BAILEES' AND LESSEES' PROTECTION AGAINST THIRD PARTIES UNDER SWEDISH LAW

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In the shipping business it is not uncommon for a prospective shipowner to enter into a long-term letting or carrying agreement, known as a long-term charter, while the ship which is to do the carrying is still in process of being constructed on the builder's slipway. Indeed, the performance of the charter may be the very purpose for which the ship is built, the contract (charterparty) being offered to a financer as security for a loan towards the building project. Since the charter may run for a period as long as fifteen or twenty years, i.e. the economic lifetime of the ship, it can be understood that a charterer's interest in the ship may be extremely important. Moreover, the freight provided for in the charterparty may very directly affect the value of the ship, and so the continued existence of the charter is of concern not only to the charterer but also to financers of the shipowner and prospective buyers of the ship.

Charterparties may not be the first thing that lawyers would think of in connection with the protection of bailee and lessee interests, but they certainly afford a striking illustration of the conflicts that may sometimes arise between a bailee and a third party attempting to defeat his right. We shall return to this special situation after an examination of the general rules concerning bailees' and lessees' protection against third parties; and it is hoped that a special dimension will be added to the study by the confrontation of the ordinary bailment and lease situation with that involving time charters.

A common-law jurist may not find it natural to speak of bailees' and lessees' interests in the same breath. To him a bailment is a mere contract which gives the bailee at most a personal right to use the chattel, while a lease is a conveyance by which the lessee acquires a proprietary interest in land. Moreover, the common-law jurist will not think of a bailment primarily as a right appertaining to the bailee but will rather be concerned with the bailee's duty of keeping the bailed chattel in safe possession and of returning it at the end of the term of bailment; indeed the

common-law notion of bailment includes many situations in which there is no right at all for the bailee to make use of the bailed property.

In Swedish law the right to use property, whether real or personal, is designated by one common term, right of use (*nyttjanderätt*). This term may be said to comprise the Roman-law *locatio rei* (hiring) as well as the *commodatum* (loan), and thus in the common-law systems would span over many aspects of bailment in addition to the entire realm of leases and licences of real property. The uniting feature in all these cases is the fact that the user has been granted a right or an interest in the property, which is effective at least against the grantor. Our problem is whether this right is effective against anyone other than the grantor.

Certain third persons who might threaten the bailee's or lessee's title will be immediately excluded from this study. It has never been seriously disputed that the bailee or lessee can successfully assert his right against trespassers and other persons not holding the property by virtue of any title. Moreover, I shall assume, for the purposes of the discussion, that the grantor had a good title at the time of the grant. Thus it will not be necessary to go into the special problems involving bailees' or lessees' rights against prior title holders. The discussion, in other words, is limited to the threats arising from adverse claims granted by a true owner.

I. HISTORICAL BACKGROUND

A. The Roman-law distinction between rights *in rem* and rights *in personam* has had a fundamental effect upon those systems of law which in varying degrees have adopted the principles of Roman law.

In a contract, according to Roman law, the parties were free to create whatever rights they wished, but rights so created were regarded as rights *in personam,* which could only be asserted by the immediate parties. As a consequence it was impossible to charge property, whether movable or immovable, with such a purely personal interest, in a manner that would affect subsequent owners of the property. Indeed, Roman law did recognize certain rights *in rem,* which could be enforced against subsequent owners and possessors of the property, but the number of these rights was

strictly limited.[1] Originally only ownership and servitudes allowed this effect; later on pledges were recognized, followed by the special contract forms known as *superficies* and *emphyteusis*. In particular, *locatio rei* (the right of use) was never among the rights *in rem*, and *emphyteusis* (at first a kind of lease) became a right *in rem* only after it had become commonly regarded as a conveyance of the property.[2]

Swedish law has, to some extent, adopted the Roman-law principle of strictly limiting the number of permissible rights *in rem*, and a similar development is found in most European countries, where ever since the reception of Roman law the general principle has been that rights *in rem* may not be created freely. Behind the principle lies the theory that while basically there is no reason to prevent parties to a contract from binding themselves by any terms they wish, rights which are to affect third parties must be easily recognizable; hence they should be few and well defined. A striking illustration of the principle is found in cases where producers of books and gramophone records have furnished their products with notices stating that the products may not be exploited for profit. In Sweden, as opposed to many other countries, such provisions have been given effect only between the parties to the original contract of sale, i.e. normally the producer and the wholesaler.[3] Similarly it could be anticipated, even before the present statutory prohibition of resale price maintenance, that attempts by producers of products to fix resale prices by the use of labels on the goods or general announcements to retailers would be declared ineffective.[4]

The interest of maintaining a clear division between the recognized rights *in rem* and rights merely *in personam* was long regarded as an obstacle to even a limited protection of rights that were merely contractual. It was thought desirable to keep the system "clean", the recognized rights *in rem* being available against the world at large, and the rights *in personam* being always denied any amount of protection except between the parties. In the words of an eminent French jurist:

[1] "Mandatory limitation of types" (*Typenzwang*) in the terminology of the German jurist Heck; see his *Grundriss des Sachenrechts*, Tübingen 1930, pp. 84 ff.

[2] Weiss, *Institutionen des römischen Privatrechts*, 2nd ed. Basle 1949, p. 239.

[3] 1949 N.J.A. 645. Cf. Hemming-Sjöberg in *Festskrift tillägnad Birger Ekeberg*, Uppsala 1950, pp. 246 ff., and further the case 1939 N.J.A. 592.

[4] Thus Mr. Justice Karlgren's dictum in 1949 N.J.A. 650; cf. also Bang-Jensen, *Mindstepris og Undersalg*, Copenhagen 1934, p. 87, and Grönfors, *Ställningsfullmakt och bulvanskap*, Stockholm 1961, pp. 9–11 with note 7.

