THE LAW OF SECURITIES—DOING WITHOUT THE SECURITIES. THE IMPACT OF PAPERLESS TRANSACTIONS IN A TRADITIONAL FIELD OF LAW

BY

ULF GÖRANSON

1. INTRODUCTION

"May I use your scissors?"

Not so many years ago that request, asked of a bank clerk in a suitable tone of voice was thought to make a certain impression on other people in the bank, at least in small towns. Here was a person with shares in his safe deposit box. It was time to cut the coupons.

However, during the 1970's the cutting of coupons dwindled and was during the next decade almost completely replaced, regarding shares in VPC companies, i.e. companies whose share registers, dividend payments, etc., are registered by the Swedish Securities Register Centre (*Värdepapperscentralen VPC AB*), with a computer-based system administered by the Centre. The dividends were automatically transferred to an account named by the registered share owner. The old share certificates, sometimes with long lists of endorsements, were replaced by computer printout certificates issued by the Centre on behalf of the companies. As soon as a certificate was subject to sale or to some other transaction it was replaced.

Now we are in the third phase of the mass handling of certificates, the paperless phase. Under legislation enacted and partly entered into force during the autumn of 1989 a system of account-linked shareholding has been introduced in Sweden, partly patterned on Danish models, the *VP system*, or the share accounts system.[1] The legislation was preceded by an investigation of a more private character than what is common in the Swedish legislative system. After a preliminary study, the Swedish Securities Register Centre in 1986 presented a proposal following an initiative by some banks and stockbrokers.[2] Two bills were presented to Parliament in June 1988 and in May 1989.[3]

[1] Share Accounts Act, SFS 1989:827, including ancilliary legislation (SFS 1989:828–46). The Danish pioneering legislation of 1983 has also led to legislation in Finland and Norway. On the Continent France has been in the forefront. In countries such as the USA and the FRG a corresponding paperless system has been achieved through trade in a system of deposits; for a comparative survey, see the Securies Register Centre's preliminary study report, 1985 pp. 111 ff.

[2] *Kontobaserat värdepapperssystem. System- och författningsförslag 86-09-18* (VP-rapporten). See also *Förstudierapport* 85-05-24.

[3] *Prop.* 1987/88:108 (the principles of the proposal) and *prop.* 1988/89:152 (proposed statutory texts, etc.).

This new order is no doubt in line with international developments and was well received by the market. Only a few of the fairly many statements procured from interested parties during the preparation of the legislation were negative, although criticism was pronounced on a number of minor details. The departmental treatment showed sensitivity to such criticism, although not all points of view were accommodated. There has also been some discussion in legal writing.[4] The Trygg-Hansa insurance company was reorganised from a mutual insurance company to a shareholding company in the autumn of 1989 and was the first company to enter the VP system by issuing shares to all of its one million-plus policy holders. Several companies followed suit during 1990 and the system was developed in 1991.

The transition to a paperless system of handling securities naturally raises a number of questions as to the legal effects of the new system. Its development has been prompted by practical considerations. The interplay between practical handling and law is particularly evident here, although this does not ease the task of research for an academic such as the present writer. The purpose of this paper is not to solve a number of difficult points of law or even to make a comprehensive list of such questions, but rather to stimulate discussion on some questions.

The development and functions of the Swedish system of handling securities during the 1980's will be briefly described and a short presentation of the VP system will be given (section 2). Section 3 will be devoted to some issues of property law connected with the VP system.

2. THE HANDLING OF SECURITIES UNDER THE OLD SYSTEM AND ACCORDING TO THE NEW SHARE ACCOUNTS ACT

To simplify the following legal discussion, a brief account of the present system of trade in securities will be given in section 2.1., where mention will be made of negative effects that have provided the reason for the transition to the paperless system discussed in section 2.2. Finally, the discussion will turn to what kinds of securities the share accounts system will encompass.

[4] Professor Knut Rodhe, who played an active part in the work on the reports of the Securities Register Centre, is decidedly positive, see *Festskrift till Sveriges Advokatsamfund*, Stockholm 1989, pp. 517 ff. Professor and Supreme Court Justice Henrik Hessler proves a penetrating but cautious observer, with an, on balance negative, attitude, *Festskrift till Lars Welamsson*, Stockholm 1988, pp. 235 ff. Rodhe has recently published another article on the subject in *Festskrift till Kurt Grönfors*, Stockholm 1991, pp. 371 ff., with critical remarks on several of the conclusions of the present author.

2.1 Dealing in securities in Sweden

The exceptional increase in the volume of stock market business during the last decade has made its imprint in Sweden as well as abroad.[5] In 1980 the total turnover on the Stockholm stock exchange was less than SEK 8 billion—in 1989 it was 113 billion following an alltime high of 143 billion SEK in 1986. The total market value of quoted shares increased during this period from SEK 56 billion to SEK 744 billion; the general index increased by 12 times. The reasons for this expansion will not be discussed here, but the increase would probably have been even greater had not certain turnover taxes been introduced towards the end of the 1980's. In January 1990, however, the Minister of Finance announced a reduction of those taxes.

The last decade also saw an increased interest in private as well as public ownership of shares in various kinds of unit trust, whereas direct household investment in shares went down in relation to the total amount of shares. Direct household investment decreased from roughly 40 percent in 1980 to 30 percent in 1989; the value of that investment had, however, increased dramatically. Public ownership of shares, direct and indirect, rose during the same period from 3 percent to more than 10 percent. Private business ownership has, with minor variation, remained around 45 percent and trust holdings around 10 percent. Foreign ownership of Swedish stock was at the beginning of the 1980's almost 10 percent of the total value, but has decreased to about 5 percent.

Trade in shares of any importance is at present handled by some 40 stockbrokers authorised by the Swedish Bank Inspection Board. Approximately two thirds of these are members of the Stockholm Stock Exchange. They trade under their own names, but mostly on behalf of clients.[6] To the extent their own holdings are not involved, the legal relationship between broker and client may therefore be described as one of commission: this complex type of contract relationship will be discussed later with particular reference to property law aspects. Trading may occur on announcement, now limited to the 50 most traded shares, or after trading hours, when unofficial quotations are also made of shares and bonds not officially quoted. Transactions also take place

[5] A comprehensive survey of the market has recently been made by a government committee, see *SOU* 1989:72.

