide mortgagee of chattels, by leaving them in the possession of the mortgagor, facilitated frauds by the mortgagor on others. There being no title deeds which a mortgagee could take to prevent further dealings by the mortgagor, the latter's possession of chattels enabled him to represent that he was still the owner. As he remained the ostensible owner, he was able to give the appearance of being in good circumstances and thus obtain false credit from others.

The only provision dealing with this problem was the reputed ownership clause of the Bankruptcy Acts, but this clause gave inadequate protection because it applied only in bankruptcy. It did nothing to protect creditors from giving excessive credit in the first place, although it did provide some consolation by allowing them to share in the proceeds of the chattels on the debtor's bankruptcy. The Bills of Sale Act 1854 was enacted mainly as an attempt to solve this problem and the solution created was to avoid bills of sale of personal chattels not entered in a public register, whether absolute or conditional, as against the grantor's assignee in bankruptcy, assignees for the benefit of creditors and persons seizing by way of execution, provided that the chattels were in the possession or apparent possession of the grantor.

How did this Act affect securities over future goods? The key definition for our purposes is that of "personal chattels" in section 7 which provided:

> "The expression 'personal chattels' shall mean goods, furniture, fixtures and other articles capable of complete transfer by delivery . . ."

In considering the application of this definition it is necessary to look at the relevant law at the time the Act was passed.

It has been seen that, subject to limited exceptions, at common

33. *Joseph* v. *Lyons* (1885) 15 Q.B.D. 280; *Hallas* v. *Robinson* (1885) 15 Q.B.D. 288. It was however observed by Lord Chelmsford in *Holroyd* v. *Marshall* 10 H.L.C. 228, 11 E.R. 1013 that if the mortgage was registered pursuant to the Bills of Sale Acts the register would provide sufficient notice; see post, test to n. 35.
34. *Re Jones, ex parte Nichols* (1883) 22 Ch. D. 782, but only when the goods were acquired as a result of the trustee's election to carry on the business; see Williams on *Bankruptcy* (18th ed. 1968) 82-83.

law future goods could not be effectively assigned and that in equity the assignment of such goods was not generally recognised until 1862 in *Holroyd* v. *Marshall.* It would therefore appear that, despite the Chancery decisions which preceded *Holroyd's* case, mortgages of future goods were probably not within the contemplation of the legislature in 1854. However, in *Holroyd's* case Lord Chelmsford observed:

> "It was argued that this Act was intended to apply to mortgages of actual existing property only, and it probably may be the case that sales of future property were not within the contemplation of the legislature; but there is no grounds for excluding them from the provisions of the Act; and upon the question of notice, the register would furnish the same information of the dealing with future as with existing property . . ."[35]

However, in 1876, this view was implicity rejected by both the Divisional Court and the Court of Appeal in *Brantom* v. *Griffits*[36] where it was held that growing crops were not "personal chattels" because the words "capable of complete transfer by delivery" meant capable *at the time the bill was executed.* If this decision was correct,[37] all bills of sale of future goods were outside the ambit of the 1854 Act.

The Bills of Sale Act 1854 was replaced by the Bills of Sale Act 1878. One change made by this Act was the extension of "personal chattels" by s. 4 to include "growing crops", thus reversing the actual decision in *Brantom* v. *Griffits.* However, the words "capable of complete transfer by delivery" were not amended and Lord Macnaghten in *Thomas* v. *Kelly*[38] inclined to the view that these words meant capable of transfer at the time the bill of sale was executed "because the decision in *Brantom* v. *Griffits,* which was given in 1876, was standing unchallenged when the Act of 1878 was passed, and obviously engaged the attention of the framers of that Act". He also regarded Lord Chelmsford's remarks in *Holroyd* v. *Marshall* as *obiter*. Although Lord Fitzgerald in the same case was of the contrary view,[39] he gave no reasons and Lord Macnaghten's opinion as to the effect of the 1878 Act on bills of sale of future goods is to be preferred.[40] Lord Macnaghten did not advert to the following addition to the definition of bill of sale made by the 1878 Act:

> "any agreement, whether intended or not to be followed by

35. 10 H.L.C. 227-228; 11 E.R. 1013.
36. (1876) 1 C.P.D. 349; (1877) 2 C.P.D. 212 (C.A.).
37. The reasoning of both courts was unconvincing. Neither satisfactorily explained why goods capable of complete transfer by delivery should be limited to those *presently* deliverable.
38. (1888) 13 App. Cas. 506, 519.
39. Ibid., 514-515.
40. Lord Macnaghten did however confuse the situation later in his judgment by distinguishing two categories of future goods for this purpose — goods not in existence at all and those in existence but not yet owned by the grantor. In his view the latter now came within the definition of "personal chattels"; see post, text following n. 59.

> the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred"

but it seems that this amendment was designed only to codify the earlier authorities[41] holding that written agreements to mortgage or charge *existing* chattels were bills of sale.[42]

Despite this uncertainty as to whether future goods were personal chattels and therefore whether a bill of sale over future goods was required to be registered, it was clear that the Act did not *prohibit* securities over future goods. Moreover, it is suggested that the observations in the above cases must be confined to the situation where the bill of sale comprised *only* future goods, and that where the bill of sale secured both present *and* future goods, as would have been the usual case, it was required to be registered. Since only in the very rare situation would a lender have been content with a security solely over future goods, in practice all bills of sale comprising future goods had to be registered.[43] Indeed, it is further suggested that Lord Chelmsford's statements in *Holroyd's* case were clearly reconcilable with the decision in *Brantom's* case since, in the former case, the bill secured present *and* future goods.

The Bills of Sale Amendment Act 1882

By requiring public registration of bills of sale, the Acts of 1854 and 1878 did to some extent achieve the desired object of warning creditors from giving excessive credit based on a debtor's possession of property. However, they were unable to prevent bills of sale from being fraudulent in other respects. No restrictions were imposed upon the *type* of property which might be the subject of a bill of sale nor on the *terms* which a grantee might impose on his debtor. All that was required was registration. Also, as a result of the repeal of the usury laws in 1854,[44] there were no longer any other legal restrictions upon the terms an unscrupulous moneylender might impose on a needy debtor.

