**NV SLAVENBURG’S BANK**

**v.**

**INTERCONTINENTAL NATURAL RESOURCES LTD AND OTHERS**

QUEEN’S BENCH DIVISION

22 FEBRUARY 1979

**LEX (1979) – 1 ALL ER 955**

OTHER CITATIONS

2PLR/1979/19 (SC)

[1980] 1 ALL ER 955

**BEFORE:-** LLOYD J

**BETWEEN**

NV SLAVENBURG’S BANK – Appellant

AND

INTERCONTINENTAL NATURAL RESOURCES LTD AND OTHERS - Respondent

**REPRESENTATION**

W F STUBBS QC and DAVID GRACE - for the Bank

EDWARD EVANS LOMBE QC and L J LIBBERT - for the Defendants

Solicitors: LINKLATERS & PAINES (for the bank); CAMERON, KEMM, NORDON (for the Defendants).

K MYDEEN Esq Barrister.

**ISSUES FROM THE CAUSE(S)) OF ACTION**

BANKING AND FINANCE:- Banking practice – recovery of loan – Jurisdictional challenges for entities with international operations

COMPANY AND COMMERCIAL LAW:- Company – Charge – Registration – Charge by overseas company with place of business in England – Company not registered in England – Validity of charge – Particulars of charge not delivered to registrar – Assignment of business including present an future trading stock by way of security – Property of company stored in England subsequent to creation of charge – Whether charge void against foreign liquidators – Whether statutory provisions regarding charges applying to all overseas companies or only those registered in England – Whether foreign liquidators entitled to plead invalidity of charge – Whether floating charge created by overseas company within provisions of Companies Act – Companies Act 1948, ss 95(1), 106

COMPANY AND COMMERCIAL LAW:- Instruments - Bills of sale – Security bills of sale – Application of Bills of Sale Acts to corporations – Whether all corporations outside Acts – Whether document creating general charge on future goods exempt from Acts – Bills of Sale Act (1878) Amendment Act 1882, s 17 – Bills of Sale Act 1890, s 1 (as amended).

DEBTOR AND CREDITOR LAW:- Credit facilities granted to a company created and secured by way of charges over its assets in favour of the bank – Company incorporated in Bermuda which had an established place of business in England – Winding up proceedings in Bermuda – Effect on claims of bank over Company Asset in England

INTERNATIONAL TRADE:- Foreign Company incorporated in Bermuda which had an established place of business in England – Credit facilities obtained from Dutch bank but secured with charges over its assets to the benefit of the bank – Compulsory winding up proceedings taken out in Bermuda against company – Implication for interests of bank over company’s assets in England

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

In 1974 a company incorporated in Bermuda which had an established place of business in England entered into agreements with a Dutch bank whereby the bank provided the company with credit facilities and the company created charges over its assets in favour of the bank. The charges included an assignment to the bank of the company’s entire business including its present and future trading stock. The company was not registered in England under s 407a of the Companies Act 1948; nor were particulars of the charges registered in accordance with s 95(1)b. Subsequently, property of the company was deposited with a storage company in England. In December 1975 the bank decided to withdraw further credit facilities from the company and on 29 December the company ceased trading. Under an agreement between the bank and the company dated 20 January 1976 the property stored in England was sold and the proceeds paid into a joint account in England in the names of the parties’ solicitors, on the terms that the rights of each in the proceeds were to be the same as their rights in the property before the sale.

Subsequently, a petition for the compulsory winding up of the company was presented in Bermuda by a creditor, and on 19 April 1976 the Bermudian court made a winding-up order and appointed liquidators. The Bermudian winding up was similar in character to an English winding up. In an interpleader issue between the bank and the company the Bermudian liquidators contended by way of preliminary points of law –

(i) that the charges in respect of the property stored in England were void as against the liquidators under s 95(1) of the 1948 Act because, by virtue of s 106c of the Act, s 95 extended to the charges; and

(ii) alternatively, if the charges were not void under s 95, they were void under the Bills of Sale Acts 1878 and 1882 because the documents creating them were unregistered bills of sale.

On the question whether the charges were void under s 95, the bank contended that –

(i) s 95 was applied by s 106 only to companies incorporated in Scotland and Northern Ireland and not to all overseas companies;

(ii) alternatively having regard to the registrar of companies’ practice not to register charges created by an overseas company unless the company was registered under s 407, s 95 was applied by s 106 only to overseas companies which were registered under s 407;

(iii) assuming s 95 applied to the charges, the liquidators could not claim that the charges were void against them since they were liquidators in a foreign winding up and therefore were not ‘liquidators’ for the purpose of s 95(1), and if they could not plead s 95, they should not be allowed to join as parties to the proceedings an English firm, as representative creditors, to plead their case under s 95;

(iv) in any event s 95 did not apply because it did not apply to the creation of a floating charge by an overseas company and therefore did not apply to the charge on the English property; and

(v) as the property was sold and the proceeds paid into the joint account before the liquidators were appointed, the charges were spent before that date, s 95 did not apply and the liquidators, who were not parties to the agreement of 20 January 1976, had no claim to the proceeds.

DECISION(S) OF QUEEN’S BENCH DIVISION

(1) By virtue of s 106 of the 1948 Act, s 95 applied to the charges on the English property, and the charges were therefore void against the Bermudian liquidators under s 95(1), for the following reasons—

(a) Since s 95 was applied by s 106 to a company ‘incorporated outside England’ it applied to all overseas companies, and not merely to those incorporated in Scotland and Northern Ireland. Moreover, despite the practice of the registrar of companies the operation of s 106 was not dependent on registration of the overseas company under s 407, for s 95 did not require registration of a charge to render it valid but merely that particulars of the charge be delivered to the registrar; it followed that it was sufficient for the operation of s 106 that the overseas company had an established place of business in England, and that the bank could have preserved the validity of the charges by delivering particulars of them to the registrar even though the company was not registered under s 407National Provincial and Union Bank of England v Charnley [1924] 1 KB 431 applied.

(b) The liquidators, although appointed in a foreign liquidation, were entitled to plead s 95 because notwithstanding that ‘liquidator’ in s 95(1) primarily meant a liquidator in an English winding up, when that section was applied by s 106 to an overseas company and the foreign winding up was similar in character to an English winding up, the meaning was extended to include a liquidator in a foreign winding up. In any event if the liquidators were not entitled to plead s 95, the court would allow joinder of an English firm as representative creditors, under RSC Ord 15, r 6(1), to plead the liquidators’ case under s (c) Section 95, in its application to overseas companies, applied to floating charges as well as fixed charges and thus applied to a charge on future property in England and was not confined to a charge on property existing in England when the charge was created. Moreover if the charge initially came within s 95 by virtue of s 106, it remained within s 95 even if the company ceased to have a place of business in England before the commencement of the liquidation

(d) On the true construction of the agreement of 20 January 1976, the charges were not spent when the property was sold and the proceeds paid into the joint account, and the rights of the parties to the litigation, including the Bermudian liquidators, to the fund, was to be considered as if the property had not been sold and was still in existence. It followed that the fund remained subject to the charges and that s 95 applied to the fund (see p 968 d and p 969 h j, post); Mercantile Bank of India Ltd v Chartered Bank of India, Australia and China and Strauss & Co Ltd [1937] 1 All ER 231 distinguished.

(2) The documents creating the charges did not come within the Bills of Sale Acts and accordingly, if the charges had not been void under s 95, they would have been enforceable against the liquidators, because, on the true construction of s 17d, of the Bills of Sale Act (1878) Amendment Act 1882, the Bills of Sale Acts applied only to individuals and not to a corporation (see p 974 d e g and p 975 b, post); Clark v Balm, Hill & Co [1908] 1 KB 667 followed.

3. Per Curiam. Section 1e of the Bills of Sale Act 1890, as amended, which exempts from the Bills of Sale Act an instrument ‘creating any security on … imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store … ’ does not cover a document which creates a general charge on all future goods (see p 977 b, post).

**Notes**

For charges created by an overseas company and for the charges required to be registered, see 7 Halsbury’s Laws (4th Edn) paras 859, 862, and for cases on the subject, see 10 Digest (Reissue) 861–867, 4966–4989.

For the application of the Bills of Sale Acts to charges by companies, see 4 Halsbury’s Laws (4th Edn) paras 654, 655, and for cases on the subject, see 7 Digest (Reissue) 32–34, 157–172.

For the Companies Act 1948, ss 95, 106, see 5 Halsbury’s Statutes (3rd Edn) 189, 197.

For the Bills of Sale Act (1878) Amendment Act 1882, s 17, see 3 Halsbury’s Statutes (3rd Edn) 269.

For the Bills of Sale Act 1890, s 1, as amended, see ibid, 270.

