THE CHATTEL SECURITIES ACT 1987 (W.A.)

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Introduction

Seventeen years ago the English Crowther Committee on Consumer Credit presented a devastating report on the inadequacies and irrelevance of the English law on credit. The same criticisms were subsequently made of Australian credit law as well. In summary, Anglo-Australian law regulated credit according to form rather than substance and persistently lagged behind business ingenuity. Consumer transactions were not distinguished from commercial ones though it was clear even then that different considerations ought to apply to them. The law relating to lending was artificially separated from the law on security, ignoring the commercial reality that sale, loan/credit and security are aspects of the one credit transaction. There was no rational policy on the rights of third parties whose fortunes at times depended on which legislation fortuitously applied to them. The laws were riddled with excessive technicalities and there was no consistent policy on the breach of statutory provisions. Overall, credit law was irrelevant to contemporary requirements and failed to provide similar solutions to common problems.

When the need for reform was acknowledged, it was thought that a global view of credit transactions would be required for holistic legislative measures. In broad outline, it was envisaged that there would be "comprehensive" legislative provisions on consumer credit which would cut across the forms of credit to regulate efficiently the substance of credit transactions. This consumer protection

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legislation in the form of the various Credit Acts was to be "accompanied" and complemented in the scheme of things by a modern, fair and rational security law of personal property. The *Chattel Securities Act, 1987* (W.A.)[1] and its counterparts are the product of that vision which one suspects rather diminished over the years. This paper discusses the concept and principal provisions of the Western Australian Act with a view to assessing its impact on common law and equity.

Security Interests

1. Meaning

The concept of a security interest in section 3 is central to the new direction of the *Chattel Securities Act*, 1987 (hereinafter, the Act). A security interest is defined as:

> an interest in or power over goods (whether arising by or pursuant to an instrument or transaction) which secures the payment of a debt or other obligation or the performance of any obligation and includes any interest in or power over goods of a lessor, owner or other supplier of goods but excludes a possessory lien or pledge.

Under this definition, a security interest is nothing more or less than any interest or power (however and from whatever source derived), the purpose of which is to secure the payment of a debt or other obligation or the performance of an obligation by enabling the secured party to have resort to the goods for the purposes of payment or the performance of the obligation. The *purpose* of security is of the essence.

Section 3 departs significantly from existing law. Traditionally, consensual securities are by way of grant and secure a current obligation of the debtor. Thus in a purchase-money chattel mortgage, for example, the security is granted by the debtor/mortgagor to secure his obligation to repay the equivalent of the purchase-money advanced by the mortgagee. In contrast, where a party reserves title in a conditional contract of sale, the common law regards the reservation as no more than the mere continuance of his title in the asset.

1. Assented to on 18 December 1987. This Act is based extensively on the *Chattel Securities Act, 1987* of Victoria which re-enacted the 1981 Act of the same name and which came into operation on 1 August 1987. The provisions in the Western Australian Act discussed in this paper and the counterpart provisions in the Victorian Act are numbered identically.

This view of the common law ignores the point of the conditional contract of sale which is to protect the owner/seller's interest or stake in the transaction by maintaining in him a real right in the asset. It does not accept that "security devices" which do not secure in the usual way any current obligation of a debtor, do serve a security purpose. A security interest in section 3 is not dependent on grant or on it securing a current obligation in the usual way. Thus a conditional contract of sale comes within it by virtue of it being in substance a security transaction.