As far as the taking of bills of sale over personal property was concerned, no abuses of this freedom from restrictions were immediately felt. This was probably due to the fact that under the Bills of Sale Act 1854, registration of a bill did not constitute such a publication of the change of ownership as to protect the grantee from the operation of the reputed ownership clause of the Bankruptcy Acts.[45] Bills of sale did not, therefore, greatly appeal to the moneylender seeking

41. E.g. *Ex parte Mackay* (1873) 8 Ch. App. 643; *Edwards* v. *Edwards* (1876) 2 Ch. D. 291.
42. See, contra, *Malick* v. Lloyd (1913) 16 C.L.R. 483, 491-492 and *King* v. *Greig* [1931] V.L.R. 413, 440.
43. See, e.g. *Baghott* v. *Norman* (1880) 41 L.T. 787.
44. Act to Repeal the Laws Relating to Usury 1854 (17 & 18 Vict., c. 90).
45. *Re Fairbrother, Ex parte Harding* (1873) L.R. 15 Eq. 223.

maximum security for his advances, for he could lose his security in the event of the grantor's bankruptcy. When the bill of sale was used, the absence of protection from the operation of the reputed ownership clause probably would have had the effect of keeping interest charges at a reasonable rate. If interest was too high and the debtor was adjudicated bankrupt, the moneylender ran the risk of losing his security.

However, the Bills of Sale Act 1878 changed the law in this respect. Section 20 excluded chattels comprised in a registered bill of sale from the sweep of the reputed ownership clause. This provision was supposedly designed in the interests of trade and had the approval of the Chambers of Commerce in the country.[46]

The moneylenders must have realised the enormous new value of the bill of sale as a security device, for the number of registered bills increased from 13,220 in 1877 to 51,000 in 1880.[47] Although there was an agricultural depression in England in 1880, a considerable part of this increase must have been due to the effect of the 1878 Act which, in the absence of usury laws, enabled unscrupulous moneylenders, in comparative safety behind the security of bills of sale, to extract extortionate bargains from needy debtors. They no longer had to concern themselves with the ability of debtors to meet their high interest rates. So long as their security was adequate and registered under the Bills of Sale Act, they were in an impregnable position. Apart from high interest rates and oppressive terms,[48] the moneylenders used a form of security covering present and future chattels which bound virtually all the debtors' future assets to the obvious detriment of general trade creditors as well as the debtor himself.

The Bills of Sale Act (1878) Amendment Act 1882 was enacted to remedy this situation, its primary object being to restrict and

46. De Villiers, *Real and Personal Property* (1901) 226.

47. *Hansard,* March 1882, col. 1401 per the Attorney-General, Sir Henry James. It was also significant in his view that of these 51,000 bills, three quarters were given to secure debts of less than £50.

48. "It was quite a common thing to find bills of sale given for . . . sums of two pounds and upwards, enabling the grantee to take everything the grantor possessed, *not* excepting his bedding, clothing and tools. The rate of interest usually ranged between seventy and ninety per cent, and in one admitted case it was four hundred per cent. The printed forms circulated by the lowest and most unscrupulous class of moneylenders contained lists of conditions scarcely possible of fulfilment, and forming a series of ingenious traps for poor and ignorant borrowers . . . Usually the borrower was beguiled into a soothing belief that exact punctuality would not be insisted upon: hence the seizures were frequently made for the first instalment, and everything comprised in the bill of sale ruthlessly sold at a sham auction." De Villiers, op. cit., note 65, 228-229. That this view was hardly exaggerated is borne out by a perusal of the Report of the Parliamentary Select Committee on the 1882 Amendment Bill — Brit. Parl. Papers VIII.1.

regulate the taking of bills of sale by moneylenders.[49] The policy of the Act was much more akin to a Moneylenders Act than the previous Bills of Sale Acts.[50] However, the 1882 Act had another object apart from protecting the needy debtor; that of protecting general trade creditors from the moneylenders' abuses in connection with the enforcement of after-acquired property clauses. These after-acquired property clauses, which were of the type sanctioned by the House of Lords in *Holroyd* v. *Marshall,* not only deprived the debtor of any freedom as to the disposal of his future goods,[51] but in practice were used so as to seriously prejudice the rights of the debtor's other creditors. The latter would usually have dealt humanely with the debtor and, after having given him credit, often found the goods purchased with this credit snatched away by the professional usurer under an after-acquired property clause. In fact the witnesses before the Select Committee considering the Amendment Bill variously estimated that eighty to ninety-nine per cent of the bills registered affecting after-acquired property were fraudulent in that they were executed with the object of defrauding general trade creditors.[52]

One would have thought that registration of the bill of sale should have been regarded as providing notice to creditors of the moneylender's power to seize the debtor's future goods and that they should have been thereby warned of the risk of advancing further credit. Although no mention of this point was made before the Select Committee, registration was obviously not regarded as sufficient to negate fraud. This emphasises the point that *the very use of after-acquired property clauses was not regarded as fraudulent in itself, but rather the methods employed by moneylenders in enforcing their security.* Although the moneylender, in theory, could only recover the amount of his advances plus interest, it was quite common for sham auctions to be conducted with the result that he was often overpaid to the obvious detriment of other creditors.

The Select Committee accordingly recommended that apart from repealing s 20 of the 1878 Act (which deemed chattels comprised in

49. The following comments of Attorney-General Sir Henry James further illustrate the point: He said that "he would admit that he was waging war against a class of men — the usurers. Not only from the evidence given to the committee, but from a general knowledge, he regarded these men as absolute enemies of the poor men — they were perfect pests of society. Unfortunately they directed their efforts to those who could not protect themselves, but who would be protected by the legislation now proposed"; *Hansard,* March 1882, col. 1401.
50. *See Manchester, Sheffield and Lincolnshire Rly Co.* v. *North Central Waggon Co.* (1883) 13 App. Cas. 554, 560 per Lord Herschell.
51. The Secretary of the Associated Chambers of the United Kingdom when asked whether small traders or farmers were sometimes tided over a period of difficulty by loans securing present and future stock, replied: "I think these cases are so few, and the evils so great, that the one does not compensate for the other; for one that is helped over the stile I believe there are fifty ruined". Select Committee on Bills of Sale Act (1878) Amendment Bill Report, Brit. Parl. Papers (1881) VIII 1, 75.
52. Ibid., 72-73.

a registered bill of sale not to be "in the possession, order or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act 1869") and providing a set form to which all security bills of sale must conform, one way of giving protection to a debtor's general creditors and restricting the virtual monopoly which a lender could gain over a needy debtor, was to provide that after-acquired property should not pass under a bill of sale and "that the law as laid down in *Holroyd* v. *Marshall* should be altered."[53]

Did the 1882 Act achieve the desired effect in this respect? It did not amend the definition of "personal chattels" and, in view of the earlier discussion, it can be concluded that securities over future goods *only*, would probably not have been affected by the 1882 Act provided they conformed to the equitable doctrine expounded in *Holroyd* v. *Marshall*. However, a security covering only future goods would not have been satisfactory to a lender and it does not appear that such a security was ever used. The more feasible arrangement of a security over present *and* future goods obviously had more appeal to the lender but its validity was affected by the 1882 Act.