[6] Apart from these, various persons or institutes conduct different kinds of broker or exchange services. They include brokers, market makers, bankers and "blanking agents" whose activities are still, on the whole, unregulated.

directly between brokers off the stock exchange floor. When a broker represents both buyer and seller the transaction takes place internally. In addition, a very large proportion, estimated at about half, of the trade in Swedish shares takes place abroad. The reasons are mainly the turnover tax and the cumbersome and not wholly reliable paper system.

In share trading, only the opposite stockbroker is known to a stockbroker, not the principals. On the Stockholm Stock Exchange a new system of transactions has been introduced, the *SAX system* (Stockholm Automated Exchange). Orders for selling and buying are continuously fed into a computer during the day and are anonymously matched. Only a rudimentary human control is exercised in order to reject obviously faulty bids. In the SAX system, therefore, the opposite broker is also unknown to the actor. Turnover will be facilitated and when SAX is completely developed the stock exchange will become depopulated, as has already happened with many stock exchanges abroad.

The current *paper-based handling* after a transaction with shares in a VPC company is effected in the following way. The selling and buying brokers present bought notes and sold notes to their respective principals to confirm that the commission has been fulfilled. The selling brokers must then forward the share certificates to the Securities Register Centre. The Centre handles the matching between the selling broker and the buying broker, re-registers the shares in the company's shareholder register and, finally, issues new share certificates. These are delivered on the fifth day after the transaction to the stockbroker's main office in Stockholm. Also on that day, payment must be made. Banks acting as stockbrokers coordinate payment with the daily Bank of Sweden clearing, whereas other stockbrokers must present certified cheques. Some of the steps described are sensitive to fluctuations in volume, and sometimes function unsatisfactorily. Furthermore, the liquidity of some actors is sometimes too low, particularly since taxes were imposed on trading in their own share holdings.

More than 25 percent of shares in Sweden are nominee registered, which means that they are deposited in trust. The owner is not disclosed and his holdings are only apparent from the trustee's own registers; the company's shareholder register shows only the trustee as a nominee shareholder.[7] In this way, the market itself had already created a paper-

[7] See Lag (1987:623) om förenklad aktiehantering (Act on Simplified Handling of Shares), preceded by an Act (1970:596) on the same subject. The Act is repealed in relation to companies to which the Share Accounts Act applies, ch. 8 of the Share Accounts Act.

less system in the early 1980's. The owner of the shares never sees his share certificates and any disposal of the shares is merely manifested by notifying the trustee. From a legal point of view the owner therefore only has a claim in relation to the trustee and, furthermore, his claim for a share is only generic as the share certificate made out to the trustee, if at all, comprises all his holding in a certain company.[8] Under the law of contracts and under the law of property, the ownership of shares has lost any connection with the notion of negotiable instruments.

Alongside the trade in shares connected to the Stockholm Stock Exchange, there is also trade in other securities which some ten years ago were unknown or played a minor role—the options and futures market and the money market. The options and futures markets involve trade in standardised options and term papers, administered by the Stockholm Options Exchange Company (Stockholms Optionsmarknad OM Fondkommission)—OM. The underlying values are represented by shares, share indexes, bonds and some currencies. Trade takes place when the client makes a registration electronically in the OM order book, or telephones the OM block order market whereupon the OM staff make the transaction. The OM thereby acts as a party in issuing the options to buy or to sell and handles the ensuing clearing.[9]

The Swedish money market consists of trade partly in conventional bonds, partly in short term interest papers such as treasury bills and the private innovations of the 1980's, mainly bank certificates of deposits and commercial papers.[10] These activities are based on the existence of a functioning secondary market. This developed after the introduction of a system of continuous market information through the on-line service provided by Reuter's computer screens. These show the various actors' revocable bids, and the transactions are made by buyers and sellers on the telephone. At the beginning of 1987 the daily turnover of the money market in Stockholm was some 40 billion SEK. When the trade in 1988 was made subject to a turnover tax, the volume had already been halved. After that it sank to a mere trifle but by the beginning of 1990 it had again reached some 10 billion SEK per day. To

[8] Compare the, to put it mildly, provisional drafting of sec. 9 of the 1987 Act, according to which a share certificate shall be deemed to have been issued, even if this has not been done.

[9] A detailed account of the futures market is given in the report of the *optionsutredning* (investigation concerning the future market), *SOU* 1988:13.

[10] Also here there is a recent report of a government investigation, i.e. that of the *kreditmarknadskommitté* (credit market committee), *SOU* 1988:29.

organise the trade better, the Bank of Sweden and the stockbrokers jointly created *Penningmarknadsinformation PmI AB* (the Money Market Information, PmI Co) and *Penningmarknadscentralen PmC AB* (the Money Market Centre PmC Co). The PmC offers a paperless register of accounts of deposits, certificates, holdings and commercial papers, and functions as a clearing house; these activities started in 1990.

2.2 The share account system according to the Share Accounts Act

In the following only the outline of the share accounts system will be presented. It will, however, be necessary to discuss some of the details later. Understandably, the Share Accounts Act applies only to companies whose share registers, etc., are administered by the Securities Register Centre (VPC). For each of these a VP register shall be set up consisting of a daily journal and one or several share accounts for each shareholder. For nominee-registered shares, the nominee shall open one or several accounts. The account must contain a great deal of information: apart from identification of owner and holding, there must be details of pledging in respect of the share, of other limitations in the right of disposal and of bankruptcy, distraint, sequestration or payment guarantee involving the share.

An account is opened by an account-operating institute, which requires a Bank Inspection Board permit. As a rule, the share owner decides which institute to employ. The intention is to issue such permits not only to banks but also to stockbrokers.

The account-operating institute shall undertake the registration measures concerning the account: first the entry in the daily journal and secondly, after all the conditions for registration are fulfilled, the entry in the share account. Particularly in the case of sales transactions, there will be some days' delay between the two entries, as the entry in the share account cannot be made before payment is received. This delay is probably an unavoidable weakness of the system, and will be discussed in some detail below. The account-operating institute may itself correct obviously incorrect entries, and at the request of an applicant or a third party the Securities Register Centre may reconsider an entry made by an account-operating institute.

Matters of entitlement to information and secrecy are also dealt with in the Act, but will not be discussed here. Rather, this paper will focus mainly on the sections in the Act which concern the legal consequences of registration. The Act's sections on the right to compensation are

divided into a part on strict liability for damage caused by acquisition in good faith of shares belonging to another, and a part on damage caused by incorrect or misleading particulars which is compensated according to rules on control liability similar to those of the 1990 Sale of Goods Act. Under the Act, nominee registration of shares does not differ very much from the old system. There are also some sections on instruments of debt, etc., which are not automatically subject to share account registration. Finally, there are provisions in the Act on a new board set up to consider disputes resulting from decisions of the Securities Register Centre or an account-operating institute, and to issue recommendations on the settlement of such disputes.