Prima facie all leases are security interests in section 3 by reason of its reference to the interest of powers of "lessors". It is submitted that only leases which are in substance for the purpose of security come within section 3. These are the finance leases and not the operating leases. In the typical finance lease which exhausts the useful or economic life of the asset, the lessee in effect builds up equity in the asset over the duration of the lease: the sum of his rights to the asset by the end of the lease being substantially the ownership of the asset. The lessor essentially "secures" the lessee's performance (that is, "acquisition" of the asset) by maintaining a real right in the asset. Expressed in the traditional imagery of securities law, the "collateral" of the finance lease may be said to be the asset or the lessee's right to use the asset for the term of the lease. In the typical finance lease it is of no consequence that the lease is described as a "sale by the lessor of that bundle of rights representing the right to use" the asset.[2] This is because the equipment decreases in value to the point that at the end of the lease its residual value can be disregarded. Frequently, however, the asset retains a significant residual value at the end of the lease far in excess of the parties' expectations and estimate. It is important in these leases whether the "collateral" is said to be the physical asset or the lessee's rights to use the asset for the term specified. The latter view not only protects the lessee's equity in the asset but also reflects the thrust of finance leases. Accordingly, a lessor must account for the amount by which the de facto residual value exceeds the estimated residual value.

2. A view which was held and promoted many years ago by, for example, the American scholar, Homer Kripke.

Operating leases (or true leases) on the other hand have no finance or security function and are, it is submitted, not within section 3. A lessee, under an operating lease, pays a rental for the use and enjoyment of the asset for a limited period of time. Typically the rental reflects the use-value of the asset, the lease is short term, and the lessee is one of a series of lessees of the asset which is maintained by the lessor. The lessee's main obligations are to pay the rent and to return the asset at the end of the lease. Operating leases are appropriately treated at common law as contracts of hire. The means by which operating leases can be distinguished from finance leases lies, it is submitted, in the notion of the residual value. A meaningful residual value belonging to and to be enjoyed by the lessor identifies the lease as an operating one provided that the residual value is estimated bona fide and reasonably in the circumstances at the time of the agreement. A reasonable estimate must take into account, inter alia, inflation, depreciation, maintenance, obsolescence and realistic alternative uses for the asset. Any subsequent and unexpected increase in the actual residual value of the asset should not affect the characterisation of the lease.

Any interest or power over goods in contracts for the grant of licences to use goods and bailments of goods for display purposes which have no security function or flavour are also outside the definition of a "security interest" under section 3 even though they are defined as leases under the Act.[3]

In the above interpretation of a security interest, the concept of an "interest" in or over goods presents little difficulty because: (i) it will not be material whether the interest is conferred or reserved, and (ii) the wider notion of a *power* in or over goods for the purpose of security is included as well. Thus whether an interest comes within the definition in section 3 will depend primarily on its security purpose. Unfortunately section 3(3) casts a shadow over this view. A lessee, hirer or a buyer under a conditional contract of sale, is deemed under section 3(3) to have an interest in the goods notwithstanding that title or general property in the goods has not passed (and indeed in the case of a lease will not pass). It is unclear what this provision is intended to achieve. An unlikely clue lies in

3. Section 3(1)

the definition of a "debtor" who is the person who *creates* the security interest.[4] Section 3(3) may be intended to confer on the stipulated parties a notional interest *so as to enable* each of them to *create* in the lessor, seller or owner, a security interest and thereby constitute himself a debtor as defined. Ordinarily a lessee, a buyer under a conditional contract of sale or a hirer under a hire-purchase agreement does not have the requisite title to confer or create in the other party any such interest and could not be called a debtor within section 3. This awkward piece of fiction in section 3(3) may be the link which was considered necessary to "tie" the broad notion of security interests to an entity called the debtor who features in section 7 (which operates to extinguish some kinds of security interest). It may also be reminiscent of traditional thinking in terms of conferment and grant which is a prerequisite of consensual securities. The effect of section 3(3) would seem to restrict prima facie security interests which are not by way of grant and which do not secure current obligations in the usual way to leases (as defined), conditional contracts of sale and hire-purchase agreements.

