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HANCOCK, H.S. SOME ASPECTS OF LIVESTOCK AND WOOL SECURITIES IN NEW ZEALAND.

SOME ASPECTS OF LIVESTOCK AND WOOL SECURITIES IN NEW ZEALAND

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INTRODUCTION

The provision of adequate facilities for lending to farmers is and always has been of paramount importance to the economic well - being wellbeingof New Zealand. On introducing the Wool and Oil Securities Bill, 1858, the first New Zealand legislation specifically to facilitate farm borrowing, Mr. Stafford was reported to have told the House:

> This measure was of a very simple and intelligible character, and one much needed in this country, where great inconvenience was frequently experienceddfrom the want of ready cash. The difficulty of obtaining ready money frequently resulted in injury to stock, and materially retarded the producing powers of the country. (1)

Over a century later in the 1971 Budget the Minister of Finance stated:

> "Farming will remain New Zealand's largest and most important export earner for as far ahead as we can see, and the Government is committed to maintain the viability of farming in the national interest."

In 1970 agricul~~a~~tural produce and processed agricultural products provided 86 per cent of the total value of exports from New Zealand. The National Development Conference recommended that 55 per cent of the additional exports required to meet national needs in 1979 should come from the agricultural sector (2).

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(1) Hansard Vol. 2 (1858) p.382

(2) Lending to Farmers. Report of the Commission of Inquiry, January 1972 p.13: here referred to as Lending to Farmers.

The purpose of this paper is to discuss the law relating to ~~the~~ securities over livestock in New Zealand (1) to determine whether it is suitable for its purpose. Where weaknesses exist in the present legislation these have been discussed and improvements suggested. Then the practical background to this type of lending is described to explain why legislation which contains more than its share of problems and uncertainties should have remained so long on the statute books without modification. Lastly a section dealing with some of the parallel American laws in this field has been included, as much for a means of comparison than as a model for reform. ~~This is so because the writer feels that~~

The paper is divided into four Parts.

Part 1 deals with the Chattels Transfer Act 1924 provisions relating to livestock securities and discusses the following areas:

(a) the definition of livestock

(b) classes of livestock

(c) description of livestock

(d) after-acquired stock

(e) description of land

(f) priorities

(g) sale of encumbered stock

(h) wool securities

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(1) For a general introduction to the historical and policy background of the New Zealand legislation in this field, see Riesenfeld, Quagmire of Chattels Securities in New Zealand, Legal Research Foundation, Auckland.

Part II examines the practical background to the lending on the security of livestock in New Zealand and explains the inter-relation between law and practice in this field.

Part III by way of comparison looks at certain aspects of the American laws relating to livestock securities and deals with the following areas:

(a) Article 9 of the Uniform Commercial Code

(b) farm products - Section 9-109

(c) description of livestock

(d) after-acquired stock

(e) sale of encumbered stock

Part IV concludes the paper by summarising the recommendations made during the previous sections as to improvements in the present law.

The Definition of Stock

"Stock" is defined in the present Act as including any sheep, cattle, horses, pigs, poultry, ostriches, and any other living animals (1). It is interesting to note the objection made by the then member for Gisborne when the extended definition of "stock" was introduced in the 1924 Chattels Transfer Bill. Mr. Lynsar cited this definition as a matter which should be adjusted "if the producer is to have any existence at all without being absolutely controlled in every movement by the mercantile institutions of the Dominion". (2) The then Minister for Justice the Hon. Mr. Parr considered there was nothing sinister in the definition of stock:

> "It (the definition) is certainly comprehensive; but a definition cannot hurt anybody, so that nothing attaches to the objection that the definition is too wide. Until a person puts his hand to paper and mortgages or deals with a particular animal, the definition cannot affect him" (3)

It is considered that the present definition of "stock" is probably a very practical and realistic one in that by virtue

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(1) S.2 Chattels Transfer Act 1924; cf. Mortgages of Stock ~~Regulation~~ Registration Act 1868. S.5 "stock" shall include any sheep cattle or horses; Chattels Securities Act 1880, " 'stock' includes any sheep, cattle and horses; Chattels Transfer Act 1889 and 1908; "stock" includes any sheep, cattle, horses, pigs, poultry, ostriches and llamas."

(2) Hansard Vol. 205 (1924) p.632
Mr. Lynsar (Gisborne) ..."I will ask honourable gentlemen to look at the interpretation of the word "stock". It includes any sheep, cattle, horses, pigs, poultry, ostriches, and other living animals. "Any living animals" will include a man's cat, dog, or goat.
An Hon. Member And rabbits.
Mr. Lynsar - Yes, and rabbits; but unfortunately the mercantile institions cannot catch them.

(3) Hansard (1924) Vol. 205 p.638.

of its all-embracing nature it removes any scope for dispute as to whether any given animal falls within its scope (4).

The notion that the expression "stock" had a restricted meaning and contemplated only "stock" depasturing on a farm or station was dispelled In re Alloway (5) by Edwards J. who held that horses, whatever the occupation of their owner were "stock" within the meaning of the Chattels Transfer Act 1908.

> "...a horse is in my opinion a horse, a cow is a cow, and a sheep is a sheep, no matter what the occupation of its owner may be, and whether he has an occupation or not." (6).

Classes of Stock

A further difficulty of interpretation in s.29 is the meaning to be ascribed to the word "class" in the phrase "all stock of the class or classes described in the instrument". Does the word refer to the particular genus of living animals such as sheep or pigs or may it refer to a class or category within a genus e.g. Jersey or Friesian cows, dairy or beef cattle. This distinction could be of vital importance to a grantee because if the latter interpretation is correct he could find his security defeated deflated if for example a farmer replaced all his

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(4) Quaere: a chattel mortgage of fish!

(5) [1916] N.Z.L.R. 433. In so~~t~~ holding Edwards J. dissented from two earlier decisions; Andrews v. Fan Tu (1909) 28 N.Z.L.R. 1042 bill of sale by an expressman over his vehicle and horse held not to be ~~that~~ as regards the horse ~~of~~ a mortgage of stock under the Act: Hickmott v. Kesteven (1913) 15 G.L.R. 402 a carrier's horse held not to be "stock" within the Act.

(6) ibid. p.445

sheep of one breed by those of another.

Ball (7) says that although there is no direct authority, it appears that sheep, cattle, horses, pigs, poultry, and any other genus of living animal each constitute a class. However, the learned author does acknowledge a passage from Chapman J.'s judgment in Bailey's case which supports a different interpretation of the word "class":

> "here it is unnecessary as a matter of business to draw any distinction between one class of cows and another..." (8)

On the other hand Edwards J. in the Court of Appeal states that in his opinion if any instrument under the Act:

> "...assigns or purports to assign animals referred to in the operative part of the instrument as the "stock" described in the schedule thereto, and such stock are found by reference to the schedule to consist of only one or more of the classes of animals which are intended by the interpretation clause of the statute in the word "stock", the meaning of that word, wherever used in the same instrument, is confined to stock of the species mentioned in the schedule." (9)

His Honour went on to say that it appeared to him quite out of the question to suppose that a mortgage of sheep, describing them in the body of the instrument by the word "stock" could be held to bring within the security horses and cattle, pigs, poultry, llamas and ostriches.

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(7) The Law of Chattels Transfer ~~Act p.67~~ Butterworth, Wellington, 1940 p.67

(8) Bailey (S.C.) p.18

(9) Bailey (C.A.) p.888

Ball's view of the word "class" in s.29 appears to correspond with ~~bear~~ the intention of the legislature as evidenced by the Parliamentary debates preceding the enactment of this section. Originally the Government had endeavoured to enact an amended s.29.which would have had the result that whenever a farmer mortgaged his sheep then all his other stock was also included and became subject to the security. The then Attorney-General the Hon. Sir Francis Bell introduced the Bill stating it was a "highly technical piece of legislation" and he did not think any advantage would be gained by explaining or discussing it. The Attorney-General believed that the Bill which had been prepared by a committee of merchants and bankers and two very experienced lawyers appointed by them to help, "will be found to be a very beneficial measure indeed" (10).

A cynic might be inclined to ask "very beneficial to whom?", because strong opposition was taken to a number of clauses especially clause 29. The member for Hamilton, Mr. Young, "felt sure that country settlers could not realise what was in this clause (29), or they would be up in arms against it from one end of New Zealand to the other" (11). As a result of the controversy raised by this provision the Minister of Justice (12) "in deference to the views of a great many members of the House" agreed to strike out the new words in that clause so that

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(10) <u>Hansard</u> Vol. 204 (1924) p.923

(11) <u>Hansard</u> Vol. 205 (1924) p.280

(12) The Hon. Mr. Parr <u>Hansard</u> Vol. 205 (1924) p.633

a bill of sale would not include stock other than that specified in the bill.

Even after so much heated discussion on clause 29 the alteration initially accepted by its opponents (as shown by the deletion of the words underlined below) failed to alter the clause's effect:

> "...and all stock of every kind (whether of the classes described in the instrument or not)..."

The situation was finally remedied when it was agreed to omit all the words struck out by the House (shown underlined above) but to substitute in lieu of the words so struck out, the words: 'of the class or classes described in the instrument' (13).

From the foregoing discussion of the Parliamentary Debates it is submitted that further ~~reason is~~ grounds are given for holding "class" in s.29 to refer to the species of stock and not a particular type or breed within a species. However this very important question is not free from doubt (14) and should be clarified at the first suitable occasion. It does seem an anomalous result when a security embracing ordinary breeding ewes worth say $6.00 a head could give the grantee the right to after acquired stud sheep ~~with~~ worth $40.00 a head. Likewise it seems a distorted approach when an after-acquired dairy herd could be part of the security on a herd of beef cattle.

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(13) Hansard, Vol. 205 (1924), 1073 (Legislative Council); 1078 (House of Representatives).

(14) See Bailey (S.C.) p.18 Chapman J. "one class of cows and the other".

On the other hand once one enters into the area of drawing distinctions between sheep or cattle on the basis of breed or function the door is thrown open for ~~an interiminable number~~ a plethora of borderline cases. Perhaps one merit of the rugged approach which throws all animals of a species into one "class" is that lenders are more inclined to advance money to farmers knowing that even if there are changes of quality or type within the secured class of animals the loan is still protected (15).

Description of stock: 8.28

The Chattels Transfer Act requires, except in the case of the chattels mentioned in s.26, that every instrument shall contain a schedule of the chattels included therein: s.23. Whether or not a description is sufficient depends upon the circumstances of each case (16). However, the object of legislation which insists upon a description of chattels is to facilitate identification of articles enumerated in the schedule with those that are to be found in the possession of the grantor. Identification should be rendered as easy as possible so that ~~the~~ dispute as to the intention of the parties

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(15) Provided of course that there is an implied or express covenant to brand or earmark. See also the covenant implied by clause 9 of the Fourth Schedule that forbids the grantor without the grantee's consent in writing to change the general quality, character or description of the stock subject to the security.

(16) Eyre v. McCullough [1925] N.Z.L.R. 395, 398. Herdman J.

or the possibility of fraud and controversy to which general descriptions invariably give rise should be rendered as rare as possible (17).

> "The Statute (18) exists so that money advanced may be well secured, and so that the person who has the security gets no more than his security. It is a protection against dishonesty; and, while it safeguards creditors, it aims at enabling the rights of a grantee to be determined with certainty and without difficulty." (19)

new paragraph

Livestock raise special problems of description. In a large flock of sheep or cattle of the same breed it is often impossible without human intervention in the form of a distinctive mark, to distinguish the property of one owner from another. Added to the difficulty of similar appearance is the natural increase which takes place each year in a breeding flock or herd. At the other end of the scale is the decrease in value of the security as stock grows older, becomes less productive and unless disposed of dies on the owner's hands.

It is therefore not surprising that the Chattels Transfer Act has made special provision for the description requirements of livestock. Section 26 exempts, inter alia, stock, wool and crops from the operation of the three last preceding sections

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(17) Carpenter v. Deen 23 Q.B.D. 566, 574 per Fry L.J. adopted by Herdman J. in Eyre v. McCullough (supra) pp.397-8.

(18) i.e. Chattels Transfer Act 1924.

(19) Eyre v. McCullough (supra) at 398 per Herdman J.

of that Act. In the case of livestock a special code is provided for their description in Sections 28, 29 and 30. No doubt the reason for the specially favourable treatment of mortgagees of stock, crops and wool was to enable farmers to borrow more readily from financial institutions on the security of such chattels (20).

