

Notes of Cases

Jurisprudence

CIVIL PROCEDURE AND THE CONFLICT OF LAWS—PRE-JUDGMENT REMEDIES IN THE FEDERAL STATE. Remedial in character for most of its history, the common law lacked a conceptual device to justify pre-judgment conservatory measures.¹ The remedies which did exist were conditional on the grant of a writ, which was discretionary in theory until the mid-nineteenth century, and rights existed only as a result of formal judgment. Prior to judgment no conduct could technically be said to be in violation of a right, and coercive measures were unjustifiable even against the defendant actively engaged in liquidating potential judgment assets.² The situation was different in Equity, in Admiralty, in the commercial courts and in civil law jurisdictions, in all of which commercial need and the concept of substantive rights pre-existing judgment justified conservatory judicial intervention. Equity always had such an original and independent jurisdiction.³ In Admiralty the writ of attachment was of great importance before disappearing with the ascendancy of common law courts over those of the Admiralty.⁴ The *lex mercatoria* common to European trade and towns allowed the remedy of attaching assets of the ambulatory trader, though here again the decline of commercial courts in England spelled the eclipse of commercial attachment.⁵ On the Continent the

¹ Proceedings by way of *distringas* or *capias ad respondendum* assured only the appearance of the defendant.

² For an example of the recurring common law theme of an absence of right preventing a pre-judgment conservatory order, see *OSF Industries Ltd. v. Marc-Jay Investment Inc.* (1978), 7 C.P.C. 57 (Ont. H.C.).

³ See Halsbury's Laws of England, vol. 24 (4th ed., 1979), p. 518, para. 916. ("... whether arising from a violation of an unquestionable right or from a breach of contract or confidence"). In *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1980] 1 All E.R. 213, at p. 215, [1975] Lloyd's Rep. 509, at p. 510 (C.A.), Lord Denning M.R. illustrated the primacy of Equity over law by speaking of the creditor "who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it".

⁴ See William Tetley, Attachment, the *Mareva* injunction and *saisie conservatoire*, [1985] L.M.C.L.Q. 58, at pp. 67-68, with references.

⁵ For the commercial court practice see the judgment of Lord Denning M.R. in *Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, [1978] 1

saisie conservatoire existed in Roman-canonical, Germanic⁶ and French law,⁷ though in the latter case it had become limited to certain commercial uses before its generalization, to the advantage of all plaintiffs, in 1955.⁸

Use of pre-judgment conservatory orders in North America has been a function of the reception of these European models. In the United States, English forms of attachment had been received and had proven their utility prior to the Revolution, and remain of importance today.⁹ In common law Canada the English pattern was largely reproduced, commercial and Admiralty forms of attachment disappearing with the ascendancy of the common law and Equity jurisdiction remaining quiescent, under the weight of remedial-based, writ-driven methodology.¹⁰ In Quebec, the *saisies conservatoires* of the old French law were vigorously contested by the newly-arrived English as "frequently attended with very dangerous consequences", and survived abolition in 1785 by only one vote in the legislative council.¹¹ They were regulated by legislation in 1787¹² and eventually became an integral and useful part of subsequent Codes of Civil Procedure.¹³

Q.B. 644, at pp. 657-658, [1977] 3 All E.R. 324, at pp. 331-332 (C.A.). H. Ashly, *Doctrine and Practice of Attachment in the Mayors Court*, London (1819), attributed the decline in attachment proceedings to practice in the Mayor's Court being monopolized by four attorneys who bought their places, and four pleaders. Cited in W.S. Holdsworth, *A History of English Law* (1952), vol. 13, p. 457.

⁶ A. Engelmann, *History of Continental Civil Procedure* (Millar transl., 1969), pp. 171, 172, 491, 501, 502, 585, 586.

⁷ See Title VIII of the Custom of Paris ("Arrêts, exécutions et gageries"); R. J. Pothier, *Traité de la procédure civile* (Orléans, 1774), vol. 2, pp. 101-107; E. Glasson, A. Tissier, *Précis théorique et pratique de procédure civile* (Paris, 1908), vol. 2, p. 620.

⁸ For contemporary French law see Gérard Légier, *Saisies et mesures conservatoires*, *Encyclopédie Dalloz, Répertoire de procédure civile*.

⁹ See for the history, Charles D. Drake, *A Treatise on the Law of Suits by Attachment in the United States* (4th ed., 1873).

¹⁰ Two provinces, however—Nova Scotia and Prince Edward Island—adopted New York style attachment in their recent Rule revisions. See Rule 49 of the Rules of Civil Procedure of both provinces.

¹¹ A.R. Burt, *The Old Province of Quebec* (1968), pp. 415, 416, 435, 441. The issue was one of many in the debate as to the extent to which English law should be introduced into the colony.

¹² 27 Geo. III, c.4 (1787), in *Ordonnances made and passed by the Governor and the Legislative Council of the Province of Quebec and now in force in the Province of Lower Canada* (1795).

¹³ See Articles 733-740 of the present Code. Article 733 provides:

The plaintiff may, with the authorization of a judge, seize before judgment the property of the defendant, when there is reason to fear that without this remedy the recovery of his debt may be put in jeopardy.

The notion of "debt" is not that of a liquidated sum owed, but rather that of a claim for violation of right, or "créance".

The majority of the provinces therefore provided no general remedy for the preservation of assets prior to judgment, and specific statutory remedies for fraudulent conveyances or absconding debtors provided little assistance in most cases.¹⁴ Canadian attention was thus assured when the equitable jurisdiction to restrain a defendant's removal of assets was resuscitated by the English Court of Appeal in 1975, and English courts began issuing what have become widely known as *Mareva* injunctions.¹⁵ The Supreme Court of Canada, in *Aetna Financial Services Ltd. v. Feigelman*,¹⁶ has now confirmed the legitimacy of the *Mareva* injunction in this country, but has issued a clear warning that the injunction is an exceptional device and one which is limited in operation by the structure of the Canadian federal state.

In *Aetna* damages were claimed in Manitoba against a federally-incorporated company with its head office in Quebec and other offices in Ontario. The defendant had at one time an office in Manitoba but by the time of litigation its business was largely conducted from its Quebec office. A *Mareva* injunction was sought to restrain transfer by the defendant of a large sum of money from Manitoba to either Quebec or Ontario. The Supreme Court reversed the restraining order granted by the Manitoba Court of Queen's Bench, which had been confirmed by a majority judgment of the Manitoba Court of Appeal.¹⁷ While a *Mareva* injunction may issue in appropriate circumstances, stated Estey J. on behalf of the court, it could not be justified in the present case, where the transfer of assets within Canada was in the ordinary course of business and there was no finding of fraud or improper motive on the part of the defendant.¹⁸

The *Mareva* injunction is therefore not a device to overcome difficulties of execution. It will issue, in the language of the court, only where there is a "genuine risk of disappearance of assets, either inside or outside the jurisdiction",¹⁹ and as a limited exception to the general principles that "execution cannot be obtained prior to judgment and judgment cannot be recovered before trial".²⁰ The position adopted is similar to that prevailing in Quebec with regard to seizure of assets before judgment, qualified by the Quebec Court of Appeal as an exceptional measure

¹⁴ See, for example, the ineffectiveness of Saskatchewan legislation (more broadly drafted, however, than that of most provinces), noted in G.A. Sheridan, *The Relationship between s. 3(1)(b) of The Absconding Debtors Act and the Mareva Injunction* (1982-83), 47 Sask. L. Rev. 370.