"The creditor is a creditor only to the debtor, and the debtor is a debtor only to the creditor."[5]

This, then, was the general rule of bailments as well as leases, neither of which belong to the classical rights *in rem*. They were never to be maintainable against anyone other than the bailor or lessor; and if he sold the property the new owner should always acquire an unencumbered title, free from responsibility for the performance of the bailment or lease.[6]

B. In due course this system, so well-conceived in form and appearance, proved to be in need of modification. The need was first felt in the sphere of land law, especially with regard to tenancies. Here the tenant's living was dependent upon the continued existence of the lease, an interest which seems more deserving of protection than the new owner's interest in a clear title. Thus in Danish and Norwegian law the original rule that "the lease is brøken by sale" was abolished as early as in the latter part of the 17th century.[7] The Prussian Civil Code allowed the tenant to remain on the premises after a voluntary sale, provided he was in possession of the property at the time of the sale,[8] and the present German Civil Code explicitly states a new principle for real property: "the lease is not broken by sale".[9] Under the French Civil Code the lessee is protected even in the case of a forced sale.[1]

In England the situation is not comparable with that existing on the Continent. The Roman-law principles were never adopted with regard to real property. Under the early common law and in theory even to this day all land in England is held in tenure from the King, but the tenant is considered to have a proprietary interest (estate) of varying quality.[2] A lease is one such proprietary interest among others and as such is entitled to protection against all interests acquired at a later date. However, the Continental dilemma exists in England with respect to rights that are merely

[5] Dean Weill, as cited from Ginossar, *Liberté contractuelle et respect des droits des tiers*, Paris 1963, p. 72.

[6] See Lundstedt's article in *Festskrift tillägnad Birger Ekeberg* (*supra*). pp. 331 ff.

[7] In the case of real property, this is stated expressly in the law, see the Danish Law 5–8–13, and the Norwegian Law 5–18–16.

[8] See Undén in *T.f.R.* 1940, p. 527.

[9] BGB sec. 571.

[1] Sec. 1743; Planiol & Ripert, *Traité pratique de droit civil français*, vol. 10, 2nd ed. Paris 1956, no. 648.

[2] For the historical development of tenure, see esp. Cheshire, *The modern law of real property*, London 1958, pp. 12 ff.

equitable. Thus the right of a licensee or the right created by a restrictive covenant was not protected under early common law against an assignee of the legal estate. But equity has intervened and has extended protection to the licensee as well as the covenantee against an assignee who either had notice of the grant or obtained his title without paying valuable consideration.[3]

Thus, the strict rule that mere contractual rights can only affect the parties has been modified very considerably in foreign systems with respect to real property. A similar development has occurred in the area of personal property. In Danish and Norwegian law it is now generally said that bailees enjoy protection against third parties, provided they have taken possession of the property.[4] In the case of a voluntary sale, however, this protection is usually thought to be available only against a buyer in bad faith; thus a buyer of a chattel in a normal sale is bound by any bailment of which he is aware or ought to be aware, but not by any others.[5] The German Civil Code has introduced a special type of bailment, called *Niessbrauch,* which is protected against third parties; it consists of a right reserved at the sale through which the beneficiary is allowed the entire use of the property sold. This right is personal in nature and usually cannot be assigned.[6] Other bailments are protected by a general rule in the Civil Code providing for protection of *lawful possession.*[7] In French law the bailee can usually bring a quasi-delictual action,[8] possibly even a contractual action,[9] against the third party who threatens his possession; always provided, however, that the third party had notice of the bailment at the time that he assumed his title.

The situation in England is rather complicated. Basically, a contract does not affect anyone who is not a party to it; only a person who is "privy to the contract" is bound.[1] Thus restrictive covenants made by producers of goods and purporting to impose conditions on subsequent purchasers have been held ineffective

[3] A restrictive covenant was first protected in *Tulk* v. *Moxhay,* (1848) 2 Ph.

[4] So, Illum, *Dansk Tingsret,* Copenhagen 1952, pp. 196 ff., Augdahl. *Den norske obligationsretts almindelige del,* 3rd ed. Oslo 1963, p. 437; cf. Undén, *op. cit.,* p. 528.

[5] Illum, *op. cit.,* pp. 200 ff., Augdahl, *op. cit.,* p. 437, cf. also Ussing, *Enkelte kontrakter,* 2nd ed. Copenhagen 1946, p. 5.

[6] BGB sec. 1030 *et seq.*

[7] BGB sec. 858, subsec. 1.

[8] Code Civil sec. 1382, see Ginossar, *op. cit.,* pp. 21 ff.

[9] Ginossar, *op. cit.,* p. 28.

[1] See Chitty, *On Contracts,* 22nd ed. London 1961, no. 901.

on the ground that the subsequent purchaser was not privy to the contract.[2] Whether a bailee is in the same precarious position as one who has imposed a restrictive covenant is somewhat doubtful. In the famous case *Lord Strathcona S.S. Co.* v. *Dominion Coal Co.*,[3] the Privy Council held that a time charter made by the previous shipowner was binding upon a purchaser with notice of the charterparty. However, it has been suggested that this rule might be peculiar to ships and would not be applicable in the ordinary bailment situation. Moreover, there is also some doubt of the real effect of the rule even in shipping cases, since in *Lord Strathcona* it was said expressly that the contract of sale could be considered to have been made *sub conditione* that the charterparty should continue to operate.[4]

Although it would seem to be the general rule in English law that a third party is not bound by bailment contracts made by the previous owner of the property, the bailee may sometimes be entitled to bring an action against the third party on another ground: where he can show that the third party "wilfully induced the breach of contract" he may have an action in tort.[5]

From the foregoing short account it should appear that, in the systems we have been considering, the bailee's or lessee's right may be protected in one of three possible ways: in Denmark and Norway and—in the lease situation—also in England the grantee's right is protected as a matter of principle; in Germany the rightful possession of the object is protected; in France and—in the bailment situation—in England a measure of protection is afforded by the rule relating to wrongful interference with contractual relationships. Under Swedish law the possibilities of protecting a bailee or lessee against third-party interference cannot be based upon any such broad principle, but require further analysis.