Section 28 (21) requires stock to be described either

(a) by brand, earmark or mark on them, or

(b) by sex, age, name, colour or other mode of description so as to be reasonably capable of identification, and

(c) the land or premises on which such stock are or are intended to be kept (22).

If the requirements of (a) and (b) above are not observed then the instrument is void as against the persons mentioned in s.18. Section 28 does not state the consequences of a failure to describe the land or premises. However it has been held that non-compliance with this requirement is that if the instrument is registered, the grantee is deprived of the benefit of such registration, although the instrument is not invalidated as

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(20) This opinion was expressed by Cooper J. in Official Assignee of Bailey v. Union Bank of Australia [1916] N.Z.L.R. (C.A.) 873 at p.890.

(21) The following letters (a), (b) and (c) and explanation are the writer's breakdown of the section's description requirements, and not the section as it appears in the Act.

(22) The question of the description of land is discussed later in this paper at pp.

between the parties (23). Therefore the description of land or premises is just as essential to protect the grantee's interest against the operation of s.18 of a sufficient description of the stock.

Branding in the commonly accepted use of the term, that is the burning of a mark on the hide, skin or face or horn of an animal with a hot iron is very little practised these days. same paragraph Although never judicially considered it is most probable that the statutory definition (24) of branding given in the various stock Acts and now embodied in the Animals Act 1967 would be used should the interpretation of this word ever be disputed. Generally in the earlier Acts the term included (in the case of sheep) earmarks, wool-marks, metal-clips attached to the ear, tattoo-marks and fire-marks on the horn or face. Therefore it is submitted ~~by the writer~~ that for the purposes of s.28 of the Chattels Transfer Act "branding" can be read as including "earmarking".

Marking in the case of sheep has now lost favour and even legality as a method of identifying the ownership of sheep.

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(23) Lee v. Official Assignee (1903) 22 N.Z.L.R. 747: cf the English Bills of Sale Act 1882 there the consequence of non-registration was to avoid the instrument even between grantor and grantee. Lee's case was applied in Silk v. Dalgety & Co. Ltd. [1923] N.Z.L.R. 1065. The question as to the description of the land is dealt with later in this paper at pp.

(24) Stock Act 1893, s.56; Stock Act Amendment Act 1895, s.7; Stock Act Amendment Act 1898, s.14; Stock Act 1908, s.61; Stock Amendment Act 1956 s.3; Animals Act 1967, s.69.

Due to the fact that any mark applied to the wool will be lost once the sheep is shorn, this method of description has never been ideal. In the Animals Act 1967 the legislature has recognised the harmful effect wool marks can have on the marketing of wool in competition with other fibres and has therefore forbidden the marking of wool except by approved preparations (25). It is understood that the marking of sheep has now fallen into desuetude compared with its use during the era when the present Chattels Transfer Act was enacted.

Earmarking is the most widely used method of marking animals for identification purposes and for purposes of recording age, sex and ownership. In theory the stringent requirements as to the registration and use of brands (which we have seen include earmarks) should make a reference to earmarks being the best possible method of describing animals. Although this is true to a large extent even here there are difficulties. A farmer who buys replacement stock or store stock for fattening will be bringing on to his farm animals which already carry the earmark of another farmer. In many cases it may be impossible for the purchaser to super-impose his mark on the new stock (26).

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(25) Animals Act 1967, s.94 subs.(3) provides a penalty on summary conviction of a fine not exceeding two hundred dollars. cf. Stock Act 1908, s.61 where "pitch, tar, paint, raddle or lamp-black mixed with oil or tallow... to be plainly made with distinct letters" was one of the methods prescribed by the Act for marking sheep.

(26) The Animals Act 1967 s.83 allows a purchaser to brand new stock with his registered brand provided that he does not place his brand over the whole or any part of the existing brand.

for marking sheep with a preparation which has not been approved

Are there then any better methods of description available? Sex may be of assistance in the case of rams or bulls in a small flock or herd but is generally an insufficient method of identification. Age is of assistance in the case of young animals, e.g. calves, heifers, lambs and hoggets but after the animal matures the only sure method of age determination is by looking at the animal's teeth (27). Name could only be appropriate with a small number of animals and even then, in the absence of some other identifying feature, one must rely on the owner or some other person to say that a particular ram is "Garry" since an animal's name in the absence of some other description is very much a subjective matter.[28] Lastly colour is at least for most cattle and sheep quite unhelpful as a means of identification. One may ask why the legislature failed to specify breed as one of the modes of description of stock since this form of identification enjoys the advantages of being absolutely immutable, (unlike a brand, mark or earmark), easy to see (unlike age, name, or even sex ~~(28)~~ (28a) and there is today a sufficient number of breeds of both sheep and cattle in

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(27) For example in the case of sheep from 1 1/2 to 2 1/2 years its set of teeth comprise two large teeth and in the following two years four and six teeth respectively after which it has a "full mouth" and age can no longer be precisely determined.

(28a) ~~(28)~~ e.g. it can sometimes be impossible to tell the difference between a ewe and a wether without catching the animal.

(28) In the opinion of a Invercargill solicitor: "Whether the names given are true or fictitious in my view makes no difference, because I do not believe that a cow would answer to its name if someone was attempting to identify it. I should like to see the word "name" deleted from s.28 of the Act."

New Zealand for this factor to be, if not a sole means of identification, at least one which may narrow the field down to a considerable extent. Yet even a description by breed may give rise to serious problems for mortgagees in the case of after acquired stock under s.29 (29).

Therefore despite the numerous methods of description allowed by the Chattels Transfer Act the mortgagee of sheep and cattle has, at least under s.28, a very limited choice as to the method he will employ to achieve a description which renders the secured animals reasonably capable of identification. Thus the reader is invited to reflect on the extreme difficulties involved in describing stock before adopting an over critical approach on the ways in which our Courts have endeavoured to meet this problem.

The leading decision on the description requirement of s.28 is the Official Assignee of Bailey v. Union Bank of Australia (30). Bailey purported to assign to the Union Bank by an instrument duly registered under the Chattels Transfer Act a herd of cattle and certain sheep depasturing on his land together with all after-acquired stock. The schedule to the instrument described the stock as:

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(29) Quaere whether "all stock of the class or clasees described in the instrument" would cover after-acquired cheviot sheep if Romney sheep were the only stock referred to in the instrument. Must "class" always refer to species or does it refer to the class created by the parties for the purposes of their instrument. stet ~~Chapman J. in Official Assignee of Bailey v. Union Bank of Australia [1916] N.Z.L.R. S.C. 9 (reversed in part on on appeal) stated that it may be possible to draw a distinction between one class of cows and another at p.18.~~

(30) [1916] N.Z.L.R. S.C. 9 and C.A. 873.

See the discussion on this point at p — of this paper.

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All that flock of sheep comprising 500 ewes of mixed ages 250 lambs of mixed sexes. Also that herd of cattle comprising 49 heifers and 1 bull All which sheep and cattle are earmarked with the registered earmark of the grantor ... (31)

The schedule also described the land on which the stock were depasturing. The instrument contained a covenant by Bailey with the Bank "that the grantor 'will brand' and will earmark as shown in the schedule hereto" but no brand was shown on the instrument or the schedule. Bailey sold the sheep and purchased 28 cows with the proceeds. None of the stock either at the date of the instrument nor subsequently bore the grantor's brand as shown in the instrument and it was admitted that they could not by means of the description given be distinguished from 28 additional cows subsequently acquired by Bailey who had not observed his covenants to brand and earmark.

After Bailey's adjudication in bankruptcy the bank seized and sold the stock depasturing on the bankrupt's farm including 77 cows (being the 49 original heifers plus 28 cows acquired with the proceeds of the sale of the sheep), 1 bull (not being the original bull but acquired after the date of the instrument), 3 yearling heifers (the progeny of some of the 49 heifers) and 8 calves or weaners, 2 horses (after-acquired) and one pony.

On an originating summons the Court was asked to decide whether the Bank or the Official Assignee was entitled to retain the proceeds of the sale. The Official Assignee argued

(31) ibid p.874.

that the instrument was void as against it because the original 49 heifers and 1 bull were not within s.28 (32) but were in fact actually misdescribed in that they were not earmarked with the grantor's earmark. The plaintiff argued that unless stock belonging to the grantor are properly described at the time of execution of the instrument they will not be covered by a covenant to earmark.

Chapman J. in the Supreme Court held that the description by sex and approximate age was in the circumstances sufficient to render the herd reasonably capable of identification unless an objection dependent on the absence of brands was to prevail. The learned Judge observed that description by reference to brands or marks in s.28 was alternative to that " by sex, age, name, colour, or other mode of description" so that one or the other would suffice. Chapman J. showed a sound insight into the practical difficulties of describing livestock referred to earlier in this paper.

> "A description by sex may leave some room for doubt, just as a description by colour may: ... a description by name may be equally defective, save in the case of a domesticated beast which will answer to its name. A dairy-farmer's herd of heifers or milch-cows is, however, in itself a fairly definite thing." (33)

Had it not been for the further complication of after-acquired stock being mixed in with andindistinguishable from the original 49 heifers there may be good business reasons to adopt Chapman J.'s somewhat rugged approach to the description

(32) s.25 of the 1908 Act.

(33) Official Assignee of Bailey v. Union Bank of Australia [1916] N.Z.L.R. (S.C.) 9 at 16-17 hereinafter referred to as Bailey (S.C.)

requirement of s.28. The policy behind his decision appears to be that the same strictness of description required by the English Bills of Sales Act and the cases decided thereunder for all chattels including stock was not appropriate, in the case of livestock, to New Zealand conditions.

> "The lending of money on stock is a regular business in New Zealand; and to it the same kind of suspicion and even discredit, that appears to attach to money-lending transactions involving bills of sale in England, does not attach." (34).

new paragraph

Yet because a particular type of lending is common in a country need not by itself justify a lessening of the standard of description required for any chattel which may be taken as a security. If anything, widespread borrowing on the security of livestock may render a strict description requirement even more necessary and desirable to protect borrowers. Perhaps the predominant and underlying influence behind the passage quoted above ~~quote~~ is that the description requirements handed down by English case law should be relaxed in New Zealand to favour lenders so that agricultural borrowers will find it easier to obtain financial accommodation.

Another justification for a different approach in New Zealand is of course the comparative numbers of stock involved. Whereas in England many farmers and even their neighbours might

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(34) Bailey S.C. 15

know many of the animals by name or individual appearance (35) the same could not be true of New Zealand farming conditions with its large numbers of livestock and comparatively sparse human population.

The decision of Chapman J. on the compliance of the instrument in question as to description under s.28 was reversed by the Court of Appeal (36). Sim J. stated that the case was not one where it was claimed that a general description, correct as far as it went, might be treated as a compliance with the section, but where it was sought to treat a serious misdescription as a sufficient description for the purposes of the section (37). Edwards J. considered that the New Zealand Act required even greater particularity of description than s.4 of the English Bills of Sale Act 1882 and that the purpose of the requirement of s.28 is declared in that section to ensure that the stock shall be reasonably capable of identification. Reviewing the English decisions on the meaning of this requirement Edwards J. found that the test whether or not the description of chattels was sufficient to meet the statute was whether or not the chattels mortgaged could be identified with reasonable certainty. This test was in His

(35) "... in a country parish in England every farmer and every farm labourer in the parish would know everyone of the cows in question by sight, and that the case is very difficult with respect to 47 cattle on a farm in New Zealand" Edwards J. [1916] N.Z.L.R. (C.A.) 881.

(36) [1916] N.Z.L.R. 873 hereinafter referred to as Bailey (C.A.) Stout C.J., Edwards J., Cooper J., Sim J.

(37) Bailey C.A. 882

Honour's opinion expressed in direct terms in the Act. Applying that test to the facts before him the learned judge found it "beyond question" that the provisions of s.28 had not been complied with.