The extent of the avoidance of a bill of sale as regards future chattels caused great difficulties. It has been seen that one of the objects of the Act was to restrict a lender's ability to take security over future goods, not only for the protection of trade creditors, but also for the protection of the debtors themselves. One would therefore have thought a bill of sale affecting present and future goods would have been rendered absolutely void in so far as the latter goods were concerned but, on the face of the Act, this was not achieved. Section 5 provided that "except as hereinafter mentioned, a bill of sale shall be void, *except as against the grantor*, in respect of any personal chattels specifically described in the schedule thereto of which the grantor was not the true owner at the time of the execution of the bill of sale".[54] It would appear therefore that an attempt to mortgage after-acquired chattels did not invalidate the bill of sale in respect of those chattels as between grantor and grantee.

However, the provisions of ss. 4 and 9 complicated matters. Section 4, which laid down the requirement that every bill of sale must have a schedule containing an inventory, provided that a bill of sale was only to be effective in respect of the personal chattels which were specifically described in the schedule and it was to be void in respect of any personal chattels not so specifically described, except as against the grantor. In contrast to this qualified avoidance,, s. 9 rendered a bill of sale absolutely void unless it was in accordance with the statutory form and this form accommodated only "chattels and things specifically described". The House of Lords in *Thomas* v. *Kelly*[55] interpreted

53. *Hansard*, March 1882, col. 395.
54. Section 6 provided an exception to this section as regards growing crops and substituted fixtures, plant or machinery.
55. (1883) 13 App. Cas. 506.
56. Ibid., at 512 (per Lord Halsbury) and 514 (per Lord Fitzgerald).

this phrase as mandatorily requiring the goods to be specifically described and "specifically" had the same meaning as in s 4. Moreover, the qualified avoidance of after-acquired property clauses in s. 5 also applied only to personal chattels *specifically described* and since after-acquired property could not be specifically described[56] there was an apparent conflict, not only in s. 5 itself but also in all the above provisions as to the extent of avoidance of a bill of sale covering after-acquired property.

Professor Riesenfeld[57] cites *Thomas* v. *Kelly* as authority for the proposition that a bill of sale covering after-acquired property being incapable of being specifically described, violated s. 9 and was therefore void also against the grantor, the Act in this roundabout fashion having achieved the expressed object of its framers. However, this is not entirely correct. Lord Macnaghten,[58] albeit *obiter*, did attempt a possible solution of the dilemma which might give some effect to the rights expressly reserved by s. 5 to the grantee against the grantor. He said that the apparent contradiction in the section could be resolved by distinguishing between chattels in existence at the time of the exectuion of the bill of sale but yet to be acquired by the grantor, and chattels which are not then in existence at all. The former after-acquired chattels would be capable of being specifically described and if they were so described, the bill was valid *inter partes*. In other words, after-acquired chattels which are not, or are not capable of being specifically described are caught by s. 9, whilst s. 5 merely covers after-acquired chattels that can be and are specifically described.

However, this artificial solution suffers from a number of difficulties.[59] One difficulty not pointed out previously is that in his judgment Lord Macnaghten used the term "personal chattels" in two conflicting senses. As noted earlier, he regarded "personal chattels", following *Brantom* v. *Griffits*, as including only those capable of transfer by delivery *at the time of the execution of the bill of sale*. In his view, therefore, mortgages solely of future chattels were excluded from the operation of the Act and for this purpose no distinction was drawn between chattels not in existence at all, and those in existence but not yet owned by the grantor. However, in attempting to define the situations when s. 5 operated apart from s. 9 he stated, in effect, that "personal chattels" does include those in existence but not yet owned by the grantor. In other words, he has here decided that "capable of transfer by delivery" refers not to the grantor's personal control over or ability to deliver the chattels but simply to whether they are *deliverable*, conveniently leaving out for the purpose of his solution the words "at the time of the execution of the bill of sale". In order to have been consistent he should have held in the first place that

57. *The Quagmire of Chattels Securities in New Zealand,* Legal Research Foundation Occasional Pamphlet No. 4, (1970), 27, note 38.
58. (1888) 13 App. Cas. 506, 522.
59. See Sainsbury, "The True Ownership Clause in the Bills of Sale Act 1882", (1924) 40 L.Q.R. 465.

Brantom v. *Griffits* was restricted to securities over goods not in existence and that mortgages solely of goods in existence but not yet owned were bills of sale. Even this approach was probably not open to him since *Brantom's* case concerned growing crops, i.e. good in existence but not deliverable!

Despite the fact that the 1882 Act still remains in force, the extent of the avoidance of a bill of sale affecting future goods has never been clarified. This is evidence that the Act did at least achieve the desired effect of discouraging the taking of bills of sale over future goods by lenders. Even if such a security was valid *inter partes* no lender could afford the risk of losing his security to his debtor's assignee in bankruptcy or execution creditors. Lenders and their legal advisers began to seek new devices which would enable securities to be taken over future goods.

The Development of the Floating Charge

The security device which was fastened upon was a type of equitable charge later known as the "floating charge". Once recognised by the courts, it enabled an incorporated company to give a security over the whole or a prescribed part of its undertaking or assets, including its future goods, but without preventing the company from dealing with them in the ordinary course of its business. Three factors influenced the development of this security: (a) the inapplicability of the Bills of Sale Acts to corporate debentures; (b) the consequent realisation of the new potential of the equitable doctrine of *Holroyd* v. *Marshall;* and (c) the fact that the reputed ownership clause of the Bankruptcy Act did not apply to companies.

It has been seen that after *Holroyd* v. *Marshall* lenders were able to utilise a form of security that covered present and future chattels and that, as a result of abuses by moneylenders especially in the enforcement of this type of security, the Bills of Sale Amendment Act 1882 was passed which effectively precluded the granting of securities over future goods. However, s. 17 of that Act provided that it did not apply to "any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the . . . goods, chattels, and effects of such company". Also s. 4 of the 1878 Act had excluded from the definition of personal chattels "interests in the property of incorporated or joint stock companies."[60] Although these provisions appeared to exclude company securities from the purview of the Bills of Sale Acts, there were many conflicting opinions in the cases as to the extent of their exclusion until finally it was held in *Re Standard Manufacturing Co.*[61] that mortgages or charges given by any incorporated company were not subject to the provisions of the Bills of Sale Acts.

