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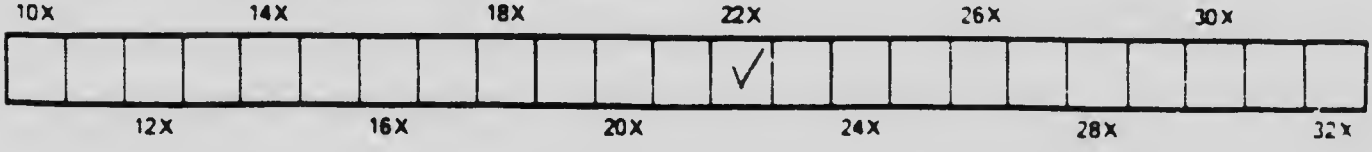


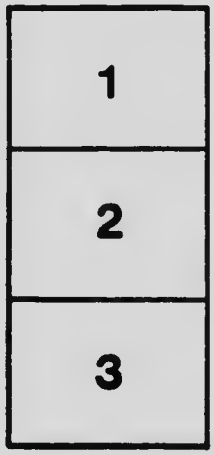


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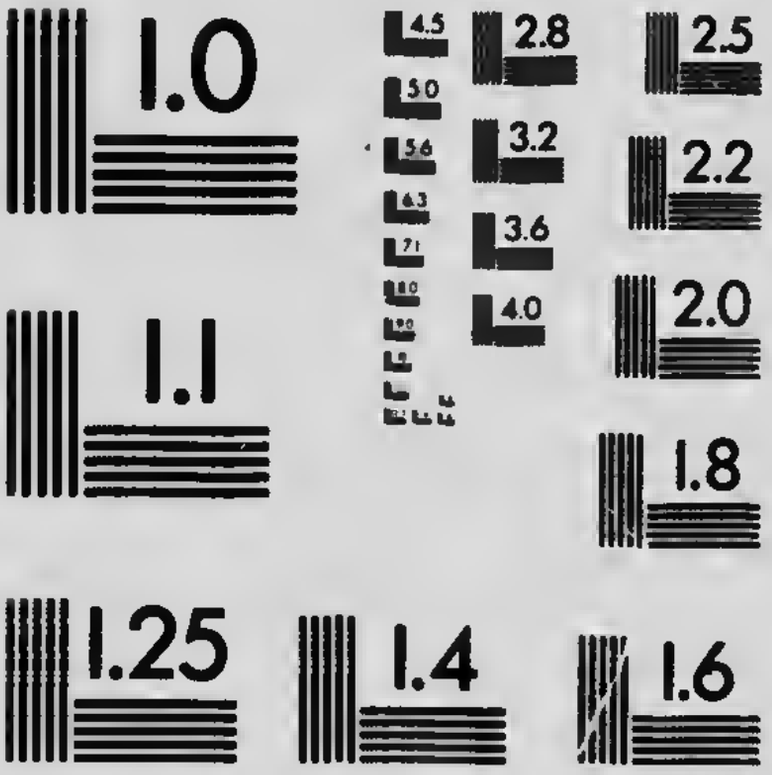


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# Conditional Sales Acts

BEING AN

## ANNOTATION

OF THE

## Act Respecting Conditional Sales of Chattels

(R. S. O. (1897) Cap. 149)

AND AMENDMENTS THERETO

TO WHICH IS APPENDED A COMPLETE SET OF

## FORMS

BY

JOHN AUGUSTUS BARRON, K.C.

(Judge of the County Court of the County of Perth)

AUTHOR OF

"Barron on Bills of Sale and Chattel Mortgages"

---

**SECOND EDITION**

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TORONTO:
THE CARSWELL COMPANY, LIMITED
1907

Entered , ccording to the Act of the Parliament of Canada, in the year one thousand nine hundred and seven, by THE CARSWELL CO., LIMITED, in the Office of the Minister of Agriculture.

TORONTO
PRINTED BY THE CARSWELL CO. LIMITED
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# PREFACE TO FIRST EDITION.

The idea of compiling this little work was suggested to me from a knowledge that in the vast majority of cases, when the [illegible]on was a business one, the vendor of a chattel [illegible]voided a compliance with the Bills of Sale and [illegible]rtgage Acts by retaining in himself the property [illegible]e chattel until payment therefor by the vendee. The result of this practice in many instances has proved most disastrous to innocent persons, and the passage of the Statute, endeavoured to be annotated, must be hailed with delight, for in a measure at all events it will afford some little protection to the public, of whom there are many too apt to assume from the circumstances of a man's possessions that he is financially that which in reality he is not.

In the hope, then, that my efforts may be of some use and of some benefit, not alone to the profession but to the business men and manufacturers, I present to the public my many days' labour in the shape of this work.

J. A. B.

Lindsay, Dec. 19th, 1889.

# PREFACE TO SECOND EDITION.

Since the first edition of my annotation of the Statutes relating to Conditional Sales was issued, now several years ago, the use in business of this form of transaction has largely increased, and as a result many cases have since then been decided, in some instances changing the law, and in some cases modifying it. I venture to think that it is not too soon to offer the profession a second edition, which I trust will be found useful to them, at least as a work of reference.

J. A. B.

Stratford, April 5th, 1907.

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*"Better to safeguard commercial morality it would be expedient to make provision for giving publicity by registration to dealings such as this. The effect of the transaction (though it may not be contrary to law) is to protect the credit of a trader who is get heavily weighted with undisclosed obligations. Grave suspicions must always arise in the minds of creditors whose claims are superseded by some instrument of peculiar character, produced at a period of crisis, by which all the assets of their debtor are secured to a near relative."- Sir John Boyd, C., Banks v. Robinson, 15 O. R. 624.*

# AN ACT RESPECTING

# CONDITIONAL SALES OF CHATTELS.

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## REVISED STATUTES OF ONTARIO (1897), CHAP. 149.

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

**1.** (1) Receipt notes, hire receipts, and orders (2) for chattels (3) given by (4) bailees (5) of chattels, where the condition (6) of the bailment (7) is such that the possession of the chattel passes (8) without any ownership therein being acquired (9) by the bailee until the payment of the purchase or consideration money, or some stipulated part thereof, (10) shall only be valid as against (11) subsequent purchasers or mortgagees without notice in good faith (12) for valuable consideration (13) in the case of manufactured goods or chattels, (14) which, at the time (15) possession is given to the bailee, have the name (15*a*) and address of the manufacturer, bailor, or vendor of the same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto, and no such bailment (16) shall be valid (17) as against such subsequent purchaser or mortgagee as aforesaid, (18) unless it is evidenced in writing, (19) signed (20) by the bailee or his agent. (21)

(1) Possession of personal property in one person is quite consistent with actual ownership in another, and this statute, as well as the Act relating to Bills of Sale and Chattel Mortgages. (*a*) are designed to protect the public against the mischievous consequences of apparent ownership in property, when the actual ownership is non-existing. There is, however, a plain and simple distinction

(*a*) R. S. O. cap. 148.

between the two statutes. Both afford facilities for acquiring information, and both insist upon the adoption of a certain course as a means of protection, but the one statute (the present one) is pointed at cases wherein the possession changes and not the ownership, the other statute (*b*) at cases wherein the ownership changes and not the possession, and the principle of construction of this class of Acts is that however salutary they may be, inasmuch as they have the effect of taking away rights of property honestly acquired, they must be construed strictly (*c*).

"Where the buyer is by the contract bound to do anything as a condition either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." (*d*)

So far as the present statute is concerned, this general definition is sufficient, but there are many classes of conditional sales, in some of which the distinction between Conditional Sale Agreements and Chattel Mortgages is both narrow and perplexing. For example, the case of a sale of a chattel, when a right is reserved to the grantor or vendor to redeem or repurchase at a fixed price, within a stipulated time. In such instances, the best test is whether or not the relationship of debtor and creditor is terminated. If it is, and the grantor is entitled to repurchase, the transaction is a conditional sale; if the debt still exists it is a mortgage. It therefore will be seen that the intention of the parties is to be reached, (*e*) and this intention determines whether the sale is absolute or conditional, and is to be gathered from the terms of the contract and the circumstances of the case. A

(*b*) R. S. O. cap. 148.

(*c*) *Brantom* v. *Griffits*, L. R. 1 C. P. D. 356; *Mason* v. *Lindsay*, L. R. 4 Ont. 365.

(*d*) Benjamin on Sales, 270; *Turley* v. *Bates* (1863), 2 H. & L. 200, 33 L. J. Exch. 43; *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438; *Martineau* v. *Kitching* (1872), L. R. 7 Q. B. 436; *Castle* v. *Playford* (1872), L. R. 7 Exch. 98.

(*e*) Strong, J., *Forrestal* v. *McDonald*, 9 Can. S. C. R. at p. 16; *Wilson* v. *Shaver*, L. R. 3 Ont. 110.

conflict thus arises, which can only be settled by a consideration of the peculiar circumstances of each case, looking at the attending circumstances, and construing the terms of the written contract. The terms of the contract shall be applied to known usage, and the intention must be manifested at the time the bargain is made. (*f*) But the intention must be gathered from the whole transaction, and not from any particular feature of it. (*g*) The legal and equitable rights of the parties must be determined as, at, and from the time the chattels are delivered from vendor to vendee, and the latter gives or enters into the consideration. (*h*) The character of the transaction is fixed at its inception, and nothing short of a new agreement can alter the original nature of the contract; (*i*) and therefore when a lien note is signed some months after the sale and delivery of the chattel for which the note is given, the lien clause is held to be inoperative so far as the chattel is concerned. (*j*) Such a lien might be treated as a chattel mortgage, in which case the lien would, of course, be subject to the Act relating to chattel mortgages. (*j*[1]) When the intention is not clearly expressed in the written instrument, and this is not the whole contract of the parties, parol evidence is then admissible to shew what the oral agreement is, and, in all cases of doubt, the inclination of the Courts is to construe the transaction as a mortgage, rather than as a conditional sale, on the ground that to do so must necessarily be less harmful than to do the reverse. (*k*). But when the circumstances indicate that the parties intended an absolute sale, an absolute sale it will be, notwithstanding it is agreed that the title to the chattel is to remain in the vendor until the performance of some con-

(*f*) *Foster* v. *Ropes*, 111 Mass. 10.

(*g*) Benjamin on Sales, 548 *et seq.*: Jones on Mortgages, § 258: *Seath* v. *Moore* (1886), 11 App. Cases 350, 370.

(*h*) Maclennan, J.A., *Sawyer* v. *Pringle*, 18 Ont. A. R. at p. 234.

(*i*) Jones on Mortgages, 263.

(*j*) *Gallant* v. *Mellett*, C. C. Kings County, P. E. I., 18 C. L. Times Occ. Notes 199.

(*j*[1]) *Cox* v. *Schack*, 22 Occ. N. 188, 14 Man. L. R. 174.

(*k*) Jones on Mortgages, § 258.

dition, (*l*) and the burthen of proof will rest upon the party alleging a sale to prove either an absolute sale or a sale upon a condition which has been performed. (*m*) The earlier Act (*n*) came into force on the first of January, 1889, including that day, and to the extent of sec. 10 of the present Act, this Act might be read into the earlier Act, for sec. 10 is declared to be retroactive and to apply to past as well as to future transactions.

(2) Not any of the transactions denoted by these forms of instruments amount, technically speaking, to a conditional sale. The marginal reference in the statute leads to the supposition that all cases of conditional sales were in the contemplation of the Legislature, yet such cannot have been the real intention of our law-makers, because the transactions aimed at are those only wherein the title or ownership does not pass, but possession does, and that too under a contract of purchase, for if a bailee of an article has possession of it, as hirer at a certain rent, his possession is that of hirer and it matters not that the article eventually becomes his, when all his rentals are paid. (*n*¹) In some instances of conditional sales both ownership and possession passes, the condition consisting in the right of re-purchase within a specified time without continuing or creating any liability on the part of the vendor. (*o*) Thus, for example, where a vendor in a bill of sale extinguishes his debt to the vendee by a bill of sale, but the privilege is accorded to the vendor of repurchasing within a given time, the transaction is a conditional sale; (*p*) and where the privilege of repurchase consists merely of a verbal agreement by the creditor to resell on the debtors fulfilling certain conditions, makes the transaction a

(*l*) *Craig* v. *Beardmore*, L. R. 7 Ont. 674: *Talbot* v. *Sandilfer*, 27 S. Car. 624: *Kimberly* v. *Patching*, 19 N. Y. 330; *Aultman* v. *Silha*, 85 Wis. 359.

(*m*) *Sawyer* v. *Spafford*, 4 Cush. (Mass.) 598.

(*n*) 51 Vic. cap. 19, Ontario, s. 9.

(*n*¹) *Mason* v. *Lindsay*, L. R. 4 Ont. 373.

(*o*) Jones on Chattel Mortgages, § 26.

(*p*) *Eiland* v. *Radford*, 58 Ala. 37: *Harrison* v. *Lee*, 1 Litt. (Ky.), 191: *Magee* v. *Catching*, 83 Miss. 672.

conditional sale. (*q*) This kind of contract confers no title in the debtors, but creates an obligation on the part of the creditor, which may be enforced by an action to compel specific performance, or for the recovery of damages. (*r*) To no transactions of this nature does the Act apply, nor yet to sales to arrive, known to trade and commerce, which are conditional sales; nor to hire of goods under an agreement to return the same. (*s*). Nor to a transaction in which the bailee is not bound to purchase the chattel in his possession, or in which he has merely the option to purchase, which option he has failed to exercise. (*s*[1]) The obligation to sell and the obligation to buy must be mutual. (*s*[2]) Nor again does the Act apply to a consignment of goods, when the sale is for the benefit of the consignor, for then the contract is one of agency simply; but such might become a conditional sale, when the goods are to be sold by the consignee on his own account, the owner reserving the title in them until the purchase money is paid. (*t*) Nor to a sale by sample, nor to a sale by description, nor to a sale on trial, nor to a sale to arrive, nor to a sale or return, nor to a transaction in which the possession changes but there is no sale. (*u*) Nor to a transaction amounting to a license on vendee's part to vendor to resume possession on default. (*v*) In truth the transaction aimed at by the statute is not, accurately speaking, a contract of sale. It could be more properly called a partial contract of sale. By the French law the condition is a "good suspensive condition," and one which entitles the vendor, if he tenders and offers to repay the portion of the price he has received, to judgment in an

(*q*) *Lamond* v. *Davall*, 9 Q. B. 1030; *Coe* v. *Cassidy*, 6 Daly (N.Y.) 242; *Pierce* v. *Scott*, 37 Ark. 308.

(*r*) *Knox* v. *Payne*, 13 La. Am. 361.

(*s*) *Grant* v. *Armour*, 25 O. R. 7.

(*s*[1]) *Mason* v. *Lindsay*, L. R. 4 Ont. 365.

(*s*[2]) *Helby* v. *Matthews* (1895), A. C. 471; *Lee* v. *Butler* (1893), 2 Q. B. 318.

(*t*) *Ex. p. White*, L. R. 6 Ch. 397; *Renoe* v. *Western Star Milling Co.*, 53 Kan. 255; *Langley* v. *Kahnert*, L. R. 9 Ont. 164.

(*u*) *Bush* v. *Fry*, 15 Ont. R. 122; *Mason* v. *Lindsay*, L. R. 4 Ont. 365.

(*v*) Cameron, J., *Polson* v. *DeGur*, 12 Ont. R. at p. 280.

action of revendication. ($v^1$). It is probably an executory agreement for a future sale on the performance of a certain condition by the vendee, the condition under the statute being the payment of the purchase or consideration money, or some stipulated part thereof. ($w$). Yet again an executory agreement, to be technically accurate, is scarcely the definition. An executory contract is absolutely to sell at a future time, and a conditional contract is conditionally to sell. In the one case, the performance of the contract is suspended and transferred to a future time, in the other case the very existence and performance of the contract depend upon a contingency. ($x$). Another distinction sometimes shewn is that in the case of a conditional sale, the interest of the vendee is exigible under execution, while in the case of an executory conditional agreement for the purchase of property it is not exigible, nor can it be transferred to *bona fide* purchasers as in the case of conditional sales. ($y$) The section does not apply unless the instrument is one by which the person into whose possession the chattel passes agrees to become the purchaser of it, but the ownership of it is not to be acquired by him until he has paid the purchase or consideration money, or some stipulated part of it:—in other words, unless he has bought or agreed to buy the chattel." ($y^1$)

Transactions of the character intended by the terms, "receipt notes," "hire receipts," and "order for chattels," are extremely common, and are becoming more and more so with the extension of trade and commerce. While conditional sales as between the immediate parties can be made by word of mouth, coupled with delivery, yet under the statute, such must be evidenced in writing, that is as against

($v^1$) *Filiatrault* v. *Goldie*, Q. R. 2 Q. B. 368.

($w$) *Harkness* v. *Russell*, 118 U. S. 663: *Sawyer* v. *Pringle*, 18 Ont. A. R. 218: *Ex parte Crawcour*, 9 Ch. D. 419 C. A.: *Ex parte Powell* 1 Ch. D. 504 C. A.

($x$) Story on Sales, § 246.

($y$) 6 Am. & Eng. Encyl. of Law 449.

($y^1$) See section 2 in which the sale "is given to secure the purchase money or a part thereof."

subsequent purchasers and mortgagees. As to all others, it matters not whether it be in writing or by word of mouth, and the law then applicable to the transaction is as if the statute had never been passed. The ease and simplicity with which the vendor of a chattel can, in a summary manner, resume possession and thereby extinguish the interest of the vendee, as well as the rights which he had in the chattel, as also the circumstances of secrecy in transactions of the kind, have naturally led to the adoption of this form of conditional sale in preference to any other method, less secret and more risky to the party selling. The agreement (*z*) sometimes provides for the payment of a rental, or some sum for the use of the article, which may be applied *pro tanto*, on the purchase money if and when finally paid. (*a*) But whatever the form of the transaction is the Legislature has said that in such a contract the vendee is not a mere hirer of the property, with a right afterwards to become a purchaser, but is the present equitable owner of it, subject to the payment of the purchase money. (*b*) Oftentimes the monthly rentals are in reality simply instalments of the purchase money, and the hardship upon the vendee of a forfeiture when several of the instalments have been paid, have, in two instances, led to construing the transaction as one of sale with reservation to the vendor of a secret lien. (*c*) Our courts, however, have always enforced these contracts according to their plain terms. (*d*) not only as between the

(*z*) For Forms, see Appendix.

(*a*) *Re Robertson*, 9 Ch. D. 419.

(*b*) *Goldie & McCulloch* v. *Harper*, 31 Ont. R. at p. 288: see *Halby* v. *Matthews* (1895), A. C. 471: *Mason* v. *Lindsay*, *supra*.

(*c*) *Harvey* v. *R. I. Locomotive Works*, 93 U. S. 664: *Hereford* v. *Davis*, 102 U. S. 235.

(*d*) *Stevenson* v. *Rice*, 24 U. C. C. P. 245: *Carroll* v. *Beard*, 27 Ont. R. 349: *Nordheimer* v. *Robinson*, 2 A. R. 305: *Walker* v. *Hyman*, 1 A. R. 345: *Mason* v. *Johnson*, 27 C. P. 208: *Mason* v. *Bickle*, 2 A. R. 291: *ex parte Crawcour*, *in re Robertson*, L. R. 9. Ch. D. 419: *Ogg* v. *Shuter*, L. R. 10. C. P. 159. See also *Chamberlin* v. *Smith*, 44 Penna. St. 431: *Crist* v. *Kleber*, 79 Id. 290: *Sargent* v. *Giles*, 8 N. H. 325: *Bean* v. *Edge*, 84 N. Y. 510.

immediate parties, but as against *bona fide* purchasers, for value without notice. (*e*)

In all the transactions, however, the true test, after all, is the element of purchase, and the provision for payment. (*f*) If the latter is sought to be disguised under the device of a lease, and the payments are denominated as rent, the courts will still construe the transaction as a conditional sale, notwithstanding the use of terms inappropriate to such a contract. (*g*).

In the case of a sale of chattels when the vendor retains a vendor's lien for the unpaid purchase money, and no actual delivery is to be made and possession is retained until the full amount of the purchase is paid, then the provision that the vendor will, on payment of the balance of the purchase money, effectually transfer the chattel, manifests the intention to transfer the title (which until then is in the vendor) and makes the sale a conditional sale. (*h*) but such a sale may not be within the Act, because possession of the chattel does not pass until payment in full, (*i*) and it is to be presumed that the time when possession is contemplated to pass in transactions within the Act, is at the inception of the bailment, or, at all events, at a period before the complete ownership has passed from the vendor to the vendee. This is the case notwithstanding express mention of the vendor's lien.

"Lien is not the result of an express contract, it is given by implication of law. If, therefore, a mercantile relation, which might involve a lien, is created by a written

(*e*) *Walker* v. *Hyman*, 1 A. R. 345. See also *Ballard* v. *Burgett*, 40 N. Y. 314: *Sumner* v. *Cotley*, 71 Mo. 121, 125: *Bradshaw* v. *Warner*, 54 Ind. 58, 62: *Hodgson* v. *Warner*, 60 Ind. 214: *Cole* v. *Berry*, 42 N. J. L. 308, 313: *Langley* v. *Kahnert*, L. R. 9 Ont. 164.

(*f*) *Helby* v. *Matthews*, (1895) A. C. 471: *Hull Ropes Co.* v. *Adams*, (1895) 65 L. J. Q. B. 114: *Lee* v. *Butler*, (1893) 2 Q. B. 318: *Mason* v. *Lindsay*, *supra*.

(*g*) *Mason* v. *Johnson*, 27 U. C. C. P. 208: *McGinnis* v. *Savage*, 29 W. Va. 362: *Harvey* v. *Rhode Island L. Works*, 93 U. S. 664: *Greer* v. *Church*, 13 Bush (Ky.) 430.

(*h*) See *Carrall* v. *Beard*, 27 Ont. R. at p. 352.

(*i*) *Gleason* v. *Knapp*, 26 C. P. 353.

contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limits their rights by the extent of the express contract that they have made." (*j*) Hence when the contract is one of conditional sale the express mention that the vendor retains a lien upon the chattel goes for nothing. (*k*) The words as to the vendor's lien must be treated as inappropriate surplusage, and read out of the terms, because one cannot have a lien on his own property, and because the right of lien, legally speaking, arises from operation of law and not from the expression of the parties. (*l*) One of the essentials of a lien is that it has reference to the property of another, and not to the property of the person claiming the lien, and, as in the case put, the contract making the right of property and the right of possession unite in the vendor, there cannot be a lien, and hence a provision for its retention is manifestly unnecessary. Nor, in a case of this kind, is it right to look at the subsequent acts of the parties in regard to the property to determine the legal effect of the contract of sale. (*m*)

The rights of the vendee depend upon the construction of the written agreement on the day it bears date. (*n*) Hence a delivery of possession of the chattel subsequently is not evidence of an intention to pass the property in it to the vendee, (*o*) and once the title has passed to the vendee on an absolute sale, of course it is too late then to seek to change the character of the transaction into one of conditional sale wherein only possession and not title passes, and any attempted compliance with this Act or its companion Act relating to Bills of Sale and Chattel Mortgages will avail nothing. (*p*)

(*j*) Lord Chancellor Westbury in *Chambers* v. *Davidson*, L. R. 1 P. at p. 305.

(*k*) *Carrall* v. *Beard*, *supra*.

(*l*) See *Carrall* v. *Beard*, 27 O. R. at p. 358, Boyd, C.

(*m*) Rose, J., *Beard* v. *Carroll*, 27 Ont. R. at p. 361.

(*n*) *Sawyer* v. *Pringle*, 18 Ont. A. R. at p.

(*o*) *Carroll* v. *Beard*, 27 O. R. 349; *Mason* v. *Johnson*, *supra*.

(*p*) *Gallant* v. *Mallet*, 18 C. L. T. 199; *Cox* v. *Schack*, 14 Man. L. R. 174.

Where a note is given for the purchase money of a chattel, and it is provided that the note should be a lien upon the chattel for which it was given until it is paid in full at maturity, and until then the property should be at the disposal of the vendor, the transaction was held to be a mortgage and not a conditional sale, the reservation of the lien being inconsistent with the retention of the title by the vendor. (*q*)

Nor, again, does it follow that because possession passes of a chattel, the statute necessarily applies, for the possession may not be that of a vendee. For instance, there might be a consignment of crude oil to a refiner on the express understanding that no property in the oil shall pass until the refiner has made certain payments. The refiner in such case cannot sell the oil, and if he does so to one who even has no knowledge of the facts, the consignor may recover from the purchaser price of the oil. (*r*) In such a transaction there is no sale, hence the consignee could not sell. "At common law a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that to make either a sale or pledge valid against the owner of the goods sold or pledged, it must be shewn that the seller or pledger had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded as against those who were induced *bona fide* to act on the faith of that apparent authority, and the result as to them was the same as if he had really given it." (*s*)

(*q*) *Frick* v. *Hilliard*, 95 N. Car. 117: *Langdon* v. *Bail*, 9 Wend. (N. Y.) 80.

(*r*) *Forristal* v. *McDonald*, 9 Can. S. C. R. 12: *City Bank* v. *Barrow*, 5 App. Cases 664.

(*s*) Per L. J. Blackburn in *Cole* v. N. *Western Bank*, L. R. 10 C. P. 354.

Nor does the possession given to ar ent under the Factors Act. (*t*) for under that Act the ag t's possession makes him the owner to sell to another the goods with which he is entrusted as the factor or agent. (*u*)

Now, however, a contract (*v*) within the statute will be void as against a purchaser unless the statute is complied with.

As has been said, our courts have always enforced these contracts according to their plain terms, not only as between the immediate parties, but as against *bona fide* purchasers for value without notice.

(3) The term "chattels" *in this section* applies to manufactured (*x*) goods and chattels of all kinds, except household furniture, (*y*) but inasmuch as, for the purposes of this Act, pianos, organs, or other musical instruments are not within the definition of household furniture, (*z*) it follows that chattels of the latter description come under the operation of the Act.

The derivation of the word "manufacture" gives to its meaning a far too limited one. Simply making with the hand does not by any means comprehend all that is covered by manufactured goods. "All artificial products of human industry, nearly all such materials as have acquired changed conditions or new and specific combinations, whether from the direct action of the human hand, from chemical processes devised and directed by human skill, or by the employment of

(*t*) R. S. O. cap. 150.

(*u*) *Johnson* v. *Credit Lyonnais Co.'y*. C. P. 93; *Cole* v. *N. W. Bank*, 3 C. P. Div. 32.

(*v*) For Forms see Appendix.

(*x*) What are manufactured goods? The meaning of the word "manufacture" is "to form by manufacture or workmanship, by the hand or by machinery, or manual dexterity; to make by art and labor."—*Worcester*. From *manu* by the hand, and *facio* to make. And Webster says the definition is "To make or fabricate from raw materials by the hand, by art or machinery, and work into forms convenient for use." And Abbott gives its meaning as "Whatever is made by human labor either directly or through the instrumentality of machinery." *Atty.-Gen'l* v. *Lorman*, 59 Mich. 163, 164.

(*y*) See section 2 *post*.

(*z*) Section 2 *post*.

machinery, which, after all is but a higher form of the simple implements with which the human hand fashioned its creations in ruder ages. are now commonly designated as 'manufactured.'" (*a*) Making a thing by art. as well as by hand. is to manufacture. (*b*)

Making a thing by machinery is, in fact, making it by hand, and any article thus made into a new form capable of being used. and designed to be used in ordinary life is a manufactured article. Anything made, which is useful, and is vendible in the shape sold. such as medicine, (*c*) is a manufactured article, (*d*) but a medicine would scarcely be within the Act, because for one reason it would not admit of the name of the vendor being plainly painted or engraved upon it, and, of course, these words (*e*) define the character or kind of manufactured article that is within the Act. Should the article, even though, in the wider sense it be a manufactured article, be one upon which it would be physically impossible to place the name in accordance with the requirements of the Act, then it would be an article in regard to which the statute does not apply. A stove, a telescope, an engine, or instrument, or part of an engine, or part of an instrument to be employed in the making of some previously known article. or in some other useful purpose, as a stocking frame or a steam engine for raising water from mines, are manufactured articles and within the Act. (*f*) Beer is said to be a manufacture. because it is made from malt and other ingredients, and whiskey is a manufacture from corn and cider from apples, (*g*) but, as in the case of medicine, these things can scarcely be said to fall within the Act.

(*a*) *Cartin* v. *Western Ass. Co.* (*Toronto*). 57 M'd. 526.
(*b*) Butler. J., in 2 H. Bl. 463, 471.
(*c*) *Murphy* v. *Anson*, 96 U. S. 134.
(*d*) *Rex* v. *Wheeler*, 2 B. & Ald. 349.
(*e*) See note 15, 15*a* and 16 *post*.
(*f*) *Rex* v. *Wheeler*, *supra*.
(*g*) *Murphy* v. *Anson*, *supra*: *Crane* v. *Price*, 4 Man. & G. 580: *Boulton and Watt* v. *Bull*, 2 Hea. Black 463: Fess Pat. 67.

A manufactured article is not a something created out of nothing, nor indeed does it consist exclusively in a new article out of and from the raw material. Under the Act it will consist almost altogether in something into which a new shape, a new condition, or a new combination is given, which before then had already gone through some artificial process: a bureau, for instance, is a manufactured article though it consists in and combines other parts previously manufactured, such as the locks, the knobs, the screws, and the lumber previously worked up from the raw material; and a locomotive, also, notwithstanding that its constituent parts were purchased from other manufacturers. Therefore, the cabinet-maker and the locomotive builder, each is a manufacturer within the Act upon whom the statutory duties rest, even though he may not be the manufacturer of the constituent parts of the article he sells.(*h*) Mineral and ore are not manufactured articles, because nothing is put into the raw substance as it comes from the earth, to change its natural condition. Therefore, coal is not a manufactured substance. (*i*) But "animal charcoal" produced by the burning of bone, and "bone dust" produced by pulverizing it are manufactured articles. (*j*) When saleable articles are produced from wood, even though the producing process is the simple act of sawing or splitting, the product is a manufactured article. (*k*) Coral is not a manufactured article, but when cut into the shape or form of a cameo it becomes manufactured. (*l*) And so one wonders why copper plates turned up at the edges should not also be considered manufactured articles, but it seems they are not such. (*m*) Cotton is not a manufactured article; but the weaving of it into covering of

(*h*) *Norris Bros.* v. *Com.*, 27 Pa. St. 496: *City of N. O.* v. *Le Blanc*, 34 La. An. 597: *Morgan* v. *Seaward*, 6 L. J. Ex. 156, 2 M. & W. 558.

(*i*) *Byers* v. *Franklin Coal Co.*, 106 Mass. 131.

(*j*) *Schriefer* v. *Wood*, 5 Blatchf (U. S.) 216.

(*k*) *Kelsey* v. *Rogers*, 32 U. C. C. P. 624: *Foppes* v. *Magone*, 40 Fed. Rep. 570: *U. S.* v. *Hathaway*, 4 Wall. (U. S.) 404, 408).

(*l*) Bailey v. Schell, 5 Blatchf. (U. S.) 195.

(*m*) *U. S.* v. *Potts*, 5 Cranch (U. S.) 284.

strips of steel to be used for making crinoline skirts, makes it so. (*n*) Firewood is not a manufactured article. (*o*). But illuminating gas is. (*p*) Spectacles are manufactured. (*q*) Straw is not, but straw plait is. (*r*) Hay is not, nor is cotton, nor is wheat, nor is sugar, nor is salt, nor are apples when dried, because the process these articles are subject to is manipulation rather than manufacture, and the substance of each is still its same original substance. (*s*) For the same reason ice, that is natural ice, is not a manufactured article. (*t*) But ice produced by frigorific effect may properly be said to be manufactured. (*u*) As ice cut into blocks is not a manufactured article, neither, it has been held, is marble which has been cut into blocks. (*v*) Neither is white lead, nor nitrate of lead, nor oxide of zinc, nor dry and orange mineral, a manufactured article, because in these forms the metal or mineral has not lost its distinctive form. (*w*). Stripping the bark from elm does not make the log when stripped a manufactured article, but if the log is then hewn or squared the act of squaring that which was round makes it so. (*x*) So shells are not manufactured articles, because cleaned and etched by acid. (*y*)

In many of the foregoing instances it must be remembered that the character of the article depends perhaps upon the particular statute having reference to it, when its character has to be defined. In some cases, for instance, the article

(*n*) *Whymper* v. *Harney*, 18 C. B. N. S. 243.

(*o*) *Correio* v. *Lynch*, 65 Cal. 273.

(*p*) *Nassau Gas Light Co.* v. *Brooklyn*, 89 N. Y. 409.

(*q*) *Artuer* v. *Sussfield*, 96 U. S. 128.

(*r*) *Beadon* v. *Parratt*, L. R. 6 Q. B. 718.

(*s*) *Frazee* v. *Maffit*, 20 Blatchf. (U. S.) 267.

(*t*) *Hiltinger* v. *Westford*, 135 Mass. 262: *Rex contra, Atty.-Gen.* v. *Lorman*, 6 Am. Rep. 287.

(*u*) *People* v. *Knickerbocker Ice Co.*, 99 N. Y. 181.

(*v*) *U. S.* v. *Wilson*, cited in *Hortrauft* v. *Wiegmann*, 121 U. S. 615.

(*w*) *Meyer* v. *Arthur*, 91 U. S. 570: see also *Murphy* v. *Anson*, *supra*.

(*x*) *Foppes* v. *Magone*, 40 Fed. Rep. 570.

(*y*) *Hortrauft* v. *Wiegmann*, 121 U. S. 669.

gets its definition from customs laws or excise laws. In general, it may be said, having regard to this particular section, that manufactured goods means such goods the manufacture of which is completed, so that the goods are in a condition to be sold, with nothing left to be done, when they are bought, than to deliver them to the purchaser. If such goods are not brought into a condition fit for sale, if something has still to be done, then the goods are yet in the progress of manufacture, and are not manufactured articles, even though the component parts may be finished and complete. But if the sale is of one of the component parts then as to that part, if it is completely finished the Act may apply, for by itself it ·nufactured article. (*z*).

In consequence, how of the Statute Law Amendment Act, (6 Edw. VII. cap. 19 sec. 23), widening the scope of this statute, so as to make it cover all chattels (see post section 2a) the question, whether a chattel is manufactured or not, ceases to be of any importance except that on a manufactured article, exclusive of furniture, the vendor may comply with the Act by painting, &c., his name upon the article sold. This amendment, however, does not come into force until 1st January, 1907.

Chattels may be moveable or immoveable, and are divided into the two classes, real and personal. (*a*). Real and personal property may be the subject of a conditional sale, but as chattels real are not contemplated by the statute, (*b*) all reference thereto may be excluded.

Chattels personal have been defined as those things which belong immediately to the person of the owner, and for which, if they are injuriously withheld from him, the owner has no other remedy than by . personal action. (*c*) Therefore, chattels personal are divisible into two classes.

First,—They consist, in part, of things which exist only

(*z*) *Rex* v. *Woodhead*, 1 Moody R. 549; *Heywood* v. *Potter*, 1 El. & Bl. 439.

(*a*) Whart. Law Lex.

(*b*) *Frazer* v. *Lazier*, 9 U. C. Q. B. 679.

(*c*) Whart. Law Lex

in contemplation of law; things of which a person has not the possession. or actual enjoyment, but only a right to, or a right to demand by action; as, for instance, a right to recover money due on a contract—a chose in action.

Second,—They consist of moveable things only as belonging immediately to the person, and which can only be delivered over from hand to hand, such (*e.g.*) as books. wares, and merchandise. (*d*)

It may be concluded that the present statute applies only to chattels within the latter definition. Though it may here be added there may be a conditional sale of a thing incorporeal in its nature, as for example, the good-will of a newspaper establishment. (*e*) Then, the Act applies to manufactured articles destined from their very character to be immoveable, that is, in the sense of being immobilized by being constructed into a building. But to give moveable property the character of immoveables by destination, it is necessary that the person incorporating the moveable with the immoveable, should be, at the time. owner both of the moveables and of the real property with which the moveable is incorporated. (*f*) Immoveables by nature are not within the Act, and to ascertain the point of difference between immoveables by destination and immoveables by nature the test is, have the fixtures when detached from the realty an independent existence as moveables? If they have, then they are chattels, if not they are part of the realty. (*g*) Possession, in the language of the statute, can pass from and be given by one to another without manual delivery. As opposed to an actual change of possession. there can be a constructive change of possession, the possession of the chattel passing in the one case as well as in the other, but the use of the word "bailment." (*h*) upon which the entire clause hinges, suggests beyond question an application of the statute

(*d*) Whart. Law Lex.: Herman on Mortgages 3.
(*e*) *Boon* v. *Moss*, 70 N. Y. 465.
(*f*) *La Banque d'Hochelaga & Waterous Engine Works Co.*, 27 S. C. R. 407: *Leonard* v. *Willard*, Q. R. 23 S. C. 482.
(*g*) Strong, C.J., *idem* p. 415
(*h*) From "*bailer*," Fr., to deliver.

only to chattels susceptible of full and complete delivery. (*i*) In fact, to property of which there may be a present possession or title, or in which there is a present vested right or interest, and not to property which may be acquired *in futuro*. (*j*)

There must then be a delivery, and there must also be a change of possession, differing perhaps from the definition of the term "chattel" under the Act respecting mortgages and sales of personal property, (*k*) only in that under the latter statute the "delivery" must be "immediate" and the possession must be "an actual and continued change of possession."

The object of the statute is to safe-guard the public, by affording one an opportunity of knowing whether or not his fellow-man is really the owner of property the possession of which leads to such belief, and to prevent a fictitious commercial standing being enjoyed by one who may be "heavily weighted" with obligation. (*l*) Though this be the laudable object of the statute, parties to a transaction cannot be prejudiced by non-compliance with the Act if the transaction be one to which the statute does not apply; as, for instance, where, from the circumstances of the case, possession in the chattel cannot be passed consistently with the object of the agreement in regard thereto; (*m*) or where a conditional sale is made of a half interest in a threshing machine, or other manufactured property, (*n*) because the vendee in such case does "not acquire" a specific chattel but only a conditional interest in an undivided moiety of an indivisible piece of personal property. (*o*) Bailment or actual delivery, cannot be made of such an undivided moiety, hence the character of the person acquiring such is not that of a bailee

(*j*) Story on Bailments, § 294.
(*i*) See *Clark* v. *G. W. R.*, 8 C. P. 191.
(*k*) R. S. O. cap. 148.
(*l*) Boyd, C. *Banks* v. *Robinson*, 15 O. R. at p. 624.
(*m*) *Burton* v. *Bellhouse*, 20 U. C. Q. B. 60.
(*n*) *Gunn* v. *Burgess*, 5 O. R. 685.
(*o*) *Gunn* v. *Burgess*, *supra*.

within the Act. As the mischief intended to be remedied by the Bills of Sale and Chattel Mortgage Act (*p*) is to prevent a secret transfer of moveable property which can be at once removed, and the apparent ownership of which is suffered to remain in a person who has parted with the ownership, (*q*) so, the mischief to be remedied by this Act is to prevent a secret transfer of moveable property, which can be at once removed, and the fictitious standing by the apparent ownership which is in him by possession when the real ownership is in another. This possession must be the sole and exclusive possession, and this is impossible in the case of an undivided interest in a chattel, because the possession of one is the possession of both, the physical possession of one with the assent of the other being constructively the actual possession of both. (*r*) Nor would the Act apply to a transfer of manufactured goods, the ownership thereof remaining in the transferor, when the goods are in the hands of a warehouseman, who becomes the agent of, and agrees to hold them for, the transferee, (*s*) and therefore the Act does not apply to a conditional sale of goods in customs, subject to duties, for they are not capable of bailment, at least until the duties had been settled. (*t*) Neither, when this statute is not complied with, can it be invoked, to defeat the claim of a transferor, who retains in himself the ownership of a chattel which, when it passes into the possession of the transferee, does so charged with, or subject to, the title of a third party. (*u*) When it is not a condition that possession of the chattel shall pass, and possession does not pass, then the Act does not apply,

(*p*) R. S. O. cap. 148.

(*q*) Per Cockburn, J., in *Brantom* v. *Griffits*, L. R. 1 C. P. D. 349: Barton, J., in *McMaster* v. *Garland*, 8 Ont. A. R. 12.

(*r*) *Holliday* v. *Counsell*, 1 T. R. 658: *Brown* v. *Hodges*, 1 Salk. 290: *Webster* v. *Overseers*, L. R. 8 C. P. 306: *Gladstone* v. *Padwick*, L. R. 6 Ex. 204.

(*s*) *Jones* v. *Henderson*, 3 Man. L. R. 433.

(*t*) *May* v. *The Security L. & S. Company*, 45 U. C. R. 106: *Harris* v. *Com. Bank*, 26 U. C. Q. B. 437.

(*u*) *Dominion Bank* v. *Davidson*, 12 A. R. 93.

for it is of the essence of a contract of bailment that there be an actual delivery of the chattel to the bailee.

It is plain then that the maxim "*Cujus est dare, ejus est disponere*" is given a much restricted application by the statute, which is now intended to apply to all chattels, susceptible of specific ascertainment, and of being actually and manually transferred and possessed in specie. (*v*) The statute applies only to chattels wherein the right of property can be transferred, and the right of property can only be transferred in a chattel, when the chattel is ascertained and identified at the time of the transfer. (*w*) Thus no right of property passes in a grant of twenty wagons to be taken out of a factory containing a much greater number, but when once the selection or appropriation is made of the particular twenty wagons the property in them passes, and not until then is the statute given an application. Until such time arrives the transaction partakes of the nature of an executory contract not contemplated by the statute (*x*)

(4) The word "given" is to be observed in this section. In the connection in which the word is used it is equivalent to the term "executed." The latter word consists of three distinct acts, "signing, sealing, and delivery," and the last of these three acts is not complete without "acceptance." Sealing is not necessary in any instrument executed under this Act, (*y*) and for that reason the addition of a seal will not vitiate the instrument. (*z*)

Signing and delivery are essential, and both are necessary to create a "giving" in accordance with the Act, and de-

(*v*) See *Gunn* v. *Burgess*, 5 O. R. 685: *Lee* v. *Culp*, L. R. 8 Out. 210.