> "If, using the words of Lord Justice Kay in Davidson v. Carlton Bank (38), the Official Assignee in this case had gone upon the land mentioned in the schedule, taking the schedule in his hand and applying it to the cattle which he found there, he would not only have failed to find a single beast which corresponded with the description in the schedule, but he would have found that by far the greater number of the beasts which were there bore earmarks totally different from that mentioned in the schedule....How, then can it be said that each beast was described in such a way as to enable a person dealing with Bailey to identify these which were intended to pass with the security?" (39)

The "reasonably capable of identification" test was considered in relation to different animals in The King v. Buckland & Sons Ltd. (40). Certain pigs were described in the schedule to the bill of sale as "1 white sow (dry), 1 black-and white sow, 6 'young' 1 week, 6 'young' 5 weeks, 8 'young' 2 weeks, 8 'young' 5 weeks, 7 slips, 10 slips, 45 young slips." There was a covenant in the instrument that the grantor "will brand" but the animals were not branded nor earmarked. In an action for damages for conversion of chattels by the grantee against the defendant company of auctioneers which had sold the pigs without knowledge of the plaintiff's bill of sale, it was held that only the "white sow (dry)" and the "black-and-white sow"

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(38) [1893] 1 Q.B. 82, 87, Lord Justice Kay's statement was cited with approval by Herdman J. in The King v. Buckland & Sons Ltd. [1922] N.Z.L.R. 683 at 686.

(39) Bailey C.A. 882

(40) [1922] N.Z.L.R. 683

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were sufficiently described for the purposes of s.28.

Herdman J. stated that the object of the legislation was to enable interested persons to avoid confusing stock which is the subject of a chattel mortgage from stock which is unencumbered and that the method of distinguishing one animal from another adopted in the case of the porkers, the slips and the young pigs did not achieve that purpose. The learned judge stated that the sex and the colour of the young pigs and the porkers might have been given in the instrument but this had not been done.

Yet even if the sex and colour of the pigs which were found to be insufficiently described had been given one might ask whether this would have been sufficient information "to enable any person, taking the schedule in his hand and applying it to the subject- matter, to identify the chattels assigned without the aid of any other document" (41). It is felt that the learned judge# in ~~this~~ Buckland's case as in Bailey's case in the Court of Appeal have perhaps approached the difficult subject of identifying livestock too much influenced by the considerations applying to inventory description and insufficiently appreciative of the special complexities involved ~~with describing~~ in the identification a living "chattel". The writer suggests that even if the young pigs and the porkers had also been referred to by colour and sex they may still have been confused with other animals on the property not within the security. It is considered that when dealing with a reasonably

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(41) per Kay L.J. in Davidson v. Carlton Bank loc. cit. 87

large number of stock which are similar in appearance e.g. sheep, poultry (42), pigs, cattle all belonging to the same breed one is confronted with a choice as to description. Either an exactitude of marking or description must be attained which would be enormously difficult and time-consuming or alternatively one should settle for the best general description available and tie this in with a description of the land or premises on which the stock are to be found. Any stock could be excepted from this general description on sufficient proof being given that they belonged to someone else, e.g. a neighbouring farmer whose sheep have slipped through the grantor's boundary fence.

Although there has been no recent litigation turning on the description of stock under s.28 of the Chattels Transfer Act this is attributable to factors described elsewhere in this paper (43) than to the quality or suitability of the section. (44).

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(42) Palmer & Co. Ltd. v New Zealand Farmers' Co-operative Distributing Co. Ltd. [1924] N.Z.L.R. 280. The difficulties presented by this case had to be cured by special legislative enactment. Now s.30 which inter alia excluded the operation of s.28 in the case of poultry.

(43) See pp. of this paper.

(44) The doubts as to the suitability of the description of livestock requirements of the Act ~~are~~ well expressed in the following paragraphs of letters from Masterton ~~and~~ Te Awamutu and Dunedin practitioners respectively to the writer: "We have not had any difficulty in describing livestock, but again the apparent lack of difficulty may be due to the lack of enforcement action. Difficulties only appear when enforcement takes place and there are competing claims. The Chattels Transfer Act refers to "brand, ear-mark and mark".

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Branding is now a thing of the past and often the only branding which is done is an internal numbering system for the farmer's own records and convenience. Ear-marking is still, of course, current but is often honoured more in the breach than in the observance. A number of farmers "deal" in livestock. This means that they purchase livestock, fatten and sell. Often the holding period is fairly short and they do not bother to re-earmark for the brief period they have the stock on the property. Thus, if ever a case arose for proper identification of livestock, the ear-mark system could well break down. I see no reason why all livestock on a given property should not prima facie be deemed to be the property of the land occupier subject to any livestock being excluded from a security on satisfactory proof of a Bailiff or an Official Assignee that in fact the stock belong to some other person."

"Branding - the present provisions for branding and earmarking would seem to be unsatisfactory. Most Instruments provide for the Grantor to brand and earmark but in practise this would rarely be carried out. Most farmers would perhaps use their own marking systems for identifying stock which would not be in accordance with the Instrument."

"The description of livestock is a problem which arises surprisingly little — surprisingly because the description is so often inadequate. There must be many instruments describing flocks of sheep as '5000 mixed age Romney ewes, 140 mixed age rams" but if an analysis was made it would show that sheep not falling within the listed descriptions existed — more so with cattle."

After-acquired stock; s.29

The Court's interpretation of s.29 (45) has circumvented some of the difficulties of description referred to in the preceding discussion on s.28. The "covenant to brand" implied by statute or expressed in the instrument has been used as a fictional device to save what might otherwise be insufficient descriptions under the Act.

The Court of Appeal decision in Baileys case best illustrates the operation of this "empty formality" (46) upon which a valid security over stock may often depend. In that case it will be recalled that Chapman J.'s decision as to the sufficiency of description was reversed on appeal. However the majority (47) held that though the instrument was not valid for the purposes of s.28, the provision in s.29 that an instrument comprising stock shall be deemed to include all the stock the property of the grantor which he has covenanted to brand or mark, and which are depasturing on the land mentioned in the instrument, made the security valid.

(45) The most thorough text on this section is Ball, Law of Chattels Transfer (1940) 63-67.

(46) Cain, The Chattels Transfer Act (1959) N.Z.L.J. 87, 89

(47) Stout C.J., Cooper and Sim J.J. (Edwards, J., dissenting)

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Stout C.J. said it was clear that the stock described in the schedule of the instrument were neither branded (48), nor earmarked as stated in the schedule. Nevertheless His Honour was of the opinion that because the instrument could be interpreted as imposing a covenant to earmark on the grantor as shown in the schedule, there was a sufficient compliance to let in the operation of s.29. This view of s.29 raises the question whether a covenant to earmark present cattle which already have a different earmark from that shown in the instrument has ~~as~~ to be construed as requiring the cattle to be earmarked with the new earmark. His Honour answered this difficulty as follows:

> "If the covenant was so construed it would make s.26 [now s.29] quite inoperative in the majority of securities. Sheep and cattle are bought with earmarks and everyone assumes that they may acquire new earmarking. The question really is, was there a covenant to earmark as described? If there was, in my opinion this security comes within s.26 and is valid and effective." (49)

The writer while sympathising with the Court's problem in seeking to give business effect to the instrument respectfully suggests that this reasoning is faulty. Although there may be good practical reasons for not requiring after-acquired cattle to be immediately earmarked with the earmark shown in the instrument under the provisions of Sections 28 and 29 of the Act, it seems inexcusable not to require

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(48) In fact no brand was mentioned or described in the instrument, although a description of the earmark was given. The plaintiff argued that the words "will earmark" could refer only to sheep but this contention was not accepted by the Court: see Stout C.J. Bailey (C.A.) 876-877.

(49) Bailey (C.A.) 877

those cattle owned by the grantor at the date of the instrument to be accurately described. Secondly this reasoning almost renders the description requirement of s.28 redundant so long as there is a covenant to brand or earmark in the instrument.

The Chief Justice went on to justify this interpretation by invoking the golden rule of interpretation, that is to try to give effect to all the words in a statute or document. He said that if there is an instrument to which s.28 is applicable, that instrument can have no effect if the conditions mentioned in that section are not complied with. This the writer submits, was the factual situation in Bailey's case since surely s.28 should have applied at least to the present cattle. His Honour then went on to say that if the condition as to branding or marking has not been complied with the security may be good under s.29 if there is a covenant to brand or mark and the lands on which the cattle are depasturing is described. Yet it is suggested that this approach contradicts the golden rule referred to by the learned Chief Justice in two ways. Firstly it fails to give effect to the words of s.28 and treats them as virtually redundant in an instrument containing a covenant to brand, and secondly it fails to give effect to the words of s.29 itself (50)

(50) It is submitted that the fourth to last sentence of Stout C.J.'s judgment in Baileys case may indicate that His Honour felt somewhat uneasy about his interpretation of the combined effects of ss.28 and 29: "If the meaning I have given to these two sections is incorrect, then the present system of advances on stock mortgages will have to be changed." p.878.

Both these failures were clearly revealed by Edwards J. in his dissenting judgment. Commenting on the majority interpretation His Honour said:

> "It is contended, however, that, although s.28 in the clearest possible language declares that the instrument shall be void, in the circumstances of the present case ...., nevertheless s.29 gives the bank the same security as would have been given by an instrument in all respects scrupulously regular within the provisions of s. 28. If that is indeed the true construction of this enactment it is, I venture to think, the most astonishing piece of legislation which it has been the duty of any Court to construe." (51)

His Honour warned that this construction would sweep away the protection given by the statute to persons giving credit to stockowners and that it would render s.28 worse than a "meaningless absurdity" but an actual trap" to those who relied upon its provisions:

> "....the mortgagee who knowingly acquiesces in the deliberate disregard of the provisions of s.28 is as fully secured as if the instrument under which he claims had complied strictly with these provisions, and as if all the covenants which by the schedule to the Act are implied in such instruments had been scrupulously observed. Nay, the mortgagee is in an even better position, for he enables the mortgagor to maintain a fictitious credit which it is to the interest of the mortgagee to support." (52)

Edwards J. stated that the purpose of s.29 was to overcome the difficulties of identification that would arise in the case of a natural increase of existing stock or where additional stock was brought onto a farm or station of the same description as the mortgaged stock and would be branded with the same brands. Since in such cases it would be impossible to distinguish between the stock included in the security and the additional stock depastured on the same lands and branded with

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(51) Bailey (C.A.) 883.

(52) Bailey (C.A.)

the same brands s.29 was enacted to meet this difficulty by bringing such additional stock within the security. His Honour said that the meaning and intent of s.29:

> "....assume the existence of a mortgage of stock complete under s.28, and to add to the security thereby given (i) the natural increase of such stock, (ii) all stock the property of the grantor branded or marked as specified in the instrument, (iii) all stock which the grantor has covenanted or agreed by such instrument to so brand or mark, provided in the second and third cases that the stock are depasturing or are at, in, or upon any land or premises mentioned in the instrument or the schedule thereto." (53)

As further support for his interpretation of s.29 Edwards J. stated that to include stock, not sufficiently described for the purposes of s.28 within the benefit of s.28 by their inclusion in category (iii) (of the preceding quoted passage) not only destroyed the effect of s.28 but rendered meaningless the following words of s.29:"not only the stock comprised therein as provided by the last preceding section, but also..". His Honour considered that these words, being in the opening sentence of s.29 were the controlling words of that section. (54)

It is not surprising that the majority decision in <u>Bailey</u>'s case although applied in <u>Honore</u> v.<u>Farmers' Co-operative Auctioneering Co. Ltd</u> (55) has been the subject of critical comment. Mr Cain states that:

"...the strong dissenting judgment of Edwards J. [in <u>Bailey</u>'s case]

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(53) ibid.885.

(54) ibid.885-886.

(55) [1923]N.Z.L.R. 56. In this case none of the stock mentioned in the schedule bore the brand described therein and all the original mortgaged stock had been sold and replaced. Herdman J. held that although the description was insufficient to comply with s.28, as the instrument contained a covenant to brand it covered the stock on the grantor's farm at the date of his bankruptcy under s.29. It was also held that the fact that the brand was not registered under the Stock Act 1908 was immaterial.

is preferred by most lenders. It was there considered by the majority that, if existing stock were so described as not to comply with (now) s.28, they might be saved if complying with s.29; the better view seems to be that the two sections are mutually exclusive, and that beast charged at the date of the instrument should be described as required by s.28, with s.29 assuming greater importance as individual beasts die or are removed." (56)

Professor Gray in the Law of Personal Property (57) shares the same opinion as that given by Mr Cain above and considers that:

" it is fortified by the circumstance that S. 29 makes no provision avoiding the instrument in case of misdescription of the stock or land: hence, if present stock could be brought within the ambit of s.29, s.28 (with its penalty) would be otiose." (58)

However Professor Gray acknowledges that the majority of the Court of Appeal in Bailey's case took the view that if an instrument failed to comply with s.28 it could be saved if it complied with s.29.