¹⁵ See *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, *supra*, footnote 3. For the extensive commentary on the decision and subsequent case law see the references in Tetley, *loc. cit.*, footnote 4, p. 69, at note 66.

¹⁶ [1985] 1 S.C.R.2, (1985), 15 D.L.R. (4th) 161.

¹⁷ (1982), 143 D.L.R. (3d) 715, [1983] 2 W.W.R. 97, (1982), 19 Man. R. (2d) 295.

¹⁸ *Supra*, footnote 16, at pp. 16, 36 (S.C.R.), 170, 186 (D.L.R.).

¹⁹ *Ibid.*, at pp. 25 (S.C.R.), 176 (D.L.R.).

²⁰ *Ibid.*, at pp. 10 (S.C.R.), 166 (D.L.R.).

requiring objective proof that a judgment will be incapable of satisfaction.²¹ The decision brings about considerable uniformity of law in the common law provinces and in Quebec.²² In the latter province, however, the *Mareva* injunction may exist as an alternative to traditional attachment, leaving plaintiffs the choice of actual seizure of specific assets or a general restraining order resting ultimately on the contempt power.²³ The two remedies of attachment and *Mareva* injunction have been held to co-exist in Nova Scotia.²⁴

The Supreme Court was also influenced in its decision by the fact that the transfer of assets was within the Canadian federation, and by a federally incorporated company. Its remarks in this regard are of interest beyond the question of the *Mareva* injunction. The court stated that transfer of assets within the federation by a resident defendant "will not trigger such an exceptional remedy as it well might do in the United Kingdom where the jurisdiction of the court and the boundaries of the country coincide",²⁵ and warned against applying "*in toto* or verbatim the dicta of the decisions in other legal systems though they have much in common with those of Canada".²⁶ Action on a Manitoba judgment in Quebec is a "formal process of enforcement"²⁷ and, though Quebec is not a party to mechanisms for the reciprocal enforcement of judgments, it privileges in its legislation the judgments of other Canadian provinces in refusing to re-examine them on the merits prior to their enforcement.²⁸ The writ of the Manitoba court could thus be said to run beyond the

²¹ See, e.g., *St. Lawrence Mechanical Contractors Limited v. Acadian Consulting Company Limited*, [1974] C.A. 236; *Mesina v. Arcobelli*, [1983] R.D.J. 335, and generally Y. Lauzon, *Les saisies avant jugement* (1974), 76 R. du N. 537. Given a similar burden of proof in the common law provinces, it is unlikely that plaintiffs obtaining a *Mareva* injunction will be required to post bond by way of security; nor is security required in Quebec if conservatory seizure is ordered. Security is required of plaintiffs seeking attachment under Nova Scotia or Prince Edward Island Rules, where the conditions of obtaining attachment are less onerous, including, e.g., the simple removing of assets from the jurisdiction; *supra*, footnote 11.

²² For considerations of harmonization of law in the development of the *Mareva* injunction in the U.K., see the judgment of Lord Denning M.R. in the *Rasu Maritima* case, *supra*, footnote 5, at pp. 658 (Q.B.), 332 (All E.R.).

²³ The Supreme Court stated, in its judgment in *Aetna*, *supra*, footnote 16, at pp. 16 (S.C.R.), 170 (D.L.R.), that the authority of the Superior Court of Quebec to grant a *Mareva* injunction "is at least equal to that of the superior courts of the other provinces". On the controversial development of the injunction in Quebec law see A. Prujiner, *Origines historiques de l'injunction en droit québécois* (1979), 20 *Cahiers de Droit* 249.

²⁴ *Parmar Fisheries Ltd. v. Parceria Maritima Esperanca L.A.* (1982), 141 D.L.R. (3d) 498, 53 N.S.R. (2d) 338 (N.S.T.D.); and for the origin of attachment in Nova Scotia, see *supra*, footnote 10.

²⁵ *Supra*, footnote 16, at pp. 36 (S.C.R.), 185 (D. L.R.).

²⁶ *Ibid.*, at pp. 35 (S.C.R.), 185 (D.L.R.).

²⁷ *Ibid.*, at pp. 32 (S.C.R.), 182 (D.L.R.).

²⁸ Article 180, C.C.P.

boundaries of Manitoba into the other provinces. The same could not be said of the courts of the United Kingdom, concluded the court, "where *Mareva* was conceived to fend off the depredations of shady mariners operating out of far-away havens, usually on the fringe of legally-organized commerce".²⁹

The decision is an important one for its approval of a useful and long-neglected remedy. It is also instructive in warning that plaintiffs seeking such extraordinary coercive relief prior to trial will not obtain it easily. Extra-territorial enforcement of a judgment will therefore remain necessary in many cases. In this regard it is useful to recall that, in spite of the ideal role accorded the federal structure by the court, provincial rules for the recognition of judgments of other provinces remain generally restrictive. Indeed, in many cases a judgment of a provincial court will be more easily recognized abroad than in another Canadian province.³⁰ Since most provinces have recently expanded their own territorial jurisdiction, the federal principles enunciated in *Aetna* should inspire some re-examination of the grounds of recognition of the judgments of other provinces.

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COMMERCIAL LAW—UNSECURED CREDITORS AND UNREGISTERED CHATTEL SECURITIES.—In *Royal Bank of Canada v. First Pioneer Investments Ltd.*,¹ the Supreme Court of Canada, in a rare encounter with private law, undertook to resolve a problem which, by its own admission,² had vexed commercial lawyers for more than a century. It still does. The issue was whether the holder of an unregistered chattel security might validly realize that security before an unsecured creditor exercised his statutory right to set it aside. The court saw its decision as a straight-forward exercise in statutory interpretation whose consequences were unproblematically dictated by "logic"³ and which served a broad commercial purpose.⁴ In fact, the result in the case was anything but logically necessary and, more importantly, its commercial utility is, at best, questionable.

²⁹ *Supra*, footnote 16, at pp. 35 (S.C.R.), 184 (D.L.R.).

³⁰ See generally Robert J. Sharpe, *Interprovincial Product Liability Litigation: Jurisdiction, Enforcement and Choice of Law* (1981); H. Patrick Glenn, *De la cause d'action et de la compétence internationale* (1981-82), 27 McGill L.J. 793, at pp. 800-808.

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¹ *Royal Bank of Canada v. First Pioneer Investments Ltd. et al.* [1984] 2 S.C.R. 125, (1985), 12 D.L.R. (4th) 1, 54 N.R. 255; hereafter *First Pioneer*.

² *Ibid.*, at pp. 132 (S.C.R.), 6 (D.L.R.), 263 (N.R.).

³ *Ibid.*, at pp. 136 (S.C.R.), 9 (D.L.R.), 267 (N.R.).

⁴ *Ibid.*, at pp. 135 (S.C.R.), 9 (D.L.R.), 266 (N.R.).

The problem before the court arose in the specific circumstance of a corporate debenture that was not registered, as it was required to be, under the Corporation Securities Registration Act of Ontario.⁵ The court's opinion, however, has implications far wider than the true interpretation of one act in one province. Corporate debentures are the only significant chattel securities in Ontario that are left, for the time being, outside that province's Personal Property Security Act,⁶ which eliminates the present question.⁷ Elsewhere in Canada, in Alberta and British Columbia and east of Quebec, the unreformed mass of specific chattel registration acts presents the same problem posed to the Supreme Court, namely, how to read the statutory clause that declares an unregistered security "void" as against creditors.