**MAIN JUDGEMENT**

Cur adv vult

22 February 1979. The following judgment was delivered.

**LLOYD** **J** delivered the following judgment.

In this case I am concerned with preliminary points of law in an interpleader issue between the plaintiffs, NV Slavenburg’s Bank (‘the bank’), a company incorporated in the Netherlands, and the defendants, Intercontinental Natural Resources (‘the defendant company’), a company incorporated in Bermuda. The order directing the interpleader issue was made by Mocatta J on 23 March 1976. Subsequently on 19 April 1976 the Supreme Court of Bermuda made an order for the compulsory winding up of the company. Joint liquidators were appointed on 27 May 1976. In May 1977 the joint liquidators applied to be made parties to the English proceedings. The bank resisted the application but on 26 July 1977 Kerr J directed that the liquidators be joined as second and third defendants in the issues. There then followed pleadings in which various defences were raised by the joint liquidators. On 19 June 1978 the defendants applied to the court for the trial of certain preliminary questions of law raised by the pleadings. Again, the application was resisted by the bank but on 11 July 1978 Donaldson J granted the application. I need not set out verbatim the preliminary questions of law which he ordered to be tried, more particularly as they have been varied by subsequent agreement between the parties. But in essence the questions with which I have been concerned are, first, whether certain charges created in favour of the bank are void against the liquidators by virtue of s 95 of the Companies Act 1948, and, second, whether, if not, the document, or documents, in question are void as unregistered bills of sale. Before coming to the questions of law I must first give a short account of the facts.

The defendant company was incorporated in Bermuda on 6 February 1974. Until it went into liquidation it carried on business in the purchase and sale of crude oil and refined petroleum products. On 1 June 1974 it entered into a so-called service agreement with Dycon Petroleum Trading Ltd, a company incorporated in the United Kingdom. According to an affidavit filed on behalf of the bank it is the sort of agreement which is not uncommon between an English company and a company incorporated in a tax haven such as Bermuda.

On 13 June 1974 the defendant company entered into three agreements with the bank, all in the Dutch language and all governed by Dutch law. The first is called ‘General credit agreement’. By that agreement the bank was to provide the defendant company with credit facilities by way of current account. By cl 9 the company agreed to provide certain collateral securities, as there set out. The second agreement is called ‘General agreement of assignment’. By cl 1 the company agreed to assign all present and future debts to the bank and to execute such assignments in a form prescribed by the bank. The prescribed form is called ‘List of assignment of accounts receivable’. The third agreement is called ‘Assignment of stocks as security’. By cll 1 to 3 the company assigned the entire business by way of security to the bank, including present and future trading stocks. By cl 4(b) the company assigned, or agreed to assign, all claims arising on the sale of its trading stocks. There was also a provision that all cash payments were on the sale of its trading stocks. There was also a provision that all cash payments were to be collected by the company as agents for the bank. Those are the three principal agreements on which the bank relies in these proceedings.

It was the practice of the defendant company to store petroleum products with a company called Paktank Storage Co Ltd, which had bulk storage facilities at Grays, Essex, and at East Ham. Paktank are the second defendants in the action and it was as result of their interpleader summons that Mocatta J made the order to which I have referred. In the course of 1975 Paktank sent a number of telexes to the bank showing the quantity of the company’s products in store at the end of the preceding month. On 3 December 1975 Paktank sent a telex in the following terms:

‘We hold the following oil products to the account of Intercontinental Natural Resources Ltd, Hamilton, Bermuda, and at your disposal, it being understood that Intercontinental Natural Resources Ltd has free and complete authority to dispose of all or any part of these products and that we are entirely free to accept their disposal instructions, subject only to contra instructions from you.’

The language of that telex had originally been suggested by the bank, and the bank’s request had been passed on by the defendant company to Paktank. Paktank sent a similar telex on 18 December 1975 giving the figures at close of business on the preceding day, showing a total quantity of 12,974 long tons in store. These telexes were referred to as ‘storage reports’.

Meanwhile, on 4 December 1975 the bank had decided to withdraw all further facilities from the company. On 19 December the Bank sent a telex to Paktank, referring to Paktank’s storage report of 18 December and asking Paktank to issue them with a warehouse receipt. The bank went on to direct Paktank not to deliver any products without the bank’s consent. On 19 December Paktank declined to accept the bank’s directions. On 29 December the company ceased trading. On 9 January Messrs Linklaters & Paines, on behalf of the bank, demanded immediate delivery of all the company’s products stored by Paktank at Grays and East Ham, and on 12 January they obtained an ex parte order from Mocatta J for the detention and preservation of the goods under RSC Ord 29, r 3. They also obtained a Mareva injunction restraining the defendants from parting with the proceeds of any goods sold prior to 12 January 1976. The parties then entered into negotiations which resulted in the opening of a joint account at Lloyds Bank in the names of the parties’ solicitors. On 20 January 1976 Messrs Linklaters & Paines wrote to the solicitors then acting for the company as follows:

‘We refer to our various discussions during the past few days, and confirm that our clients, NV Slavenburg’s Bank, are agreeable to the uplifting on an interim basis by Dycon Petroleum Trading Co. Limited of the oil presently stored by Paktank Storage Co. Ltd. in the name of Intercontinental notwithstanding the existence of the Order of Court of 12th January 1976, pending the signing, it is hoped, of an appropriate written agreement setting out more permanent arrangements for the uplifting of and payment for the oil and the destination of its proceeds pending the conclusion of the present litigation between Slavenburg’s, Intercontinental and Paktank. [I can omit the next paragraph. The letter continues:] We have opened an account styled "Linklaters & Paines/Freshfields" at the City Branch of Lloyds Bank Limited [and it then gives the address, and then further down it continues:] Withdrawals from the account can only be made on 7 days’ notice and they must be supported by the signatures of one designated partner in Linklaters & Paines and one designated partner in Freshfields or else by an Order of Court. [and then the letter concludes:] The purpose of these arrangements, it is hardly necessary to add, is to preserve the proceeds of the oil just as the oil itself is, by means of the present Court Order, preserved.’

The first payment into the joint account was made on 21 January and payments continued to be made through the rest of January, and in February and March. By 15 April the joint account stood at £905,098·21. In October 1976 it was converted into a dollar account and now stands, with interest, at $1,747,327·02. The joint account contains three main elements: first, there is a relatively small sum of £63,068, which was the company’s share of the profit arising out of a joint venture for the sale of fuel oil to the Central Electricity Generating Board. The other party to the joint venture was a company called Shaw’s Fuels Ltd. The defendant company’s share of the profit was specifically assigned to the bank by a ‘List of assignment’ dated 16 December 1975, and was paid into the joint account on 29 January 1976. The second element in the joint account is £256,607·98, being the proceeds of sale of products sold between 1 January 1976 and the date of Mocatta J’s order of 12 January 1976. This sum was paid into the joint account on 15 April 1976. The third element in the joint account represents proceeds of products sold since 12 January 1976.

The remaining events can be mentioned very briefly. On 15 March 1976 a creditor in Bermuda presented a petition for the compulsory winding up of the company on the basis of a judgment debt of $5,195,832. On 19 April, as already mentioned, a winding-up order was made and the joint liquidators were appointed on 27 May 1976. Meanwhile on 13 April 1976 the company and the bank reached agreement by telex, subsequently confirmed by letter, as to the terms on which the joint account had been set up. The joint liquidators were not, of course, parties in their own names to that agreement, since they had not yet been appointed. Since the agreement is important for an understanding of the bank’s submissions, I will set out the letter in full.

‘Dear Sirs, This letter confirms our telex of today as follows: Following legal action taken by you in the High Court in London on 12th of January, 1976 on behalf of N.V. Slavenburgs Bank arresting all mineral oils owned by us and stored with Paktank in the U.K. a joint bank account was set up at Lloyds Bank in the names of Linklaters and Paines and Freshfields into which it was agreed the proceeds of the sale of such mineral oils should be paid on terms that the right, interest and equities of each ourselves and N.V. Slavenburgs Bank in such proceeds of sale should be identical to those in the mineral oils from which the proceeds derived.

‘Since January 21st, 1976 sales of mineral oils have taken place with the consent of Slavenburgs and the proceeds of the sale duly paid to the joint bank account on the terms set out above. In addition on or about 29th January, 1976 Shaws Fuels Ltd. paid into the joint account £63,068·48. This sum did not represent proceeds of sale of mineral oils subject to your arrest but was our share of profit on approx. 40,000 tons of fuel oil delivered to CEGB in December, 1975 the account receivable in respect of which was purported to be assigned by us to Slavenburgs. A further 40,000 tons were delivered to CEGB in March under the same contract and the proceeds which will be considerably less than £63,000 are expected to be paid shortly.