Finally a few words on the practical handling of an account-registered share. On the day of the transaction entries are made in the daily journal on clients' sales and acquisitions. For reasons of identification the entries are made *en bloc* under the name of each broker. Entries will thus, it seems, not be made continuously, as the designers of the system might have intended. Rather, each broker will after the end of the trading day, most likely the following morning, list the transactions in which he has been involved and report them *en bloc*. In doing so he reports the number of shares in a certain VPC company, the price, the day of the transaction, his own name and the client's name. If the sale or the acquisition is made with several brokers a report has to be made for each transaction. When the opposite broker looks at the daily journal only the broker, not his client, is visible.

On the day of payment the deal is completed by clearing through the Bank of Sweden. On the preceding day the Securities Register Centre has calculated each stockbroker's net payment. To ensure that full payment can be made at once, a standing, satisfactory bank guarantee has to be presented by those stockbrokers who do not themselves participate as banks in Bank of Sweden clearing. According to the Ministry of Finance model system, the guarantee is made by a payment bank with a drawing right with the Bank of Sweden, through which the flow of payments may be channeled. As volumes temporarily increase the broker may be required to present an additional guarantee. It is the task of the Bank Inspection Board to approve such guarantees or equivalent surety. All exchange of payment is consequently to be made through the participation of the payment banks in clearing, and the use of certified checks will be abolished.[11] This model is designed to ensure

[11] Minister of Finance in *prop.* 1988/89:152 pp. 156 ff.

that the clearing is not disturbed by the failure of a broker to pay in full, except for the case of a broker's de-facto insolvency. Such backing does not seem unusual in the current system, and its absence in the former Swedish system has been criticised by some foreign observers.

When the clearing is completed, the Bank of Sweden is to report to the Securities Register Centre, which is in charge of the various steps of control of payment. The matter is thereby closed and in consequence entries are made in the share accounts of each buyer and seller. It is estimated that the present five day handling will be shortened to three days.

2.3 The scope of the share account system

The share account system is primarily intended to regulate trade and holdings of shares. The system also includes various kinds of issue certificates, convertible debt instruments, participating debentures and similar instruments of debt, all of which may be regarded as preliminary stages towards the issuing of shares, as well as bonds issued by banks or industrial enterprises (ch. 1 sec. 2, ch. 9 sec. 1 of the Share Accounts Act). Common to all these papers is that they are already subject to the provisions of the Companies Act or that they can clearly be subsumed under the rules of the Promissory Notes Act. For promissory notes, convertible debt instruments and preferential rights to participate in issues referred to in ch. 5 of the Companies Act, the issuing company may opt to use the share account system. But for shares and other certificates, mainly ordinary bonus issues and new issues, the share account system is not optional.

Apart from this, the legislator has only been willing to make one exception.[12] Since, according to Swedish law, shares in foreign companies still cannot be owned directly but must be deposited with a bank as a nominee shareholder, the VPC system has created special foreign deposit certificates in order to facilitate trade. These certificates may also on request be brought into the share account system. The options, futures and other securities market, handled by OM are not included, nor are the warrants and call options handled by the Securities Register Centre.

The reason for this, i.e. that these kinds of security are not subject to

[12] *Prop.* 1987/88:108 p. 10 ff, 22 f, *prop.* 1988/89:152 p. 76 f, cf. bet. 1989/90:LU5 p. 8 f.

private law statutory regulation, does not seem very convincing. As will be shown presently a number of questions concerning current and future trade in securities are far from clear in statutory law. The Ministry of Finance, on the other hand, had no time to wait for an evaluation of the barely-finished enquiry into the options and money markets. To be sure, trade to-day is still not very expansive in the certificates explicitly excluded. As we have seen from the accelerating development during the 1980's, however, this may well change and the market may also create certificates of a new kind not used here now.

The enquiry, however, indicates a positive attitude to future expansion of the share account system. It rather seems natural to attempt to improve coordination not only with the trade in options, futures and other securities arranged by the OM but also with the PMC-organised money market, where the similarities with the share account system are particularly prominent. Hopefully, such an expansion will occur within the next few years.

3. PROPERTY LAW ISSUES

Under current property law, shares, traditional as well as modern VPC documents, are looked upon in the same way as negotiable instruments under the Promissory Notes Act 1936. Thus, possession is the relevant property-law fact, and transfer of possession constitutes the completion of any acquisition or pledge. As far as paperless shares are concerned, this order has been replaced by registration as the relevant fact under property law, or, to be exact, such entry in the daily journal as is followed by registration in a share account.

In the following general introduction, certain preconditions will be spelt out for the ensuing discussion in section 3.1. An illustrative example will be given in section 3.2, followed by a discussion of the usual property-law conflicts concerning third parties: protection against the other party's creditors, section 3.3, and double disposal and *bona fide* acquisition, section 3.4. Lastly, some conclusions and proposals for reform will be presented in section 3.5.

3.1 General introduction

At first sight the introduction of the paperless share account system seems to be a major reform. Several factors in the practical handling of

trade in shares have, however, already caused the current link between property-law and the transfer of share certificates to seem outdated and highly unrealistic. Will then the system of registration under the Share Accounts Act promote safety and clarity in conflicts arising with third parties?

The property-law rules introduced in ch. 6 of the Share Account Act are patterned on the Promissory Notes Act and also on the systems of registration of the Maritime Code and the Land Code. The basic notion is to protect acquisition in relation to third parties through registration. The notion may be appropriate for pledges and, of course, also in cases of transactions directly between seller and buyer. For normal stockbroker trade, however, it would seem that the Share Accounts Act is less helpful in solving practical complications.

The protection of the buyer in relation to the seller's creditors and to the rightful owner on the seller side, and in situations of double sale, is in ch. 6 of the Act considered case-by-case. The rules seem to presuppose that it is possible to follow an individual share from seller to buyer. One has but to exchange the notion of a transfer of possesion in secs. 14 and 22 of the Promissory Notes Act for the notion of registration to see the pattern clearly. It is as if nothing had happened for half a century! This property-law edifice of doctrines can hardly survive confrontation with the real world.

The reason for this harsh judgement is the simple observation that trade with securities shows hardly any significant link between buyer and seller. Stockbrokers with shares for sale each day release a substantial number onto the market. These are acquired via the SAX system by an anonymous collective of buying brokers. A normally quite impersonal machine sees to it that, from the moment of the transaction, the bids of the buyers and the sellers are matched. Further, a buying broker is free to hand over the acquisitions made in a trading day to his principals, regardless of the origin of the shares so acquired, if it can be traced at all.

