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THE ADVOCATE TRAINING PROGRAMME

COMMERCIAL TRANSACTIONS

THE LAW OF CHATTELS TRANSFER

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INTRODUCTION

- Every lender desires to obtain as good a security as he possibly can for his loan.
- **Personal remedy** against the borrower is often considered inadequate, for a person advancing money upon mortgage requires something better than this.
- The lender is entitled to some *jus in rem*, literally, the right against the world at large, or some right in certain specific things.
- This is in addition to the mere *jus in personam* or right against a specific person, that the mortgagor's vows, promises or covenants will give him.

Introduction...*contd.*

- This led to a call for legislation to make provision for chattel securities and the transfers thereof.
- Such legislation would be one to protect lenders against losing their money to unscrupulous borrowers.
- Legislation would facilitate loans on the security of chattels by giving a lender, who registers his instrument, a high degree of protection.

Introduction...*contd.*

- The Chattels Transfer Ordinance, now the Chattels Transfer Act, Chapter 28, Laws of Kenya was enacted in 1930
- It came into operation in Kenya on 13th June 1930.
- The CTA is the Kenyan equivalent of the English Bills of Sale Acts but is largely modelled upon the New Zealand Chattels Transfer Act of 1924.

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Introduction...contd.

In the National Assembly the reason for the Bill was given:

- "The confident hope of Government is that the provisions of this Bill will enable credit to flow more rapidly and in greater quantities than it does at present from the ordinary banking and commercial channels". See Kenya Legislative Council Debates (1930) Vol. I



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Introduction...contd

Later, in Court, Worley, V.P of the Court of Appeal for Eastern Africa in *Dyal Singh -v- Kenyan Insurance Ltd* (1955) 22 EACA 22, referring to the Kenya & New Zealand as "young communities, mainly agricultural and rapidly developing" stated that it was "common to find classes of settlers, farmers, traders and others who are short of working capital and from time to time need to obtain loans to tide them over till the next harvest is in and the cash crops sold, but they have little security to offer except their stock, their machinery or their growing crops": see page 14.



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Introduction...contd

Worley further stated : "Lenders however are reluctant to advance money at reasonable rates on chattels and I think that it is clear that one of the main purposes of the Ordinance was to facilitate loans on the security of chattels by giving a lender, who registers his instrument, a very high degree of protection", p. 14.



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Introduction...contd

- A contemporary newspaper article in the East African Standard, Saturday 7th June 1930, (6 days before the Bill became operational) said, in part, that it was "evident that there was a widespread desire on the part of the farming community for legislation to allow farmers to raise money from their crops and stocks by creating a charge thereon".



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DEFINITION OF CHATTELS

There are three different meanings to the word "chattel":

(a) A movable physical object, e.g. a horse, a book or a shilling as contrasted with a piece of land.

(b) Movable property, whether corporeal or incorporeal; that is to say, chattels in the sense above plus all proprietary rights except those which are classed as immovable.

In (b), debts, shares, contracts and other choses in action are chattels, no less than furniture or stock-in-trade, as are patents, copyrights and other rights *in rem* which are not rights over land.

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Definition of chattels...contd.

(c) Personal property, whether movable or immovable, as opposed to real property.

In this sense, (c), leaseholds are classified as chattels, because of the special rule by which they are excluded from the domain of real property.

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Definition of chattels...contd.

In Kenya, the meaning of the word "chattel" is limited to the first two, (a) and (b), senses. For example, a lease of land in Kenya is immovable property.

The concept of *chattels real* is unknown here.

The Act defines "chattels" as **any movable property that can be completely transferred by delivery.**

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Definition of chattels...contd

- Chattels present peculiar problems of their own.
- Motor vehicles are the most usual form of chattels to be offered as security for loans.
- However, a vehicle may quickly and easily be stolen never to be traced again: See e.g. *Express Finance Limited v Joseph Muisyo Nzioka, HCCC 2680 of 1996*, where the court could only make an order for recovery of the loan as the motor vehicle had already disappeared.

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TYPES OF CHATTELS

By statute, the following are included in the definition of chattels:

- (a) machinery;
- (b) stock and the natural increase of stock (sheep, cattle, horses, pigs, poultry and any other living animals);
- (c) all crops (including grass for hay or grain) grown above or below the ground; and
- (d) wool.



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CHATTELS EXCLUDED

Specifically the following are excluded from the definition of chattels:

- (a) title deeds, choses in action or negotiable instruments; or
- (b) shares and interests in the capital or property of any company or other corporate body; or
- (c) shares and interests in the stock, funds or securities of any government or local authority; or
- (d) debentures and interest coupons issued by any government or local authority or company or other corporate body.