‘During the first two weeks of January prior to your court proceedings we sold mineral oils from U.K. storage for a total net sale price of £256,607·98 the accounts receivable in respect of these sales were purported to be assigned by us to Slavenburgs. The sales were made to Dycon Petroleum Trading Ltd. and that Company has deposited the said sum of £256,607·98 on Client Account with Messrs. Freshfields to be released only as follows: 1. In accordance with instructions from an authorised signatory of Dycon to pay either us or Slavenburgs. 2. In accordance with joint instructions from us and Slavenburgs to pay either of us. 3. In accordance with an order of the High Court arising from any proceedings between us and Slavenburgs relating to the monies in question.

‘Against your Clients agreement

1. That the Joint Account is to be divided into three parts, the first representing proceeds of sale of mineral oils subject to their arrest, the second representing payments made under the CEGB contract and the third representing the proceeds of sale of mineral oils to Dycon Petroleum Trading Limited prior to the arrest and

2. That the rights, titles, interest and equities of Intercontinental Natural Resources Limited and N.V. Slavenburgs Bank in each part of the account shall be identical to the rights, titles, interest and equities that each of them held in the mineral oils and accounts receivable from which each part derived and against your Clients agreeing to amend their pleadings before the High Court to reflect this agreement and to enable the Court to decide the issues pertaining to each of the three parts we will join with your clients in instructing Freshfields to pay the £256,607·98 into the joint account and will instruct Shaws Fuels to pay the balance of the CEGB monies into the joint account.’

A number of facts have been agreed between the parties, and I have been asked to make a number of assumptions for the purpose of dealing with the questions of law which are now before the court. It may well be that the short cut which the court had in mind when ordering the preliminary questions of law will in the end, in this case as in others, prove to have been the longest way round. But, be that as it may, I am satisfied that the points which are now before the court are in no way academic, and in those circumstances my proper course is to attempt to deal with all the points that have been argued.

I now turn to the questions of law. As already mentioned, they fall into two main groups, the first relating to s 95 of the Companies Act 1948, and the second to the Bills of Sale Acts. For the purposes of dealing with the first group of questions I am asked to assume (i) that they are to be determined in accordance with English law and not Dutch law; (ii) that the company had at all material times an established place of business in England within the meaning of s 106 of the Companies Act 1948; (iii) that the documents relied on by the bank, that is to say the general credit agreement, the general agreement of assignment, the assignment of stocks as securities, the list of assignments and storage reports, all create charges within the meaning of s 95(2) of the 1948 Act; (iv) that no particulars of these charges were ever delivered to the registrar for registration pursuant to s 95(1). On those assumptions counsel for the company and the joint liquidators argues that the charges are all void as against the liquidators by virtue of the combined effect of ss 95 and 106. I need not set out the provisions of s 95, but s 106 provides as follows:

‘Application of Part III to charges created, and property subject to charge acquired, by company incorporated outside England. The provisions of this Part of this Act shall extend to charges on property in England which are created, and to charges on property in England which is acquired, by a company (whether a company within the meaning of this Act of not) incorporated outside England which has an established place of business in England.’

Counsel for the bank takes five points: the first, logically (though not in the order in which he took them) is that s 106 does not apply because on its true construction it only applies to companies incorporated in Scotland and Northern Ireland. Counsel supports that argument in a number of ways. First he says that all other provisions relating to overseas companies generally are to be found in Part X of the Act; therefore if s 106 relates to overseas companies generally you would expect to find it in Part X and not at the end of Part III. Secondly, he says that ss 103 and 104 presuppose the existence of a registered office; and other provisions in Part III create offences. It would be absurd, he says, that Parliament should have intended such provisions to apply to all overseas companies. Thirdly, he appeals to the legislative history. He says that the words in brackets, ‘whether a company within the meaning of this Act or not’, which, on their face, are fatal to his argument, were first enacted when the legislature was preoccupied with the problem of applying the Companies Acts to Northern Ireland, and that they were introduced for that limited purpose only.

I cannot accept counsel’s argument. The language of s 106 is crystal clear. If by ‘companies incorporated outside England’ the legislature had meant companies incorporated in Scotland and Northern Ireland, and nowhere else, it would have been simple enough to say so. Moreover, it is impossible to reconcile counsel’s contention with s 461 of the 1948 Act which provides:

‘Application to Northern Ireland.

(1) Nothing in this Act, except the provisions thereof which relate expressly to companies registered or incorporated in Northern Ireland or outside Great Britain, shall apply to or in relation to companies registered or incorporated in Northern Ireland.

‘(2) Nothing in this Act, except where it is expressly provided to the contrary, shall affect the law in force in Northern Ireland at the commencement of this Act.’

Nor is it correct to say that all provisions relating to overseas companies are contained in Part X: see Part IX which relates to the winding up of unregistered companies, and, in particular, s 400. None of the standard textbooks on company law suggest that s 106 is confined to Scotland and Northern Ireland, and Buckleyg, Palmerh, Goweri and Penningtonj all clearly assume the contrary. The editors of Buckleyk in particular draw attention to the potential difficulty of applying ss 103 and 104, according to their literal terms, to all overseas companies. But they do not draw the conclusion that s 106 is on that account to be treated as inapplicable to all companies incorporated outside England except those incorporated in Scotland and Northern Ireland.

As for the legislative history, I am guided, and indeed bound, by what was said by the House of Lords on the construction of consolidation Acts in Farrell v Alexander ([1976] 2 All ER 721 at 725, 733, 746, [1977] AC 59 at 73, 82, 97). There is no difficulty or ambiguity in the meaning of s 106. The words in brackets make it clear that the section applies to any company whether or not a company as defined in s 455. In those circumstances I do not regard it as desirable to speculate (and it could be no more than speculation) why the words were introduced into the Companies Act 1929l. For those reasons I reject counsel’s first argument.

Counsel’s second argument is that assuming, contrary to his first argument, s 106 applies to overseas companies generally, it only applies where they have been registered under Part X. As appears from the affidavit of Mr Hathaway of Linklaters & Paines, sworn on 21 July 1977, this seems to have been the principal argument relied on by the bank in resisting the liquidators’ application to be joined as parties to the proceedings. The point is taken in para 3 of the points of reply as follows:

‘… if, which is denied, Incon had an established place of business in England no registration of the said company or place of business pursuant to the provisions of Part X of the Companies Act, 1948, was ever effected by or on behalf of the said company. In the premises it was not possible, it was not practicable and it was not necessary to register the Plaintiffs’ securities pursuant to Section 106 of the Companies Act, 1948.’

Counsel for the bank, however, did not put the point in the forefront of his argument. He described it as a point, not the point. He supported it by reference to the practice of the Registrar of Companies as described in a letter dated 24 October 1977. From that letter it appears that, since overseas companies with a place of business in England are obliged to register under Part X, the registrar requires the company to comply with Part X before he will accept particulars of charges for registration under Part III. The letter continues:

‘There is no method by which an overseas company can register charges unless it has an established place of business in England and therefore should first register under section 407, unless it informs the Registrar that it is in the process of submitting the necessary documents required under that section, in which case the charges would be held for a short period pending registration. If registration was not completed within a short period the charges would be returned.’

In contrast, a Scottish company is not, of course, required to register under Part X. In the case of Scottish companies, therefore, wishing to register a charge under s 95, the registrar opens a special file.

Against the background of that practice (which I am to assume has continued uniformly since 1928) counsel for the bank submits, first, that the object of delivering particulars of charges under s 95(1) is so that they may be registered. He stresses the words ‘for registration’, and if the fact is that charges will not be registered unless the company has first registered under Part X, then s 95 cannot have been intended to apply to such charges. Secondly, he submits that a chargee is entitled to know where he is, and it is unsatisfactory that the validity of his charge in the absence of registration should depend on something which may be so uncertain as whether the company has an established place of business in England or not.

The fallacy in the argument lies in regarding registration of the charge under Part III as a condition precedent to its validity. It is clear both from the language of s 95 and from what was said in National Provincial and Union Bank of England v Charnley that it is delivery of particulars of the charge, together with the instrument (if any) by which it is created or evidenced that saves the charge, and not its registration. In the National Provincial Bank case ([1924] 1 KB 431 at 447) Scrutton LJ said, after referring to the language of the section: ‘That makes the avoidance depend on the neglect to send in the particulars. The neglect to register the charge will not make it void.' Counsel reserved the right to challenge the correctness of that dictum in a higher court. So far as I am concerned, it seems to follow that the bank could have preserved the validity of its charges by delivering particulars within 21 days, despite the unwillingness of the registrar to register the charge without prior registration by the company under Part X. In those circumstances there is really nothing left in counsel’s argument under this head. There is certainly nothing in s 106 to suggest that the operation of that section is dependent in any way on the company having registered under Part X, and I am unwilling to imply any such limitation.