In the afternoon of the trading day, or the next morning, entries are made in the daily journal of the sales and acquisitions of the clients, for identification purposes brought together under the name of each stockbroker. However, the opposite side have no possibility of finding out from the daily journal who the buyer or the seller is: only the broker's name is revealed. On payment day the matter is completed by registration in each buyer's and seller's share account. The registration implies that full ownership and protection under property law against third

parties is acquired. Ch. 6 sec. 5 of the Share Account Act reads as follows:

> The legal consequences of a registration pursuant to secs. 2–4 (referring to protection against third parties, double disposal and *bona fide* acquisition) come into effect when the acquisition is registered in the form of an entry in the daily journal, provided that the acquisition is subsequently registered in the form of an entry in the share account.

This important property-law provision takes as its primary point of departure the registration in the buyer's, and not in the seller's, account. Furthermore, it cannot concern registration of the broker's acquisition only. The name of the broker is, to be sure, entered in the daily journal together with the name of the buyer/principal, but it does not seem to be intended that the name of the broker shall also appear in the principal's share account. Therefore, registration of the broker's acquisition only cannot create full property-law effects, which possibly might benefit the principal.

Furthermore, it is not fully clear what circumstances might constitute a hindrance to final registration. The two-step model chosen to secure payment routines contains no express statement to the effect that also interested third parties are in a position to stop an entry in a share account after journal registration. A somewhat more careful drafting of the section just quoted would have made much of the following discussion superfluous. No guidance whatever is given in the *travaux préparatoires*, which the present author, with a view to the theory of the sources of the law, does not particularly regret.[13]

3.2 An illustrative example

A sales broker has on behalf of 10 principals placed selling offers for, altogether, 10 000 shares in a certain company. These are acquired by a buying broker in a transaction involving 10 buyers. (The additional complications arising out of the fact that there may be more than one broker buying the 10 000 shares will not be discussed here.) On payment day it becomes clear that one of the sellers has been subject to distress, another has sold his shares twice, and yet another is not the rightful owner. These three scoundrels have each disposed of 100 shares. The remaining 9 700 shares have on the day of payment been

[13] *VP-rapport* pp. 108 ff, *prop.* 1988/89:152 p. 77 f, 110 ff.

de-registered from the sellers' accounts. On the buyers' side, however, the question arises who should stand the risk of the 300 contested shares. For it is not possible to point out which of the ten buyers have bought precisely these contested shares.

In theory, the discrepancy may on payment day entail several plausible consequences for our 10 buyers. One possibility is that none gets his acquisition registered in his share account, regardless of the fact that only a trifling part of the shares have not been transferred. How and when the matter is solved is of no concern here. Another possibility is that the buying broker himself covers the deficiency. The practical solution is, however, a third alternative. This will be discussed before an attempt is made, in the next section, to solve the conflict by applying the rules of ch. 6 of the Share Accounts Act.

It must be added that the market does not accept partial fulfillment of transactions made. Today, under the paper system, partial fulfillment is not unusual and occurs most commonly in cases not connected to property-law third party conflicts. For when the selling broker places the order he does not always have access to the seller's share certificates. The commission might have been made orally or by telefax from a seller whom the broker is used to working with. It may be difficult, particularly if the seller is a foreigner, to have the certificate delivered to the Securities Register Centre in time for the matching. Usually, the deficiency is covered by the broker who brings in shares from his own holdings. He trusts that the principal will deliver eventually and he will charge him with any costs caused by the delay. The selling broker hardly risks delays due to the handling of the certificates in the share account system. But the risk of failure to deliver because of contested claims remains.

It is conceivable that the selling broker acts in the same way. The broker brings in the 300 non-transferable shares from his own holdings. This may be done if he has a priority right to payment before other interested parties on the selling side. Most likely the broker has such a right, since he has sold shares out of his own holdings, or shares acquired for this purpose. The broker will, however, as a contracting party, incur the risk of a rise in the rate forcing him to buy the share at a higher price than he received. In addition, he loses his commission. Particularly if the seller has become insolvent, the broker's claim for compensation is worthless.

Is the broker completely unprotected in such situations? No—according to the Commissions Act he has a statutory lien in the goods offered for sale. The broker always has to register his lien according to the newly

enacted sec. 31 subsec. 2 of the Commissions Act.[14] There is no doubt that the lien will be valid for the broker's claim in relation to payment receivable for the shares. A complication may occur when there are several buying brokers on the opposite side. The claim for payment for the shares is then not yet directed against any one of these individuals, and even less so against any particular principal on the buying side.

3.3 The protection of the buyer against the seller's creditors

As indicated earlier, ch. 6 of the Share Accounts Act solves the property-law conflicts touched upon here by adopting as a main principle that the *acquisition* is to be registered in the daily journal and followed up by an entry in the buyer's share account. This solution is not appropriate or even practicable for ordinary trade through stockbrokers. Instead, common property-law principles relating to *transactions in commission* must apply.[15] These principles may in themselves appear complex, and the difficulties are increased by the fact that we have also to deal with the fundamental property-law principle of individualisation of property.[16]

The first issue will be the contest between the creditors of the selling shareholder and the buyer. For the creditors to acquire a right in the shares it is a precondition that the shares are still individualised. In the example in the preceding section it seems fairly safe to assume that any individualisation of the 10 000 shares has ceased with the transaction. If not before[17], the SAX matching of the bids from the sellers and the buyers means such an intermingling that the whole block must be

[14] In commission involving chattels the lien becomes effective in relation to a third party when the broker takes possession of the goods. It may appear proper instead to require registration in such a case. The market would easily adapt to such a requirement. The same requirement of registration also applies to the buying broker's lien in relation to his principal, sec. 36 of the Commissions Act.

[15] A broad survey of property law questions relating to commissions is included in the report of the commission law investigation, *SOU* 1988:33, under the chairmanship of professor T. Håstad.

[16] On questions of individualisation, see Göranson, *Traditionsprincipen*, Uppsala, 1980, ch. 16, particularly pp. 509 ff. and the case discussed there 1910 NJA 216, Håstad, *Sakrätt 3rd ed.*, Stockholm, 1985, pp. 137 ff., 254 ff., and in *Festskrift till Hessler* pp. 309 ff., *SOU* 1988:63 pp. 142 ff., Hessler in *Festskrift till Welamsson*, Stockholm 1988, pp. 241 ff., all with numerous references, cf. Lindskog in *JT* 1989–90 p. 217.