Ball does not specifically direct himself to the issue as to whether stock on the properties at the time of the instrument and purported to be included therein must be described in accordance with s.28 (59) but does say that it is desirable that an instrument to obtain the protection of ss.28 and29, should contain,inter alia,an exact description of the stock at the time of the instrument. (60) This it is submitted is an implied acceptance of the fact that lenders should not place total reliance on the majority decision in Bailey's case.

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(56) The Chattels Transfer Act (1959) 35 N.Z.L.J. 87,89.

(57) 5th ed.

(58) ibid. p.148.

(59) see The Law of Chattels Transfer (1940) first complete paragraph on p.64, subheading (2).

(60) ibid. p.65.

Covenant to brand

The covenant to brand, mark or earmark assumes great significance under the Act by virtue of the interpretation placed by the Court on s.29 (1). It is therefore relevant to inquire into the meaning of this covenant which has been described by one writer as being in certain circumstances an "empty formality" or "fiction". The most thorough judicial treatment of the covenant to brand was given by Salmond J. in Palmer & Co. Ltd. v. New Zealand Farmers' Co-operative Distributing Co. Ltd. (2) where His Honour held that a covenant to brand on its true construction was insufficient to bring s.29 (3) into operation so as to include after-acquired poultry being upon land specified in the instrument.

> "A covenant to mark or brand is not a meaningless form of words inserted in an instrument for the purpose of bringing into operation s.26 of the Chattels Transfer Act. To be effective for this purpose it must, on its true construction as a term of the contract, impose upon the grantor a legal obligation to mark or brand in a specified manner the after-acquired stock claimed by the mortgagee in reliance on that covenant. To ascertain whether the clause in question has this effect it must be interpreted on the same principle as any other term in the contract. The question for determination, therefore, is whether the grantor of the defendant's bill of sale has, on the true construction of that document, bound himself by a valid and operative covenant to "brand and ear-mark "with hissregistered brands and ear marks" all poultry which he may afterwards possess upon the farm mentioned in the instrument. I consider that he has not. The covenant can only be reasonably construed as limited to sheep, cattle, and horses." (4)

(1) e.g. Bailey's case S.C. & C.A.

(2) [1924] N.Z.L.R. 280, 282-3

(3) s.26 Chattels Transfer Act 1908

(4) [1924] N.Z.L.R. 282-3

His Honour went on to state that the question is not whether the parties expected or understood that the stock in question would be branded but whether the grantor has bound himself by a valid covenant to do so. If he has, s.29 applies even though the covenant is not performed or expected to be performed.

While this judgment is to be commended for its decisive and unequivocal approach to the problem the self contradiction inherent in the decision may be a cause for uneasiness. This fault is clearly expressed by Mr. Cain when he says:

> "Hence (i.e. from the decision in Palmer's case) ... there must be a valid covenant to brand, but it must not be "a meaningless form of words". A covenant to brand poultry was meaningless (Palmer's case) but it seems that to covenant to brand stock that can in fact be branded, but which the parties know the grantor has no intention of branding is not meaningless." (5)

He concludes on this point that if poultry and other stock not capable of being branded are entitled by s.30 to exemption from the covenant to brand, it seems reasonable to extend the exemption to stock which are not branded in the usual course of farming practice or to specifically exempt dairy stock from the branding covenant of s.29. (6)

The writer, assuming that Mr. Cain when he speaks of a covenant to brand also refers to a covenant to brand, mark or earmark considers that there is certain merit in this proposal. A number of experienced practitioners in this field have expressed their dissatisfaction with the existing position to

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(5) (1959) 35 N.Z.L.R. 89

(6) s.30 was enacted in the 1924 Act after the decision in Palmer's case and no doubt to remedy the difficulties raised by that case for mortgagees of stock not capable of distinctive marking.

the writer. A senior conveyancing partner in a Hamilton firm is of the opinion that:

> "The use of a brand is almost universally in discard, while even an earmark is used only occasionally (7) and is then often of little use, particularly for one who deals in stock, because of the difficulty of earmarking when the stock has already been earmarked with some other earmark."

This opinion is reinforced by those of Masterton, Te Awamutu and Waipukurau solicitors, respectively:

> "The Chattels Transfer Act refers to "brand, ear-mark and mark". Branding is new a thing of the past and often the only branding which is done as an internal numbering system for the farmer's own records and convenience. Ear-marking is still, of course, current but is often more honoured in the breach than in the observance."

> "The present provisions for branding and earmarking would seem to be unsatisfactory. Most instruments provide for the grantor to brand and earmark but in practice this would rarely be carried out. Most farmers would perhaps use their own marking systems for identifying stock which would needbe in accordance with the instrument."

> "The main difficulty (of the Act) is of identification. Where the fat lamb farmer buys in ewes from a number of flocks the earmarks are not much use. As far as branding is concerned, this is rarely used now and I do not think there is any longer a requirement to register a brand. This difficulty is why stock firms tend to lend a limit per head of $3 per sheep regardless of age, quality, breed, etc." (8).

Unfortunately it is easier to criticise the present legislation than to improve upon it. The amendment suggested by Mr. Cain is strictly speaking unnecessary in the case of s.28 because

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(7) Writer's note: With respect it is understood the earmarking particularly of sheep is still very prevalent in New Zealand.

(8) Writer's note: For those unfamiliar with sheep prices a good store or fat lamb would fetch between $4 to $6; a 2 tooth breeding ewes $6 to $10; a fat wether $5 to $7. It is understood that generally stock firms will lend only about 50% on the total value of livestock.

the branding or marking requirement there is not obligatory so long as the stock are otherwise referred to or described so as to be reasonably capable of identification. So far as s.29 is concerned there is some merit in Mr. Cain's proposal to exempt stock which are not branded (assuming this term embraces also earmarked or marked) in the usual course of farming practice, but with respect it appears that this solution could raise as many problems as it seeks to answer. Since "stock which cannot be properly the subject of distinctive marking" are already exempted by s.30 all that are left are stock which can properly be the subject of distinctive marking. Given that the practice of earmarking sheep or cattle may vary from farm to farm and district to district who is to say whether it is usual or not to mark such stock in the course of farming practice? The writer suggests that a better way to meet the problem is to delete the words "branded, earmarked, or marked as specified in the instrument, or which the grantor has covenanted or agreed by such instrument so to brand, earmark or mark, and" from s.29 and substitute therefor "and which are reasonably capable of identification as being the property of the grantor". Such an amendment would have the effect of including all after-acquired stock of a class in a mortgage of present stock of that class.

It could be argued that such an amendment is favourable to grantees. In the writer's opinion there would be little substance in this type of criticism because the amendment does little more than reflect what is the effect of existing law and what the existing law is generally understood to mean by the parties. At the same time it obviates the need for the covenant to brand "fiction". It is submitted that any alternative would make the identification requirement an extremely onerous and time consuming task and would tend to make lending on the security of livestock an unattractive proposition. Essentially, the writer feels, that one must acknowledge the peculiar complexity of describing livestock for the purposes of an instrument by way of security and adopt a practical albeit a different approach from the description of other chattels. Any grantor who is unhappy with encumbering his future class of stock in this way has only to insert in his instrument a clause expressly excluding the operation of s.29.

Land

A particularly important problem with such a mobile security as livestock is the requirement of describing the land on which they are depasturing and the consequences of a failure to do so. In Lee v. Official Assignee of Parke (1) it was held that non-compliance with the requirement of the Act (2) that "the land or premises on which such stock are shall be described or mentioned in such instrument or schedule" did not invalidate the instrument between the parties but, if registered, deprived the grantee of the benefit of the registration.

~~When~~ what then in ~~the~~ view of Lee's case is the situation where stock are on the move from one property to another or have been removed for sale? Are they still covered by the security under s.28? Edward J. stated that:

> "Section 28 does not, however, confine the security thereby given to stock otherwise sufficiently described while they are upon the lands so mentioned. Such stock if they can be identified, can be followed wherever they may be found? (3)

Another approach can be derived from a careful reading of s.28 itself. The section states that unless stock are branded, or marked or described so as to be reasonably capable of identification the instrument shall be void to the extent and as against the persons mentioned in s.18. The second part of

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(1) [1903] N.Z.L.R. 747; applied in Silk v. Dalgety & Co. Ltd. [1923] N.Z.L.R. 1065.

(2) s.34 Chattels Transfer Act 1889 the equivalent to s.28 of the present Act.

(3) Bailey (C.A.) 885

the section divided from the first part by ~~two~~ a semi-colon reads:

> "...; and the land or premises on which such stock are or are intended to be depastured or kept shall be described or mentioned in such instrument or schedule."

If it had been intended that non-compliance with this latter requirement should render the instrument void then surely the legislature would have included the description of land provision in with the description of stock provision in the main body of the section and clearly stated that a non-compliance with either would invalidate the instrument. Moreover the second part of s.28 allows a certain flexibility or independence of the stock from the land in that the words "land on which such stock are or <u>are intended to be</u> depastured" suggests that the legislature has contemplated a situation where the mortgaged stock will not in fact be on the land. Yet if this is the case why should a failure to describe the land invalidate the instrument.if the stock are otherwise reasonably capable of identification? It is submitted that the purpose of the land description requirement in s.28 is to inform grantees that if they fail to descibe the land or misdescribe it, although their instrument is not thereby void, they do so at their peril because in the words of Edwards J.:

> "The 28th section having provided that for the purpose of identification of the stock mortgaged it shall be sufficient to describe such stock by some brand or brands or other marks upon them, it at once becomes apparent that in the absence of some further provision endless disputes might arise as to the identity of the stock mortgaged. To meet this difficulty the concluding paragraph of s.25 provides that the land or premises on which such stock are shall be described or mentioned in the instrument or schedule." (4)

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(4) ibid. 884-885

It would appear that on this important question there are a number of possible views as to the effect of non-compliance with the description of land requirement in s.28:

i. Non-compliance renders the instrument incapable of registration under the Act or if registered deprives the grantee of the benefit of such registration: Lee's case.

ii. Non-compliance renders the instrument incapable of registration but provided stock can be identified if they are removed from the land then the security retains the protection of the Act. Edwards J. in Bailey's case.

iii. Non-compliance does not render the instrument void and incapable of registration but the stock in question must be reasonably capable of identification under s.28 and if a grantee omits to correctly describe the land he does so at his peril, since his security will stand or fall by the description of the stock.

It is considered that (i) and (ii) above read together represent the present law though not necessarily the best interpretation of s.28 and that (iii) is against the weight of authority. The problem presents a dilemma. If the land is not made an essential part of the description then as Edwards J. commented, enormous difficulties would be involved for a lender advancing money on a herd or flock because he would have to rely on the description of the animals which, as shown earlier in the paper, can be a most uncertain and difficult exercise to accomplish. Yet if land is an essential part of the description then third parties can easily be deceived into lending on stock which is not on land shown in the instrument. Also there are difficulties with stock on the move, temporarily on another paddock or farm, or which have strayed (4), not to mention innocent misdescription

(4) Fortunately for reasons given elsewhere in this paper many of these problems under modern N.Z. farming conditions are academic rather than practical.

of land due to clerical errors or incorrect information being supplied (5).

The words "or any land and premises used and worked as part of the first mentioned land and premises, whether or not such stock be removed therefrom" have not been the subject of judicial consideration. It is therefore relevant to ~~look at~~ refer to the Parliamentary debates preceding the enactment of this additional provision in 1922 and 1924. The Hon. Mr. Lee (Minister of Justice) stated during the debates on the 1922 Chattels Transfer Amendment Bill that the reason for the amendment to the principal Act by adding the words "whether or not such stock may be afterwards removed therefrom" was to provide:

> "...that the security is to remain over stock if the stock is removed from the land on which it was originally depastured. It happens sometimes that there is a bill of sale by way of security over stock, and the farmer may buy an ~~of~~ adjoining field and remove the stock to it. At the present time the stock affected by the bill of sale must remain where they were when the bill of sale was made. This removes that difficulty. (6).

In 1924 the further words "or any land and premises used and worked as part of the first mentioned land and premises" were added. It seemed to be the view of the Government members that the addition only reflected the existing law after the 1922

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(5) In In re Fairbrother Official Assignee v. Baddeley (1905) 25 N.Z.L.R. 546, Stout C.J. at 548 took a sensible approach to a clerical error in the misdescription of land in holding that "the blender of substituting [lot] "23" seeing that the rest of the description is correct ought not to invalidate the instrument."

(6) Hansard (1922) Vol. 198 774

~~(8) Hansard (1924) Vol. 205 p.635: the member for Hamilton. Mr. Young.~~

Amendment Act (7). The member for Timaru, Mr. F.J. Rolleston stated

> "it is quite reasonable that stock should still be covered although perhaps not on the land. It would not be reasonable to say that because stock were taken off the land the security would not stand." (8).