Before leaving the point, I should say that counsel for the defendants expressly disclaimed any criticism of the registrar’s current practice. Nor would I, myself, wish to criticise it in any way. His reasons for insisting on the company first registering under Part X are clear enough. But they cannot affect the outcome of this case. I reject counsel for the bank’s second argument.

Counsel for the bank’s third argument is that, assuming ss 95 and 106 apply to the charges in the present case, nevertheless the joint liquidators cannot take advantage of s 95 because ‘the liquidator’ in s 95 means ‘the liquidator in an English liquidation’, whereas the joint liquidators were, as I have already mentioned, appointed by the Supreme Court of Bermuda. Counsel’s argument is that wherever the word ‘liquidator’ appears in the Act it means liquidator in an English winding up, whether voluntary or compulsory; that s 95 of the 1948 Act is no exception, and that it cannot be extended to include the person appointed in a foreign liquidation, even though he may happen to be called a ‘liquidator’.

I would accept the premise of counsel’s argument, but I would not accept the conclusion. The primary meaning of ‘liquidator’ in s 95 is, no doubt, the liquidator in an English winding up, just as the primary meaning of ‘company’ in s 95 is an English company. But when applied to a foreign company by s 106 the word ‘company’ in s 95 must necessarily be given an extended meaning. That being so, I can see no difficulty in doing the same for the word ‘liquidator’. For the purpose of s 106 (but only of course for the purpose of s 106) it means either an English liquidator or the foreign equivalent (whether in place of incorporation or elsewhere) as the case may be. Otherwise s 106 would lose much of its impact. It cannot have been intended that wherever there is a foreign winding up there should always have to be a winding up in England under Part IX before s 95 can be operated for the benefit of unsecured creditors. Certainly there is nothing express to that effect and, again, I cannot see why any such limitation should be implied.

There could perhaps be a difficulty where it is uncertain whether a foreign proceeding is in the nature of a winding up. But no such difficulty arises here. I was referred to the Companies Act of Bermuda 1923. From s 38 it appears that so far as practicable companies in Bermuda are wound up in the manner in which English companies are wound up ‘under the law and practice in England regulating the winding-up of companies’. I note that the winding-up order in Bermuda was made under the United Kingdom Companies Act 1948 as well as under the 1923 Act, and that one of the two joint liquidators is in fact resident in England. Counsel submits that, though I am entitled to read the Bermudian Companies Act 1923, I am not entitled to draw any conclusion as to its meaning. I need not deal with that submission, although it is hardly a submission which commends itself to me. For I only refer to the 1923 Companies Act in the present connection for the limited purpose of satisfying myself (which I should in any event have thought obvious) that a winding up in Bermuda is a proceeding which the English court will recognise or characterise as a winding up for the purposes of s 95 of the 1948 Act. I hold that the joint liquidators come within the meaning of ‘liquidator’ in s 95 as applied to the present case by s 106.

In case I should be against him on that point counsel for the defendants applied to join Messrs Sedgwick Forbes & Co, the well known insurance brokers, as fourth defendants in the interpleader issue. Even if the joint liquidators cannot, themselves, take the points under s 95 because they are not liquidators appointed in an English liquidation, there can, he said, be no objection to Messrs Sedgwick Forbes taking the same points as representative creditors. Counsel for the bank strenuously resisted the application on the ground that it would be unfair to the bank. The application comes, he says, too late. But the underlying principle is as stated in RSC Ord 15, r 6(1):

‘No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.’

In the present case the proceedings are still only at the stage of preliminary questions of law. It would require a very strong case indeed before I would refuse leave to join a new party at this stage. In fact so far from the defendants being in mercy it is rather the other way round. Paragraph 22 of Mr Hathaway’s affidavit, to which I have already referred, shows that one of the points taken by the bank in resisting the application to join the liquidators was that the liquidators would not in any event, as foreign liquidators, be entitled to take ‘an independent point in the litigation’. In the context this must mean a point under section 95. I will read the relevant paragraph:

‘Further Incon is a foreign corporation and the Liquidators are acting under a foreign winding-up order. No winding-up order has been made in England relating to Incon’s asserts here, nor have liquidators been appointed in England. In these circumstances in my respectful submission the Liquidators while they can act on behalf of Incon and in its name cannot act separately from it, take an independent point in litigation, or raise matters which the company itself could not raise.’

Subsequently Messrs Cameron, Kemm, Nordon, the solicitors acting for the defendants, wrote as follows on 22 August 1977:

‘As you will be aware, one of the points taken by your Clients at the hearing was the question of whether or not the liquidators, being liquidators appointed by the Supreme Court of Bermuda, had any locus standi in their own right in the English Court. The Judge was not disposed to determine this question on an interlocutory application. It was agreed that it would be open to your Clients to take it by way of defence in the action if they so wished. However, having regard to the fact that it is open to our Clients at any time to apply for Incon to be wound up in England (for which purpose the existence of assets in England would be sufficient) and that on the making of such a winding-up order there would be liquidators in England who would undoubtedly have locus standi it seems to us to be pointless to take this step for that purpose alone. Whatever the result of the litigation between our respective Clients, your Clients will in any event at the end of the day still be unsecured creditors for quite a considerable sum of money and it is not therefore in their interest that the assets which will in any event be available for unsecured creditors should be further dissipated by the costs of an English winding-up proceeding. We should be glad therefore if you would kindly confirm within the next 14 days that your Clients will not seek to take the locus standi point by way of defence or by way of appeal from the order of Mr. Justice Kerr.’

There was no reply to that letter, nor was the point ever pleaded. Counsel for the bank says that the point which he is taking on the construction of the word ‘liquidator’ in s 95 of the 1948 Act is entirely separate and distinct from the so-called locus standi point. For myself, I cannot see the difference. Certainly there is no difference in substance. Whichever way the point is put it could have been met by a successful application to the court for the company to be wound up in England and it was to avoid the pointless expense of doing that that Messrs Cameron, Kemm, Nordon wrote their letter of 22 August 1977. So that even if the points are entirely separate, as counsel maintains, the defendants were justified in thinking that no technical point of the kind covered by that letter was going to be taken, which is why the defendants were so surprised (as clearly they were) when the present point was taken. In those circumstances, I can see no unfairness whatever in allowing the amendment to meet the point by joining Messrs Sedgwick Forbes as representative creditors. Accordingly that application is allowed. If authority is needed for the course which I have taken it is to be found in the decision of Harman J in Re Eichholz.

Counsel’s last point under this head is that there is in any event no point in joining the creditors because they cannot be in a better position than the English liquidators. I find it difficult to follow that argument. I could understand (though I would not accept) an argument that the creditors have no locus standi in the absence of an English winding up. But counsel expressly disclaims that argument. His argument is that, on the true construction of s 95, they are not creditors at all within the meaning of the section. It seems to me that a creditor is either a creditor or he is not. It cannot depend on whether the company is being wound up, and, if so, where.

I now turn to the fourth argument. Counsel for the bank submits that s 106 only applies to charges on property which is in England at the time the charge is created or the property acquired. I cannot accept that argument either. It would mean that all floating charges so far as they relate to future property would be outside the scope of the section. Yet s 95(2)(f) expressly covers floating charges. In applying s 95 to overseas companies Parliament must have intended it to apply to floating charges as well as fixed charges and must therefore have intended it to apply in the case of future property in England as well as existing property in England. I reject counsel’s main argument under his fourth head.

There is, however, a subsidiary argument, that, even if a charge were initially brought within s 95 by s 106, it would cease to be within s 95 if at any time the company ceased to have an established place of business in England under s 106. For this purpose I have to qualify the assumption made above, that the company had an established place of business in England at all material times, and assume instead that, having had such a place of business, it ceased to have a place of business before the commencement of the winding up in Bermuda on 15 March 1976. The point can be illustrated in the following way: suppose on day 1 a foreign company with an established place of business in England creates a charge on its assets in England. If it fails to deliver particulars of the charge within 21 days, the charge is potentially void against the liquidator and general creditors. Suppose on day 30 a liquidator is appointed. What is the position if on, say, day 25 the company had ceased to have an established place of business in England? Counsel for the defendants submits that the liquidator’s rights are unaffected. He would, I think submit the same even if the company had ceased to have a place of business in England on day 15. Counsel for the bank, on the other hand, submits that the conditions of s 106 have to be satisfied not only at the date of the creation of the charge but also at the commencement of the winding up. For until then there is nobody who is in a position to take advantage of the provisions of s 95. The point is not altogether easy. But on the whole I prefer counsel for the defendants’ submission. Section 106 is, as he says, a triggering section. If its conditions are satisfied it triggers s 95 in relation to charges at the moment of their creation. Thereafter the charge is to be treated as if it were for all purposes a charge created by an English company. If that is right, it does not matter that the conditions of s 106 ceased to be satisfied the day after the creation of the charge. Counsel for the defendants referred me to Re C L Nye Ltd. But I do not find the case particularly helpful in this connection. I prefer to rest my decision on what seems to me the most natural meaning of s 106.