[17] Strictly speaking the intermingling perhaps already takes place when the selling broker places his offer to sell in the SAX system comprising all the blocks of shares of the 10 principals.

considered to have been transferred to the buying commissioner on behalf of his principals. The 100 shares subject to distress can no longer be discerned in the total block. As to the owner, the seller, his individualised ownership has ceased and been replaced by a claim against the broker for the payment received for the shares. This claim is primarily directed against the buying broker.[18] As a result, no genuine conflict between the buyer and the seller's creditors can exist, as far as the shares are concerned. Distress or bankruptcy should therefore not interfere with the right of the buyer, in the last resort, to gain registration of his acquisition. For, again, the acquisition is not directly linked to the selling side in the transaction.

Some objections may, however, be raised against this notion that any individualisation has ceased. No registration measure has yet been taken, which means that the shares may still be identifiable as the seller's. They are still registered in his share account. Here, however, as already noted, the transaction is seen from the buyer's viewpoint and decisive importance is attached to what the buyer may discern. For him such identification is impossible, since he does not even know who the selling broker is. Had we been concerned with chattels the matter might have been different.[19] But here we are concerned with entries in two computerised systems, the SAX system and the share accounts system.[20] It seems advisable to exercise caution in making far-fetched analogies from the domains of property-law in relation to chattels.

Some degree of independence should consequently be afforded transactions based on registration. The SAX handling of the transactions also involves registration, which creates clarity and order and which prevents fictitious transactions. All the reasons underlying the

[18] See sec. 56 of the Commissions Act, which excludes claims directed against the principal(s) of the opposite broker; the principal side will besides "individualise" only when the matching between buying and selling commissions is later made by the Securities Register Centre.

[19] Suppose that a boy collects old newspapers for re-cycling and turns them over to an agent of the Re-cycling Centre in the street. At that moment one may speak of a joint possession between the newspaper-collecting commissioner and the acquirer. Should the bailiff turn up at that very moment and attempt to distrain the copies of a debtor—we ignore the fact that the newspapers may be worthless—the debtor might possibly be able to identify his own copies; he may have put them in some particular carrier bags or made notes or clippings in them. For the acquirer, however, such identification is impossible. There may possibly be address labels which make identification possible, but if we return to the case of the shares, such individual markings simply do not exist.—A certain parallel is to be found in the widely discussed case 1976 NJA 251, cf. Göranson, *op.cit.*, pp. 508 ff. with references.

[20] Cf. Hessler, *op.cit.*, pp. 241 ff.

requirements of physical transfer or notification of the creditor in conflicts involving third parties find a corresponding expression in the registration measures of the trade system. In this connection it is of no import that this is not the registration chosen by the legislator for the solution of property-law third party contests.

There still remains, however, the obstacle that in the Share Accounts Act the property-law effect is explicitly linked to the registration of the acquisition. And at the moment here identified for the definite protection of the buyer's right to the shares, i.e. the transaction in the SAX system, no entry has yet been made in the daily journal or in the buyer's share account. The delay of the entry in the daily journal is said to be for practical reasons and does not quite tally with the requirement in ch. 4 sec. 4 that any registration shall be undertaken at once. The entry to the account is delayed to allow matters of payment to be solved. These links to practical matters have, however, nothing to do with property-law conflicts. We shall soon return to how creditors' protection under the law of commissions may also become effective at the "early" stage here indicated. Later, in section 3.5 below, statutory clarification of this far more appealing property-law solution will be advocated.

In practice, the notion advanced here that the seller's creditors cannot confiscate shares sold after the SAX transaction may have negative consequences for the creditors primarily if the shares have appreciated greatly during the few days between transaction and payment. This is a risk the creditors have to accept. But they may also in some cases have to compete with the statutory liens of the brokers/commissioners. However, the individualised share is not a subject of floating charges over the assets of a business, and therefore, the payment should not be subject to such priority either. Seen from the selling side, the property-law conflict is troublesome only where there are advance payments and changes in the market rates.

Quite another issue is whether distress on the shares reported to the share account system between the time of transaction and final entry into the share account will constitute priority in the claim for payment under sec. 8 of the Act on Priorities. The fact that the share after the transaction is no longer the individualised property of the debtor, according to the reasoning earlier in this paper, is certainly an argument against such a priority. The proper object of distress should rather be a share in the claim for payment against the buying broker. But this state of affairs is unknown to the bailiff, at any rate until the transaction is reported to the daily journal the same evening or the following morning. This lack of co-ordination between the SAX system and the share

account system should, at least for reasons of order and simplicity, work to the benefit of the seller's creditors. One should not require a new distress upon the shares after it is clear that the transaction has been completed.[21]

The question is how, in such situations, the share account system itself intends to cope with reports of a seller's insolvency. It appears that such reports should be made directly to the Securities Register Centre and not to an account-operating institute to be entered into the daily journal and the share account. If courts and bailiffs, who at the moment use ordinary mail, should start using telefax, it may well happen that an entry on distress, attachment or bankruptcy is made before an entry of the transaction itself in the daily journal. Will the transaction entry automatically be barred, or will two conflicting entries be made?

Further, how will the system work if the enforcement decision is made after the entry of the transaction in the journal but before the entry three days later in the share account? The property-law rules in ch. 6 of the Share Accounts Act indicate that any entry of the transaction will yield so long as it is not followed up with an entry in the share account. But still, even though the registration has not been followed up, the shares are no longer available and therefore not accessible to the seller's creditors. Obviously, there must be clearer routines before the share account system is used more widely. Would a link between the SAX system and the daily register of the share account system be too daring an idea? In terms of computers the matter appears easy, and a proposal for reform presented in section 3.5 below is based on this notion.[22]

It is also unclear whether the follow up of the entry in the daily journal by registration in the share account shall be prevented by contesting claims presented in the interval between the registrations. It appears that the statutory text and the *travaux préparatoires* fail to specify the wording of ch. 4 sec. 5 of the Share Accounts Act, that a registration takes place "after all terms and conditions for registration have been fulfilled". Obviously, the main purpose is to secure the payment routines, but does this provision only concern payment? The fact that distress or bankruptcy has occurred certainly does not consti-

[21] A conflict which may only be apparent is to be found in the fact that according to ch. 4 sec. 30, subsec. 4 of the Debt Recovery Code, a provision added in 1989 (SFS 1989:842), it is expressly provided that priority right at distress of shares takes effect with the registration in the account; in case of distress of claims on the other hand, the priority right becomes effective with the bailiff's decision.