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HOUSES AS CHATTELS

- Under the English legal system, a building or a house is deemed to be part of the land and can never be a chattel.
- In Kenya, there are a number of old court decisions which hold that in certain circumstances a house could be a chattel.
- E.g. in *Suliman Virji & Sons -v- Kassam Amersi* (9122) 9 E.A.L.R 33, the court held that where the defendant had the right to remove the building from the land, such a building was chattel.



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Houses as chattels (*Suliman Virji* case) ..contd.

- The court had to consider the legal position of a building which was situated on land held by the defendant under a tenancy agreement, her landlord holding the land under a Crown lease.
- The house consisted of a building of corrugated iron walls and roof erected on a stone plinth. "The corrugated iron sheets are nailed together, the walls resting on the plinth; there are wooden posts used as support for the roof which are cemented into the plinth", per Sheridan J.



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Houses as chattels...contd

- The house had been included in a bill of sale which was consequently held to be valid and the grantee had the right to seize and sell the house.
- The *Sulimani Virji* case was decided before the passing of the CTA, but the court, in the 1935 case of *Jamal Sunderji Mitha v Halima Binti Taufic*, 16 KLR 89, came to the same conclusion when Horne, J. had to consider a *wakf* of a house without the land on which it stood.

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Houses as chattels...contd

He said:

"Ordinarily it is difficult to regard a house as a chattel but a building worth only Shs. 200/=, like temporary buildings or wood and iron buildings bolted down to concrete blocks or resting on them, may quite easily be transferable completely by delivery and thus fall within the definition of "chattel" in the Chattels Transfer Ordinance.

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Houses as chattels... contd.

For an article to be a chattel within the meaning of the CTA it must fulfill two requirements:

1. It must be capable of being manually transferred from one place to another; and
2. Its identify must remain unaffected by such transfer.

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Houses as chattels... contd.

- The first requirement excludes any possibility of symbolic or "constructive" delivery being permissible and thus makes it impossible for any large or bulky object to be a chattel within the definition
- The second requirement was considered by Bourke J. in the case of *Saleh -v- Eljofri & Another* 24 KLR 17, when he referred to the fact that demolition of the house would mean that "the whole character of the thing would be gone".

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Houses as chattels... *contd.*

He said,

"...Consider a trailer on its wheels, this is a chattel within the scope of the CTA but if its wheels were to be removed it would be almost impossible for it to be transferred manually by delivery. It would be necessary to dismantle it and later reassemble the pieces after they have been separately delivered. In such circumstances the trailer is arguably not capable of being "completely transferred by delivery" and accordingly outside the provisions of the CTA. This appears to be an absurdity which arises from the faulty definition of the word "chattels"..."

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Houses as chattels.. *contd.*

Therefore if the two requirements suggested above are correct, then it would follow that the decisions of the Court in *Jamal Sunderji Mitha -v- Halima Binti Taufic (1935)* and *Saleh -v- Eljofri & Another (1950)* were wrong.

The court seems to have followed as precedent the holding in *Suliman Virji & Sons -v- Kassam Amersi (1922)* which was decided on the provisions of the English Bills of Sale Act

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DEFINITION OF INSTRUMENT

The word "instrument" is defined in the Act, to mean "any instrument" given to secure the payment of money or the performance of some obligation.

It is used in its ordinary conventional sense, that is, as a deed or other formal written legal document.

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TYPES OF INSTRUMENTS

An instrument under the Act includes-

- any bill of sale (an assignment of chattels personal under seal);
- mortgage;
- lien; or
- any other document that **transfers or purports to transfer** the property in or right to the possession of chattels.

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Types of instruments...*contd.*

Such transfer may be permanent or temporary.

It may be absolute or conditional.

It may also be by way of sale, security, pledge, gift, settlement or lease.

NB: In Kenya, the usual kinds of instruments are the chattels mortgage, letters of hypothecation, pledges, liens, powers of attorney and bills of sale.

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Types of instruments...*contd.***Mortgage**

- A *chattel mortgage* is an instrument by which the owner conveys conditional title to personal property to secure the payment of a debt or the performance of a contract or other obligation.
- It is a pledge that the debt will be paid. Any personal property that may be sold may be mortgaged, such as automobiles, livestock, machinery, farm implements, life-insurance policies, corporation stock, and crops.

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Types of instruments (mortgage)...*contd.*

- The *mortgagor* is the person who conveys the property. *Owner*
- The *mortgagee* is the person to whom the transfer is made. *Receiver*
- The chattels mortgage is effected by the creation or transfer of a legal or equitable interest in property.