I now turn to the last of the points under s 95. Counsel for the bank submits that there is nothing here for s 95 to bite on, because the property charged had all been sold and the proceeds paid into the joint account in the names of the parties’ solicitors before the liquidators were ever appointed. It is settled law, says counsel, that a liquidator cannot avoid a charge that has ceased to exist or become spent, and the charges here were all spent prior to the appointment of the liquidators, when the products were sold pursuant to the agreement of 20 January 1976. He further submits that the liquidators cannot, themselves, take advantage of that agreement since they were not parties to it, and, in those circumstances, the joint liquidators can lay no claim to the fund for the benefit of the creditors.

The point was first foreshadowed in the letter from Messrs Linklaters & Paines dated 16 January 1979. As the argument progressed it became an increasingly important part in the bank’s case. It was accepted by both sides that, for the sake of simplicity, the relevant date should be regarded as the date of the appointment of the liquidators rather than the commencement of the winding up or the date of the winding-up order.

Now, I agree with counsel for the bank that once a charge is spent there is nothing for s 95 to bite on. That appears sufficiently from the language of the section itself and also from at least two authorities that were cited. In Mercantile Bank of India Ltd v Chartered Bank of India, Australia and China, and Strauss & Co Ltd two banks had lent money to a company on the security of certain documents variously called letters of hypothecation and letters of lien. The company subsequently went into liquidation. The banks each alleged against the other that the other’s securities were void for non-registration. Prior to the liquidation the defendant bank had seized the company’s assets under the terms of its security. One of the questions was whether the defendant’s security should be regarded as a floating charge or not. Porter J said ([1937] 1 All ER 231 at 235):

‘I do not propose finally to decide that question, because I think it is admitted … that, the goods having been seized, the Chartered Bank [that is the defendant bank] has put itself in a different position; and has brought down, as it were, on the floating charge a perfecting of the charge upon those goods, whatever they may be … ’

Later on in the same judgment, after referring to a number of authorities, he said ([1937] 1 All ER 231 at 241):

‘On the authority of those cases, it appears that once seizure had taken place, at a time before liquidation, at any rate, of the company, the security, even if it were originally a floating security, has ceased to be so describable. It has become a definite charge which has been perfected by the seizure of the goods. Therefore, in so far as the Chartered Bank has seized the goods rightfully, it is entitled, in my view, to the benefit of its security.’

Porter J’s decision is authority for the view that once a charge has been perfected by seizure of the goods charged it is too late for the liquidator to intervene.

Counsel for the bank had some doubt whether the decision of Porter J goes all the way for him. But the point was not really contested by counsel for the defendants, so that I need not consider whether his doubts are justified. Certainly it is too late for the liquidators to intervene if the chargee has already been paid prior to the liquidation. That appears from the other decision to which I was referred, namely Re Row Dal Construction Pty Ltd, a decision of the Supreme Court of Victoria. In that case a bank had lent money to a company on the security of certain book debts which were assigned to the bank. The company subsequently went into liquidation. But before it went into liquidation the bank had been paid the amount of its loan under the assignment. The liquidator sought to recover from the bank the amount paid under the assignment on the ground that the assignment was void as against him for non-registration. It was held that he could not succeed as the bank had already been paid before he came on the scene. The non-registration was therefore irrelevant. Heron CJ said ([1966] VR 249 at 258):

‘Had liquidation in this case intervened before the payment of the £6,000 actually paid … on 31 May, no doubt in that event there would have been a contest as to the destination of this sum, the liquidator claiming it as property of the company and relying upon non-registration of the assignment to defeat the bank’s claim, and the bank for its part claiming it as its property by reason of the absolute assignment. But as things are the liquidator can derive no assistance from the failure to register under s. 72 [of the Victorian Companies Act 1958]. When he was appointed on 6 July 1962, there was no property of the company upon which the bank claimed any security, and there was consequently no basis upon which he could call in aid s. 72 to defeat the bank’s assignment. These considerations are, in my opinion, sufficient to dispose of this point.’

Counsel for the bank laid particular stress on the penultimate sentence of that passage which I have just read. He says that the position is precisely the same here because the only property of the company on which the bank claimed security had been sold and the proceeds paid into the joint account before the liquidators were appointed.

The real dispute, as it seems to me, on this part of the case is not as to what is the effect in law of the charge being spent, because it is largely common ground that if a charge is spent before liquidation s 95 has nothing to bite on. The real dispute is whether the charges were indeed spent, or whether the bank can be heard to say that they were spent, on the facts of this case; for, if counsel is wrong about that, then the rest of his argument falls to the ground.

There are, I think considerable difficulties in the way of his submission. In the first place it is to be noted that the facts of the present case are very different from those in the two cases to which I have just referred. The bank has not seized or taken possession of the property in any way, as in the former case, nor has it been paid, as in the latter. The money is still in the joint account. It is no more within the control of the bank than it is within the control of the company. In the absence of agreement between the parties to this action, the destination of the fund in the joint account is subject to the decision of this court. Secondly, when one looks at the bank’s pleading, it is clear, as counsel for the defendants points out, that the basis of the bank’s claim to be entitled to the amount in the joint account are the very charges which the liqidators seek to impugn. It hardly lies in the bank’s mouth to say that the charges are spent, when, at the same time, it asserts their existence and validity as the basis of its claim against the company.

But I am prepared to assume that the bank could get over both those difficulties. The real objection to the argument of counsel for the bank, as it seems to me, lies in the agreement of 20 January 1976 by virtue of which these products came to be sold. It is accepted by both parties that one must construe that agreement as amplified by the letter of 15 April 1976, to which I have already referred. What does that agreement provide? It provides quite simply that the rights of each party to the proceeds of sale shall be the same as its rights in the oil. One therefore asks oneself the question: what rights would the bank have had to the oil if it had still existed? The answer must be that the bank’s rights would have been liable to have been defeated by the very arguments which the liquidators are now advancing.

Counsel for the bank puts forward a number of counter-arguments against that simple view. First, he submits that you must look at the rights of the bank immediately prior to the sale of the products, at which time the liquidators had not been appointed. He draws attention to the language of the relevant passage in the letter as follows:

‘That the rights, titles, interest and equities of Intercontinental Natural Resources Limited and N.V. Slavenburg’s Bank, in each part of the account, shall be identical to the rights, titles, interests and equities that each of them held in the mineral oils and accounts receivable from which each part derived.’

He says that the word ‘held’ shows that you are not to look at future events. It seems to me that that is reading far too much into a single word; and it is to be noted that that word does not appear when the effect of the agreement is set out in the first paragraph of the letter. I can see no justification for treating the parties’ rights as having been frozen when the agreement was made, still less for treating them as having been frozen in relation to any particular quantity of petroleum products immediately prior to the sale of that quantity.

Counsel for the bank’s second argument was that ‘the bank’s rights’ means its rights as against the only other party to the agreement at the time it was made namely the company. The bank’s rights cannot, he said, be affected by any ‘rights’ which the liquidators may acquire under s 95, since the liquidators were not, themselves, parties to the agreement. But that is to draw an entirely artificial distinction between the rights which the liquidators assert in the name of the company for the general benefit of its creditors, which rights are indisputably preserved by the agreement, and the additional rights which they, and they alone, can assert for the benefit of creditors under s 95.

Thirdly, counsel for the bank argues that I cannot assume that a liquidation was inevitable on 20 January 1976, or even likely. But, as counsel for the defendants pointed out, the company can have had no motive for entering into the agreement of 20 January 1976 other than to benefit the general creditors. There was never any doubt about the existence of the company’s debt to the bank or its amount. From the start the only dispute has been whether, and if so to what extent, the bank’s debt is secured. This must have been as obvious to the bank as it was to the company. It may well be, as counsel for the bank asserts, that a liquidation was not inevitable. But it does not follow, in my judgment, that the liquidators are to be regarded as strangers to the agreement.