[22] For clarity's sake it should be added, that the reasoning conducted so far is based on the notion that the deal is irrevocable after the transaction in the SAX system.

tute a condition that has not been fulfilled. On the other hand, it is not conceivable simultaneously to retain an entry on distress concerning 100 shares in the account of the seller and a corresponding increase of the holdings in the account of some of the broker's clients or of all of them in proportion. The effect would be to increase the total amount of the company's shares by 100!

Turning now to the commission law aspect, the matter of sale of shares under the paper-based VPC system has been discussed in legal writing. One solution, with many supporters[23], takes as its point of departure the view that the selling commissioner/broker is an independent third party in possession of the shares. Notification may therefore be utilised as a property-law element. Whenever the selling broker makes a deal with a buying broker, he is automatically "self notified" of the transaction. In this situation the transfer of ownership and the protection against third parties occur simultaneously at the closing of the deal. There appears to be nothing which prevents this line of thought from being applied to paperless transactions as well.[24] Evidently, this solution also coincides with the view just presented based on reasons of individualisation.

The solution involving a middleman suffers, however, from a few shortcomings. The selling broker does not always have the shares in his possession at the time of the transaction. In the paperless system we may, however, neglect this possibility. The requirement of an express notification poses another problem; the notification that the transaction has taken place must be directed to the possessor. According to the Supreme Court judgment reported in 1962 NJA 49, it is not enough that the depositary is in bad faith, i.e. otherwise has knowledge of the transaction. Even though the view of the present author on judge-made law is stricter than that of most lawyers, there seems to be reasons for distinguishing this case and disregarding the fact that a separate message, an express notification, is missing.

The contention that the commissioner is an independent actor, like a

[23] This theory was first fully developed by Walin, *Separationsrätt*, Stockholm 1985, pp. 31 f., and has later been accepted by Håstad, *op.cit.*, pp. 195 ff., see also Rodhe *op.cit.*, p. 211 at footnote 30, Sjöberg in *SvJT* 1986 pp. 386 ff., *SOU* 1988:63 p. 144. Cf. against this, less clearly and with insufficient basis in theory, Flodhammar, *SvJT* 1986 pp. 31 ff.

[24] The fact that registration has replaced possession as the relevant property law element is not decisive, in spite of the fact that the commissioner can never be registered as possessor of the shares in an account. For the benefit of those who require some kind of parallel to possession, it may at least be said that the commissioner in his capacity of account-operating institute has the registration apparatus at his disposal.

depositary, constitutes the most difficult point in the notification model discussed here. What support is there in fact for this view? An ordinary agent does certainly not occupy such a position. Why would a stockbroker differ from an agent in this respect? The fact that the stockbroker as a commissioner acts under his own name is certainly an indication in this direction, but the question is whether it is decisive, since the broker is as bound by instructions regarding the selling transaction as any agent is. A commission to sell does not include any independent management or deposition, such as a duty to receive dividends or to monitor issues. The label of independence seems arbitrary on the stockbroker.

The present author has elsewhere suggested a solution which avoids the permanent uncertainty involved in the distinction between a dependent and an independent intermediary.[25] The commissioner/stockbroker is, to be on the safe side, regarded as a dependent possessor: independent possession thus remains with the principal. The moment the commission is fulfilled, i.e. when the transaction is made, the principal is immediately severed from his possession, which up until then is channeled through the commissioner. Any remaining accountability on the part of the commissioner has no connection with the possession of the shares themselves, but is, rather, concerned with the collection of payment. In this way the commissioner, as far as the shares are concerned, acts on behalf of the buyer with a duty to deliver the shares at some later stage. Indirectly, the buyer possesses the shares from the moment of the transaction.[26] In this way, analogies with the doctrine of notification become superfluous.

The present author considers that this solution may in principle be applied to the paperless shares in the share accounts system, regardless of the fact that Swedish legal doctrine does not usually discuss in terms of possession of rights. For, as already indicated, the commissioner's handling of the machinery of registration may be regarded as a parallel to registration, albeit superfluous.

What is interesting about this reasoning along the lines of commission law is that, regardless of how the legal construct is modelled, it leads to the same result as the "individualisation" discussion. The seller's credi-

[25] Göranson, *op.cit.*, pp. 464 ff; the solution has evidently not made an imprint on the ensuing discussion—perhaps the reason is that it has been subject only to cursory reading because of its presentation in a theoretical section of the book.

[26] This is not a matter of constructing some *constitutum possessorium*, which is not recognised under Swedish law as a property law element, as the seller himself no longer possesses the shares.

tors' access to the shares will cease at the moment the transaction through the broker takes place.

Therefore, the rules on protection of creditors in ch. 6 of the Share Accounts Act seem to be immediately applicable only in cases of private transactions directly between buyer and seller, and, not insignificantly, to pledge.[27] Also in case of pledge, however, difficult problems of individualisation may arise where the pledge concerns a share deposit, especially if the shares belong to the 25 percent of the total held by nominee shareholders. On the other hand, the simplified routines of the new system may create a clearer situation than the current one. A short example from the discussion will serve to illustrate this.[28]

Suppose that the pledger owns 5 000 shares of the same kind. They are deposited with a third party *without* nominee registration. The owner wants to pledge either 1 000 of these or as many as may cover a debt at any particular time. The remainder is to be freely at his disposal. Unless further measures of individualisation are taken, it would seem that both methods contravene the requirement of individualisation raised in Swedish court practice. Thus no valid pledge has been made. In *Håstad's* well founded opinion, however, a valid pledge has still been made in the first case, when a certain number of shares is indicated, without a need to separate them from the rest of the shares in the deposit.—The system of registration implies a simpler solution. Registration of the pledge of the 1 000 shares entails a satisfactory individualisation, and a valid pledge has been made with the share account entry.[29] The difficulties involved in handling the securities and the deposits are avoided.

[27] In internal dealing, when the broker represents both buyer and seller, it is however presupposed according to prop. 1987/88:108 that the ordinary three day payment cycle be followed.

[28] Håstad, *op.cit.*, pp 254 ff., and more extensively in *Festskrift till Hessler*, pp. 309 ff., esp. pp. 323 ff., has discussed these problems in detail. From a practical point of view the present author has nothing to object against Håstad's suggestion to weaken the requirement of individualisation in the case of a pledge of a block of shares in a large deposit. It would still, however, appear that his opinion cannot be reconciled with the case 1910 NJA 216 discussed in *Traditionsprincipen*, pp. 510 ff. For reasons of sources of law the present author therefore maintains that Swedish law still raises a strict requirement of individualisation. Lindskog seems to accept Håstad's "distinguishing" the Supreme Court case, *JT* 1989–90 p. 220 in footnote 43. Rodhe has adopted a more strict view, *op.cit.*, p. 437.