C. The unwillingness of the Swedish law to protect bailee and lessee rights as well as other rights which are regarded as founded upon mere contract stems from two sources: first, the mandatory limitation of the number of rights *in rem*, and, secondly, the unwillingness to recognize hybrid rights, which are partly personal and partly real.

As concerns the first of these reasons, it is hard to see why one

[2] Chitty, *op. cit.*, no. 913.
[3] [1926] A.C. 108.
[4] Doubt was thrown on the *Lord Strathcona* decision in, especially, *Port Line, Ltd.* v. *Ben Line Steamers*, [1958] 2 A.C. 126.
[5] Cf. Chitty, *op. cit.*, no. 916.

should necessarily limit the number of available rights *in rem* to those that were recognized by the Romans. It is more understandable that one should wish to preserve the distinctive character of the rights *in rem* by leaving it to the legislature to decide what types of rights should be recognized. With regard to chattels it has been said by an eminent writer that the limitation of types of rights is motivated by a desire to maintain undivided ownership and that, therefore, only those contracts which convey the entire ownership—principally the contract of sale—are allowed *in rem* protection from the moment of contracting.[6] Other contracts, such as the contract of pledge, may become protected from the moment of actual transfer of possession of the chattel. However, the trend of development has been such that the commercial importance of various contract types other than the sale has been increasing, and in addition the Swedish Sale of Goods Act now acknowledges that the incidents of ownership can be acquired gradually.[7] Under such circumstances there is reason to question whether there are still any valid grounds for opposing a controlled increase in the number of "full-grown" rights *in rem*.

As concerns the unwillingness to recognize rights partly personal and partly real, in other words the question whether a limited protection should not be accorded to some of those rights which have traditionally been regarded as personal, a discussion of the matter at this point would seem like flogging a dead horse. It has long been acknowledged that the exclusiveness of accorded rights *in rem* is a thing of the past, and that the real issue is not the clarity of a conceptual distinction but the policy grounds that can be adduced for and against a protection of rights which are now labelled as contractual.

These two considerations, the recognition of additional rights *in rem* and the achievement of a limited protection of rights *in personam*, are closely interrelated. If the discussion is going to turn upon policy grounds it must be recognized that rights, however traditional in character, must be expressed in the way which best serves the community, and this may mean that they should be allowed a measure of protection which may vary from case to case; while it may seem reasonable that a bailee's interest should be protected against purchasers with notice of the bailment, it might perhaps seem less essential that it should also be protected

[6] Lundstedt, in *Minnesskrift ägnad 1734 års lag*, vol. 2, pp. 668 ff.

[7] See Lagergren, *Delivery of the Goods and Transfer of the Property and Risk in the Law of Sale*, Stockholm 1954, pp. 61–63, p. 67.

against the bailor's creditors who are claiming the property for a forced sale.

There are indeed many situations in which rights traditionally described as personal have been given a measure of protection against third parties. Thus certain claims enjoy a preferred status in the debtor's bankruptcy, which in reality means that the creditor is protected against certain other claimants. In some situations interference with a contractual right may give rise to a criminal action: thus a person who induces another to sell property in disregard of a security right previously granted to a third party may become liable criminally for aiding and abetting conversion. Under the provisions in Chapter 6 of the Penal Code, liability in damages would then ensue automatically, provided the loss can be proved. However, this applies only where the interest interfered with is a security interest. Transactions involving property which is subject to a mere right of *use* are not punishable and will not on this ground constitute a cause of tort action against the user. Nor does it appear to be possible under Swedish law, as opposed to what we have found in French law, to hold the third party liable upon general principles because of his mere awareness of a limited right to the object previously granted to a third party.

It seems appropriate to point out at this stage that no legislative problems are involved in a relaxation of the rigid distinction between rights *in rem* and rights *in personam*; for, unlike the German Civil Code, the Swedish Code is not based upon a distinction of this kind and never mentions either rights *in rem* or rights *in personam*. Against this background it seems all the more surprising that Swedish law should have clung with such tenacity to the traditional distinction between rights which can and rights which cannot be afforded protection against third parties.

II. BAILEES' AND LESSEES' PROTECTION UNDER SWEDISH LAW

We have seen that the need for protection against third-party interference was first felt in the area of land law, and also that, where protection has eventually been achieved, the lease has been more favoured than the bailment. It is appropriate to discuss these two situations separately. More specifically, the immediately fol-

lowing section will deal with leases of real property, and the next section with bailment of chattels; thus the special problems connected with houses on another's land, which being immovable cannot be "bailed" though by Swedish law they are regarded as personal property, will not be discussed. In accordance with the Swedish dichotomy, as set out at the beginning of this article, the section on real property will concern not only leases but also licences of real property.

A. The Older Real Property Code contained a provision, since repealed, to the effect that the "lease is broken by sale".[8] Tenants in those days (the Code is part of the General Code of 1734) were highly dependent upon the will and dealings of their landlords; if the landlord sold the land the tenancy was held at the new owner's sufferance.[9] No way was found of alleviating the obvious hardship of the tenants' situation until the development of an efficient land registry enabled prospective purchasers and persons willing to lend money on the security of the land to ascertain whether the land was leased; by using the register they could appraise the actual value of the property with any charges appertaining to it. The register also made it possible to avoid the difficulties of proving good faith on the part of a buyer or lender.[1]

As a result, the tenant was allowed to protect himself by having his right of tenancy entered in the land register. The existence of the register also made it possible to protect others for whom justice and equity did not speak so strongly; thus licensees such as those having hunting or fishing rights or rights of removing sand, gravel, clay, etc., could—and still can—obtain protection by registration.