Counsel for the bank’s fourth, and final, argument was that, whatever the parties may have agreed, the petroleum products did in fact cease to be the property of the company when they were sold, and that thereafter there was nothing to which the charge could apply. The money in the joint account is not ‘the company’s property’ within the meaning of s 95. The parties cannot by their private agreement make s 95 apply to something to which, on its true construction, it does not apply. It seems to me that there is a short answer to that argument. Of course the parties cannot by their private agreement contract themselves out of a public statute. But that is not what these parties have sought to do. They are, in effect, agreeing to be bound by a statute as if it applied, which is a very different thing. I can see no reason why they should not make such an agreement. Indeed such agreements are matters of everyday experience in the commercial world as, for instance, where parties agree to apply the Carriage of Goods by Sea Act 1971 to a bill of lading to which it would not otherwise apply; or to a charterparty, which the Act specifically excludes from its operation. For the above reasons, I cannot accept any of counsel for the bank’s submissions as to the construction and effect of the agreement of 20 June 1976. To my mind the meaning is, as I have already said, clear enough, namely that you look at the rights of the parties (and that means all the parties to this litigation, including the liquidators) as if the petroleum products were still in existence. If that is right, then it follows that counsel for the bank’s argument that s 95 of the 1948 Act has nothing to bite on must be rejected.

There was some further discussion in the course of the hearing as to the nature of the bank’s claim to the sums standing in the joint account. I have already mentioned that in their pleading they claim as assignees or chargees. The alternative is to regard them as beneficiaries under a trust. I do not find it necessary to consider that question further, because I take it to have been conceded that if the bank should fail on all the points that have been argued, then, on the assumptions I have been asked to make, the sum in the joint account would fall to be paid out to the defendants. If that is not conceded, I would so decide.

That concludes the various points which have been argued in relation to s 95, all of which I have decided against the bank. On the assumptions which I have been asked to make, I hold that the charges created by the documents on which the bank relies are all void, so far as any security was conferred thereby, against the third and fourth defendants, as joint liquidators, and against the fifth defendants, as representative creditors of the company. It follows on the same assumptions that the defendants are entitled to have paid out to them the sum standing in the joint account.

I now come to the second group of questions, namely whether the documents on which the bank relies are void as unregistered bills of sale. If I am right so far, that is to say, if its charges are all void against the liquidators or representative creditors under s 95, then the point does not arise. But as I am dealing with preliminary questions of law on a number of assumed facts, some or all of which may not be established at the trial, counsel for the defendants naturally wishes to be able to support his attack on alternative grounds. In any event, having heard full argument (more than 50 authorities were cited) it is obviously right to express my conclusion, if only quite shortly.

The first main issue in relation to the Bills of Sale Acts is whether they apply to companies at all. Counsel for the bank says they do not. Counsel for the defendants says they do but not if the charge falls to be registered under s 95. If for any of the reasons which counsel for the bank has advanced the present charges are not void under s 95, then, says counsel for the defendants, the defendants can fall back on the Bills of Sale Acts.

The general pattern of the Bills of Sale legislation is very well set out in Halsbury’s Laws of England. Very briefly, the 1878 Act is the sole Act in force in relation to absolute bills. It is also in force in relation to bills given by way of security, to the rather limited extent that it has not been amended by the Bills of Sale (1878) Amendment Act 1882. It is agreed by all parties that the documents on which the bank rely, if they are bills of sale at all, are bills of sale given by way of security and not absolute bills. Accordingly, I am concerned primarily with the 1882 Act. I need only refer to one section of it, s 17, which provides:

‘Debentures to which Act not to apply. ‘Nothing in this Act shall apply to any debentures issued by any mortgage, loan or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company.’

While I am primarily concerned with the 1882 Act, I am also concerned indirectly with the 1878 Act to the extent that it throws light on the question whether the Bills of Sale Acts as a whole (since they are to be read as one) apply to companies as well as individuals, and also to the limited extent to which, as I have already said, it still applied in relation to security bills.

Before dealing with the submissions on either side, I must refer, in order to make the submissions intelligible, to the five principal cases in this field. I can start with Read v Joannon. Prior to Read v Joannon there were cases in which it had been said, or more often assumed, that the Bills of Sale Acts applied to companies as well as individuals: see Shears v Jacob, Deffell v White, Re Cunningham & Co Ltd, Attenborough’s Case, Edmonds v Blaina Furnaces Co Ltd, Levy v Abercorris Slate and Slab Co, Jenkinson v Brandley Mining Co, and Brocklehurst v Railway Printing and Publishing Co. There were also cases the other way: see Re Asphaltic Wood Pavement Co Ltd and Welsted & Co Ltd v Swansea Bank Ltd.

In Read v Joannon the question arose in relation to an ordinary company debenture. It had been held in the City of London Court that the debenture was void as against an execution creditor, under the 1878 Act, notwithstanding s 17 of the 1882 Act. The matter then came on appeal before the Divisional Court in July of 1890. In an unreserved judgment Lord Coleridge CJ said (25 QBD 300 at 303):

‘The question is, whether a debenture of an incorporated company requires registration as a bill of sale. I am of opinion—and I think it right to say that my opinion does not stand alone, but is supported by a judge of much greater authority than myself, whom I have had the opportunity of consulting—that such debentures are not bills of sale and are not struck at by either of these Acts of Parliament—that they were never within the Act of 1878, and are expressly exempted from the operation of the Act of 1882.’

Wills J said (25 QBD 300 at 304–305):

‘I am of the same opinion; and I agree with my Lord, upon consideration, that debentures of an incorporated company are not, and were never intended to be, within the operation of the Act of 1878.’

Both judgments went on to hold that even if the debenture had fallen within the 1878 Act, considered on its own it was taken out of the 1878 Act by s 17 of the 1882 Act.

In the course of the next term precisely the same question came before the Court of Appeal, consisting of Lord Halsbury LC, Bowen and Fry LJJ, in Re Standard Manufacturing Co. There was a very full argument lasting four days. In the course of the argument it was submitted for the execution creditors that debentures were registrable as bills of sale and that that had been the general understanding prior to Read v Joannon. It was submitted for the debenture holders that limited liability companies never were within the operation or policy of the Bills of Sale Acts, quite apart from s 17 of the 1882 Act. The point was thus directly before the Court of Appeal. The judgment of the court was given the following February by Bowen LJ. The court held that the debentures were expressly excepted by s 17 from the 1882 Act. But they went on to consider the position under the 1878 Act. The court held that company debentures are not within the 1878 Act. There are three strands to be found in the reasoning. In the first place company debentures are not within the mischief of the Act. The Act was designed to prevent frauds on creditors by secret bills of sale. Company debentures could hardly be described as ‘secret documents’ since there already existed provision for their registration under the Companies Clauses Consolidation Act 1845 and the Companies Act 1862. Secondly, the language of the Act seemed much more appropriate to individuals than companies; thus in s 12 there is provision that the index of bills of sale to be kept by the registrar is to be arranged according to the ‘surnames’ of their grantors; thirdly, the court referred to previous authority. The judgment concludes with the following paragraph ([1891] 1 Ch 627 at 647–648, [1891–4] All ER Rep 1242 at 1247–1248):

‘The view that debentures like the present are not within the Bills of Sale Act of 1878 was that adopted by Baron Pollock, in the case of John Welsted & Co. v. Swansea Bank, and by Lord Coleridge and Mr. Justice Wills in the case of Read v. Joannon: see also Edmonds v. Blaina Furnaces Company and Levy v. Abercorris Slate and Slab Company. We agree with this view, and we think that this appeal should, therefore, be allowed with costs both here and below, on the ground that the mortgages or charges of any incorporated company for the registration of which other provisions have been made by the Companies Clauses Act, 1845, or the Companies Act, 1862, are not within the Bills of Sale Act of 1878.’

The Standard Manufacturing case was followed a year later in an Irish case, Re Royal Marine Hotel Co, Kingstown (Ltd). Porter MR ([1895] 1 IR 368 at 375) stated the ground of the decision in the Standard Manufacturing case as follows:

‘It was there decided by the Court of Appeal that a debenture charging the chattels of a limited Company was not void as against execution creditors because it was not registered under the Bills of Sale Acts, on the ground that under the Companies Act of 1862 the Company is bound to keep a register of its mortgages and charges, and that the debenture should have been placed upon such register, and that the Legislature having enacted this particular provision for registering charges given by a Company on its property, impliedly relieved a Company from registering such charges under the Bills of Sale Acts. I agree with [counsel for the unsecured creditors] that this may be a far-reaching decision but I am bound by it.’