2. Attachment

For the purposes of the Act, each of the security interests under section 3(4) will in the ordinary case attach effectively at the time of the agreement. This follows from the application of sections 3(4) and 3(3). Section 3(4)(a) provides that a security interest attaches at the time at which value is given by the secured party and the debtor has *rights* in the goods, unless the parties intend that it should attach at a later time. Since by section 3(3) a hirer, lessee or buyer under a conditional contract of sale is deemed to have an interest in the goods that is sufficient to create a security interest, irrespective of the passing of title or general property, he would certainly have the requisite *rights* in the goods for the purpose of attachment in section 3(4). When section 3(3) is read with section 3(4)(b), which deems such agreements to give value to the debtor, the time at which the security interest attaches is the time of the agreement. A con-

4. A debtor "in relation to a security interest means the person who created the security interest and includes the lessee in relation to a lease of goods and the hirer in relation to a hire-purchase agreement": section 3(1).

trary intention will simply be a matter to be decided in the familiar way by looking at the terms and circumstances of the transaction. The use of a floating charge, for instance, must manifest an intention that the security interest is to attach at a later date.

3. Legal or Equitable

The Act does not merely define security interests. It enables the creation of legal security interests by agreement between the parties. Section 5, which must rate as the most curious provision in the Act, provides that:

> The parties to a security interest may agree that the security interest shall be a legal interest in the goods subject to the security interest and, if the parties so agree, the security interest is a legal interest in the goods.

Section 5 seems to have been copied from the corresponding provision of the *Chattel Securities Act, 1987* (Victoria) which replaced a provision in the 1981 Act by the same name that treated security interests as statutory charges and gave to the secured party various rights and powers in respect of the exercise of the security. This brief historical excursus throws little light on section 5 except to cast aspersions on the drafting of the Act. On the face of it, section 5 has two implications: (i) a *legal charge* by agreement between the parties is now possible whereas a charge exists only in equity in the absence of such a statutory provision; and (ii) the "conversion" of an otherwise equitable interest into a legal interest has the advantage of improving the ranking of competing security interests at common law and in equity. The priorities of most competing security interests, as will be seen shortly, are not affected by the Act.

4. The Limited Application of the Statutory Concept of "*Security Interest*"

Forward-looking as the definition of security interest in the Act may be, its application is limited to goods. Hence "all chattels personal and fixtures" are included but things in action and money are not.[5] This limitation evinces an unduly static perception of personal property transactions and gives rise to uncertainty in the following instances:

5 Ships registered in an official register in W A. relating to title to ships, aircraft, livestock, unshorn wool and growing crops, shorn wool and harvested crops to the extent of rights expressly conferred in a registered security under the *Bills of Sale Act, 1899*, and documents of title are expressly excluded.

(a) Where a creditor cum owner reserves title over goods which he allows the debtor to deal with in the course of his business *on the condition* that he has proprietary rights over the proceeds of their disposition, the condition can manifest an intention that the debtor will be his trustee-agent or trustee-bailee with respect to the proceeds. Put differently, the condition can be a mere provision for the conversion of the creditor's goods into another form. Hence the creditor's proprietary rights continued in the proceeds in equity.[6] Under the Act, if the creditor similarly stipulates that he has proprietary rights over the proceeds of the goods on disposal, his security interest attached to goods within the Act may be equated by analogy with a security interest in the proceeds. It follows that the Act will govern the security interest in the proceeds irrespective of the form of the proceeds.

(b) Where a creditor reserves title over goods which are used up subsequently to produce new goods, a creditor's rights over the new goods could in equity only be by way of a charge granted by the debtor which will attach at the time of their acquisition. Prima facie, there are two distinct security interests under the Act, albeit to secure the same obligation or performance, which attach at different times and which, it would seem, need to be individually perfected if they are over registrable goods. The practical difficulties of registering security interests over or in new goods as and when they come into existence are self-evident. Section 3(4), which deals with attachment, does not provide an answer unless it is construed to mean that the value given for the first security interest is also value for the second so that the debtor has rights in the goods in original as well as new form. On this argument there is thus an inchoate security interest over the future (new) goods which need not be perfected by registration again when it attaches. This problem will not arise in practice for the moment because, given current definitions, it is very unlikely that registrable goods (essentially motor vehicles, trailers, semi-trailers and caravans) will be used up to produce new ones. Goods that can be prescribed as registrable goods under section 3 may, however, raise these difficulties.

6. Cf. tracing or following property at common law which seems to turn on a personal obligation to account for proceeds in tangible form.