(*w*) *Snell* v. *Heighton*, 1 C. & E. 95.

(*x*) *Lee* v. *Culp*, *supra*: *Ross* v. *Harteau*, 18 C. S. R. 713: *Mirabita* v. *Imp. Ottoman Bank*, 3 Ex. D. 164, 172: *Crofoot* v. *Bennett*, 2 Comstock (N.Y.) 258: *Groat* v. *Gile*, 51 N. Y. 431: *McDougall* v. *Elliott*, 20 U. C. R. 299: *Bryans* v. *Nix*, 4 M. & W. 774: *Godts* v. *Rose*, 17 C. B. 229: *Logan* v. *Le Mesurier*, 6 Moore P. C. 116: *Campbell* v. *Mersey Docks*, 14 C. B. N. S. 412: *Rhodes* v. *Thwaites*, 6 B. & C. 388: *Aldridge* v. *Johnston*, 7 E. & B. 885: *Atkinson* v. *Bell*, 8 B. & C. 277.

(*y*) See *Paterson* v. *Maughan*, 39 U. C. R. 379: *Hall* v. *Collins Bay Co.*, 12 App. R. 65: *Thompson* v. *Pettitt*, 10 Q. B. 101.

(*z*) *Milton* v. *Mosher*, 7 Met. 244.

livery, which is essential, is not a complete delivery without acceptance. The giving means, in fact, a completing of the documents referred to in the statute in accordance with the various formalities required by law. Sealing is not one of these formalities, nor, in fact, is attestation. I venture to say that "giving," as it appears here, has a wider significance than the term "execution," for, though in a general sense the latter term includes "delivery," yet it is so frequently used in the limited sense of "signing" that it has come to be used in this narrower sense, (*a*) and a document can scarcely be said to be "given" unless it is delivered. When it is delivered then it passes into the possession of the person for whom, or for whose benefit, it was made, but this possession is nothing more than *prima facie* evidence of delivery, and, as the statute (section 2) imposes the duty on the bailor or vendor of filing the document, the fact of filing it, cannot be any better proof of delivery. (*b*)

To the words "given by" is to be ascribed the same definition as possessed by the term "executed by." Therefore until an instrument under the Act is delivered it has no efficacy whatsoever. It is from delivery—the last act of execution—that the instrument takes effect, and it is from the time of delivery that the period begins to run within which the copy of an instrument under the Act must be filed, (*c*) should the alternative not be observed, of painting, printing, stamping or engraving the name of the manufacturer upon the chattel, delivered to the bailee or vendee.

The date of the instrument is usually evidence of the time when it is given, (*d*) but as there may be a false, or impossible, or no date at all, such evidence is only presumptive, and it is still open to the parties to shew that the instrument was given at a time different to that shewn by the date. (*e*)

(*a*) *Le Mesnager* v. *Hamilton*, 101 Cal. 532; 40 Am. St. Rep. 81.
(*b*) *Wells* v. *Jackson Iron Mfg. Co.*, 48 N. H. 537.
(*c*) See section 2 *post*.
(*d*) *Haywood* v. *Thacker*, 31 Q. B. 427.
(*e*) See *McLean* v. *Pinkerton*, 7 App. R. 490; *Burdett* v. *Hunt*, 25 Me. 419; *Partridge* v. *Swazey*, 46 Me. 414.

Though the date of the instrument be the correct date, it affords no indication as to the time of the day when the instrument was given. The rule formerly was, that as a general rule courts refused to take notice of a fraction of a day, because of the almost certain uncertainty of such a course; and "uncertainty is always the mother of confusion and contention." But in fixing the time, as regards the acts of parties, even though the acts are judicial in form, the courts will consider fractions of a day whenever necessary to decide which of two events first happened. (*f*) Should a bailor have to depend upon a compliance with the Act as to filing a copy of the instrument in order to sustain his right to a manufactured chattel as against a subsequent purchaser or mortgagee, it might be required of him to establish the time of day when the instrument was given, because when the justice of the cause so requires the courts will consider a fraction of a day. (*g*) It is therefore suggested that a bailor or vendor preserve indisputable evidence as to the hour of the day when execution of an instrument takes place.

(5) Literally a bailee is one to whom goods are intrusted for a specific purpose. (*h*) One to whom goods are delivered in trust, upon a contract express or implied, that the trust shall be faithfully executed on his part. As for example: If cloth be delivered to a tailor to make a suit of clothes, he has the cloth upon the implied contract to render it again when made, and that in a workmanly manner. (*i*) The tailor is a bailee. If money or goods be delivered to a common carrier, to convey from place to place, he is under contract to carry them as instructed. (*j*) The carrier is a bailee. (*k*)

(*f*) *Campbell* v. *Strangeway*, 3 C. P. D. 107: *per Cur.* in *Edwards* v. *Reg.*, 9 Ex. 628: *McMartin* v. *McDougall*, 10 U. C. Q. B. 399: see 2 Cowp. 720, 9 Dowl. 828.

(*g*) *Beckman* v. *Jarvis*, 3 U. C. Q. B. 280: but see *Mitchell* v. *Dowson*, 3 L. J. 185, wherein it is decided that in determining the application of a statute, a fraction of a day is not to be considered.

(*h*) Whart. Law Lex.

(*i*) 1 Vern. 268, Blackstone 11. 451.

(*j*) 12 Mod. 482.

(*k*) See more fully note (8) *post*, under bailment.

(6) The statute defines the condition of the bailment as being simply that the ownership in a chattel shall not be acquired until payment of the purchase money in whole or in part. When such are the conditions in a transfer of a chattel, then upon such a transaction the statute operates and takes effect, and the requirements of the statute must be complied with, otherwise the interest of the bailor, vendor or manufacturer may be defeated as against a subsequent purchaser or mortgagee in good faith without notice for valuable consideration. According to English law a contract of sale may be modified in any way the parties agree, as, for instance, by suspending the operation of the general effect of the contract in respect of the vesting of the property in the vendee, and providing that it shall not pass until the price is fully paid. It cannot be pretended that there is anything illegal in such a condition, which seems to be the French law and the law of the Province of Quebec, where the condition is correctly defined as a good suspensive condition. (*l*) But when such are not the conditions in the bailment, and other distinctly different conditions be attached to the bailment, the statute then has no application. (*m*) Or, should the statutory conditions referred to be expressed in the instrument, and in addition thereto other conditions be embraced, not within the operation and effect of the statute, then if that part of the instrument which brings it within the Act can be severed from the rest, the instrument, as to the rest, is not invalid for want of compliance with the statute, (*n*) and this is the case whether the illegality be created by statute or by common law. (*o*) But if severance cannot be made, then the whole is void, if the statute is not observed. And it may be on the principle of

(*l*) *Filiatrault* v. *Goldie*, Q. R. 2 Q. B. 368: *Staron* v. *Comp. des Moteurs au Gaz*, S. V. 90 2, 113: *La Banque d'Hochelaga* v. *The Waterous Co.*, 27 C. S. R. 406.

(*m*) *Baldwin* v. *Benjamin*, 16 U. C. Q. B. 52: *Mathers* v. *Lynch*, 28 U. C. Q. B. 354: *Walker* v. *Niles*, 18 Gr. 212.

(*n*) *Kitching* v. *Hicks*, 6 O. R. 739: *Mowat* v. *Clement*, 3 Man. L. R. 585. See *Hughes* v. *Little*, 17 Q. B. D. 204.

(*o*) *Pickering* v. *Ilfracombe Ry. Co.*, 3 L. R. 250: *Re Browning*, 9 Ch. 583.

rejection and retention, when the contract is severable, that an instrument under the Act, given by two bailees to a bailor, or taken by two bailors from a bailee, may be, in the one case, invalid only, so far as the interest of one bailee is concerned, and in the other valid only so far as the interest of one bailor is concerned. (*p*) The mind has only to speculate upon the many kinds of conditions which can be attached to the bailment of chattels to discover that the statute is very limited in its operations.

A condition is that which is referred to an uncertain chance, which may or may not happen: it is a restraint annexed to a thing, so that by the non-performance, the party to it shall receive prejudice and loss; and by the performance, commodity or advantage. Conditions are affirmative, which consist in doing an act; are negative, which consist of not doing an act: are restrictive, for not doing a thing: are compulsory, as that the bailee shall do an act: are single, as, to do one thing only; are copulative, as, to do divers things: are disjunctive, as, to do one of several things; are precedent: (*q*) and yet the extent of the term is not exhausted. Ingenuity then, will discover many cases to which the statute has no application; and doubtless many methods of evading its terms.

(7) "Bailment, from the French *bailer*, to deliver, is a delivery of goods in trust, upon a contract expressed or implied that the trust shall be faithfully executed on the part of the bailee. It is a delivery of goods to another person for a particular use: as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee. The person delivering, or him to whom it is delivered for the bailor, hath only the right, and not the immediate possession; the bailee hath the possession, and only a temporary right. But it is a qualified property in them both, and each of them is entitled to an action, in case the goods be damaged or taken

(*p*) *Ex parte Brown, In re Reed*, 9 Ch. D. 389.
(*q*) Whart. Law Lex.

away: (*r*) the bailee on account of his immediate possession, (*s*) the bailor because the possession of the bailee is mediately his possession also. (*t*) The vendee in fact has this right of action, even after condition broken, on the ground that being responsible for the goods he is entitled to sue for them. (*u*) In all instances of bailment there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property because of his contract for restitution, the bailor having still left in him the right to a chose in action, grounded upon such contract. And on account of this qualified property of the bailee he may, as well as the bailor, maintain an action against such as injure or take away these chattels. The bailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distrainor, and the general bailee, may all of them vindicate, in their own right, this their general interest, against any stranger or a third person. For, being responsible to the bailor if the goods are lost or damaged by his wilful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may have purloined or injured them that he may always be ready to answer the call of the bailor. (*v*)

Blackstone has divided bailments thus:—

(i) *Depositum*, or a naked bailment of goods to be kept for the use of the bailor without recompense.

(ii) *Commodatum*—Where goods or chattels that are useful are lent to the bailee *gratis*, to be used by him.

(iii) *Locatio rei*—Where goods are lent to the bailee to be used by him for hire.

(*r*) *Nicols* v. *Bastard*, 2 C. M. & R. 659; Tyr. & G. 156, 1 Gale, 295.

(*s*) *Mason* v. *Morgan*, 24 U. C. Q. B. 328.

(*t*) *Mears* v. *London & S. W. Ry. Co.*, 11 C. B. N. S. 850; 31 L. J. C. P. 220; 6 L. T. N. S. 190.

(*u*) *Harrington* v. *King*, 121 Mass. 269.

(*v*) Blackstone, vol. 2, 396, 451, 452; Lord Holt *Coggs* v. *Bernard*, 1 Sm. L. C. 147-184.

(iv) *Vadium*—Pawn.

(v) *Locatio operis faciendi*—Where [illegible]s are delivered to be carried, or something is to be do[illegible] about them, for a reward, to be paid to the bailee.

(vi) *Mandatum*—A delivery of goods to somebody, who is to carry them, or do something about them *gratis*.

Again, bailments may be said to be properly divisible into three kinds:—

(i) Those in which the trust is exclusively for the benefit of the bailor, or of a third person, when the bailee is liable for gross negligence only.

(ii) Those in which the trust is exclusively for the benefit of the bailee, who is then bound to the very strictest diligence, and

(iii) Those in which the trust is for the benefit of both parties, or of both, or one of them, and a third party, when the bailee must exercise an ordinary and average degree of diligence.

The first embraces deposits and mandates; the second, gratuitous loans for use; and the third, pledges or pawns, and hiring and letting to hire.(*w*)

It is unnecessary to consider the subject of bailments as embraced by the first and second definitions above given, as the limited nature of bailments to which the statute applies makes such a course unnecessary. Indeed, it is somewhat difficult, if the word "bailment" be correctly used in the statute, to bring within even the third of the foregoing definitions, the transactions contemplated by the present Act.

A pledge or pawn of course is not contemplated by the statute. Such has been defined thus: "When goods or chattels are delivered to another as a pawn to be security for money borrowed of him by the bailor, (*x*) or as security for the performance of an engagement. (*y*)

(*w*) Story's Bailments.

(*x*) Lord Holt, *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 913

(*y*) 1 Domat B. 3 tit. 1. § 1. art. 1.

Hence, though the statute aims at transactions within the general definition of bailment "as a delivery of goods in trust, upon a contract express or implied that the trust shall be faithfully executed on the part of the bailee," it appears as if, of the various classes of bailments, except it be that of hiring and letting to hire, none of them exactly fit the circumstances the statute is intended to meet. Where a chattel is delivered by one to another under an agreement that the latter may purchase it on compliance with certain conditions, and if he pays for it within a specified time he is to become the owner, but if not, he is to pay a sum agreed upon for the use of the property, the transaction is technically a bailment and not a conditional sale, (*z*) but the writer ventures the opinion (*a*) that, notwithstanding the alternative open to the bailee of paying for the use of the chattel, the right given to purchase would bring the transaction within the Act, because that portion of the agreement can be severed from the rest. (*b*) There can, however, be no question that where property is delivered to a purchaser who is to have the use of it, the vendor reserving to himself the naked title and the right to reclaim the property if not paid for, with no further liability for the purchase money on the part of the purchaser, that the transaction is a conditional sale and not a bailment. (*c*)

The statute insists that the bailment shall be in writing, at least as against subsequent purchasers and mortgagees. The probabilities are then that in most cases the legal liability of both bailor and bailee is to be ascertained from the written contract. The responsibility of either bailor or bailee may be lessened or enlarged either by express or implied contract. When by writing, the writing governs, for an express contract of the parties may vary or supersede the

(*z*) *Sargent* v. *Gile*, 8 N. H. 325: *Mason* v. *Lindsay*, L. R. 4 Ont. 365.

(*a*) See *Goldie & McCulloch* v. *Harper*, 31 Ont. R. 284.

(*b*) *Kitching* v. *Hicks*, 6 O. R. 739: *Mowat* v. *Clement*, 3 Man. L. R. 585: *Hughes* v. *Little*, 17 Q B. D. 204.

(*c*) *Bryant* v. *Crosby*, 36 Me. 562.

obligations implied by law. (*d*) When not in writing, then common sense and natural justice will help to define what are the legal obligations of the parties.

To produce the legal obligation of the contract of bailment,

(i) The bailment must not be prohibited by law.

(ii) It must be between persons competent to contract.

(iii) There must be a free and voluntary consent between the parties. (*e*)

A conditional sale under the Act of a piano to be used in a house of ill-fame is repugnant to sound morals, and therefore illegal. The consideration for the sale may be lawful but the use being unlawful the sale and agreement incident thereto, are void. Nor does it matter whether the unlawful purpose is carried out or not, provided, of course, that the intention of the one party to put the instrument to an unlawful use is known to the other at the time of the agreement. (*f*) If the vendor knows that the purchaser intends to apply the goods to an illegal or immoral purpose, he cannot recover the price, and it does not matter whether the seller does or does not expect to be paid out of the fruits of the illegal use of the property. But the vendor if innocent can rescind such a contract of sale when he discovers the truth, and he can do this without assigning any reason at the time of the rescission, but the rescission must be before the contract of sale is completely executed; if afterwards, it is too late, and the sale will not be set aside. (*g*)

The rules of common law, establishing the incapacity of certain parties to contract (except when varied by legislation), apply to contracts under the statute, thus, infants, lunatics, idiots, and persons of unsound mind are debarred from contracting either as bailor or bailee.

(*d*) Jones on Bailments, §31, 33, 34.
(*e*) Story on Bailments, 378.
(*f*) *Pearce* v. *Brooks* (1866), L. R. 1 Ex. 213.
(*g*) *Cowan* v. *Milbourn*, (1867), L. R. 2 Ex. 230; *Ayerst* v. *Jenkins* (1873), 16 Ex. 275.

Slight diligence only is required to be exercised on the part of a bailee in the care, custody and safety of property when the bailment is for the sole benefit of the bailor; when for the sole benefit of the bailee, then great diligence is demanded on his part, and when for the mutual benefit of both bailor and bailee the law expects ordinary diligence alone to be exercised by the bailee. In the first case he is liable only for gross neglect, in the second case for slight neglect, and in the last case for ordinary neglect. (*h*)

From this it may be concluded that, unless the written instrument provides differently, ordinary diligence must be exercised by the bailee, who will only be responsible for ordinary neglect. The contract between the parties may extend the bailee's liability to inevitable accidents or to damage or loss, by fire or the acts of God or other *vis major*, (*i*) but if not, the bailee then is not liable on account thereof, (*j*) nor is he liable for loss through robbery by force, though for a loss by a private or a secret theft he may be liable, if a proper degree of diligence has not been used. If the bailee is guilty of any fraud, whereby loss ensues, then of course the bailee is responsible, and, because the law will not let a man contract to be safely dishonest, a bailee cannot protect himself in writing against loss of this nature. Gross negligence (*k*) may be equivalent to fraud, and though a bailee may protect himself against loss through negligence, however gross, should the element of fraud enter into the bailee's conduct the writing cannot shield him.

The ordinary diligence expected to be exercised by a bailee is that "degree of diligence which men in general exert in respect to their own concerns." (*l*) Ordinary diligence may

(*h*) Jones on Bailments, 16, 119: *Coggs* v. *Bernard*, 2 Ld. Raym. 919: Story on Bailments, §23.

(*i*) *Atkinson* v. *Ritchie*, 10 East. 530: *Barker* v. *Hodgson*, 3 M. & S. 267: *Digby* v. *Atkinson*, 4 Camp. 275.

(*j*) *Searle* v. *Larrick*, L. R. 9 Q. B. 122.

(*k*) For meaning of term, "gross negligence," see *Fitzgerald* v. *G. T. R. W. Co.*, 4 App. R. 601.

(*l*) *Reynolds* v. *Roxburgh* (1886), 10 Ont. R. 649.

be said to be the common prudence which men of business and heads of families usually exhibit in affairs which are interesting to them. (*m*) Or "it is the care which every person of common prudence and capable of governing a family takes of his own concerns." What is ordinary diligence then depends more on fact than on law, and is governed by an infinite variety of circumstances. The actual state of society, habits of business, usages of life, the degree of danger, the very country or section of country wherein parties are, the nature, quality, bulk of value of the article bailed, are all circumstances which may have to be considered in fixing the degree of diligence incumbent on a bailee to exercise. These considerations arise mainly where the contract is silent as to the degree of care required to be exercised, but if, as we have seen, the written contract narrows or enlarges the liability of the bailee, the contract has alone to be looked to. If the bailee is required to exercise great diligence, the degree is to be measured by that which a *very* prudent person would take of his own concerns; (*n*) if but slight negligence, then by that which any person of common ordinary prudence would exercise in his own matters. (*o*)

Diligence is but a relative term for negligence, and as there are degrees in the one so there are in the other.

There are in the civil law as in our law, three degrees of negligence:

(i) Gross fault or neglect (*lata culpa*).

(ii) Ordinary fault or neglect (*levis culpa*).

(iii) Slight fault or neglect (*levissima culpa*).

Ordinary negligence exists where ordinary diligence is absent. Slight negligence exists when great diligence is absent, and gross negligence exists when slight diligence is absent.

(*m*) Story on Bailments, §11.
(*n*) *Vaughan* v. *Newlove*, 3 Bing. N. C. 468, 475.
(*o*) *Vaughan* v. *Newlove*, *supra*.

As in the case of diligence so in the case of negligence. When the bailment is for the sole benefit of the bailor the law requires only slight diligence, so relatively he is responsible for gross neglect, of whom, for the benefit of the bailee, the law requires great diligence, and therefore he is responsible for slight neglect. Where for the benefit of both parties, reciprocally, then as the law requires ordinary diligence on the part of the bailee, so is he responsible for ordinary neglect.

The duty devolving upon the bailee of a chattel under the Act is to "put the thing to no other use than that for which it is taken; to use it well; to take care of it; to restore it at the time appointed; to pay the price for it, or the rent for it as the case may be, and in general to observe whatever is prescribed by the contract, or by law, or by custom. (*p*) If he sells or parts with it, the bailment is at an end, and the rights of the bailor are as if the bailee were a stranger, and he may recover the chattel from him into whose possession it has passed, or may sue him for the price. (*q*)

Thus it is clear a vendee must not put an article delivered to him to a different use than that intended at the time when he received it from the vendor. (*r*) If he does, and injury to the property is the result, he renders himself liable to the bailor, and he is similarly liable if the wrongful conduct, default or negligence be that of his children or servants. (*s*) It is not every unauthorized use however that creates a liability in the bailee as for conversion of the chattel: but such an act as is clearly inconsistent with the ownership being in another, as is so repugnant to the contract as to practically negative the right of the bailor in the chattel, at once entitles the bailor to resume posses-

(*p*) 1 Domat B. 1, tit. 4, §2, art. 1.

(*q*) *Fenn* v. *Bittlestow*, 7 Exch. 152: *Bryant* v. *Wardell*, 2 Exch. 479: *Ex p. Leslie*, 20 Ch. D. 131.

(*r*) *Edwards* v. *Carr*, 13 Gray 234: *Milton* v. *Salisbury*, 13 Johns 211: Story on Agency, § 452 to 461.

(*s*) Story on Bailments, § 400.

sion. (*t*) When it comes to a question of the vendee's liability for the price of a chattel conditionally sold under the present statute, which has been lost when in the vendee's possession, then though the property in the goods has not passed by the terms of the agreement, the vendee is liable for the full price to the vendor, notwithstanding no negligence is shewn on his part, or that the loss is found to be in no way attributable to him. (*u*) The reason for this is that the vendor under a contract has done all that he was required to do.

The vendee has an interest in the property which he could convey, and which is subject to execution at the suit of a creditor, (*v*) and which will ripen into an absolute title by the payment of the purchase money, (*w*) and he has the actual legal and rightful possession in which he must not be disturbed, (*w*[1]) with a right of property upon the performance of a certain imposed condition. (*x*) The effect of this statute (*y*) is to give to the vendee an equitable right to the property, and even though the agreement be, that on default, all payments shall be treated as rent, and the agreement be deemed a hire agreement, the substance of the transaction will be a present sale and purchase, (*z*) and the vendee will still be liable to the vendor, in case of loss by fire, upon a promissory note given by him in part for the price of the chattel sold. But the loss may fall upon the vendor if in an action on such a note there is proved to be a total failure of consideration or a partial failure as to something which is ascertained and liquidated. (*a*) A distinction may be found to exist between the

(*t*) *Donald* v. *Suckling*, L. R. 1 Q. B. 585.

(*u*) *Hesselbacker* v. *Ballantyne*, 28 Ont. R. 182; *Goldie & McCulloch* v. *Harper*, 31 Ont. R. 284.

(*v*) 62 Vic., 2nd Sess., cap. 7, sec. 9.

(*w*) 1 Whart. Cont. 617.

(*w*[1]) *Bridgman* v. *Robinson*, L. R. 7 Ont. 591.

(*x*) *Vincent* v. *Cornell*, 13 Mass. 296.

(*y*) R. S. O. cap. 149.

(*z*) Meredith, C.J., *Goldie & McCulloch* v. *Harper*, *supra*, at pp. 287, 288; *Cull* v. *Roberts*, 28 Ont.

(*a*) *Barber* v. *Morton* (1882), 7 A. R. at p. 122.

example just given and a case wherein the agreement is not one of purchase and sale, but by way of rental, even though by the agreement the chattel becomes the property of the vendees if and when all instalments of rent are fully paid. (*b*) Having acquired these rights under the contract, and the property being at all times subject to the risks incident to the exercise of exclusive right of possession, the loss must fall on him who has the possession, namely, the vendee, and he still remains liable to the vendor for the price agreed upon. Therefore. in the case of a sale of a pair of horses, when the title was to remain in the vendor until payment, and the vendee assumed control of the horses, though they remained in the vendor's stable, and one of the horses died, it was held that the loss fell on the vendee. (*c*) Again where one rents a piano and agrees to return it in as good order as when received. customary wear and tear excepted, the lessee is liable for the price even though the piano be destroyed by inevitable accident, and the mention that injury by wear and tear is excepted, will furnish a reason for holding that injury from inevitable accident is not excepted. (*d*) And in an action upon a promissory note given for the price of a machine, sold by the payees to the maker of the note upon a conditional sale, under which the property in the machine was not to pass until payment of the note, the promissor is still liable, though the machine has been accidentally destroyed by fire while in his possession; (*e*) and this is the law even though the article sold has not reached the physical possession of the vendee, if the delay is his; (*e*[1]) and still is so even though he had notified the vendor that the contract is rescinded. (provided the contract be under seal and is delivered and is subject to the approval of the

(*b*) See *Mason* v. *Lindsay*, L. R. 4 Ont. 365.

(*c*) *Humeston* v. *Cherry*, 23 Han. N. Y. 141; *Bumley* v. *Tafts*, 66 Miss. 48.

(*d*) *Harvey* v. *Murray*, 136 Mass. 377: *Grant* v. *Armour*. 25 O. R. 7.

(*e*) *Goldie & McCulloch* v. *Harper*. 31 Ont. R. 284: *Sawyer and Massey* v. *Robertson*. L. R. 1 Ont. 297.

(*e*[1]) L. R. 1 Ont. 297.

vendor) if the latter has not had a reasonable time in which to signify his assent. ($e^2$)

Where two persons are joint vendees of the property, then both are liable in the event of ordinary negligence, ($f$) but not so when one of them only is the sole bailee. ($g$) So is the bailee liable for the negligent acts of his sub-agent. ($h$) But while the bailee is liable for the negligence of his servants, as for instance where the servant carelessly and improperly exposes the chattel, so that it be stolen, ($i$) yet, if the act complained of has not been done by the servant in the service of, or course of employment by, his master or in obedience to his orders, the bailee is not responsible. ($j$) The liability of the vendee or bailee of a chattel may be extended by written contract beyond that which the law creates, ($k$) as, for example, when there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it, or pay damages for not doing it, although, in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible. ($l$) But this rule is only applicable when the contract is positive and absolute, and not subject to any condition, express or implied. Then there is this principle that where, from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for fulfillment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such

($e^2$) *Waterous* v. *Pratt*, 30 Ont. 538: *Xenos* v. *Wickham* (1886), L. R. 2 H. L. 296, 323.

($f$) *Davey* v. *Chamberlain*, 4 Ex p. 229.

($g$) *Ibid.*

($h$) *Laugher* v. *Pointer*, 5 Barn. & Cress. 547: *Milligan* v. *Wedge*, 12 Adolp. & Ellis 737: *Quarman* v. *Burnett*, 6 M. & W. 499.

($i$) *Coggs* v. *Barnard*, 2 Ld. Raym. 909, 910.

($j$) Story on Bailments, § 402.

($k$) Edwards on Bailments, 3rd ed. 380.

($l$) *Taylor* v. *Caldwell*, 3 B. & S. 826: *Hall* v. *Wright*, 3 B. & E. 746.

continuing existence as the foundation of what was to be done, then in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case before breach performance becomes impossible from the perishing of the thing without default of the contractor. (*m*)

There is also an obligation devolving on the bailor. He must deliver the article, and refrain from interfering with the bailee's use of it during the period of bailment, which will be until breach of condition. He must warrant the possession and title to the bailee to an extent necessary for the bailee's use of it, and that the article is free from any fault which would render it unfit for the purposes it was intended to be put to; (*n*) but, if the bailor is a gratuitous bailor, then only for such defects of which he was aware, and owing to which directly the borrower is injured. (*o*) If the price is sued for, the defendant may shew that the article sold was not as warranted, and this he may do in the same action in which he is sued for the price, and in that way reduce the plaintiff's claim by the difference between the value of the article as warranted, and its actual value in fact. (*p*) The vendee may reject the chattel if it does not come up in quality with the warranty, or, after receipt and acceptance he may bring his action for damages, or he may counterclaim in the vendor's action for the price; (*q*) but it does not appear that when the property has not passed, the buyer may still recover general damages, i.e., the difference between the value of the article contracted for and that supplied. It would seem anomalous, says Rose, J., "that when a

(*m*) *Taylor* v. *Caldwell*, 3 B. & S. 826.

(*n*) Story on Bailments, § 383.

(*o*) *Blackmore* v. *Bristol & Exeter Ry. Co.*, 8 El. & Bl. 1035: 4 Jur. N. S. 657: *MacCarthy* v. *Young*, 6 H. & N. 329.

(*p*) *Cull* v. *Roberts*, 28 Ont. R. 591: *Tomlinson* v. *Morris*, 12 Ont. R. 311: *Copeland* v. *Hamilton*, 9 Man. R. 143: *Crompton Loom Works* v. *Hoffman*, L. R. 5 Ont. 554.

(*q*) Benjamin on Sales.

contract expressly provided that no property should pass . . . there should be a recovery of damages, being the difference in value between the article contracted for, but to which the plaintiff was not entitled, and might never become entitled, and the article supplied, to the possession of which she had ceased to be entitled." (*r*) There is an implied warranty on the part of the seller, that the article sold is free from any charge or lien at the time of the sale, and one who sells, retaining the property in himself until the happening of a certain event impliedly warrants his right to sell, unless of course the circumstances of the sale shew that the seller is transferring only such property as he may have in the goods (*s*). In other words, the man who sells is supposed to warrant he has a good title, unless the circumstances of the case suggest otherwise; (*t*) and it may be that a vendor who sells a machine for a specific purpose known to the vendor at the time of the sale will have to pay, upon his failing to give title, not alone the value of the machine, but likewise the prospective profit his vendee has lost, which he stood to make by the use of the machine at the time when it is taken from him, (*u*) and when the buyer intends the article for a special purpose, but the vendor supposes it is for another purpose, the buyer can recover as damages for the non-delivery according to contract, the loss of profit which might have been made from the purpose supposed by the seller, provided the buyer has actually sustained damages to that or a greater amount: (*v*) and notwithstanding the property in an article by the contract remains in the vendor until it is paid for, there is a warranty, express or implied, that it shall be fit for the purposes intended, and if the article supplied does not do the work required of it, the vendors are liable for loss

(*r*) *Frye* v. *Milligan*, 10 Ont. R. at p. 513; *Hamilton Mfg. Co.* v. *Knight*, 5 B. C. R. 301, but see *Copeland* v. *Hamilton*, 9 Man. R. 143.

(*s*) Chalmers on The Sale of Goods, 17, 18.

(*t*) *Peuchen* v. *Imperial Bank*, 20 O. R. 325.

(*u*) *Gracie* v. *Argentina* (1880), L. R. 14 App. Cases 519; *Sheard* v. *Horan*, 30 Ont. 618.

(*v*) *Cory* v. *Thames Ironworks and Shipbuilding Co.*, L. R. 3 Q. B. 181.

of profits, if the vendees have done their best to remedy the defects, but for which defects, these profits would have been earned. (*v*[1]) Whatever the view may have been on the question of implied warranty of title upon the sale of goods, (*w*) it seems now to be the law that "by a contract of sale the seller impliedly warrants his right to sell the goods, unless the circumstances of the sale or agreement to sell are such as shew that the seller is transferring only such property as he may have in the goods," and while there appears to be no English decision on the point, there is probably an implied warranty on the part of a seller that the goods are free from any charge, and he must put the property sold into a fit and proper condition to answer the purpose for which the property was bought. Thus on a sale of "one-second-hand Woodbury Power and Case Separator, known as Arnason's outfit, the same to be put in good running order by Arnason Bros., by putting in set of cylinder spikes," this contract must be construed so as to hold that putting the machine in good running order was a condition, the failure to perform which by the vendors, gave the vendee a right to repudiate it, and the taking the machine and using it by the vendee is not a waiver of the vendee's right to insist on the performance of this condition. (*x*) And where in a contract for the sale of a gasoline engine and tank there is a warranty that if the engine would not work well, notice thereof is to be given to the defendants, stating wherein it failed, and giving a reasonable time to get it and remedy the defect; and if such defect could not be remedied, the engine was to be returned to the defendants, and a new engine given in its place, the plaintiff's remedy under such contract is for the return of the engine and its replacement by another engine, and not damages for breach of warranty. (*y*)

(*v*[1]) *Crompton & Knowles* v. *Hoffman*, L. R. 5 Ont. 554: *Corey* v. *Thames*, L. R. 3 Q. B. 181. See (1878) 4 Q. B. D. 670.

(*w*) *Mosley* v. *Attenborough*, L. R. 2 C. P. 628: *Raphael* v. *Burt*, Cab. & El. 231.

(*x*) *Abell* v. *Craig*, 18 Occ. Notes, 296.

(*y*) *Hamilton* v. *Northey Mfg. Co.*, 20 Occ. Notes 178: *Hendcliffe* v. *Barwick*, 5 Ex. D. 177.

The special qualified property—a defeasible interest in fact—which is transferred from bailor to bailee, together with the possession, enables the bailee to mortgage not the chattel but his interest in the chattel, such as it is, and upon payment of the price of the goods, if such is the contingency upon which the ownership therein passes to the bailee, or the latter waives the payment, the mortgage will become valid. (*z*) Indeed, there is nothing to prevent a bailee disputing the title of his bailor, which he may properly do in order to deliver the chattel to the rightful owner; (*a*) relying upon the right title and authority of the latter. (*b*) But if he so far appropriates the chattel to his own use as to make the act amount to a conversion, opposed to the terms of the bailment, he may render himself guilty of a felony. (*c*) Should he sell the goods by private sale to a *bona fide* purchaser, the bailment is at once determined, and the bailor may maintain an action against the purchaser. (*d*)

In like manner the bailor who delivers property to the bailee under an agreement that the title thereto shall not pass until paid for, may mortgage; he may also sell either before or after default, subject to the rights of the buyer in possession. (*e*) and the interest of the seller may be levied upon and sold for the debts of the seller. (*f*) After the bailor has so disposed by way of mortgage of the chattel in question, the bailee is entitled to refuse to deliver it to the

(*z*) *Crompton* v. *Pratt*, 105 Mass. 255.

(*a*) *White* v. *Brown*, 12 U. C. Q. B. 477: *Ogle* v. *Atkinson*, 5 Taunt. 759: *Wilson* v. *Anderton*, 1 B. & Ad. 450: *Cheesman* v. *Exall*, 6 Ex. 341.

(*b*) *Thorne* v. *Tilbury*, 3 H. & N. 534: *Biddle* v. *Bond*, 34 L. J. Q. B. 137.

(*c*) *Regina* v. *Massey*, 13 C. P. 484: *Regina* v. *Tweedy*, 23 Q. B. 120: *Livingstone* v. *Massey*, 23 Q. B. 156.

(*d*) *Cooper* v. *Willomatt*, 1 C. B. 672: 9 Jur. 598: 14 L. J. C. P. 219.

(*e*) *Carroll* v. *Beard*, 27 Ont. 349: *Bridgman* v. *Robinson*, L. R. 7 Ont. 591.

(*f*) *McMillen* v. *Larned*, 41 Mich. 521: *Burnell* v. *Maxin*, 44 Ch. 277. *Everett* v. *Hall*, 67 Me. 497: Jones on Chattel Mortgages, 104: *European & Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.*, 8 Jur. N. S. 136: 30 L. J. C. P. 247.

bailor, because if he did so, he would expose himself to an action. (*g*) Should the vendee of the bailor's interest in the chattel be forced to bring an action to obtain the property, it is not necessary that the bailor should be added as a party in order to entitle the plaintiff to succeed. (*h*) And in an action by the bailor, or the vendee of his interest, against one who has purchased the chattel from the bailee, the action is not one of detinue, and therefore a demand is unnecessary prior to the bringing of the action; nor is the act of the bailee's vendee in taking the chattels, such a conversion as will turn the action into one of trover; but, even if the latter were so, a denial after action of the plaintiff's right could be treated as evidence of conversion before action of the plaintiff's interest in the chattels. (*i*) The action of trover requires both right of property and right of possession to support it. (*j*) Hence it is that trover seldom lies at the action of the vendor against his vendee, or the vendee against his vendor, because in cases of conditional sales under the Act, one has the property and the other the possession, but when the right to both unite in one person, the action of trover is open to a plaintiff. (*k*) If the goods are wrongfully taken from the vendee by a third party, the vendee, even after breach of his condition with the vendor, can recover the full value of the goods from the wrongdoer. (*l*) The reason for this is that such vendee is still the owner, and being the owner is liable for and must pay the full price of the goods. If the sole condition of sale is prepayment, then before breach the vendor cannot recover the property or its value. (*m*)

(*g*) *European & Australian Royal Mail Co. v. Royal Mail Steam Packet Co., supra.*

(*h*) *Blackley v. Dooley*, 18 O. R. 381.

(*i*) *Blackley v. Dooley*, 18 O. R. 381.

(*j*) *Bloxam v. Sanders*, 4 B. & C. 941, 949: *Milgate v. Kebble*, 3 M. & G. 100: *Donald v. Suckling*, L. R. 1 Q. B. 585: *Ex p. Chalmers*, L. R. 8 Ch. 289: *Grice v. Richardson*, 3 App. Cases 319.

(*k*) *Rogers v. Deritt*, 25 O. R. 84.

(*l*) *Harrington v. King*, 121 Mass. 269: *Detrick v. Ashdown*, 15 S. C. R. 227: *Bridgman v. Robinson*, L. R. 9 Ont. 591.

(*m*) Benjamin on Sales, 301: *Bridgman v. Robinson, supra.*

(8) The statute only applies to such chattels the possession of which can pass from one to another (*n*) the ownership therein remaining with the vendor, until the payment, in part or in whole, of the purchase or consideration money. Hence the statute has no application when an innocent pledgee or vendee obtains a chattel from one between whom and the real owner of the chattel there has been no contract. In such a transaction the innocent pledgee or vendee must submit to his loss, though it would be different if he could shew that the person from whom he acquired the chattel was in possession of it, in some capacity enabling him to make a pledge or sale, (*o*) as, for example, if he were an agent within the meaning of the Factors Act. If neither the property nor the possession passes, the vendor cannot then maintain an action against the vendee, as if the property in the articles had passed, nor could he recover from his vendee if the article is destroyed when in his possession. (*p*) "Possession" is one thing and "right of possession" another thing, hence when the right of possession is retained in the vendor, and notwithstanding this, actual possession has in fact passed to the vendee, the statute may still apply. (*p*[1]) Actual possession is not any the less possession because the right of possession is in some one else. If this is not so, then the protection given by the statute goes for nothing. (*q*) If an article is shipped to the vendee under a contract by which the possession passes but not the property, the vendor may maintain an action for the price at once should the vendee refuse to perform his part of the contract, provided there has been no default on the part of the vendor, even though the ve-

(*n*) *Ante* foot notes 3 and 4, p. 5, also foot note 1, p. *Sutherland* v. *Mannia*, 8 Man. R. 541; *Bouce* v. *McDonald*, 4 W. L. *Times* 77.

(*o*) *Bush* v. *Fry*, 15 Ont. R. 122.

(*p*) Galt, J., *Gleason* v. *Knapp*, 26 U. C. C. P., at p. 559; *Friendly* v. *Canada Transit Co.*, 10 Ont. R. 756; *Langdon* v. *Robertson*, 13 Ont. R. 497.

(*p*[1]) *See Western Milling Co.* v. *Drake*, 2 Terr. L. R. 49; *Sutherland* v. *Marmix*, 8 Man. L. R. 541; *Bouce* v. *McDonald*, 9 Man. L. R. 297.

(*q*) *Western Milling Co.* v. *Drake*, 2 N. W. T. Rep. 34.

has not taken actual possession of the article in question. The measure of damages in such a case will be the full price of the goods, because the right of possession has been transferred to the vendee, and the vendor has done all that the contract required him to do. ($q^1$)

(9) There is nothing objectionable in the sale of a chattel upon the terms that the ownership shall not pass until the happening of a certain event, ($r$) which is usually the payment of the price. It is to sales of this kind that the statute applies. Hence it is not necessary to consider that line of cases wherein questions arise as to when the property in a chattel passes; or, if it has passed, so as to fix the rights of the vendor and the vendee, and the consequences to either of them as regards their respective creditors. ($s$) When the ownership in a chattel is changed, but not the possession, then another statute is invoked, ($t$) but, to all cases of manufactured goods, including pianos, organs and other musical instruments, but not furniture, except from and after the 1st of January, 1907, when the possession changes, but not the ownership, then the present statute prevails. It may become necessary to ascertain the intention of the parties regarding a change of ownership, and according as the intention may or may not be that the ownership changes, so is it decided whether or not the statute has any bearing. The question of property passing being simply one of intention, ($u$) when such intention is clearly established, *cadit questio*.

This intention is gathered by the circumstances of the transaction, the conduct of the parties, and the terms of the written contract. ($v$) To make an instrument a mortgage when in form and nature a conditional sale, or *vice versa*, the

($q^1$) *Tufts* v. *Poness*, 32 Ont. 51.
($r$) *Stevenson* v. *Rice*, 24 C. P. 245.
($s$) *Paton* v. *Currie*, 19 U. C. R. 388.
($t$) R. S. O. cap. 148.
($u$) *Gleason* v. *Knapp*, 26 U. C. C. P., Galt, J., at p. 558; *Bank of U. C.* v. *Killaby*, 21 U. C. R. 1; *Robertson* v. *Strickland*, 28 U. C. R. 221; *Ogg* v. *Shuter*, L. R. 10 C. P. 159.
($v$) *Langley* v. *Kahnert*, L. R. 9 Ont. 164; Jones on Mortgages, § 258.

intention of the parties at the time of the transaction must be clearly proved. (*w*) But the character of the transaction is fixed at its inception, for nothing short of an agreement between the parties afterwards, can alter the original nature of the contract. (*x*) The contract must be construed as of the day of its true date, and upon its construction as of that date depends the rights of vendor and vendee. (*y*)

So far as the bailee is concerned, and confining a sale by him of a chattel to his acts alone, he can confer upon third persons no better title than he himself possessed, and as he possesses none, then none can pass from him to a third person. (*z*) But he has an interest which he can sell, and, if the condition is performed, his vendee will have a complete title. (*a*) In fact, the interest of the bailee can, before default, be sold for the debts of the vendee, and the bailor or vendor, it has been held, cannot maintain trover until breach of the condition, if by the terms of the agreement he is not entitled to take the property until such breach. (*b*) Still the bailee can do nothing more than dispose of an interest, not of the ownership. (*c*) Therefore in all cases wherein it is agreed that the title or ownership of the property shall not pass until the arising of a certain contingency, or the happening of a certain event, then until the happening of the event or the arising of the contingency the bailee or vendee cannot dispose of the chattel so as to defeat

(*w*) *Wheeland* v. *Swartz*, 1 Yeates (Pa.) 579: *Sawyer* v. *Pringle*, 18 Ont. A. R., McLennan, J.