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Types of instruments...*contd.***Hypothecation**

Under hypothecation, goods are availed as security for a debt without transferring either the property or the possession to the lender.

Debtor retains ownership but creditor gets right *in rem* which entitles him to deal with the goods in the manner stated in the letter of hypothecation in the debt is not repaid.

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Types of instruments...*contd.*

Pledge

- A pledge involves the transfer of possession, but not the ownership of a chattel as security for the payment of a debt or the performance of an obligation.
- The chattel or goods or documents of title for the chattel or goods are delivered by the pledgor to the pledgee to be held as security upon understanding that the goods will be restored to the pledgor upon payment of debt/discharge of obligation.
- If the pledgor fails to pay or perform as agreed, then the chattel or the goods may be sold.

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Types of instruments...*contd.*

Lien

- The right to hold the property of another person as security for the performance of an obligation is known as a lien
- With respect to personalty, a lien is the right of a creditor or bailee to retain the possession of a chattel previously delivered to him or otherwise entrusted to him until his claim upon it is satisfied.
- At common law a lien lasts only so long as the creditor or bailee retains possession of the chattel or goods.
- However, there may exist an equitable lien on chattels which are not in his possession at the time the obligation arises, that is, independently of possession.

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Types of instruments...*contd.*

Power of Attorney

- See definition below.
- It may also be given to authorize or license another person to take possession of chattels as security for any debt.

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Types of instruments...*contd.*

Bill of Sale

- Under the Act, an instrument is defined as including a bill of sale.
- In the United Kingdom, a bill of sale was a **document intended to give effect to the grant of chattels where the possession remained unchanged.**
- Under the Bill of Sale Act (UK) such instruments are of two kinds:

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Types of instruments (bills of sale)...*contd.*

- a) absolute bills of sale where chattels are sold absolutely; and
- b) bills of sale by way of security for securing loans.

In spite of the express reference to this kind of document in our statutes, it is not known or used in Kenya.

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OTHER DOCUMENTS DEEMED TO BE INSTRUMENTS

- The following which are not capable of being drawn to accord with the statutory form of instrument (Form No. 4, First Schedule, section 22) are also deemed to be instruments within the meaning of the Act.
 - (i) Inventories of chattels to which a receipt is attached;
 - (ii) Receipts for purchase-money of chattels;

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Documents deemed to be instruments ... *contd.*

(iii) Other assurances of chattels

This phrase seems to be in reference to the first two documents, (a) and (b) and should be construed *ejusdem generis* with the words therein.

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Documents deemed to be instruments .. *contd.*

(iv) Declarations of trust without transfer;

In relation to goods, this is a statement by one party that he holds the goods in trust for another. The beneficial ownership of the goods passes to the designated beneficiary, while the legal title remains in the trustee.

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Documents deemed to be instruments ...
contd.

(v) Powers of attorney

(authorities or licences to take possession of chattels as security for any debt)

- A power of attorney is a formal instrument by which one person gives authority to another to represent him or to act in his stead, usually in his absence, for certain purposes.
- The giver, the donor or principal or constituent, confers on another, the donee, power to act on behalf of the donor in the performance of a specified act or classes of acts generally.

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Documents deemed to be instruments (p/a) ... *contd.*

- Under this heading such a power of attorney will only constitute an instrument if it confers the power to take possession of chattels as security for a debt.
- The power may be conferred directly or indirectly.

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Documents deemed to be instruments ... *contd.*

- (vi) Any agreement by which a right in equity to any chattels or to any charge or security thereon or there-over is conferred.

Such an agreement will be void if not registered or if it does not comply with the statutory form: See section 2 of the Act.

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DOCUMENTS EXCLUDED

The Chattels Transfer Act specifically excludes the following from the definition of instruments:

- (a) securities over, or leases of, mortgaged, charged or leased fixtures;
- (b) assignment for the benefit of creditors of the person making them; or
- (c) assignments of or share in any ship or vessel; or
- (d) transfers of or share in any ship or vessel;

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Documents excluded... *contd.*

- (e) transfer of or agreement to transfer instruments by way of security;
- (f) transfers of chattels in the ordinary course of business of any trade or calling;
- (g) debentures and interest coupons issued by any government or local authority;
- (h) bills of sale of chattels in any foreign parts or at sea;

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Documents excluded... *contd.*

- (i) bills of lading, warehouse keepers' certificates, warrants or orders for the delivery of chattels, entries in auctioneers' books or *any other document used in the ordinary course of business as proof of the possession or control of chattels or authorizing the possessor of the document to transfer or receive the chattels thereby presented;*
- (j) debentures and interest coupons issued by any company or other corporate body and secured upon the capital stock or chattels of that company or corporate body;

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