(c) Would a floating charge, which typically affects a fund of assets including both choses in possession and choses in action, be a security interest in or over goods? Presumably, wherever the fund includes goods within section 3, the floating charge to which they are subject comes within the Act as an unattached but present security interest at the time of the security agreement. The use of a floating charge should be treated as manifesting the intention of the parties that it is to attach at a time later than that otherwise assumed under section 3(4).

Priority

The Act affects the well-established, if at times unsatisfactory, rules at common law and in equity that govern the priority of security interests. Where registration is required to perfect a security interest against third parties such as liquidators and creditors, it does not as a rule affect the priorities of competing security interests in the same asset.[7] Section 10(1) of the Act, subject to three exceptions, makes registration the determinant of priority with respect to the debt, payment or obligation secured including all future and contingent obligations.

Section 10(1) displaces the following common law and equitable rules on priority:

(i) that a legal interest is preferred over an equitable interest;
(ii) that as between two competing legal interests or between two competing equitable interests where the "equities are equal", the first in time prevails; and
(iii) that future advances cannot be tacked after notice of a subsequent security interest.[8]

But section 10(1) applies only in limited circumstances and it admits three exceptions. Registration under the Act is only available

7. The notable exception being section 34 of the *Bills of Sale Act, 1899* (W.A.).
8. *Hopkinson v Rolt* (1861), 9 H.L. Cas. 514; 11 E.R. 829; cf. *Matzner v Clyde Securities Ltd.*, [1975] 2 N.S.W.L.R. 293.

in respect of registrable goods,[9] which under section 3 are essentially motor vehicles, trailers, caravans, semi-trailers and any prescribed goods. This limited application of section 10(1) gives rise to the more difficult question of whether the priority conferred on a registered security interest over registrable goods flows through to the proceeds.

Two examples may be used to highlight some arguments. The first is the now familiar example of a security interest involving a reservation of title over motor vehicles within section 3 which the debtor is permitted to deal with in the course of business *on the condition* that the secured party has a proprietary right over the proceeds. It is clearly arguable that, just as the security interest over the proceeds may be identified with the security interest over the goods and be governed by the Act,[10] the priority the secured party enjoys in respect of his registered security interest in the motor vehicles is enjoyed by him in respect of the proceeds on the ground that the proceeds are ordinarily regarded as merely a new form of the goods over which he has a prior ranking security interest. However, the creditor's claim to the proceeds will not be apparent in the register because there is no provision for the creditor to have his security interest in the proceeds registered with priority dating back to the registration of the security interest in the original goods. This, of course, puts a third party who takes a security interest over the proceeds from the debtor in a disadvantaged position. Consequently, even if the proceeds are registrable goods, registration by the second creditor will only protect him against subsequent security interests.

In the second example, a creditor with a registered security in-

9. Registrable goods are:
   (a) motor vehicles within the meaning of the *Road Traffic Act, 1974*, being motor vehicles that, unless the regulations otherwise provide, are, or have been, licensed under the Act;
   (b) trailers, caravans and semi-trailers described in the First Schedule to the *Road Traffic Act, 1974*, being trailers, caravans and semi-trailers that, unless the regulations otherwise provide, are, or have been, licensed under the Act;
   (c) motor vehicles and trailers within the meaning of the *Interstate Road Transport Act, 1985* of the Commonwealth as amended and in force for the time being, being vehicles and trailers that are registered in Western Australia under that Act; and
   (d) prescribed goods.

10. As discussed above, p.288.

terest involving a reservation of title over motor vehicles permits the debtor to deal with the vehicles in the course of business *but without any condition* that he, the secured party, has a proprietary right over the proceeds. It would seem that as the secured party's right to follow or to trace his property at common law is only a personal obligation on the part of the debtor to account for proceeds in tangible form, there is no "power in or over" goods. Consequently he has no security interest in or over the proceeds.