(*x*) Jones on Mortgages, 263.

(*y*) *Carrall* v. *Beard*, 27 O. R. 349: *Mason* v. *Johnson*, 27 C. P. 208: see *ante* p.

(*z*) Benjamin on Sales, 1 Am. Ed. 433: *Boyce* v. *McDonald*, 9 Man. R. 297: *Higgins* v. *Burton*, 26 L. J. Ex. 342: *Hardman* v. *Booth*, 1 H. & C. 803: Brett, L. J., *ex parte Crawcour*, *In re Robertson*, L. R. 9, Ch. D. 419.

(*a*) *Day* v. *Bassett*, 102 Mass. 445: *Vincent* v. *Coonell*, 13 Pick. 294: *Currier* v. *Knapp*, 117 Mass. 324.

(*b*) *Fairbanks* v. *Phelps*, 22 Pick. 535: *Newhall* v. *Kingsbury*, 131 Mass. 445: see *Blackley* v. *Dooley*, 18 O. R. 381.

(*c*) *Crompton* v. *Pratt*, *supra*.

the title of the true owner, *nemo dat quod non habet*, (*d*) and the possession of the chattel by the vendee or bailee does not improve his position in any particular, (*e*) and when it is so provided, the ownership will not pass until all the instalments are paid, even though all but one remain unpaid, (*f*) and the original vendor, if guilty of no laches, may recover the property from the vendee of his vendee. (*g*) Of course our statute protects purchasers, or is designed to do so, but where the statute is inapplicable, then the fact that the purchaser bought in most perfect good faith is immaterial, for it his duty to inquire and see that his vendor has a good title to the property which he undertakes to sell. He is just in the same position—that is legal position—as a *bona fide* purchaser of stolen goods. (*h*) "At common law," as stated by Mr. Justice Blackburn in *Cole* v. *N.-Western Bank*, (*i*) "a person in possession of goods could not confer on another, either by sale or his pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that to make either a sale or pledge valid against the owner of the goods sold or pledged, it must be shewn that the seller or pledger had authority from the owner to sell or pledge as the case might be. If the owner of the goods had so acted as to clothe the seller or pledger with apparent authority to sell or pledge, he was at common law precluded as against those who were induced

(*d*) *Banks* v. *Robinson*, 15 O. R. 618: *Walker* v. *Hyman*, 1 A. R. 345: Benjamin on Sales, Am. Ed. sec. 6: *Stevenson* v. *Rice*, 24 C. P. 250: *Ex parte Powell*, L. R. 1 Ch. D. 501, 505: *In re Matthews*, L. R. 1 Ch. D. 501: *Mason* v. *Johnson*, 27 C. P. 208: *Mason* v. *Bickle*, 2 A. R. 291: *Nordheimer* v. *Robinson*, 2 A. R. 305: *Crawcour* v. *Salter*, L. R. 18 Ch. D. 30: *Ex parte Crawcour, in re Robertson*, L. R. 9, Ch. D. 419.

(*e*) *Loesdeman* v. *Maclim*, 2 Starkie 311: *Fuentis* v. *Mantis*, L. R. 3 C. P. 268: *Ex parte Crawcour, supra*.

(*f*) *Crawcour* v. *Salter*, L. R. 18 Ch. 30, *per* Malins, V. C.

(*g*) Story on Sales, § 313: 2 Kent's Com. 497: *Sheard* v. *Horan*, 30 Ont. 618.

(*h*) *Deshon* v. *Bigelow*, 8 Gray (Mass.) 159.

(*i*) L. R. 10 C. P. 354.

*bona fide* to act on the faith of that apparent authority, and the result as to them was the same as if he had really given it." Should there be a sale by the vendee of his interest, the fact that his vendee goes into possession of the chattel will be primâ evidence that the latter has it and is detaining it, or, that it is under his control, (*j*) and will subject him to an action for conversion at the suit of the real owner, and, in the absence of demand before action the sub-vendee's conduct after action may amount to conversion and be treated as evidence of such. (*k*) For a court is not bound to impute the conversion to any particular time, but will treat the defendant's denial after action of the plaintiff's right to the chattel as evidence of a conversion before action. (*l*) But wherein difficulties often arise is in the application or non-application of the doctrine of estoppel.

If a man by his words or conduct wilfully endeavors to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist. And if a man either in express terms or by his conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts. If the true owner of goods or chattels so conduct himself as to enable another, who has the possession, but not the property in such goods or chattels, to hold himself out to the world as the real owner, the true owner is estopped from denying the title to an innocent purchaser for value, and the possession of property

(*j*) *Blackley* v. *Dooley*, 18 O. R. 381.

(*k*) *Morris* v. *Pugh*, 3 Burr. 1242: *Wilton* v. *Girdlestone*, 5 B. & Ald. 847.

(*l*) *Blackley* v. *Dooley*, *supra*.

attached to the realty which thereby becomes realty is a sufficient indication of ownership to stop the real owner as against an innocent purchaser for value. (*m*) Again, if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented. And finally, if in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards, as against the first, to shew that the state of facts referred to did not exist." (*n*) But possession is not the equivalent of title, and consequently no case has ever decided that the owner of goods is estopped merely because he has entrusted with the possession of his property a person who wrongfully sells it to another, even though that person is engaged in a business in the course of which he sells goods of the same kind as those which have been delivered to him as bailee. If this were not the law, then no man could safely leave his watch with a watchmaker who sells watches, or his carriage with a carriage maker who sells carriages. (*o*) It is quite clear in such a transaction that the Factors Act (*p*) does not apply, because to successfully invoke this statute two elements of fact must combine. First, the goods must be entrusted to the bailee as a factor

(*m*) *McDonald* v. *Weeks*, 8 Grant Chy. 297.

(*n*) Moss, C.J.A., in *Mason* v. *Bickle*, 2 App. R. 295. See *Carr* v. *London & N. W. R. Co.*, L. R. 10 C. P. 307: *Pickard* v. *Sears*, 6 A. & E. 469: *Freeman* v. *Cooke*, 2 Ex. 654: *Trust & Loan Co.* v. *Ruttan*, 1 S. C. R. 546 at pp. 584-7: *Jordan* v. *Money*, 5 H. L. Cases 185: *Clarke* v. *Hart*, 6 H. L. Cases 656.

(*o*) Strong, J., *Forristal* v. *McDonald*, 9 Can. S. C. R. at p. 17: *City Bank* v. *Barrow*, 5 App. Cases 664.

(*p*) R. S. O. cap. 152.

or agent for sale, and secondly, the bailee must carry on the business or calling of a factor. (*q*) Nor does the somewhat similar Act known as the Bills of Sale Act (*r*) have any bearing, because, first, the goods in question must be merchandise, and manufactured goods may not be merchandise; and secondly, the person to whom they are transferred must be a trader and the goods must be sold or transferred to him as such trader for the purpose of resale by him in the ordinary course of business. While possession may be some evidence of title, it is not the equivalent of title. If it were so, then the Legislature have needlessly passed the two statutes just referred to; and any contest would be limited to the two questions of fact, namely, the actual possession of the person assuming to sell the chattel, and the *bona fides* of the purchaser. A simple belief entertained by one party in a state of facts upon which belief such party acts, does not estop a third party from denying the existence of such facts, even though the conduct of such third party, if innocent of any wilful intent to deceive, gave rise to the belief. (*s*) The fact of possession of a chattel remaining with a bailee after the time of payment has elapsed when it was to be re-taken by the bailor, does not estop the bailor from setting up title thereto as against a purchaser from the bailee. Nor even the production by the bailee of a note given in purchase of the chattel, at least when the note bears no apparent reference to the purchase of the chattel. (*t*) And of course the bailor or vendor, by taking a note upon the contract of conditional sale, does not thereby put an end to the contract, (*u*) not even when he discounts the note or renews it, the latter practice being so common as to be cognizant to all commercial men. (*v*)

(*q*) *Fuentes* v. *Montis*, L. R. 4 C. P. 93; *Cole* v. *N. W. Bank*, L. R. 10 C. P. 354; *Johnston* v. *Credit Lyonnais Co.*, 3 C. P. D. 32.

(*r*) R. S. O. cap. 148, sec. 41 (1).

(*s*) *Mason* v. *Bickle*, 2 App. R. 291.

(*t*) *Mason* v. *Bickle*, *supra*.

(*u*) *Stephenson* v. *Rice*, 24 C. P. 250; *Loring* v. *Loring*, 64 Me. 556; *Kent* v. *Buck*, 45 Vt. 18; but see *Ballard* v. *Burgett*, 40 N. Y. 314.

(*v*) *McLean* v. *Smith*, 2 H. L. C. 309.

By registering a mechanics' lien against the realty of one to whom the vendor has sold a chattel to be affixed to the realty will not estop the latter from suing in detinue for the article so sold. (*w*) Where, again, upon the faith of a written undertaking to deliver goods, a third party is induced to buy from him to whom the goods were to be delivered, the original vendor is not estopped from refusing to act on the written undertaking. (*x*)

"A declaration to one man rarely operates as an estoppel in favor of another, for it would generally be unjust to carry the responsibility arising from a statement further than the person to whom it is addressed. (*y*) Declarations may be so general as to indicate an intention to reach and influence the public at large, but even then to operate as an estoppel against the declarant, there is required some evidence from which an inference can be drawn that the party injured, knew and was influenced by the declarations. (*z*)

Estoppel does not pass title. It simply precludes the owner from setting up title against the purchaser. Therefore if the owner stand by and allow a chattel to be sold as the chattel of another who omits to take possession, and then the owner sells to another person, the latter will be preferred, for he is not privy to the estoppel, and therefore is not estopped from asserting title to the chattel. (*a*)

The printing or painting of a man's name upon a chattel does not estop the true owner so doing from afterwards proving ownership of the chattel, but "when the owner, by his own act or consent, has given another, such evidence of the right to sell or otherwise dispose of his goods as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of sale or disposition, then, if the person so intrusted with the possession

(*w*) *Vulcan Iron Co.* v. *Rapid City Co.* (1894), 9 Man. R. 577.
(*x*) *Farmloe* v. *Bain*, L. R. 1 C. P. D. 445.
(*y*) Burton, J.A., *Walker* v. *Hyman*, 1 App. R. 351.
(*z*) *Wheelton* v. *Hardisty*, 8 E. & B. 259.
(*a*) *Richards* v. *Johnston*, 4 H. & N. 660.

of the goods, and with the *indicia* of ownership, or the authority to sell or otherwise, in violation of his duty to the owner, sells to an innocent purchaser, the sale will prevail against the right of the owner." (*b*) * * *

A case does not fall within this exception unless the owner confers on the vendor the evidence of ownership or of authority to dispose of the goods. (*c*) And if a man owning property delivers it to a third person and sends him forth to sell it and to receive pay for it, no secret agreement between them can affect the title acquired by a purchaser who buys in good faith without notice of the agreement. (*d*)

Transactions of the kind wherein the ownership does not pass should not be confounded with that class of transactions wherein the vendee has both title and possession, but the contract is voidable at the election of the vendor on the discovery of fraud. In transactions of the latter kind, a sale to a third party before the right to cancel is exercised by the owner of the goods, will defeat the right of the original owner. (*e*)

(10) The words "payment of the purchase or consideration money," contemplate a money consideration, and therefore should the consideration be other than that, or other than that which has a money value, the transaction between vendor and vendee is one not coming within the operation of the Act. (*f*) Payment is a condition precedent to be performed by the vendee before the vesting of the property. Until this condition be performed or waived the title does not pass from the vendor, who may on the non-performance of the condition recover his property from the vendee, and,

(*b*) *Forristal* v. *McDonald*, 9 Can. S. C. R. 12 at p. 17: *Pickering* v. *Bush*, 15 East. *Dyer* v. *Pearson*, 3 B. & C. 38.

(*c*) Brickell, J. See *McMahon* v. *Sloan*, 12 Penn. 229, 233: *Walker* v. *Hyman*, 1 App. R. 345: see *McNeill* v. *Tenth National Bank*, 46 N. Y. 325, 330.

(*d*) *Fitzgerald* v. *Hunter*, 19 Hun. 180.

(*e*) *White* v. *Gorden*, 10 C. B. 927.

(*f*) *Baldwin* v. *Benjamin*, 16 U. C. Q. B. 52: see *Sutherland* v. *Nixon*, 21 U. C. Q. B. 631: *Brooks* v. *Lester*, 35 Md 65: *Carpenter* v. *Blot*, 1 E. D. Smith 491.

if the statute is complied with, from a third person deriving title from the vendee. And, when the payment is to be by instalments, the title remains in the vendor until all instalments are fully paid; but the vendee may perfect his title by tendering the vendor the full amount of the purchase money, and if the instalments carry interest, then also the full amount of interest, even though the instalments be not due. (*g*) The vendee cannot relieve himself from liability by returning or offering to return the property, (*h*) nor can the vendor, if after default he allows the vendee to retain possession, and then accepts a part payment, disturb the vendee, for he thus waives the forfeiture, and the vendee's rights arise anew to acquire the title by payment, and they remain to him until another demand by the vendor for payment is refused by the vendee. (*i*) The fact of the purchase or consideration money not being payable to the vendor does not deprive the statute of its application. It is a sufficient legal consideration that the consideration moves from one party to a second party, and the ownership of the chattel is retained in a third party.

It makes no difference that the vendee or bailee give his promissory note to the vendor for the amount of the consideration money, (*j*) unless of course the note is taken in satisfaction of the purchase money, or unpaid part thereof, as the case may be, (*k*) and the mere taking of a note for the purpose of closing an account is not proof that it was taken in satisfaction of the purchase money. (*l*) And taking a cheque from the buyer does not ordinarily operate as payment to prevent the seller from retaking the goods, if the cheque is not paid. (*m*)

(*g*) *Cushman* v. *Irwell*, 7 Hun. (N.Y.) 525.

(*h*) *Appleton* v. *Norwalk*, 53 Conn.: 4 *Henry* v. *Tufts*, 25 Ill. App. 101.

(*i*) Benjamin, p. 301.

(*j*) *Stephenson* v. *Rice*, 21 U. C. C. P.: *Walker* v. *Hyman*, 1 App. R. 345.

(*k*) *Nordheimer* v. *Robinson*, 2 App. R. 305.

(*l*) *Nordheimer* v. *Robinson*, 2 App. R. 305.

(*m*) Benjamin on Sales, 299.

There can be no objection to the vendor's discounting the note given for the purchase money. His so doing cannot be urged as a waiver of the owner's right of property, nor, of course, as constituting payment of the consideration money (*n*).

Nor does the fact of providing that the purchase money be paid as rent in weekly or monthly or longer instalments, in any way prevent the application of the statute. (*o*) But when the contract and the note are contained and interwoven in the same instrument, the note is not negotiable, in fact it is not a promissory note. (*p*) Of course much depends upon what the contract contains. If there is nothing in the contract except that which accelerates the time of payment upon certain events, and nothing which makes payment of the note conditional, the instrument does not lose its character as a promissory note: but the additional words that the title and property in the article for which the note is given shall remain in the vendor until the note is paid (and without these or words of similar meaning the instrument is not within the Act) are fatal to the instrument as a negotiable promissory note, because the purchaser is not compelled to pay when the day of payment arrives unless at the same time he gets the property with a good title. There is here a condition, and the payment to be made is therefore not an absolute unconditional payment, such as is required to make a good promissory note. (*q*) On the other hand, an instrument in the form of a promissory note with conditions thereunder written may be an instrument evidencing a conditional sale. (*r*) The promise to pay contained in the note, and the obligation to transfer the title to the chattel are mutual, each

(*n*) *Mason* v. *Bickle*, 2 App. R. 295: *Hall* v. *Hazlitt*, 7 Ont. App. 305.

(*o*) *Nordheimer* v. *Robinson*, 2 App. R. 305: *Goldie & McCulloch* v. *Harper*, 21 Ont. R. 284.

(*p*) *Third National Bank* v. *Armstrong*, 25 Minn. 530: *Mersey Steel Co.* v. *Naylor*, 9 App. Cases 440: *Wettlaufer* v. *Scott*, 20 O. A. R. 652.

(*q*) *Dominion Bank* v. *Wiggins*, 21 O. A. R. 275.

(*r*) *Wettlaufer* v. *Scott*, 20 Ont. App. 652.

is the sole consideration for the other concurrent condition, and each depends upon the other. And if, prior to default, the vendor takes possession of the property and disposes of it, so that on maturity of the vendee's promise to pay, an observance of the condition on the part of the vendee becomes impossible, no action can be maintained against the maker of the note. (*s*) In fact the vendee never acquires any title or right to possession, and by the vendor's act, is deprived of his power of acquiring any by payment of the price. (*t*) So great is the obligation on the vendor's part to restore the chattel, that even when he takes and sells the chattel, after having sued and obtained judgment on the notes given therefor, the vendee can open up and go behind the judgment (because the transaction of sale subsequent to the judgment shews that the consideration for the judgment has disappeared by the intentional act of the vendor—the judgment creditor) and have the judgment declared invalid. (*u*) The rule of law is that where there is a contract in which there are two parties, each side having to do something, if the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, "I am not going to perform my part of it, when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct." (*v*) Hence, the balance of the purchase money under such circumstances, cannot be recovered from the vendee, and the contract of the vendor, once he has disposed of the specific chattel, cannot be fulfilled by substituting another article of a similar make and material. (*w*) When, however, the property in the chattel by the sale passes to the vendee, and by the agreement there is no right re-

(*s*) *Third National Bank* v. *Armstrong*, *supra*.

(*t*) *Minneapolis Harvester Works* v. *Halley*, 27 Minn. 495.

(*u*) *Arnold* v. *Playter*, 22 O. R. 608. See *Plessisville* v. *Levesque*, Q. R. 22 S. C. 306, as to effect on vendor's position of obtaining a judgment.

(*v*) *Cowan* v. *Fisher*, 31 Ont. R. 426: *Mersey Steel Co.* v. *Naylor*, 9 App. Cases 438: *Freath* v. *Burr*, L. R. 9 C. P. 208.

(*w*) *Sawyer* v. *Pringle*, 18 O. A. R. 228.

served to resell, then, if the vendor retakes possession and sells, the vendor is guilty of a mere tortious act, for which the vendee has his remedy; he may bring trespass against the vendor for taking possession of the chattel, and may recover the actual value of the article at the time it was taken; but he, the vendor, can sue for the balance of the purchase money. This results from the fact that there has been no rescission of the contract. Where, however, there is a reservation to take and resell on default, and the vendor exercises that right, it operates as a rescission of the original sale, and dissolves the contract. (*x*) The fact of the vendor taking possession of the article, using it, and offering it for sale, and neglecting to take proper care of it, may be treated by the vendee as a rescission of the contract, and the vendor will lose his right as against the vendee. (*x*[1]) Then, in those cases wherein by the agreement it is provided that the property remains in the vendor, who may retake possession on default and sell, and the purchase money be applied *pro tanto* on what is due, and the vendees are to remain liable for the difference, the difference can then be sued for, *because of this special agreement* without which no action for any part of the price can be maintained, if the vendors have taken possession of and sold the chattel. (*y*)

(11) The words "shall only be valid as against" have a meaning and effect which requires to be noticed. Instruments under the Act shall be invalid as against *subsequent purchasers or mortgagees* without notice in good faith, unless the provisions of the Act are complied with. In other words, such an instrument shall be "null and void." (*z*)

(*x*) *Page* v. *Corcasjee Eduljee*, L. R. 1 P. C. 127; 3 Moo. P. C. N. S. 499: *Stephens* v. *Wilkinson*, 2 B. & Ad. 320: *Chinery* v. *Viall*, 5 H. & N. 288.

(*x*[1]) *Harris* v. *Dustin*, 1 Terr. L. R. 404.

(*y*) *Arnold* v. *Playter*, 22 O. R. 698. See *Frye* v. *Milligan*, 10 Ont. R. 509, Tremeear, p. 88.

(*z*) As to the meaning of which words, in this connection, see *Billiter* v. *Young*, 6 Ell. & Bl. 1.

In a somewhat analogous sense an Imperial Act (*a*) uses the words "fraudulent and void," and the difference between these words and those in the present statute, is referred to in *ex parte Blaiberg*. (*b*)

This is the intention of the Act, and is the effect of it, yet by the peculiar wording of the section, the negative inference is, that if an instrument shall only be valid as against the persons mentioned on certain conditions, if only valid as to them, then as to others not mentioned in the Act that the instrument shall be invalid, but of course the inference has not the force of giving a meaning to the section different to that intended.

The meaning of the words "as against" found in this statute when read with the subsequent words "purchasers and mortgagees," etc., is, that the instrument of conditional sale shall be void, in order to give effect to the purchase of the purchaser, or mortgage of the mortgagee, but no further, (*c*) and, so soon as the claims of the persons protected by the statute are satisfied, the vendor or bailor of the chattel becomes entitled *eo instanti*, to any benefits that may remain thereafter. The statute does not mean that the instrument shall be void to all intents and purposes because it does not say so; but that it shall be void simply and only to let in the claim of the purchaser or mortgagee, as the case may be. Such is the meaning to be attached to any statute, when it declares a deed void as against a particular person. It makes it void merely to the extent of his claim. (*d*) The words of the statute are "shall only be valid." This means in fact "invalid," and this latter word in turn means having no force, effect or efficacy: void; null. (*e*) Yet, the words are not used in the sense of being absolutely void, but relatively void: that is, voidable, capable of being avoided, and

(*a*) 41 & 42 Vic. cap. 31, sec. 8.

(*b*) L. R. 23 Ch. D. 254.

(*c*) *Ex parte Blaiberg*, L. R. 23 Ch. D. 254.

(*d*) *In re Artistic Colour Printing Co.*; *Ex parte Fourd...*, 21 Ch. D. 150; *Ex parte Blaiberg, supra.*

(*e*) *State* v. *Casteel*, (Ind.) 110, Ind. 174.

not that the transaction is a nullity as if it had never existed. (*f*) In fact, the word "void" is seldom regarded as implying a complete nullity except in a very clear case. (*g*) But the general rule is that where the word "void" is introduced for the benefit of parties only, it is construed to mean voidable; but if used to secure a right to, or confer a benefit upon, the public, it will receive its full force and effect, and be held to mean null and incapable of confirmation. (*h*)

Under the Imperial Act, 17 & 18 Vict., cap. 36, sec. 1, it was at one time held in a case wherein the defendant made a bill of sale of his goods to S., which was not registered, and afterwards made a bill of sale which was registered, that although the unregistered bill of sale was not invalid as against the secured bill of sale, yet inasmuch as execution had issued against the defendant, and the statute made null and void the instrument as against execution creditors, the same was displaced *altogether* by reason of the execution, and therefore that S. could not set up his unregistered bill of sale, as against the subsequent instrument which was registered. (*i*)

(12) There are two classes of persons, against each of which an instrument under the Act shall be invalid.

(i) Subsequent purchasers without notice in good faith for valuable consideration.

(ii) Subsequent mortgagees without notice in good faith for valuable consideration. The consideration must be a valuable one. The purchaser or mortgagee must part with something of value, or must suffer some loss, and this, of course, will exclude a mere volunteer who takes by gift, devise or inheritance.

(*f*) *Ewell* v. *Daggs*, 108 U. S. 148.

(*g*) *Brown* v. *Brown*, 50 N. H. 542.

(*h*) *Rex* v. *Hipswell*, 8 B. & C. 466: 15 E. C. L. 267: *Pearce* v. *Morrice*, 2 Ad. El. 84.

(*i*) *Richards* v. *James*, L. R. 2 Q. B. 285.

Having regard to the purpose of the Act there can be little doubt that the subsequent purchasers and mortgagees of the chattel are subsequent purchasers or mortgagees from the bailee, not from the bailor. Apart from the statute it is quite clear that where the condition of prepayment is express, then no absolute title passes until payment, and therefore the vendee can give none to others; but here the statute steps in and says, the effect of failure to comply with its terms will be that the vendee can give to others such title if they be purchasers or mortgagees in good faith. The mortgagee stands on the same footing as a *bona fide* purchaser, and can acquire no title as against the vendor if the Act is complied with. (*j*) And an assignee can stand in no better position than his assignor. (*k*)

The persons protected by this Act are the same as those protected by the statute of the State of New York. (*l*) And as in the latter Act, so in ours, creditors are excluded. Their rights are not increased, but remain just the same as if the Act had not been passed, and because a representative of creditors can have no higher rights than the creditors have, it follows that a liquidator of an insolvent vendee, as representing creditors of the vendee, cannot be heard to take the objections open to others under the Act. Nor are these objections open to him in his capacity as representing the vendor, because the contract of the vendor with the vendee stands good both against the vendor and the liquidator, (*m*) and a pledgee of property held under a contract of conditional sale is not within the protection of the statute. (*n*)

The reason of the statute declaring void an instrument under the Act, as against these two classes of persons unless its requisites are complied with, will appear obvious, when

(*j*) *Herring* v. *Willard*, 2 Sandf. (N.Y.) 418.

(*k*) *Benner* v. *Puffer*, 114 Mass. 376.

(*l*) Laws of 1884, cap. 315: Bank's Rev. Stat. (4th ed.) 2522.

(*m*) *Re Canadian Camera Co., A. R. William's Claim*, L. R. 2 Ont. 677: *Frank* v. *Batten*, 49 (Hun.) N. Y. 91.

(*n*) *Kauffman* v. *Klang*, 16 Misc. Rep. (N. Y. Supreme Court 379).

it is remembered for a moment how easily a fictitious and undeserved financial standing can be secured by the apparent ownership of personal property. The wonder is, not at premature legislation in the interests of a community, but that legislation should be so long delayed. There can be no doubt of the wisdom of the statute. "Better to safeguard commercial morality, it is to make provision for giving publicity by registration to dealings such as this statute contemplates. The effect of such transactions (though they be not contrary to law), is to protect the credit of a trader who is yet heavily weighted with undisclosed obligations. Grave suspicions must always arise in the minds of creditors whose claims are superseded by some instrument of peculiar character, produced at a period of crisis, by which all the assets of their debtor are secured to a near relative." (*o*)

Prior to coming into force of this statute, a transaction aimed at by this legislation would be perfectly good as against the parties designated now to be protected, provided there was an absence of fraud, fraud vitiating all things.

Now one of two things is required, so far as manufactured goods are concerned.

(i) The name and address of the manufacturer or vendor.

(ii) A registration.

One or other of these requisites must exist, and he who fails in both, must suffer for improperly enabling another to appear to the world as absolutely owning property which in reality belongs to another. An unauthorized registration, however, will not be sufficient to effect third persons with notice of the vendor's claim, nor will registration of an agreement of sale, which is not executed according to statute (*e.g.*) when executed by the vendor and not by the vendee, secure the benefits of the statute. (*p*)

Between the parties themselves, however, that is, between the bailor and bailee, or the manufacturer or vendor and

(*o*) Boyd, C., in *Banks* v. *Robinson*, 15 O. R. p. 624.

(*p*) *W. W. Kimball Co.* v. *Mellon*, 80 Wis. 133; *S. L. Sheldon Co.* v. *Mayers*, 81 Wis. 627.

vendee, no injury can result from a non-compliance with the statutory requirements: therefore, so far as they are concerned, and all claiming under them, their administrators or representatives, or as against any other title inferior to that of the immediate parties, except a subsequent purchaser or mortgagee as above indicated, a conditional sale where the possession changes but not the ownership, is valid without compliance with the statute. (*q*)

It is valid without such compliance as against the creditors of the conditional vendee or bailee, for as already pointed out nowhere does it appear that the creditors of the vendee or bailee are intended to be protected. (*r*) An execution creditor can have no better or higher right against the goods of his debtor, than the debtor himself, and, if the debtor had no right, except that of possession, the creditor can acquire no right. (*s*)

But surely creditors should be safeguarded against a fictitious position of one to whom they give credit, in the ordinary course of business. While a creditor, it is true, without the aid of a statute, cannot stand in any better relationship towards the chattels than the debtor, it must be remembered that it may be the very possession of these chattels by the debtor that induces the creditor to give him credit, and when it is further remembered that this possession in the debtor is by the act of his vendor, it may well be asked why in this Act (as they are in the Act relating to Bills of Sale and Chattel Mortgages), "creditors" are not included. (*s*[1])

In *Cogg* v. *Hartford, etc., R. Co.*, 3 Gray (Mass.) 542, Bigelow, J., said: "It is difficult to see any good and satisfactory reason for the distinction which is attempted to be

(*q*) *Robinson* v. *McDonald*, 2 B. & A. 134: *Broughton* v. *Broughton*, 1 At. K. 625.

(*r*) *Frank* v. *Batten*, 49 Hun (N.Y.) 91.

(*s*) Osler, J., *Dominion Bank* v. *Davidson*, 12 App. R. 92: *Beaver* v. *Lord Oxford*, 6 D. M. & G. 507.

(*s*[1]) "Creditors" are included in the Acts of the following States, viz.: Iowa, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, Texas, Vermont, Virginia, Washington, Wisconsin.

made between the rights of the vendee and his creditors to goods sold and delivered on condition, and those of *bona fide* purchasers. All the cases turn on the principle that the compliance with the conditions of sale and delivery is, by the terms of the contract, precedent to the transfer of the property from the vendor to the vendee. The vendee in such cases acquires no property in the goods. He is only a bailee for a specific purpose. The delivery which in ordinary cases passes the title to the vendee, must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession; and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy. The cases above cited expressly recognize them as legal and valid contracts between the vendor on the one hand and the vendee and his creditors on the other. If valid to this extent, it necessarily follows that they are so for all purposes. If the property does not pass out of the vendor for one purpose, it certainly does not for another. If it remains in him at all, it is because such is the agreement of the parties, and it cannot be divested by any act of the vendee until the contract is fulfilled. A *bona fide* purchaser, as well as an attaching creditor, must acquire his title through the vendee. If the latter has no title, he can communicate none. The purchaser and the attaching creditor are in this respect upon the same footing. No equities can intervene to give the former a better right as against the original vendor than the latter: they are *in æquali jure*. Neither of them has a legal title to hold the property." The rights of creditors are protected in the North-West Terri-

tories (*t*) if the value of the goods sold be $15, or over; and in the Province of Nova Scotia the rights of creditors are similarly guarded, but without any limit in value of the goods sold to the conditional vendee. (*u*)

If the property be taken under execution the vendor can recover the property apart from any interference by the Act. (*v*) As the assignee for the benefit of creditors succeeds only to such rights as the assignor had at the time of the assignment, he can acquire no title to property held by the assignor under a contract of conditional sale, where the title to such property has not yet become vested in the assignor by the performance of the condition. (*w*)

As regards the two classes of persons above mentioned, (p. 53) however, the instrument as to them can only be made effectual by painting, printing, or engraving the name of the manufacturer, bailor, or vendor on the article sold, or by filing the instrument in accordance with the statute. (*x*)

In this section the words "good faith" are inserted, requiring that a purchaser or mortgagee should be such in good faith. And when such is the case, the courts will hold the original vendor to the most strict proof of his rights before disturbing the position of such innocent purchaser, particularly when the transaction covers goods sold in the ordinary course of business. (*y*) Actual knowledge is not inconsistent with good faith, (*z*) but where collusion exists with the vendee or bailee to cheat the manufacturer or vendor, the purchase transaction as to them will be void, even though the statutory formalities have been omitted. (*a*)

(*t*) Ord. 1898 cap. 4*a*.

(*u*) A. S. S. cap. 28, sec. 8, sub-sec. 4.

(*v*) Story on Sales § 213, 2 Kent's Comm. 497, Am. & Eng. Encl. of Law, vol. 7, p. 492.

(*w*) *Brewer* v. *Ford*, 54 (Hun) N. Y. 116; *Campbell Printing Press Co.* v. *Walker*, 114 N. Y. 7.

(*x*) Section 6, *post*.

(*y*) *Purtle* v. *Heney*, 33 N. B. R. 607.

(*z*) *Sage* v. *Browning*, 51 Ill. 217; *McDowal* v. *Stewart*, 83 Ill. 538.

(*a*) *Fuller* v. *Paige*, 26 Ill. 358; *Gooding* v. *Riley*, 50 N. H. 1400; *Pattern* v. *Moore*, 32 N. H. 382.

It is possible a purchaser or mortgagee, for valuable consideration, though he may have notice of the existence of a conditional sale, may still be a purchaser in good faith; where, for instance, the statute itself has not been complied with. (*b*)

But it is hard to conceive how, possessing actual knowledge of the existence of a *bona fide* transaction, a purchaser or mortgagee can be such in good faith, so as to bring himself within the description of persons protected by the statute. (*c*)

"I should have thought that anyone purchasing with notice or knowledge of a prior purchase was not a purchaser in good faith, for whose protection the statute was passed." (*d*) But this view is not supported by authority, (*e*) although in the Province of Manitoba such a purchaser is put upon enquiry, and if he neglects his obvious duty in this regard, and suffers in consequence, he has no one to blame but himself, and loses the protection of the Act. (*f*) The governing authority (*g*) although not in keeping with the law in many of the States of the Union, (*h*) yet seems to follow the doctrine of the English cases, which declare a purchaser with notice to be in bad faith as contradistinguished from good faith, when the notice is so full and direct as to render a subsequent purchase an act of positive fraud. (*i*)

A subsequent purchaser is none the less a subsequent purchaser, because he has omitted to obtain actual possession, or immediate delivery with actual and continued change of pos-

(*b*) *Edwards* v. *English*, 7 E. & B. 564: *Morrin* v. *Rourke*, 39 U. C. Q. B. 500: *Moffat* v. *Coulson*, 19 U. C. Q. B. 341: *Caplin* v. *Anderson*, 88 Ill. 120: *Porter* v. *Dement*, 35 Ill. 478.

(*c*) *Farmers Loan & Trust Co.* v. *Hendrickson*, 25 Barb. (N.Y.) 484: *Tyler* v. *Strong*, 21 Barb. (N.Y.) 198: *Tiffany* v. *Warren*, 37 Barb. (N.Y.) 571: *Sagre* v. *Hewes*, 32 N. J. Eq. 652.

(*d*) Rose, J. *Winn* v. *Snider*, 26 Ont. A. R. at p. 386.

(*e*) *Moffat* v. *Coulson*, *supra*.

(*f*) *Sutherland* v. *Mannix*, 8 Man. R. 541: *Singer Mfg. Co.* v. *Converse* (Colo.) 47 Pac. Rep. 264.

(*g*) *Moffat* v. *Coulson*, *supra*.

(*h*) Eng. & Am. Ency. of Law, 1st ed., vol. 20, p. 584 *et seq.*

(*i*) *Chadwick* v. *Turner*, L. R. 1 Ch. D. 310.

session. These words are not used in the statute to define a subsequent purchaser, upon whom, in fact, as against a prior purchaser, the statute does not impose any of its obligations. (*j*) The latter can invoke for his protection the requirements of the statute in another, which he has himself failed to comply with. The Act avoids one, but the other stands good, except when it, in turn, is attacked by a further subsequent purchaser.

A subsequent purchaser in good faith within the meaning of the statute, is one who becomes a buyer by mutual assent of the parties express or implied, and not one who has unlawfully converted the chattels: for instance, he is not a purchaser, within the statute, who has acquired the chattel by paying a judgment obtained against himself by the vendee or bailee of the property. (*k*)

A purchaser who has paid nothing is, of course, not within the protection of the statute, because he cannot be defrauded, and a *bona fide* purchaser can only receive protection to the extent of his payments. (*l*) His purchase money must be actually paid, if it be simply secured it will not be sufficient, and he will not be protected unless his purchase is actually completed. It will not be sufficient if the transaction amounts to nothing more than an agreement for purchase. (*m*)

A *bona fide* purchaser at a sheriff's or bailiff's sale, is a purchaser intended to be protected by the statute, (*n*) and it has been held that a purchaser without notice cannot be considered a purchaser in bad faith, because he bought at a sale under execution at the instance of a creditor who was not entitled to subject the chattel to satisfy his claim, (*o*) but then such a purchaser cannot be a purchaser within the

(*j*) *Winn* v. *Snider*, 26 Ont. A. R. 384.

(*k*) Jones on Chattel Mortgages, § 484.

(*l*) *Kohl* v. *Lynn*, 34 Mich. 360.

(*m*) *Patten* v. *Moore*, 32 N. H. 382; *Cummings* v. *Tooley*, 39 Iowa 195; *Kessey* v. *McHenry*, 54 Iowa 187.

(*n*) *McNight* v. *Gordon*, 13 Rich. (S. C.) Eq. 222.

(*o*) *McNight* v. *Gordon*, *supra*.

definition of the Act, because he derives his title through a sale at the instance of a creditor, whose execution could have no force against the chattel, except to sell merely the vendee's interest therein, and nothing more. The purchaser must be a purchaser from the bailee or vendee.

A pre-existing debt is a sufficient consideration to bring a purchaser within the meaning of this Act, and to entitle him to the benefit of its provisions. (*p*) "A purchaser for value is a well known expression to the law. By the common law of the country the payment of an existing debt is a payment for valuable consideration. That was always the common law before the reign of Queen Elizabeth, as well as since. Commercial transactions are based upon that very idea. It is one of the elementary legal principles, as it seems to me, which belong to every civilized country; and many of the commercial instruments which the law recognizes have no other consideration whatever than a pre-existing debt. The man who has a debt due to him, when he is paid the debt has converted the right to be paid into actual possession of the money: he cannot have both the right to be paid and the possession of the money. In taking payment he relinquishes the right, for the fruition of the right. In such a case the transaction is complete, and to invalidate that transaction would be to lull creditors into a false security and to unsettle business." (*q*)

A landlord may become a purchaser in good faith from his tenant, the vendee or bailee of the chattel, within the meaning of the statute, either by taking the goods of his tenant as so much payment of his rent, or by purchase in pursuance of arrangement, and if the statute has not been complied with, the rights of the owner of the chattel will be defeated. A landlord would still be such a purchaser within the Act, should he, with the tenant's consent, but without notice, purchase the goods in the tenant's possession

(*p*) *Williams* v. *Leonard & Sons*, 26 C. S. C. R. 406.

(*q*) See also *Leask* v. *Scott*, 2 Q. B. D. 376; *Poirer* v. *Morris*, 2 E. & B. 89; *Currie* v. *Misa*, L. R. 10 Ex. 153.

at a bailiff's sale, instituted by himself by way of distress in order to secure his rent; (*r*) but having once made his distress, the landlord cannot afterwards be permitted to assume the character of a subsequent purchaser under the Act in order to cure defects of an illegal distress. (*s*)

It formerly was the law that any goods upon the demised premises were liable to a distress for rent; but the law now is that a landlord shall not distrain for rent on the goods and chattels the property of any person, except the tenant or person who is liable for the rent, although the same are found on the premises; (*t*) but such alteration in the law does not exempt from distress for rent the interest of the tenant in any goods or chattels sold to him under a contract of purchase such as is aimed at by this statute. (*u*) The R. S. O. 1897. cap. 170, s. 31, enacts as follows:—

31.—(1) A landlord shall not distrain for rent on the goods and chattels the property of any person except the tenant or person who is liable for the rent, although the same are found on the premises; but this restriction shall not apply in favor of a person claiming title under or by virtue of an execution against the tenant, or in favor of any person whose title is derived by purchase, gift, transfer, or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise, nor to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase, or by which he may or is to become the owner thereof upon performance of any condition, nor where goods have been exchanged between two tenants or persons by the one borrowing or giving from the other for the purpose of defeating the claim of or the right of distress by the landlord: nor shall the restriction apply where the property is claimed by the wife, husband, daughter, son, daughter-in-law, or son-in-law of the tenant, or by any other relative of his, in case such other relative lives on the premises as a member of the tenant's family.

(2) Nothing in this section contained shall exempt from seizure by distress goods or merchandise in a store or shop managed or controlled by an agent or clerk for the owner of such goods of merchandise when such clerk or agent is also the tenant and in default and

(*r*) *Forlinger* v. *McDonald*, 45 U. C. R. 233.
(*s*) *Griffin* v. *McKenzie*, 46 U. C. R. 93.
(*t*) R. S. O. 1897 cap. 17 O. S. 31.
(*u*) *Carroll* v. *Beard*, 27 Ont. R. at p. 355.

the rent is due in respect of the store or shop and premises rented therewith and thereto belonging, when such goods would have been liable to seizure but for this Act.

(3) Subject to sections 39 and 40 the word "tenant" in this section shall extend to and include the sub-tenant and the assigns of the tenant and any person in actual occupation of the premises under or with the assent of the tenant during the currency of the lease, or while the rent is due or in arrear whether he has or has not attorned to or become the tenant of the landlord.

Taxes, however, are different to rent. A chattel can be levied upon for taxes notwithstanding the property therein is in one not liable for them. In such an event, the proper course to take is, for the vendor of the chattel to pay the taxes, and then he becomes entitled to be reimbursed by the person on whose behalf they were paid. (*v*)

If a purchaser buy the interest of the vendee or bailee, and undertakes to pay the purchase money of the chattel, he cannot take advantage of the want of registration, or the absence of name from the chattel. (*w*) Nor can he do so, if the amount due to the vendor or manufacturer form part of the purchase money agreed upon between the purchaser and the vendee; (*x*) but either a purchaser or subsequent mortgagee is at liberty to shew that the claim of the manufacturer has been liquidated, or that the chattel itself was in point of fact never subject to the manufacturer's claim. (*y*)

The circumstance that a subsequent mortgagee knew of the existence of the rights of the manufacturer, and in order to protect his own interests prejudiced those of the manufacturer or vendor of the chattel, is not a good and sufficient reason for saying that the subsequent mortgage was not made or taken in good faith, and therefore prevented the mortgagee from setting up non-compliance on the part of the vendor with the statutory requirements. (*z*)

(*v*) *Edmunds* v. *Wallingford*, 14 Q. B. D. 811.