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60. There had also been a similar provision in s. 7 of the Bills of Sale Act 1854.
61. [1891] 1 Ch. 627.

It would appear that the reason behind the enactment of s. 17 was that debentures issued by incorporated companies as distinct from other corporations and individual traders were not considered to be liable to the same mischief of oppressive bills of sale at which the 1882 Act struck. It was not so clear that company debentures were exempted from registration under the 1878 Act, however Bowen L.J., delivering the judgment of the Court of Appeal in the *Standard Manufacturing Co.* case, held that debentures were not within the mischief of that Act either, since it was designed to prevent secret charges and debentures already required registration:

> "At the date of the Bills of Sale Act 1878, debentures which charged the property of such companies were well known in the commercial world. Having regard to the provisions already made by [the Companies Act 1862] for their registration, such documents could hardly be described as secret, or as belonging to the class of documents by which frauds were perpetrated upon creditors by secret bills of sale."[62]

This latter explanation for the exemption of company securities from the requirements of the Bills of Sale Act 1878 is perhaps more convincing now than at the time it was given since company securities now require *public* registration. In 1891, s. 43 of the Companies Act 1862 required the *company* only to keep a register at *its* office of the details of its mortgages and charges, and the right of inspection was limited to creditors or members of the company. In fact, public registration of corporate debentures was introduced by the Companies Acts Amendment Act 1900 probably as a result of the deficiencies in the system highlighted by the *Standard Manufacturing* decision.

Allied to this development was the prior recognition of the potential of the equitable doctrine of *Holroyd* v. *Marshall* to enable inclusion in corporate debentures of future goods. After some initial reluctance by the courts,[63] the validity and effect of a floating charge securing both the present and future property of a company was finally recognised in *Re Panama, New Zealand and Australian Royal Mail Co.*[64] In that case the company had issued debentures charging its "undertaking" with payment of the debt and it was held that the word "undertaking" was sufficient to cover all the present and future property of the company. The charge was effective and would operate by way of a floating security. Thus, when the company was wound up, the charge became a specific charge on the assets which it then owned and accordingly the debenture holders ranked for payment ahead of the general creditors.

62. Ibid., at 646.
63. See *King* v. *Marshall* (1864) 33 Beav. 565, 55 E.R. 488; *Re Marine Mansions Co.* (1867) L.R. 4 Eq. 601; *Re New Clydach Sheet and Bar Ion Co.* (1868) L.R. 6 Eq. 514.
64. (1870) L.R. 5 Ch. App. 318.

As a result of the decisions in the *Panama* and *Standard Manufacutring Co.* cases and subsequent cases[65] recognising the validity of the floating charge the latter became an immensely popular security device because it enabled the incorporated trader to give an effective security over its present and future property. The charge was described as "floating" because it hovered like a cloud over the whole of the particular classes of assets, present and future, included in it, but without preventing the mortgagor from disposing of them in the ordinary course of business until some event occurred to cause it to crystallize. What made the security more appealing from the lender's point of view was the fact that the reputed ownership clause of the Bankruptcy Acts did not apply to companies.[66]

The incorporated trader has remained in a favoured position in so far as the giving of security over its future goods is concerned. However, although the floating charge has remained the most common instrument for business financing and few difficulties have arisen in practice, it is far from the ideal device for giving security over future goods. Apart from the fact that it can be granted only by companies, the major disadvantage is that it does not attach specifically to the goods until an event has occurred, usually the appointment of a receiver, which makes the charge "crystallize" so that in the meantime the debtor may have depleted the security or intervening encumbrancers taken priority.[67]

II. NEW ZEALAND DEVELOPMENTS

Early Statutes

By 1858 it became apparent that the common law rules relating to future goods were commercially inconvenient in a new colony striving to establish and develop export markets. In the early days of the colony staple exports were wool, whale oil and whale bone. Great inconvenience was frequently experienced because of the unavailability of ready cash to finance the development of the wool-growing businesses and whaling expeditions with the result that the producing power of the colony was being materially retarded.[68] Often the only security which the wool grower or whaler could offer to a proposed lender was the future produce of his labours and, as it was not thought possible as the law then stood to give security over future goods, it was too risky for a lender to finance these new ventures. Although a Bills of Sale Registration Act had been enacted in 1856,

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65. See, e.g. *Illingworth* v. *Houldsworth* [1904] A.C. 355; *Evans* v. *Rival Granite Quarries Ltd* [1910] 2 K.B. 979.
66. The Bankruptcy Act 1914 (U.K.) does not apply to companies and the reputed ownership clause (s. 38(c)) is not among the sections incorporated by reference into the winding-up provisions of the Companies Act 1948.
67. But see the writer's article, "Automatic Crystallisation of a Floating Charge [1972] N.Z.L.J. 330.
68. See (1856-1858) N.Z. Parl. Debates, 382.

it was undoubtedly not thought to affect the common law position with regard to future goods.[69]

As a result, the Wool and Oil Securities Act 1858 was passed to enable proprietors of sheep and whaling stations to give valid securities over wool of the next ensuing clip, or oil or bone to be caught in the next ensuing whaling season. Upon registration of the security at the Provincial Supreme Court office the lender became entitled to the future produce mentioned therein and was deemed to be the owner thereof and in possession of the same,[70] thus achieving exemption of the produce, once it came into existence, from the reputed ownership clause of the English Bankruptcy Act (incorporated into New Zealand law by the English Laws Act 1858). This exemption, which was thought not to be available to ordinary bills of sale registered pursuant to the Bills of Sale Registration Act 1856, was probably designed as a further encouragement for lenders to advance on these securities.

The growth of wheat on a large scale as an export commodity led to the Agricultural Produce Lien Act 1870 which legalised the granting of securities over certain yearly crops. Although the provision for such a security was not a great innovation (a security over growing crops was valid at common law under the "potential existence" doctrine) it was undoubtedly thought not only desirable that such securities should be registered so as to give public notice to other creditors, but also that lenders should be encouraged to advance on this type of security by exempting growing crops from the reputed ownership clause. This Act was replaced by the Agricultural Produce Lien Act 1871 which enabled the security agreement to provide for the giving of future advances.