Although section 10 deals with contingent and future obligations in respect of the debt, other obligation or performance it does not address the problem of after-acquired goods. In equity, a present, albeit inchoate, security interest over after-acquired goods ranks before a subsequent security interest over the same after-acquired goods even though both security interests attach at the same time i.e., at the time of their acquisition. Even if under section 10 the priority of the after-acquired goods is linked to the registered security interest over existing goods, it is still possible that a secured party with a registered security interest over registrable goods and after-acquired goods may subsequently find that the priority conferred by registration does not extend to some or all of the after-acquired goods if they are not of the registrable kind. This would leave the priority of the security interest over the non-registrable after-acquired goods to be determined separately and according to established equitable principles. The priority of such after-acquired goods in equity will in the ordinary case relate back to the priority of the existing security interest.

The three exceptions to which section 10(1) is subject are:

(i) any express contrary provision in the *Companies (Western Australia) Code*,
(ii) any agreement between the secured parties — section 10(2),
(iii) and, subject to (i) and (ii), the taking of possession by a secured party in respect of another security interest in the same goods before a security interest is registered — section 10(3).

With the displacement of the rule on tacking it would be prudent to reach agreement between secured parties on the matter of priority and not rely on notification or the absence of it.

Extinguishing of Security Interests

In the usual priority question the issue is the ranking of valid

competing interests: hence one speaks of the subordination of certain interests to others. A bona fide purchaser for value of the legal title without notice could generally and in the absence of an exception to *nemo dat quod non habet*, acquire a legal title encumbered by an attached and perfected security interest. If the competing legal claims were to the absolute interest, the claim of even the bona fide purchaser for value and without notice is destroyed if he cannot establish an exception to *nemo dat*. In this competition the issue ceases to be one of priority.

The Act follows this general pattern. In two situations section 7 of the Act accords paramountcy to the interest of the purchaser "for value in good faith and without notice" by *extinguishing* certain kinds of security interests when the purchase price (or the first part of the purchase price) is paid.

First, where the secured party is not in possession of the goods and such a purchaser purchases or purports to purchase an interest in the goods from the debtor or "another person who is in possession of the goods in circumstances where the debtor has lost the right to possession of the goods or is estopped from asserting an interest in the goods against the purchaser" the following security interests are extinguished:

(a) any registered inventory security interest;
(b) any unregistered security interest over registrable goods;[11]
(c) any unregistered security interest over unregistrable goods the purchase price of which does not exceed $20,000; and
(d) commercial vehicles and farm machinery the purchase price of which does not exceed $20,000.

Secondly, where a purchaser purchases a vehicle (as defined in section 5(2) of the *Motor Vehicles Dealers Act, 1973*) from a licensed motor vehicle dealer or a licensed car market operator, for value in good faith and without notice at the time the purchase price (or the first part thereof) is paid, any security interest (irrespective of registration) of a secured party out of possession is extinguished.

11. Except where such registrable goods are a motor vehicle, trailer, caravan or semi-trailer which are not licensed under the *Road Traffic Act, 1974*, but which are registered or licensed in another State or Territory and the security interest is registered under a corresponding law of that State or Territory.

There is a thread of rationale in section 7. Essentially two purposes for which goods are given in security have been used as the bases for the specific treatment of the respective security interests. In inventory financing, the parties to securities over inventory contemplate that the debtor will re-sell its stock in trade so that the proceeds therefrom can be applied to the repayment of the debt. A purchaser for value in good faith and without notice should, therefore, be able to take free of any inventory security interest irrespective of registration. An inventory security interest is defined in section 3 to mean a security interest given by a dealer in or over goods of a kind in which the dealer deals in the course of the dealer's business or reserved in or over goods in the dealer's possession or control, being goods of a kind in which he deals in the course of his business. Stock-in-trade as well as goods of the same kind as a dealer's stock-in-trade are within this definition.

The other kind of security interest is one in or over consumer goods. Consistently with the current policy of consumer protection, it is deemed fitting to extinguish security interests in unregistrable goods, the purchase price of which does not exceed $20,000 (broadly designated as consumer goods). Section 7(2) provides a clear and striking example of consumer protection.