(*w*) *Greitker* v. *Alexander*, 15 Iowa 470.

(*x*) *Kellog* v. *Secord*, 42 Mich. 318

(*y*) *Barry* v. *Bennett*, 7 Met. (Mass.) 354; *Housatonic & La Banks* v. *Martin*, 1 Met. (Mass.) 294.

(*z*) *Tidey* v. *Craib*, 4 O. R. 696

A subseqnent mortgagee in good faith is not required to comply with the statnte requiring registration of chattel mortgages (*a*) in order to maintain priority over an unregistered instrument nnder that Act. The reason is that this statute so states, namely, that such an instrument shall be void as against snbsequent mortgagees. It does not say "valid only as against subsequent mortgagees *who have registered.* but simply as against subsequent mortgagees." (*b*)

A subsequent mortgagee is *pro tanto* a purchaser. He is affected in the same way as a purchaser. and entitled to occupy the same legal position as regards want of notice, the existence of good faith, and any other statutory advantages possessed by a purchaser under the Act.

(13) The consideration moving between the vendor and vendee of a chattel, to be within the Act, must be a money consideration; but the consideration required to move from the persons protected by the Act is a valuable consideration. While money is a valuable consideration, yet a valuable consideration covers more than mere money.

A valuable consideration is money, or any other thing that bears a known value, or marriage, (*c*) or some other benefit to the person making a promise however slight. Or to a third person by the act of the promisee. (*d*) Or any loss, trouble. detriment or inconvenience to, or charge or liability upon the promisee, however slight. for the sake or at the instance of the promisor, though without any benefit to the promisor. (*e*) Or the suspension or forbearance of legal proceedings. the prevention of litigation or the settlement of disputes.

(14) See *ante* foot note (3), and page 15. It must now not be overlooked that by reason of the Statute Law Amend. Act.

(*a*) R. S. O. 1887. cap. 125.

(*b*) *De Courcey* v. *Collins*, 21 N. J. Eq. 357.

(*c*) *Keven* v. *Crawford*. L. R. 6 Ch. D. 29: *Wright* v. *Redgrove*. W. N. (1870) 30-32.

(*d*) *Bailey* v. *Croft*. 4 Taunt. 611: *Williamson* v. *Clements*. 1 Taunt. 523.

(*e*) *Shirbyan* v. *Albany*. Cro. Eliz. 67: *March* v. *Culpepper*. Cro. Car. 71.

6 Edw. VII. cap. 19, which, however, does not come into force until the 1st January, 1907, the present statute is made to cover the case of all chattels. The question to be answered hereafter is not whether the article conditionally sold is manufactured, but whether in law it is a chattel. Of course, as to manufactured chattels, they still will be governed by section one, as heretofore, but as to all other chattels, the amending Act (see *post* sect. 2 (*a*)) will apply.

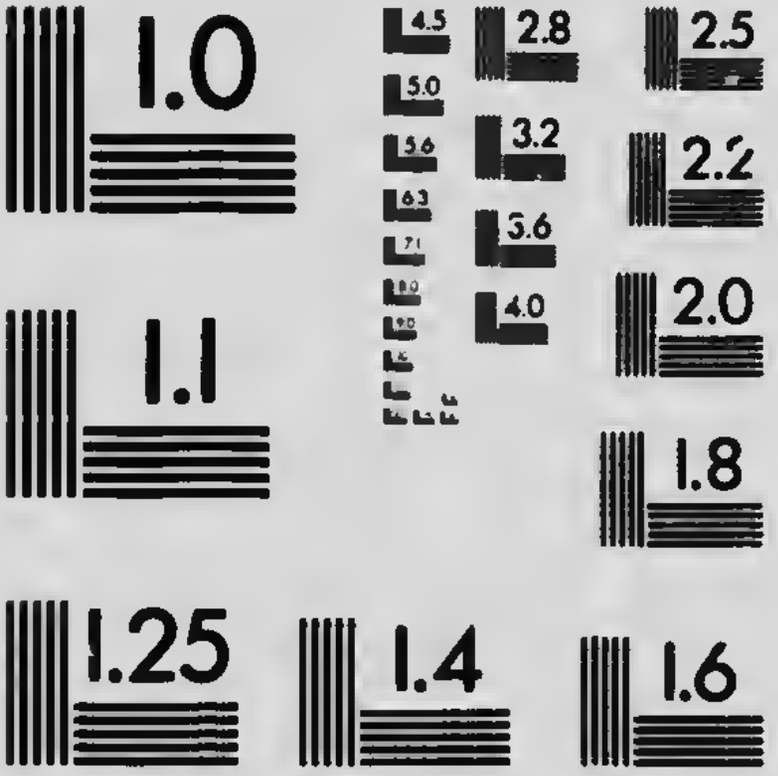
(15) It must be noticed that the time when the chattel must have the name and address of the manufacturer, bailor or vendor of the same painted, etc., thereon, or otherwise plainly attached thereto, is the time when possession is given to the bailee, not when the sale is made, although in practice, generally speaking, both are contemporaneous. Indeed, judging from an analogy with bills of sale, it is not necessary that the present Act be complied with, within any particular time after the sale, provided, of course, it is complied with so far as name, etc., is concerned, when possession is given. (*f*) Now, the important time to have the name upon the chattel is certainly later on as much as at this particular period. Still, such is the law, and if complied with, the vendor's rights are not lost to him by the name, address, etc., being obliterated while the chattel is in the possession of the vendee or under his control, not even if so obliterated at a paint shop to which the article has been sent to be painted by the vendee, with the knowledge of the vendee, for this knowledge, it is said, cannot be changed into an assertion that the name and address of the vendor was not upon the article when possession was delivered as provided by the statute. (*g*) Nor can it be assumed that the vendor knows that in the process of painting, the obliteration of his name is necessarily involved. Nor, further, is there any duty cast upon

(*f*) *McDonald* v. *Gaunt*, 30 Ont. R. 398; *Wettlaufer* v. *Scott*, 20 Ont. A. R. 652.

(*g*) *Wettlaufer* v. *Scott*, *supra*.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)

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him to prevent the vendee from obliterating the name, etc., or calling upon him (the vendor) to exercise any control over it in that respect during the period of bailment. But it might, and probably would, be a very different thing if the vendor in collusion with the vendee intended that in the repainting of the chattel his name, etc., should be painted out. In such case, while the statute has been fully complied with, a principle of law at once operates by which a man may and shall not benefit by his own fraud, and while this principle of law in no way runs counter to the statute, it prevents it being made an instrument of injury to an innocent party. If the statute stopped at requiring the name to be painted, printed, stamped or engraved, it might have improved the section; but when the alternative is given of plainly attaching the name, etc., this the manufacturer may well do, thereby complying with the Act, and within a week, the object of the statute be defeated by the name becoming detached. Once detached one means of notice and, if employed, the only means of notice which need be adopted, is destroyed, and the public by a statutory trap exposed to the very danger the statute is designed to guard against. In answer to the claim of a subsequent purchaser the answer of the manufacturer would be that he complied with the statute, by plainly attaching his name to the chattel, and that he was not at fault if the name became detached. Yet it may be reasonably supposed that by attaching the name to the article is meant a reasonably permanent method fixing the name upon the article itself, and if anything less than the latter is done it is not sufficient. How much better it would be to omit (*h*) this method of publication, giving no alternative, but requiring simple registration, and thus meeting the suggestions of an eminent jurist that in this particular the statute requires amendment to make it more effectual. But the statute must be construed with reasonably close adherence to the language used. (*i*)

(*h*) See *Wettlaufer* v. *Scott*, 20 O. A. R. at p. 656.

(*i*) Hagarty, C.J.O., in *Wettlaufer* v. *Scott*, 20 O. A. R. at p. 654.

Ten days from the execution of any instrument under the Act is allowed for registration. (*j*) Hence, though the statute insists that when the name is placed on, or attached to the instrument, it must be done at the time when possession is given to the bailee; yet, if it be not so done, no advantage thereof can be taken until the expiration of ten days, within which period the alternative of registration may be complied with.

(15*a*) The exact name must be on the article sold. Anything short of this is insufficient, even though intending purchasers be not misled. For instance, if the corporate name of a vendor is "The Mason and Risch Piano Company, Limited," the use of the words "Mason & Risch" is not a compliance with the provisions of this section. (*j*[1]) "The Legislature does not permit of the Court holding that anything other than that which it has prescribed as necessary, shall be a compliance with the statute, even though what is done is in the opinion of the Court as effective for the end which the Legislature intended to attain as that which it has required to be done to protect the common law rights of the owner of the chattel." (*j*[2]) It follows then, that, if words are added to the correct name, which negative the fact that the person so named is the manufacturer, bailor or vendor, the Act is still not complied with. Suppose, for instance, after the name on the article, follows the word "Agent," so that the inscription indicates that the person so named is agent, then by parity of reason, the inscription is insufficient. It is, however, suggested that with the surname of the vendor initials alone of the Christian name would be quite sufficient, for example: J. A. Brown instead of James Andrew Brown. The former inscription would be sufficient. (*j*[3])

(16) See preceding note and *ante* note (7) and (8).

(17) See *ante* note (11), (12) and (13).

(18) See *ante* note (11), (12) and (13).

(*j*) Section 2, *post*, p. 72.

(*j*[1]) *Mason* v. *Lindsay*, L. R. 4 Ont. 365.

(*j*[2]) Meredith, C.J., *Mason* v. *Lindsay*, *supra*.

(*j*[3]) *Mason* v. *Lindsay*, L. R. 4 Ont. at p. 372.

(19) The statute insists that as against purchasers, mortgagees, etc., the transaction be reduced to writing. Should the article sold have upon it the name of the vendor, as required by the statute, then there remains no legal necessity for registration under section 2, *post*, but none the less the transaction must be reduced to writing; and, though section 2 substitutes an alternative for the present clause, when the present clause is not complied with, yet to perform the alternative this clause must be observed, so far at least as reducing the terms of the bailment to writing.

The word "writing" includes words printed, painted, engraved, lithographed, photographed, phonographed, and otherwise traced or copied. (*k*) No specified or particular form of writing is required, and though the instrument be far from technical in form, yet if, from its entirety, it can be gathered that the possession of the chattel is passed from one to another, while the ownership is to remain in the bailor until paid for by the bailee, the instrument will be a writing within the Act.

It need not be witnessed, for the statute does not say so, and if witnessed, it need not be attested. (*l*)

It often has been the practice in selling an article, for the vendor to take a note therefor, and in the margin of the note or underneath it to have printed words to the effect "that the title in the property for which this note is given shall not pass until the note be paid." It is questionable if such a writing would be sufficient, because the statute requires the writing to be signed by the vendee, and the signature to the note might be said not to be a signature attached to memorandum, and such an instrument, we have seen, is not a promissory note. (*m*)

(*k*) R. S. O. 1897, cap. 1, sec. 8, sub-sec. 14.

(*l*) *Armstrong* v. *Ausman*, 11 U. C. Q. B. 498; see *Bryan* v. *White*, 2 Robertson 517, wherein it appears that the word "attestation" means "being present and seeing the execution." See also *Brodie* v. *Ruttan*, 16 U. C. Q. B. 207; *Sharpe* v. *Birch*, L. R. Q. B. D. 111; *Ford* v. *Kettle*, L. R. 9 Q. B. D. 139.

(*m*) *Dominion Bank* v. *Higgins*, 21 Ont. A. R. 275.

(20) Signing consists in the subscription by one himself of his name in writing, or by his agent. So long as the signature is that of the bailee, it matters not on what portion of the instrument it appears, so long as it can be identified therewith and proved to be appropriated by the party to the recognition of the contract, and a very material and operative part of it. (*n*) In fact, an instrument under the Act beginning I. A. B., agree, etc., etc., has been held to be a sufficient signing, provided the instrument be in the handwriting of the person sought to be charged, (*o*) but the danger from such a signing arises from the difficulty, as a matter of law, in saying that it necessarily authenticates and governs every material and operative part of the instrument. (*p*) A different result may happen when the document, so soon as authenticated by the signature of the party, ceases to be "a mere private privilege, but a matter of public concern." (*q*) The word "signed" before the bailee's name raises no presumption that the document is not an original. (*r*) If a man cannot write, he may make his mark. (*s*) In fact it has been intimated that a mark was a good signature, even if the party signing was able to write his name (*t*) The signature is also good, when the pen is guided by an amanuensis, the person intending to sign merely touching the top of the penholder. (*u*)

It is desirable that the signature, and of course the instrument, be written in ink, simply as a matter of permanence and security, but, if in pencil, it is none the less legal on that account. "There is no authority for saying that,

(*n*) *Hunt* v. *Adams*, 5 Mass. 359: *Closon* v. *Bailey*, 14 Johns 484: *Schmidt* v. *Schmaelter*, 45 Mo. 502: *Toms* v. *Coming*, 7 M. & G. 88; *Regina* v. *Justices of Kent*, L. R. 8 C. B. 305.

(*o*) *Taylor* v. *Dobbins*, 1 Strange 399: *Saunderson* v. *Jackson*, 2 Bos. and P. 238: Chitty, Jr., on Bills 10.

(*p*) *Hubert* v. *Treherne*, 3 M. & G. 704.

(*q*) *Provafoot* v. *Barnes*, L. R. 2 C. P. 88, 94: *Re Simpson & County Judge of Lanark*, 9 Prac. R. 358.

(*r*) *Becker* v. *Wood*, 16 C. P. 29.

(*s*) *George* v. *Surrey*, 1 M. & M. 516: E. C. L. R. vol. 22.

(*t*) *Baker* v. *Denning*, 8 Ad. & E. 94: see *Harrison* v. *Elring*, 3 Q. B. 117.

(*u*) *Helshaw* v. *Langley*, 11 L. J. C. 17.

when the law requires a contract to be in writing, that the writing must be in ink. There is not any great danger that our decision will induce individuals to adopt the mode of writing by pencil in preference to that in general use. The imperfection of this mode of writing, its liability to obliteration, and the impossibility of proving it when so obliterated, will prevent its being generally adopted." (*v*) If the name be printed, it is sufficient, but in such case the name cannot prove itself. Adoption by the party as his signature is necessary to be proved. (*w*)

Any hieroglyphic, though perhaps not a flourish, will be sufficient, provided such be adopted by the signer as his signature, but while the full name need not be written, at least the surname should appear. The initials, however, have been held to be sufficient; (*x*) though there is some doubt as to this, (*y*) unless the initials are intended as a signature by the party who writes them. (*z*) The objection to a mark, initials, or anything short of the written name, is not to its sufficiency as a signature, but to the difficulty occasioned when seeking to establish the writing as the signature of the party sought to be charged. Whatever is written or marked must be with the intention of denoting a signature. (*a*) Therefore a description of a person is not a signature, as, *e.g.*, where one subscribes a letter to a relative with the relationship of the writer as your affectionate mother without more. (*b*)

(21) The Act gives no information as to how the agent is to be appointed. There is nothing in the Act that makes

(*v*) Abbott, C.J., *Geary* v. *Physic*, 5 B. & C. 234, E. C. L. R. vol. 11: 7 Dow. & R., 653 S. C.; *Jeffery* v. *Walton*, 1 Stark 267, E. C. L. R. vol. 2: *Rhymes* v. *Clarkson*, 1 Phil. 22: *Green* v. *Shipworth*, 1 Phil. 53: *Dickenson* v. *Dickenson*, 2 Phil. 173.

(*w*) *Schneider* v. *Norris*, 2 M. & S. 286: *Brown* v. *Butchers Bank*, 6 Hill 443.

(*x*) *Merchants Bank* v. *Spicer*, 6 Wend. 443: *Palmer* v. *Stephens*, 1 Denio, 471.

(*y*) Benjamin on Sales, 4th Am. ed. 280.

(*z*) See remarks of Lord Westbury in *Caton* v. *Caton*, L. R. 2 H. L. 127, 143: *Chichester* v. *Cobb*, 14 L. T. (N.S.) 433: Leyden's Vendor and Purchaser, 144, ed. 1862.

(*a*) *Hubert* v. *Moreau*, 2 C. & P. 12 Moore C. P. 216.

(*b*) *Selby* v. *Selby*, 3 Mer. 2.

a personal signature necessary. The appointment may be a verbal one, or it may be by subsequent ratification, as well as by antecedent delegation of authority, (*c*) *qui facit per alium facit per se*, but when it is by subsequent ratification, the principal must be in existence at the time of the making of the contract, because when no principal is in existence at the date of the contract, th[illegible] can be no contract so far as he is concerned, and in such case the agent is personally liable. (*d*)

The authority to the agent may be an express authority. If it is authority to execute a document under seal, then the authority must be under seal. An instrument under this Act is not required to be under seal, hence there need not be any seal to the agent's authority. In fact it need not be even in writing, and if it be in writing no particular form of writing is necessary.

There may be an implied authority. If a principal stands by and concurs expressly or tacitly in the act of the agent he is bound by it. Implied authority, then, can arise in many ways. It can arise in the course of business or from employment, or f[illegible]epealed recognitions by the principal of the agent's authority.

Almost any one may be an agent. Even one who is himself unable to make a contract, can act as agent, but probably not one who actually lacks capacity, or who has not the mental power or discretion to consent. (*e*) "As this agency is a mere ministerial office, infants, *a fema covert*, persons attainted, outlawed, excommunicated, aliens and others, though incapable of contracting on their own account, so as to bind themselves, may be agents for these purposes. (*f*)

The bailee or vendee under the Act cannot be the agent of the bailor or vendor. (*g*)

(*c*) *Maclean* v. *Dunn*, 4 Bing. 722; *Gosbell* v. *Archer*, 2 Ad. & E. 500.

(*d*) *Kelner* v. *Baxter*, L. R. 2 C. P. 174; *Scott* v. *Lord Ebury*, L. R. 2 C. P. 255.

(*e*) Daniel on Neg. Insts. 229.

(*f*) Chitty on Bills, 13 Am. ed. (28) 36.

(*g*) *Shorman* v. *Brandt*, Ex. Ch. L. R. 6 A. E. 920.

And an agent authorized to sell to one designated person a chattel of which he is given possession is not an agent to sell it to another. In such a case, the agent is simply a special agent, whose agency is terminated the moment the sale to the person named failed to be made. Such an agent is not an agent entrusted with the possession of goods under the Factor's Act. (*h*) Nor, under that Act, does the town agent include a mere servant or caretaker, or one who has possession of goods for carriage, safe custody or otherwise as an independent contracting party, but rather to one "whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which it has taken its name, (*i*) to one, who is of that class . . . factors . . . have a business which, when carried out in its legitimate result, would properly end in selling or obtaining payment for goods. That would be a kind of class: factors, and agents in the class of factors. If such a person is entrusted, and is entrusted in that capacity, then, in the absence of bad faith on the part of the pledgee, the pledge is good." (*j*)

**2.** The preceding section shall not apply to household furniture (1) other than pianos, organs, or other musical instruments (2) nor shall it apply to any chattels mentioned in any such receipt, note, hire receipt, order, or other instrument (3) where the manufacturer, bailor or vendor, within ten days from the execution (4) of the receipt note, hire receipt, order or other instrument evidencing the bailment or conditional sale given to secure the purchase money, or a part thereof (4*a*) shall file (5) with the clerk of the County Court of the county in which the bailee or conditional purchaser resided at the time of the bailment or conditional purchase (6) a copy (7) of the said receipt note, hire receipt, order or other instrument evidencing the bailment or conditional sale.

**2***a*. (8) Receipt notes, hire receipts and other chattels (8*a*), given by (9) bailees (10) of chattels other than manufactured (11) goods and chattels, where the condition (12) of the bailment (13) is such that the possession of the chattel passes (14) without any ownership therein being acquired (15) by the bailee until the

(*h*) R. S. O. cap. 150, sec. 2; *Bush* v. *Fry*, 15 Ont. R. 122.

(*i*) Willes, J. *Baumann* v. *Henker*, 13 C. B. N. S. at p. 527-8; *City Bank* v. *Barrow*, 5 App. Cases 664.

(*j*) *Cole* v. *North Western Bank*, L. R. 9 C. P. 470, 10 C. P. 354.

payment of the purchase or consideration money, or some stipulated part thereof (16), shall only be valid as against (17) subsequent purchasers or mortgagees without notice in good faith (18) for valuable consideration (19), provided that the bailor or vendor (20) within ten days from the execution (21) of the receipt note, hire receipt order, or other instrument evidencing the bailment or conditional sale given to secure the purchase money, or a part thereof (22), shall file (23) with the Clerk of the County Court of the County in which the bailee or conditional purchaser resided at the time of the bailment or conditional purchase (24), a copy (25) of the said receipt note, hire receipt or order, or other instrument evidencing the bailment or conditional sale, and no such bailment shall be valid as against such subsequent purchaser or mortgagee as aforesaid, unless it is evidenced in writing signed by the bailee or his agent (26).

(1) What is comprised in the term household furniture? We are told by this section that pianos, organs, and other musical instruments are not included in the term, but apart from this statutory definition as to what is not household furniture, it becomes no easy matter to define exactly what is household furniture. The term has been said to comprise everything that contributes to the use and convenience of the householder, even ornaments of the house, (*k*) according to the station in life of the person enjoying them, (*l*) and yet whether one regards the ordinary use of language or the technicalities of the law relating to fixtures, such articles as fixtures do not pass under the word "furniture," (*m*) and certainly fixtures are an essential contribution to the use and convenience of a householder, but the intention as to fixtures decides their character; (*n*) and according as the intention is, or the special circumstances are, so may fixtures be, or not be comprised within the term "household furniture." (*o*)

(*k*) *Kelley* v. *Portlet*, Amb. 605; *see Paton* v. *Sheppard*, 10 Sim. 192.

(*l*) *Allen* v. *Wallace*, 21 N. S. R. 49, 53; *Kirby* v. *Clapp*, 15 App. Div. (N.Y.) 37.

(*m*) *Finney* v. *Grice*, L. R. 10 Ch. D. 13.

(*n*) See *post* section 10, p. 121; *Lancaster* v. *Eve*, 5 C. B. N. S.; see L. R. 14 Ch. D. 379; *Smith* v. *Wagoner*, 50 Wis. 155; *Godard* v. *Gould*, 14 Barb. (N.Y.) 662; *Gooding* v. *Riley*, 50 M. H. 400; *Horan* v. *Willard*, 14 N. B. R. 358; *Alexander* v. *Carril*, 19 N. B. R. 599.

(*o*) *Finney* v. *Grice*, *supra*.

but as a general rule fixtures are not comprised within the term "furnitnre" (*idem*). "Fixed furniture," though in a sense fixed, as where glasses are fastened by nails, and the book cases by screws, are not fixtures but furniture. (*p*)

By reason, however, of the amendment to the statute which follows as section 2*a* immediately after section 2 (6 Edw. VII cap. 19, sec. 23), which, however, does not come into force nntil the 1st January, 1907, household furniture no longer is excluded from the operation of the Act. It cannot escape notice that the amendments referred to have been carelessly pitched into the Act, without any regar their effect on portions of the . left untouched. example: take this very section. Now section 2 declares that the Act shall not apply to household furniture. This section has in no way been altered. It therefore stands. But another section, namely, section 2*a*, by making the Act cover all chattels, declares that the Act shall apply to household furniture. Of course there is no question as to what is the legal result: the only question is one for comment on the pitch and toss method of amending our laws.

(2) For forms relating thereto see appendix.

(3) See *ante*, section one, note (3), p. 5.

(4) In computing the period of ten days, the first day, or the day of execution of the instrument, is excluded, (*q*) so that if an instrument is executed on the first day of the month, the instrument is duly filed if filed on or before the eleventh day of the same month, nnless that day falls on a Sunday, when it may be filed on the next day following which is not a holiday. (*r*) But if a Sunday or a holiday is one of the intervening days, then such Sunday or holiday counts as one day. (*s*)

(*p*) *Birch* v. *Dawson*, 2 A. & E. 37.

(*q*) *McLean* v. *Pinkston*, 7 A. R. 492.

(*r*) R. S. O. cap. 1, sec. 8, sub-secs. 16 and 17: *McLean* v. *Pinkerton*, 7 A. R., ceased to be the law, when this statute was enacted, and this statute, or rather the original of it, was passed in consequence of the decision in *McLean* v. *Pinkerton*.

(*s*) *McLean* v. *Pinkerton*, 7 A. R. 492.

The time from which the ten days is to be computed is not necessarily the date of the instrument, but the date of the execution. The presumption is, that the execution was upon the day of the date of the instrument, but this can be rebutted, for after all it may only be the nominal date, and when it is immaterial; (*t*) and it would seem that it is not necessary that the writing evidencing the bailment should be completed by its execution within any particular time of the date of the actual sale. (*t*) The date of a deed or instrument, generally means the time when the deed was really made or delivered, not always the day that may have been inserted in the deed, which sometimes may be an impossible day. (*u*)

Parol evidence is admissible to shew that a mistake was made in the insertion of the date. (*v*)

A purchaser or mortgagee finding an instrument under the statute registered more than ten days after the date, must not take it for granted that therefore the instrument is void. He is affected with notice, if the fact be, that the mortgage was filed within the period fixed by the statute, because he is presumed to know the law, and to know that the date of the instrument may not, after all, be the date of its execution. (*w*) When asserting any rights under a mortgage it is incumbent on the mortgagee to prove its validity as to filing, and though the statute relating to chattel mortgages makes the clerk's certificate evidence of registration, it is only *prima facie* so, and therefore evidence can be gone into, to shew when the mortgage was left in the clerk's office, for at such time mortgages are considered as filed. (*x*)

(*t*) *McDonald* v. *Gaunt*, 30 Ont. R. 398; *McLees* v. *Pinkerton*, *supra*; Pingrey on Chattel Mortgages, sec. 140.

(*t*) *Idem*.

(*u*) *Beckman* v. *Jarvis*, 3 U. C. Q. B. 280; 2 Bla. Com.

(*v*) *Shaughnessey* v. *Lewis*, 130 Mass. 355; *Stonebreaker* v. *Kerr*, 40 Ind. 186; Hoadley, 48 Ind. 452; *Holman* v. *Dorin*, 56 Ind. 358.

(*w*) *Stonebreaker* v. *Kerr*, *supra*; *McDonald* v. *Gaunt*, 30 Ont. R. 398.

(*x*) Jones on Mortgages, 2nd ed., 199.

(4*a*) These words clearly indicate that the instruments aimed at by the Act, are only such as cover an actual sale. (*y*)

(5) Upon receipt of any instrument under the Act, presented to him for that purpose, the clerk shall file the same. It has been held that filing consists in simply handing the instrument to the proper officer; (*z*) but the meaning of the word "file," at common law, namely, "a thread, string, or wire, upon which writs and other exhibits in courts and offices are fastened or filed for the more safe keeping, and ready turning of the same," (*a*) would indicate that the present statutory use of the word was correct. The simple leaving of a mortgage with the clerk, does not necessarily constitute filing. Should the clerk receive it with instructions not to register it for a few days, there is no filing within the statute, at least until further orders are received concerning the instrument; (*b*) and the fact of the clerk acting contrary to his instructions, and endorsing thereon the time of filing, or of its receipt by him, will not create a filing within the statute. (*c*)

(6) The instruments mentioned above are to be filed in the office of the clerk of the county court, or union of counties, as the case may be, where the purchaser resides at the time of the execution of the instrument; and, if this is done, registration need not be afterwards had in another county, to which he afterwards removes. (*d*) It formerly was the law in relation to bills of sale and chattel mortgages that registration should take place in the county wherein the mortgagee or bargainee resided, and not in the county wherein were the goods, except in the event of the bargainor residing out of Ontario.

(*y*) See *Mason* v. *Lindsay*, L. R. 4 Ont. at p. 376.

(*z*) *Graham* v. *Summers*, 25 Minn. 81.

(*a*) Whart. Law Lex.

(*b*) *Low* v. *Pettergill*, 12 N. H. 337; see *Ross* v. *Hamilton*, E. T. 3 Vic.; *Foster* v. *Smith*, 13 U. C. R. 243; *In re Ross*, 3 Prac. R. 394; *B. of M.* v. *Munro*, 23 U. C. R. 414; *Kerr* v. *Lundley*, 15 C. P. 531; *T. & L. Co.* v. *Cuthbert*, 13 Grant 412.

(*c*) *Town* v. *Griffith*, 17 N. H. 165; *Parker* v. *Palmer*, 13 R. I. 349.

(*d*) *Barrington* v. *Skinner*, 117 N. Car. 47.

Information can be more speedily acquired by examining the records in a county wherein a man resides or was residing at the time of the filing, than could the necessary information be acquired by being compelled to know where goods were at a certain period of time at which place a search would require to be made. For this reason it is submitted that the amendment made by the later legislation (*c*) will not be found to be an improvement, and the law of this statute will be found to be preferable.

Under no circumstances is the instrument to be filed in the county where the goods are if different from the county wherein the purchaser resides. (*c*[1]) Should such be done the transaction will be invalid as against the parties protected by the Act.

In the event of a removal of the chattel from the Province of Ontario to another Province of the Dominion, the written agreement between the parties, if valid, will still be held to be good, for the *lex loci contractus* controls the nature, construction and validity of the contract as contra-distinguished from real property contracts, the law of which is the *lex loci rei sitæ*. (*f*) If the contract is valid in the Province wherein it is made, it is valid everywhere, unless it is *contra bonos mores*, or is one for the doing of something which is strictly forbidden by the country wherein that something is to be done; and when made in one Province and the chattels are afterwards removed to another Province, the contract will hold the goods in the latter Province if it complies in all respects with the laws in the former Province. (*g*)

The place where the instrument must be filed is the place where the vendee resides at the time of the purchase. (*h*)

(*c*) 43 Vic. cap. 15, sec. 1.

(*c*[1]) *Cohen* v. *Chandler*, 79 Ga. 427: *Bond* v. *Brewer*, 96 Ga. 443.

(*f*) *Peninsular Steam Nav. Co.* v. *Shand*, 3 Moo. P. C. N. S. 272: *River Stave Co.* v. *Sill*, 12 Ont. R. 557: *Marthinson* v. *Patterson*, 10 Ont. App. 188.

(*g*) *River Stave Co.* v. *Sill*, *supra*: *Singer* v. *MacLeod*, 20 N. S. R. 341: *Golin* v. *Dunbar*, 32 N. B. R. 325: *Bunn* v. *Robertson*, 1 N. W. T. Rep. 89: *Hope* v. *Hope*, 8 D. M. & G. 731, 26 L. J. Ch. 417.

(*h*) *Reynold* v. *Case*, 60 Mich. 76.

Filing in the wrong county cannot charge notice. (*i*) It may be asked then where does a man reside, or what is "residence" or "domicile." Supposing that at the time of the purchase the vendee was actually in the act of moving from one place to another, and was in fact on his journey to his new home, but had not removed all his furniture and effects. In such a case, not improbable, yet not likely, his domicile or residence is at that place from whence he is moving, because a new domicile is not acquired merely by intention but by the actual possession of a new domicile, giving evidence of habitation or occupation. (*j*) Thus, it will be seen, intention alone is not the only element in domicile. There is another, namely, residence, and both must concur to give domicile. The change must be *animo et de facto*. . . . Residing in a place without the intention of remaining will not give a man a domicile, nor will the intention to change residence without actual possession give him a new domicile. (*k*) It may be necessary to note that while frequently used in the same sense, the terms "domicile" and "residence" differ in signification. Thus a residence of one country may go to another country with the intention of residing there for the purpose of trading, and he may be a resident of the latter country, but he does not thereby become domiciled, because domicile imports an abiding and permanent home, and not a mere temporary one, (*l*) although it is not technically necessary that a person should form the intention of never moving away. (*m*) Kindersley, V.-C., in *Lord* v. *Colvin* (*n*) says: "I would venture the opinion that in residence

(*i*) *Bother* v. *Buswell*, 51 Me. 601.

(*j*) *Brodru* v. *Bissonette*, Q. R. 13 S. C. 271.

(*k*) *Sharpe* v. *Grispin*, L. R. 1 P. & D. 611: *King* v. *Foxwell*, 3 Ch. Div. 518; *Douglas* v. *Douglas*, L. R. 12 Eq. 617: *Stevenson* v. *Masson*, L. R. 17 Eq. 78: *In re Grove*, 40 Ch. Div. 216: *Stevens* v. *Fisk*, Cassells' Digest S. C. decisions 235.

(*l*) *King* v. *Foxwell*, 3 Ch. D. 518: *In re Grove*, 40 Ch. Div. 216.

(*m*) *Whitney* v. *Shuboon*, 12 Allen (Mass.) 111: *Silvey* v. *Lindsay*, 42 Hun. (N.Y.) 116: *Sturgeon* v. *Korte*, 34 Ohio St. 525.

(*n*) Kindersley, V.C., in *Low* v. *Colvin*, 4 Drew 376, 28 L. J. Ch. 366.

there must be the *animus residendi;* (*o*) but there need not be, as in domicile, the abiding and permanent home with actual possession thereof, for residence does not imply that the owner of the property must personally live thereon, for residence is quite compatible with much absence from it." (*p*) Then the word "residence" is an ambiguous word, and may receive a different meaning according to the position in which it is found, or the statute in which it is used; (*q*) and, because of its elasticity, admitting, as it does, of restriction or expansion to suit the subject matter to which it has reference, its interpretation cannot be given in one set rule, but must depend upon the subject matter in which it is used, and be restricted to the fitness of that matter. (*r*) Thus the Consolidated Rules of Practice for Ontario (*s*) in their use of the words "domiciled or ordinarily resident." have to be interpreted with regard to the extra-territorial jurisdiction of the High Court of Justice for the Province. (*t*) For example, an agent resident in Detroit, of a joint stock company carrying on business in Ontario, with its head office at Woodstock, where his wife and family resided, who visits them once a fortnight and sometimes once a month, but not, as a rule, for more than a day and a half, must be held to reside in Ontario under Rule 1198 (*a*). (*t*[1]) The "residence" of a grantor, or an attesting witness under the Imperial Bills of Sale Act, may be where he sleeps, but it is said to be more proper to state the place where he is chiefly to be found, namely, his place of business, or his master's place of business, where he per-

(*o*) *Whithorn* v. *Thomas*, 7 M. & Gr. 1.

(*p*) *Warner* v. *Moir*, 53 L. J. Ch. 474: 25 Ch. D. 605: but see *Walcot* v. *Botfield*, Kay 534: *Wescomb's Case*, L. R. 4 Q. B. 110: *Taylor* v. *St. Mary Abbott*, L. R. 5 C. P. 309.

(*q*) *Per* Erle, C.J., *Nasff* v. *Mutter*, 31 L. J. C. P. 359: *per* Cotton, L.J., *Re Bowie, ex p. Breull*, 50 L. J. Ch. 384: *ib.* Ch. D. 484.

(*r*) Bac. Max. 10.

(*s*) Rule 162, c.

(*t*) *Nesbit* v. *Gahn* (1902), 3 O. L. R. 429: *Allen* v. *Allen*, 15 Ont. Prac. R. 463: see *Harrison* v. *Harrison*, 20 Ala. 629: *Kerl* v. *Kerl*, 34 Md. 21: *Rigney* v. *Rigney*, 127 N. Y. 408.

(*t*[1]) *Moffat* v. *Leonard*, L. R. 6 Ont. 383.

forms his ordinary duties; (*u*) but, where there is nothing to shew by the context, that it is used in a more extensive sense, the word "residence" then denotes "the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink and sleep." (*v*). A person's place of business may be his residence, (*w*) and may indeed be *prima facie* evidence of his residence within the English Com. L. P. Act of 1852; (*x*) and a person may have more than one residence. (*y*) Lord Coke says: "If a man dwelleth in a forrayne shire, riding, city, or town corporate, and keepeth a house and servants in another shire, riding, city or town corporate, he is an inhabitant in each." (*z*) His having an establishment in one place, does not prevent his also residing in another; (*a*) and absence from that other, no matter how long, if there be the liberty of returning at any time, and there has been no abandonment of the intention to return, whenever it may suit the party's pleasure or convenience so to do, will not prevent a constructive legal residence at such other place. (*b*)

Under the Act in question, the case may often arise whether the vendee's "residence" is where his family eat, drink and sleep, or where he himself carries on business. The very nature of some businesses—the sawmill business for example—is such that the business must often be carried on elsewhere than that place wherein the family eat, drink and sleep. And, perhaps, the sawmill business, as much as any other business, employs machinery or manufactured chattels within the operation of the Act. It is easy for any one of

(*u*) *Per* Pollock, C.B., *Attenborough* v. *Thompson*, 27 L. J. Ex. 23; 2 H. & N. 559.

(*v*) *Per* Bayley, J., *R.* v. *Nath Curry*, 4 B. & C. 599.

(*w*) *Ablett* v. *Basham*, 25 L. J. Q. B. 239; 5 E. & B. 1019; *Yardley* v. *Jones*, 4 Dowl. 45.

(*x*) *Nacf* v. *Mutter*, 31 L. J. C. P. 357.

(*y*) *Greenham* v. *Child*, 59 L. J. Q. B. 27; in *Re Moulson*: *Ex p. Knightly*, 51 L. J. Ch. 823.

(*z*) 2 Coke's Inst. 702.

(*a*) *Whithorn* v. *Thomas*, 7 M. & G. 1, E. C. L. R. Vol. 49.

(*b*) *Powell* v. *Guest*, 18 C. B. (N. S.) 72, 80; E. C. L. R. vol. 114, 31 L. J. (C.P.) 69, 70.

experience to recollect many instances of business men residing at their place of business, whose families reside elsewhere, and cases of this kind make the matter of double residence one of some importance under the Act, for the question arises, in which county should the instrument of sale be filed. Once it is found the vendee has two residences, then there is no difficulty in deciding where to file the instrument, because if it is filed in either county, the Act will be met; though it can scarcely be questioned that the filing should be in that county in which the article sold is used by the vendee and can at any time be seen, provided of course the vendee resides there too. But the place of filing has in business dealing to be decided upon, while the place of residence may be a doubtful matter of opinion, for the vendee's place of business may fix the residence to the exclusion of the far-off residence of the family, and particularly so, if the article is in use at such place of business. The opinion is ventured that this should be so. (*c*) A company within the Act, of course, resides where its head office is; (*d*) but see *Keynsham Linen Co.* v. *Baker*, (*e*) and *Baillie* v. *Goodwin*, (*f*) where the place of manufacture and sale is said to be the residence or place where the company "dwells and carrys on business," which may not be where the head office is.

(7) Registration, in compliance with the Act, is for the purpose of notice. An unauthorized registration is not notice, any more than registration of an instrument not executed according to the statute. (*f*[1]). An instrument properly registered within the period of ten days limited by this section, relates back, operates and takes effect upon, from and after the day of its execution, and

(*c*) *Ablett* v. *Basham*, 25 L. J. Q. B. 239: *Yardley* v. *Jones*, 4 Dowl. 45.

(*d*) *Jones* v. *Scottish Acc. Insce. Co.*, 55 L. J. Q. B. 415, 17 Q. B. D. 421: *Taylor* v. *Crowland Gas Co.*, 24 L. J. Ex. 233.

(*e*) 33 L. J. Ex. 41: 2 H. & C. 729.

(*f*) 33 Ch. D. 605.

(*f*[1]) *Fairbanks* v. *Eureka Co.*, 67 Ala. 109: *Kimball* v. *Weldon*, 80 Wis. 133.

is notice from that day. If registered within the period of ten days, then, inasmuch as it relates back to its date, or rather to its day of execution, it will take precedence over instruments subsequently executed, although first filed; but if it is filed after the time limited it loses its retrospective effect and a subsequent *bona fide* mortgagee or purchaser, will have priority whether the subsequent transaction be in writing and filed or not. The statute, it will be observed, does not govern the subsequent transaction except that it shall be in good faith. If it did the result would be different. (*g*) It has been held, under somewhat similar statutes, that an instrument governed by the Act if filed after the specified period will be notice from the time it is filed, and be a protection against incumbrances made *subsequently* to such filing. The ruling is, it is said, deduced from the spirit and purpose of Acts in being notice to the public. But it will be found that decisions to this effect generally follow from a statute giving effect to such legislation. The Act in question is in derogation of the common law, which imposed no such restrictions upon the disposing of property as the Act contains, and therefore the Act must be construed strictly. (*h*) The function of those, whose duty it is to construe Acts of parliament, is "not to say what the Legislature meant, but to ascertain what the Legislature has said that it meant." (*i*) And in this Act it has said that the sale shall only be valid on certain conditions being performed, and if these conditions are not performed, then clearly all parties concerned are as if the statute had never been passed.

In order to file an instrument under the Act it must be taken to the office of the clerk and there left with him. Going to his office after office hours, and the clerk not being there, and then, in the evening taking it to the clerk and giving it to him at his residence, does not make the filing good as of

(*g*) *Fleschner* v. *Sumter*, 12 Oregon, 161: *Soude* v. *Morrow*, 33 Pa. St. 83.

(*h*) *Hoyt* v. *Hoyt*, 8 Bosw. (N. Y.) 524: *Mason* v. *Lindsay*, L. R. 4 Ont. 365.