The common answer, as the Ontario Court of Appeal repeated in *Re Shelly Films Ltd.*,⁸ is to read "void" as meaning voidable. In *Shelly Films*, which until *First Pioneer* was regarded as the leading authority, a trustee in bankruptcy sought to overturn a chattel mortgage, given by the bankrupt, for lack of compliance with the Ontario Bills of Sale and Chattel Mortgages Act.⁹ There was no doubt about the inadequacy of its registration, but the mortgagee had taken possession and sold the secured property before the trustee challenged the validity of the mortgage. The court first declared "[t]here is ample authority for construing the words 'null and void' . . . as 'voidable'".¹⁰ It then considered the effect of this decision on the fact that the mortgaged goods had already been sold. The secured party asserted that the mortgage was spent and could not subsequently be set aside. The court agreed, citing in particular *Meriden Britannia Co. v. Braden*¹¹ as a case "which has never been overruled or indeed questioned on this point".¹² For the unsecured creditors, a further claim

⁵ R.S.O. 1980, c.94, s. 2(1). Hereafter, in footnotes, C.S.R.A.

⁶ R.S.O. 1980, c.375. Hereafter, in footnotes, P.P.S.A. By an amendment, S.O. 1981, c.2, s.1, s. 66a of the P.P.S.A. permits corporate debentures to be registered pursuant either to the P.P.S.A. or the C.S.R.A. There are now moves afoot to abolish the C.S.R.A. entirely and thus move debentures under the exclusive purview of the P.P.S.A.

⁷ S. 22(1) of the P.P.S.A. renders unperfected security interests "subordinate" to other specified interests, but not void. It was the word "void" in the C.S.R.A. which gave rise to the dispute in *First Pioneer*, and that word does not appear in the P.P.S.A. We generally approve of the P.P.S.A.'s resolution of this problem, which is comparable in effect to the result that most courts before *First Pioneer* had reached by construing "void", when it appeared in the C.S.R.A. and similar statutes, to mean voidable.

⁸ (1963), 37 D.L.R. (2d) 469, [1963] 1 O.R. 431 (Ont.C.A.).

⁹ R.S.O. 1960, c. 34.

¹⁰ *Supra*, footnote 8, at pp. 473 (D.L.R.), 435 (O.R.).

¹¹ (1894), 21 O.A.R. 352 (Ont. C.A.).

¹² *Supra*, footnote 8, at pp. 475 (D.L.R.), 437 (O.R.). In *First Pioneer* the court appears to have adopted the stance that the leading case here was its own decision in *E.R.C. Clarkson v. McMaster Ltd.* (1895), 25 S.C.R. 96, and not the decision the previous year in *Meriden Britannia*. In *First Pioneer* the appellants asserted, as Wilson J.

was made to recover the proceeds of the sale of the mortgaged goods. A number of cases since *Meriden* have permitted the creditors to do so by virtue of the Assignments and Preferences Acts. The court, however, had no difficulty in denying this claim, pointing out that "[n]o case has been cited to the Court of a creditor being allowed to follow the proceeds of sale under a voidable mortgage where evidence of fraudulent intent was missing".¹³

The whole of the court's judgment in *Shelly Films* was predicated upon the choice it made between reading the chattel mortgage as totally void or only voidable. It was pressed to make a choice as a result of the way the statute was worded. The Ontario Act, like its counterparts in other provinces, declared the chattel mortgage "void" only against certain classes of third parties, including creditors. It did not say the chattel mortgage was "void" between the parties or against the purchaser from the secured creditor. Thus the Act set up an intrinsic contradiction that the chattel mortgage might be void against some but not against others. By reading "void" to mean voidable the court neutralized the legislative paradox in a way that permitted the creditors to exercise their statutory rights, at least so long as they acted with timeliness, without denying the validity of the security for others meanwhile. *Shelly Films* also stands firmly in protection of the *bona fide* purchaser of the secured property and against the unsecured creditors when they have not pressed their statutory rights before the sale.

First Pioneer threw up very similar issues to *Shelly Films* but it turned out quite differently at the hands of the Supreme Court. In *First Pioneer* a franchisor of Volkswagen car rentals, calling itself Rent-A-Bug

noted, *supra*, footnote 1, at pp. 133 (S.C.R.), 7 (D.L.R.), 263 (N.R.), that *Shelly Films* was an aberration of the law as set out in *Clarkson*. But the decision in *Clarkson* had by no means overruled or altered the law as set out in *Meriden Britannia* and followed in *Shelly Films*. In fact the Supreme Court in *Clarkson* did not even refer to *Meriden Britannia*. There was no need for it to have done so since there was a clear and critical difference of circumstances between *Clarkson* and *Meriden Britannia*. In *Clarkson*, the grantee of an unregistered chattel mortgage had taken possession of the goods but had not sold them before the grantor's creditors brought suit. In this situation the court confirmed the effect of the then recent legislative amendment (55 Vict., c.26, s.4 (Ont.), compare today for example, R.S.N.S. 1967, c. 23, s.13) that a mortgagee who has failed to register his security interest cannot subsequently perfect it against existing creditors by taking possession of the secured goods. As between such secured and unsecured creditors alone, there is indeed no good purpose in allowing the mortgagee to thwart the protection granted the general creditors by the legislation merely by seizing the mortgaged property. But neither the statute nor the case went so far as even to consider the situation after the seized goods have been sold and the competing interests of an innocent third party thereby introduced. This was the predicament that *Meriden*, *Shelly Films* and *First Pioneer* presented to the courts. Moreover, the Supreme Court itself acted upon this factual distinction in the subsequent case of *Grand Trunk Pacific Railway Co. v. Dearborn* (1919), 58 S.C.R. 315, 47 D.L.R. 27, which was referred to in *Shelly Films*.

¹³ *Supra*, footnote 8, at pp. 476 (D.L.R.), 438 (O.R.).

Ltd., had initially financed itself by an unsecured loan¹⁴ from the Royal Bank. Some time thereafter, finding itself in need of working capital for expansion, it borrowed money from First Pioneer Investments Ltd. which took as security a debenture granting it a floating charge over Rent-A-Bug's assets. The debenture was granted with the knowledge of the bank; in fact some of First Pioneer's loan was used to reduce Rent-A-Bug's debt to the bank.¹⁵ The debenture, which contained the usual default provisions, was never registered pursuant to the Corporation Securities Registration Act. When Rent-A-Bug's business collapsed, First Pioneer crystallized the floating charge by appointing a receiver who, without objection from the bank, sold Rent-A-Bug's assets at a price subsequently found at trial to be fair and then used the proceeds to pay off some of First Pioneer's loan. After the bank had collected its loan by calling in the personal guarantee of one of Rent-A-Bug's principals, this suit was begun in its name in order to object, on behalf of all creditors of the failed company, to the actions of First Pioneer's receiver.