1. *Nemo Dat* and the Effect of Section 7

Section 7 is frequently treated as a significant exception to the principle of *nemo dat quod non habet*. It is submitted that this view of section 7 can be misleading. Let us suppose that a purchaser buys goods from the true owner for value, in good faith and without notice of, say, an inventory security interest in favour of a secured party out of possession. That inventory security interest will be extinguished by the operation of section 7 and the purchaser's title is simply the best title which the true owner can pass to him. If the same purchaser buys from a non-owner (say, a thief) without notice of an inventory security interest in favour of a secured party out of possession, that inventory interest is similarly extinguished. The purchaser's title is, however, not the best. *Nemo dat quod non habet*. In this case section 7 does not empower a non-owner who disposes of another's goods without authority to confer a title better than his own. In the absence of any of the familiar exceptions to *nemo dat*, the purchaser's title cannot be upheld against the true owner's.

It therefore appears that section 7 has the same effect as the market overt exception to *nemo dat* only where the purchaser acquires an interest in goods from the true owner or someone who would, but for the extinguished security interest, be the true owner.

The Act does deal directly with *nemo dat* and its exceptions in section 7(6) by repealing the buyer-in-possession exception in section 25(2) of the *Sale of Goods Act, 1895* (W.A.) in relation to registrable goods, goods, commercial vehicles and farm machinery the purchase price of which does not exceed $20,000, and motor vehicles, trailers, semi-trailers and caravans within the *Road Traffic Act, 1974* (W.A.).[12] As section 7(1) in fact enhances the position of the bona fide purchaser for value without notice, there seems no further need for section 25(2) except that dealers of unregistrable goods are not purchasers under section 3 and will now lose the benefit of section 25(2) of the *Sale of Goods Act, 1895.*

From the secured party's point of view sections 7(1) and (2) are far-reaching in effect because "purchase" is defined to mean to "acquire an interest in the goods by way of purchase, exchange, lease or hire-purchase". Under section 3 a purchaser is a person who acquires an interest in the goods in any of these stated ways other than a secured party or a dealer in relation to unregistrable goods.[13] Let us suppose that an owner of registrable goods over which there is an unregistered security interest, say a mortgage, enters into a hire-purchase agreement with X. X acquires an interest (or is deemed to do so) at the time of the agreement notwithstanding that title or general property in the goods has not passed to him (section 3(3)) because he is a purchaser as defined. Assuming he took in good faith and without notice at the time he paid his first instalment, X's interest is given paramountcy over the unperfected mortgage. The same would be the case if the security interest was not registrable. Whatever the precise quantum of X's deemed interest, it would not be absolute but it would still be paramount under section 7(1).[14]

12 See also s. 7(6)(d).

13. A lessor, owner or other supplier of the goods under a lease, hire-purchase agreement or other contract for the supply of goods is by definition also a purchaser and thus can assume both roles of purchaser and secured party.

14. It is possible for a mortgagor to "get rid of" the mortgage by the expedience of entering into a subsequent hire-purchase agreement. The mortgagee's protection lies in sections 7(7) and (9) whereby he is subrogated to the mortgagor's rights against the hire-purchaser and if the hire-purchase agreement is terminated, the mortgagee's rights revive.

2. Purchaser for Value, in Good Faith Without Notice

Although "value" and "good faith" are not defined, their prerequisites will presumably be interpreted consistently with the mass of case law on similar notions under Sale of Goods legislation. The essence of good faith has traditionally been honest belief. For the purpose of section 7 a purchaser does not purchase for value in good faith and without notice of a security interest in the circumstances set out in section 8 unless he proves the contrary beyond reasonable doubt. "Notice" is defined in section 3(5) to mean actual or constructive notice of the security interest. It is not entirely clear if the actual or constructive notice needs to be of the existence of the security interest or its terms. The wording of section 3(5)(b) specifically refers to the "existence of a security interest" in explaining the notion of constructive notice in this context and supports the former interpretation.