Ball considers that the effect of the words added in the 1924 Act is to include other lands which, although not described in the instrument, are used and worked as thought they were part of the land described in the instrument (9). The writer considers that this view is borne out both by the words themselves and also the intention of the legislature so far as it can be discerned from Hansard.

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(7) Hansward (1924) Vol. 205, p.635; the member for Hamilton Mr. Young.

(8) ibid. p.637

(9) Law of Chattels Transfer p.67

PRIORITIES

The present law relating to priorities among competing instruments is a cause of dissatisfaction and even uncertainty among practitioners. Section 22 provides that where two or more instruments are executed comprising wholly or partly the same chattels, priority is given to such instrument or instruments in the order of the time of their respective registrations provided that where the grantee under a second or subsequent instrument claims priority by virtue of prior registration he must prove that at the time his instrument was executed he had no notice of any existing unregistered instrument.

The question which this Section raises is whether a subsequent grantee can achieve priority by obtaining the prior grantee's consent in a Deed of Variation of priorities. If this is not possible then at any time when grantees have agreed to vary the priority of their instruments from the order shown on the register then all instruments registered prior to that to which the grantees have now agreed to accord priority would have to be discharged. The latter approach would appear to be unnecessarily cumbersome and a duplication of effort for the prior instruments thus discharged would have to be re-registered immediately after the registration of the instrument to which the prior grantees have now agreed to yield priority. Not only is this method a duplication of effort but it also carries with it the risk that the re-registered instruments may become voidable securities under s.57 of the Insolvency Act 1967 (1) even though the identical form of such secuities were originally registered over 12 months before the filing of a creditors petition.

The answer to this problem is clear with only one type of lender, the State Advances Corporation. Under s.73 of the Rural Intermediate Credit Act 1927 any instrument by way of security given for the purposes of that Act shall have priority over any previously registered instrument, if the grantee under the previously registered instrument joins in the instrument given for the purposes of that Act and therein agrees that such instrument shall have priority. The writer submits that the need for a special provision dealing with the priority question in the case of State Advances loans raises a strong suggestion that, in the absence of a special provision relating to other categories of lenders, ~~that~~ the only way in which legal (2) priority can be achieved under s.22 of the Chattels Transfer Act is by ensuring that there are no prior registered instruments at the date of the registration of the instrument for which priority is sought.

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(1) This section provides, inter alia, that every security or charge over any property of a bankrupt will be voidable as against the Assignee of the bankrupt's estate if it is executed or given by the debtor within the period commencing twelve months immediately before the filing of a creditor's petition in bankruptcy. This provision does not apply in the case of money actually advanced or paid or any other valuable consideration given in good faith by the grantee of the security to the grantor at the time or at any time after the execution thereof.

(2) As between the grantees a deed varying priority would confer perfectly valid equitable rights.

It is submitted that this whole problem of priorities with its inconvenience and uncertainty could be easily rectified by enacting a provision in the Chattels Transfer Act along the lines of s.103 of the Land Transfer Act 1952 which provides for the variation of priority of mortgages. Under this section priority is accomplished by the execution of an agreement between the mortgagor and ~~by~~ the mortgagee under every mortgage that by this agreement (which is called a a memorandum of priority (3)) is postponed to any mortgage over which it previously had priority (4).

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(3) The Memorandum is to be in Form J in the Second Schedule of the Land Transfer Act 1952.

(4) It is not proposed to discuss the rules governing priorities under Article 9 of the Uniform Commercial Code in the section of this paper dealing with the parallel American provisions because the solution suggested above, it is submitted, would be both simple and adequate.

Sale of stock by grantor

It is obvious that if a farmer is to carry out his normal operations he must have some freedom to dispose of stock. This raises the problem for the grantee of an instrument over such a stock because his security would be thereby diminished. The implied covenant in clause 9 of the Fourth Schedule to the Act and the interpretation placed on it by the Courts endeavour to balance this potential conflict of interest. Encumbered stock may only be sold by the grantor during the ordinary course of business, but no sale shall be made so as to reduce the number of the stock stated in the security.

An interesting Parliamentary battle preceded the enactment of this covenant in its present form. Clause 9 of the Bill originally presented to the House of Representatives in 1924 contained the words "or to reduce the present value of the stock for the time being subject to this security to less than the market value of the stock originally covered by this security" after the words "so as to reduce the number of the stock stated in this security" which appear in the present clause. Opposition members described the requirement on the grantor to keep stock up to its original value as "absurd" and "farcical". (1). The principal arguments against this provision were the drastic fluctuations which could occur in the value of stock, especially during times of economic recession.

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(1) Mr. Lynsar (Gisborne) stated: "I know any number of people who before the slump paid £12 and £14 for cattle. I myself bought at prices up to £18. But when the slump came those cattelw ere not worth more than £3." Hansard (1924) Vol. 205 p.633

A further practical difficulty cited was the inevitable seasonal variations in the value of stock. For example a sheep would be of lesser value after shearing when its years clip of wool had been removed than before when it was carrying this extra asset on its back. Mr. Lynsar agreed that in view of the severe penalty imposed by the Act on a grantor who impaired the amount of his security it would be quite unjust and impractical to retain the value requirement:

> "Everything is done to tie these unfortunate people up in an unmerciful way, without any consideration. Farmers do not understand business documents unless the language is plan" (2)

In reply the Minister of Justice the Hon. Mr. Parr said that ordinarily if a man gives a mortgage over anything, he cannot sell without the consent of the mortgagee but that there had always been a departure from that principle with regard to chattels and stock in particular. The Honourable member considered it absolutely reasonable that if a farmer wished to sell his secured stock he was free to do so in the ordinary course of business, provided that the value of the stock was kept up to the value at the date when he gave the bill of sale. In the case where he wanted to sell and reduce the value, all he had to do was to get the consent of themortgagee (3).

As with clause 29 the opposition prevailed and the Government agreed to omit any requirement for the farmer to keep up the value of his stock from the Bill, which is the position in the present Act (4).

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(2) ibid. 634
(3) ibid. 638-639
(4) see pp.   of this paper.

The power of sale in the ordinary course of business provided that no such sale shall be made so as to reduce the number of the stock stated in the security was explained by Sim J. delivering the judgment of the Court of Appeal in National Bank v. Dalgety & Co. (5)

> "That power has been conferred for the purpose of enabling the mortgagor to carry on his business and to pay debts incurred in the course of carrying on that business. If in every case he had to pay the proceeds to the mortgagee it would mean a realisation of the mortgagee's security and would put an end very soon to the mortgagor's business."

This case was an action for damages for conversion by the allegedly wrongful sale of stock comprised in an instrument by way of security brought by the grantee against the grantor and the party to whom the proceeds of the sale had been paid. The Court rejected the argument that the proceeds of such a sale should be paid to the grantee. It also held that the covenant not to remove the stock must be read subject to the proviso that when the grantor was entitled to sell stock he was entitled to remove them from the station for that purpose. The condition that the number of stock left on the station after a sale is not to be less than the number stated in the instrument must be construed distributively so that where the instrument includes several classes of stock the number of any particular class must not be reduced below the number of that class stated in the instrument. If a grantor made a sale in excess of the number which he was authorised to sell the sale would be bad only to the extent of the excess. In that case the

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(5) [1925] N.Z.L.R. 250 at 255

instrument stated the number of cattle as "549 or thereabouts" and the Court found that a sale by the defendant which reduced the number to 503 unsold was justified by the terms of the instrument and the question of conversion did not arise.

In New Zealand Farmers Co-op. v. Canterbury Frozen Meat (1932) N.Z.L.R. 381 the grantee relied on a clause in the instrument which appointed the grantee to act as sole selling agent of all stock and produce of the grantor as negativing the grantee's implied covenant to sell in the ordinary course of business. It is understood that this type of covenant is invariably included in securities between stock and station agents and farmers. The Court held that this clause did not negative the grantor's power of sale but only regulated it. The implied covenant to sell in the ordinary course of business gave the grantor a right to insist on a sale of surplus stock. If the sale is made by the grantor in breach of the covenant the purchaser gets a good title and the remedy of the grantee as for damages for breach of contract.

Of all the covenants implied or expressed, in an instrument, it would be difficult to better clause 9 Fourth Schedule for a provision which gives ~~one~~ the grantor the maximum of temptation combined with the maximum of opportunity. A careful reading of each obligation in clause 9 shows that unless a grantee is in a position to constantly supervise the grantor's farm and stock then it will be exceptionally difficult for him to learn of the non-observance of the covenants. For example the covenant forbidding removal is in practical terms quite impossible to enforce and almost as difficult to detect unless the grantee is sufficiently energetic to have the stock counted at regular intervals.

Yet despite these problems is it fair to criticise clause 9 since in the final analysis few legal provisions can protect an innocent party against fraud? For reasons dealt with elsewhere in this paper (6) despite the theoretical difficulties involved in practice most of these problems are obviated by the character and business methods of the parties concerned.

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(6) See pp.

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<u>Purchasers and auctioneers of encumbered stock</u>

In the writer's opinion a curious anomaly is presented on the question of the protection afforded by s.19 of the present Act to the bona fide purchasers or auctioneers without express notice of encumbered stock. It is clear that such people are protected in the case of an unregistered instrument but what is the position where an instrument is "void to the extent and as against the persons mentioned in section eighteen" through non-compliance with s.28? Surely such purchasers and auctioneers are equally deserving of protection as the persons mentioned in s.18(1).

In the1908 Act s.16 (now s.18 of the 1924 Act) it had an additional subsection (3), absent from the present Act, which provided:

> "No instrument comprising stock, or made or executed in respect of wool or crops, shall be valid or effectual against any bona fide purchaser for valuable consideration without express notice, unless such instrument is duly registered under this Act."

Thus in <u>The King</u> v. <u>Buckland & Sons Ltd</u>. (1) Herdman J. held that:

> "As s.25 (now s.28) of the Chattels Transfer Act 1908 provides that imperfectly described stock are not secured to the grantee of an instrument as against the persons mentioned in s.16 of the Statute, it would seem to follow that a bona fide purchaser for value without notice (being a person mentioned in subs. 3 of s.16) who buys stock which are not reasonably capable of identification by reference to brands, or marks, or by reference to the other means of identification referred to in s.25, is protected. If, then, the buyer of such stock is secured from attack, why should an auctioneer, who sells the same stock bona fide and without any knowledge of the existence of a security, be held liable for wrongful conversion?

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(1) [1922] N.Z.L.R. 683

To hold that such a person is responsible for moneys realised by the sale of the stock appears to savour of injustice, but nevertheless it seems that he is liable."

Now by virtue of the present s.18 not even a bona fide purchaser for value without notice will be protected as against the grantee of an instrument which fails to comply with s.28. It is submitted that this position is totally unsatisfactory. Why should the grantee have the benefit of an instrument which does not describe the chattels therein so that they are reasonably capable of identification by a person who has gone to the trouble of searching the register? This result in the case of stock securities does not appear to have been intended by the legislature when clause 2 of the Chattels Transfer Amendment Bill 1922(2) was presented to the House. The then Minister of Justice, the Honourable Mr. Lee explained the purpose of the clause as follows:

> "The object of this clause is that those who hold instrument by way of security and do not register them within the appointed time shall not be able to contest the right of a subsequent purchaser for valuable consideration in respect of the ownership of the chattels. They have their opportunity to disclose their ownership by registration. It is also necessary to protect the auctioneer who sells those chattels. They are innocently sold, and it is wrong that the auctioneer should suffer". (3)

The Member for Wairau, Mr. McCallum approved of the clause because it extended the protection of the original Statute from stock, crops and wool to all property.[4] However no one seems to have contemplated the result that extending subsection 16(3) to

(2) s.19 Chattels Transfer Act 1924

(3) Hansard (1924) Vol. 198 p.773-4

(4) ibid p.774

cover all classes of property and making it into a new section (5) could have on the rights of a grantee whose instrument fails to comply with the present s.28.

The writer suggests that the anomaly complained of could be cured by simply inserting the words "and section nineteen" after the words "section eighteen" in section 28.