(*i*) *Per* Mathews, L.J., *Rothschild* v. *Commissioners of Inland Revenue* (1894), 2 Q. B. at p. 145.

the time of the visit to the office. (*j*) The office hours of the clerk of the County Court are from 10 in the forenoon until 4 o'clock in the afternoon, except upon legal holidays or other special days appointed by an Act of the Legislature. (*k*) The clerk then cannot by filing a document after hours give priority to a person who may present it after four o'clock in the afternoon and before 10 o'clock the next morning. The clerk's duties are ministerial and limited to the hours fixed by statute. The public are bound to have knowledge of these hours, and he who acts upon the knowledge is not to be prejudiced by the clerk in favour of one who thus tries to get an advantage. The rule of Court on the subject (*l*) is directory only, and for the guidance of the officials only, and does not prevent them from keeping their offices open to a later hour than 4 o'clock in the afternoon, if they see fit to do so, or the business of the office requires it. (*m*) But that cannot be for the purpose of doing an act in favor of one as against another who, relying upon the statute, believes the recording office is closed, as the statute says so. Custom and convenience has established the practice of instruments within the Act being sent to the proper office by means of the mail. In such cases, it may be that the sender creates the clerk his agent for the purposes of filing the document, and it will be filed so soon as the clerk reaches his office and there accepts it; but, if the clerk receives it from the post after hours, he cannot then file it to the prejudice of another, any more than the party himself could do so. At best the receipt by the clerk after hours would make the filing good as of 10 o'clock the next morning, but it would raise a nice question if another instrument was presented to the clerk to be filed on the stroke of the clock the next morning when the office is legally opened. As against this view it might be urged that the time for performing the act of

(*j*) *Hoosdey* v. *Garth*, 2 Gratt (Va.) 471: 44 Am. Dec. 393.

(*k*) R. S. O. cap. 55, s. 8.

(*l*) Con. Rule 9.

(*m*) *Muir* v. *McNeill, Re N. Bruce Election*, 27 C. L. J. 538: 11 C. L. Times 265.

filing, is given as so many days, and a day is 24 hours standard time, (*n*) and so the filing must be good if done at any hour of the day within the number of days fixed by statute, provided the document is left at the proper office. (*o*) The clerk, as has been said, is a ministerial officer, (*p*) and therefore he may appoint a deputy to act in his stead, (*q*) and may record instruments to which he himself is a party. (*r*) The filing, in fact, will be good if the instrument is left with any person who is actually discharging the duties of the office, whether already appointed deputy or not, or having charge during a vacancy in the office. (*s*)

(8) This section does not become law until 1st January, 1907.

(8a) See ante p. 1, note (1) also page 4, note (2); also page 11, note (3). It must now be remembered that the effect of this section, placed here by the Statute Law Amendment Act (6 Edw. VII. cap. 19, sec. 23) is to extend the entire Act, so that it now includes all chattels in its operation. Whatever is a chattel comes within the purview of the Act, provided the chattel at the time of the sale is capable of being passed out of the possession of the vendor into that of the vendee. The very essence of the Act is that possession changes, but not the property, hence, if the chattel is of such a character that makes change of possession impossible, then to such a chattel the statute does not apply[1]. Some confusion may arise hereafter, as did arise in Miles v. Ankatell [2] on the moot question whether the chattel be capable of being moved from the possession of one to that of another. The tests for determining this are stated in the Am. & Eng. Ency. of Law, 1st ed., vol. 8, p. 13, but

(*n*) R. S. O. cap. 144, s. 1.

(*o*) *Lloyd* v. *Ward*, 13 Prac. R. 238.

(*p*) *Lloyd* v. *Ward*, *supra*.

(*q*) *Dodge* v. *Potter*, 18 Barb. (N.Y.) 193.

(*r*) *Brockenborough* v. *Metton*, 55 Tex. 493: see *Queen City Refining Co.*, 10 Prac. R. 415.

(*s*) *Cook* v. *Hall*, 6 Ill. 575: *Bishop* v. *Cook*, 13 Barb. (N. Y.) 326.

[1] *Hamilton* v. *Harrison*, 46 U. C. Q. B. 127.

[2] 29 Ont. 21.

rules or tests, no matter how clear or comprehensive, do not always enable one to arrive at a conclusion in the particular case in hand; and it may be said that each case has to be determined largely upon its own facts.

It must not be overlooked that while the statute is now extended in its scope to all chattels—that is to all chattels the possession of which has changed—a compliance with the amendment will not suffice in the case of manufactured chattels, as to which section one still governs. But here a nice question will arise. A table, a chair, or a sofa is a manufactured article; but the statute prior to the recent amendment excepted such from its operation, because such were household furniture, hence household furniture, though it is manufactured, is governed not by section one of the Act, but by the amending section, and therefore as to household furniture, though such be manufactured, the vendor may not protect himself by placing his name upon it, as can be done in the case of other manufactured articles, a carriage for example, but he must strictly comply with the amending section by filing the contract of sale within 10 days in the proper office.

(9) See section one, footnote (4), p. 19.
(10) See section one, footnote (5), p. 21.
(11) See ante, footnote (8).
(12) See section one, footnote (6), p. 21.
(13) See section one, footnote (7), p. 23.
(14) See section one, footnote (8), p. 39.
(15) See section one, footnote (9), p. 40.
(16) See section one, footnote (10), p. 47.
(17) See section one, footnote (11), p. 51.
(18) See section one, footnote (12), p. 53.
(19) See section one, footnote (13), p. 64.

(20) It is now to be observed that the proviso here provided is only in favor of a bailor or vendor. In the preceding section,[3] the word "manufacturer" precedes the words "bailor or vendor," shewing that the present amend-

[3] See page 72.

ment[4] is not intended to effect the law as it hitherto existed as regards manufacturers, but hits at the bailor or vendor of any article other than a manufactured article, such, for example, as a horse. The writer, in fact, is in a position to know that the amending legislation finds its origin in the sale of a horse by one who, while parting with the possession, reserved to himself the property in the animal. Confusion, and perhaps injustice, resulted. The vendee of the conditional vendee of the animal complained that, when he innocently purchased from one who had in him all the indicia of ownership, he should not be permitted to suffer as against the conditional vendor, who by his secret dealing with his vendee led to the mischief. There is much to be said in favor of legislating against the repetition of such results. The same mischievous effects, however, are constantly happening in business circles because the Banking Act,[5] in the power it extends to banks of taking security receipts, makes no provision for the existence of such receipts being discovered by enquiry.

(21) See section two, footnote (4), p. 73.

(22) See section two, footnote (4a), p. 75. This section does not apply unless the instrument is one by which the person into whose possession the chattel passes agrees to become the purchaser of it, but the ownership of it is not to be acquired by him until he has paid the purchase or consideration money, or some stipulated part of it—in other words, unless he has bought or agreed to buy the chattel.[7]

(23) See section two, footnote (5), p. 75.

(24) See section two, footnote (6), p. 75.

(25) See section two, footnote (7), p. 80.

(26) It must occur to most ordinary people that when the statute insists that the instrument evidencing the bailment or conditional sale, is to be filed, to then add that the instrument must be in writing is adding what is surplusage. How

[4] 6 Edw. VII. c. 19, s. 23.
[5] S. C. 73.
[7] *Mason* v. *Lindsay*, L. R. 4 Ont. 576.

is it possible, it may be asked, to file the instrument evidencing the bailment unless it is in writing? And then to say it must be in writing is to justify the comment of a great judge who, speaking of this statute, says he construes this Act with some diffidence, "because of the exceptionally faulty character of its draughting, which renders it well-nigh impossible for any one to say, with any degree of certainty, what the language employed by the legislature to express its will really means." [s]

**3.** (1) When the bailee (1) or conditional purchaser (2) resides (3) at the time of the bailment or conditional purchase in an unorganized district (4), all instruments (5) may be filed with the Clerk of the Court with whom mortgages and sales of chattels are to be registered in such district (6), under the law at the time in force.

(2) This section shall apply to instruments filed with the said officer prior to the 7th day of April, 1890. 53 Vic. c. 36, ss. 1, 2.

(1) See *ante* section 1, not (6).

(2) The words conditional purchaser do not appear in the first section of the Act. They occur for the first time in the tenth line of section two (*ante*, p. 72), and are there used synonymously with the term bailee; and as the "bailee" there mentioned is the bailee mentioned in section one, there is no doubt that the bailee mentioned in section one is controlled by the words "conditional purchaser"—a far more apt term for a vendee contemplated by the Act than the term bailee, which has a much wider significance.

(3) See note to section 2, *ante* p. .

(4) See R. C. O. cap. 109, p. 1072.

(5) The use of the word "instruments" is to be observed. At first blush it would suggest the idea that the original instrument itself is required to be filed, but this is not so, for it means instruments "under the Act," and elsewhere the provisions are for filing copies only ($s^1$).

(6) When the vendee resides within the District of Algoma, Thunder Bay, or Nipissing, the instruments shall be filed in the office of the District Court Clerk in the district.

[s] *Mason* v. *Lindsay*, L. R. 4 Ont. 376.

($s^1$) See *Harris* v. *Com. Bank*, 16 U. C. Q. B. 437.

($s^2$) If within Parry Sound, Muskoka or Rainy River, then in the office of the Clerk of the First Division Court of the District. ($s^3$) The provisional county of Haliburton is not an unorganized district. Therefore so far as that county is concerned, instruments under this Act must be filed with the Clerk of the County Court of the county of Victoria, to which county Haliburton is attached for judicial purposes. The special statute governing the filing of chattel mortgages, ($s^4$) in Haliburton not applying to instruments under this Act, for the reason given. Should it happen that any of these districts hereafter emerge from a district into a regular county organization, then and from such time this section could have no application, and the instruments within the Act would thereafter be filed with the Clerk of the County Court in the then county.

**4.** The clerk of the court (1) on receipt of such copy shall (2) duly file the same and cause it to be properly entered in an index book to be kept for that purpose, and shall be entitled to charge ten cents (3) for every such filing and five cents for every search in respect thereof. A clerical error which does not mislead, or an error in an immaterial or non-essential part of the said copy so filed, shall not invalidate the said filing or destroy the effect thereof (5).

(1) The clerk of the court of the county wherein the bailee or vendee resides. It has been held that, during a vacancy in the office of clerk, the filing is valid when performed by any person in charge of the office for the time being. ($t$).

(2) Upon receipt of any instrument under the Act, presented to him for that purpose, the clerk shall file the same. It has been held that filing consists in simply handing the instrument to the proper officer *to be filed* and *so accepted* by the proper officer; ($u$) but the meaning of the word "file," at common law, namely, "a thread, string, or wire, upon

($s^2$) R. S. O. cap. 148, s. 15 (2).
($s^3$) R. S. O. cap. 148, s. 15 (2).
($s^4$) R. S. O. cap. 148, s. 15 (4).
($t$) *Bishop* v. *Cook*, 11 Barb. (N.Y.) 32.
($u$) *Graham* v. *Summers*, 25 Minn. 81.

which writs and other exhibits in courts and offices are fastened or filed for the more safe keeping and ready turning of the same," (*r*) would indicate that the present statutory use of the word was correct. The simple act of leaving an instrument with the clerk, does not necessarily constitute filing. Should the clerk receive it with instructions not to register it for a few days, there is no filing within the statute, at least until further orders are received concerning the instrument; (*w*) and when it is filed, with instructions to the clerk not to "record," it is not filed within the meaning of a statute providing for deeds being filed for record; (*x*) and the fact of the clerk acting contrary to his instructions, and endorsing thereon the time of filing, or of its receipt by him, will not create a filing within the statute. (*y*)

It has been held that the filing was not complete by the mere reception of it by the proper officer, that to make the filing complete the indorsement of the clerk is necessary. In *Ford* v. *Brooks* (*a*) it was said: "It clearly results that the filing of a document consists both in handing it to the clerk and in the indorsement of it by that officer with the date on which it is received or came to his hands. (*b*) But the weight of authority does not favor this view, which would leave the public at the mercy of the clerk or other official. If the clerk intentionally or from carelessness should omit to endorse the document handed to him, then a person might suffer through the misprison of the officer for the act of another over whom he had no control, and that, when he himself has done all that he could do and all that the law

(*r*) Whart. Law Lex.

(*w*) *Low* v. *Pettergill*, 12 N. H. 337; see *Ross* v. *Hamilton*, E. T. 3 Vic.; *Foster* v. *Smith*, 13 U. C. R. 240; *In re Ross*, 3 Prac. R. 394; *B. of M.* v. *Munro*, 23 U. C. R. 414; *Kerr* v. *Lundy*, 15 C. P. 531; *T. & L. Co.* v. *Cuthbert*, 13 Grant 412.

(*x*) *Bowen* v. *Fassett*, 37 Ark. 507.

(*y*) *Town* v. *Griffith*, 17 N. H. 165; *Parker* v. *Palmer*, 13 R. I. 359.

(*a*) 35 La Ann. 153.

(*b*) *Lamson* v. *Falls*, 6 Ind. 309; *White* v. *Union Bank*, 6 La Ann. 162.

demands of him. (*c*) A paper is filed when it is delivered to the proper officer, and by him received to be kept on file. The indorsement is but evidence of the filing, (*d*) though not of course the only evidence, and other testimony may be admitted to prove the fact. (*e*) It is to be observed, however, that this statute makes no provision for an endorsement by the Clerk on the instrument itself, the proper entry in the index book being all that the statute demands. This entry would be the best evidence of the filing. (*e*[1])

Should the office of clerk be vacant, or the proper officer absent from illness or other cause, and a person who is in charge of the office receives a document to be filed, and properly enters it in the index book kept for the purpose, and places it among other documents in the office of the same kind, this is then a valid filing, (*f*) for delivery may be made to any person having charge of the office for the time being; (*g*) and therefore delivery to a deputy of the clerk appointed by the clerk as his deputy, though without authority of law, followed by the usual course so far as the deputy was concerned, is sufficient to constitute a filing independently of the question of the legality of the appointment. (*h*) But in all cases there must be a delivery of the paper for the expressed purpose of it being filed. (*i*)

(3) The clerk, as will be seen, is entitled to charge for filing the sum of ten cents. This fee he is entitled to keep for his own benefit, and this circumstance is important in its effect on whether a paper is filed or not, when the fee is not paid. If the fee were payable to the Province then the in-

(*c*) Wade on Notice, § 162; *Rex* v. *Wade*, 1 B. & Ad. 861, 20 E. C. L. 497; *Ex p. Thorn*, L. R. 8 Ch. 722.

(*d*) *Powers* v. *State*, 87 Ind. 148; *Peterson* v. *Taylor*, 15 Ga. 483.

(*e*) *Peterson* v. *Taylor*, 15 Ga. 483; *Bettison* v. *Budd*, 21 Ark. 580.

(*e*[1]) *Powers* v. *State*, *supra*.

(*f*) *Bishop* v. *Cook*, 13 Barb. (N.Y.) 329.

(*g*) *Oats* v. *Walls*, 28 Ark. 244.

(*h*) *Dodge* v. *Potter*, 18 Barb. (N.Y.) 193.

(*i*) *Lamson* v. *Falls*, 6 Ind. 309.

strument is not filed until the fee is paid; but when the fee is payable to the clerk or officer for his own exclusive benefit, then the latter may waive his right to prepayment, and if this right is waived, the instrument is filed from the time it is put into the clerk's custody, though the fee may never be paid. (*j*)

(4) See Emmott v. Marchant, L. R. 3 Q. B. D. 555.

(5) The words "true copy" much less "copy" do not mean "exact copy." The misspelling of a name, or the omission of a letter, if a person seeking information is not misled, will not signify (*k*)

**5. The manufacturer, bailee or vendor shall leave a copy (1) of the receipt note, hire receipt, order or other instrument by which a lien (2) on the chattel is retained, or which provides for a conditional sale, with the bailee or conditional vendee at the time of the execution (3) of the instrument, or within twenty days thereafter. (4)**

(1) The copy need not be an exact copy; clerical differences between it and the original do not prevent it being a copy. But the copy must be so true that nobody reading it could by any possibility be misled. (*a*)

(2) It is of course intended that the instruments here referred to are the same as those referred to in section one of the Act (*ante*, p. 1); yet the instruments mentioned in section one do not retain in the manufacturer or vendor of the chattel any lien, while the instruments mentioned in this section are so defined. Lien is not the result of contract. It arises by implication of law, and it ceases to exist when possession of the article passes from him who would seek to enforce it, and the very essence of the transaction aimed at by this statute is the possession—the actual visible possession—being not in the vendor, but in the vendee. The essential element in lien is that it has reference to the property of

(*j*) *Pinders* v. *Yager*, 29 Iowa 468; *Tregambo* v. *Comandre Mill, etc., Co.*, 57 Cal. 501.

(*k*) *Gardner* v. *Shaw*, 24 L. J. (N. S.) 319; *In re Hewer, ex parte Kahen*, 21 Ch. D. 871.

(*a*) *In re Hewer, ex parte Kahen*, 21 Ch. D. 871.

another, but in every transaction under the statute the property remains and must remain in the vendor, the person in whom by this section, the instruments therein mentioned, seek to retain the lien. The vendor cannot have a lien on his own property, and if the receipt note, hire receipt, order or other instrument mentioned in this section contains anything professing to grant him a lien, all words so intended are surplusage and must be excluded. (*b*) Might it not be, that a manufacturer, bailor, or vendor could say in excuse for non-compliance with this section — at least if it were not for the alternative portion of it—that inasmuch as he had no such instrument as mentioned, he could not well obey the section by having a copy of it as directed.

The words "other instrument by which a lien," etc., on the principle of *ejusdem generis* embrace just such instruments as come within the definition of a receipt note, hire receipt or order for chattels, and the word "lien" here used, connected with the word "receipt note," might define the instrument as a receipt note lien. While it is to be observed that the word "lien" does not appear in section one (*ante*), which is the governing section as to instruments within the Act, and is in fact the part of the statute covering the instruments referred to in this section, it is not uncommon to find "lien notes" adopted by business men to signify their transactions. While such may be a note, they are not promissory notes, as is generally supposed, (*c*) because the additional provision thereon inscribed, that the title, ownership and property for which they were given should not pass from the payees until payment in full, and that if the notes were not paid at maturity the vendors might take possession of the chattel for which the notes were given, etc., etc., were matters unwarranted by the Bills of Exchange Act, 1890 (*d*) for in no sense do such instruments come within the words "a pledge of collateral security with authority to sell or dis-

(*b*) *Carroll* v. *Beard*, 27 Ont. R. 352.
(*c*) *Dominion Bank* v. *Wiggins*, 21 Ont. App. 275.
(*d*) Sec. 82, sub-sec. 3.

pose thereof." (*e*) The mere adding to a properly drawn up promissory note the following words: "Should I sell or leave the land I now occupy, or make preparation to leave the Province, or should the note not be paid within one month after maturity, then in any such case it and all other notes given by the promissor to the promissee shall at once become due and payable, and suit may be entered and tried and finally disposed of in the court having jurisdiction at the place of payment hereof," will not affect the negotiability of the note as a promissory note, for the only effect of such words is to accelerate the time of payment. The words do not make payment in any way conditional, nor is there any more uncertainty in the time of payment, than in the case of a note payable on or before a certain day, or of a note payable on demand. (*f*) But when the words added are "the title and right to the possession of the property for which this note is given shall remain in the promissee until the note is paid," the note then ceases to be a negotiable promissory note, because it becomes in effect a conditional payment. (*g*)

A lien is "a right in one man to detain that which *is in his possession*, belonging to another, until certain demands of him, the *person in possession*, are satisfied. (*h*) Possession is necessary, either actual or constructive, to the existence of a lien, and a debt also must exist, arising out of the particular chattel sought to be held, and the title to the chattel must be in the debtor. (*i*). Now the very first element in transactions under this Act is that the property or title is not in the debtor, but in the creditor or vendor, and the other element akin to the first is that the debtor has the possession,

(*e*) *Kirkwood* v. *Smith* (1896), 1 Q. B. 582: *Prescott* v. *Garland*, 34 N. B. R. 291: *Bank of Hamilton* v. *Gillies*, 12 Man. R. 495.

(*f*) *Chesnew* v. *St. John*, 4 A. R. 10; *Wise* v. *Charlton*, 4 A. & E. 786; *Jury* v. *Butler*, E. B. & E. 459: *Lears* v. *Ag. Ins. Co.*, 32 C. P. at p. 601.

(*g*) *Dominion Bank* v. *Wiggins*, 21 Ont. App. 275: *Third Nat. Bank* v. *Armstrong*, 25 Minn. 530.

(*h*) *Reilly* v. *McIlmurray*, 29 Ont. R. 167: *Hammonds* v. *Barclay*, 2 East 227.

(*i*) *Forth* v. *Simpson*, 13 Q. B. 680, 686: *Scarf* v. *Morgan*, 4 M. & W. 283.

and not the vendor or creditor. The circumstances creating a lien are absolutely foreign to transactions under this Act, as adverse and opposite as it is possible to make them so, hence the use of the word lien in the section is inappropriate and ill-used. (*j*) The possession necessary to create a lien in favor of a vendor, may be the possession of an agent of the vendor. (*k*)

Equitable liens, however, differ from common law liens in that in equitable liens it is not a necessary condition that the creditor or the vendor have actual or constructive possession of the chattel. They arise from a written contract whereby one party indicates an intention to make some particular property, fully identified by he contract, a security for a debt or obligation, and if the property be not at the time *in esse* but *in posse*, when it becomes *in esse* the equitable lien so contracted for, *eo instanti*, attaches to it. Such a contract is upheld, not alone between the original parties, but is good as against the heirs, executors and administrators of the person giving it, and against his assignees without value and subsequent encumbrancers with notice of the transaction. (*l*) If, therefore, the word "lien" in the statute means anything, it means an "equitable lien"; but, again, one cannot give an equitable lien on another man's property. A. cannot by contract give to B. an equitable lien on C.'s property, and so in this light the word is inapt. Such a lien could be contracted for, when, and if C.'s property becomes A.'s, but in transactions under the Act, when the property becomes the vendee's, all liability to the vendor will have been liquidated, the debt will be paid, and the same moment that would see the article the property of A. and the lien *arise*, would also see the written contract for the lien cancelled and satisfied by payment. In this view, an extended reference to the law of lien seems without the purview of this work.

(*j*) *Carroll* v. *Beard*, 27 Ont. R. 361: see *ante* p. .
(*k*) *Allen* v. *Spencer*, 1 Edm. (N.Y.) Lel. Cas. 117.
(*l*) *Ex p. Wills*, 1 Ves. 162: *Ex parte Matthews*, 2 Ves. 272.

(3) See *ante* section 2 note (4).

(4) See *ante* section 2 note (4), bearing in mind that what is there said as to the method of computing time applies, under this section, with the variance of "twenty days" for "ten."

The requirement put upon the manufacturer, bailor or vendor appears to be "directory" only for the vendee's benefit and information—and the omission to leave such copy would not, of course, invalidate the instrument.

**6.** (1) Every manufacturer, bailor or vendor shall (2) in answer to any inquiry made by (3) any proposed purchaser or other interested person (4) within five days (5) furnish full information (6) respecting the amount or balance due or unpaid on any such (6a) manufactured goods or chattels, and the terms of payment of such amount or balance, and in case of his refusal or neglect (7) to furnish the information asked for, (8) such manufacturer, bailor or vendor shall on conviction before a Stipendiary or Police Magistrate or two Justices of the Peace, be liable to a fine not exceeding $50.

(2) Any person convicted under this Act shall have the right to appeal against such conviction to the Judge of the County Court without a jury (9).

(1) The Act extends not alone to the manufacturer of the chattel, but also to any other person not the manufacturer, who may be bailor or vendor thereof.

(2) The word "shall" has to be construed as imperative as distinguished from the word "may," which is construed as permissive. (*a*)

(3) The statute does not point out how this enquiry is to be made. There is a course settled by statute, to be pursued when the enquiry is made by letter, (*b*) but there is none so fixed, when the application is a verbal one, and there is nothing to prevent the application being by word of mouth. A verbal application is, however, a highly objectionable course to adopt, not because there is any provision against such being done, but because such a practice opens the door to much uncertainty of fact, and possible miscarriage of justice, in

(*a*) R. S. O. 1887, cap. 1, sec. 8, sub-sec. 2.

(*b*) Section 7 *post*.

the event of an action being taken on an alleged refusal of a verbal application.

When made by letter the following is suggested as a form:

To of

SIR,

I (*name in full*) am a proposed purchaser of (*or*) interested in the following manufactured chattel, namely: (*here describe the same*) now in the possession of (*give the name and description in full of the person in whose possession the chattel is*).

I request full information respecting the amount due, or the balance due or unpaid to you, if anything, on said manufactured chattel, and the terms of payment of such amount or balance.

My name is (*here give name in full*) and my post office address to which a reply may be sent is (*here give name of post office*).

Dated at this day of A.D. 188 .

(*Signature of applicant.*)

(4) It is not everyone who is entitled to the information required to be given by the manufacturer, bailor, or vendor. Only a proposed purchaser *or other interested person* in the chattel can compel the manufacturer, bailor, or vendor to furnish the information.

A proposed mortgagee is a proposed purchaser *pro tanto*, therefore he comes within the statute; but it is more difficult perhaps to determine the extent of the meaning to be given to the words, "or other interested person." Do these words mean a future as well as a present interest? Their use is in the present tense, while the reference to a purchaser is in the future, and a legislative distinction may have been intended.

The Bill of Sale and Chattel Mortgage Act, (*c*) uses words to clearly indicate an intended interest. A person contemplating giving credit to the bailee or vendee of a chattel has not a present interest therein and the possibility of credit being given and thereby a future interest being acquired, is too remote to establish such person in the character of an "interested person." The opinion is ventured that even a creditor who has not established his right to proceed against

(*c*) R. S. O. cap. 148.

the chattel is without the class included in the term "interested person." On the principle of *ejusdem generis* the words "other interested person" have a meaning, somewhat narrowed by the preceding words "any proposed purchaser," (*d*) and it is quite possible the very purpose of legislation may be defeated on account of the absence of clear and unambiguous words. The word "person" mentioned in the clause includes any body corporate, or politic, or party, and the heirs, executors, administrators, or other legal representative of such person to whom the context can apply according to law. (*e*) In case of dispute the onus would be upon the person making the demand, to shew that he was entitled under the Act to the information asked for. The consequences to the vendor for refusing such information, makes the question as to who is entitled to it, still more important, for a prosecution must necessarily fail unless the person seeking the information successfully shews that he is within the meaning and contemplation of the Act.

(5) The five days begin to run from, and are exclusive of, the day upon which the application is made. If the application be made on the first of August, then the information must be furnished on or before the 6th of August following, (*f*) but the application is not made until it be received, and hence the five days begin to run from and exclusive of the day when the application is received, and the information is received, when it is given by registered letter, deposited in the post office, (*g*) thus more than five days may elapse before the information is received, and yet the Act be complied with.

Sunday counts as one day, when it intervenes, but not when it is the last day of the five. Formerly it was the law that when by statute a certain number of days was given for doing an act, the last of which happened to fall on a Sunday, that

(*d*) See *Evans* v. *Mostyn*, 2 C. P. D. 547: *Manton* v. *Tabois*, L. R. 30 Ch. D. 92.

(*e*) R. S. O. cap. 1, sec. 8, sub-sec. 13: *Pharmaceutical Society* v. *London*, 5 App. Cases 857.

(*f*) *McLean* v. *Pinkerton*, 7 A. R. 492.

(*g*) Section 7, *post*.

day in such case was included in the time given, and the party had no further time within which to do the act, unless the statute expressly provided that it might be done on the day following, (*h*) but this has been changed. (*i*)

When necessary to carry out the ends of justice, the Court will divide a day, or even an hour, and thus give the party equitably entitled thereto the benefit of every moment of time. (*j*) but in determining the operation of a statute the fraction of a day is not taken into consideration. (*k*)

(6) The statute suggests a course which should be adopted in furnishing the information asked for. (*l*) This course should in all cases be followed, not that any other, even one by word of mouth, is illegal, but because in any other than that suggested by the statute the duty, possibly a difficult one, of proving that the information was given, would rest upon the manufacturer, vendor, or bailor; whereas the information is presumed to have been received by the person applying for it, if the statutory course is shewn to have been followed. The following is suggested as a simple and sufficient form to be used in supplying the information demanded.

To of

(*the name and post office address given by the person enquiring.*)

SIR,

The amount due (*or*) The balance due (*or*) The amount unpaid (*or*) The balance unpaid on that certain manufactured chattel referred to by you in your application for information bearing date the day of , 188 , and received by the undersigned on the day of 188 , is the sum of $ . The terms of payment of such amount (*or*) balance are as follows (*here state fully the sum to be paid, the time or time of payment, with or without interest if on, or by way of promissory note, or by way of rent or otherwise*).

This statement is mailed to you at the above address and registered.

Dated this day of

at in the

(*Signature of manufacturer, or vendor, or bailor*).

(*h*) *McLean* v. *Pinkerton*, 7 A. R. 490; *Gibson* v. *Michael's Bay Lumber Co.*, 7 O. R. 746; *In re Parke*, 13 L. R. Chy. Ir. 85.

(*i*) R. S. O. cap. 1, sec. 8, sub-secs. 16 and 17.

(*j*) *Beckman* v. *Jarvis*, 3 Q. B. 280.

(*k*) *Mitchell* v. *Dobson*, 3 L. J. 185.

(*l*) See sec. 7, *infra*.

(6a) By the Act 6 Edw. VII. cap. 19, sec. 24, the word "manufactured," which here appears immediately after the word "such," is struck out from and after the 1st January, 1907. This amendment becomes necessary, otherwise the benefits of the section would not be open to that class of persons the amending Act is designed to benefit.

(7) The refusal or neglect is the refusal or neglect of the manufacturer, bailor, or vendor, to whom application is made. No provision is made in case the application is to a person in the employ, or the agent, of the manufacturer, bailor, or vendor. The application, then, must be brought home to the knowledge of the manufacturer, etc., before the proceedings consequent upon a refusal or neglect can be taken. Before a conviction can be secured the refusal or neglect must be established, and in a conviction, care must be taken that therein the non-observance of these statutory conditions precedent, are expressed, otherwise the conviction might be quashed.

(8) It is only the information *asked for* that must be furnished, and then not beyond that which the statute mentions, even if more is asked for. Should the application narrow the information wanted to less than the information compellable under the statute, then the manufacturer cannot be proceeded against for not furnishing the full information provided for by the statute.

If the words "within the time aforesaid" had been added after the word "for" in the seventh line of this section, a doubt would not arise, which may now arise, as to whether the manufacturer renders himself liable to the penalty mentioned when he omits to furnish the information until after the expiration of the period of five days.

(9) The proceedings to be taken in case of refusal or neglect to furnish the information are those provided for by R. S. O. cap. 90, s. 1, and are the like proceedings as if the penalty had been imposed by the Criminal Code or other Dominion statute. If there is a conviction, the justice or police magistrate may order the defendant to pay costs (s. 4 (1)), or he may order the prosecutor to pay costs should he dismiss

the information or complaint (s. 4 (2)). These costs must be such that seem reasonable and not inconsistent with the fees established by law. (*m*) It does not appear that the statute R. S. O. cap. 90, which provides for proceedings by way of appeal, governs the appeal provided for in this section. The appeal granted by the above statute (R. S. O. cap. 92, ss. 2, 3) is to the General Sessions of the Peace, the practice and procedure in which, being the same as the practice and proceedings under the statute of the Dominion of Canada, then in force, permits of the intervention of a jury. This section deprives either party of a jury, and the appeal is not to the General Sessions, but to the Judge of the County Court sitting in Chambers, and the practice and proceedings on such appeal are governed by another statute. (*n*) It will be observed that should the presiding justice dismiss the information or complaint, the informant, however much he may be aggrieved, has no appeal, because it is only the person convicted to whom the right of appeal is given. (*o*) The conviction referred to means the conviction of the party against whom the information or complaint is laid. (*p*)

(9) For proceedings on appeal see R. S. O. cap. 92.

**7.** The person (1) so inquiring shall if such inquiry is by letter give a name and post office address to which a reply may be sent (2) and it shall be sufficient if the information aforesaid be given by registered letter deposited in the post office (3) within the said five days (4) addressed to the person inquiring at his proper post office address. (5) or where a name and address is given as aforesaid, addressed to such person by the name and at the post office so given. (6)

(1) The person so inquiring must be a proposed purchaser or other person interested in the chattel. (*a*)

(2) It seems to be imperative on the person applying to give a name and post office address to which a reply may be

(*m*) R. S. O. cap. 95, sec. 1, Schedule.
(*n*) R. S. O. cap. 92.
(*o*) *Re Murphy & Cornish*, 8 Prac. 420.
(*p*) *Regina* v. *Toronto P. S. Board*, 31 O. R. 457.
(*a*) *Ante* sec. 2, foot note 4.

sent, and yet the duty does not seem to be a condition precedent to a reply being sent, because provision is made by this section for sending the reply to the person enquiring at *his proper* address, *or* to the written address *when given*, which latter address may not be the *proper address* of the person enquiring. (*b*) When an address is given the information must be sent to that address; if none is given then to his proper address.

(3) If the letter is deposited in the post office it is not necessary to prove that it was received. Any loss or miscarriage will not prejudice the sender. (*c*) The statute permits and justifies mailing the information, which, in effect, is the same as if the enquirer gave instructions so to send the information. (*d*) The letter should be posted at the general post office, or at an authorized receiving house, (*e*) Delivery to a mail-carrier is not sufficient. (*f*) The post-mark is *prima facie* evidence that the letter was mailed in the office to which the marks relate on the day designated, (*g*) but not conclusive evidence, (*h*) and the genuineness of the post-mark may be proved, not alone by a post office employee, but by any witness. (*i*) Should the letter miscarry through the indistinctness of the handwriting of the manufacturer, vendor or bailor, then the statute will not have been com-

(*b*) See *Eastern Bank* v. *Brown*, 17 Me. 356: *Crowley* v. *Barry*, 4 Gill. 194: *Bell* v. *Hagerstown Bank*, 7 Gill. 216: *Barmester* v. *Barron*, 17 Q. B. 828.

(*c*) *Warwick* v. *Noakes*, Peake N. P. 67: *Parker* v. *Gordon*, 7 East 385: *Dobree* v. *Eastwood*, 3 C. & P. 250: *Stocken* v. *Collen*, 7 M. & W. 515.

(*d*) *Nat. Bank of Bellefonte* v. *McManigle*, 69 Penn St. 156.

(*e*) *Hawkins* v. *Rutt*, Peake's N. P. C. 186.

(*f*) *Hawkins* v. *Rutt*, *supra*.

(*g*) *Early* v. *Preston*, 1 Pat. and Heath 228: *Crawford* v. *Branch Bank*, 1 Ala. 205: *New Haven Co. Bank* v. *Mitchell*, 15 Conn. 206: *Archangelo* v. *Thompson*, 2 Camp. 620: *Rex* v. *Plumer*, Rus. & Ry. 264: *Langdon* v. *Hulls*, 5 Esp. 156: *Fletcher* v. *Braddyll*, 3 Stark 64.

(*h*) *Stocken* v. *Collin*, 7 M. and W. 545: 9 C. & P. 653 (38 E. C. L. R.).

(*i*) *Woodcock* v. *Houldsworth*, 16 M. and W. 124: *Fletcher* v. *Braddyll*, *supra*.

plied with. (*j*) It will not be sufficient to shew that the letter was placed in a tray to be carried to the post office, and that in the usual course of the manufacturer's business all letters deposited in the tray were carried to the post office by a clerk, (*k*) though it might be sufficient if the clerk established that, though he had no recollection of the particular letter, he invariably carried to the post office all the letters found in the tray. (*l*)

(4) The person to whom application is made for information has five days from the day of the date of the application within which to deposit the letter containing the information in the post office. The time does not begin to run until the application is received, which may not be until the second day, or even later, after the application was mailed. If the second day, then that day is excluded, the time beginning to run on the third day, which becomes the first day of the five, then on the fifth day therefrom, the information is posted, and if the letter containing it be not received until (say) the second day after the day of mailing, a period of nine days will have elapsed, and yet the statute be not disregarded. (*m*)

(5) The statute appears to contemplate an omission by the applicant to furnish a post office address, and yet the duty of the applicant to do so appears to be imperative. What is a man's *proper* address? The office to which a person actually goes for his letters is always the proper one, even though he may not live there or have his place of business there, (*n*) but if such is not the office where he receives his letters, then the information should be directed to the post office at or nearest to the applicant's place of resi-

(*j*) *Hewitt* v. *Thompson*, 1 Mood & Rap. 543.

(*k*) *Hetherington* v. *Kemp*, 4 Camp. 194: *Hawkes* v. *Salter*, 4 Bing. 715, E. C. L. R. vol. 13: 1 Mo. & P. 750 S. P. See 3 Camp. 379: 1 M. & Sel. 567 S. C.

(*l*) *Skilbeck* v. *Garbett*, 14 L. J. 338 Q. B.: 7 Q. B. 846.

(*m*) See *ante* section 2, foot note (5).

(*n*) *Farmers Bank* v. *Gurnell*, 26 Grat. 137: *Bressard* v. *Levering*, 6 Wheat. 102.

dence. (*o*) Care should be exercised in writing the address, for, should the letter miscarry by reason of a confused or indistinct address, the information will not be considered as having been furnished. (*p*)

A general address will hardly be sufficient, especially when the information is intended for one at a large place, for example, "Mr. Jones, Toronto," is a direction more likely than otherwise not to reach the person for whom it is intended, (*q*) but, if the first name were prefixed, it might be sufficient. (*r*) Should there be two places of delivery in one town, an address to the town itself will be sufficient, unless it be known at the time to the sender of the letter at which of the two post offices the party receives his letters. (*s*) If a person usually receives his letters at the place where he is engaged in business, then the information should be sent there, but if such place is not known, then the letter should be sent to the place where the person lives. (*t*) Where it is known that a party receives letters at two different post offices, then it would be safer to direct the information asked for to both addresses, but a letter addressed to either place will be sufficient. (*u*) and it will be sufficient if addressed to one post office, equi-distant with another post office, from the party's residence, although the latter post office is where he usually receives his letters. (*v*) A place of temporary sojourn is not a proper address whereat to send information; (*w*) but if

(*o*) *Bank of Columbia* v. *Lawrence*, 1 Pet. 582: *Bank of Geneva* v. *Howlett*, 4 Wend. 328: *Mercer* v. *Lancaster*, 5 Barr. 160: *Jones* v. *Lewis*, 8 W. & S. 14.

(*p*) *Hewitt* v. *Thompson*, 1 Mood. & Rob. 543.

(*q*) *Mann* v. *Moors*, 1 R. & M. 249: *Clarke* v. *Sharpe*, 3 M. & W. 166.

(*r*) *True* v. *Collins*, 3 Allen 440.

(*s*) *Morton* v. *Westcott*, 8 Cush. 425: *Cabot Bank* v. *Russett*, 4 Tidy 167: *Bank of Manchester* v. *Slason*, 13 Vt. 334: *Dorner* v. *Romer*, 21 Wend. 10.

(*t*) *Seneca Co. Bank* v. *Neass*, 3 Coms. 442: 5 Denio 329.

(*u*) *Exchange* v. *Bouee*, 3 Rob. (La.) 307. See *Chouteau* v. *Webster*, 6 Mete 1.

(*v*) *Raud* v. *Reynolds*, 2 Grat. 171.

(*w*) *Runyon* v. *Mountfort*, Peebee 371: *Stewart* v. *Eden*, 2 Caines 121.

the information is requested by a member of the House of Commons or Legislative Assembly it will be sufficient to send the reply to the applicant addressed at the place where the bodies are in session, (*x*) but this rule will only apply during the period of session.

(6) Care should be taken to address the information to the post office and by the name given. The statute, then, stands between the person applied to and the person applying, and the former runs no risk. It will always suffice to follow the direction given by the applicant, although the address given be not that whereat the applicant usually receives his letters. (*y*)

**8.** In case any manufacturer, bailor or vendor (1) of any chattels (2) in respect to which there has been a conditional sale or promise of sale (3) or his successor in interest (4) takes possession thereof for breach of condition, (5) he shall retain the same for twenty days, (6) and the bailee or his successor in interest may redeem the same within such period, (7) on payment of the full amount then in arrear, together with interest and the actual costs and expenses of taking and keeping possession which have been incurred (8).

(1) The manufacturer, bailor, or vendor are those mentioned in section one. It is not indispensable that the article conditionally sold or promised to be sold, should belong to the owner. It might be sold by a third party with the owner's consent.

(2) See *ante* section one, note (4).

(3) Unless there has been a conditional sale or a promise of sale, this section has no application. The writer ventures the suggestion that the term conditional sale is not appropriately used here or throughout the statute. A conditional sale, strictly speaking, appears to be a sale with right of *re*-purchase in the vendor. This statute is intended to meet the case of a sale with right of purchase in the vendee.

(*x*) *Chonteau* v. *Webster*, 6 Mete 1: *Graham* v. *Sangston*, 1 Md. 59: *Marr* v. *Johnston*, 9 Yerg. 1.

(*y*) *Eastern Bank* v. *Brown*, 17 Me. 356: *Crowley* v. *Barry*, 4 Gill. 194.

In the one case the sale is made with right of re-purchase in the vendor: in the other case the sale is not yet really made, but the right of purchase is in the vendee. In the one case the property passes; in the other the possession only passes. (*a*) An instance of a promise of sale, or an agreement to sell upon a condition, is found in the case of *Stevenson* v. *Rice*, (*b*) where the agreement was as follows:—

Received from Weber & Company a seven octave rosewood piano, No. 6854, on hire for three months, at $6 per month, payable in advance, the said piano being valued at $300, which sum I agree to pay in the event of the said instrument being destroyed, injured, or not returned to the said Weber & Co. on demand, free of expense, in good order, reasonable wear excepted. It is agreed that I may purchase the said piano for the sum of $300, payable as follows:—Three promissory notes, payable in one, twelve and twenty-four months from the date hereof. The whole to be paid within the said time with interest at seven per cent. per annum from date. But until the whole of the said purchase money be paid, the said piano shall remain the property of the said Weber & Co., on hire by me. And in default of the punctual payment of any instalment of the said purchase money, or of the said monthly rental in advance, the said Weber & Co. may secure possession of the said piano without any previous demand, although a part of the purchase money may have been paid, or a note or notes given by me on account thereof, this agreement for sale being conditional, and punctual payment being essential to it. But in the event of the said piano being so returned to the said Weber & Co. in good order, any sum received on account of the purchase money beyond the amount due for rent, and any expenses incurred in reference to the said instrument will be paid.

Witness.

(Signed) JEROME MARK.

(*a*) For instance, of conditional sales wherein the property passes, see *ante* p. 3, note (3).

(*b*) 24 U. C. C. P. 245.