Constructive notice is confined in section 3(5)(b) to where a person having been put on inquiry as to the existence of the security interest, deliberately abstains from further enquiry when he might reasonably have expected further enquiry to reveal the security interest. Remissness and such other lesser culpabilities are not included. The question remains whether registration under Part III is constructive notice. If it is, what is it constructive notice of? One could draw on the law with respect to charges. Registration is constructive notice of the existence of the security interest but not of its terms. This of course means that a purchaser is always put on inquiry in respect of registered security interests and that it would be immensely difficult for him to prove that he would not reasonably have expected inquiry to reveal the security interest.

Rights of the Secured Party where his Interest is Extinguished

In the event that section 7(1) or (2) applies to give the bona fide purchaser for value without notice an unencumbered title, a secured party whose security interest is extinguished is subrogated to the rights of the debtor/supplier in and in respect of the goods, including the right to receive any part of the unpaid purchase price: section 7(7). Where the purchaser is discharged by payment of the full purchase price before he receives notice of the rights of the secured party, the secured party is unlikely to have any right in or in respect

of the goods. He would be left with essentially contractual rights against the debtor.

Section 7(7) does not seek to impose a uniform policy on the entitlements of the secured parties to the sums that would satisfy their interests. It does not alter existing law on the entitlements of secured parties. In other words a secured party who has purchase-money secured will continue under section 7(7) to recover such sum while a secured party who reserved title over goods will as at common law continue to be entitled to recover the full purchase price paid by the bona fide purchaser for value and enjoy any windfall resulting from increased market prices. Where the contract of purchase is rescinded the extinguished security interest will revive and continue as if the purchase had not occurred: section 7(9).

Rightful Exercise of Power of Sale

The effects of sections 10 and 7 on the law on priority and the interest of bona fide third parties are the most significant changes undertaken by the Act. Two other provisions, sections 9 and 6, warrant discussion as well. Section 9(1) provides that a purchaser who buys goods subject to security interests from a secured party rightfully exercising a power of sale will take free of all encumbrances subsequent to the first mentioned secured party. The bona fides of the purchaser is not called into question nor should it be. The registration or registrability of the security interests is only indirectly material in ascertaining the priority of the subsequent security interests. Apart from this, as between the ranked secured parties, registration is irrelevant since any surplus inures for the benefit of the later ranking parties.

It may be thought that section 9(1) operates to the disadvantage of subsequent secured parties where a first mortgagee enters into a collusive arrangement with an associate to sell the goods to the associate at a gross undervalue in order to defeat the claims of subsequent secured parties. Prima facie, the effect of section 9(1) is to leave the subsequent secured parties to claim for an account or damages against the mortgagee and the purchaser because the bona fides of the purchaser is not material. This, it is submitted, is not

the case for it cannot be said that the fraudulent contrivance was a rightful exercise of a power of sale.[15]

It is conceivable that a second-ranked secured party may wrongfully exercise a power of sale in which case the prior-ranked secured party (inter alia) can sue for damages under section 9(2). It would seem that the purchaser will in this case take subject to the prior-ranked security interest which is not extinguished by section 9(1), unless the purchaser can invoke section 7(1) or (2).[16]

Section 9(1) does not amount to an exception to *nemo dat*. Giving to a purchaser in the circumstances an unencumbered title is not *ipso facto* to give him a title better than that which the selling party can give him. A thief in possession of goods, even though his possession of the goods is unlawful, has a sufficient interest to give security interests over the goods. These security interests will be extinguished under section 9 when an earlier ranked secured party exercises his power of sale. The strength of the purchaser's title is not in such an instance improved by the operation of section 9(1). Thus the true owner of the goods can successfully defeat the purchaser's title to the goods.