[29] It is presupposed that an entry is made in the pledgee's account. Otherwise the legislation would make an interesting contribution to the question of whether severance from the right to dispose of the property, or from possession, is the essential element of completion of property law rights. There seems to be no reason to depart from the position that severance from the right to dispose is not always enough.

A floating amount of shares determined only with regard to value will, on the other hand, not be sufficiently individualised unless particular registration routines are introduced. According to Håstad such a pledge is not valid in property-law under the current securities system. Technologically the problem could easily be solved by computerised daily re-registrations in the accounts of the pledger and the pledgee in relation to the stock exchange rate at the end of the trading day. If the present system is retained, i.e. the pledge value of the noted shares set by the banks does not change daily, re-registration will be necessary only when the pledge values are changed. It would seem that the pledger's right of access to the surplus value of the shares poses less of a problem for the validity of the pledge than the lack of invidualisation does. If it turns out that the value of the pledged shares has dropped and that the pledge does not constitute satisfactory surety for the loan, this is mainly to be regarded as bad calculation of risks on the pledgee's part. Besides, he runs the same risk in relation to the basis of floating security, and therefore, there seems to be no fundamental obstacle to such a view, even though the matter might be seen differently under Swedish court practice (cf. 1987 NJA 105 and 1989 NJA 705 I and II).

As far as nominee registered shares are concerned the current system is retained, whereby a notification of the pledge to the nominee will have property-law effect regardless of registration. One may query whether this is quite proper. One might consider that to avoid uncertainty, nominee registered shares should be registered with the owner whenever pledged, and that an entry of the pledge thus is made in the account of the shareholder. Today's, for many actors very convenient, anonymity would unfortunately be lost and, also, the registration with the owner would incur transaction costs which may not be negligible, even though any such costs would be considerably lower than in today's handling of securities.

3.4 Double disposal and extinctive acquisitions

The discussion of the two other classical property-law conflicts, double disposal and extinctive *bona fide* acquisitions, will be less elaborate. Here also, the property-law effect has been linked to the registration of the acquisition, provided there is good faith on the side of the buyer, ch. 6 secs. 3–4 of the Share Accounts Act.

Daily journal entries are intended to be made *en bloc* at the end of the trading day or in the morning of the following day. The problem is that this routine seems to facilitate double disposal. Suppose that the owner

orders the broker to sell a block of his shares, which is promptly carried out in the SAX system; checking the seller's share account does not give any indication of limitations of his right to the shares. An hour later the owner asks another broker to arrange a pledge, which may immediately be registered in the daily journal and in the share account. When the selling broker some hours later reports the transaction to the share accounts system, an entry on the pledge has already been made and provided that it has also been made in the shareholder's account, the pledge is valid under property-law. In the unlikely event that the pledgee is in bad faith, however, the pledge will have to yield in favour of the buyer's right according to ch. 6 sec. 3 subsec. 2 of the Act. But who is the buyer?

Suppose that a buying broker has acquired the 10 000 shares involved in the original example, section 3.2 above. Of these, 100 shares were subject to double disposal and 100 were sold by someone other than the rightful owner. To the buyer, only the selling broker is visible.[30] Practically, there seems to be no other alternative than to assume that the buying broker is always in good faith as to the hidden owners' unlawful arrangements. And it requires a strong element of chance for a normal buyer to be in bad faith when his acquisition is entered in his share account. Besides, as far as commission relating to trade is concerned, the view has been put forth in legal writing that only the subjective knowledge of the commissioner is relevant.[31] However, the problem is rather, that it cannot in most cases be clarified exactly who bought the shares which are subject to the unlawful disposal.

How must—and how should—the share accounts system tackle the situation when the first buyer and rightful owner somehow manages to have an entry made before the acquisition of the *bona fide* buyer is registered in his share account? Several chronological situations are conceivable, but here only one example of a double disposal will be mentioned. Suppose that there are a pledge and a later sale on the same day before the pledge is registered. The pledge gains legal validity by registration the same day in the daily journal and in the shareholder's account. The following morning, the selling and buying brokers list

[30] The case when the stockbroker acts dishonestly or without a commission will not be discussed here; the good faith of the acquirer is sufficient even without transfer of possession, secs. 55 and 56 of the Commissions Act, which must be presumed to apply also to shares of this kind, cf also *SOU* 1988:63 pp. 127 ff.

[31] This view was first put forth by Hult and has subsequently been accepted in legal writing, see Håstad, *Sakrätt*, p. 68 with references. Cf. Hessler in *Festskrift till Welamsson*, pp. 244 ff.

their respective transactions for entry in the daily journal. Will registration be refused for the total amount of the shares because of a contested entry for 100 of the 10 000 shares sold by the broker? Or will an entry be made on the sale of 9 900 shares? If all 10 000 shares were to be registered as sold this would probably constitute a system error, entailing strict liability for the Securities Register Centre for damages under sec. 1 of the Share Accounts Act.

One may further wonder what will happen on the buyer's side if the broker wants to register an acquisition of 10 000 shares on behalf of 10 different principals. There are only 9 900 uncontested shares available. Will only one of the principals sustain the loss or is it to be divided among the various principals, possibly in proportion to their respective acquisitions? Again, we find that the market does not accept partial delivery. But does this imply that the broker is to accept responsibility and cover the loss of the unlawfully sold shares from his own holdings? In this situation he hardly has time to acquire a statutory lien in the shares, since registration of this will probably take place simultaneously with the report of the sale, therefore later than the contested registration. Another possibility is of course that the buying broker accepts partial delivery and compensates his principals from his own holdings.

Should not these cases also be subject to the principle advocated earlier, of loss of claim of ownership because of the lack of individualisation of the property? The present author is unable to give a definite answer to this question. To be sure, the entry in the account of the unlawful seller has not been deleted, but as a result of the transaction there is, in any case, a contested acquisition of a block of shares of which the contested ones form a part. The fact that the aggrieved party's claim has priority over that of the unlawful seller in the payment does not entirely solve the problem, since the rates may fluctuate. Furthermore, the buyer has not yet gained full ownership of the shares: this will occur at a later stage and rather haphazardly, too. Share account registration cannot show whence the shares emanate.