The Leasing Act of 1907 affords a possibility of protecting leases even if they have not been registered; this additional protection is not extended to licences such as those mentioned above. Mainly, this further protection was impelled by social considerations, obviously important in the case of agricultural and dwelling leases. However, the Act went further and extended protection to all leases, because it was felt that a considerable value might often come to be attached to a lease through the efforts of the lessee. Thus in the case of business lettings the tenant might have built up substantial goodwill leading to an unearned increment for the lessor in the letting value of the premises.

[8] Real Property Code, 1734, chap. 16, sec. 15.
[9] Undén, *Svensk sakrätt*, vol. 2, 3rd ed. Lund 1958, p. 180.
[1] See Undén, *op. cit.*, pp. 181 ff.

Let us, then, inquire into the present status of the law. What degree of protection is afforded lessees against various adverse claimants?

(1) The Leasing Act, Chapter 1, sec. 5, provides that in the situation where the *same property has been let to more than one person* an earlier lessee is entitled to protection against a subsequent lessee, unless the subsequent lessee has had his lease registered. A similar rule applies to other limited rights, such as easements or licences. It is important to note that in this connection it makes no difference who was first in possession of the property; even a possessor must surrender his right in favour of one whose right was granted earlier.

(2) What is the lessee's or licensee's position *against a new owner of the property after a voluntary sale?*

The lease or licence can be excepted from the sale and then remains effective in accordance with the general principles governing contracts made in favour of third parties. This is expressly stated in the Leasing Act and the Land Charges Registration Ordinance.[2] As a matter of fact, the new owner in such cases is also responsible for the insertion of a similar proviso if he subsequently resells the property, so that the new owner will become bound.

As we have seen, the lessee and licensee can also obtain protection against a new owner by having their rights entered in the land register. This facility was first introduced in the early 19th century and was later adopted in the Land Charges Registration Ordinance, 1875. However, registration is only available to lessees and licensees whose rights have been expressed in writing.

In the case of leases the law also protects the tenant's mere possession, provided he has a written contract; if the lease has been granted orally the new owner can bring it to an end by giving the tenant notice to quit. The rationale underlying this rule was that the tenant's possession of the premises would apprise the new owner of the *existence* of the lease, and the written contract would give him a chance to discover its *terms*.[3] There might of course be cases in which a prospective purchaser would be unable to ascertain whether there was a tenant in possession, but the Law Committee estimated that such cases must be rare and would

[2] Leasing Act, chap. 1, sec. 3, Land Charges Registration Ordinance, sec. 48.

[3] Report of the Law Committee for the preparation of a new Real Property Code, vol. 1, Stockholm 1905, pp. 153–154, cf. p. 220.

not justify the adoption of a special rule protecting purchasers in good faith.[4]

Apart from the rules now considered there is no provision in the Leasing Act under which a new owner can be bound by leases or licences granted by his vendor. In particular, the Law Committee carefully refrained from providing that the vendee must respect licences or parol leases of which he was aware at the time of the sale. The legislation being explicit on this point, it is hardly possible to reach the same result by construing mere notice as a tacit acquiescence or acknowledgment of the licensee's or lessee's right, effective as an implied term of the sale.[5] However, the new Draft Real Property Code, 1960, proposes to introduce a new rule, under which mere notice will be sufficient to render the vendee bound by prior rights.[6]

(3) When land is sold as a result of an *execution order* or the *owner's bankruptcy* a lessee's or licensee's interest may come into conflict with that of the owner's creditors. In these situations protection of a lease or licence is achieved by an *exception* being made for it at the forced sale. Whether it can be thus retained depends in turn upon the price that is obtained at the auction. Consequently, the lessee's or licensee's position cannot be ascertained until the sale is complete, and until then, in any case, he is entitled to remain on the property. If his right cannot be retained he is thereafter entitled to a period of notice.

Before the sale all mortgages and other rights against the property are arranged in order of their priority, but only those which are expressed in writing are considered. The property is first called for sale with all rights retained, but if the bid that is reached is insufficient to cover the preferred money creditors, new calls are made, in which leases and similar rights are sacrificed one by one, beginning from the bottom of the priority list. However, registered rights enjoy priority as from the date of registration and will be retained so long as all *prior* money claims are met. Rights having a higher priority than the execution claim are always protected in this way.[7]

(4) A special problem with regard to leases of dwellings has

[4] Report of the Law Committee (*supra*), p. 75 and pp. 153, 220.

[5] Regarding the weight of the preparatory works, see Schmidt, in *Scandinavian Studies in Law* 1957, pp. 171 ff.

[6] The Draft Real Property Code, chap. 11, sec. 11.

[7] See the Execution Code, sec. 107, and, regarding the order of priority, sec. 123.

arisen as a result of the modern legislation relating to security of tenure. The tenant's position has been strengthened to an extent that renders the ordinary rules of third-party protection almost superfluous. This new protection is of particular importance in houses which are subject to rent restriction. Leases in such houses will often become fraught with a "black" value that may very considerably affect the value of the reversion. The house-owner cannot attain this "black" value by simulating a forced sale, for even if the tenants are given notice to quit such notices will be declared invalid by the Rent Control Board as being unethical practice in tenancy relationships.[8]

Quite apart from this special problem of housing control, the foregoing survey of the real property field should have revealed a fairly extensive and well-defined protection of lessee and licensee interests. When we move into the sphere of personal property and bailments we find a more rudimentary regulation and a far less developed protection.

B. The tenet that "the lease is broken by sale" has been considered of old to apply by analogy to chattels as well as to real property, but in the area of chattels the rule has not been modified by statute. To some extent this is presumably due to a feeling that contracts for the use of chattels have not been so important socially and economically as have contracts for the use of real property, and that the loss of a bailment right is not a very serious misfortune for the bailee. It seems likely that this situation may have changed. Hire of chattels is used in our day in many transactions of great economic importance, especially such as involve motor vehicles, machines and ships.