The Mortgages of Stock Registration Act 1868 was a further measure passed to enable the development of another of this country's primary industries. Section 6 provided for the registration of stock mortgages within twenty-one days and, upon registration, the possession of the mortgagor was, in line with the other special securities Acts, deemed to be the possession of the mortgagee. Every such registered mortgage was, unless the contrary was expressed therein, deemed by s. 8 to include not only the stock specifically mentioned and the increase and progeny of such stock, but also all stock branded with the specified brand or brands belonging to the mortgagor and situated at his stock station. Since s. 7 also allowed the security agreement to include provision for future advances, it can be seen that there is an early precedent in New Zealand for what is now regarded as an essential feature of any law regulating securities over a dealer's stock-in-trade — the "cross-over" security, whereby present and future property becomes security for present and future advances. Indeed, it is interesting to note that one Member of Parliament, during the debate on the Bill,

69. The Bills of Sale Registration Act 1856 had, with a few minor exceptions, been copied from the English Bills of Sale Act 1854.
70. Section 1.

queried the distinction between chattels possessed by a storekeeper for sale and sheep possessed by a stock owner. He did, however, assent to the different treatment of the latter because "as a matter of expediency in this colony, and seeing the large interest involved, it was important to enable that interest to develop satisfactorily."[71]

Application of the Common Law and Equity Rules

Apart from the special enactments outlined above, the granting of securities over future goods fell to be regulated by the common law and equity rules outlined earlier. Thus, in 1870 it was held by Chapman J. in *Driver* v. *Pitt*,[72] applying *Holroyd* v. *Marshall*, that where a duly registered bill of sale by way of mortgage over a farmer's stock and implements included a provision making all after-acquired stock and implements subject to the security, the latter after-acquired property passed in equity to the grantee immediately it was placed upon the farm. Accordingly, the grantee's equitable interest prevailed over a subsequent rival equity. The question whether a grantee could assert a legal title to future goods came before the New Zealand courts in *Bathgate* v. *The Bank of Otago Ltd.*[73] It was held that where a bill of sale contained a power or licence to seize after-acquired property and that power was exercised, the seizure was a sufficient "novus actus" to confer a legal title which prevailed against the assignee in bankruptcy of the grantor. This decision was obviously in line with the English authorities such as *Congreve* v. *Evetts*[74] which established that the seizure of property by a grantee was sufficient to negate the application of the original common law rule. In 1877 a similar conclusion was reached by Johnston J. in *Matson* v. *Craig*.[75]

As a result of these decisions, it became common practice to insert in bills of sale powers enabling the grantee on the grantor's default to seize and realise all property of the grantor situated on his premises. Although this was far from an ideal method of obtaining security over a debtor's future goods since the seizure had to be executed prior to the intervention of the debtor's other creditors, it did give a certain measure of additional protection to the secured creditor who kept a watchful eye on his debtor's affairs. Indeed, it was found in many instances after the decision in *Matson* v. *Craig* in 1877 that one creditor had, a short time before bankruptcy, taken possession of everything under such a bill of sale and defeated the claims of the general body of creditors.

Although the grantee taking possession of the after-acquired property could obviously keep only enough of the proceeds of sale

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71. (1868) 2 N.Z.P.D. 121.
72. (1870) Mac. 812; The security agreement in this case, since it included farming implements, was outside the Mortgages of Stock Registration Act, 1868.
73. (1872) Mac. 914.
74. (1854) 10 Exch. 298; 156 E.R. 457.
75. (1878) 3 N.Z. Jur. (N.S.) S.C. 33.

to cover the amount of the outstanding advance plus interest, and to that extent was not receiving undue protection, the general creditors suffered in two respects. First, such a seizure was valid even though the bill of sale had never been registered. Under the Bills of Sale Registration Act 1856 an unregistered bill of sale remained valid inter partes, and was only void in respect of chattels in the grantor's possession or apparent possession at the time of intervention by execution creditors, assignees for the benefit of creditors, or the assignee in bankruptcy of the grantor. Thus, general creditors had no way of knowing that either an advance had been made or that there was a power to seize all subsequent property. Secondly, since these bills of sale were usually executed over specific items of a trader's stock which would subsequently either have been sold or depreciated in value, the grantee was able to defeat the rights of other creditors by deferring seizure until the grantor had bought upon credit a quantity of goods sufficient in value to pay the outstanding debt. The security would then be enforced and the ordinary unsecured creditors left with nothing.

Intervention by the Legislature

The Chattels Securities Act 1880 consolidated the special statutes dealing with securities over wool, oil, stock and crops with the Bills of Sale legislation, but no steps were taken to deal with the problems that had arisen in relation to future goods. However, as a result of agitation by some Chambers of Commerce, the Chattels Securities Act 1880 Amendment Act 1883 was passed. This Act was based on the English Bills of Sale Act 1878 Amendment Act 1882. It stipulated in s. 4 that every bill of sale must set forth a full true and clear statement of the consideration; otherwise it was void. Most important for present purposes, s. 5 provided that every bill of sale should be valid only in respect of the personal chattels comprised in the schedule, otherwise it would be void and of no effect (except so far as it related to substituted trade fixtures, machinery, plant and appliances); and s. 6 provided that no bill of sale should be valid or have any effect as regards any goods or chattels acquired by the grantor after execution of such bill of sale.

These provisions effectively eliminated the possibility of making advances upon the security of present and future stock-in-trade, and the practice of inserting a general power to seize and sell future property in bills of sale was discontinued. A bill of sale was to be absolutely void as regards the grantor's future goods, i.e. in respect of those goods it was not only void as against third parties but also as between grantor and grantee.

Why did the New Zealand legislature provide that a bill of sale should be void inter partes as well as against third parties in respect of future goods? It has been seen that the object of the English Act of 1882 was, not only to protect general trade creditors, but also to prevent impecunious debtors from being bound by complicated

documents which they were often unable to comprehend, and to protect them from mortgaging away all their future assets for the purpose of present credit. Now, the object of the New Zealand Act of 1883 was mainly to protect general trade creditors. This is so despite the fact that the protection did not go so far as the English Act of 1883. That Act had abolished s. 20 of the 1878 Act with the result that registered bills of sale were again subject to the operation of the reputed ownership clause of the Bankruptcy Act 1869. Although the New Zealand Act of 1883 made no mention of this, s. 82 (2) of the Bankruptcy Act 1883 excluded the operation of that clause in relation to registered securities.