Another instance is found in *Newhall* v. *Kingsbury* (*c*) where a mowing machine was agreed to be sold, the price therefor being paid in instalments, but the machine was not to become the property of the vendee until paid for. Another instance was in *Howland* v. *Johnson*. (*d*) where a sewing machine was agreed to be sold; another in *Lathem* v. *Summer*, (*e*) where a piano was so sold; and other instances in the following several cases: *Singer Sewing Co.* v. *Treadway*, (*f*) *Howe Machine Co.* v. *Willie* (*g*) *Preston* v. *Whitney*. (*h*) *Johnson* v. *Whittemore*, (*i*) *Hine* v. *Roberts*, (*j*) *Third National Bank of Syracuse* v. *Armstrong*. (*k*) *Minneapolis, etc., Co.* v. *Hally*, (*l*) *Ketchum* v. *Brennan* (*m*) And again another instance in the case of *Whelan* v. *Couch* (*n*) wherein the agreement was in the following words:—

"This agreement made this thirty-first day of August, 1874. between John Whelan of Toronto. saloon-keeper, and Josiah Thomas Couch. of the same place, saloon-keeper. The said Whelan hath agreed to sell, and the said Couch to purchase the right to use the fixtures of bowling alley in and pertaining to the premises in rear of number sixty-six. on the west side of Jarvis street. in the city of Toronto. as now used by the said Whelan, and access to use the same thereto from Jarvis street. together with the beds. balls and pins only (as the other fixtures and fittings do not pertain to the bargain), for the sum of ten hundred and seventy-eight dollars in gold. payable three hundred and fifty dollars in cash at this time, and one hundred and nine dollars on the first day of each of the months of October. November

(*c*) 131 Mass. 445.
(*d*) 7 Daley 297.
(*e*) 89 Ill. 233.
(*f*) 4 Brad. 57.
(*g*) 85 Ill.
(*h*) 23 Mich. 260, 267.
(*i*) 27 Mich. 463, 470.
(*j*) 48 Conn. 267.
(*k*) 25 Minn. 530.
(*l*) 27 Id. 495.
(*m*) 53 Miss. 596.
(*n*) 26 Grant. 74

and December next ensuing the date thereof, and the sum of fifty-nine dollars on the first day of January next, 1875; and the further sum in equal payments of nine dollars per month (the first of such payments of nine dollars to be made on the first day of February, 1875), on the first days of each and every month after the said first day of January as aforesaid, until the full balance of said purchase money shall have been paid in full without interest. The said Couch to have possession on the first day of September next, but only as in the nature of one subservient to said Whelan, and he is not to have any other right or title to the place, nor is this agreement intended to be complete nor to operate in favor of said Coueh until the whole of the said payments have been made, when this right or title shall be considered complete. And in case of default in the after payments, as above, or any of them, all matters hereunder are supposed and considered to fall through, and moneys paid hereunder to be forfeited to said Whelan. It is further agreed that said Couch is to keep the place orderly, quiet, decent and peaceable, and well cleaned, and to close the place at twelve o'clock each night, and open at six o'clock each morning. He shall also keep the place open, in good running order, each and every lawful day and night, and properly managed and looked after, and make it as productive as possible.

"The players at each alley to have the privilege of playing three balls for the benefit of the house.

"The place and things pertaining to said alleys passing by this agreement to be insured.

"The said Couch shall conduct no other business upon said premises. Time to be of the essence of this agreement.

"The said beds, balls and pins are not to be removed from said premises until paid for in full.

"As witness our hands and seals this thirty-first day of August, 1874.

JOHN WHELAN. [L. S.]
J. T. COUCH, JR." [L. S.]

(4) Any one who acquires the entire interest of the manufacturer, bailor or vendor, becomes the successor in interest

of such manufacturer, bailor and vendor. A mortgagee of the chattel succeeds the bailor in interest. (*o*) In such a case the bailee might properly decline to give up the chattel to the bailor, because to do otherwise would render the bailee liable to an action (*p*)

(5) Upon breach of condition, the vendor may at once take possession of the chattels. If the vendee holds under a hire or rent receipt and wrongfully sells the lease is terminated, and the vendor or hirer may resume possession, and he may recover it from the person to whom it has been sold, (*q*) and so far as the legal rights of the parties are concerned without reference to this statute, he may henceforth treat the chattels absolutely as his own, regardless of the contract under which they were agreed to be sold. He may sell them or give them away with or without first taking possession; (*r*) he may squander them or destroy them. (*s*)

But, if a vendor chooses to do any of these things, he cannot still maintain the contract in its integrity, and seek to recover from the vendee the price of the chattels. (*t*) which, by his own act he has placed beyond his control. (*u*) If he is determined to hold the vendee to his bargain, then he is bound to keep the chattel for delivery to him upon payment, and if he disables himself from doing this, then he entitles the vendee to repudiate the contract, for his act operates in law a rescission of the contract. (*v*) The chattel must be kept so as to be redelivered to the vendee in as good condition as when retaken by the vendor; for if he has put it to his own use and it has become worn or injured, then the vendor

(*o*) *Everest* v. *Hale*, 67 Me. 497.

(*p*) *European and Australian Royal Mail Co.* v. *Royal Mail Steam Packet Co.*, 8 Jur. N. S. 136: 30 L. J. C. P. 247.

(*q*) *Singer Co.* v. *Clark*, 5 Ex. D. 37.

(*r*) *Hubbard* v. *Bliss*, 12 Allen (Mass.) 590.

(*s*) Jones on Ch. Mtge, 2nd ed. p. 1. *Pate* v. *Parmley*, 43 How. (N.Y.) Pr. 445: 34 N. Y., S. C. 398: *Tompkins* v. *Batie*, 11 Neb. 147, 151.

(*t*) *White* v. *Smith*, 28 N. S. R. 5.

(*u*) *Arnold* v. *Playter*, 22 Ont. R. 609.

(*v*) *Leanor* v. *McLaughlin*, 32 L. R. A. 467.

cannot recover the balance of the purchase money. (*w*) It makes no difference in this respect if default is first made by the vendee in one or more of his payments, and upon which default the vendor resumes possession. (*x*) The reason for this is, perhaps, that the vendee not only never acquired any title to or right of possession in the chattel, but by his vendor's act he has been wholly deprived of his power to acquire any, even should he pay or offer to pay the price. (*y*) Another reason might be given which at once appeals to one's sense of right, namely, that where there is a failure to perform one part of a bargain, which goes to the root of the contract, such failure enables the other party to the contract to say: "I am not going to perform my part of it, when performance by you of your part is defeated by your own misconduct;" (*z*) but the non-performance so alleged in breach of the contract must unquestionably go to the whole root and consideration of it, otherwise the part broken is not to be considered as a condition precedent, but as a distinct covenant for the breach of which the party injured may be compensated in damages. (*a*)

If the vendor, instead of disposing of the chattel, should store it and retain it for the vendee, then he may sue the vendee for the entire price, but payment of the price and delivery of the chattel should then be contemporaneous. But payment of the price must be payment by the vendee under the contract, for if the contract so provide, the vendor may sell the chattel to recover his money, and if he fails to get it all, he may then sue the original vendee for the balance due under the contract, because in such a case there has not been a rescission of the contract. (*b*) In case the vendee, having by agreement under seal agreed to take an article to be manufactured, afterwards refuses so to do, the vendor may

(*w*) *Harris* v. *Dustin*, 1 N. W. T. Rep. 6 (part 4).
(*x*) *Sawyer* v. *Pringle*, 18 A. R. 218.
(*y*) *Minneapolis Harvester Works* v. *Halley*, 27 Minn. 495.
(*z*) *Mersey Steel Co.* v. *Naylor*, 9 App. Cases 443.
(*a*) *Cowan* v. *Fisher*, 31 O. R. 426.
(*b*) *Sawyer* v. *Pringle*, 18 A. R. 218: *Arnold* v. *Playter*, 22 O. R. 699.

then sell the article, acting as agent for the vendee in so doing. If there is a deficiency, the vendor may recover the difference between the contract price, and the price obtained on such resale, as he may keep the property as his own, in which event he may recover the difference between the market price at the time and place of delivery and the contract price. (*c*) Should there be default in the vendor, as for example should he fail to deliver the article bargained for, the vendee may rescind the contract, and may recover from the vendor any payments which in the meantime he may have made; but he cannot disaffirm the contract if he has, by his conduct or otherwise, acquiesced in the default; nor can he take advantage of a fraudulent misrepresentation, to rescind the contract if, after he received it he did not within a reasonable time announce the fraud and disaffirm the contract; and of course, once having made a contract, the vendee cannot by the simple act of returning the article, or offering to return it, put an end to the transaction. (*d*) From the dicta in *Sawyer* v. *Pringle* (*supra*), it is to be inferred that the vendee loses any portion of the purchase money, that he may have paid, prior to the breach, upon the happening of which the vendor has taken possession; but the decisions are not all in this direction, although the prevailing opinion is that instalments already paid are forfeited upon default in payment of subsequent instalments. (*e*) Some of the States' Courts acting upon equitable principles require the vendor who rescinds the contract for default, after receiving partial payments, to refund the sum already paid after deducting a reasonable compensation for the use of the property. (*f*) Such seems to be the law in the Province of Quebec, where a vendor before he is entitled to a payment in an action of revendication, must first offer to pay the portion of the price

(*c*) *Dunstan* v. *McAndrew* (1870), 44 N. Y. 72; *Waterous Engine Works Co.* v. *Pratt*, 30 Ont. 540. See *Sawyer* v. *Baskerville*, 10 Man. R. 652.

(*d*) *Howe Machine Co.* v. *Wilson*, 85 Ill. 333; *Frye* v. *Milligan*, 10 Ont. R. 311; *Tomlinson* v. *Morris*, 12 Ont. R. 311; *Cull* v. *Roberts*, 28 Ont.

(*e*) Eng. and Am. Encl. of Law, vol. 6, p. 458.

(*f*) *Idem*, p. 459; Benjamin on Sales, ed. 321.

he has already received; (*g*) and this, in that Province, appears to be the law, even though the vendor has a right to offset against the amount received by him, a claim for the use of the article. (*h*) The provision that the property in the chattel shall not pass until the price is entirely paid is, in that Province, considered a good suspensive condition operative in favor of the vendor, when he tenders back or offers to repay the portion of the price already paid by the vendee. (*i*)

But the rule only applies so long as the vendee is in possession of the thing sold, and does not operate against a third party who comes into possession of an immoveable, to which are attached moveable things, which by law are immoveable by destination. (*j*) If the principle of law prevails that all payments are forfeited, then it is in the power of a vendor to work a serious injury upon his vendee when the default of the latter is among the last of his payments. Thus it is, if the agreement does not provide that on default, the vendor may resell, without notice to the vendee, the vendor has not the right to resell without reasonable notice to the vendee or his assigns. The reason is that such a practice would be allowing the vendor "to fix the measure of damages or the amount of the balance by his own act, without notice or warning to the party interested, and having assumed to sell without notice it becomes open to the vendee to impeach the sale by shewing that a greater sum could have been realized if the chattel had been properly sold after proper notice." (*k*)

At all events, it is clear that a promissory note given for some of the payments cannot be collected by the payee if he has previously taken the property, because, in

(*g*) *Cousineau* v. *The Williams Mfg. Co.*, Q. R. 11 S. C. 389; *Filiatrault* v. *Goldie*, Q. R. 2 Q. B. 368; *Damase Laine and others* v. *Theophile Boland*, 26 S. C. R. 419.

(*h*) *Tafts* v. *Girouse*, Q. R. 12 S. C. 530.

(*i*) See also *Staron* v. *Comp. des Moteurs au Gaz*, S. 1, 90, 2, 113.

(*j*) Taschereau, J., *Wallbridge* v. *Farrell*, 18 C. S. C. R. at p. 20.

(*k*) *Discher* v. *C. P. L. & S. Co.*, 18 Ont. R. 273.

such case, the consideration for the note has failed. (*l*) And in Nova Scotia it is held that a vendor who retakes the property and retains it, cannot recover the purchase price because he has rescinded the contract. (*m*) And again if, after judgment is obtained by the vendor upon the promissory notes of his vendee, the vendor takes possession and sells the chattel, he cannot afterwards collect any balance due on his judgment, because the consideration for the judgment has disappeared by the intentional act of the judgment creditors. (*n*)

Once there is a breach by the vendee, then it behooves the vendor to be cautious, because very little may amount to a waiver, and stop or postpone all his rights until the happening of another breach. For instance, the receipt of payments after a breach is held to be a waiver of the breach; (o) and before seizing the property he must make a fresh demand for payment. (*p*) And in fact allowing the vendee to remain in possession for a long time without any request for payments due, or for the return of the property, may be a waiver of the condition. (*q*) Likewise the vendor may defeat his own rights by election. Thus if a vendor sues and recovers judgment against his vendee for the price of goods conditionally sold, after the goods have been transferred to an innocent purchaser from the vendee, the original vendor cannot recover the goods from such innocent purchaser, because the recovery of the judgment is looked upon as an election by the vendor to treat the contract as completed. (*r*) There may be in the agreement many other defaults specified upon the happening of any of which the vendor is at liberty to

(*l*) Galt, J., *Gleason* v. *Knapp*, at p. 560: *Arnold* v. *Playter*, 22 Ont. R. 603: *Leanor* v. *McLaughlin* (1895) 32 L. R. A. 467, 165 Pa. 150: Benjamin on Sales, p. 302.

(*m*) *White* v. *Smith*, 28 N. S. R. 5.

(*n*) *Arnold* v. *Playter*, *supra*.

(*o*) *Hatchings* v. *Munger*, 41 N. Y. 155.

(*p*) *O'Rourke* v. *Hadcock*, 114 N. Y. 541.

(*q*) *Gorham* v. *Holden*, 79 Me. 317: *Perkins* v. *Grobben* (1898), 39 L. R. A. 815 (Mich. Sup. Ct.).

(*r*) *Purtle* v. *Heney*, 33 N. B. R. 607.

resume possession, and even though no default be made in payment, yet if the agreement so provide, the vendor may resume possession, if any statement in the contract on the part of the vendee be untrue, or if the vendee should become insolvent, or should allow an execution to issue against his goods, or if he should abscond, or leave the chattels exposed to the elements or to accident, or should omit to pay his taxes, or for any other good cause. Such conditions would leave it optional with the vendor to resume possession at his pleasure, wholly beside any default in payment. (*s*) So likewise a stipulation, that the chattels shall remain at a certain specified place, and shall not be removed without the written consent of the vendor, is a valid and binding condition, the violation of which will entitle the vendo to retake possession, and a single consent to one removal will not be construed into a consent to a second removal.

This statute appears only to contemplate the case of possession being taken as a breach of condition. It does not, in express terms, interfere with the common law right to take possession at any time, even before breach of condition, when by the contract the vendor retains in himself the ownership, and does not provide for possession being had by the vendee until default or condition broken. If the contract do not contain a clause giving the vendee the right to possession until default, or until condition broken, then possession taken at any time under such a contract, provided it retain the ownership in the vendor, is a possession which the vendor has a right to acquire without reference to the vendee, and would effect the same result, as if the taking of possession had resulted from the act of the vendee. (*t*)

Possession follows the property, is the rule of law. The right of possession is an incident to the right of property. The property being in the vendor, the right to possession is in him too, provided the contract does not otherwise pro-

(*s*) *Sawyer* v. *Pringle*, 18 O. A. R. 218.
(*t*) *Smith* v. *Fair*, 11 A. R. 763.

vide, and therefore the vendor may assume possession at any time (*u*).

This rule of law, however, may be relaxed where an implication arises that possession was unquestionably intended to remain with the vendee. (*v*)

Such an implication may arise in all those instances wherein the absolute use and possession of the chattel is indispensable to the performance by the vendee of his covenants in regard thereto; (*w*) but it does not appear that the simple reservation of the right to the vendor to enter and take possession upon default in payment and sell to satisfy his claim, will override the general rule of law as above stated. (*x*)

This feature of the law is only important in regard to the present subject, if it be found that the statute, by providing for a course to be pursued when possession is taken for breach of condition, does not by implication or otherwise modify the common law doctrine, as to taking possession above referred to The view is taken that the statute does not provide against such a taking possession. It merely states what shall be done when possession is taken for a breach of condition, and we are told that "the limited function of a Judge is not to say what the Legislature meant, but to ascertain what the Legislature has said that it meant." (*y*)

The anticipation is therefore indulged, that the manufacturer, seeking to evade the trouble to them of compliance with the statute, will act upon their common law right whenever it is possible so to do.

(*u*) *Porter* v. *Flintoft*, 6 C. P. 335: *White* v. *Morris*, 11 C. B. 1015: *Ruttan* v. *Beamish*, 10 C. P. 90: *McAuley* v. *Allen*, 20 C. P. 417: *Samuel* v. *Colter*, 28 C. P. 240: *Coles* v. *Clark*, 3 Cush. (Mass.) 399: *Hall* v. *Sampson*, 35 N. Y. 274: *London* v. *Emmons*, 97 Mass. 37.

(*v*) *Samuel* v. *Colter*, *supra*: *Bingham* v. *Bettison*, 30 C. P 438: *Wheeler* v. *Montefiori*, 2 Q. B. 133: *Albert* v. *Grosvenor Invest. Co.*, L. R. 3 Q. B. 123.

(*w*) *Babcock* v. *McFarland*, 43 Ill. 381.

(*x*) *Ferguson* v. *Thomas*, 26 Me. 499: *Smith* v. *Fair*, 11 A. R. 763.

(*y*) Matthews, J., in *Rothschild* v. *Commissioners of Inland Revenue* (1894), 2 Q. B. at p. 145.

If there is a license to the vendor in the contract to take possession upon default, the license is irrevocable, and the vendor may upon default, in whole or in part of the purchase money, enter the buyer's house and forcibly remove the chattel; (*z*) but the entry must be made in a reasonable manner and without needless violence, (*a*) and will not justify the vendor in creating a breach of the criminal law in order to acquire the property. (*b*) He may go on another man's land to get his chattel, (*c*) at least, if he can shew it was not on the land through his own fault or neglect, (*d*) and even then he may do so at the risk of having to pay any damages incurred in exercising this right. A forcible entry into a house by a conditional vendor under an agreement granting the right to him to break in to get and take away the goods conditionally sold, is not a forcible entry within the terms of the Criminal Code, (*e*) provided it was made with the clear intention of getting the goods, but rather partakes of a trespass for which the trespasser may be liable in a civil action, and this is so, although the entry was opposed by the occupant of the house, and so made as to bring about a breach of the peace. (*f*)

So long as the relative position of debtor and creditor exists, just so long may the vendor pursue all or any of his remedies given him by the agreement to be exercised upon default. He may exercise them concurrently, but cannot pursue more than one to satisfaction. (*g*) By satisfaction is

(*z*) *Walsh* v. *Taylor*, 39 Md. 592: *McClelland* v. *Nichols*, 24 Minn. 176.

(*a*) *Drury* v. *Hervey*, 126 Mass. 519: *Churchill* v. *Hulbert*, 110 Mass. 42.

(*b*) *London Co.* v. *Drake*, 6 C. B. N. S. 768.

(*c*) *McGregor* v. *McNeill*, 32 C. P. 538: *Wolfe* v. *Home*, 2 Q. B. D. 355: *Saint* v. *Pelley*, L. R. 10 Ex. 137: *Patrick* v. *Colarick*, 3 M. & W. 483.

(*d*) *Read* v. *Smith*, Ber. 173.

(*e*) Sec. 89.

(*f*) *Queen* v. *Pike*, 2 Can. Crim. Cases 314.

(*g*) *Sawyer* v. *Pringle*, *supra*: *Waterous* v. *Wilson*, 11 Man. R. 295: *Kirchoffer* v. *Clement*, 11 Man. R. 460.

meant a full and complete payment of the debt, and so a vendor may both retake possession and proceed to judgment. (*h*)

(6) The twenty days is exclusive of either the first or last day of the taking possession. This is in accordance with the general rule as to the computation of time, which is to make the first day inclusive, and the last day exclusive, or *vice versa*. (*i*)

Sunday is counted as one day only when it is one of the intervening days. (*j*).

(7) The vendor, having taken possession, must do nothing calculated to prevent restoration of the property in as good and sound a condition as when taken, in the event of the bailee deciding to redeem, at the end of the period of twenty days. Should he so act as to prevent restoration, he becomes amenable to the law, and liable in damages for placing the property beyond redemption. This not only is the result of the present statutory enactment, but it is the law in those cases wherein the vendor takes possession, prior to condition broken, by virtue of the omission in the contract of the right to possession being with the vendee. (*k*)

Not only can the bailee redeem, but the right is given to any one who is his successor in interest. His mortgagee may be such a successor in interest, and should the mortgagee redeem, then his interest would merge in the higher or greater interest, and he would become the owner. (*l*) But for the statute, the vendor might take the property from the vendee, or from any one claiming through him, though he be a purchaser or mortgagee in good faith, and without notice of the condition, and deprive them of all right or

(*h*) *Darr* v. *Replogle*, 167 Pa. 347; *Brewer* v. *Ford*, 54 Hun. (N.Y.) 116.

(*i*) See cases cited Barron on Bills of Sale, etc., 2nd ed., p. 317.

(*j*) See *ante* p. 97.

(*k*) Lush, J., *Albert* v. *Grosvenor Investment Co.*, L. R. 3, Q. B. 123; *Bingham* v. *Bettison*, 30 U. C. C. P. 438; *Spaulding* v. *Barnes*, 4 Gray (Mass.) 330; *per* Osler, J., *Smith* v. *Fair*, 11 A. R. 763.

(*l*) *Forman* v. *Proctor*, 9 B. Mon. (Ky.) 124; *Chase* v. *Ingalls*, 122 Mass. 381; *Currier* v. *Knapp*, 117 Mass. 324.

interest in the property, (*m*) but now all claiming under, from, or through the bailee has an equal right to redeem within the statutory period of twenty days. The right, too, is possessed by the vendee's vendee, his mortgagee, executor or administrator or legal representative. No one entitled to redeem can in any way impair his right to redeem. This statutory right to redeem is now paramount to the instrument itself and may be enforced even in opposition to its terms, as for instance, in defiance of an agreement by the bailee in the instrument of bailment to abandon his right to redemption, upon his failure to perform the condition. (*n*)

(8) The amount can be ascertained by adopting the proceedings given by section 6 (1), (2), p. 91, and sec. 7, p. 97.

The amending Act 6 Edw. VII. chap. 19, sec. 25, adds the words "and keeping." Prior to such amendment, a conditional vendor was confined in his demands to the cost of "taking" possession. He now can, in relation to transactions from and after the 1st January, 1907, extend his claim to cost of "keeping" as well as "taking" possession.

**9.** Where the goods or chattels (1) have been sold or bailed (2) originally for a greater sum than $30 (3) and the same have been taken possession of, as in the preceding section mentioned (4) such goods or chattels shall not be sold without five days' (5) notice (6) of the intended sale (7) being first given to the bailee or his successor in interest. (8) The notice may be personally served (9) or may, in the absence of such bailee or his successor in interest, be left at his residence or last known place of abode in Ontario, or may be sent by registered letter, deposited in the post office at least seven days before the time when the said five days will elapse, addressed to the bailee or his successor in interest, at his last known post office address in Canada. (10) The said five days or seven days may be part of the twenty days in section 8 mentioned. (11)

(1) See *ante* page 11, note 3.

(2) See *ante* page 21, note 6.

(*m*) *Whelan* v. *Couch*, *supra*.

(*n*) *Bunaleugh* v. *Poolman*, 3 Daly (N.Y.) 236; *Laveque* v. *Navarine*, 52 Vt. 267.

(3) This section does not apply to a bailment wherein the goods when sold were sold for less than $30, but, nevertheless the goods, no matter what was the price therefor, have still to be retained by the bailor, when possession is retaken, for a period of twenty days, as provided for by section 8 *ante* page 104.

(4) See *ante* page 104, note (5).

(5) This means five clear days "where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by another person, both the days of doing the acts ought to be excluded in order to insure to him the *whole* of that space of time. Here is a case in which one party (the bailor) is required to give notice to another (the bailee), a certain time before a particular act can be done by the former; the party to whom the notice is given cannot fix the period of the day when it is to be given:" but the Act of Parliament allows him five days, as an intervening period within which he may deliberate whether he will do a certain act, viz., redeem, and unless you exclude both the first and the last day you do not give him the whole five days for that purpose. (*a*) If the statute had said five days *at least*, then it would be apparent beyond question that five complete days were meant to be given, (*b*) but "a day is a day whether 'at least' be added or not." (*c*)

It is to be observed however, that while the words "at least" are omitted in reference to the period of five days, they are used in the same section in defining the period of "seven days" which must elapse after depositing the notice in the post office. "Seven days at least" mean seven clear days. (*d*)

(*a*) Alderson, B., *Young* v. *Higgon*, 6 M. & W. at p. 54.

(*b*) *Zouch* v. *Dempsey*, 4 B. & Ald. 522.

(*c*) Littledale, J., *Regina* v. *Justices' of Shropshire*, 8 Ad. & Ell. 173: see *Young* v. *O'Reilly*, 24 U. C. Q. B. 172: *Stadacona Fire & Life Ins. Co.* v. *Mackenzie*, 29 C. P. 10: *Hans* v. *Johnston*, 3 O. R.100.

(*d*) *Kemohr* v. *Marx*, 19 Can. Law Jour. 10.

The five days here mentioned may be five of the days of the twenty, during which twenty days the goods or chattels must be kept so as to permit of redemption, but in order to so compute the period of five days, the necessary notice must be given not later than on the fourteenth day of the twenty days so as to allow the last of the five days to expire before the end of the term of twenty days.

(6) The following is a form of notice which may be adopted.

To , of

SIR:—

Notice is hereby given you that, at the expiration of five days from the day of service of this notice upon you, to wit: upon day of , 188 . I shall proceed to sell the following goods or chattels, namely, (describe the property) at in the of , in the county of . The said goods or chattels were taken possession of by me, on account of the breach of condition in the conditional sale or promise of sale thereof by me to you. If you desire to redeem the said goods or chattels you are at liberty to do so, at any time within twenty days after the day of (the day of taking possession) on payment of the sum of $ being the amount in arrear on such conditional sale together with interest and actual costs and expenses of taking possession which have been incurred.

Dated this day of . 18 .

(7) It must not be inferred from the words of the statute that the goods must be sold, but only, if sold, then a certain notice of the intended sale must be given. The bailee is given twenty days from the taking possession by the bailor within which to redeem, a right he cannot deprive himself of, so that the bailee cannot be heard to complain at a sale being made after the time for redemption has elapsed without the right of redemption being exercised.

(8) The notice should be, not only of the intended sale, but of the intended place of sale, for, without the latter, a notice could hardly be said to be a notice of an intended sale.

(9) See *ante* page 46, note (3).

(10) There are three different means of effecting service,

(i) Personal service, which of course is the safest and surest, and therefore the best method to be adopted.

(ii) Service by mail: that is, by depositing in the post office a registered letter containing the notice, addressed to the bailee at his last known post office address in Canada.

(iii) Service at the bailee's residence or last known place of abode in Ontario.

(11) Personal service is only dispensed with in the event of absence of the bailee, etc., that is absence from his residence or last known place of abode in Ontario. (*e*) Absence of the bailee from the place whereof he is described in the instrument is not necessarily absence from his residence, because the description in the instrument, at most, is but *prima facie* evidence of the residence of the bailee. (*f*)

Though personal service can be effected, such does not appear to be compulsory, when the alternative method of service by mail is adopted. But if the post is made the means of service, strict care must be exercised in complying with the statute. The letter must be addressed to the last known post office address of the bailee in Canada. If the bailee is known to have left, and to be residing out of Canada, a notice addressed to his last known address in Canada would scarcely be deemed sufficient. In such a case it would be advisable to leave the notice at the bailee's last known place of abode in Ontario. The letter must be registered and it must be deposited in the post office at least seven days before the last day of the five previously mentioned (*g*) would expire. Thus if the five days would elapse on the 20th of the month, the notice must be mailed and registered on or before the 12th of the same month. (*h*)

It is not safe to conclude that a man's residence is at the place whereat his family reside. Nor is it conclusive as to a man's residence to fix it of the place whereat his family

(*e*) See *Marr* v. *Corporation of Vienna*, 10 L. J. 275.
(*f*) *Miller* v. *Van Norman*, 13 Q. B. 461.
(*g*) *Ante* p. 47, note (4).
(*h*) See *ante* p. 3, notes (4), (5), (6), section 2, note (5).

reside. (*i*) There may be a constructive residence, as well as actual residence. Absence of the bailee from his constructive residence would not entitle the bailor to dispense with personal service. (*j*) A person may have more than one residence. If he has houses in different places at each of which he keeps an establishment, each may be called his residence though he may not go there for years. (*k*)

By section 8 the period of twenty days must in all cases elapse after possession taken to permit of the bailee redeeming should he be so disposed. This section provides a course which must be pursued should the bailor wish to sell the property after taking possession, but that the bailor may not be compelled to hold the property any longer than twenty days, the proceedings leading up to sale may all be taken within that period, though the sale cannot take place until its expiration.

**10.** (1) Where any goods or chattels (1) subject to the provisions of this Act are affixed to any realty (2) without the consent in writing of the owner of the goods and chattels, such goods and chattels shall notwithstanding remain so subject, (3) but the owner of such realty, or any purchaser, or any mortgagee, or other incumbrancer on such realty, shall have the right as against the manufacturer, bailor or vendor of such goods or chattels, or any person claiming through or under them, to retain the said goods and chattels upon payment of the amount due and owing thereon.

(2) The provisions of this section are to be deemed as retroactive and shall apply to past as well as to future transactions. 60 Vic. cap. 3, sec. 3; cap. 14, sec. 80.

(1) It is to be noticed that the words used in this section are "goods and chattels," whereas in section one the word "chattels" alone is used. Of the two words, the word chattel, ordinarily speaking, has a wider significance, but its meaning is much circumscribed by section one (*ante*, p. 1).

(*i*) *Miller* v. *Van Norman*, *supra*; see *Bank of Toronto* v. *Fanning*, 17 Chy 514; *LaPlante* v. *G. T. R. Co.*, 26 Q. B. 479.

(*j*) *Queen* v. *Vice-Chancellor of Oxford*, 7 Q. B. 471.

(*k*) *Walcott* v. *Botfield*, Kay 534, 18 Jur. 570.

Prior to the 1st January, 1907, it is only as to manufactured goods or chattels (*ante*, p. 11) that this section has any application, and up to then it has no application to any article comprehended within the definition of household furniture except a piano, an organ or other musical instrument (section 2, *ante*, p. 72).

(2) What constitutes annexation to the realty is an extremely wide question: but, inasmuch as when annexed the owner of the realty can only retain the chattel on paying for it, and when not annexed he can have no claim upon it under the Act, the question of what is sufficient to constitute annexation is not a matter of much concern, at least to the vendor, except, of course, when the act of annexation destroys the legal identity of the article annexed. If it is not annexed the vendor takes it; if it is annexed he still takes it, if the owner of the realty refuses to pay for it. Yet a question whether there has or has not been annexation is important because according as the answer is 'Yes' or 'No,' so there is or is not the option in the owner of the realty to buy the article. The owner of the chattel might wish to repossess the chattel, but this he could not do if the owner of the realty decided to retain it, and pay for it. If annexation has taken place, then the owner of the chattel would be obliged on payment to forfeit his right to it. This privilege in the owner of the realty, when he chooses to exercise it, will give to the words "affixed to any realty" a wider significance than is ordinarily understood by annexation. In other words, what might not be an "affixing to the realty" as against the owner of the chattel, might still be an annexation within the statute. Thus it was at one time (1851) considered that chattels did not become fixtures when they were attached slightly so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object of the annexation was not to improve the inheritance, but to render the machines steadier and more capable of convenient use as chattels; (*a*) and, of course, if these principles still prevailed, an owner

(*a*) *Holland* v. *Eastwood*, 6 Ex. 295.

of the realty would not enjoy the statutory option of keeping such chattels on payment to the vendor. But now it is held that the circumstance that the fastening is merely to steady the machines when in use is not inconsistent with the inference that the object is permanently to improve the freehold. In fact the machine without such steadying could not be effectually used, and therefore it was clearly necessary. While the object of fixing is to ensure steadiness and to keep the machine in place when wanted, the same can be said, probably, of most trade fixtures. (*b*) and thus the owner of the realty would enjoy his rights under this statute. While machinery slightly attached, merely to steady it. (*b*[1]) may lose its character as a chattel, machinery which at all times requires to be firmly fixed to the freehold for the purpose for which it is worked, may never lose its character as a moveable chattel; (*c*) and thus the rights of the owner of the realty in the exercise of his option of retaining the chattel under this statute be as difficult of ascertainment as the question of fixtures is difficult of solution. Only general rules can be offered. By reason of the diversity of conditions, the vast variety of forms in which machinery can be used, the multitude of objects to which machinery is put, the constantly continuing improvements with which modern ingenuity supplies the ever changing and growing demands of busy people, these principles are often perhaps more reliable in their breach than in their application. Simply as a guide and only as such, it may be said that the object of the annexation and the purposes to which the premises are applied may be regarded, and if the object of setting up machinery is to enhance the value of the premises, or to improve them for the purposes for which they are being used, and if the machinery is affixed to the realty, however slightly, but in such a way as is appropriate to its use indicating a permanent rather than an occasional affixing, then both as to the degree of annexation and as the object of it, it may be con-

(*b*) *Longbottom* v. *Berry*, L. R. 5 Q. B. 123.
(*b*[1]) *Goldie & McCulloch* v. *Henson*, 35 N. B. Reps. 349.
(*c*) *Longbottom* v. *Berry*, *supra*.

cluded that the machinery has become part of the realty. (*d*) Again, though injury may result by the removal and detaching an article from the realty, the injury does not in all cases control the character of the chattel, but few cases will be found in which an article, the removal of which involves material injury to the realty, has been considered to be a chattel in the absence of a governing agreement. (*e*) As injury by removal is sometimes the controlling factor (for the amount of damage that would be done by removing the article may be so great as to prevent the removal;) (*f*) so in some cases is the mode of annexation; (*g*) and in some cases it is the only factor in deciding the question whether a chattel has or has not become a fixture, (*h*) and yet, as compared with considerations arising from the character and purpose of the article in relation to the use of the realty, the mode of annexation becomes of minor importance. (*i*) Then the convenience when in use, of a chattel, may decide its character, for it may be of no use unless attached as part of the realty; or it may be only more conveniently used by being so attached. (*j*) Thus a machine held to the freehold by cleats that it may the more conveniently be worked, is not sufficient to make the machine part of the realty. (*k*) Nor when belting is used for a similar purpose; (*l*) but belting itself is a fixture when necessary for communicating the motive power from the engine: (*m*) but a cotton gin was held to be part of the realty, because its use would be much

(*d*) King, J., *Haggart* v. *Brampton*, 28 S. C. R. at p. 182.

(*e*) *Ex p. Moore Banking Co.*, 14 Ch. Div. 379: *Wake* v. *Hall*, L. R. 8 App. 195; *McCausland* v. *McCallum*, 3 Ont. R. 305: *Markle* v. *Houck*, 19 U. C. Q. B. 146.

(*f*) *Wake* v. *Hall*, L. R. 8 App. Cases at p. 205.

(*g*) *Wiltshear* v. *Cottrell*, 1 El. & Bl. 674.

(*h*) *Towne* v. *Fisk*, 127 Mass. 125, 34 Am. Rep. 353.

(*i*) *McRea* v. *Central Nat. Bank*, 66 N. Y. 495: *Feder* v. *Van Winkle*, 53 N. J. Eq. 370.

(*j*) *Carscallen* v. *Moodie*, 15 U. C. Q. B. 304: *Bannell* v. *Tupper*, 10 U. C. Q. B. 414: *Longbottom* v. *Berry*, L. R. 5 Q. B. 123.

(*k*) *Sun Life Assce. Co.* v. *Taylor* (1893), 9 Man. R. 89.

(*l*) *Longbottom* v. *Berry*, *supra*: *Sun Life* v. *Taylor*, *supra*.

(*m*) *Gooderham* v. *Denholm*, 18 U. C. Q. B. 203.

lessened unless attached, and its gearing in consequence passed with it. (*n*) So that the convenience when in use appears to be a matter of degree. Then the permanent use and improvement of land is an important consideration: (*o*) for if chattels, when affixed, give to the land its chief value, the prevailing view is that the chattels then become fixtures: thus a cider mill annexed to an orchard with the view of its permanent enjoyment passes with the land; (*p*) and land, with an inexhaustible supply of stone, gives to a stone-mill erected thereon a permanent character, and it too passes with the land; (*q*) but, on the other hand, a ferry-boat run by a chain, the chain being supported by buoys and fastened to land, is held to be a chattel, because the whole is not intended for the permanent improvement of the land. (*r*) Whatever in fact is placed in a building to carry out the obvious purpose for which it was erected, or to permanently increase its value for occupation, is part of the realty. (*s*) But chattels which are merely incidental to the particular business carried on at the time, and which can be used in one place as well as in another, and which add nothing to the building, though they may be of advantage to the businesses conducted there, are said to be personal property and not fixtures. (*t*)

"It would seem that when a building is erected for a particular purpose, and machinery is placed therein to effectuate that purpose, and is reasonably necessary therefor, and is in some substantial manner attached to the land or the building, and consequently to the freehold, so as to give one the idea of permanency, and to evince an intention of making a

(*n*) *McKenna* v. *Hammond*, 30 Am. Dec. 366, see *Wake* v. *Hall*, L. R. 8 A[illegible]. 204.

(*o*) *Haggert* v. *Brampton*, *supra*.

(*p*) *Wadleigh* v. *Irwin*, 41 N. H. 503.

(*q*) *Davis* v. *Morgan*, 56 Mo. App. 311.

(*r*) *Cowart* v. *Cowart*, 3 Leer (Tenn.) 57.

(*s*) *Lentbridge Sav. Bank* v. *Exeter Mad. Works*, 127 Mass. 542.

(*t*) *Chase* v. *Tacoma Box Co.*, 11 Wash. 377.

fixture of it, the courts incline to regard such machinery as part of the realty, irrespective of weight or size, unless the size be such that the machine cannot be removed without removing or damaging the building." (*u*)

"The general principle to be kept in view, underlying all questions of this kind, is the distinction between the business which is carried on in or upon the premises, and the premises, or *locus in quo*. The former is personal in its nature, and articles that are merely accessory to the business, and have been put on the premises for this purpose, and not as accessions to the real estate, retain the personal character of the principal to which they appropriately belong and are subservient. But articles which have been annexed to the premises as accessory to it, whatever business may be carried on upon it, and not peculiarly for the benefit of a present business, which may be of a temporary duration, become subservient to the realty and acquire and retain its legal character." (*v*)

Another test is that when the annexation is for the benefit of the machine and not for the benefit of the freehold, then the machine retains its character as personalty; (*w*) hence it is that machinery furnishing motive power is part of the realty to which it is attached; (*x*) while machinery merely accessory to a building may or may not become part of the realty, according as the building is or is not erected for or permanently devoted to the particular purpose, for the carrying out of which purpose, the machinery is so annexed, or according as the moveable and immoveable property are both vested in the same person. (*y*) Sometimes buildings are sold and carried to the spot intended for

(*u*) *Per* Bird, V.C., in *Roddy* v. *Brick*, 42 N. J. Eq. 225.

(*v*) *Fortman* v. *Coepper*, 14 Ohio St. 558, quoted in *Wagner* v. *Cleveland, etc., R. Co.*, 22 Ohio St. 563, 10 Am. Rep. 770.

(*w*) *Keefer* v. *Merrill*, 6 App. R. 121.

(*x*) *Boyd* v. *Shorrock*, 37 L. J. Ch. 114, L. R. 5 Eq. 72; *Walmsley* v. *Milne*, 7 C. B. N. S. 115; *Burke* v. *Taylor*, 46 U. C. Q. B. 371.

(*y*) *Carscallen* v. *Moodie*, 15 U. C. Q. B. 304; *Gardiner* v. *Parker*, 18 Chy. 26; *Dickson* v. *Hunter*, 29 Chy. 73. .

them and there placed. Independently of actual fastening, buildings so placed may or may not be fixtures ($y^1$). If accessory to the land in the sense of being there for the purpose of improving it as a permanent improvement, or for the purpose of better enjoying the land itself, ($z$) then the building is treated as part of the land; ($a$) but if the building be of little value, and is of a decidedly temporary character, even though the soil may be somewhat levelled to make for it a suitable foundation, it retains its character as personalty. The description of the article is for the jury, and they having answered, then it is for the Judge to say whether, according to the fact found, the article is or is not a fixture.

Fences, especially wire fences, may be a manufactured article (*ante*, p. 12). If they are, then they come within the purview of the Act, and can be sold under and by way of a conditional sale. If sold to a vendee who places the fence on his own land, then little difficulty arises, at least so long as the vendee of the fence and the owner of the land are the same person. But, should the vendee of the fence sell the land to an innocent purchaser, the latter may be preferred or deferred to the right of the conditional vendor, according as this Act is or is not complied with. A fence, even a rail fence, is generally considered to be part of the realty, and cannot be replevied as personal property by one who wrongfully builds it upon the land of another; for, when so built, it becomes the property of that other, and once having so vested, the latter can remove it and dispose of it as his own. This is so, though the fence is attached only by its own weight, ($b$) as is the case with the common rail fence, which, judged by the test of the intention, has never been doubted is part of the

($y^1$) *Leonard* v. *Willard*, Q. R. 23 S. C. 482.

($z$) *Wake* v. *Hall*, L. R. 8 App. Cases at p. 204.

($a$) *Bunnell* v. *Tupper*, 10 U. C. Q. B. 414; *Phillips* v. *Grand River F. M. Ins. Co.* (1881), 46 U. C. R. 334; *Cleaver* v. *Culloden*, 14 U. C. Q. B. 491; *Bald* v. *Hagar*, 9 C. P. 382; *Sheboneau* v. *Beaver M. Fire Ins. Co.*, 33 U. C. Q. B. 1, 30 U. C. Q. B. 472; *Cameron* v. *Hunter*, 34 U. C. Q. B. 121; *Miles* v. *Ankatell*, 29 Ont. 21.