There were three issues at trial.¹⁶ The two main ones concerned the conduct of the receiver for First Pioneer: whether he acted *bona fide* and whether his sale of Rent-A-Bug's assets could be impeached under either the Fraudulent Conveyances Act¹⁷ or the Assignments and Preferences Act.¹⁸ Both of these issues were decided in favour of First Pioneer, which was absolved of all assertions of fraud. The final legal issue, which was dealt with only briefly but which was destined to become the main ground of appeal before the Supreme Court of Canada, was whether, given the right of the bank and other unsecured creditors to intervene due to the debenture's lack of registration, First Pioneer should be permitted to realize its security as it had done. On this point Parker A.C.J.H.C. said:¹⁹

There is no doubt that under the scheme of this Act the unregistered debenture is void as against the plaintiff and other creditors of Rentabug. However, that is not the issue here. When Spence was appointed receiver-manager, the appointment occurred not by reason of a priority or right of Pioneer over the bank or other creditors, but rather by reason of a contract between Rentabug and First Pioneer Investments Ltd. I have found no authority for holding that this contract is void as between the parties by virtue of failure to comply with the *Corporation Securities Registration Act*.

¹⁴ *Supra*, footnote 1. The court speaks of the Bank's loan as being "secured" by a personal guarantee of the Rent-A-Bug's principals; *supra*, footnote 1, at pp. 127 (S.C.R.), 2-3 (D.L.R.), 257 (N.R.). That is not a security in the sense we use the term here. It gave the bank no *in rem* rights in any of the assets of either Rent-A-Bug or the guarantor.

¹⁵ *Royal Bank of Canada v. First Pioneer Investments Ltd. et al.* (1979), 106 D.L.R. (3d) 330, at p. 336, 27 O.R. (2d) 352, at p. 358 (Ont. H.C.).

¹⁶ *Ibid.*

¹⁷ R.S.O. 1980, c. 176, s. 2.

¹⁸ R.S.O. 1980, c. 33, s. 4.

¹⁹ *Supra*, footnote 15, at pp. 340 (D.L.R.), 362 (O.R.).

In its brief reasons for dismissing the bank's appeal on this point, the Ontario Court of Appeal²⁰ relied on its own decision in *Shelly Films*.²¹ It held that the provision in the Corporation Securities Registration Act rendering unregistered securities "void" should be read as meaning voidable, and that consequently, once the receiver had sold Rent-A-Bug's assets, unsecured creditors were precluded from setting aside the security interest or from claiming any proceeds of sale now in the hands of First Pioneer.

On further appeal, the Supreme Court reversed the lower courts and held that First Pioneer could not realize its unregistered security without accounting to Rent-A-Bug's unsecured creditors, as represented by the bank, for the proceeds of the sale. As Wilson J. wrote for the court:²²

. . . the unregistered debenture [should be] held to be valid in so far as it embodies an enforceable contract between First Pioneer and Rent-A-Bug. As against other creditors of Rent-A-Bug . . . the same logic dictates that it should be declared void *ab initio* pursuant to s.2 of the Corporation Securities Registration Act. As such, the unregistered debenture creates no security interest or preference and the position of the respondent First Pioneer is thereby reduced to that of an unsecured creditor.

The opinion of the Supreme Court on the legal issue comes as a shock. Both the reasons for judgment and the implications of the decision raise many doubts. The discussion which follows first considers the reasoning of the court and then goes on to point out the difficult implications of the case.

Perhaps the first point to note about the judgment is that at no time did the court hint that the decision of numerous earlier courts to read "void" as voidable was an illegitimate judicial liberty with the clear words of a statute. Wilson J. did not simply haul out the literal rule of interpretation and insist that judges must blindly follow the plain meaning of the legislation, leaving the consequences to elected law makers. Rather, the court embraced an instrumental approach to its task and voiced the opinion that construing "void" to mean void best fulfilled the purpose of Ontario's Corporation Securities Registration Act and that it was the failure of earlier courts to comprehend this true purpose which had led

²⁰ (1981), 121 D.L.R. (3d) 510, 32 O.R. (2d) 121 (Ont. C.A.).

²¹ *Supra*, footnote 8.

²² *Supra*, footnote 1, at pp. 136 (S.C.R.), 9 (D.L.R.), 266-267 (N.R.). At the risk of seeming unduly fussy about the court's use of English, a linguistic difficulty in this passage should be pointed out. The court considers the *debenture* as being either valid, voidable or void but the language of the C.S.R.A. speaks of the *charge* or *mortgage* contained therein as being valid, voidable or void. As the recent decision of the Ontario Court of Appeal in *Acmetrack Ltd. v. Bank Canadian National et al.* (1984), 12 D.L.R. (4th) 428, 48 O.R. (2d) 49 (Ont. C.A.) has reminded us, "debenture" is an uncertain term. It is used at various times to refer to a debt, secured debt or the security device itself. Given the court's later confusion on this very point it would be better to stick with the language of the statute.

them astray. Even so, this constructive approach to the task of interpretation also invites review on the same grounds of the court's own decision, beginning with its characterization of the dispute before it.

The Supreme Court set out the legal problem in *First Pioneer* as follows:²³

The issue might be framed . . . as whether the scheme of the *Corporation Securities Registration Act*, R.S.O. 1970, c.88 would be defeated by allowing the holder of an unregistered debenture to enjoy the position of a secured creditor by realizing on his security before unsecured creditors had a chance to intervene to avoid the transaction.

This was a curious way to present the matter since it was clear in *First Pioneer* that the unsecured creditors always had, and were never denied, a chance to intervene. Indeed, the bank had actual notice of First Pioneer's action under its debenture.²⁴ It would be more accurate to say that the issue was whether the unregistered debenture holder could retain the amount of the underlying loan recovered by enforcement of the impeachable security when unsecured creditors failed to take their chance to object until after the debt had been collected. Framed this way, the issue better reflects the circumstances of the different creditors. First Pioneer had contracted with Rent-A-Bug for security for its loan, including a power to appoint a receiver to realize that security, as the trial court noted.²⁵ When the actions of the receiver were challenged, First Pioneer was cleared of all allegations of fraud upon the creditors. The right to appoint a receiver was not questioned, as it could not be, for it rested on a valid term of the agreement between First Pioneer and Rent-A-Bug. According to the Corporation Securities Registration Act, only the security interest is open to attack for lack of registration. Once the receiver disposed of Rent-A-Bug's assets, First Pioneer's security was spent and so was no longer available for attack.²⁶ Since the receiver pursued this course without fraud on the creditors, why should First Pioneer be called to account?

The contrary opinion depends upon establishing that First Pioneer's security interest was by statute void, not merely against creditors, but also against Rent-A-Bug itself so that there were no assets subject to the agreement which the receiver was empowered to enforce. His appointment, it would have to be argued, was an admittedly valid but futile act. But the Corporation Securities Registration Act does not say the security interest was void *inter partes* and unless authority for so holding it can be

²³ *Supra*, footnote 1, at pp. 132 (S.C.R.), 6 (D.L.R.), 262 (N.R.).

²⁴ *Ibid.*, at pp. 130 (S.C.R.), 4-5 (D.L.R.), 260 (N.R.).

²⁵ *Supra*, footnote 19.

²⁶ "It seems to me, therefore, that it is quite impossible to say that a spent transaction of that kind . . . can be revived, as it were for the purpose of being destroyed, to let in, as against the true title, a subsequent execution creditor": Lord Selborne, in *Cookson v. Swire* (1884), 9 App. Cas. 653, at p. 663 (H.L.).

found, as the trial court could not²⁷ and as the Supreme Court ultimately did not,²⁸ the intervention of the creditors came too late to make any difference. Faced with the paradox of the legislation that the security interest was apparently valid for some but void against others, the claims of the creditors might have been expected to fail for lack of timely prosecution and the enforcement of First Pioneer's valid contractual rights should have been allowed to stand.