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(5) s.19; 1924 Act

Wool Securities

In every instrument by way of security comprising sheep there shall be implied unless expressly negatived, a covenant by the grantor that he will deliver to the grantee the wool shorn from such sheep in each year during the continuance of such instrument (1). The Act has provided a number of important protections for grantees of securities over wool. Thus a grantee is entitled to the wool of the sheep not only while growing but afterwards when shorn from the sheep and wherever such wool may be (2). The subsequent sale, bailment or mortgage or other encumbrance of or affecting the sheep mentioned in the wool security shall not prejudicially affect a duly registered instrument or the rights of the grantee to the wool referred to therein (3). Where sheep are already mortgaged the grantor may ~~xxxx~~ within the terms of the written consent of the grantee give to a third person a valid security on the next ensuing clip of the wool of such sheep (4). If an instrument by way of security has been given over sheep and the instrument provides that the grantor will give to the grantee an instrument over the wool growing or to grow upon such sheep or to require the grantor to deliver to the grantee the wool shorn from such sheep during the continuance of such instrument, then, while the first mentioned instrument lasts the grantee is deemed to have a lien or security over each clip

(1) s.41(2) 1924 Act.

(2) s.38

(3) s.39

(4) s.40

in all respects as if an instrument in respect of the wool had actually been executed and registered, and none of the subsequent dealings with the sheep referred to in s.39 will prejudicially affect the security (5).

A number of points are raised by these sections. In s.38 there is no indication as to how the sheep whose wool is mortgaged, are to be referred to or described. One presumes that the same considerations would apply here as under ss. 28 and 29, but if this is so it would have been a simple matter to spell this out in the Act rather than to leave it in doubt. The question could be of some practical importance, for example in the event of third parties acquiring rights to the sheep as envisaged by s.39 or in the case of after-acquired sheep being added to the flock (6). At first sight the implied covenant empowering the grantee to shear where the grantor is in default would answer this problem (7). However, on further analysis the requirement of sufficiently describing "the flock of sheep mentioned in this instrument", still remains. It is difficult to see how "the increase

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(5) s.41

(6) e.g. Goldsborough v. McCullough (1868), 5 W.W. & A'B (L.) 154 held, inter alia, the fact that after the execution of the lien, a number of lambs were born whose wool was commixed with thtat of the sheep, did not invalidate the lien. However, this problem would be covered in New Zealand by clause 12 of the Fourth Schedule of the Act.

(7) Clause 12, Fourth Schedule.

thereof (i.e. of such sheep) and all other sheep which if this instrument were an instrument by way of security over sheep would be included therein" can be ascertained if the original sheep in the wool security have not been sufficiently described. As we have seen s.38 gives no explicit indication as to how this is to be done. Nevertheless in practice lenders on the security of wool alone would ensure that the description of the sheep concerned would be the same as for an instrument under s.28 and s.29. Where the wool security is in conjunction with a security on the sheep under s.41(2) then the problem will not arise provided of course that such sheep havebeen sufficiently described in accordance with ss.28 and 29.

Under s.39 two questions arise for consideration. The rights of persons possessing interests in the sheep which are (i) prior and (ii) subsequent to the interests of the grantee.

On the question of prior interests the Act is not explicit and in s.39 it only mentions the position in the case of a "subsequent" dealing with the sheep and that such dealing shall not prejudicially affect the rights of a grantee under a duly registered instrument. What then are the grantee's rights against prior interests such as those of a landlord entitled to distrain for rent or a mortgagee of the sheep under a registered instrument? It is submitted that in such cases there are sufficient implications in the Act to justify a power in the grantee on default of the grantor to enter on the property, take possession of the sheep and shear and or seize the wool clip. If this were not the case an instrument under s.38 which

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"shall entitle the grantee to the wool of the sheep not only while growing" would be largely ineffectual unless the grantee had first obtained an agreement by the landlord whereby the latter consented to allow the grantee to enter on the property to enforce his security and to waive his right to distrain for rent (8). In the case of a prior mortgagee the question arises whether his "consent in writing" to the security over the wool under s.40 carried with it an implied power to enter on the property and shear or seize the wool or whether such a power must be expressly "authorised" in such consent. In the absence of any authority on this point the writer submits that the only way that proper effect can be given to s.38 is to imply a power on the grantee to enter the property and shear and or seize the secured wool clip. This view is strengthened by reference to the power to be implied in instruments by way of security over wool in the schedule to the Act (9). This power states that, on default by the grantor the sheep "shall be shorn either by the grantor or by the grantee, at the option of the grantee...and shall be delivered by the grantor to the grantee..." Presumably if the grantee has the option to shear the sheep himself he impliedly has the right to enter on the land, take possession of the sheep for the purposes of shearing and to remove the wool. Further support for the view that the grantee's rights

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(8) It is understood that many lenders on the security of stock on leased land require an agreement by the landlord not to distrain before they will advance any money to the grantor of the instrument.

(9) Fourth Schedule, clause 12.

may prevail against the prior interests in the sheep, provided of course that these interests have not already been exercised, ~~in~~ is the provision in the implied power that:

> "(the grantee) may from the proceeds (of the sale of wool) pay himself the moneys hereby secured, and any rent payable to any landlord, and any moneys payable to any mortgagee or other person that he may be compelled to pay in order to protect his security over the said wool..."

In this passage the implication is that the grantee is not obliged to pay the landlord or any mortgagee out of the proceeds either before or after he has paid himself for the moneys secured by the instrument but the grantee need only make such payments insofar as they are necessary to protect his security.

If the above view of the grantee's power as against prior interests is correct why then did the legislature deem it necessary in s.39 to expressly deal with the rights of the holders of subseqaent interests in the sheep? ~~If the view stated above is correct and the~~ If a power to enter on the property and take possesion of the sheep for the purposes of shearing and removing the wool can be implied in all securities over wool what is the purpose of s.39.?

new para It is considered that the implied power dealt with in the preceding paragraphs only subsists between the grantor and the grantee. In effect the grantee is given the same rights to deal with the wool of the sheep as the grantor. However, the purpose of s.39 is to extend the grantee's rights so that they operate not only against the grantor but also against all persons acquiring subsequent interests in the sheep. For example if the above interpretation is correct then the grantee would have no right against a prior mortgagee or the holder of other types of prior encumbrances who were in possession or had taken other steps to enforce their interest. However, as against a subsequent interest the grantee would by virtue of s.39 enjoy full rights under his security to get possession of and sell the wool, irrespective of whether the holders of such subsequent interests had taken steps to realise their security or not.

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(10) For a discussion of the parallel Australian provisions relating to wool securities see Francis, The Law and Practice in all States of Australia Relating to Mortgages and Securities (1964), 328=9 and Sykes, Crop and Wool Lien Complexities (1959) 33 A.L.J. 43 and 67.

PART III: UNITED STATES LAW OF LIVESTOCK SECURITIES

(i) The uniform Commercial Code, Article 9

For the purposes of comparison it is now proposed to deal briefly with the law relating to chattel securities over livestock in the United States. The governing American legislation in this field is Article 9 of the Uniform Commercial Code which was enacted to overcome the intolerable situation which was developing, of a multiplicity of complex and often overlapping laws uncertainty and expense. (1). The aim of Article 9 was to provide a simple and unified set of rules within which the immense variety and number of present day secured financing transactions could proceed with less cost and greater certainty.

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(1) Uniform Laws Annotated, Uniform Commercial Code, Vol. 3 West Publishing Co. (1968) St. Paul, Minn. p.10. here referred to as 3 U.L.A. U.C.C.

"The growing complexity of financing transactions forces us to keep piling new statutory provisions on top of our inadequate and already sufficiently complicated nineteenth-century structure of security law. The results of this continuing development are, and will be, increasing costs to both parties and increasing uncertainty as to their rights and the rights of third parties dealing with them."

(ii) Farm products - Section 9-109

Section 109 classifies "goods" into "consumer goods", "equipment", "farm products" and "inventory". Goods are "farm products":

> "if they are crops or livestock or supplies used or produced in farming operations or if they are products of crops or livestock in their unmanufactured states (such as ginned cotton, wool-cip, maple syrup, milke and eggs), and if they are in the possession of a debtor engaged in raising, fattening, grazing or other farming operations. If goods are farm products they are neither equipment nor inventory".

This classification is important in many situations in determining such matters as the rights of persons who buy from a debtor goods subject to a security interest (Article 9-307) certain questions of priority (Article 9-312) the place of filing (Article 9-401) and in working out rights after default. The official comment to the Code states that goods are "farm products" only if they are in the possession of a debtor engaged in farming operations (2). and have not been subjected to a manufacturing process. The term livestock is not defined but "it is obvious from the text that "farming operations" includes raising livestock..." (3). When livestock or their products come into the possession of a person who is not engaged in farming operations they cease to be "farm products".

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(2) c.f. the New Zealand position as expressed by Edwards J. in <u>In re Alloway</u> (supra) that the occupation of the owner of livestock is irrelevant and see pp (supra).

(3) 3 U.L.A. U.C.C. p.74.

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(iii) Description of livestock

The sufficiency of description of goods subject to a security is dealt with in section 9-110 which states:

> "for the purposes of this Article any description of personal property or real estate is sufficient. Whether or not it is specific if it reasonably identifies what is described."

The Official comment states that a description under this section is sufficient if it does the job assigned to it, namely that it makes possible the idenitification of the chattel described. The section is intended to depart from the decisions often found in the older chattel mortgage cases, in which descriptions were held to be insufficient unless they were of the most exact and detailed nature.

At first sight section 9-110 covers the problem of livestock description in an eminently short and simple fashion. However, the discussion earlier in this paper (4) on the special difficulties in describing this type of security show that at least in the case of livestock Article 9-110 poses more questions than it answers. It is therefore necessary to turn to the case law on this question (5).

The summary of the common law description requirement of animals in the Corpus Juris Secumdumn (6) states that although

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(4) see pp. (supra)

(5) see Corpus Juris Secundum, Vol 14, Chattel Mortgages Section 65 pp.673-5 for the complete list of the American decisions.

(6) ibid pp.673-5

the Courts recognise certain general principles determining the sufficiency of the description requirement of animals in a chattel mortgage, they are not uniform in the application of such principles when the rights of third parties become involved. Generally speaking a description is sufficient if it puts third parties on inquiry which, if pursued, would enable them to identify the mortgaged property. Thus in County Bank v. Hulen,[7] a description of mules by reference to the location, possession, value and seller's name was held to be sufficient. However a number of cases have held that animals are sufficiently described by merely stating their characteristics with respect ~~or-by-indicatin~~ to age, colour, height, sex and weight, or by indicating their marks and brands (8). Other cases have held such a description to be void as against third parties unless there is some additional means of identification such as a statement as to location, ownership, or possession, or some additional means of identification (9). The designation of animals merely by species or class and the number mortgaged has generally been held to be insufficient (10) without a reference

(7) Mo. App. 195 S.W. 74

(8) Thomason. V. Decatur County Bank, 111 S.E. 578

(9) A description by colour, although alone insufficient, is rendered sufficient by a further description of the animals as being bought of the mortgagee whose residence is stated in the mortgage. Burlington State Bank v. Marlin Nat. Bank. Civ. App., 207 S.W. 954.

(10) However in Sheffield v. Dean, 135 S.E. 109 "30 head of horses now located at the residence of ...(the mortgagor)" in a named district of a certain county was held too vague and indefinite.

to the location of the animals. Thus in Payne v. Boutwell (11) "16 head of dairy milch cows of various kinds, colours and descriptions now located on my dairy farm in West Elba" was found by the Court to be a sufficient description.

Provided that the description of mortgaged animals was originally sufficient, the mortgagee does not lose his right to enforce his security because of a subsequent change in the animal's appearance (12). If the description is otherwise sufficient, errors such as in stating the age, colour, weight, or brand or the number included under a certain brand, will not vitiate the mortgage unless such errors are confusing and misleading.

Thus in Hourigan v. Home State Bank, 162 P.699, 700 cattle were described in a mortgage by classification, age, colour and a certain brand followed by statements that the described cattle comprised all cattle owned by the mortgagor and that the mortgage covers all the mortgagor's cattle "in the above

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(11) 164 So. 753, 754

(12) Stickney v. Dunaway, 53 So. 770

brand or description or in any brand of the above classification." The Court held that the description was sufficient in that it cast upon a third party the duty of inquiring as to whether cattle of a brand different from that stated in the mortgage were covered thereby. However in Ehrke v. Tucker (13) a description of "native Kansas steers" by age, brand and location was considered by the Court to be insufficient to give notice that it embraced cattle not bearing the designated brand. and found in a location other than that specified in the mortgage.