Naturally, a share accounts system must also protect aggrieved parties, whose rights in certain shares have become precarious because of unlawful disposal. But the method of linking protection to the establishment of the opposite party's good or bad faith seems highly questionable. In a private bill to Parliament, some objections of a property-law nature were raised in relation to the proposed system.[32] However, the

[32] Private bill 1988/89:L20 B. Fiskesjö *et alia* (Center Party).

majority of the standing parliamentary committee accepted the Government's proposal mainly with reference to the land ownership registration system in force. Parallels were made between the entry in the daily journal and the possibility to grant a non-definite entry in the land register of the applicant's title.[33] Any comparison with the land register entries of titles and mortgages is, however, strongly misleading, as the principle of individualisation is never endangered there.

3.5 Some conclusions and proposals for reform

As we have seen, the property-law system of registration of the Share Accounts Act may entail increased security in some difficult cases of pledge and in transactions outside the stock exchange. However, when the share account system is confronted with the normal system of stockbroker transactions, it emerges as unrealistic and far from clarifying. Trade is usually carried out in the form of package commissions on the part of both buyer and seller. The sales and acquisitions become intermingled in an intricate way: there is no direct link between them. The final allotment is random, which is even more pronounced with the transactions under the new SAX system. Trade with *per se* individualised VPC-shares already involves elements of intermingling which make the system of property-law rules of the Promissory Notes Act not entirely appropriate. Trade in nominee registered shares also, in both systems, is completely anonymous.

Before a proposal for a safer property-law system is presented, it should be noted that the complications discussed here are not subject to the rather strict control liability for damages placed on the Securities Register Centre, laid down in ch. 7 secs. 2–3 of the Share Accounts Act. The Centre does, however, bear strict liability for any loss caused by *bona fide* acquisitions according to ch. 7 sec. 1 of the Act.[34] Here, too, the main difficulty is that the loss is linked to registration of another party as owner or pledgee. But as long as one cannot tell exactly which shares have been subject to an unlawful disposal, this rule is certainly

[33] *Bet.* 1989/90:LU5 pp. 11 ff.

[34] Ch. 7, sec. 1 of the Share Accounts Act. "If, as a consequence of Ch. 6, secs. 3–5, an acquisition of shares is valid against the person owning them or against someone in whose favour a limitation in the right of disposition applies, this latter person is entitled to compensation from the Securities Register Centre for damage suffered by him as a result of the acquisition.

Subsec. 1 also applies if, as a consequence of Ch. 6, sec. 6, a pledging of shares applies against the person owning the shares or against someone in whose favour a limitation in the right of disposition applies."

difficult to interpret. It is easy to find the aggrieved party, but it is impossible to say precisely which registration on the buying side has caused the loss.

The main weaknesses of the share account system, it would seem, are, first, the successive completion of property-law disposal and, secondly, the intentional delay between the transaction and the entry into the daily journal. On the other hand, the system would be a first class one if, instead, the SAX system were linked to the share accounts system. Any transaction would immediately be registered in the daily journal. The journal, however, must in its turn be linked to the contents of the "main register", i.e. the share accounts, in order for existing limitations in the right of disposal immediately to take effect should an attempt be made to sell such a share. This would prevent a transaction in the SAX system. Alternatively, the block offered for sale in the previous example would only comprise 9 800 shares—the 200 subject to double disposal or not offered by the rightful owner would automatically be excluded. The block would thus be "clean". Any property-law effect would be linked precisely to the transaction and the simultaneous entry in the daily journal. The buying broker and hence his principals would immediately gain full ownership and the aggrieved parties on the selling side would lose their claim in the shares.

The advantage of such a system is that double disposal hardly becomes possible at all. The party whose acquisition is registered first will become the rightful owner, since any transaction is registered the moment it is made. Should a pledgee for some reason be late with registration, he has only himself to blame if a sole transaction is registered first. The race for first registration would be less random than now, when registration of transactions for ownership takes place at the earliest in the evening or the following morning.[35]

Nor is there any real need for a requirement of good faith. Even if such a requirement expressly took into account the subjective knowledge of the buying broker, it would still not be of any material help to the aggrieved party. For in the SAX system the buying broker does not know who the selling broker or his principals are. Only the computer handles the actual matching, not the actors on the stock exchange. On the other hand, a requirement of good faith does not do much harm and might be retained for exceptional cases. At any rate it might calm

[35] In the discussion following the presentation of this paper in 1990 the actors of the stock exchange were not yet prepared to accept any links between the so far not totally reliable SAX system and the share accounts system.

some critics of the system. And it is, of course, indispensable as far as pledges and direct transactions outside the stock exchange are concerned.

It might be appropriate to make the Securities Register Centre responsible also for damages arising out of the system proposed here, which would promote general safety of stock exchange transactions and strengthen confidence in the system. It also seems evident that the Securities Register Centre should have priority in the claim for payment over the disposer.[36] For reasons of clarity such a rule should be laid down in statute. The reasoning here has been based on the supposition that the selling broker acts in good faith. Should this not be the case the Securities Register Centre naturally has a right of recourse to him as already provided in ch. 7 sec. 5 of the Share Accounts Act.

The same property-law effects emanating from immediate registration of the transaction also apply whenever the seller's creditors have a claim in shares which have been committed for sale or pledge (see the discussion on protection of creditors in section 3.3 above). As long as no entry on *inter alia* bankruptcy or distress has been made, the share is still free to be disposed of. As soon as the transaction is made, the shares are no longer accessible to the creditors or the receivers.

The same solution has been reached on the basis of complex reasoning concerning commission trade under the Share Accounts Act in its present form. There is, however, no harm in some clarification. And in the view of the present author the same principles also apply to disposal without the involvement of commissioners. It is therefore, strongly recommended that any protection of creditors be based on the transaction with simultaneous entry in the daily journal. There is no need to wait for an entry in the share account of the buyer, even if this is regularly done for acquisitions other than those involving stockbrokers. It should be stressed again that although the registration in two steps may be necessary for the handling of payment, it should not *per se* have property-law effects. A brief comparison with property-law rules on chattels reveals that in Sweden courts long ago ceased to refuse protection to creditors in chattels subject to reservation of title clause, which have changed hands.

No particular rules on surrogate surety for the creditors seem necessary. Payment is anyway on its way to the selling debtor. The creditors must, however, compete with possible liens or right of set-off of the brokers involved.

[36] The surrogate in the form of payment may however be lost on its way, should the brokers have gained statutory lien or a right to set-off.