When the court turned to the interpretation of the word "void" in the Corporation Securities Registration Act, it pointed to two supposedly distinct lines of diverging thought in the earlier cases which it sought to overcome with a novel (but ultimately unconvincing) solution. The approach of one line of cases, it was said,²⁹ is to focus on the secured creditor-debtor relationship and to view registration as the means to prevent the fraudulent disposal of secured assets by unsecured creditors. This point of view reflects only one side of the fear of fraud. According to Lord Blackburn, the statutory requirement for registration was intentionally a double-edged sword. He was explaining the purpose of the early English Bills of Sale legislation, the recognized source of many Canadian chattel security ideas, in *Cookson v. Swire*,³⁰ when he said:

... two evils arose . . . In the first place it often happened that there was really a sham put up to endeavour to defeat a man, and there was a great quantity of perjury, of fighting and expense, before it was proved to be a sham. That was a great evil. The other was that there were real honest transactions which were asserted to be shams when they were not, and in those cases there was apt to be much perjury and great expense before it was decided.

By requiring registration of the security interest, he pointed out:³¹

In the first place its being registered will put an end to any fear that *any one* should start forward afterwards and say, The transaction being kept secret is a proof that it was a sham transaction, for, it being actually registered as bills of sales are required to be, it could no longer be secret, and there would be no badge of fraud in that respect.

Thus so far as fraud is the concern of this kind of legislation, the public record created by registration prevents every party, secured creditor, unsecured creditor and debtor alike, from engaging in secret transactions. It defeats the opportunity for fraud and for allegations of fraud on all sides.

Registration of chattel securities, from this perspective, is chiefly a matter of evidence. To defeat secrecy it was, of course, necessary to ensure that registration would occur. Therefore the interested party, the

²⁷ *Supra*, footnote 19.

²⁸ *Supra*, footnote 22.

²⁹ *Supra*, footnote 1, at pp. 133 (S.C.R.), 7 (D.L.R.), 264 (N.R.).

³⁰ *Supra*, footnote 26, at p. 665.

³¹ *Ibid.*, (Emphasis added).

secured creditor, is required to register the transaction upon pain of the penalty that its security is ineffective against certain classes of competitors. It is to be noted that the chattel registration acts say nothing directly about the effect of the transaction between the secured creditor and its borrower. As other courts have observed,³² the rights between the parties to a secured transaction exist at common law and in equity so that, in the absence of intervention by a statutorily protected third party, no purpose is served in setting aside a *bona fide* but unregistered security interest.

The other line of cases was said³³ to promote registration as notice to unsecured creditors of the existence of a security interest. Registration is the process of informing third parties that goods and assets in the possession and apparent ownership of someone are in fact encumbered by a secured title interest of another. There is more than a hint in this approach that the act of registration by the secured creditor is sufficient advertisement of the discrepancy between the apparent and the actual state of the debtor's affairs for the whole world to become cognisant of it. That is not a true representation of the usual situation. Persons about to deal with the debtor may search the registries but more often do not. The commercial reality is that business people must act on appearances and trust. As Lindley L.J. observed in *Manchester Trust v. Furness*:³⁴

In dealing with estates in land title is everything, and it can be leisurely investigated; in commercial transactions possession is everything, and there is no time to investigate title; and if we were to extend the doctrine of constructive notice to commercial transactions we should be doing infinite mischief and paralyzing the trade of the country.

Since these words were expressed in 1895 the pressure and haste of business has greatly increased. The possibility of central filing systems, which modern technology provides, has not alleviated sufficiently the physical problems of making conclusive searches. Many parts of Canada still depend upon individual registries for different acts maintained in each county by the manual filing of a copy of the security agreement.

More importantly, nowhere do the chattel registration acts say that anyone is bound to search or that anyone shall be prejudiced if he does not. The registries provide evidence of a perfected security for those who seek there, but they do not create risks for those who do not know of it. Nevertheless, Ontario courts have typically held that registration consti-

³² See the trial decision quoted, *supra*, footnote 19; *Cookson v. Swire*, *supra*, footnote 26, at p. 663; *Mehar'g v. Lumbers* (1896), 23 O.A.R. 51, at p. 61 (Ont. C.A.); *Snyder's Ltd. v. Furniture Finance Corporation Ltd.*, [1931] 1 D.L.R. 398, at p. 405, (1930), 66 O.L.R. 79, at pp. 86-87 (Ont. App.Div.); *Workmen's Compensation Board v. United States Steel Corporation and Roberts Drilling Co. Ltd.* (1956), 5 D.L.R. (2d) 84, at pp. 86-87, 18 W.W.R. 403, at p. 406 (Alta. S.C.).

³³ *Supra*, footnote 1, at pp. 134-135 (S.C.R.), 8 (D.L.R.), 264-265 (N.R.).

³⁴ [1895] 2 Q.B. 539, at p. 545 (C.A.).

tutes imputed knowledge of a security interest in the mind of everyone who deals with the debtor.³⁵ As a result, registration enhances the security of the lender, especially where his interest is only equitable and so might be over-reached by others who, but for the deemed statutory notice, would have no knowledge of its existence.

Other common law jurisdictions in Canada have turned their faces against that interpretation of the chattel registration acts.³⁶ They take the position that registration enables others to find out by inquiry in a public file whether the debtor's circumstances are in fact as they seem. If a security interest has been taken and registered, an inquirer will acquire actual knowledge of it and can govern his actions accordingly. If the inquirer finds no registration of any security interest, he may safely act as if there is none, since the statutes operate to protect him in the event that any unregistered transaction subsequently comes to his attention. From this perspective, the chattel registration statutes protect third parties by enabling them to discover the true facts about the debtor's circumstances. They achieve this purpose by requiring the secured creditor to register the security in order to protect it from attack. From the secured creditor's point of view, this approach places additional requirements on him to maintain his existing interest and gives him no advantages. It contrasts sharply with the Ontario interpretation which treats registration as validating his security even against *bona fide* but unwitting third parties.

There probably are not two distinct lines of thought in the cases in the way the Supreme Court suggested. Prevention of fraud by any interested party is certainly a major, if not the purpose of the chattel security acts. It is achieved by the evidentiary process of registration, which affords access to information about the secured goods for anyone inter-

³⁵ The latest example is *Acmetrack Ltd. v. Bank Canadian National et al.*, *supra*, footnote 22. And now see *P.P.S.A.*, *supra*, footnote 6, s. 53(1).