($b$) Ewell on Fixtures, 302.

realty. (*c*) A temporary or accidental detachment of the fence does not deprive it of its character of realty. But material about to be used, but not yet used, even though deposited along the line of the proposed fence, in the construction of a fence, does not lose its character of personal property until annexed to the land. (*d*) By virtue of this statute it would seem the owner of the land cannot retain the fence sold to his vendor by the latter's conditional vendor, and found upon the land when he purchased it, and so placed without the written consent of the conditional vendor, without payment of the amount due and owing thereon.

A chattel annexed to realty still remains a chattel in favor of its owner, though its removal might injure the freehold. (*e*) It does not become "immobilized." But if injury would result to the freehold, the owner of the realty can, it is submitted, under the statute, successfully contend that the chattel is affixed to the realty; that it is immobilized so as to hold it, against the owner, on his paying for it; for, as was said by Lord Hardwicke, in *Lawton* v. *Lawton*, (*f*) "You shall not destroy the principal thing by taking away the accessory to it." In other words, if the transaction is outside of the Act, a chattel may be affixed to the realty, and yet not become immobilized; whereas, with exactly the same conditions existing, if the Act applies, the chattel may be claimed to be affixed, so that the owner of the land may exercise the option given him by the Act of keeping the chattel on paying for it.

A manufacturer, bailor, or vendor of chattels, prior to the enactment of this section, could not be defeated in his right to property, within the meaning of the Act, by the bailee or vendee annexing the chattel to realty, so as in all other respects, to make the chattel part of the realty, and if the owner of the soil sought to retain that which has been so

(*c*) Spragge, V.C., *McDonald* v. *Weeks*, at p. 310.
(*d*) *Mott* v. *Palmer*, 1 N. Y. 564: Ewell on Fixtures, 302.
(*e*) Am. & Eng. Enc. of Law, vol. 13, p. 602.
(*f*) A. & K. 15.

improperly affixed to his land, by one who had not the legal title to the thing so affixed, he would have to pay for it. (*g*) This is still the case to the extent of compelling the owner of the soil to pay for the chattel; (*h*) but it takes away from the owner of the chattel his former legal right to take the chattel if he so desired. The statute, in fact, leaves the option with the owner of the soil whether he will keep the chattel and pay for it, or give the chattel up, an option he did not possess prior to the passing of this Act.

In dealing with fixtures, the intention in regard thereto decides their character, and the intention is indicated by two circumstances, viz., the degree of annexation and the object of annexation. (*i*) These two circumstances are such as to be patent to all, and so, the intention that guides is not the secret intention of one party or the other, or of both, or such that rests in mere agreement, but it is the legal intention to be gathered from the surrounding circumstances, as, for example, the kind of article, its mode of attachment to the realty, the purpose for which it was put in its place, the enhancing the value of the premises or improving its usefulness for the purpose for which it is used, the circumstance even of the property being of a temporary and unsightly character, and the agreement and understanding between the parties at the time of placing the structure upon the realty. (*j*) And, likewise, a mere expressed intention to sever a fixture from the realty and sell it in case another will buy it, even though communicated to that other, will not operate to convert a part of the freehold into a chattel or to alter

(*g*) *Stevens Man. Co.* v. *Barfoot*, 9 O. R. 692.

(*h*) *McEntire* v. *Crossley* (1895) A. C. 457, 464.

(*i*) *Thomas* v. *Inglis*, 7 Ont. R. 588; *Holland* v. *Hodgson*, L. R. 7 C. P. 328; *Haggart* v. *The Town of Brampton*, 28 S. C. R. 174; *Keefer* v. *Merrill*, 6 Ont. A. R. 121; *Doran* v. *Willard*, 14 N. B. R. 358; *Fowler* v. *Fowler*, 15 N. B. R. 488; *Philips* v. *Grand Rivers F. Mut. F. Ins. Co.*, 46 U. C. Q. B. 334; *Hobson* v. *Gorringe* (1897) 1 Ch. 182, at p. 193.

(*j*) *Miles* v. *Ankatell*, 29 Ont. R. 25, reversed in appeal 25 O. A. R. 458; *Haggart* v. *Brampton*, 28 Can. S. C. R. 174.

its character in any way. (*k*) And when there is an absence of intention to sever the machinery from the freehold, a mortgage of the land will cover the machinery and even the leathern driving belts used in working the machinery which pass with the realty, as does the key of a door pass with the house. (*l*) And the mortgagee, who has lent his money on the security of real estate to which is affixed a chattel—a furnace for example—may, if the furnace is removed and sold by the mortgagor, follow and take it, even from the possession of an innocent purchaser. (*m*)

An instrument under this Act, executed in view that the chattels are about to be annexed to the realty, is regarded as sufficient evidence of the intention and agreement of the parties that they retain their character as personal property, which they do. (*n*) When the intention exists, then a bailee cannot, by annexing the chattel, alter its character. (*o*) And the statute says, notwithstanding any annexation, the chattel shall remain a chattel subject to the foregoing option in the owner of the realty, provided of course it is in the first place a chattel covered by the Act. The absolute owner of chattels cannot attach them to the freehold of another, and afterwards be heard to claim that the chattels so annexed are not fixtures. (*p*) But, if some one other than the owner of the goods attaches them to the freehold, and the owner of the

(*k*) *Minhinnick* v. *Joly*, 29 Ont. R. 238.

(*l*) *Dewar* v. *Mallory*, 16 Gr. 618.

(*m*) *American Investment Co.* v. *Sexton*, 20 Ont. R. 77; *Stockwell* v. *Campbell*, 29 Conn. 362.

(*n*) Jones on Mortgages, p. 111. Am. & Eng. Enc. of Law, vol. 13, p. 625. *Hobson* v. *Gorringe* (1897) 1 Ch. 182; *D'Eyncourt* v. *Gregory*, L. R. 3 Eq. 382; *Holland* v. *Hodgson*, L. R. 7 C. P. 328; *Hobson* v. *Gorringe*, 66 L. J. Ch. 114 (1897) 1 Ch. 192; *Haggert* v. *Brampton*, 28 C. E. R. 180; *Keefer* v. *Merrill*, 6 O. A. R. 121; *Doran* v. *Willard*, 14 New Bruns. 358; *Fowler* v. *Fowler*, 15 New Bruns. 488; *Phillips* v. *Grand River F. M. F. Insce. Co.*, 46 U. C. Q. B. 334.

(*o*) *D'Eyncourt* v. *Gregory*, L. R. 3 Eq. 382.

(*p*) *Stephens* v. *Barfoot*, 13 A. R. 366; *Laine* v. *Beland*, 21 S. C. R. 419; *Polson* v. *DeGeer*, 12 Ont. R. at p. 280; *Joseph Hall Manf. Co.* v. *Haslett*, 8 O. R. 465; 11 A. R. 749; *Leonard* v. *Boisvert*, 10 Que. S. C. 343.

realty seeks to escape payment therefor, and still hold them as his own, he must produce the consent in writing of the owner of the goods to such attachment, before he can do so. Generally speaking, a sale of fixtures is a sale of chattels. (*q*) Even fixtures of a nature that the vendor must know, in order to be made use of, must necessarily be built into, and become part of the building, none the less retain their character of chattel property in favor of a vendor thereof who retained in himself the right of property in the fixtures notwithstanding the rule "*quicquid plantatur solo, solo cedit.*" (*r*)

The right of reception exists so long as the property retains its legal identity, (*s*) subject, however, to the exercise of the statutory option by the owner of the realty; but, if he seeks to keep the property without paying for it, he renders himself liable, not, however, in action for conversion, but in detinue, for trover will not lie for fixtures while they remain attached to the freehold; (*t*) and a demand by the vendor and refusal by the person in whose possession they are is sufficient to entitle the vendor to bring an action to recover the chattels. (*u*)

The form of judgment is to the effect that the chattel is the property of the plaintiffs, and that the defendant detains the same and doth permit the plaintiff to remove the same, failing which, as an alternative relief, the plaintiffs do recover for the wrongful detention, the amount

(*q*) *Haller* v. *Runder*, 1 C. M. & R. 266; *Hellawell* v. *Eastwood*, 6 Exch. 812.

(*r*) *Gough* v. *Wood*, (1894) 1 Q. B. 713; *Hobson* v. *Gorringe*, (1897) 1 Ch. 182; *La Banque d'Hochelaga* v. *Waterous Co.*, 27 C. S. R. 406; *Central Branch R. W. Co.* v. *Fritz*, 27 Am. Rep. 175; *Hall Manfg. Co.* v. *Haslett*, *infra*.

(*s*) *Hall Manfg. Co.* v. *Haslett*, 11 A. R. 749; *Howell* v. *Listowel Rink and Park Co.*, 13 O. R. 476; *Waterous Co.* v. *Henry*, 2 Man. R. 169.

(*t*) *Oates* v. *Cameron*, 7 U. C. R. 228; *England* v. *Cowley*, L. R. 8 Ex. 126.

(*u*) Burton, J.A., in *Hall Manfg. Co.* v. *Haslett*, 11 A. R. at p 752.

assessed, or to be assessed as damages. (*v*) The simple act of annexation to the freehold does not justify the inference that the chattel becomes the property of the freeholder, where the chattel is severable without material injury to itself or to the freehold, for it is always open to inquiry under what circumstances the chattel was annexed, and whether an agreement did or did not exist under which the owner would be entitled to take it. (*w*) The maxim "*quicquid plantatur solo, solo cedit*" cannot be invoked unless there be such a fixing to the soil as reasonably to lead to the inference that it was intended to be incorporated with the soil. (*x*) If the circumstances are such as to indicate that articles, attached to the freehold by nothing more than their own weight, are still to be part and parcel of the freehold, then they are fixtures to the realty, (*y*) otherwise they are not, hence it will be seen that the option given by the statute to the owner of the freehold, depends upon the circumstances surrounding the placing of the articles upon the land.

A question often arises as to the character of part of or accessories to articles or structures which are attached to the freehold, for example, the fork which is part of or accessory to the patent hay fork. The fork itself is detachable, but the remainder or principal part is fixed to the barn or stable in which it is used. The whole is sold under a conditional sale agreement. Notwithstanding annexation the title remains in the vendor, but he cannot deprive the owner of the freehold under this section of the statute of the right to retain the fork on paying for it, because it is detached from the freehold, and therefore not a fixture. "Where, in the case of machinery, the principal part becomes a fixture by actual annexation to the soil, such part of it as may not be so physic-

(*v*) *Polson* v. *Degeer*, 12 Ont. R. 275; *Duncan Iron Works Co.* v. *Rapid City Co.*, (1884) 9 Man. R. 577, 587.

(*w*) *Lancaster* v. *Eve*, 5 [illegible] N. S. 717.

(*x*) Williams, J., *Lancaster* [illegible] *Eve*, 5 C. B. N. S. 717.

(*y*) *Can. Perm. L. & S. Co.* [illegible] *Merchants Bank*, 3 Man. R. 285; *Keefer* v. *Merrill*, 6 Ont. App. 121; *Holland* v. *Hodgson*, L. R. 7 C. P. 334; *Haggart* v. *Brampt* [illegible] 28 S. C. R. at p. 180.

ally annexed, but which if removed would leave the principal thing unfit for use, and would not of itself and standing alone be well adapted for general use elsewhere, is considered constructively annexed," and accordingly crates, cupping machines and workbenches, "not actually annexed" but essentially necessary to the working of the principal machinery were held to pass as part of the realty, a canning factory. (*z*) So detachable wheels belonging to a polishing machine were held to partake of the character of the machine (*a*) and loom beams laid upon the looms, when in use were held to possess the character of the looms, (*b*) and in the same way lathes, bending machines, Bradley forges, a Daniel's planer, dynamometer scales, the watchman's clock, are constructively annexed, because they are necessary parts of fixed machines, (*c*) neither being practically available for the purpose for which it was used, without the other, because, in fact, such things are parts of a whole, as duplicate sets of rolls belonging to a rolling machine, (*d*) duplicate cylinders for a blining machine, and duplicate alleys for grindstones, (*e*) and keys to the fixed locks of a door swinging on its hinges; (*f*) but a copying press and table, anvils, an iron clamp for making engine wheels, a band sawing machine and saws therewith, belting, a platform scale on wheels, fire hose and fire hose reel with its brass parts and couplings, brass nozzles and branches, must not be said to be constructively annexed, and therefore could not be claimed by the owner of the realty on payment thereof under this section as against the conditional vendor who sold them (*g*).

(*z*) *Dudley* v. 67 Md. 441: 1 Am. St. Rep. 368.

(*a*) *Farree* v. *George*, 108 Mass. 78: 11 Am. Rep. 310.

(*b*) *Hopewell Mills* v. *Taunton S. Bank*, 150 Mass. 519: 15 Am. St. Rep. 235: *Gooderham* v. *Denholm*, 18 U. C. R. 203: see 15 Q. B. D. 358, L. R. 5 Q. B. 133: *Haggart* v. *Brampton*.

(*c*) *Haggart* v. *Brampton*, *infra*.

(*d*) *Ex p. Ashbury*, L. R. 4 Ch. 630.

(*e*) *Delaware R. Co.* v. *Oxford Iron Co.*, 36 N. J. Eq. 452.

(*f*) *Lifford's Case*, 11 Coke: *Bishop* v. *Elliott*, 11 Exch. 113: see *Gooderham* v. *Denholm*, 18 U. C. Q. B. 203.

(*g*) *Haggart* v. *Brampton*, 28 S. C. R. 174: see *Gooderham* v. *Denholm*, *supra*.

Where an industry is carried on, as mining, and the machinery and buildings are intended to be accessory to the mining, and not accessory to the soil, then the machinery and buildings are personal chattels and not part of the realty, even though the foundations are below the surface of the soil, and without some disturbance to the soil, the structures could not be removed. (*h*)

Transactions, however, under this statute are not subject to much of the confusion that arises in defining the character as a fixture or no fixture, because the statute limits the transactions to those wherein the property or title shall not pass to the vendee until the performance by him of the condition imposed, and, as we have seen, the annexation of the chattel thus sold to the realty of the purchaser cannot render it part of the realty (except in the Province of Quebec, perhaps, where the article is of that character destined from its inception to become part of the realty), and irrevocable. The right is implied of removing it upon failure in the vendee to perform the condition. But where dispute may arise is, by reason of this section, granting a certain privilege to the owner of the realty, he not being the vendee of the chattel, according as the chattel is or is not affixed to the realty, and, therefore, according as it may or not be a fixture, and to the extent that it may be detached to enforce this privilege, so may it be necessary to pass upon the question of fixture or no fixture.

It is not literally correct to say that whatsoever is annexed to land of another without his consent becomes his property. Such is not the extent of the maxim "*quicquid plantatur solo, solo cedit,*" but rather, and literally, "whatever is affixed to the soil, belongs to the soil." The property in the materials still remains the property of him who owned them as chattels, though by annexation the materials become part of the soil, and, therefore, if by any cause the chattels become severed from the freehold, the owner of them may take them.

(*h*) *Wake* v. *Hall*, L. R. 8 App. Cases at p. 205.

($h^1$) "The maxim cited is to be found in the works of Gaius, and probably he was quoting an older maxim. And the passage in which he uses it is incorporated in the Digest, book 41. title I., "*De acquirendo rerum dominio.*" In the 7th section of that title is a great deal of very able reasoning as to what should be the law as to property where one person has changed the nature of the thing belonging to another, by bestowing his labor on it, as, for instance, where one has turned the silver of another into a vase, his block of marble into a statue, or his grapes into wine. That question is not material here; and then in the 10th law of the 7th section it is said (I translate the Latin), "If one on his own land has erected a building with materials belonging to another, he is the owner (*dominus*) of the building, for all that is built into the soil becomes part of it, '*quia omne quod inaedificatur solo cedit.*' But this is not so that he who was the owner of the materials ceases to be the owner thereof; but, nevertheless he (the owner of the material) cannot bring an action to recover in specie, nor take them away himself ('*nec vindicare eam potest neque ad exhibendum de ea agere*'), because of that law of the twelve tables, which provides '*ne quis tignum alienum aedibus suis junctum eximere cogatur sed duplum pro eo praeeste.*' Therefore if by any cause the building is cast down, the owner of the materials can '*nunc eam rindicare et ad exhibendum agere.*'" So far from meaning by the maxim that the property which had existed in the materials whilst chattels was lost, and vested in the owner of the soil, the maxim is used when Gains, and the framers of the Digest who adopted his opinion, thought that the property in the materials remained in the person who was owner of them whilst chattels, and did not vest in the owner of the building, though by the annexation the materials had become part of the soil, and though by the positive law of the twelve tables he was obliged to leave the building untouched on being paid double the value of the materials."

($h^1$) See the interesting consideration given to this maxim by Blackburn, L.J., in *Wake* v. *Hall*, L. R. 8 App. 195.

(3) If the consent in writing is given of the owner of the goods—that is—the person in whom is retained the property in them, then annexation to the freehold may give rise to just such a question as is dealt with in the next preceding pages; but, instead of the contention being on the part of the owner of the realty, the contention may be on the part of the owner of the chattel, that notwithstanding his consent, the article so annexed did not become part of the realty in the sense of being a fixture, and he is therefore entitled to it. In other words, that the statute means affixed to the realty, *so as to become a fixture?* Owing to the varied conditions of annexation, questions of this kind may frequently arise.

What this means is that if the conditional vendee affixes the chattel sold to him by his conditional vendor to the realty, without the consent in writing of the latter, then that the chattel shall be subject to the law as if the section had never been passed—the vendor may take it, or he may sue for it and the judgment would be that the chattel is the property of the plaintiff, that the defendants are detaining the same and that they do permit the plaintiff, by themselves, their servants or agents, to remove the same on demand at the *locus* in which they are placed; and failing this, as an alternative, that he does recover against the defendant, for the wrongful detention, the amount assessed or to be assessed as damages; and that upon removal the defendant do pay to the plaintiff any damages he may have to pay to the owner of the realty to repair any damage he may do to the realty in the removal of the chattel. (*i*) This is only embodying by way of statute that which is the law, and has always been the law without the statute. The inference from the language might be, that if the vendee has such written consent, the chattel shall cease to remain subject to the Act, but this would produce such startling results that this inference must not aid or suggest its meaning. Many chattels sold would be utterly useless unless annexed to the realty, and the writing evidencing the

(*i*) *Vulcan Iron Works* v. *Rapid City Co.*, 9 Man. R. 577, 587; Cameron, C.J., *Poulson* v. *Degeer*, 12 Ont. R. at p. 282.

transaction implies consent to annexation. if it does not expressly say so. In such cases it could not be that the conditional vendor lost his right at common law, or under the statute.

The statute says consent in writing. But surely he who would seek to benefit by the consent not being in writing, could not deprive others of the result of his verbal consent, if positively given, though not in writing. A person is estopped by his own conduct. if it be clear and explicit, from availing himself of legislative provisions intended for his benefit: (*j*) and, if a verbal consent is either admitted or proved clearly to have been given and acted on. it is a very intelligible equity to prevent the setting up of the formal provision as to a written consent. (*k*) But, when one party asserts and the other denies a verbal assent. then in the absence of proof of something being done on the faith of a proved assent, a Court of Equity will not dispense with the written consent. (*l*)

(*j*) *Joyce* v. *Booth*. 1 B. & P. 97: *Cox* v. *Cameron*. 4 Bing. N. C. 453.

(*k*) *Beucker* v. *Emmany*. 28 C. P. at p. 442: *Lorecke* v. *McKay*. 29 C. P. 54.

(*l*) *Beucker* v. *Emmany*. 28 C. P. at p. 442.

## 6 EDW. VII. CAP. 19.

## THE STATUTE LAW AMENDMENT ACT, 1906.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

(a) Sec. 23. The Act to amend the Act respecting Conditional Sales of Chattels is amended by adding thereto the following as section 2a:—

2a.[1] Receipt notes, hire receipts and orders for chattels given by bailors of chattels other than manufactured goods, and chattels where the condition of the bailment is such that the possession of the chattel passes without any ownership therein being acquired by the bailee until the payment of the purchase or consideration money, or some stipulated part thereof, shall only be valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration, provided that the bailors or vendors within ten days from the execution of the receipt note, hire receipt, order or other instrument evidencing the bailment or conditional sale given to secure the purchase money, or a part thereof, shall file with the clerk of the County Court of the county in which the bailee or conditional purchaser resided at the time of the bailment or conditional purchase, a copy of the said receipt note, hire receipt, or order, or other instrument evidencing the bailment or conditional sale, and no such bailment shall be valid as against such subsequent purchaser, or mortgagee, as aforesaid, unless it is evidenced in writing signed by the bailee or his agent.

24. Subsection 1 of section 6 of the said Act is amended by striking out the word "manufactured" in the fourth and fifth lines thereof.[2]

(a) Rev. Stat. c. 119 amended.

[1] See *ante* page 83.

[2] See *ante* page 91 and p. 95.

25. Section 8 of the said Act is amended by adding the words "and keeping" after the word "taking" in the eighth line of the said section.[3]

26. Sections 23, 24 and 25 of this Act shall not affect or apply to any such receipt note, hire receipt, or order for chattels made or given prior to the 1st day of January, 1907.

[3] See *ante* page 100 and page 113.

# FORMS.

## RENT AGREEMENT WITH PRIVILEGE OF PURCHASE.

———, ———, 19—

1.* This is to Certify, That I have this day hired from and said has to me leased, for the term of six months, with the privilege of further retaining as long as the rent is promptly paid, a Cabinet Organ, style No. valued at Dollars; for the use of which I agree to pay to said Dollars per month, payable monthly, in advance, and at that rate for any fraction of a month, at the office of said .

2. And in consideration of the renting to me of said Instrument, I hereby agree that it shall be kept at, and not be removed from my premises, viz., without the consent of said, first had in writing; I agree to preserve it carefully, and that when returned to, or otherwise repossessed by said it shall be in as good order as when received by me, ordinary wear from careful use excepted.

3. In case of any damage to said instrument by fire, water, or any cause other than careful use, I agree to pay to said the amount of said damage; and in case of the destruction thereof from any cause, to pay the above valuation, less any amount of rent which may have been paid.

* On the authority of Mason v. Lindsay, L. R. 4 Out. 365, a transaction covered by the above form, is not within the Act, because the lessee is not bound in such an agreement to purchase the organ in question.

4. Provided, however, and these presents are upon the condition, that if I shall fail to perform any of my agreements as herein provided, said shall have the right without further notice or demand, to take possession of said Organ and remove the same, and for that purpose to enter any place of mine where said has reasonable cause to believe said Organ to be, without being deemed to have done anything wrongful, and upon such taking, said term and my right to hold or use said Organ shall cease, but without prejudice to the right of said for arrears of rent, if any, or on account of preceeding breach of agreement.

Signed,

Post Office address,

5. I HEREBY AGREE that if said continue to hold said Organ and pay rent therefor, on or before the day it is due, as herein provided, until payments have been made, amounting to the valuation aforesaid, said Organ shall become the property of said but until the completion as aforesaid of said payments, said Organ shall remain the property of said .

6. For the time any payment is made before it is due, a deduction will be made at the rate of ten per cent. per annum for such time.

Residence,

## CONDITIONAL SALE OF MACHINERY, WITH STATEMENT BY VENDEE OF OWNERSHIP OF LAND.

AGREEMENT, made the day of in the year of our Lord one thousand nine hundred and

Between of the , , of the first part, and of the of the second

part, whereby the said agrees to manufacture for the said , in a good workmanlike manner, the following machinery, that is to say:
The said party of the first part is to be ready to deliver the said machinery free and in good order on the cars on his siding at for station on or about the day of next, after which delivery the same is to be at the risk and expense of the said party of the second part.

The said party of the first part also agrees, if required by the said party of the second part on receiving reasonable notice of the arrival of the said machinery at the place where the same is to be erected for use, to send a competent workman to make the connections between boiler and engine, and start the engine running or leave it ready to start. But all other materials and labour of every kind to be provided by the said party of the second part.

And the said party of the second part agrees at the proper time and in a convenient manner, to prepare and provide all proper foundations, frames, connections and materials, and a sufficient supply of water convenient to boiler, and all the labour and assistance required for the speedy and convenient erection and putting in running order the said machinery; in default of which, the said party of the first part shall thereupon be freed from further duty or concern in respect of the said machinery.

And the said party of the second part agrees to pay for the said machinery to be manufactured and delivered as aforesaid, the sum of Dollars, when ready for delivery, in cash, or by note, payable as follows:
and interest on the whole amount unpaid to be paid with each payment, and to furnish good, sufficient and satisfactory security. Provided that if any default shall happen in the payment of any such sums of money, then all the said sums then unpaid, whether due or not, shall immediately become due and payable in like manner and with the like consequences

and effects as if the time herein mentioned for payment of such sums had fully come and expired.

The property in the said goods shall not pass to the party of the second part until the purchase money and the notes given therefor shall have been fully paid. But the said party of the second part is to have possession and to use the said machinery until default is made in the payment of the price or of some part thereof. Or if any statements herein made are ascertained to be untrue, or if the said party of the second part becomes insolvent, absconds, encumbers, or attempts to, or does dispose of his property herein mentioned, or has his property seized for debt, rent, or taxes, or leaves the machinery unprotected, or fails to pay his taxes within seven days after lawful demand made therefor, then and in such case the whole debt immediately becomes due and payable and is to bear interest at per cent. per annum till paid, and the said party of the first part may, at his option, resume possession and recover such costs and damages as he may have incurred in consequence of such default, or of any other cause above stated. And it is further agreed between the said parties, that the said party of the first part shall have a charge upon the lands therein below mentioned for the amount of the said purchase money, until the said notes and all renewals thereof shall have been fully paid. And the said lands are hereby charged with the payment of the said notes and all renewals thereof.

This order and acceptance thereof constitute the whole contract between us, and there is no other agreement between us respecting these articles but what is herein expressed.

The said party of the second part also agrees to insure the said machinery for not less than two-thirds the amount of the purchase money, and the policy to be made "loss, if any, payable to the party of the first part."

And also if he shall require the said party of the first part to superintend the erection of the said machinery as aforesaid, to pay the actual travelling expenses from

aforesaid and back (including board) of the said party of the first part, his workmen, servants and agents for that purpose; and the said parties also agree that the said party of the first part is not to be responsible in damage or otherwise for any delay or failure in fulfilling the terms of this contract on his part, arising from a strike or strikes of workmen, or from any unforeseen or unavoidable cause.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first above written.

SIGNED, SEALED AND DELIVERED, ) SEAL.

*in presence of* )

) SEAL.

I, the party of the second part in the foregoing agreement mentioned, own and have a deed of, duly registered in my name, acres of land, it being Lot No. Concession Township County the current cash value of which is not less than $ and the same is free and clear of all encumbrance, except

and no interest or instalments are in arrear, and I will not sell or further encumber the same until all notes or other indebtedness to the party of the first part are paid, and the said notes or any renewal thereof and said indebtedness, shall be a charge upon the said lands until fully paid, and the said lands are hereby charged with the payment of the said notes or any renewals thereof.

I also own personal property, not exempt from execution, of the value of at least $ in excess of all my debts and liabilities.

Dated at
the day of

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## FORM OF HIRE OR RENT RECEIPT WITH RIGHT OF PURCHASE.

RECEIVED from (*name of Vendor in full*) *here describe the chattel in detail.*

On hire, for months, at Dollars, per month, payable in advance, the said above described chattel being valued at Dollars, which sum agree to pay in the event of the said instrument being injured destroyed by fire or otherwise, or not being returned to the said on demand, free of expense, in good order, reasonable wear excepted. And I agree that the said instrument shall not be removed from the premises now occupied by me at without notice to and the consent of .

IT IS AGREED, that I may purchase, and I hereby agree to purchase* the said above described chattel for the sum of Dollars, payable as follows: and interest on the unpaid principal at per cent., from date of agreement, but until the whole of the said purchase money be paid, the said instrument shall remain the property of on hire by me. And, in default of the punctual payment of any instalment of the said purchase money, or of the said monthly rental in advance, may resume possession of the said instrument without any previous demand, although a part of the purchase money may have been paid, or a Note or Acceptance given by me on account thereof—this agreement for sale being conditional, and punctual payment being essential to it; but in the event of the said instrument being so returned to them in good order, any sum received on account of the purchase money, beyond the amount due for rent and any expenses incurred in reference to the said instrument, will be repaid. On payment in full of purchase money and interest, no rent or hire will be charged.

Dated at this day of , 19

(Name)
(Address)

* See Mason v. Lindsay, L. R. 4 Ont. 365.

## FORM OF RELEASE OF RIGHT OF DISTRESS BY LANDLORD UPON CHATTELS PURCHASED BY WAY OF RENT RECEIPT OR OTHERWISE.

I the landlord of the house and premises rented by hereby release all claim and right of distress for rent now due or which hereafter may become due for the same upon that certain instrument mentioned in an agreement bearing such date herewith hired by the said from

Dated the day of , A.D. 19

Witness

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## FORM OF HIRE RECEIPT WITH RIGHT OF PURCHASE.

Toronto, 19

THIS CERTIFIES that I have hired of hereinafter called the Vendors, one Sewing Machine, numbered style , on the following terms, viz.:

I have paid this day Dollars, and agree to pay promptly at the office of the said Vendors, at when the same becomes due, without any demand whatsoever to be made therefor, the further sum of Dollars, on the day of each and every month hereafter as a monthly Rent therefor until the sum of Dollars shall have been paid to the said vendors.

And I hereby expressly admit that I have examined and tried the said machine, and that it is now in perfect order and condition.

And it is expressly understood that until the whole sum of Dollars shall have been paid the said vendors, I will neither part with, nor do I acquire, any title to said

machine; and in case of my failure to pay any of the said amounts above stated within the time aforesaid, I do hereby authorize the said vendors or any of their agents, without process of law, to take possession of said machine, and with that object to enter any of my premises to search for and obtain the said machine and to remove the same therefrom, using such force as may be necessary for so doing; and I hereby waive and release any right of action which I might otherwise have against the said vendors, or any of their agents, by reason of their procuring or attempting to procure possession of said machine after default as aforesaid; and I agree to pay all costs and expenses of every kind which may or can arise or accrue to said vendors by reason of such default; and such taking and removal of said machine shall not relieve me from payment of the rent as herein agreed.

And it is further agreed, that upon default of payment of any of the above instalments, the whole of the balance of the said sum of Dollars shall immediately become due and payable as rent for the said machine.

I also agree not to permit the said machine to be removed from without the written consent of the said vendors, and in the event of the said machine being so removed, the said vendors are to be at liberty to repossess the same forthwith, and the whole balance of rent then remaining unpaid shall forthwith be due and payable by me.

And finally, it is hereby acknowledged that there has not been any alteration or modification of the terms or provisions of this lease, either written or verbal, made by said vendors or any of their agents; and further, that any future modification of its terms or provisions, to be of any binding effect on said vendors, shall be stated in writing on this lease, and be signed by said vendors.

Witness { Residence
{ P.O. Address

## RENT AGREEMENT WITHOUT CONDITIONS OF PURCHASE WHERE LESSORS ASSUME FOR A CASH CONSIDERATION ALL RISKS FROM FIRE.

Received from

on hire for months, at Dollars per payable in advance. The value of the said is dollars, for which sum I will be responsible, in case of any accident other than fire that may damage or destroy the said instrument; and I further bind myself to return the same, free of expense, in like good order as when received, reasonable wear excepted. And should the above period be extended, this agreement shall continue to be binding.

Dated at Ottawa, this day of , 19

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## RENT AGREEMENT WITHOUT CONDITIONS OF PURCHASE. LOSS BY FIRE TO BE BORNE BY THE LESSEE.

Received from Messrs.

on hire for months, at Dollars per payable in advance. The value of the said is Dollars, for which sum I will be responsible, in case of fire or any other accident, that may damage or destroy the said instrument; and I further bind myself to return the same, free of expense, in like good order as when received, reasonable wear excepted. And should the above period be extended, this agreement shall continue to be binding.

Toronto, 19

## RENT AGREEMENT WITH CONDITIONS OF PURCHASE.

No.

RECEIVED from Messrs. , hereinafter called the vendor (*describe the chattel*) on hire at Dollars per month, payable in advance, the said chattel being valued at Dollars, which sum agree to pay in the event of the said instrument being injured, destroyed, or not being returned to the vendors, on demand, free of expense, in good order, reasonable wear excepted.

It is agreed that I may purchase the said for the sum of Dollars, payable as follows:

but, until the whole of the purchase money be paid, the said shall remain the property of the vendor, on hire by me. And, in default of the punctual payment of any instalment of the said purchase money, at the times above stated respectively, or at any time or times, to which the payment thereof, or any part thereof, may hereafter be extended, or of the said monthly rental in advance, the vendor, or his agent or agents, may, without rendering themselves liable to an action or actions for so doing, enter upon the premises where the said may be, and resume possession thereof, without any previous demand, although a part of the purchase money may have been paid, or a Note or Notes, Draft or Drafts, given on account thereof, and although the same may be then outstanding under discount, this agreement for sale being conditional, and punctual payment being essential to it; but in the event of the said being so assumed by the vendors, and being returned in good order, any sum received on account of the purchase money, beyond the amount due for rent, and any expenses incurred in reference to the said instrument, is to be repaid to me, and any Notes or Drafts received on account of the purchase money are to be returned to me at maturity. On payment in

full of purchase money, and interest, no rent or hire is to be charged to me.

It is further agreed that this receipt and agreement embodies the whole of the agreement between myself and the vendors, with respect to said and I hereby waive all verbal agreements not embodied herein, and agree that I am not entitled to receive credit at any time for any moneys which may be received by the vendors by the discount of any or the Notes, or Drafts, which may have been taken by them, on account of said purchase money.

Dated this day of A.D. 19

Witness

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## AGREEMENT TO SELL UPON CONDITION.*

RECEIVED from , on hire for three months, at per month, payable in advance, the said chattel being valued at , which sum I agree to pay in the event of the said chattel being destroyed, injured, or not returned to the said on demand, free of expense, in good order, reasonable wear excepted. It is agreed that I may purchase the said chattel for the sum of , payable as follows:—Three promissory notes payable in one, twelve and twenty-four months from the date hereof. The whole to be paid within the said time with interest at seven per cent. per annum from date. But until the whole of the said purchase money be paid, the said chattel shall remain the property of the said , on hire by me. And in default of the punctual payment of any instalment of the said purchase money, or of the said monthly rental in advance, the said may secure possession of the said chattel without any previous demand, although a

* This form is taken from *Stevenson* v. *Rice*, 24 U. C. C. P. 245.

part of the purchase money may have been paid, or a note or notes given by me on account thereof, this agreement for sale being conditional, and punctual payment being essential to it. But in the event of the said chattel being so returned to the said in good order, any sum received on account of the purchase money beyond the amount due for rent, and any expenses incurred with reference to the said chattel, will be paid.

Witness. (Signed)

---

## ANOTHER FORM. †

This agreement made this thirty-first day of August, 1874, between John Whelan of Toronto, saloon-keeper, and Josiah Thomas Couch, of the same place, saloon-keeper. The said Whelan hath agreed to sell, and the said Couch to purchase, the right to use the fixtures of bowling alley in and pertaining to the premises in rear of number sixty-six, on the west side of Jarvis street, in the city of Toronto, as now used by the said Whelan, and access to use the same thereto from Jarvis street, together with the beds, balls and pins only (as the other fixtures and fittings do not pertain to the bargain), for the sum of ten hundred and seventy-eight dollars in gold, payable three hundred and fifty dollars in cash at this time, and one hundred and nine dollars on the first day of each of the months of October, November and December next ensuing the date thereof, and the sum of fifty-nine dollars on the first day of January next, 1875; and the further sum in equal payments of nine dollars per month (the first of such payments of nine dollars to be made on the first day of February, 1875), on the first days of each and every month after the said first day of January as aforesaid, until the full balance of said purchase money shall have been paid in full without

† Taken from *Whelan v. Couch*, 26 Grant 74.

interest. The said Couch to have possession on the first day of September next, but only as in the nature of one subservient to said Whelan, and he is not to have any other right or title to the place, nor is this agreement intended to be complete nor to operate in favour of said Couch until the whole of the said payments have been made, when this right or title shall be considered complete. And in case of default in the after payments, as above, or any of them, all matters hereunder are supposed and considered to fall through, and moneys paid hereunder to be forfeited to said Whelan. It is further agreed that said Couch is to keep the place orderly, quiet, decent and peaceable, and well cleaned, and to close the place at twelve o'clock each night, and open at six o'clock each morning. He shall also keep the place open, in good running order, each and every lawful day and night, and properly managed and looked after, and make it as productive as possible.

The players at each alley to have the privilege of playing three balls for the benefit of the house.

The place and things pertaining to said alleys passing by this agreement to be insured.

The said Couch shall conduct no other business upon said premises. Time to be the essence of this agreement.

The said beds, balls and pins are not to be removed from said premises until paid for in full.

As witness our hands and seals this thirty-first day of August, 1874.

JOHN WHELAN. [L.S.]

J. T. COUCH, JR. [L.S.]

## FORM OF PROMISSORY NOTE GIVEN FOR PROPERTY, THE TITLE AND RIGHT WHEREIN IS RETAINED BY THE PAYEE.

$ 19

On the first day of 19 , for value received I promise to pay to or order at his office in Ontario, the sum of Dollars.

The title and right to the possession of the property for which this note is given shall remain in till paid.

Witness

---

## ANOTHER FORM.

$ Stratford, Ont. 19

On or before the first day of , 19 , I promise to pay to or order, at his office in Stratford, the sum of Dollars, for value received with Interest at seven per cent. per annum until due, and ten per cent. after due until paid.

The express condition of the sale and purchase of the machine for which this note is given, is such that the title or ownership thereof does not pass from the said until this note, or notes given in renewal thereof, is paid with interest; and should I sell or dispose of my property, he may declare this note due and payable, even before maturity of same, and suit may be entered, tried, and finally disposed of in the Court where the office of is located, and he may retake possession of the machine, without process of law, and sell the said machine at public or private sale, the proceeds thereof to be applied upon the amount unpaid of the purchase price.

Witness

## ANOTHER FORM.

$

Listowel, Ont. 19

* Months after date I promise to pay or order, at the Dominion Bank here, the sum of Dollars with interest at per cent. from date until maturity, and also after maturity of note until paid for value received.

And I agree to the conditions hereunder written.

I further agree to furnish security, satisfactory to the payee, at any time, if required. If I fail to furnish such security when demanded, or if I make any default in payment, or should I dispose of my landed property, the payee may then declare the whole price of the article for which the above note is given, due and payable, and suit therefor may be immediately entered, tried, and finally disposed of in the Court in whose division the payee is, and the payee may retake possession of the machinery without process of law and sell it to pay the unpaid balance of the price whether due or not. Subject to the aforesaid provisions I am to have possession and use of the machinery at my own risk. These conditions and agreements are to continue in force until the full payment of the price is made.

Witness

I hereby acknowledge that I have, on the date of the within note, received from the payee a true copy of the above agreement.

Witness

* See *Dominion Bank* v. *Wiggins*, 21 Ont. App. R. 275.

## FORM OF ORDER FOR DELIVERY AND SALE OF SPECIFIC CHATTELS FROM ONE WHO AGREES TO SELL THE SAME AND NO OTHER WITHIN CERTAIN TERRITORY.

To

GENTLEMEN,—

Please enter my order at your regular list price for the season, to be delivered on board the cars at addressed as follows:

about the day of . 18 . for which I agree to give you my note or notes, payable at your office as follows: (*here describe how notes are to be payable*).

| IMPLEMENTS. | NUMBER ORDERED AND REMARKS. |
|---|---|
| *Here describe the Implements.* | |

Territory

Freights

No travellers are authorized to sell or consign goods on any other terms than those on this sheet.

Positively no verbal arrangements recognized.

The title and rights to the possession of the property for which this sales contract is given shall remain vested in the vendor until fully paid for.

The vendors agree to ship goods to you as herein set forth until further notice.

The undersigned agree to settle for all goods ordered by him from the vendors as herein set forth.

In consideration for the control of the sale of your implement in the above territory, I agree to push the sale of them with energy and to become interested in the sale of no other of the same line of manufacture as made by you.

Name.
P.O.
Ry. Station.

---

## ANOTHER FORM OF ORDER FOR CHATTEL, WITH SPECIAL WARRANTY BY VENDOR.

Toronto, , 19 .

To

Sir.—Please sell us (*here describe the chattel*) and have the same ready about the next, to be delivered at Toronto for station, for which we agree to pay, when ready for delivery, the sum of $ in cash, or by note, payable at your office, Toronto, as follows:

with interest at seven per cent. per annum.

We further agree to furnish satisfactory security if required. We are to have immediate possession and use of the articles, but the property therein is not to pass to us until full payment of the price, and of any obligation given therefor, or for any part thereof. If we make any default, or if the property is seized for debt or rent, the whole amount of the notes is at once to become payable, and to bear interest at ten per cent. per annum till paid, and you may resume possession, and sell the articles, towards paying the unpaid price or balance thereof. This order and your acceptance thereof constitute the whole contract between us, and there is no other agreement between us respecting these articles but what is herein expressed.

SPECIAL WARRANTY.

The above machinery is warranted to be made of good material and with proper usage to work well. If the above machine will not bear the above warranty after a trial of one day, written notice shall be given to and the agent of whom purchased, stating wherein it fails to satisfy the warranty, and reasonable time shall be given to send a competent person to remedy the difficulty, the purchaser rendering necessary and friendly assistance. If the machinery cannot be made to fill the warranty, it is to be immediately returned by the purchaser he place where received, free of charge, and another substituted therefor that shall fill the warranty, or the money and notes returned. When at the request of the purchaser a man is sent to operate the above machinery which is found to have been carelessly or ignorantly handled, to its injury in doing good work, putting same in working order again, the expense incurred by him shall be paid by purchaser. Continued possession shall be evidence of satisfaction.