(1) The Commercial Code, Chapter 13, sec. 2, contains an ancient provision which gives the hirer a certain measure of protection. It provides that if a person lets the same chattel by contract to two persons, the one who first hired the chattel shall be entitled to retain it. There is a difference of opinion as to whether this rule is applicable after the delivery of the goods to the second hirer, but at any rate there is no doubt that the previous right prevails when the second hirer was in bad faith at the time of delivery. Thus there is at least one situation in which the first hirer can assert his contractual right against a person other than the grantor; and thus he has at least a certain measure of third-party protection.

[8] Hedfelt & Zetterberg, *Hyresregleringen*, 3rd ed. Stockholm 1959, p. 95.

(2) In the important situation of a *voluntary sale* of the hired object the authorities are practically unanimously of opinion that the hirer is not protected, not even against a purchaser with notice of the hiring agreement. The bailee's right must be *excepted at the sale* if it is to have any effect against the buyer; but if it is so excepted it takes effect as a stipulation for the benefit of third parties. However, there are tendencies in other areas of the personal property law towards a relaxation of the strict maxim that "the lease is broken by sale". In particular, the development in the case law relating to pledges suggests such a relaxation.

A naked contract to deliver a pledge has in itself no effect against third parties; this is the traditional rule. But in two cases from 1924 and 1925[9] the Swedish Supreme Court extended protection to persons who had merely contracted for a pledge but had not completed the transaction by assuming possession—*nota bene* against a purchaser with actual as opposed to constructive notice of the contract.[1] If this principle can be applied in respect of a contract of pledge, which itself is not endowed with third-party protection, it shows at least that the dogmatic aversion to third-party protection of contractual rights is giving way. In the discussion aroused by the above-mentioned two cases it has been generally denied that the new principle can be taken to extend to hire, but at the same time the expectation has been expressed that a development in this direction might be under way.[2]

(3) Turning now to the problem of the *bailee's protection against the bailor's creditors,* as it arises in cases of forced sale of the property or the bailor's bankruptcy, there is a provision in the Execution Act, incorporated by reference in the Bankruptcy Act, which might seem to have a bearing upon the matter. Sec. 68 of the Execution Act provides (*inter alia*) as follows:

> "Property belonging to another may not be taken into execution in the debtor's estate, nor may an execution be conducted to the prejudice of another's *right* to the debtor's property."

What are the "rights" that are to be respected under this provision? The section has generally been understood as a mere memento that certain rights not enumerated may have to be respec-

[9] 1924 N.J.A. 329; 1925 N.J.A. 80; cf. also 1940 N.J.A. 297.

[1] Cf. Nial i *Sv.J.T.* 1940, p. 683; Lundstedt in *Festskrift tillägnad Birger Ekeberg* (*supra*), pp. 344 ff.

[2] Nial, *supra,* p. 282, Walin in *Sv.J.T.* 1941, pp. 428 ff.

ted.[3] In an article which has provoked much discussion Hassler has challenged the prevailing view by suggesting that it would be arbitrary to limit the applicability of sec. 68, and that the "rights" which are to be respected must include all contractual rights to the debtor's property.[4] Hassler's opinion was severely criticized by other writers, among them Nial[5] and later Lundstedt,[6] and eventually Hassler himself was reluctantly forced to renounce his view.[7]

A leading line of argument in the discussion of Hassler's thesis was that the legislature could be said to have specifically settled the matter in an analogous situation. In the Wills Act, 1930, the Law Committee had found it necessary to insert a special provision for the protection of bailments created by bequest.[8] This has been understood as an indication that protection of bailee rights requires statutory support. It seems open to dispute whether such an assumption is warranted. A bailment granted by will is different from a hiring situation, in which the bailor will usually have received valuable consideration that may be taken to have benefited the estate in one way or another. But whatever may be the value of the juxtaposition with testamentary bailments it is clear that the idea of bailments being effective against the property owner's creditors is now rejected by all leading writers and cannot be accepted as a correct statement of the law.

However, it has been suggested by Walin[9] that there may be two situations in which a bailee would be entitled to protection against the owner's creditors; namely, where his right, granted by a previous owner, had been *excepted* on sale to the present owner, and where he had himself been the previous owner and had *reserved* the right at the sale. In both cases, in Walin's opinion, that which is sold is not simply a piece of property, but only a reversion or a limited right to the property, and the purchaser should

[3] Trygger, *Kommentar till utsökningslagen*, 2nd ed. Stockholm and Uppsala 1916, p. 230, Nial, *supra*, p. 675, Undén, *Svensk sakrätt*, vol. I, 3rd ed. Stockholm 1955, p. 6 note 5, with further references.

[4] Hassler, *Festskrift tillägnad Nils Stjernberg*, Uppsala 1940, pp. 104 ff.

[5] Nial (*supra*).

[6] Lundstedt, *Festskrift tillägnad Birger Ekeberg* (*supra*), p. 331. Others have also joined in the debate, e.g. Ekelöf, *Sv.J.T.* 1940, p. 689, Undén, *T.f.R.* 1940, p. 527, and Walin, *Sv.J.T.* 1941, p. 428 ff.

[7] Hassler, *Utsökningsrätt*, Stockholm 1952, p. 165, 2nd ed. Stockholm 1960, p. 179.

[8] Currently in the Inheritance Code, chap. 12, sec. 7. The Law Committee's view can be found in the official publication, *S.O.U.* 1929: 22, p. 289.

[9] *Sv.J.T.* 1941, pp. 428 ff.

not be able to pass on a better title to his creditors than he himself had obtained.