³⁶ Courts have refused to analogize chattel registration acts to land registration systems, which typically provide that registration is notice. See *Commercial Credit Co. of Canada Ltd. v. Fulton Bros.* (1922), 65 D.L.R. 699, 55 N.S.R. 208 (N.S.S.C. *in banco*); *Vowles v. Island Finances Ltd.*, [1940] 4 D.L.R. 357, (1940), 55 B.C.R. 362 (B.C.C.A.); *Reporter Publishing Co. Ltd. v. Manton Bros. Ltd.* (1961), 35 W.W.R. 498 (Man. C.A.); *Terra Power Tractor Co. Ltd. v. Chapman* (1977), 2 Alta. L.R. (2d) 247, 5 A.R. 286 (Alta. D.Ct.); *Dalgleish v. I.A.C. Ltd. et al.* (1977), 2 Alta. L.R. (2d) 261, 5 A.R. 28 (Alta. S.C.); *General Motors Acceptance Corp. of Canada Ltd. v. Hubbard* (1978), 87 D.L.R. (3d) 39, 21 N.B.R. (2d) 49 (N.B. App. Div.). In *Kozak v. Ford Motor Credit Co. of Canada Ltd. et al.* (1971), 18 D.L.R. (3d) 735, [1971] 3 W.W.R. 1 (Sask. C.A.), the Saskatchewan Court of Appeal viewed registration under that province's Conditional Sales Act as notice, but when Saskatchewan adopted the P.P.S.A. this question was explicitly addressed and it was decided that registration should not constitute notice: S.S. 1979-80, c. P-6.1, s. 51. Ontario's P.P.S.A., *supra*, footnote 6, provides in s. 53 (1) that registration is notice and Manitoba has followed suit: S.M. 1973, c. 5, s. 52(1). See G.V. LaForest, *Filing Under the Conditional Sales Act: Is it Notice to Subsequent Purchasers?* (1958), 36 Can. Bar Rev. 387.

ested in them.³⁷ Thus the differences in emphasis over the purposes of the chattel registration acts might better be seen as convergent, rather than divergent, lines of thought. However that may be, the more important consideration is what the Supreme Court did as a result of its interpretation of these cases.

The Supreme Court proceeded to discover a new unifying relationship which explodes the apparent paradox that a security interest might be both valid *inter partes* and void against the third parties at one and the same time. Apparently,³⁸ once the purposes of chattel security registration are viewed more broadly than the prevention of fraud so as to emphasize public accessibility to the debtor's affairs, the significant relationship shifts from the parties to the secured transaction to the competitors to the security, namely the secured and unsecured creditors. As a consequence, it was said:³⁹

The unregistered debenture can then be rendered void (rather than voidable) as against other creditors without undermining the existence of a valid contractual debt owed to the debenture holder. Since the crucial relationship at which the Act is aimed is that between the debenture holder and other unsecured creditors, the effect of non-registration is to render void the debenture holder's preference vis-à-vis such other creditors. Nothing in the statutory registration requirement, however, is geared toward rendering void the debt itself.

In addition to the queries that have been lodged against the reasoning of the court that led it up to this statement, this novel solution gives rise to several new difficulties of more serious character. The first sentence is true enough but misses the point. Whether an unregistered interest is treated as void or voidable never affects the underlying debt for which the security was given. The debt is separate and apart from security. It is valid and enforceable *in personam* on its own merits, whether any security happens to have been taken or not.

It is the security for payment, not the contract for the debt, which is the transaction under attack and no previous court ever held otherwise. In *First Pioneer*, it was the security agreement between First Pioneer, the debenture holder, and Rent-A-Bug, the debtor, which the Corporation Securities Registration Act required to be registered. That is why the second sentence of the court's opinion is puzzling. Far from being a

³⁷ See Boyd C. in *Barker v. Leeson* (1882), 1 O.R. 114, at p. 117 (Ch.D.):

The object of the [Chattel Mortgage] Act is to enforce a visible and actual transfer of possession upon every change of ownership, or to compel the recording of the instruments which manifest the change of property. The intent is, that persons who are about to become the creditors of others by parting with money or money's worth, may, by searches in the public office, obtain information for their guidance; and that the ostensible owners of chattels may not gain fictitious credit on the faith of property which is either encumbered or belongs to other people.

³⁸ *Supra*, footnote 1, at pp. 134-135 (S.C.R.), 8 (D.L.R.), 265 (N.R.).

³⁹ *Ibid.*, at pp. 135 (S.C.R.), 9 (D.L.R.), 266 (N.R.).

“crucial relationship” between secured and unsecured creditors, there is no contractual or legal connection between them. Their only link is that they share a common debtor. In the event that they both want to reimburse themselves for their different debts out of the debtor’s property, they become outright competitors. Then the secured creditor’s interest must either stand or fall to the unsecured creditor’s right of execution.

As a result, it is difficult to appreciate what the court means by declaring that the effect of failing to register the security interest is “to render void the debenture holder’s preference *vis-à-vis* such other creditors”. What preference is at stake? The court can hardly have meant a preferential right in the secured creditor to collect his debt. As the court itself recognizes in the last sentence, the legislation is not aimed at the debt. If, as seems more likely,⁴⁰ the court had in mind the secured creditor’s claim to a preferential right to the debtor’s property, the statement is still confusing. Short of proceedings in bankruptcy or a general assignment upon insolvency, neither the debenture nor the charge it contained created a preference for First Pioneer in the absence of any other creditor claiming competing rights in the same property. Unsecured creditors have no rights in the debtor’s property until they execute against it. They had not done so here.

More to the point, the creditors, represented by the bank, had stood by and let the receiver enforce the security and liquidate the very assets from which they might have recouped their own debts without ever intervening to press their own statutory rights against First Pioneer. Nothing in this crucial paragraph of the court’s judgment addresses these facts. The legal reasoning is entirely beside the legal issue. Nevertheless, it purportedly provided the basis in the next sentence to overrule the judgment in *Shelly Films*, whose *ratio* did deal concretely with this legal issue.

So the problem remains of how to regard an unregistered security interest before an unsecured creditor intervenes. The Supreme Court did not treat First Pioneer’s security interest as void *ab initio* as against Rent-A-Bug, the contracting debtor, but it did declare the security void *ab initio*, and not merely voidable, *vis-à-vis* the unsecured creditors.⁴¹ This is an impossible confusion of language. The court has done nothing to overcome the very real dilemma set up by the statute, except perhaps to increase the legal uncertainty by overruling the previous tentative and not unreasonable solution.

The future implications of this bewildering judgment are no more certain. If it is accepted on its face, a large number of new doubts about the law of chattel securities arise. Although the court held First Pioneer’s security interest valid against Rent-A-Bug, it also held the same security

⁴⁰ *Ibid.*, at pp. 136 (S.C.R.), 9 (D.L.R.), 267 (N.R.).

⁴¹ *Ibid.*

void against creditors. First Pioneer was reduced to an unsecured creditor and since its receiver had not only taken possession of Rent-A-Bug's assets but also sold them, it was made to account for the proceeds of the sale to all the creditors.⁴² A few of the most proximate implications of this decision will be raised.

For a start, if creditors can call for an accounting of the proceeds of sale of imperfectly secured goods, is their right subject to any time limit? First Pioneer was no doubt surprised to be made to disgorge, after the fact, the amounts realized from the secured assets and used to pay down its debenture loan. The decision must have implications for redistribution in previous, as well as prospective, situations where secured creditors have made off with sale proceeds. How far back in time may unsecured creditors retroactively pursue their remedy of account? For how long after the sale is the secured creditor at risk of being made to remit the proceeds he has received? May general creditors seek an accounting at any time before the expiry of the limitation period for their own debt or does a new limitation period, perhaps that for an action for money had and received, start to run at the time of the receiver's sale?