In the writer's opinion there is considerable merit in the more liberal approach to the question of livestock description than has been shown by the Courts in New Zealand. Surely the most important purpose of the registered security agreement is to put parties who intend to give credit to a farmer on inquiry since few potential lenders would bother to catch all the animals concerned to ensure that all their brands earmarks or other means of identification corresponded with the registered agreement. Perhaps the greatest admission of the unsuitability ~~inadequacy~~ of the New Zealand stock description requirements has been the need to invoke the fictional concept of a covenant to brand to obviate the results ~~counteract~~ the which a strict interpretation of ss. 28 and 29 would otherwise give. (14) ~~effect of the rules application (14)~~.

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(13) 160 P.985

(14) See pp. of this paper. A Masterton solicitor who wrote to the writer on this subject recommended an approach rather similar to that used by the U.S. Courts: "I see no reason why all livestock on a given property should not prima facie be deemed to be the property of the land occupier subject to any livestock being excluded from a security on satisfactory proof of a Bailiff or an Official Assignee that in fact the stock belong to some other person."

(iv) after-acquired stock

Under Section 9-204(1) a security interest cannot attach until there is agreement that it attaches, value is given and the debtor has rights in the secured chattel (15). Under subsection (3) a security agreement may provide that collateral, whenever acquired shall secure all obligations covered by the security agreement (16). This is a direct negation of the principles embodied in the New Zealand Act which require every instrument to have an inventory of the chattels comprised therein and render instruments void as against the persons mentioned in sections 18 and 19 in respect of any chattels which the grantor acquires or becomes entitled to after the time of the execution of the instrument. However it will be recalled that the New Zealand provisions dealing with livestock securities (17) are not subject to sections 23 and 24 and therefore share the same underlying principle as section 9-204(3) of the Code namely that they allow a security interest to attach to after-acquired property.

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(15) For the purposes of Article 9-204(1) the debtor has no rights in the young of livestock until they are conceived.

(16) Although certain special rules in the case of crops and consumer goods are stated in subsection (4) of this Article.

(17) ss.28 and 29

Unlike s.29 of the Chattels Transfer Act, Article 9 does not imply a term by which the natural increase of stock comprised in a stock mortgage or stock of the same class are subsequently brought onto the land are also deemed to be included in the mortgage. Again we must turn to the American common law for the answer to this question. In determining whether a mortgage covers after-acquired property, the Court will, as nearly as possible, carry out the intention of the parties (18). The description will not however be extended beyond its terms and where the property to be acquired in the future is expressly limited to a certain class the mortgage will not be extended to another class. If, however, there is a covenant that after-acquired property of a certain class will be subject to the mortgage then such property will be included even if it is of a totally different quality to the property which is presently mortgaged (19). It would therefore appear that the covenant to brand after-acquired stock implied under the New Zealand Act (20) would be fully effective under American law.

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(18) Stockyards Loan Co. v. Nicholas 243 F. 511

(19) Guaranty Trust Co. of New York, v. New York & Q.C. Ry. Co. 170 N.E. 887

(20) See pp. of this paper.

As already stated the Code has no equivalent to our s.29 which implies a term in every mortgage of stock that the natural increase thereof shall be deemed to be included in the security. Again it is necessary to turn to the case law.

The position in the United States as to the inclusion of the natural increase of stock in a mortgage is of course affected by the laws of the various states. In some jurisdictions the mortgagee is vested with the legal title to the mortgaged property while in others the mortgage is considered a mere lien. In the former case it is generally held that the mortgage extends to the increase of the animals during the life of the mortgage, even though the mortgage isssilent as to the increase (21). Generally, in these jurisdictions where the mortgage creates a mere lien without passing title, particularly where a statute so provides, the lien does not cover the increase of the animals mortgaged unless these are expressly included in the mortgage agreement. Thus in Brown v. Schwab (22) the Arizona Supreme Court had to consider a mortgage of "all cattle and horses branded OXO,/O," running on a particular range, which was followed by statement, "The mortgagor agrees not to sell any more cattle than the amount of increase each year". McAlister, Ch. J (23) held that on its

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(21) O'Brien v. First Galesbury Nat. Bank & Trust Co. 194 N.E. 562

(22) 39 A.L.R. 150 (Arizona Supreme Court 1925)

(23) Ross & Lockwood, JJ. concurring

proper construction the mortgage covered the increase of such cattle, and contemplated that such increase would be branded in like manner (24).

A lien on the natural increase of stock, does not continue after a reasonable period of nurture neuture by the mother has elapsed as against a subsequent mortgagee or a purchaser without actual or constructive knowledge of the mortgage (25). This is of course quite different from the position under s.29 of the New Zealand Act where no such limitation is placed on the duration of the security. Nevertheless as between the parties the lien may continue and in Holt v. Lucas (26) it was held that the fact that a chattel mortgage specifically covers the increase of livestock will cause the lien to continue during the existence of the mortgage.

(v) Sale of encumbered stock

Section 9-201 of the Code dealing with the general validity of a security agreement states:

> "Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors. The official comment to Section 9-201 emphasises that a security agreement is effective against third parties."

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(24) per McAlister Ch. J. at p.153 "It is appellant's contention that the term "branded" refers to the cattle bearing this brand at the time the mortgage was executed, and none other; but a consideration of the entire instrument, we think, leads to the conclusion that it refers not merely to these, but as well to their increase, which it was clearly intended should thereafter bear the same brand."

(25) Paska v. Saunders, 153, A.451

(26) 96 p.30

It is interesting to note that under the Code the mortgagee of farm products (which includes livestock) is singled out for especially favourable treatment: (27)

> "A buyer in the ordinary course of business ...(28) other than a person buying farm products from a person engaged in farming operations takes free of a security interest treated by his seller even though the security interest is perfected and even though the buyer knows of its existence" (29)

Under Section 9-306(2), except where Article 9 otherwise provides, a security interest continues in collateral notwithstanding a disposition thereof by the debtor, unless his action was authorised by the secured party. Since no section of the Article "otherwise provides" in the case of farm products, Section 9-306 (2) gives the secured party the right to follow collateral into the hands of persons who have bought and paid for livestock over which, unbeknown to them, another party has a security interest.

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(27) Gilmore. Security Interests in Personal Property. Vol. II p.707 questions why if the buyer in the ordinary course of business takes free of a perfected security interest in the case of inventory, he should not take free of such interest in the farm products case. "Yet, rightly or wrongly, and for reasons which are never precisely articulated, the agricultural financer comes off much better than the inventory financer."

(28) "The buyer in the ordinary course of business is defined as one who buys in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party" 3 U.L.C. U.C.C.p.185
U.L.A.

(29) Article 9-307(1)

Fortunately for buyers finding themselves in this predicament the common law rules of waiver and estoppel may be invoked against the secured party, and it may be argued that the debtor's authority to sell the collateral arises from an express provision in the security agreement or from the conduct and action of the secured party. The recent decision of the Supreme Court of New Mexico in Clovis National Bank v. Harold Thomas d/b/a/ Clovis Cattle Commission Company (30) shows that the above defences may be powerful weapons in the hands of buyers or auctioneers of encumbered livestock.

In the Clovis National Bank case the bank loaned money to a rancher who in turn gave the bank a promissory date and a security interest in his cattle. The security was properly filed in accordance with Section 9-401 of the Code. The security agreement prohibited the rancher to sell or transfer the cattle without the permission of the bank. The rancher consigned these cattle to the defendant for sale at public auction, although the bank had no knowledge of the consignment and had not consented to the sales. The auctioneer sold the cattle and remitted the proceeds to the rancher, but the rancher failed to repay the bank loan which the cattle had secured. It was established in evidence that the rancher had previously sold cattle covered by a similar security agreement without obtaining the bank's permission to do so. On that occasion he had paid the bank the proceeds of the sale under

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(30) 77 N.M. 554, 425 P. 2d. 726 (1967)

circumstances such that the bank knew an unpermitted sale of the collateral had been made, but the bank had raised no objection.

The trial Court held that the bank had consented to and acquiesced in the sales, and was estopped from recovery because of its conduct. On appeal the New Mexico Supreme Court held; that the bank by prior conduct, had waived its right to require its authorisation for the sale of the cattle. The Court, basing its decision not on estoppel but on consent and waiver, stated that although the provisions of the Uniform Commercial Code applied to this case, the pre-code law result still prevailed.

Oman, J. delivering the majority judgment of the Court of Appeals considered that:

> "By excluding "farm products" from the classifications of "equipment" and "inventory" and by expressly providing in Section 9-307(1)..., that a buyer in the ordinary course of business of farm products from a person engaged in farming operations does not take free of a security interest created by the seller, the draftsmen of the code apparently intended"to freeze the agricultural mortgagee into the special status he has achieved under the pre-code case law."
> 2 Gilmore, Security Interests in Personal Property 714 (1965) (31)

Oman J. was therefore of the opinion that the holder of the security interest in farm products has the same protection under the code which he had under pre-code law, and that the cattle broker was still liable to the secured party for the conversion of the collateral. Nevertheless under the Code the secured party may consent to the sale of the collateral, and

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(31) 425 P. 2d. 731

thereby waive his rights therein (32) and since there was no particular provision in the Code displacing the law of waiver particularly waiver by implied acquiescence or consent, the Code provisions were supplemented by these common law rules (33).

A vigorous dissent to the majority opinion was recorded by Carmody J. (34) who considered that Section 1-205 of the Code was of particular importance to the facts of the present case:

> The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other, but when such construction is unreasonable express terms control both course of dealing and usage of trade. (35).

The Judge was of theopinion that there was neither an express written waiver nor sufficient evidence on which a common practice, usage or procedure could be based. Moreover the defendant auctioneer had no more right than the debtor himself to rely on a custom and usage which was contrary to the express terms of the contract.

This decision has been criticised by Thomas H. Emmerson (36)

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(32) Official Comment No. 3 Section 9-306 and Official Comment No. 2 Section 9-307.

(33) 425 P. 2d. 731-732

(34) "The consequences and repercussions that today's decision will have on security interests involving farm products and the applica-ility of the Commercial Code to such are incalculable. Thus even though it may sound like "a voice crying in the wilderness" I feel required to respectfully voice my dissent." ibid. p.734

(35) ibid, p.736

(36) <u>Uniform Commercial Code - Security Interests in Livestock</u> (1968) 8 National Resources Journal 183.

"One purpose of the Code is to permit the continued expansion of commercial practices. The decision in the Thomas case is likely to restrict loans on livestock. The usefulness of providing livestock as collateral is now under question."

Emmerson suggests that an auctioneer or a person buying livestock directly from the owner should be charged with the duty to search the records for the presence of a security agreement covering the livestock.[37] This is in effect the position in New Zealand under s.4 of the Chattels Transfer Act 1924, which provides, inter alia, that all persons shall be deemed to have notice of a registered instrument and of the contents thereof. The discussion earlier in thispaper on The King v. Buckland shows that ever where an instrument over livestock has not conformed with the description requirements of section 28 the auctioneer will nevertheless be liable to the secured party. It was also shown that under the1924 Act the protection afforded to auctioneers or purchasers under s.19 does not extend to the case of an instrument which fails to comply with s.28. (38)

It can of course be argued that the New Zealand position is too favourable to mortgagees yet in the final analysis the crucial question is whether the laws relating to a particular type of collateral offer sufficient protection to the lenders. If they do not then the lender will be reluctant to make finance available and the borrower himself will probably be the ultimate loser because it may be unable to obtain sufficient funds to

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(37) ibid. 189

(38) see pp. infra.

HANCOCK, H.S. SOME ASPECTS OF LIVESTOCK AND WOOL SECURITIES IN NEW ZEALAND.

carry on his operations efficiently (39).

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(39) cf. Hansard (1858) Vol. 2, p.382, debate on the Wool and Oil Securities Bill: Mr. Stafford: "This measure was of a very simple and intelligible character, and one much needed in this country, where great inconvenience was frequently experienced from the wait of ready cash. The difficulty of obtaining ready money frequently resulted in injury to stock, and materially retarded the producing powers of the country."

PART II: PRACTICAL ASPECTS OF FARM LENDING ON SECURITY OF LIVESTOCK

In the previous section of this paper the faults in the present New Zealand legislation governing livestock securities have been discussed. One might well ask how these rules have withstood the test of ~~about~~ over forty years without bein g the subject of either extensive litigation or reform. The present section of this paper seeks to answer this question by dealing with the practical circumstances and practice surrounding this type of borrowing.

The vast majority of lending on the security of livestock is done by institutional lenders. The principal sources of such finance in the private sector are Trading Banks, Dairy Companies, and Stock and Station Companies. The main Government sources are the State Advances Corporation and Marginal Lands Board.