From a practical point of view it seems curious that the previous owner should be in a position to create a protected right by a reservation at the assignment but should be unable to achieve the same result by negotiating for the right thereafter. If it is the policy of the law to hold the creditors immune from the uncertainty resulting from a recognition of limited rights, it should make no difference whether these rights were created by the present or the previous owner. A full ownership can always be assigned, but an attempt to assign less than the full ownership will not affect the creditors.

C. The present state of the law may be summarized as follows:

In the area of real property a certain amount of third-party protection has been afforded lessees and licensees. The key position of real property in our economic system renders it desirable that rights running with the property should be made public, and so protection could at first be obtained by registration only. However, the further protection later extended to leases based on written contracts has very considerably diminished the practical importance of registration. With regard to dwelling leases our present tenant-security legislation has made registration of lessee rights a precaution by and large unnecessary; as we have seen, the tenant is protected in other ways more effectively than is any other lessee.

Proceeding to the law of chattels we find a less complete protection of bailee rights, but the position is somewhat uncertain, and it is possible that the law may be in a state of development towards a wider recognition of the bailee's interest. In particular, there is reason to expect an increase of his protection against a vendee of the buyer, and there might be some possibility of a greater protection against the bailor's creditors. Since these are the situations in which a development appears to be possible, particular attention will now be given to the problems involved. In accordance with the approach used in this study, the problem considered will be not whether the traditional system places obstacles in the way of a change, but whether policy grounds appear to speak for an increase in bailee protection.

III. SOME CONSIDERATIONS DE LEGE FERENDA REGARDING THE POSSIBILITIES OF EXTENDING BAILEES' PROTECTION

A. What seems remarkable in the present system is, above all, the fact that neither legal writings nor case law acknowledge any protection for the bailee against a purchaser with notice of the bailment. To the unbiassed mind it appears unjust for a person to interfere with prior rights to the obvious detriment of the prior grantee. We have seen that in other systems the bailee is usually protected in one way or another against successors to the title who had notice of the grant. The Law Committee, apparently under the impression that protection in these cases finds support in the general conscience of the community, has recommended the introduction of such a rule in favour of lessees and licensees in addition to the extensive protection that they already enjoy.[1] In the *travaux préparatoires* for the new Real Property Code the Committee proposes not only that actual notice should defeat the vendor's clear title, but also that constructive notice should have the same effect, "in accordance with what has been considered to be natural and reasonable in other fields of the law".

If this should become the rule in the field of real property, where the lessee's protection is already relatively well provided for, and where it is of paramount importance that the value of property should be ascertainable in an objective manner, then there seem to be even stronger reasons for having a similar rule with regard to chattels.

What, then, has been adduced *against* such a rule for protection of bailments against purchasers with notice? In particular, the unique position of a sale in the economic system has been stressed: the requirements of commerce are said to necessitate protection of buyers to an extent which forbids the protection of lesser rights.[2] Furthermore, it has been thought desirable to protect the purchaser, who in fact was unaware of the bailment, even though constructive notice may be imputed to him.[3]

Even if commerce was not considered to have any need for a general protection in any other case than a sale, this would not

[1] *S.O.U.* 1960: 25. p. 312.
[2] Lundstedt, *op. cit.*, p. 341.
[3] Lundstedt, *op. cit.*, p. 342.

seem to be a valid reason why one should protect the buyer who in fact had notice of the bailment. In the constructive notice situation the answer may be more doubtful, for here the buyer's behaviour is not tainted with bad faith.

Against the suggested rule of protection against purchasers with notice it has also been said that it would be inconsistent to protect bailments, when no corresponding protection is allowed in the area of land law, in spite of the greater social and economic importance of the rights involved.[4] This view is open to several objections.

In the first place, the argument will lose all its validity if and when the proposed Real Property Code becomes law, because leases and licences of real property will then be provided with the very protection which we are considering in respect of bailments.

Secondly, if the distinction is drawn on account of economic and social importance, it would not be likely to coincide with the division between real property and chattels. The economic interest involved in the letting of chattels is often very considerable, for example in the case of specialized machines, which are often "let" for extended periods. Moreover, the social interest is not always of overwhelming importance with regard to real property; in particular the social interest in protecting licensees may often seem to be rather insignificant. Though there may still be a kernel of truth in the statement that in general rights to real property are more important, there is a strong tendency towards integration of real and personal property, especially in the industrial field.

Indeed the whole rationale for the statement now under discussion seems doubtful; why should the absence, in the case of real property, of a general protection against purchasers with notice be any reason for denying such protection in the case of chattels? The true situation is that as regards real property a protection has already been achieved with a view to the special conditions prevailing in that area, and for this reason a special protection against purchasers with notice was deemed unnecessary, while in the field of private property the protection is manifestly inadequate.

B. It seems, then, that a case can be made for protection of the bailee against *mala fide* purchasers. The reasons for such protection are equally cogent whether the chattel has come into the

[4] Nial, *supra*, p. 682.

bailee's possession or not. We may also ask whether there are reasons for protecting the bailee even against *bona fide* purchasers when he has become *possessed* of the chattel, in a similar manner to what we have found to be the position in German law. Even if such a rule might be conceivable, it is not likely to be realized in a foreseeable future. One must take one step at a time. We shall, therefore, refrain from discussing the possibility of protecting the bailee's mere possession.

C. We proceed then to the question of protection against the owner's creditors. Although here a denial of protection does not seem so offensive as in the purchaser's bad faith situation, the bailee's interest still requires consideration, and much can be said for an increase in the protection he currently enjoys.

(1) I have already pointed out that there seems to be no ground for distinguishing between a bailment reserved or excepted at a sale and one granted by the vendee himself. In the one case it can be assumed that the grant has reduced the price paid by the present owner; in the other that he has received or will receive a certain compensation from the bailee. In both cases the estate has been compensated or will in all probability be compensated for the grant, and the creditors are entitled to seek their satisfaction out of this swelled estate. If in addition we are to sacrifice the bailment itself, it would seem that the creditors would be given double security at the bailee's expense!