Then in 1896 the Standard Manufacturing Co case was distinguished by Vaughan Williams J in Great Northern Railway Co v Coal Co-operative Society. The case concerned debentures issued by a society registered under the Industrial and Provident Societies Act 1876. By virtue of its registration the society became a body corporate with perpetual succession, a common seal and limited liability. But it was not a limited company within the Companies Act 1862, so that it was not obliged to keep a register of mortgages or charges under s 43 of that Act or under any other Act. Vaughan Williams J held that the debentures were void against the liquidator for non-registration. The primary ground of his decision was that the society, although a corporation, was not an incorporated company within the meaning of s 17 of the 1882 Act. He said ([1896] 1 Ch 187 at 194):

‘The word "company" has come to have a very well recognised meaning. There are various legal companies, but this industrial society does not come within the connotation of that word in any of its accepted legal meanings. And I think that that alone would be sufficient ground for saying that the section was designed by the Legislature in favour of companies, and that if the Legislature had intended to exclude from the operation of the Bills of Sale Act all sorts of corporations, nothing would have been easier for the Legislature to do than to say so in plain terms.’

But Vaughan Williams J went on to consider the broader question whether corporations, be they limited companies within the Companies Act 1862 or not, are within the Bills of Sale Acts at all. He treated the decision in the Standard Manufacturing Co case as being confined to companies for which other provisions for registration had been made in the 1845 Act or the 1862 Act. The question whether the Bills of Sale Acts could ever apply to corporations had been ‘deliberately and studiously left open’. He said ([1896] 1 Ch 187 at 197):

‘I think I have now been through the authorities on the point. There is the judgment of the Court of Appeal delivered by Bowen L.J. in re Standard Manufacturing Co., which decides that companies for the registration of the mortgages of which provision is made are not within the Act of 1878, and I am asked to go a step further and say that no corporations are within the Bills of Sale Acts. I do not feel disposed to go that step.’

He then concluded ([1896] 1 Ch 187 at 198):

‘Under those circumstances I am disposed to hold that there is nothing in the Bills of Sale Acts generally or in s. 17 of the Act of 1882 which excludes from the operation of the Bills of Sale Acts debentures issued by an industrial society like the present, and I therefore decide in favour of the liquidator.’

The last case to which I must refer is Clark v Blam, Hill & Co, a decision of Phillimore J. The case concerned a series of debentures issued by a company incorporated in Guernsey but charged on property in England. The question was whether the debentures were void for want of registration. The company was not obliged by the law of Guernsey to keep a register of charges. Phillimore J held, nevertheless, in favour of the debenture holders. His conclusion as to the 1878 Act is expressed at the very start of his judgment, namely that all debentures of all incorporated bodies are outside the 1878 Act and that there is ‘a little error’ ([1908] 1 KB 667 at 670) in the judgment of Vaughan Williams J in the Great Northern Railway case. As for s 17 of the 1882 Act, he accepted that the Court of Appeal in the Standard Manufacturing case had not gone the full length and had rightly guarded itself against deciding more than it needed to by limiting its decision to companies which keep a register of mortgages or charges. Nevertheless he regarded that distinction as being unsatisfactory. He threfore decided the point left open by the Court of Appeal in accordance with the earlier decision of the Divisional Court in Read v Joannon. He said ([1908] 1 KB 667 at 671):

‘I myself think that, though the Court of Appeal rightly guarded itself against deciding more than it need do in In re Standard Manufacturing Co., I ought to follow and am bound by Read v. Joannon which is wider in its terms; and I must say that the reasoning of Wills J. in that case commends itself to my mind.’

He also considered, and rejected, the argument that ‘incorporated company’ in s 17 of the 1882 Act means ‘company incorporated in the United Kingdom’.

In the light of those cases, all decided within a relatively short space of time, counsel for the defendants submits, first, that the overriding authority is that of the Court of Appeal in the Standard Manufacturing Co case. Read v Joannon was approved but only on the limited ground that the company in that case was one for which the 1862 Act had provided an alternative system of registration. In the absence of an alternative system of registration the Bills of Sale Acts apply to individuals and corporations alike. They are all within the mischief of the Acts. It follows that if for any reason the charges in the present case are not registrable under s 95 of the 1948 Act they are caught by the Bills of Sale Acts just as charges given by companies registered under the Industrial and Provident Societies Act 1876 were held to be within the Acts by Vaughan Williams Jo. In particular it would, he said, be absurd that an overseas company with an established place of business in England which failed to register under Part X should, as a result of its own failure, escape registration of its charges altogether, ie under the Bills of Sale Acts as well as under the Companies Act. As for s 17 of the 1882 Act, he says that it shows conclusively, or is at least a very strong indication, that, but for s 17, companies are within the Bills of Sale Acts. Otherwise it serves no useful purpose.

These are forceful arguments but I do not think they ought to prevail. The real difficulty in counsel for the defendants’ path is the decision of Phillimore J in Clarke v Balm, Hill & Co. That decision is for all practical purposes the latest decision in the field. It has stood now for 70 years. Even if I thought it wrong (which I do not) I would be most reluctant not to follow it. So far as I know, it has never been criticised in any of the standard textbooks. It is treated as good law in the most recent textbook on the topic, Gough on Company Charges, a book to which I am much indebted. The only support which counsel for the defendants could find for the opposite view was a single reference in Halsbury’s Laws of England. If Clark v Balm, Hill & Co is rightly decided, as I believe it to be, then it is clear that the present case cannot be distinguished. Both concerned foreign companies. Both concerned companies for which, on the assumption that I am making, there was no alternative system of registration. Counsel for the defendants tried to persuade me that Clark v Balm, Hill & Co was wrongly decided. If he could have shown that the decision was inconsistent with what had been held by the Court of Appeal in the Standard Manufacturing Co case, he would, so far as I am concerned, have succeeded. But there is no such inconsistency. The Court of Appeal decided that certain corporations were outside the Bills of Sale Acts. It did not decide that all other corporations are within the Acts. It left the point open; and it was the point which was left open by the Court of Appeal which Phillimore J decided in the negative.

It is true, of course, that the reasoning in Clark v Balm, Hill & Co is difficult, even impossible, to reconcile with the decision of Vaughan Williams J in the Great Northern Railway Co case. It is also true that Vaughan Williams J was an acknowledged expert in this field. But as between the two, and with the humility which any judge must feel in the circumstances, I would prefer the decision of Phillimore J. In the first place, as I have already mentioned, it is the latest in point of time. Secondly, like Phillimore J, I find it difficult to see that the publicity afforded by the 1862 Act registration system was ever a very sound basis for distinguishing between debentures of corporations which fall within the 1862 Act and those that do not. Thirdly, I would attach rather more importance than did Vaughan Williams J to the infelicity of the language of the Bills of Sale Acts when applied to corporations. It seems to me clear that, as Bowen LJ says, the draftsman cannot have had corporations in mind. As for cl 17 of the 1882 Act, the obvious explanation is that given by Phillimore J, namely that it was inserted per majorem cautelam.

It may perhaps be possible to reconcile the two cases on the narrow ground that, while a foreign company is an incorporated company within the meaning of s 17, a society registered under the Industrial and Provident Societies Act 1876, though incorporated, is not an incorporated company. But I would prefer to put my decision on the broad ground indicated by Phillimore J, namely that the Bills of Sale Acts apply to individuals only and not to corporations at all.

There is a further point which weighs with me, and which I must mention, even though it did not find much favour with counsel for the bank. Even if the Great Northern Railway Co case was correctly decided, and even if the Court of Appeal in Re Standard Manufacturing Co is to be taken as having held that the only corporations outside the Act are those for which Parliament had provided an alternative system of registration, then it seems to me that Parliament has provided just such a system in the present case by virtue of Part III of the Companies Act 1948. Counsel for the defendants’ argument in effect came to this, that the Bills of Sale Acts are a catch-all, which apply to all bills of sale as defined unless a charge created by a particular bill of sale happens to be registrable under the Companies Act 1948; so that if, for instance, Parliament had provided for a system of registration of charges, but a particular charge, while coming broadly within the system, fell through an unforeseen gap, for example, by non-registration of an overseas company under Part X of the Companies Act 1948, then it would be caught by the Bills of Sale Acts.

I think this is to attribute far too meticulous an intention to the legislature. Assuming Parliament did not intend to exclude all corporations when they enacted the Bills of Sale Acts, as I have held that they did, the intention must have been to exclude certain broad categories of corporation, namely those for whom a separate system of registration was provided by the Companies Acts in force from time to time. You then look at the current Companies Act and ask yourself: is the company in question within the registration provisions? If it is, then the Bills of Sale Acts on their true construction do not apply, and it is irrelevant that the particular charge may not be registrable. In other words, you look at the company and not at the charge.

If that is right, then it seems to me that on all except one of counsel for the bank’s arguments the present company falls outside the Bills of Sale Acts even if the charges were not registrable under the Companies Act. The one exception is counsel’s argument that s 106 only applies to companies incorporated in Scotland and Ireland. On all the other arguments the company is within the registrable provisions of the 1948 Act even if the particular charge is not registrable, and, accordingly, the Bills of Sale Acts do not apply.