Fixtures

Section 6 changes the law on fixtures fundamentally by deeming goods that become affixed to land not to be fixtures for the purpose of enabling a secured party with a security interest over the goods to possess, remove and sell them.[17] The secured party is obliged to make good any damage to the land in so removing the goods but this right of removal is ineffective against a purchaser

15. In *Expo International Pty Ltd v Chant*, [1979] 2 N.S.W.L.R. 820 it was held that a receiver and manager appointed under the terms of a floating charge and who is expressed to be the agent of the mortgagee has duties towards the mortgagor *similar to those of a mortgagee exercising his power of sale*. The duties include the duty to exercise his powers in good faith, the duty not to sacrifice the mortgagor's interests recklessly, and the duty to make reasonable efforts to obtain a proper price. *Australian and New Zealand Banking Group Ltd v Bangadilly Pastoral Co Pty Ltd* (1978), 52 A.L.J.R. 529 Part V of the *Credit Act, 1984* (W.A.) provides examples of statutory standards for the enforcement of regulated mortgages within it.
16. Section 7(2) is of course unlikely to apply
17. Section 6 makes section 27 of the *Hire Purchase Act* redundant The drafting of section 6 leaves much to be desired. Sub-sections (3), (4), (5) and (6), for example, are quite unnecessary and their deletion will also leave sub-sections (7) and (8) reading better.

for value in good faith and without notice of the security interest of the secured party. Registration of a security interest will put a purchaser on notice to preserve for the secured party his right to possess, remove and sell under section 6(1). Section 3(6) provides specifically that the law on notice applies for present purposes as if section 3(5) had not been enacted — thus permitting the wider equitable rules of constructive and imputed notice to apply.

Modern and Rational?

Some four to five years ago Roy Goode in his lecture on the modernisation of personal property security law suggested that the "commercial world" was entitled to expect five essentials in a rational regime:

(1) That all transactions intended as security should be regulated as secured transactions, regardless of the technical legal form in which they are cast.
(2) That in any transaction thus characterised as a secured transaction the creditor's interest should be limited to a security interest, that is, to what is necessary to give him the amount he is owed, together with interest or charges, any surplus belonging to the debtor.
(3) That a person who in good faith acquires an interest in an asset of the debtor company should not be subordinated to a prior security interest of which he had neither knowledge nor the means of discovery.
(4) As a corollary of (3), that a secured creditor who wishes to leave the debtor in possession of the security should be furnished with simple, efficient and inexpensive legal machinery by which he may give public notice of the existence of his security interest.
(5) That priority rules should be so designed as to avoid unjust enrichment of one creditor at the expense of others.[18]

The *Chattel Securities Act, 1987* is exceedingly conservative when measured against these essentials. First, the concept of "security interest" in the Act is forward-looking only at first blush. In disregarding technical legal forms of security arrangements it gives the Act some "global" flavour and facilitates reference to an otherwise motley group. But the Act fails completely to recognise that secured parties should only be entitled to the sums secured, that is, their security interests in the true sense, irrespective of the chosen legal form of the transaction, and that any surplus should belong to the debtor. Second, while the Act provides for registration as a means of

18 "The Modernisation of Personal Property Security Law" (1984), 100 L Q R. 234, 237.

discovery, it is limited to a parsimonious list of registrable goods. Secured creditors do not have an adequate opportunity to publicise their interests where they wish to leave the secured chattels in the possession of the debtor.

Third, the new priority rule (according to registration) in section 10(1) is extremely limited in its application. The residual application of static common law rules and equitable principles will continue to pose commercial and legal problems especially in receivables financing. The now disfavoured Romalpa clause illustrated the enormous problems commercial ingenuity can cause to a body of rules which cannot come to grips with the dynamic quality of personal property transactions.

All this is not to deny that the Act: (i) pursues a uniform policy in favour of purchasers for value in good faith and without notice in respect of certain kinds of security interests; (ii) continues a policy of consumer protection (although the effect here is not to protect the end-user of goods but to protect those who acquire interests in what is considered less costly assets); (iii) minimises cluttering of the register; (iv) will improve access to the register through computerisation and (v) is certainly an improvement on the outmoded *Bills of Sale Act, 1899* by having registration of interests by reference to essential information rather than registration of documents.

On the balance, the *Chattel Securities Act, 1987* does not warrant the epithets "modern" and "rational" primarily because it fails to be what it ought to be. It is very much a piece of legislation responding to particular problems with purchases of cars and trailers which have had adverse media attention.