Again we find ourselves faced with the sceptre of the undivided ownership which prevents us from imparting to each interest the amount of protection that it deserves. Once more it seems desirable to recognize a more compound notion of ownership—an ownership which may be limited by restrictions of different kinds. That which is seized by the creditors, in this more differentiating view, is not "the property", but a certain right to the property.

(2) Such a notion of divided ownership would not be unprecedented in Swedish law. In a conditional sale, even when styled as hire-purchase, the vendee is considered to acquire a protected right; in the event of the vendor's bankruptcy he may pay his instalments until he obtains unlimited ownership. It may well be asked why a "mere" hirer should be entitled to less protection.[5]

(3) The bailee's case may be further reinforced by a point regarding insurance. Property which is let commercially is usually insured. Now, under Swedish insurance law any payments from

[5] Cf. also Walin, *supra*, pp. 430 ff.

the insurance accrue to those who have so-called competing interests in the property, i.e. interests which affect the value of the remaining property. This may be true of a bailee if he has paid his rent in advance or if his right was given gratuitously. If the property is seized upon, no consideration is paid to the bailee's interest; but if a casualty occurs he is paid in full by the insurer. So, of course, the resourceful bailee who apprehends the impending bankruptcy of his bailor will see to it that a casualty occurs, and that he receives payment under the insurance. He must act promptly, for once the bailor has been declared bankrupt the bailee's right to the insurance moneys is extinguished.[6]

Three objections have been raised against a protection of bailee interests:

(1) It has been said that there are rarely any important interests at stake, for the bailee will usually be in a position to find a substitute elsewhere, and he will rarely have paid rent for any considerable time in advance.[7]

This may be true in many cases, but the practical circumstances vary considerably. Hiring is the natural way to satisfy a temporary need, and is often used because the hirer does not find it worth while to buy the object himself. This is why hiring is used in many everyday situations, for instance in the case of cars, boats and various other objects in common use. In such cases the hiring period is usually short, and the damage to the hirer is generally not very great.

But often hiring is used in preference to buying because the lessor is a specialized contractor; in these cases the hiring is often combined with the providing of personnel.[8] Excavators and building cranes are frequently provided on such terms. Again, various kinds of specialized machines or equipment are only supplied on hiring terms because the owners wish to retain a certain control over the market. This seems to be the practice with regard to milk-packaging machinery and telex equipment and, until recently, electronic computers. In the two latter types of situations the period of hiring may be long, and the hirer's interest in retaining possession may be exceedingly great; if he is deprived of the

[6] See, regarding the law on this point, Hellner, *Försäkringsrätt*, Stockholm 1959, p. 291, with further references.

[7] Nial, *supra*, pp. 678 ff.

[8] I am indebted to Professor Jacob Sundberg for the factual information contained in this and the foregoing paragraphs. Walin mentions a further example, see p. 428 of his article (*supra*).

machine he will find little consolation in the fact that the payment of rent will cease. Thus it is hardly correct to say quite generally that hirers have no considerable interests at stake.

(2) An objection that seems to carry more weight in the everyday situations is that the selling price at an execution sale might be depressed unduly if the sale could be made only subject to the existing hiring agreement.[9] Though it is always hard to determine what factors influence the prices at auctions—whether there are any hiring agreements excepted or not—it certainly seems probable that bidders would be deterred by the thought of having to respect hiring agreements, and that a disproportionate fall in prices would result; for it must always be hard for a bidder to determine how the hiring agreement is going to affect him in actual practice. Possibly it might be feasible as a corrective measure to introduce a right for the creditors to pay off the hirer while the hiring period is still running.

(3) Finally, it has been said that the risk of simulated transactions (the letting of property to proxies) would increase if hiring agreements were given protection against the owner's creditors.[1] However, it is a basic rule in Swedish law, applicable to gifts, sales, barters and pledges, that immunity to a previous titleholder's creditors is attained only by the actual and bodily transfer of possession to the new titleholder. It is quite clear that in accordance with this rule a hirer could never be fully protected until he had assumed possession. The risk of simulated hiring transactions is thereby substantially lessened, and it would in any case be less serious to the creditors than the risk of simulated sales, for in spite of a simulated hiring they retain at least the ownership to the reversion. Indeed, to sacrifice the hirer's right because it comes into conflict with the creditors' interests does not seem to be the best way out of the dilemma. Simulated transactions can be handled in better ways, without disturbing the rights of honest negotiators.[2]

Of the various reasons for a refusal to provide protection against the owner's creditors, the most cogent one seems to be the practical consideration that the selling price at a forced sale might be depressed unduly. In the case of everyday articles, which are not regularly employed only by letting, this consideration is not offset by any important equity in favour of the bailee. However, in these

[9] Nial, *supra*, p. 679.
[1] Nial, *supra*, p. 679.
[2] Similarly, Walin, *supra*, p. 431.

situations the ground would in general seem to be well prepared for an arrangement with the bailee, such that the property could be sold free of the bailment if the creditors found this to be of importance to them.

In many commercially important situations we have found that the bailee has a serious need for protection. It is no answer to this need that protection seems unimportant in other cases, where the bailment itself is of less value. Nor does it seem desirable to introduce different rules for different kinds of articles, as this would invite hair-splitting litigation regarding the "character" of different chattels. Indeed, important practical considerations speak for an increased protection of all bailee interests, and the general tendency towards a relaxation of the strict doctrine of undivided ownership seems to point in the same direction. Nevertheless, the road is strewn with ingrained objections and reminiscent doctrine, and it will certainly be a long time before increased protection is afforded at the creditors' expense.