Second, if it turns out that the unsecured creditors do not get satisfaction on an accounting by the secured creditor, may they have recourse to the goods themselves? In *First Pioneer*, did the third party who purchased the debtor's assets from the receiver acquire good title to them or could the creditors have traced them into its hands and seized them in execution because they were still the property of the debtor? These questions were not addressed by the Supreme Court. The relief requested by the bank did not raise them directly. Just possibly the answer is that the purchaser in this case did receive good title to the goods because the receiver, in selling them, might be described as an agent of Rent-A-Bug who transferred the title that Rent-A-Bug had in them. But, although debentures typically provide that receivers appointed under them shall be deemed to act as agents of the debtor company, courts have not always been willing to accept this characterization of the relationship for all purposes, even when the debenture has been properly registered.⁴³ The ability of a receiver appointed under an unregistered debenture to rely on the agency argument may be even more limited.

Even if this agency argument could be relied upon to eliminate the passing of title problem in cases involving receivers appointed under debentures, *First Pioneer* still throws up new problems in other areas. The problems arise because cases under Corporation Securities Registration Acts have been relied on as authority in cases occurring under the

⁴² *Ibid.*

⁴³ For example, *Re International Woodworkers of America, Local 1-324 and Wescana Inn Ltd. et al.* (1977), 82 D.L.R. (3d) 368, [1978] 1 W.W.R. 679 (Man. C.A.).

similarly worded legislation dealing with chattel mortgages and conditional sales, and *vice versa*. In *First Pioneer*, for example, both the Ontario Court of Appeal and the Supreme Court of Canada treated the decision in *Shelly Films*, which had dealt with Ontario's Bills of Sale and Chattel Mortgages Act,⁴⁴ as being of direct authority on the meaning to be given to the Corporation Securities Registration Act. The Supreme Court, in departing from *Shelly Films*, did not merely distinguish it as being a decision arising under a different statute. It expressly overruled the case.³⁵ A difficulty thus arises for repossessing chattel mortgagees and conditional sellers since they do not purport, as receivers may do, to sell under the cloak of agency. They sell because they claim to have title.

Since the Supreme Court overruled *Shelly Films* a repossessing mortgagee's title interest must be regarded as void, and not merely voidable, and so considerable doubt now exists about whether a third party purchaser can get good title to the goods. Would that third party be protected from hunting creditors by some novel exception to the *nemo dat* principle? Without such protection, the *bona fide* purchaser of goods seized by a secured creditor runs severe commercial risks.

The existence of those risks was accepted in *Barker v. Leeson*.⁴⁶ This case, as noted by the Supreme Court,⁴⁷ is one of the few to hold unregistered security interests are void, not merely voidable. In consequence, the court in *Barker* acknowledged:⁴⁸

No subsequent dealing with mortgagor and mortgagee based upon the continued existence of a security declared invalid as to creditors can re-establish that security or legalize a sale under it. Any one purchasing at such a sale has explicit notice, from the absence of the statutory requirements, that the instrument has no efficacy as against creditors. He knows that he can only purchase subject to the right of any creditor then existing who chooses to take the proper steps to follow the goods.

In practice, the risks faced by the purchaser are greater than the court cared to admit. The court supposed the would-be purchaser at a secured creditor's sale will search the records and thus will discover whether the security was properly registered. As a matter of ordinary business practice, unless a creditor or some other person raises objections to the sale, purchasers are unlikely to search. Furthermore, in *Barker v. Leeson* the security was not registered at all, so the task of searching the registry was not too difficult to accomplish. Often it is very much more complicated. Since many of the chattel security statutes set out detailed registration requirements which are easy to run afoul of, would-be purchasers will

⁴⁴ *Supra*, footnote 9.

⁴⁵ *Supra*, footnote 1, at pp. 136 (S.C.R.), 9 (D.L.R.), 266 (N.R.).

⁴⁶ *Supra*, footnote 37.

⁴⁷ *Supra*, footnote 1, at pp. 134 (S.C.R.), 8 (D.L.R.), 265 (N.R.).

⁴⁸ *Supra*, footnote 37, at pp. 117-118.

have to be very careful indeed. Creditors may be able to set aside a security interest which, on first glance, appears to be properly registered.

The risk of upset to the good faith purchaser has been sufficient reason by itself to persuade courts to interpret "void" as voidable. It was the main reason relied on by the Ontario Court of Appeal in *Shelly Films*:⁴⁹

There is ample authority for construing the words "null and void" in the *Bills of Sale and Chattel Mortgages Act* as "voidable", the reason being found in the policy of the Court that the *bona fide* purchaser for value without notice shall receive protection. If the conveyance to such a purchaser is to be valid it must follow that the mortgagee whose title had not been questioned prior to that time had a valid interest to convey at the time of sale.

Since the Supreme Court overruled *Shelly Films*, it impliedly disapproved its reasons also. The question of the *bona fide* purchaser's entitlement in the face of attacking creditors was not pursued in *First Pioneer*,⁵⁰ so renewed uncertainty would seem to be the result. The court's holding that First Pioneer's security interest was valid against Rent-A-Bug directly conflicts with its immediately subsequent holdings that the unregistered debenture created no security interest and First Pioneer was only an unsecured creditor.⁵¹ These opinions are not a foundation on which to establish a totally novel exception to so formidable a legal principle as *nemo dat*. Since the court will permit the creditors to chase the proceeds of sale in the hands of the secured party, perhaps it would allow them to follow the property itself, so far as the rules of identification and tracing will permit.

First Pioneer was concerned with a lack of registration, but it also has implications for the related situations of defective registration and renewal of registration. A defectively registered security is usually thought to be no better than an unregistered one.⁵² A failure to comply fully with the technical requirements of the particular chattel registration act renders the attempted security interest "void" against creditors, or so it seemed previously. However, the Supreme Court placed emphasis on "a perception of registration as serving the wider purpose of enabling parties deal-

⁴⁹ *Supra*, footnote 8, at pp. 473 (D.L.R.), 435 (O.R.).

⁵⁰ The reader of *First Pioneer* might think that this matter was taken care of by the Bankruptcy Act which contains a provision that addresses it by way of an exception to the *nemo dat* principle; R.S.C. 1970, c. B-3, s. 76(3). In her opening sentence Wilson J. referred to Rent-A-Bug as "a bankrupt company"; *supra*, footnote 1, at pp. 126 (S.C.R.), 2 (D.L.R.), 256 (N.R.). This statement, however, is another instance of the court's less than precise use of language. Rent-A-Bug was not petitioned into bankruptcy and the Bankruptcy Act did not apply to this case.

⁵¹ *Supra*, footnote 1, at pp. 136 (S.C.R.), 9 (D.L.R.), 266-267 (N.R.).

⁵² *E.g.*, *Trustee in Bankruptcy of Kendrew and Kendrew v. A.B. Cushing Mills Ltd.*, [1946] 3 W.W.R. 571, (1946), 27 C.B.R. 272 (Alta. App. Div.); *Re Crichton Enterprises Ltd.* (1980), 38 N.S.R. (2d) 348, at p. 353 (N.S.S.C.).

ing with the debtor to determine conclusively what security interests in the debtor's assets are in existence before advancing credit".⁵³ What, then, is the position of a creditor who searched the registry before advancing a loan to the debtor and thereby discovered an extensive but imperfectly registered security interest? Is the security interest still "void" against the creditor, or does his actual knowledge of its existence defeat his right? These questions may also be asked about the position of the creditor who by some other means acquires actual knowledge of the existence of an unregistered registered security.