That the object of the Chattels Securities Amendment Act 1883 was not explicity to protect the debtor against usurious terms imposed by moneylenders is evidenced by the fact that no mandatory form of bill of sale was prescribed, non-compliance with which would render the whole bill void. Indeed, it would appear that the social conditions and activities of moneylenders in New Zealand at the time did not necessitate such debtor protection. One would therefore have thought that bills of sale, in so far as they affected future goods, should have remained valid *inter partes*.

A possible explanation of why bills of sale were rendered void inter partes as well as against third parties in so far as they affected future goods, could arise from the fact that the method employed by lenders in England for securing a debtor's future goods was different from that employed in New Zealand. In England, prior to 1882, lenders used after-acquired property clauses of the *Holroyd* v. *Marshall* type, i.e. the security agreement specifically included the debtor's future goods, whereas, in New Zealand, the form of bill most commonly used only secured present goods *but* with a power to seize future goods. This difference in practice was not merely one of form. In the former case, if the only object of an Act was to protect trade creditors, the validity of the security over future goods inter partes could and should be left untouched. In the latter case, however, it would be necessary in order to protect third parties, to render the bill void even inter partes since a valid seizure conferred a *legal* title; if such a seizue was to be valid as against the debtor, the legal interest would *a fortiori* have to prevail over the subsequently created rights of third parties.

In view of these considerations, it is submitted that the New Zealand legislature probably did not have in mind the complete avoidance of after-acquired property clauses and, by using sweeping language, unwittingly prevented this form of security from being valid at least inter partes. However, even this partial validity would have been unsatisfactory from the lender's point of view since he could not afford the risk of losing his security to the debtor's assignee in bankruptcy or other creditors.

Finally on the 1883 Act, it is important to note that, *as in England*

in 1882, it was not so much the inherent nature of securities over future goods which demanded interference by the legislature, but rather the abuses by lenders in enforcing their securities.

In 1886, it was decided by the Court of Appeal in *Reid* v. *Official Assignee of McCallum*[76] that the provisions of the 1883 Amendment Act applied also to the special securities over stock, wool, oil and crops. It had been argued in that case that the Amendment Act could only relate to bills of sale other than these special securities. It was said, for example, that the provisions making the bill of sale a security for only those chattels which are owned by the grantor and specified in a schedule, were inconsistent with s. 14 of the principal Act which gave the grantee the benefit of all stock on the station bearing the specified brand or brands. The Court held, however, that the provisions of the 1883 Act were equally needed in the case of a stock mortgage as of any other bill of sale given as a security, and there was nothing in the principal Act which authorised the inclusion of after-acquired property in stock mortgages. The express provisions relating to after-acquired *branded* stock could be read as an exception to those relating to after-acquired chattels and limiting the operation of the instrument to chattels described in the schedule.

The legislature responded by enacting the Chattels Securities Act 1880 Amendment Act 1887, s. 3 of which provided that ss. three to seven of the 1883 Amendment Act were not to apply to the "special securities" — those affecting stock, crops, wool and oil. It was thought necessary to remove any uncertainty in the law and preserve their special treatment in the economic interests of the country.[77] However, it is submitted that the effect of the amendment was not merely to *preserve* the special treatment of these securities but to *strengthen* it. The legislature had never intended, for example, when enacting the special provisions relating to mortgages of stock, to allow the inclusion not only of future stock branded in the specified manner, but also *all* future stock, whether branded or not. It is suggested that the 1887 Act had made this possible.

In 1889 the law relating to chattels securities was recodified in the Chattels Transfer Act of that year. The special provisions relating to instruments over stock, wool and crops were maintained (ss. 34-41), but no mention was made of securities over whale bone and oil, presumably because they were considered redundant in view of the decline of the whaling industry. The provision concerning future chattels was reworded to read — ". . . 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." (s. 30). This provision merely adopted the English terminology of "true owner" and effected no change in the law; instruments attempting to secure present and future goods remained absolutely void in respect of the latter. Stock,

76. (1887) 5 N.Z.L.R. 68.
77. (1887) 57 N.Z.P.D. 812-815.

wool and crops were again exempted from the operation of this section (s. 31 (1)) and that which re-enacted the requirement of description of all chattels in a schedule (s. 29), as also were substituted fixtures, plant and trade machinery (s. 31 (2)).

In 1908, the law was again recodified[78] but no changes were made in the above provisions. Amending Acts of 1922 and 1923 slightly extended the scope of instruments comprising stock and modified the provisions relating to securities over wool,[79] but otherwise the law relating to instruments affecting future chattels remained the same until the Chattels Transfer Act 1924 which still remains in force.

The Chattels Transfer Act, 1924

Section 23 of this Act provides that every instrument shall contain a schedule of the chattels comprised therein and shall give a good title only to the chattels described, otherwise it is void to the extent and as against the persons mentioned in ss. 18 and 19[80] in respect of any chattels not so described. Section 24 renders an instrument void to the same extent in respect of any chattels which the grantor acquires or becomes entitled to after the time of the execution of the instrument.

Although these provisions again invalidated an instrument comprising future chattels, the instrument was no longer rendered totally void in respect of those chattels but remained valid *inter partes*. This was confirmed in *Re Franks*.[81] In that case, on the purchase of a drapery business, the buyer executed a bill of sale in favour of the vendor over the stock-in-trade which empowered the vendor, upon default, to seize "any chattels, stock-in-trade or goods the property of the grantor whether subject to this security or not." Upon default by the grantor, the grantee seized all the stock on the premises about four-fifths of which had been acquired subsequent to the execution of the bill of sale. The grantor was later adjudicated bankrupt and it was held that the grantee, having seized the after-acquired chattels prior to the grantee's bankruptcy, obtained a good title as against the Official Assignee.

Now, this was precisely the type of result the legislature had intended to and did avoid by enacting the predecessors of ss. 23 and 24 in 1883. It has been seen that it was necessary to render a power of seizure of future goods absolutely void in order to protect general trade creditors, but in 1924, as a result of rendering such a power valid *inter partes*, the legislature had occasioned the very abuses which it had intended to remedy when first enacting these provisions. However,

78. Chattels Transfer Act 1908.
79. Chattels Transfer Amendment Act 1922, ss. 3 and 4;
Chattels Transfer Amendment Act 1923, ss. 2 and 3.
80. Briefly, the Assignee in Bankruptcy of the grantor, assignee or trustees for the benefit of his creditors, a sheriff, bailiff and any other person levying execution pursuant to a court order.
81. [1934] N.Z.L.R. 886.

despite this change, the instrument by way of security has remained an inadequate device for securing future goods since any seizure has to be executed prior to the intervention of the grantor's other creditors.