The lending institutions have firstly protected themselves by the conservative nature of their advances.

During 1970-71 the State Advances Corporation authorised \$3.7 million for stock loans aut of a total annual authorisation for farming finance of \$55.3 (1). The Corporation policy has been to assist sharemilkers and lessees of farms to adequately stock properties and loans are made available usually for five years on stock and plant, interest being at the rate of 5 1/2%. The margin of security required is usually 60% of value and the normal limit is \$8,000 for one man. Applicants between the age

(1) Report of State Advances Corporation 1970-71. The balance of this amount was on the security of land.

of 21 and 35 may obtain loans at 5 1/2% on an extended limit of 75% of value available (2). It should be noted that these funds are primarily intended to encourage development and an established farmer would probably have to look to a bank or stock and station firm for this type of finance.

The Marginal Lands Board was set up under the Marginal Lands Act 1950 to assist those farmers who were unable to obtain capital or credit from the normal commercial sources to develop their farms to an economic level. Applicants to the Board must first have tried other avenues of finance such as the State Advances Corporation, stock firms, banks and insurance companies.

The local Marginal Lands Committee must be satisfied that the farmer concerned has the experience and business ability to successfully carry out his development programme. Before approval takes place a departmental field officer inspects the farm, discusses the development with the applicant, and makes a detailed report and valuation of the property which is submitted with the application to the Marginal Lands Committee which in turn inspects the property and discusses the development with the applicant. The Committee's report and recommendations are forwarded to the Board. If the Board approves the proposals as sound it also fixes the amount of

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(2) These This figures are taken from Farm Finance by D.M. Ross, Farm Economics Section, New Zealand Department of Agriculture, printed in Appendix I of Lending to Farmers p.55, here referred to as Farm Finance.

the advance and the purposes for which it is to be used. Advances for stock are at 5 1/2% to 6% and payable within 7 ~~days~~ years from the date of the first advance (3). In 1969-70 $2.30 million was advanced under by the Board bringing its total of outstanding advances up to $15.21 million (4).

It is therefore evident that the thorough investigation preceding the making of a loan by the Board protects any advances made. Assistance is not given to the inefficient but solely to those farmers whose only barrier to increased production is lack of capital. Despite this care there are sometimes failures. Where these are the result of circumstances beyond the farmer's control the board may sometimes postpone payment or in extreme cases even remit money due to it.

Although Trading Banks lend primarily on the security of land they also take charges over stock and a conservative 50% is the usual margin of security normally required. The overdraft interest rate has a maximum average of 6%, ~~on~~ with current account advances varying from 6-7 1/2% and ~~on~~ term loans generally 7% and upwards. Advances on current account, being essentially a form of short-term lending, are repayable on demand. Provided,

(3) Ross, Farm Finance, p.63

(4) Report of Department of Lands and Survey 1970

however, that the farmer makes regular reductions of the advance as seasonal or other farm revenue becomes available it is unusual for a bank to "call up " a current account. Term loans on the other hand are normally approved on the basis of repayment in regular monthly, quarterly or other periodic instalments (5). In June 1971 $27.1 million and $35.1 was advanced to the dairy and sheep-farming sectors respectively out of a total Trading Bank loan to farmers of $93.0 million at that date (6).

The stock and station firms arethe major lenders on the security of livestock and provide short-term and seasonal finance for sheep, cattle and mixed farming. The credit granted is "on demand" and repayment is expected over short or intermediate term. Security is not always taken especially in the case of long established and substantial clients. When however security is required the stock firms generally lend on 50% of the value of the available security. The rate of interest on current account varies from 7 1/2% to 8 1/2% or if no arrangement has been made 9% (7). When a farmer approaches his local stock firm seeking financial assistance an inspection of his property and full appraisal of his current financial commitment is ~~often~~ usually made. The branch office manager will often know both the farmer and his practical circumstances through previous business dealings.

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(5) Ross, Farm Finance. Ch. 6

(6) Reserve Bank Bulletin Series, 1971

(7) Ross, Farm Finance, p.95

When the proposal goes to head office for approval it will be considered by men who have themselves been branch managers and are well-versed in most aspects of farming in most parts of the country.

The prime consideration is the borrower's ability to survive and service his commitment and at the same time repay the proposed advance while maintaining the asset. It is generally accepted that over the last decade stock and station agents have become more skilled and better educated and therefore the likelihood of a farmer being given a loan which he cannot manage has been correspondingly diminished. As one stock firm representative commented to the writer "the big factor for us is to keep a person's business without having to buy it."

The dairy companies lend to shareholding suppliers, sometimes on the security of the stock and chattels of the suppliers and sometimes fully against the ~~covering~~ coming cheques of the particular suppliers. In the latter type of lending a proportion of the gross proceeds are held back for a final end of season payment, thus giving the company a substantial security should a borrower fail to meet his loan commitments.

The lending policy varies from one company to another ranging from 50 to 66 2/3% of the market value to a margin which is entirely flexible and discretionary. The term can vary from 3 - 6 months to 7 to 9 years, and interest can be from 3 to 6 to 7 1/2%. The usual security required is a bill of sale over the livestock though in the case of some of the shorter loans no security is required (8). In all cases the

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(8) Ross, Farm Finance pp. 92-94=

borrower will approach the dairy company who through course of dealings or subsequent inspection and appraisal can form a reliable assessment of the applicant's ability to service the loan.

The other main sources of rural lending such as building socities, trustee savings banks, life assurance offices are not relevant to the present discussion since these institutions usually lend on the security of land and not livestock. Likewise solicitors and private lendersneed not concern us as these people do a negligible amount of lending on ~~this type~~ farm animals, of security.

The care and conservatism with which the limited number of institutional lenders ~~availabl~~ evaluate the ability of their borrowers is not a course the only explanation for the relative dearth of dispute and litigation in this multi-million dollar field of financing. An important reason has been the general prosperity of the farming sector and also the importance of farming to the nation as a whole. No government could allow a situation to develop whereby large numbers of farmers were forced to sell up their farms and stock through inability to pay off their loans. An excellent example of this political aspect to farm borrowing was seen in the 1967-71 slump in the industry, brought about mainly by the drop in wool prices. The stock firms found themselves saddled with an increasing number of farmer customers who, due to falling prices and increased costs, were unable to pay off their "on demand" seasonal loans. The dramatic increasing burden of "hard-care" debt which the stock firms were required to carry, is illustrated by the folloiwng Reserve Bank figures.

STOCK AND STATION AGENTS ADVANCES TO CUSTOMERS (9)

Period	Current Account Advances $ (m)	Other $ (m)	Total $ (m)
1965 - March	67.1	38.6	105.7
1966 - March	80.7	48.8	129.5
1967 - March	71.5	52.7	124.2
1968 - March	66.0	52.0	118.0
1969 - March	71.1	54.0	125.1
1970 - March	77.6	61.3	138.9
1971 - March	89.3	59.6	148.9
June			130 (estimated

Since neither the stock firms nor the farming comments community were able to withstand the strain this substantial increase in lending had placed on their respective resources, representations were made to the Government in 1970 for assistance. As a result a supplementary loan scheme was made available for farmers to insure that they had sufficient working capital for the year. Further assistance was provided by the stock retention scheme whereby farmers were given a payment calculated on the number of sheep on hand at 30th June 1971 (10). Two thirds of a $45 million amount (11) was advanced during the 1971-72 season and another third

(9) Reserve Bank Bulletin Series 1971

(10) The first 250 sheep do not qualify from 250 to 5,000 sheep $1 per head is paid; from 5,000 to 10,000 sheep 60c. per head and over 10,000 sheep 20c. per head.

(11) $15 million was contributed by the Meat Board and $30 million by the Government.

is to be advanced for the 1972-73 trading season. Although provision has been made for a third stage for the 1973-74 season due to the improved farming economic situation this is not likely to be necessary.

We may therefore conclude from the 1967-71 temporary recession that the days of large-scale foreclosures and mortgagee's sales, at least in the farming industry, are not likely to reoccur since the Government will be first constrained to give the necessary assistance. The words of Gilmore, with the necessary modification, are equally applicable to the New Zealand situation, when he accounts for the famine of farm security litigation in the United States since the 1920's and 30's:

> "The organisation of farming and the structure of farm debt have, of course, completely changed since the great depression of the 1930's. The federal government has become, directly or indirectly, through a maze of agenices, the principal supplier of all kinds of farm credit. It is a safe political prediction that a collapse of real estate values, followed by a nationwide wave of foreclosures and evictions, will never again be seen: remedies, humanitarian and financial, will be applied fer short of the point of total collapse which saw the enactment of the emergency farm legislation, state and federal, of the 1930's." (12)

The care with which the institutional lenders screen loan applicants is only one aspect of the control and supervision which they are able to exercise on borrowers. Thus whenever stock firms make loans to farmers they require in return that the farmer puts all his business through that firm. In this way the lender has a continuous record of the farmer's income from the sale of wool, ~~or~~ sheep and cattle. At any stage when the account

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(12) Gilmore, Security Interests in Personal Property, Vol. 2. p. 858

appears to be deteriorating the branch manager of the stock firm will take swift action to ascertain the problem and endeavour to help the farmer through strict budgetary control to extricate himself from the difficulties. Thus the danger of total financial collapse which would necessitate the realisation of a stock security, is usually averted long before it occurs.

The writer understands from speaking to the Rural Finance Managers of major stock companies that over the last decade the farming communityt has become better educated in the sound economics of farming. It has also become more adaptable to change and modernisation. These factors have probably accounted for secured lenders to farmers only rarely having to realise their security. Similarly there has been a general raising of the educational standards and business skill of stock and station agents which has led to borrowers being very rarely permitted to take on commitments which they cannot subsequently service.

Considering the millions of dollars advanced on the security of livestock in this country it is amazing that so few problems arise with the sale or other disposal of encumbered stock by borrowers. One of the principal reasons is the type of lender involved. A number of solicitors who have expressed their views to the writer on this subject attribute the infrequency of such problems to the general honesty and reliability of the farming community. (13)

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(13) In the words of a Hamilton practitioner: "I would attribute the absence of litigation in this field to the general credit worthiness of farmers as a group and the fact that they are tied to their farms and their need to retain a good credit standing."

Even if a farmer does wish to make an unauthorised sale he will run into difficulties. At the local level, where all auctions occur, the stock and station companies will normally know a farmer and whether his stock are secured. The names of persons giving securities over their stock are available in the Mercantile Gazette and most branches keep a list of grantors and grantees in their area. Should auctioneers inadvertently sell encumbered stock the invariable practice is to account to the grantee the commission for the sale if such a demand is made. It is also clearly understood that the auctioneer will have to pay the proceeds of the sale of stock comprised in a duly registered instrument to the grantee should the grantor be unable to do so. (14).

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(14) A Gisborne practitioner has stated to the writer that: "very few problems arise in Gisborne as the result of the sale of encumbered stock because the district is sufficiently small for each stock firm to know who is secured to whom and to know that unless they toe the line the local stock and station agents' Association will be take them to task. The number of private sales in this district is limited and in practice have not given rise to any problems."
A Dunedin solicitor describes his experience with the sale of encumbered stock to a freezing company thus: "The particular problem on sale of encumbered stock which my firm has encountered on several occasions recently has been the sale of stock to freezing companies. However, the legal position is clear and with a certain amount of "prodding" the companies have paid over the net proceeds to the moneylender."

The description requirements of the present Act are the cause of considerable criticism among some practitioners (15) It has been suggested that the only reason why they survived in their present form is the fact that they have been so seldom tested by litigation.

Between the parties, of course, an insufficient description does not void the instrument but only deprives it of the benefits of registration. Since, therefore, grantees usually take action long before bankruptcy occurs, an equitable charge is usually a sufficient security.

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(15) See pp. of this paper. The practical difficulties involved are clearly expressed by a Hamilton solicitor as follows:-

> 2. The need to obtain an accurate description of livestock in terms of the Chattels Transfer Act is a source of particular difficulty, and in view of the substantial turn-over in stock, seems a rather useless exercise. One does one's best to endeavour to comply strictly with the Act but this can and does in some cases lead even to a measure of antagonism from the farmer, who sometimes has even to muster stock if the property is a large holding.
>
> 3. Many farmers are uncertain as to the breed of some of their animals, particularly cross-breds.
>
> 4. Even if a fully comprehensive and accurate description is obtained, the position can alter between the time of completion of the description and execution of the Instrument.