The Corporation Securities Registration Act and most other chattel security acts⁵⁴ make no express reference to the state of a creditor's knowledge about prior security agreements, unlike the other classes of persons protected by these acts. A subsequent purchaser or mortgagee must be without notice of the previous unregistered security interest at the time of his own transaction if he wants to rely on the statute to defeat it.⁵⁵ The absence of this qualifying requirement for creditors has been enough for courts to draw the negative inference that knowledge of the security interest is no bar to their statutory claims.⁵⁶ But the Supreme Court in *First Pioneer* relied on its perception of the function of registration to reach its conclusion that the unregistered, and thus undiscoverable, debenture interest was void against the creditors. Is it to be inferred as a consequence that informed creditors are not able to avail themselves of the protection of the registration acts? The court's reasoning in *First Pioneer* seems to grant a new prestige to this possible alternative interpretation.

A registered security interest often "ceases to be valid" after a number of years unless its registration is renewed.⁵⁷ In cases concerning such a provision, courts have had to determine whether the consequence of non-renewal is that the security interest is void or voidable. The most common response has been to treat the security interest as voidable,⁵⁸ but

⁵³ *Supra*, footnote 1, at pp. 135 (S.C.R.), 8-9 (D.L.R.), 266 (N.R.).

⁵⁴ Not so the Nova Scotia Conditional Sales Act, R.S.N.S. 1967, c. 48, s. 2(1).

⁵⁵ *Supra*, footnote 5. See also: Corporations Securities Registration Act, R.S.N.S. 1967, c. 60, s. 2; Business Corporations Act, S.A. 1981, c. B-15, s. 88.2; Bills of Sale Act, R.S.N.S. 1967, c. 23, s. 2; Bills of Sale Act, R.S.N.B. 1973, c. B-3, s. 3; Bills of Sale Act, R.S.A. 1980, c. B-5, s. 2; Conditional Sales Act, R.S.N.S. 1967, c. 48, s. 2; Conditional Sales Act, R.S.N.B. 1973, c. C-15, s. 2.

⁵⁶ *E.g., Re Crichton Enterprises Ltd. supra*, footnote 53; *Clarkson Co. Ltd. v. Muir* (1982), 53 N.S.R. (2d) 609, 41 C.B.R. 309 (N.S.App. Div.).

⁵⁷ This is not the case under the C.S.R.A. but it is under the chattel mortgage and conditional sales legislation. See, for example, Bills of Sale Act, R.S.N.S. 1967, c. 23, s. 10, as amended by S.N.S. 1983, c. 18, s. 1; Conditional Sales Act, R.S.N.S. 1967, c. 48, s. 11, as amended by S.N.S. 1983, c. 20, s. 3; Bills of Sales Act, R.S.A. 1980, c. B-5, s. 11.

⁵⁸ See *John Forsyth Co. Ltd. v. Thorburn* (1963), 42 D.L.R. (2d) 692, [1964] 1 O.R. 450 (Ont. H.C.).

since the cases have usually relied on *Shelly Films*, which was overturned in *First Pioneer*, they have also now been cast in doubt. A voidable transaction seemed the preferable result, since the alternative of declaring void *ab initio* what was evidently a valid security during its registered existence smacked of paradox, if not impossibility. What is to be made of the phrase "ceases to be valid" after the decision in *First Pioneer*? Should the security interest be treated as valid for the duration of the registration but void thereafter? If so, which creditors may defeat the secured creditor, all of them or only those who made advances after the period of registration ran out? The Supreme Court supplied no clues about how to cope with these problems.

The judgment of the Supreme Court in *First Pioneer* seems to evince a desire to protect the unsecured creditors. This sentiment is understandable. One clear enough purpose of the ill-drafted chattel registration acts is to declare unregistered security interests invalid so as to preserve the property for the unsecured creditors of the common debtor. The typical image of a claim by unsecured creditors against the secured creditor as akin to a battle between David and Goliath is likely to encourage the sympathy of any court for the general creditors. The trouble in this case is that these considerations are inadequate justifications for the consequences which appear to follow from the court's reasons.

The chattel registration acts do not only affect persons who contract with the debtor; they also involve parties who deal with the secured creditor. The *bona fide* purchaser from the secured creditor is entitled, as much as the unsecured creditors, to protection of his interest in the goods. Much commercial law is concerned to preserve the expectations of innocent purchasers. Equity would also support the purchaser against indolent or indulgent creditors who failed to take their chance to intervene before the goods were sold. In *First Pioneer* especially, the principal creditors were not ignorant outsiders; they were the bank, which preferred to call in its guarantee, and the guarantor, who was a principal of *First Pioneer*.⁵⁹ The merits of these conflicts of interest which grow out of the unfortunate wording of the chattel registration acts were not addressed by the court.

Looking beyond the legal opinions of the Supreme Court, the ultimate result may, from one view, exhibit a measure of equity between the parties. The purchaser of the assets from the secured creditor, *First Pioneer*, was not disturbed and, perhaps, should be supposed to have received good title to them. *First Pioneer* itself was made to account for the

⁵⁹ It may be that the Supreme Court felt some sympathy for the guarantor who was the person most clearly prejudiced by the results of the decisions at trial and in the Court of Appeal. He may have had no choice but to stand by while the bank failed to attack the unregistered debenture and then turned to its guarantee to protect itself. One can join in the court's sympathy but the decision in *First Pioneer* is not the proper remedy for creditors' abuse of guarantors.

proceeds of this sale to the unsecured creditors for failing to comply with the Corporation Securities Registration Act. Thus First Pioneer was prevented from benefitting from its own misconduct, but the innocent purchaser from it was protected.

If this is the intended interpretation of the decision, the result presents a sense of fairness between the innocent parties,⁶⁰ at the same time as it gives substantial effect to the apparent objectives of the chattel registration acts. The purchaser from the secured party may keep the property while the unsecured creditors acquire its value towards satisfaction of their debts. The only trouble is the legal analysis of the Supreme Court in *First Pioneer* prohibits this result. While it might have been reached by an elaboration or extension of the voidable interpretation used by previous courts,⁶¹ it cannot be achieved under a principle that the secured transaction is void. The agency argument might eliminate this problem in some cases, but it will not always be available.

The irony of *First Pioneer* is that the whole matter is about to disappear in Ontario where the case arose. The Minister's Advisory Committee⁶² has recommended that the Corporation Securities Registration Act be repealed and all corporate security interests be filed henceforth under Ontario's Personal Property Security Act. The storm of uncertainty created by this decision may, therefore, subside quietly at its epicentre while its shock waves go echoing loud and long in the law down East and out West.

HUGH M. KINDRED*
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⁶⁰ The same sense of fairness is not universally shared. There are considerations in favour of the secured creditor. As Burton J.A. observed in *Meriden*, *supra*, footnote 11, at pp. 354-355:

Whether the . . . legislation placing cases like the present where no fraud is alleged (but the security taken for a just debt is open to some technical objection) upon the same footing as suits brought to relieve against fraud is well advised, may be open to question, but there would seem to be no good reason for facilitating the proceedings of creditors to set aside a mortgage honestly given for a just debt—robbing Peter to pay Paul.

⁶¹ Such an interpretation would undoubtedly have enlarged the consequences of a voidable transaction. No court has granted such a remedy before, it seems, in the absence of fraud: see text at footnote 13. Moreover, apart from the lack of registration, there was no fraud by First Pioneer; see text following footnote 18.

⁶² Report of the Minister's Advisory Committee on the Personal Property Security Act, Ministry of Consumer and Commercial Relations, Ontario (1984), pp. 3, 26.

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