With regard to the other method of securing future goods in an instrument — the after-acquired property clause — it is to be noted that by allowing such a clause to remain valid inter partes, the legislature had clearly expressed that its object was not to prevent the debtor in his own interests from mortgaging away his future property, but rather to protect other creditors.

Another limited exception to the prohibition against the granting of instruments over future goods was introduced by s. 4 of the Chattels Transfer Amendment Act 1931, which added a proviso to s. 24. In the case of an instrument expressed to be given as security for a loan to be expended in the purchase of certain chattels, the grantor is deemed to have acquired those chattels contemporaneously with the execution of the instrument. This provision was enacted to enable lenders supplying money for the purchase of certain chattels to take an immediate security therein without having to wait until they are in fact acquired and thus being forced virtually to rely for their security on the debtor's co-operation. In the absence of such a provision it would be necessary for the "purchase money" lender either to purchase the chattels himself and then resell to the debtor, or enter into some other credit arrangement with the vendor. Both these alternatives would be commercially inconvenient. It is, however, a very limited exception, as it applies only to specific chattels contemplated at the time of the loan. The chattels must still be described in the schedule, and more important, a security interest in future goods purchased from the proceeds of sale of other goods is not validated.

A more far-reaching exception to ss. 23 and 24 is provided by s. 26 which preserves the special treatment of livestock, wool and crops, and fixtures, plant and trade machinery. In 1931, "tractors, engines, machines, vehicles, implements and farming plant of every description described in such instrument and used upon or in connection with any land or premises specified in the instrument" were added as a further exception.[82] Thus, in respect of these categories of chattels, after-acquired property clauses are allowed.

The Act also retains the previous special provisions relating to securities over livestock, crops and wool; for example, in respect of livestock, not only can the parties create a security interest in *all* future livestock, but s. 29 provides that unless otherwise agreed, an instrument comprising livestock includes not only that described in the instrument but also all livestock, branded or marked in the specified way, which belong to the grantor and after the execution of the instrument are upon the land mentioned in the instrument. As a result of these special provisions, the instrument by way of security is an extremely workable method of conducting agricultural financing.

82. Chattels Transfer Amendment Act 1931, s. 5.

The Floating Charge in New Zealand

The Chattels Transfer Act 1889 followed the English Bills of Sale Amendment Act 1882 in excluding "debentures . . . issued by any company or other corporate body and secured upon the capital stock or chattels of such company or other corporate body" from the definition of "instrument".[83] Allied to this was the exclusion of "debentures and interest coupons issued by any . . . company or other corporate body" and "shares or interests in the capital or property of any company or corporate body" from the definition of "chattels".[84] Also, s. 78 of the Companies Act 1882 provided, like its English counterpart, that every limited liability company should keep a register of all mortgages and charges affecting the company's property, and that the register should be open to inspection by any member or creditor of the company.

Despite these apparently clear words, the New Zealand courts were puzzled as to the actual extent of the exclusion of company charges from the purview of the Chattels Transfer Act 1889, as had been the English courts (who were faced with similar provisions) until the decision in *Re Standard Manufacturing Co.*[85] In that case, it will be recollected, it was held that mortgages or charges granted by companies were outside the Bills of Sale Acts, and one would have thought the New Zealand courts would have had no hesitation in adopting this approach. However, in *Bank of New Zealand* v. *Walter Guthrie and Co. Ltd.*[86] Williams J. held that mortgages covering future chattels in the form of floating charges, executed by certain trading companies to secure debentures of an affiliated company, were not debentures and were therefore void as instruments to the extent that they related to future goods. In his view, a debenture was a document which either created a debt or acknowledged it, which was not the case here. There was no general exemption of instruments given by registered companies from the Act of 1889, only debentures. Furthermore, the exemption of interests in the property of any corporate body from the definition of "chattels" was limited to "shares and to interests which have been created in the property of a company and are vested in individuals"[87] and did not apply to any other interest in corporate assets. He rejected the policy reasons given in *Re Standard Manufacturing Co.* (that corporate debentures were well-known in the commercial world and that the Companies Act already required publicity to be given to corporate charges) as inapplicable to the New Zealand Act upon the somewhat flimsy ground that the latter, in contrast to the English Act of 1878, contained provisions dealing with other than "publicity", i.e. registration of bills of sale.

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83. Section 2.
84. Ibid. The last mentioned exception dated back to the Bills of Sale Registration Act 1856.
85. [1891] 1 Ch. 627.
86. (1898) 16 N.Z.L.R. 484.
87. Ibid., at 493.

However, the Court of Appeal in *Geoghegan v. Greymouth-Point Elizabeth Railway & Coal Co.*,[88] held that a trust deed creating a floating charge on all company assets, present and future, was outside the Chattels Transfer Act. The court relied upon the policy reasons adduced in the *Standard Manufacturing Co.* case but did not even refer to the decision in *Walter Guthrie.*

The indefiniteness of the term "debenture" as a criterion determining the application of the Chattels Transfer Act 1889, especially those provisions relating to registration and future goods, to company securities led to further legislation aimed at clarifying which company securities were excluded from that Act. Section 9 of the Companies Act Amendment Act 1900 provided for registration with the Registrar of Companies of instruments creating three classes of mortgage including "floating mortgages on the undertaking or property of the company". Section 130 (11) of the Companies Act 1903 extended the duty of registration to a fourth class and reworded the latter provision to read — "a floating charge on the undertaking or assets of the company". Furthermore, to make the position absolutely clear, s. 3 of the Chattels Transfer Amendment Act 1919 excluded from the definition of "instrument" mortgages or charges granted or created under the Companies Act if registered pursuant to that Act.

As a result of these enactments it was finally clear that mortgages or charges granted by companies were no longer restricted by the after-acquired property provisions of the Chattels Transfer Act. A pactice grew up, especially after the Companies Act 1903 enabled the formation of private companies with as few as two members, of traders incorporating mainly for the purpose of rendering it possible to raise security on their present and future stock-in-trade.

It was suggested in 1935 that:

> "This secuity may be and is probably used to give an unfair preference to a creditor and thus occasions the very abuses which the legislation as to bills of sale in 1883 and subsequently was directed against. It is true that debentures creating charges and other securities over chattels must be registered to be effective as against creditors; but such registration as regards bills of sale was found insufficient in 1883 and the same applies as regards debentures in these days."[89]

However, no steps have ever been taken to curb the use of the floating charge. In fact it is now used extensively in New Zealand by banks, finance companies and wholesalers for securing loans. It provides a present equitable charge on a company's assets, present and future, which permits the company to continue to deal with its property, notwithstanding the charge, in the ordinary course of its business. It has the distinct advantage that it can include not only the

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88. (1898) 16 N.Z.L.R. 749.
89. Levi, "Instruments By Way of Security" (1935) 11 N.Z.L.J. 10, 11.

goods owned at the time of execution but also all future goods of the same description, thus enabling a company to dispose of its present goods and then replace them without necessarily depleting the lender's security.