D. Hiring agreements, or contracts of a largely similar nature, play an important role in the employment of *ships*.[3] Thus a ship will sometimes be let for a long period of time on a so-called demise or bare-boat charter, under which the entire control and possession of the ship passes to the charterer, together with the duty of engaging the ship's crew. This form of charter may be properly described as a bailment. A far more common mode of employment is to "let" a ship *with* her crew on a time charter: many ships, especially tankers, are regularly employed in this way. Under a time charter the control and possession of the ship remain with the shipowner, but the charterer is granted the right to use the ship's space and to direct the voyages she is to perform. Technically, this form of charter is classed as a contract of carriage. From a policy point of view, however, the situation under the two types of charter is not very different, and the reasons for protecting the charterer's interest appear to be equally strong in both cases.

In spite of the very high building costs prevailing today, the value of a ship lies not so much in the costs of material and labour that have gone into her construction as it does in the revenue that her employment can bring. Whether a ship can be profitably

[3] See, regarding the problem discussed in this section, the exhaustive discussion in the papers from the sixth conference of the International Bar Association, 1956, published by the Association under the title *International Shipbuilding Contracts*, Oslo 1956.

employed depends on the state of the freight market, and that market is characterized by great instability.[4] The result is that the value of ships is subject to extreme fluctuations, and this is true especially of ships which are regularly employed on a time-charter basis. However, if a shipowner can secure steady employment for his ship under a time charter of sufficient duration, he will to a great extent immunize himself against the effects of the market fluctuations, so that to him the ship will retain her value, provided that the freight is definitely predetermined and that the charterer is financially solid. The current practice of chartering tankers to large oil companies is usually designed to achieve this end. The charter hire becomes a reliable source of income—for better or for worse—tied up definitely for a long period.

The charterer has seldom any appreciable interest in retaining the use of the vessel except that which depends upon a favourable rate of freight. If the market freight has fallen, he will be glad to be free from his obligations under the charterparty, and it is only where the market freight has risen that he will be desirous of protection against third parties. A protection of the charterer's interest in this situation will, however, always adversely affect the value of the ship, since her earning capacity will be tied to the original charter rate for the entire period of the charter.

The shipowner is not the only person to have money invested in the ship. Usually there is a financer behind him who has extended credit to the owner, and who will hold mortgages on the ship as security. But, for many reasons, ship mortgages alone are very unsatisfactory security, and the financer will often rely on the additional security of a long-term charterparty, either directly, by having the charterparty pledged or assigned to him, or indirectly, by counting on the steady income from the charterparty to enable the shipowner to meet his obligations. The financer's expectations would be shattered if the charterparty were to be extinguished as a result of the owner's bankruptcy or the voluntary sale of the ship. From the financer's point of view the charterer should not only be entitled to go on with the performance of the charterparty, but be bound to do so, even if the ship were sold or her administration were taken over by the financer. However, the situation is generally understood to be governed by the contrary principle prevailing in the law of bailments. The contract of carriage becomes dissolved after a sale of the vessel or the ship-

[4] See, especially, Brækhus in the above-mentioned publication, p. 3.

owner's bankruptcy, the charterer being neither entitled nor bound to go on with its performance. As a result, Swedish bankers and insurance companies are reluctant to extend high-marginal credit to shipowners, to the detriment of the shipping industry.[5]

Thus the interest of the financer seems to reinforce the strength of the argument that the contract of carriage should remain effective even after a voluntary sale or the shipowner's bankruptcy. As regards the volutary sale, it may even be asked whether the interest of the financer does not warrant a protection of the charterparty against purchasers in good faith. The problem will seldom arise in practice, because the buyer, seller and charterer will usually enter into a tripartite agreement, in which the new owner undertakes to assume the duties under the charter. But if the charter hire is considerably lower than the market freight, it might be expected that some shipowner would wish to sell the ship to a good-faith purchaser, so as to rid her of the charterparty. This would prejudice the financer who had taken the charterparty as security; it is true that the value of his mortgages, which no doubt he has taken as collateral security, may increase as a result of the disappearance of the unfavourable charterparty, but his guarantee of a steady income has been replaced by an uncertain claim against the former shipowner plus a right to the equally uncertain amount that may be realized by the foreclosure[6] of his mortgages.

If the interests of the financer were considered to warrant a rule that the contract of carriage should be preserved in the owner's bankruptcy, those same interests speak for the preservation of the contract after a voluntary sale also, regardless of the good or bad faith of the purchaser. But such a rule would obviously be highly detrimental to the purchaser. The solution would seem to lie in the opening of a possibility of registration of long-term charters. Although it is true that lessees have made only sparing use of the land register as a means of protecting their leases, the situation is different in a commercial environment such as the shipping world, and there is reason to expect that charterers will register their rights, at least if this is made a condition for

[5] See Fogelklou in *Handelshögskolan i Göteborg. Skrifter*, 1950, no. 2.

[6] Technically, the Swedish procedure is different from a foreclosure, the property being sold free of charges by order of the court. In practice, the result may sometimes be rather similar, because the creditor effectively acquires the control of the ship, cf. the Norwegian case 1935 N.D. 198.

their obtaining protection.[7] However, sales and long-term charters of ships frequently being international transactions, it is important that uniform rules should be adopted in different lands. Indeed, work on international unification of rules relating to long-term charter registration has already been commenced within the framework of the International Maritime Committee, but it has not yet resulted in any definite recommendations.[8]

[7] Registration of time charters is possible in Norway, but according to Selvig, "Om dom på naturaloppfyllelse", *Arkiv for sjørett*, vol. 5, p. 588, is not practised to any great extent. However, it is used precisely in cases where the charterparty is of decisive importance for the financing of the ship. One may surmise that the sparing use of registration is due to a widespread feeling that time charterers will always be protected against purchasers of the ship with notice, cf. Jantzen, *Godsbefordring til sjøs*, 2nd ed. Oslo 1952, p. 338.

[8] The question was discussed at the Athens Conference of the International Maritime Committee, 1962, and it is again on the agenda for the New York Conference, 1965.