I now turn to the second main issue under the Bills of Sale Acts. Assuming the Bills of Sale Acts are capable of applying to companies, are the documents in the present case debentures issued by an incorporated company within the meaning of s 17 of the 1882 Act? The point does not arise as a separate point if I am right on the first issue, so I can deal with it quite briefly. Counsel for the defendants argues, first, that ‘incorporated company’ does not include a company incorporated abroad. In Clark v Balm, Hill & Co Phillimore J held that ‘incorporated company’ at least included a company which, if not a company incorporated according to the law of the United Kingdom, was nevertheless incorporated according to the laws in force in one portion of the British Empire under the sanction of the common Sovereign.

Although the British Empire no longer exists, I see no reason for not applying what Phillimore J said to a company incorporated in Bermuda.

Secondly, counsel argued that the documents are not debentures within the meaning of s 17. A debenture, he said, is a document which creates or acknowledges an indebtedness. It is of the essence of a debenture that it identifies the particular sum which is due. Accordingly, a document which relates to future indebtedness, that is to say to a debt which is unquantified at the date of the creation of the document and may never arise, cannot be a debenture. Thus it was said that the ordinary form of bank debenture which is taken by a bank as security for sums to be advanced on current account (sometimes called an ‘all-moneys’ debenture, as opposed to a ‘fixed sum’ debenture) is not a debenture at all.

I was referred to a number of cases. I note that in many of them judges of great eminence have declined to attempt a definition of what is meant by a debenture. I certainly do not propose to rush in where they have feared to tread. No doubt it is true that in general a debenture is a document of which it can usually be said that it creates or acknowledges an indebtedness. But there is no hard and fast definition. Certainly none of the cases to which I was referred decide that a document cannot be a debenture unless the debt to which it relates is quantified at the date of its creation. I am unwilling to be the first so to decide. Had it been necessary for my decision I would have held that all the documents on which the bank relies in the present case, with the exception of the storage report, are debentures of an incorporated company within the meaning of s 17 of the 1882 Act.

I now come to the last question of all. Assuming the documents on which the bank relies are otherwise within the Bills of Sale Acts, are they exempt by virtue of the Bills of Sale Act 1890? Section 1 of that Act, as amended by s 1 of the Bills of Sale Act 1891, provides as follows:

‘Exemption of letters of hypothecation of imported goods … An instrument charging or creating any security on or declaring trusts of imported goods given or executed at any time prior to their deposit in a warehouse, factory, or store, or to their being reshipped for export, or delivered to a purchaser not being the person giving or executing such instrument, shall not be deemed a bill of sale within the meaning of the Bills of Sale Acts 1878 and 1882.’

For the purpose of dealing with questions under the 1890 Act, I am to assume (i) that the relevant petroleum products are imported goods, and (ii) that the assignment of stocks as security was executed prior to their deposit with Paktank. In those circumstances, counsel for the bank argues that the assignment of stocks as security is to be deemed not to be a bill of sale. Counsel for the defendants, on the other hand, submits that the 1890 Act is not dealing with future goods at all, that is to say with instruments which charge or create any security of goods generally, but only with particular goods which can be identified at the time of the creation of the charge, for example a consignment of goods arriving by a particular ship. In Halsbury’s Laws of Englands there is a footnote which reads:

‘It would seem that the statutory provisions contemplated an instrument referring to a specific consignment of goods, rather than a general letter of pledge covering all goods which may from time to time be imported by the pledgor.’

Counsel were unable to refer to any other authority. The point is a very short one.

On the whole I agree with counsel for the defendants’ contention on this point. It seems to me that what the section contemplates is the sort of document sometimes called a letter of hypothecation, but more usually called a trust receipt, which a bank takes when releasing bills of lading held under a documentary credit in order to enable the merchant to take delivery of the goods from the ship’s side. In Lloyds Bank v Bank of America National Trust and Savings Association the practice in relation to such documents was described as well established and of very long standing. I do not say that the section is necessarily confined to such documents.

But I do decide that it was not meant to cover a document which creates, or purports to create, a general charge on all future goods, whether imported or not. I would therefore agree with what is said in the note in Halsbury’s Laws to which I have already referred, with a proviso that the word ‘specific’ might prove misleading. For the goods do not have to be specific goods in the strict Sale of Goods Act sense, provided the consignment is sufficiently identified. With regard to the storage reports, counsel for the bank agreed that they could not come within the section because they were only issued after the petroleum products had been deposited with Paktank.

On this last issue, therefore, I decide in favour of the defendants. But on the other issues in relation to the Bills of Sale Acts, I decide in favour of the bank.

The overall result is that, on the assumption I have been asked to make, the defendants win outright on the first group of issues, that is to say in relation to s 95 of the Companies Act 1948. But on their alternative case under the Bills of Sale Acts they fail.

Order accordingly.

**Cases referred to in judgment**

Asphaltic Wood Pavement Co Ltd, Re (1883) 49 LT 159, 7 Digest (Reissue) 32, 157.

Brocklehurst v Railway Printing and Publishing Co [1884] WN 70, Bitt Rep in Ch 117, 7 Digest (Reissue) 33, 166.

Clark v Balm, Hill & Co [1908] 1 KB 667, 77 LJKB 369, 15 Mans 42, 7 Digest (Reissue) 33, 165.

Cunningham & Co Ltd, Re, Attenborough’s Case (1885) 28 Ch D 682, 24 LJ Ch 448, 52 LT 214, 7 Digest (Reissue) 22, 97.

Deffell v White (1866) LR 2 CP 144, 36 LJCP 25, 15 LT 211, 12 Jur NS 902, 7 Digest (Reissue) 83, 474.

Edmonds v Blaina Furnaces Co, Beesley v Blaina Furnaces Co (1887) 36 Ch D 215, [1886–90] All ER Rep 581, 56 LJ Ch 815, 7 Digest (Reissue) 34, 169.

Eichholz, Re, ex parte trustee of the property of the deceased debtor v Eichholz, Eichholz’s trustee v Eichholz [1959] 1 All ER 166, [1959] Ch 708, [1959] 2 WLR 200, 25 Digest (Repl) 175, 38.

Farrell v Alexander [1976] 2 All ER 721, [1977] AC 59, [1976] 3 WLR 145, 32 P & CR 292, HL.

Great Northern Railway Co v Coal Co-operative Society [1896] 1 Ch 187, 65 LJ Ch 214, 73 LT 443, 2 Mans 621, 7 Digest (Reissue) 34, 172.

Jenkinson v Brandley Mining Co (1887) 19 QBD 568, DC, 7 Digest (Reissue) 33, 168.

Levy v Abercorris Slate and Slab Co (1887) 37 Ch D 260, [1886–90] All ER Rep 509, 57 LJ Ch 202, 58 LT 218, 7 Digest (Reissue) 34, 170.  
  
Lloyd’s Bank Ltd v Bank of America National Trust and Savings Association [1938] 2 All ER 63, [1938] 2 KB 147, 107 LJKB 538, 158 LT 301, 43 Com Cas 209, CA, 1(1) Digest (Reissue) 487, 3374.

Mareva Compania Naviera SA v International Bulkcarriers SA p 213, ante, [1975] 2 Lloyd’s Rep 509, CA.

Mercantile Bank of India Ltd v Chartered Bank of India, Australia and China and Strauss & Co Ltd, Chartered Bank of India, Australia and China v Mercantile Bank of India Ltd and Strauss & Co Ltd [1937] 1 All ER 231, 9 Digest (Reissue) 694, 4128.

National Provincial and Union Bank of England v Charnley [1924] 1 KB 431, 93 LJKB 241, 130 LT 465, [1924] B & CR 37, 10 Digest (Reissue) 861, 4963.

Nye (CL) Ltd, Re [1970] 3 All ER 1061, [1971] Ch 442, [1970] 3 WLR 158, CA, 10 Digest (Reissue) 860, 4962.

Read v Joannon (1890) 25 QBD 300, 59 LJQB 544, 63 LT 387, 2 Meg 275, DC, 7 Digest (Reissue) 32, 159.

Royal Marine Hotel Co, Kingstown (Ltd), Re [1895] 1 IR 368, 7 Digest (Reissue) 34, \*127.  
Row Dal Constructions Pty Ltd (in liq) [1966] VR 249.

Shears v Jacob (1866) LR 1 CP 513, Har & Ruth 492, 35 LJCP 241, 14 LT 286.

Standard Manufacturing Co, Re [1891] 1 Ch 627, [1891–4] All ER Rep 1242, 60 LJ Ch 292, 64 LT 487, 2 Meg 418, CA, 7 Digest (Reissue) 33, 163.

Welsted & Co Ltd v Swansea Bank Ltd (1889) 5 TLR 332, 7 Digest (Reissue) 32, 158.