It should be noted, however, that whereas the recognition of the after-acquired property clause in an instrument by way of security would have given a *specific* charge over each particular item of stock as it was acquired, the floating charge suffers from the disadvantage that it is incapable of attaching to particulars items until "crystallization", i.e. until some event specified in the security document occurs, usually the appointment of a receiver. It is thus not an ideal method of securing future goods because intervening encumbrancers and creditors may take priority.[90]

In principle,[91] there is no reason why a company cannot create a specific or fixed equitable charge over a class of property (e.g. all manufactured goods) which by appropriate language could be made to include future goods of that class and also allow the debtor to dispose of property subject to the charge in the ordinary course of business. A fixed general charge would achieve the same results as a floating charge but with the added advantage that the security would attach immediately upon acquisition by the company of the future goods rather than on intervention by the lender. In practice, however, this type of charge has been neglected, but, if it were used, it may be that a court would hold that the charge still floats, even though it is described as specific, since the company is left free to dispose of the goods free from the charge and without any obligation to account specifically for proceeds.[92]

A Security Over Future Goods Only?

Would this type of security escape the restrictions contained in ss. 23 and 24 of the Chattels Transfer Act 1924? This Act, and *a fortiori* the latter sections, applies only to "instruments" over "chattels" and "chattels" is defined in s. 2 as meaning "any personal property that can be completely transferred by delivery". These words are virtually the same as those used to define "personal chattels" in the English Bills of Sale Acts and it has been seen[93] that the authorities favoured the view that chattels must be capable of complete transfer by delivery at the time of the execution of the agreement. Since future

90. See ante, n. 67 and the text thereto.
91. It has been seen that *Holroyd* v. *Marshall* held that a mortgage may secure future property so that equitable title will pass to the mortgagee as soon as the mortgagor acquires the property so long as it is adequately described, but that it is sufficient if the property falls within general descriptive words. *Tailby* v. *Official Receiver* (1888) 13 App. Cas. 523.)
92. Sher. and Allan, "Financing Dealer's Stock-in-Trade" (1965) 1 N.Z.U.L.R. 371, 419-420; see also *Re Yorkshire Woolcombers' Association Ltd.* [1903] 2 Ch. 284, 295.
93. See text prior to n. 42 ante.

goods are not so capable, bills of sale solely comprising future goods were outside the ambit of the Bills of Sale Acts.

It has been suggested in a recent English article[94] that, in view of this restriction on the meaning of the word "chattels", it is possible for an unincorporated trader to create a type of charge which simply floats until future goods come into the debtor's possession. However, it is submitted that such a security will rarely be feasible. In most cases lenders will at least require a *present* security for their advances. Moreover, it would appear that a distinction must be drawn for this purpose between goods not in existence at all and those in existence but not yet owned by the grantor. Although there is some doubt in the cases, it may be that the phrase "goods that can be completely transferred by delivery" refers not to the *grantor's* personal control over or ability to deliver the chattels but rather to whether or not the chattels are *deliverable,* in which case only mortgages of goods not in existence at all would be outside the legislation.[95] Thus, even if it is feasible for the unincorporated trader to grant a bill of sale over his present goods and at the same time a separate floating charge merely securing future goods, it will be extremely difficult for a lender, at the time of enforcing his security, to prove that particular items of stock were not in existence at the time of the execution of the charge.

Furthermore, on the only occasion our courts have discussed the English authorities on this point, they were not followed. Hosking J. in *Carncross* v. *Wilson's Motor Supplies Ltd.*[96] thought the term "chattels" was not limited to such as are in existence at the date of the instrument:

> "Our definition, where not inconsistent with the context, indicates, in my opinion, the kinds of personal property in the abstract that can be transferred by delivery — that is to say, such as would, if in existence, be capable of complete transfer by delivery".

Despite the fact that the *Carncross* decision led to two amendments which were incorporated into the Chattels Transfer Act 1924, it is suggested that it still remains authoritative on this point.

Conclusion

It has been seen that New Zeaand law has not yet developed an entirely satisfactory device to enable the granting of securities over future goods. The outmoded limitations are reflected in ss. 23 and 24 of the Chattels Transfer Act 1924 which effectively preclude the use of the instrument by way of security for this purpose. The floating

94. Fitzpatrick, "Why not a Partnership Floating Charge" [1971] Journal of Business Law 18.
95. See text following n. 59 ante.
96. [1924] N.Z.L.R. 327, 330.

charge also suffers from a number of limitations. A more satisfactory method of securing future goods is now demanded especially in the field of financing dealers' stock-in-trade.

"The availability of a properly functioning system of legal devices to secure credit is one of the main prerequisites of economic growth . . . modern conditions have greatly enlarged the range of assets which may and must be utilised in order to afford adequate sources of security for members of the commercial community who are willing and able to supply manufacturers or distributors with capital needed for modernisation, expansion, or steadiness of operation".[97] One of the range of assets which must now be utilised is the dealer's stock-in-trade. Since dealer finance, as opposed to consumer finance, generally involves a continuous flow of dealings between financer and dealer, it should be possible for *one* security agreement to give the financer security, not merely over stock owned at the date of the agreement or even stock which the dealer proposes to acquire with the initial advance, but over all future stock to be acquired to replace the initial stock and that falls within the general description of the secured property contained in the agreement.

Fortunately, it is only legislative inertia, not any deeply rooted doctrinal objections, which stands in the way of appropriate changes being made in the law. Indeed, it has been seen in the preceding discussion that both in England and New Zealand, the legislature interfered with the granting of securities over future goods not because there was anything inherently undesirable in such a security, but rather *in an attempt to curb what were regarded as fraudulent practices by lenders in enforcing their securities.*

Apart from the obvious commercial utility of permitting a dealer to give a present security over his future stock-in-trade, there are also other policy considerations which will have to be taken into account when reform of the law relating to securities over future goods is being contemplated. These policy considerations will be discussed in the next part of this article, together with the recent American and Canadian solution to the problem of future goods and the current proposals for reform in New Zealand.

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97. Riesenfeld, op. cit., n. 57, at p. 1.

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