Witness:

---

## DELIVERY ORDER FOR CHATTEL, WITH RIGHT OF PROPERTY RETAINED IN VENDOR.

Lindsay, Ont. , 19

To (hereafter called the vendor).

You are hereby instructed by the undersigned (hereinafter called the purchaser), to ship to my address, with such reasonable business despatch as your convenience will permit, from at purchaser's risk and expense to me at in the Province of and in care of the following as per prices agreed upon: (*here describe minutely the property.*)

The above machinery is warranted, with proper usage, to do good work, and to be of good materials throughout and in good order.

It is also agreed that the purchaser will supply competent men to properly operate said machinery.

Each purchaser certifies that he is the owner in fee,

in his own right of the property described as follows:

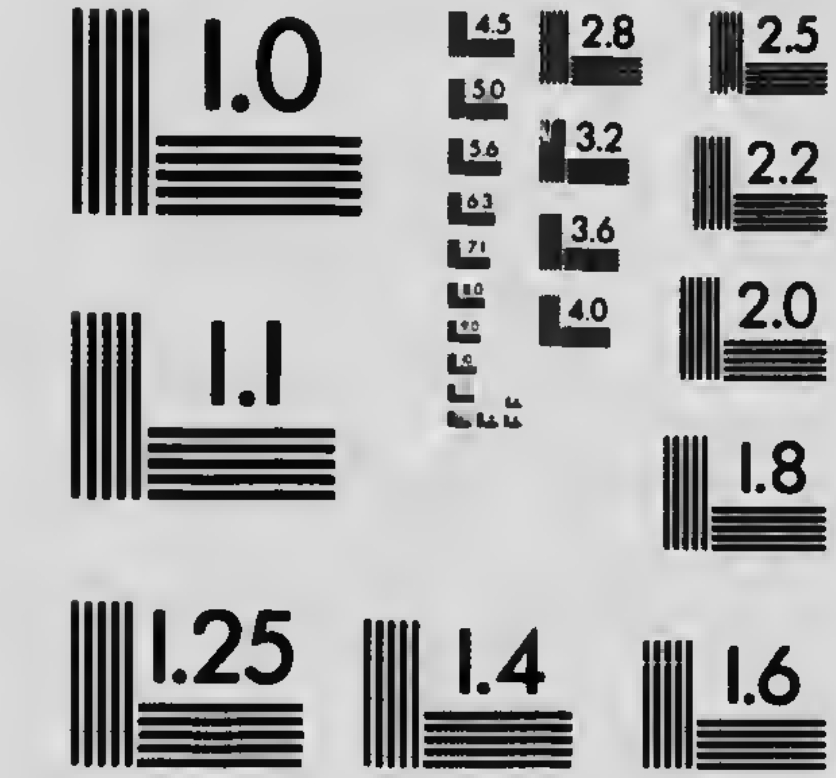
The property in the said goods shall not pass to the purchaser until the purchase money hereinafter mentioned, and the notes given therefor or by way of renewal (if any), shall have been fully paid. Provided that in default of payment of said notes, or renewals thereof, all payments made shall be forfeited, but the said purchaser to have possession and to use the said machinery until default is made in the payment of the price, or of some part thereof, or of any obligation given therefor. If any statements herein made are ascertained to be untrue, or if the said purchaser becomes insolvent, absconds, is about to abscond, encumbers, is about to encumber, or is disposing of his, or has his property attached, or sells, or attempts to sell his property or machinery without leave from the said Vendor, or his assigns in writing, then in such case the whole debt and any note or notes given on account thereof shall become due and payable, and the said Vendor or his assigns, may at his option, assume possession of above machinery, with or without legal process, and recover such costs and damages as he may have incurred in consequence of such default, or of any other cause above stated, and any balance remaining unpaid. All prior payments to be considered as rent only.

And the purchaser further agrees with the said Vendor and his assigns, that he shall have a charge upon the said lands for the amount of the said purchase money, and interest upon the said lands and any other land whereof such purchaser is now or shall hereafter own or be interested in until the said notes and all renewals thereof shall have been fully paid, and the said lands are hereby charged with the payment of the said purchase money, notes and all renewals

thereof, and interest as hereinafter mentioned, and for the purpose of securing the same, the purchaser hereby grants to the vendor aforesaid, his heirs and assigns, the said land, and all such other lands aforesaid, and agrees with the Vendor, that on default (for one month) in payment he, the Vendor or his survivor or his heirs, administrators or assigns shall be entitled to exclusive possession of the said lands, and may, (after one month's previous written notice to the purchaser, his heirs or assigns of his or their intention to exercise this power, which notice may be given by mailing at such notice addressed to the purchaser at the Post Office address hereunder given, or leaving the same at the usual or last place of abode in this Province of the purchaser), sell and convey, or before sale let or demise to any person or persons all or any of said lands hereby charged, for such consideration as he or they shall deem proper, and either subject or not to any prior encumbrances thereon, and apply the residue of the proceeds (after reimbursing himself or themselves thereout the expenses about such sale or about retaking or removing or endeavouring to retake said machinery, or about the collection of any of said notes) in or towards payment of the then unpaid notes or renewals or purchase moneys aforesaid, and any surplus shall belong to the undersigned or their assigns, and production of any of said notes overdue shall be conclusive evidence to any such purchaser or lessee of such default having been made and continued from the maturity thereof. All moneys which shall be owing to the purchaser for work done by (or by the agents or servants of) the purchaser during any season hereafter, either wholly or partly, with or by the aid of such machinery or any thereof, shall (to the extent of the purchase moneys hereunder, or notes therefor, then overdue or falling due within six months thereafter), belong to and are hereby assigned by the undersigned to the Vendor aforesaid, he to apply to any amounts actually received by him therefrom (less the expenses in collecting same), on account of such moneys or notes overdue or so falling due, and the balance repaid to the purchaser.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)




APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

Non-registration hereof against said lands shall not, nor shall failure or neglect to collect earnings hereby assigned, or to notify persons liable therefor, release or affect the liability of persons liable as surety or endorser for payment of any of said purchase moneys or notes, it being intended that the Vendor shall not be bound to resort to such lands or earnings further than they deem proper for their own security. Failing to make payment at office, expense of collection to be paid by the purchaser. I hereby waive all legal and homestead exemptions as to our real and personal estate. If from any cause not under the control of the Vendor, said machinery is delayed beyond the time agreed for its delivery, no damages shall be claimed by the purchaser.

In consideration whereof, the undersigned agree to receive the same; and to pay freight and charges from place of shipment, on arrival, and also on delivery to pay the sum of dollars to the said Vendor, his executors, administrators or assigns, in lawful money, on the following terms of payment:

CASH, on or before delivery, $ Balance as follows:

with eight per cent. interest per annum from date until due, and any arrears of interest to be added to the principal annually, and bear interest at rate aforesaid:

And it is hereby agreed that if the said notes are not executed and satisfactory security furnished, as agreed, before the said machinery is used and within ten days after the delivery of the said machinery, then in such case the whole debt becomes due and payable. Witness our hands and seals the day and year above written.

(SEAL).
P.O.
(SEAL).
P.O.
(SEAL).
P.O.

## FORM OF AFFIDAVIT OF EXECUTION TO ACCOMPANY NEXT PRECEDING INSTRUMENT FOR PURPOSE OF REGISTRATION.

PROVINCE OF )
County of ) I (*Name in full of witness:*)
of the of in the County of
in the Province of Ontario, make oath and say:

1.—I was personally present and did see the within instrument duly signed, sealed and executed by the parties thereto.

2.—That the said instrument was executed at

3.—That I know the said parties.

4.—That I am a subscribing witness to the said instrument and duplicate.

Sworn before me at )
in the County of this )
day of , 19 )

A *Commissioner, &c.*

---

## ANOTHER FORM OF DELIVERY ORDER.

Lindsay , 19

To Messrs.

GENTLEMEN,—Please supply me with one
and ship the same to Station.
Railway, about the day of
next, for which I agree to pay the sum of dollars
on delivery, in payment as follows:
a satisfactory note for $ due
do $ due
do $ due
payments, with seven per cent.
interest.

I agree to settle for this machine in cash or notes according to above terms as soon as it is started and fills the warranty. I am to have possession and use of this machine, but the title therein is not to pass to me until payment of the price or of any obligations given therefor; and if any default in the payment is made possession is to revert to you, and should I sell or dispose of my property you may declare all payments due and payable even before maturity of same, and may also retake possession of the machine.

This order is not to be binding on you until received and ratified by you and is subject to warranty and agreement hereunder written.

Customer's P. O.

(Signed).
Agent.

The above machine is purchased and sold subject to the following

WARRANTY AND AGREEMENT.

The said machine is made of good material, and with proper management it is capable of doing good work. The purchaser shall have one day to give it a fair trial, and if it should not work well, he is to give written notice, stating wherein it fails, to the Agent through whom it was ordered, and also to the Vendors, and allow reasonable time to get to it and remedy the defects, if any, the purchaser rendering necessary and friendly assistance, furnishing a suitable team, driver, etc., when, if it cannot be made to do good work, he shall return it to the place where received free of charge, in as good condition as when received except the natural wear, and a new machine will be given in its place, or the notes and money will be refunded. Should any part of the machine break during the first season through defective material or workmanship and by fair usage, it shall be replaced free of charge when the broken parts are returned to the Vendors or the Agent through whom the machine was purchased. Continued possession of the machine or failure to give notice as above shall be conclusive evidence that the machine fulfils the Warranty.

(*Signature of Vendors.*)

No Agent has authority to change the above Warranty.

## ANOTHER FORM OF DELIVERY ORDER.

Toronto, 19

To

Toronto, Canada.

GENTLEMEN—You will please ship to my address, about , 19 , of your

(*here describe the implements.*)

Which I agree to receive and give a fair and impartial trial, without being influenced by any other manufacturers' agents, and to purchase if it proves equal to your Warranty, and as guaranteed, or to return within ten days after receipt of implement as above to the Station, and notify you that it is there subject to your order.

This is given in good faith, as I wish to purchase the best.

The Price, complete, as above, is dollars, for which I agree to give settlement, payable as follows:

after trial as above, and until fully settled for, the title and property to remain in the Vendors.

This order is subject to the memorandum hereunder written.

### WARRANTY AND SPECIAL NOTICE.

The foregoing implements will not be received if returned to us without our permission, and no implements returned under this warranty will be credited on account, but will be made perfect and returned, or new ones sent in their place, as the Vendors may elect.

The Vendors warrant each implement to do first-class work when properly adjusted. After ten days allowed after delivery for time to give it a trial in the field, if it fails to give satisfaction, notice must be given to the dealer selling it, and reasonable time given him to make it work as represented, failing in which the implement can be returned. If used to do more than one day's work on trial terms as above, the implement will be considered sold.

The Vendors agree to repair implements proving defective, but no allowance will be made on broken parts not returned to Vendors or their agents.

Implements with defective iron or steel parts to be taken down, marked with an explanation of the defect, and signed by the sender, that the Vendors may know who it is from, the Vendors will put in order, free, and return.

The Vendors will not undertake to pay for repairing implements away from shop,

All Warranty cancelled when implement passes into other hands or loaned to neighbors.

(*Signature of Vendors.*)

---

## ANOTHER FORM OF DELIVERY ORDER.

Lindsay, Ont. , 19

To

GENTLEMEN,—Please supply me with one and ship the same to Station, Railway, about the day of next, for which I agree to pay the sum of Dollars on delivery, in payment as follows:

Satisfactory note for $ due 19 , with 8% interest
do do $ due 19 , with 8% interest
do do $ due 19 , with 8% interest

I agree to settle for this machine in cash or notes according to above terms as soon as it is started and fills the Warranty.

I am to have possession and use of machine, but the title therein is not to pass to me until payment of price or of any obligations given therefor; and if any default in payment is made, possession is to revert to you, and should I sell or dispose of my property you may declare all payments due and payable even before maturity of same, and suit may be entered, tried and finally disposed of in the court where the head office of the Vendors is located, and may retake possession of the machine, without process of law, and sell machine to pay the unpaid balance of the price whether due or not.

This Order is not to be binding on the Vendors until received and ratified by them, and is subject to Warranty and Agreement hereunder written.

I declare the above to be a true copy of the bargain for the sale of this machine.

Agent.

(SIGNED),

General Agent.

The above-mentioned machine is purchased and sold subject to the following

## WARRANTY AND AGREEMENT.

The machine is made of good material, and with proper management it is capable of doing good work. The purchaser shall have one day to give it a fair trial, and if it should not work well, he is to give written notice, stating wherein it fails, to the agent through whom it was ordered, and also to the Vendors, Lindsay, Ont., and allow reasonable time to get to it and remedy the defects, if any, the purchaser rendering necessary and friendly assistance, furnishing a suitable team, driver, etc., when, if it cannot be made to do good work, he shall return it to the place where received, free of charge, in as good condition as when received except the natural wear, and a new machine will be given in its place, or the notes and money will be refunded. Should any part of the machine break during the first season through defective material or workmanship, and by fair usage, it shall be replaced free of charge when the broken parts are returned to us or the agent through whom the machine was purchased. Continued possession of the machine, or failure to give notice as above, shall be conclusive evidence that the machine fulfils the Warranty.

No agent has authority to change the above Warranty.

## *STATEMENT TO OBTAIN CREDIT.*

I own and have a deed of, duly registered in my name acres of land, it being Lot No. of the Concession of the Township of in the County Province the current cash value of which is not less than $ and the same is free and clear of all incumbrance except

I also own personal property not exempt from execution of the value of at least $ in excess of the amount of all my debts and liabilities.

(This statement is made to Vendors to procure credit from them in the purchase of the goods mentioned in the above order and the same are sold by them on the faith thereof.)

Signature of purchaser

Dated at

## ANOTHER FORM OF DELIVERY ORDER.

19 .

To The Company, Toronto, Ont.

You are hereby authorized to ship to me, to Station, on or about day of next, or before required for use, the following implements and machinery: (*here describe the property.*)
For which I agree to pay you Dollars in cash; or my notes, payable as follows:

Note for $ due the first day of , 19 , with int. at 7%

Note for $ due the first day of , 19 , with int. at 7%

Note for $ due the first day of , 19 , with int. at 7%

Payable at

This machine to be warranted as per Manufacturers' printed Warranty, hereunder written, and I agree to settle for it upon above terms, as soon as it is started and fills the Warranty.

I further agree to furnish security, satisfactory to you, at any time, if required. If I fail to furnish such security when demanded, or if I make any default in payment, or should I dispose of my landed property, you may then declare the whole price due and payable, and suit therefor may be immediately entered, tried, and finally disposed of in the Court in whose division the head office of The Company is, and you may retake possession of the machinery without process of law and sell it to pay the unpaid balance of the price whether due or not. Subject to the aforesaid provisions I am to have possession and use of the machinery at my own risk, but the title thereto is not to pass to me until full payment of the price, or any obligation given therefor.

These conditions and agreements are to continue in force until the full payment of the price is made.

NOTE.—This Order is not to be binding on The Company until received and ratified by them.

(Signed),

Agent,

Witness,

## WARRANTY.

WE, THE CX[illegible] agree that the for which Mr. has given his order this day, shall be well m[illegible]ood material, and will work well on a fair trial; also, that part break during the first season, through defective material o[illegible]workmen[illegible]p and by fair usage, it shall be replaced free of charge, if the broken parts are returned to us or our Agent from whom the machine was purchased, before the following date of purchase.

If after a fair trial of one day, the said does not work according to Warranty, it will be the duty of the purchaser to immediately give written notice to us at Toronto, and also to the Agent through whom it was purchased, stating wherein it fails, and allow reasonable time to get to it and remedy the defects, if any; the purchaser rendering necessary and friendly assistance, furnishing a suitable team, driver, etc., when, if the machine cannot be made to do good work, he shall return it to the place where received free of charge, in as good condition as when received, except the natural wear, and a new machine will be given in its place, or the notes or money will be refunded.

Continued possession of the machine, or failure to give notice as above, shall be conclusive evidence that the machine fulfils the Warranty.

This Warranty is not valid or binding upon The Company, unless delivered to the purchaser without alteration, interlining, or erasure.

Dated 189

Agent Signature of Vendors

## ANOTHER FORM OF DELIVERY ORDER.

Toronto, 19 .

To

Please ship to my address with such reasonable business despatch as your convenience will permit, from place of manufacture, or the following as per prices agreed upon:

| | |
|---|---|
| | $ |
| | $ |
| | $ |
| | $ |
| | $ |
| | $ |
| | $ |
| | $ |
| | $ |
| | $ |
| | $ |
| Terms: | Amount, $ |

And I hereby agree that if the said machinery or goods is not settled for, by cash or notes, according to the above terms of sale, within 20 days after date of shipment, then the whole amount shall become due, and I, for value received, promise to pay the same on demand.

And I further agree not to countermand this order, and until payment in full of the purchase money the said machinery and goods shall be at my risk, and I will insure in your favor for amount sufficient at all times to cover your interest therein, and on demand will assign and deliver to you the policy of insurance, and should I fail to do so within ten days after receipt of goods, you are at liberty and are hereby instructed, to insure them as per this agreement, and the charges and costs for so insuring shall become part of this indebtedness and be added to the first cash payment, and the title in the said machinery and goods shall not pass from you until all the dues, terms and conditions of this order shall have been fully complied with by me, and I will not sell or

remove any of the said machinery or goods from my premises without your consent in writing so to do, and in case of default of any of the payments or provisions of this order you are at liberty without process of law to enter upon my premises and take down and remove the said machinery and goods, and I hereby agree to deliver the said machinery and goods to you in like condition as received, subject to ordinary wear and tear, and I hereby waive all claims for damages or loss, and will pay the expenses of such removal. And I hereby declare that the foregoing embodies all the agreements made between us in any form, and that any note or notes or other security given by r . you for this indebtedness shall be collateral thereto.

Yours truly,

Ship *via*

---

FORM OF RECEIPT TO BE GIVEN BY BAILEE OR CONDITIONAL VENDEE OF RECEIPT NOTE, HIRE RECEIPT, OR ORDER, UNDER SECTION 8 OF THE ACT (*See ante p.* 68), AND WHICH SHOULD ACCOMPANY ALL INSTRUMENTS UNDER THE ACT.

Lindsay, Ont. 19 .

I acknowledge to have received on the above date a true and correct copy of the receipt note, the hire receipt, order, or sale note (as the case may be), by which a lien on that certain property (*describe property*), conditionally sold to me, on the day of . 19 . has been retained by (*here insert name of Vendors*).

*Signature of Bailee or Vendee.*

FORM OF APPLICATION BY PROPOSED PURCHASER FOR INFORMATION RESPECTING AMOUNT OR BALANCE DUE OR UNPAID ON MANUFACTURED ARTICLES UNDER SECTION 2, *ante p.* 41.

To of

SIR,

I (*name in full*) am a proposed purchaser of (*or*) interested in the following manufactured chattel, namely: (*here describe the same*) now in the possession of (*give the name and description in full of the person in whose possession the chattel is*).

I request full information respecting the amount due, or the balance due or unpaid to you, if anything, on said manufactured chattel, and the terms of payment of such or balance.

My name is (*here give name in full*) and my post office address to which a reply may be sent is (*here give name of post office*).

Dated at this day of A.D. 19 .

(*Signature of Applicant*).

---

FORM OF LETTER SUPPLYING THE INFORMATION DEMANDED BY FOREGOING APPLICATION UNDER SECTION 2, *ante p.* 41.

To of

(*the name and post office address given by the person enquiring*).

Sir,

The amount due (*or*) The balance due (*or*) The amount unpaid (*or*) The balance unpaid on that certain manufactured chattel referred to by you in your application for information bearing date the day of

19 , and received by the undersigned on the day of 19 , is the sum of $ . The terms of payment of such amount (*or*) balance are as follows (*here state fully the sum to be paid, the time or times of payment, with or without interest if on, or by way of promissory note, or by way of rent or otherwise*).

This statement is mailed to you at the above address and registered.

Dated this day of

at in the

(*Signature of manufacturer, or vendor, or bailor*).

---

## FORM OF NOTICE OF SALE UNDER SECTION 5. *ante p.* 58.

To , of

Sir,

Notice is hereby given you that, at the expiration of five days, from the day of service of this notice upon you, to wit: upon day of 19 , I shall proceed to sell the following goods or chattels, namely, (*describe the property*) at in the of in the county of . The said goods or chattels were taken possession of by me, on account of the breach of condition in the conditional sale or promise of sale thereof by me to you. If you desire to redeem the said goods or chattels you are at liberty to do so, at any time within twenty days after the day of (the day of taking possession) on payment of the sum of $ being the amount in arrear in such conditional sale together with interest and actual costs and expenses of taking possession which have been incurred.

Dated this day of 13 .

## ANOTHER FORM OF DELIVERY ORDER.

Toronto. 190 .

Toronto.

GENTLEMEN.—Please supply me with one

and ship to Station about or before required for use, for which I agree to pay you the sum of Dollars upon the following terms:—

A Satisfactory Note for $ due 1st day of 190 , with int. at 7%.

A Satisfactory Note for $ due 1st day of 190 , with int. at 7%.

Payable at

I agree to accept delivery of the machine upon arrival at the Agent's Warehouse, Railway Station or Wharf, and upon such arrival it is to be subject to my risk and expense, and I agree to pay for it on above terms.

I agree not to rescind this Order or Agreement, or refuse to accept delivery of the machine or property for which this order is given.

I also promise and agree to furnish further security, satisfactory to you, at any time, if required. If I fail to furnish such security when demanded, or if I make any default in settlement or payment, or should I dispose or attempt to dispose of my land or any part thereof, or of my personal property, you may then declare the whole price due and payable even before other maturity by promissory note or otherwise of the same, and suit therefor may be immediately entered, tried, and finally disposed of in any Court having jurisdiction where the Head Office of is located, and you may re-take possession of the Machine, Implement, Wagon, Sleigh or property so sold to me without process of law, and at any time thereafter without notice to me, may sell the same at public auction or private sale, the proceeds thereof, less proper charges of re-taking possession and sale, to be applied on account of the amount of the purchase price and interest then unpaid; such sale or right to sell shall in no way affect or limit my liability for the full purchase price, or your right to sue for and recover from me the said full purchase price and interest, except that in the event of such sale I shall receive credit on account as before provided, and shall thereafter be liable to pay the balance

only. Upon such sale, if any, my right to possession and delivery before and after full payment and all my other rights and claims thereto shall forever cease. Subject to these provisions, I am to have possession and use of the Machine, Implement, Wagon, Sleigh, or property at my own risk of damage or destruction from any cause whatsoever; but the property therein and the title thereto is not in any event to pass to me, on contrary shall remain in you, until full payment of the purchase price and interest or any obligations or renewals thereof given therefor.

I acknowledge having received a true copy of this Order, Agreement and Warranty, endorsed on back hereof.

Any action which may be brought or commenced in a Division Court in respect or on account of this contract may be brought or commenced against the maker or person liable hereon in a Division Court other than where he resides or in which the contract was made. The order is not binding on , until received and ratified by them, and is subject to Warranty and Agreement endorsed hereon.

..... .....

Witness .....

This machine is purchased and sold subject to the terms of agreement signed by purchaser and to the following

## WARRANTY AND AGREEMENT.

This machine is made of good material, and with proper management it is capable of doing good work. The purchaser shall have one day to give it a fair trial, and if it should not work well, he is to give written notice, stating wherein it fails, to the Agent through whom it was ordered, and also to Toronto, Ont., and allow reasonable time to get to it and remedy the defects, if any, the purchaser rendering necessary and friendly assistance, furnishing a suitable team, driver, &c., when, if it cannot be made to do good work, he shall return it to the place where received, free of charge, in as good condition as when received except the natural wear, and a new machine will be given in its place, or the notes and money will be refunded. Should any part of the machine break during the first season through defective material or workmanship, and by fair usage, it shall be replaced free of charge when the broken parts are returned to us or the agent through whom the machine was purchased. Continued possession of the machine or failure to give notice as above shall be conclusive evidence that the machine fulfils the Warranty.

No Agent has authority to change the above Warranty.

## FORM TO BE USED FOR THE PROVINCE OF QUEBEC.

Montreal, 19 .

Montreal, P.Q.

GENTLEMEN.—Please supply me with one

and ship to about or before time required for use, for which I agree to pay you the sum of Dollars upon the following terms:—

1.—A Satisfactory Note for $ due 1st day of 190 .
2.—A Satisfactory Note for $ due 1st day of 190 .
3.—A Satisfactory Note for $ due 1st day of 190 .

Payable at with interest at the rate of 10% per annum after maturity.

I agree to accept delivery of the machine upon arrival at the Agent's Warehouse, Railway Station or Wharf, and upon such arrival it is to be subject to my risk and expense, and I agree to pay for it, or give my promissory notes, on above terms.

I agree not to rescind this Order, and in the event of my attempt so to do, or refusal to accept delivery of the machine, the Company shall be entitled to recover from me in any Court of Justice having jurisdiction in the City of Montreal, such damages as it may sustain by reason thereof.

I also promise and agree to furnish security, satisfactory to you, at any time, if required.

If I fail to furnish such security when demanded, or if I make any default in payment or refuse to sign my notes, or should I dispose or attempt to dispose of my land or any part thereof, or of my moveable property, the whole price of the machine and its accessories shall then become due and payable even before maturity of the same, and suit therefor may be immediately entered, tried, and finally disposed of in any Court of Justice having jurisdiction in the City of Montreal. You may also re-take possession of the machine or property so sold to me without process of law, and at any time thereafter without notice to me, sell the same at public auction or private sale, the proceeds thereof, less proper charges of re-takiug possession, repairing and sale, to be applied on account of the purchase price and interest then uupaid. Such sale or right to sell shall

in no way affect or limit my liability for the full purchase price, or your right to sue for and recover from me the said full purchase price and interest, except that in the event of such sale, I shall receive credit on account as before provided, and shall thereafter be liable to pay the balance only. Upon such sale, if any, my right to possession and all my other rights and claims thereto shall forever cease.

Subject to these provisions, I am to have possession and use of the said machine or property at my own risk of damage or destruction from any cause whatsoever. It is specially agreed that the property therein and the title hereto is not in any event to pass to me until full payment of the purchase price and interest, it being understood that any payment made on account of the same shall be considered as on account of hire for the use of the same, or on account of depreciation in its value, or for both.

This Order shall not be binding on the Company until received and ratified by it. It is subject to Warranty and Agreement endorsed hereon.

I acknowledge to have received a duplicate of this Order, as well as of the Warranty and Agreement therein mentioned.

.....

Witness .....

This machine is purchased and sold subject to the terms of agreement signed by purchaser and to the following

## WARRANTY AND AGREEMENT.

This machine is made of good material, and with proper management it is capable of doing good work. The purchaser shall have one day to give it a fair trial, and if it should not work well, he is to give written notice, stating wherein it fails, to the Agent through whom it was ordered, and also to Montreal, Que., and allow reasonable time to get to it and remedy the defects, if any, the purchaser rendering necessary and friendly assistance, furnishing a suitable team, driver, &c., when, if it cannot be made to do good work, he shall return it to the place where received, free of charge, in as good condition as when received except the natural wear, and a similar machine will be given in its place, or the notes and money will be refunded. Should any part of the machine break during the first season through defective material or workmanship, and by fair usage, it shall be replaced free of charge when the broken parts are returned to us or the agent through whom the machine was purchased. Continued possession of the machine or failure to give notice as above shall be conclusive evidence that the machine fulfils the Warranty.

**N.B.—No Agent has authority to change the above Warranty.**

## FORM TO BE USED FOR THE MARITIME PROVINCES.

This order is not binding on Limited, until received and ratified by them, and is subject to Warranty and Agreement endorsed hereon.

190 .

St. John, N.B.

GENTLEMEN,—Please supply me with one

and ship to about or before required for use, for which I agree to pay you the sum of Dollars upon following terms:—

A Satisfactory Note for $ due 1st day of October, 190 , with int. at 7%

A Satisfactory Note for $ due 1st day of October, 190 , with int. at 7%

Payable at

I agree to accept delivery of the machine upon arrival at the Agent's Warehouse, Railway Station or Wharf, and upon such arrival it is to be subject to my risk and expense, and I agree to pay for it on above terms.

I agree not to rescind this Order or Agreement, and in the event of my attempt to do so or refusal to accept delivery of the machine, the Company shall be entitled to recover from me in the Court having jurisdiction where the Head Office of the Company is situated, such damages as it may sustain by reason thereof.

I also promise and agree to furnish further security, satisfactory to you, at any time, if required. If I fail to furnish such security when demanded, or, if I make any default in payment, or should I dispose or attempt to dispose of my land or any part thereof, or of my personal property, you may then declare the whole price due and payable even before other maturity by promissory note or otherwise, of the same, and suit therefor may be immediately entered, tried, and finally disposed of in any Court having jurisdiction where the Head Office of , is located, and you may re-take possession of the Machine, Implement, Wagon, Sleigh or property so sold to me without process of law, and at any time thereafter without notice to me, may sell the same at public auction or private sale, the proceeds thereof, less proper charges of re-taking possession and sale, to be

applied on account of the amount of the purchase price and interest then unpaid; such sale or right to sell shall in no way affect or limit my liability for the full purchase price, or your right to sue for and recover from me the said full purchase price and interest, except that in the event of such sale I shall receive credit on account as before provided, and shall thereafter be liable to pay the balance only. Upon such sale, if any, my right to possession and delivery before and after full payment and all my other rights and claims thereto shall forever cease. Subject to these provisions, I am to have possession and use of the Machine, Implement, Wagon, Sleigh or property at my own risk of damage or destruction from any cause whatsoever; but the property therein and the title thereto is not in any event to pass to me, on contrary shall remain in you, until full payment of the purchase price and interest or any obligations or renewals thereof given therefor.

I acknowledge having received a true copy of this Order, Agreement and Warranty, endorsed on back hereof.

.....

Witness. ..... .....

This machine is purchased and sold subject to the terms of agreement signed by purchaser and to the following

## WARRANTY AND AGREEMENT.

This machine is made of good material, and with proper management it is capable of doing good work. The purchaser shall have one day to give it a fair trial, and if it should not work well, he is to give written notice, stating wherein it fails, to the Agent through whom it was ordered, and also to St. John, N.B., and allow reasonable time to get to it and remedy the defects, if any, the purchaser rendering necessary and friendly assistance, furnishing a suitable team, driver, &c., when, if it cannot be made to do good work, he shall return it to the place where received, free of charge, in as good condition as when received except the natural wear, and a new machine will be given in its place, or the notes and money will be refunded. Should any part of the machine break during the first season through defective material or workmanship, and by fair usage, it shall be replaced free of charge when the broken parts are returned to us or the agent through whom the machine was purchased. Continued possession of the machine or failure to give notice as above shall be conclusive evidence that the machine fulfils the Warranty.

No Agent has authority to change the above Warranty.

## ANOTHER FORM.

This order is not binding on the until received and ratified by them, and is subject to Warranty and Agreement endorsed hereon.

Stratford, 19 .

GENTLEMEN,—Please supply me with one

and ship to station, about or before required for use, for which I agree to pay the sum of Dollars in payment as follows:—

A Satisfactory Note for $ due 1st day of 19 , with int. at 8 p.c.

A Satisfactory Note for $ due 1st day of 19 , with int. at 8 p.c.

Payable at Bank of Montreal, Stratford.

This machine to be Warranted as per Manufacturers' printed warranty, endorsed hereon, and I agree to settle for it on above terms, as soon as it is started and fills the Warranty. And I acknowledge having received a true copy of this Order, Agreement and Warranty as endorsed on back hereof.

I agree not to rescind this Order or Agreement, and in the event of my attempt to do so or refusal to accept delivery of the machine, the Company shall be entitled to recover from me in the Court having jurisdiction where the Head Office of the Company is situated, such damages as it may sustain by reason thereof.

I also promise and agree to furnish further security, satisfactory to you, at any time, if required. If I fail to furnish such security, when demanded, or if I make any default in payment, or should I dispose or attempt to dispose of my land or any part thereof, or of my personal property, you may then declare the whole price due and payable even before other maturity by promissory note or otherwise, of the same, and suit therefor may be immediately entered, tried and finally disposed of in any Court having jurisdiction where is located, and you may re-take possession of the Machine, Implement, Wagon, Sleigh or property so sold to me without process of law, and at any time thereafter without notice to me may sell the same at public process of law, and at any time thereafter without notice to me

may sell the same at public auction or private sale, the proceeds thereof, less proper charges of re-taking possession and sale, to be applied on account of the amount of the purchase price and interest then unpaid; such sale or right to sell shall in no way affect or limit my liability for the full purchase price or your right to sue for and recover from me said full purchase price and interest, except that in the event of such sale I shall receive credit on account as before provided, and shall thereafter be liable to pay the balance only. Upon such sale, if any, my right to possession and delivery before and after full payment and all my other rights and claims thereto shall forever cease. Subject to these provisions I am to have possession and use of the Machine, Implement, Wagon, Sleigh or property at my own risk of damage or destruction from any cause whatsoever; but the property herein and the title thereto is not in any event to pass to me, on contrary shall remain in you, until full payment of the purchase price and interest or any obligations or renewals thereof given therefor.

Any action which may be brought or commenced in a Division Court in respect or on account of this contract may be brought or commenced against the maker or person liable hereon in a Division Court other than where he resides or in which the contract was made.

Signed X.....

Witness .....

## FORM OF A PROMISSORY NOTE.

*The Following Blanks Must be Filled in Carefully and Correctly*

NAME.....

POST OFFICE.....

TOWNSHIP.....

LOT.....CON.....

COUNTY.....

PROVINC.....

OWNER OF.....ACRES

RENTER OF.....ACRES

MACHINE No.....

B. R. No..... INTEREST.....

$ 100 Lindsay, Ont., ..... 190 ....

On or before the first day of November, 190 , for value received, I promise to pay to.....or order, at the Bank of Montreal here, the sum of.....Dollars

100

with interest at.....per cent. per annum till due, and.... .....per month after due until paid.

☞ Given for.....

And in consideration of value received and the accommodation obtained, I hereby (as to this debt) waive, renounce, and give up all right to exemption from seizure and sale under execution, of any land, goods or chattels that would otherwise be exempt, and I agree to fur ish further security satisfactory to you at any time if required. If I fail to furnish such security when demanded, or if I make any default in payment, or should I attempt to sell or dispose of my land or personal property, or if for any good reason you should consider this note insecure, you may declare it or any other notes made by me in your favor due and payable at any time, and suit therefor may be immediately entered, tried and finally disposed of in the court having jurisdiction where the head office of the ..... is located, and you may retake possession of the machinery or property for which this note is given without process of law, and at any time thereafter without notice to me may sell the same at public auction or private sale, the proceeds thereof, less proper charges for retaking possession and sale, to be applied on account of the amount of purchase price and interest then unpaid. Such sale or right to sell shall relieve my liability to that extent only, and I hereby agree to pay on demand the balance then found to be unpaid thereon, and you shall have the right to proceed against me to recover the unpaid balance. Subject to these provisions I am to have possession and use of the machinery, &c., for which this note is given at my own risk of damage or destruction from any cause whatever, but the title thereto is not in any event to pass to me until full payment of the purchase price and interest or any obligation or renewals thereof given therefor. I hereby acknowledge receiving a copy of this note.

*Witness*..... ..... .....

## ANOTHER FORM OF NOTE.

No. Due

$

Stratford, Ont., , 190

months after date, for value received promise to pay , or order, at , the sum of Dollars, with interest at seven per cent. per annum till due, and eight per cent. per annum after due until paid.

I am to have possession and use of the property for which this note is given at my own risk of damage or destruction from any cause whatever, but in case I make default in payment, suit thereof may be entered, tried and finally disposed of in the Court having jurisdiction where the Head Office is located. I further agree to pay all costs and charges for collecting or renewing this note, and should I attempt to sell or otherwise dispose of my land or personal property, then this note to become due and payable forthwith. The title and right to the possession of the property for which this note is given shall remain in John Campbell & Son until this note or any renewal thereof is paid, and I agree in case I make default of payment to hand same over on demand to be sold and the proceeds to apply on this note or unpaid balance without recourse to law, and that so far as the collection of this note and all costs thereof are concerned all statutory exemptions are waived.

I hereby acknowledge having this day received a copy of this note.

Witness.

This contract is subject to the approval of

No Salesman or Agent is authorized to make any promise, verbal or otherwise, outside of this Agreement, or in any way to alter the same.

Received from one piano, Style , No. , and for which I agree to pay Hundred and Dollars ($ ), with interest at seven per cent. per annum on unpaid balances both before and after maturity, at the office of the said Company, Toronto, or as follows

It is agreed that until the whole of the purchase money be paid the Instrument shall remain the property of the payees (but shall be at my risk). And in default for one month of any of above payments or any extended payment, or in case the said Instrument shall be removed from the premises hereafter mentioned (unless consent is given in writing by the Company), the whole balance of the said purchase money shall, at the option of the Company, become due, and the Company, or their agents, may, notwithstanding any action for or judgment recovered in respect of the purchase money of the said Instrument, or any part thereof, using such force as may be required, and without being liable to any action for so doing, enter upon the premises where said Instrument may be, and resume possession thereof without any previous demand, and resell the same, although a part of the purchase money may have been paid, or securities given and discounted, this agreement being conditional on punctual payment. If possession is resumed I shall remain liable for full amount of the purchase money, but shall be entitled to receive credit thereon for the proceeds of such Instrument after deducting costs of removing and reselling the same, and any balance that may then remain shall be paid to me. Any notes, bills of exchange, or other securities which may be given by me, are only collateral, and are not in any way to relieve me from payment according to the terms hereof.

The said Instrument shall, until paid for, be used only at my residence, No. Street, , and shall not be removed therefrom without the written consent of the Company.

This contract (a copy of which I have received) contains the whole agreement between myself and

Toronto..... Signature.....

Witness.....Salesman..... P. O. Address.....

## A GUARANTEE FOR THE PERFORMANCE BY THE PURCHASER OF FOREGOING AGREEMENT.

I hereby guarantee to that the within named will pay all the moneys which shall become due by to them under the within agreement, and that will perform all other terms and conditions thereof, and all obligations that may arise out of the same.

Signed .....

.....

---

## FORM OF CONDITIONAL HIRE RECEIPT.

This contract is subject to the approval of Company.

No Salesman or Agent is authorized to make any promise, verbal or otherwise, outside of this Agreement.

Received from on hire for months at Dollars per month payable in advance, the said Piano Forte being valued at $ . which sum I agree to pay in the event of said instrument being injured, destroyed, or not being returned to on demand, free of expense, in good order, reasonable wear excepted, and should above period be extended this agreement shall continue binding.

It is agreed that I may purchase the said Piano Forte for the sum of Dollars payable as follows:

with interest at seven per cent. per annum on unpaid principal, but, until the whole of the purchase money, and interest be paid, the said Piano Forte shall remain the property of , on hire by me, and shall

not be moved from the premises where now delivered without the written consent of . And, in default of the punctual payment of any instalment of the said purchase money, when it falls due, according to the times above stated respectively, or at any time or times, to which the payment thereof, or any part thereof, may hereafter be extended, or of the said monthly rental in advance; or in case the said instrument shall be removed, or any attempt made, or threatened to move it from the said premises without such written consent, , or their agents, may, using such force as may be required, without rendering themselves liable to any action or actions for so doing, enter upon the premises, where the said Piano Forte may be, and resume possession thereof, without any previous demand, although a part of the purchase money may have been paid, or a Note or Notes, Bill or Bills of Exchange, given on account thereof, and although the same may be then outstanding under discount, this agreement for sale being conditional, and punctual payment being essential to it. If possession is resumed, as aforesaid, all instalments of rent to date of taking possession shall be forthwith paid by me, together with any damages the instrument may have sustained beyond any ordinary wear, and all expenses incurred in connection with this contract, and the carrying out of the same on the part of the said and all costs and expenses connected with taking possession of the said instrument, or otherwise occasioned by my default. But, any sum received on account of the purchase money beyond the amount due for rent, and any costs and expenses incurred as aforesaid, is to be repaid to me, and any Notes or Bills of Exchange received on account of the purchase money, are in such event to be returned to me at maturity. On payment in full of purchase money, and interest, no rent or hire is to be charged to me. Any Notes or Bills of Exchange, or other securities given by me are only collateral, and are not in any way to relieve me from payment, according to the terms thereof.

And it is further agreed that this receipt and agreement embodies the whole of the agreement between myself

and with respect to said Piano
Forte and I hereby waive all verbal agreements not embodied herein, and agree that I am not entitled to receive credit at any time for any moneys which may be received by by the discount of any of the Notes or Bills of Exchange which may have been taken by them on account of said purchase money. I hereby acknowledge to have received a copy of this agreement.

Toronto, (Sign here)

---

## GUARANTEE TO ACCOMPANY NEXT ABOVE AGREEMENT.

I, hereby guarantee to that the within named will pay all moneys which shall become due by to them under the within Conditional Hire Receipt, and that will perform and fulfil all the other terms and conditions thereof, and all obligations that may arise out of the same.

Dated

---

## FORM OF ORDER.

To

Toronto, Ont.

Toronto, 190 .

GENTLEMEN.—Please supply me with one

and ship to station about or before required for use, for which I agree to pay the sum of Dollars, as follows:—

A Satisfactory Note for $ due 1st day of 190 , with int. at 7%.

A Satisfactory Note for $ due 1st day of ,
190 , with int. at 7%.

A Satisfactory Note for $ due 1st day of ,
190 , with int. at 7%.

Payable at

This machine to be warranted as per manufacturers' printed Warranty endorsed hereon, and I agree to settle for it on above terms, and I acknowledge having received a true copy of this Order, Agreement and Warranty as endorsed on back hereof.

I agree not to rescind this Order or Agreement or attempt to do so.

I also promise and agree to furnish further security satisfactory to you, at any time, if required. If I fail to furnish such security when demanded, before shipment, you may at your option cancel this order. If I fail to furnish such security after shipment, or if I make any default in payment, or should I dispose or attempt to dispose of my land, or any part thereof, or of my personal property for any one of the above-named reasons alone, you may declare the whole price due and payable, even before other maturity by promissory note or otherwise, of the same, and suit therefor may be immediately entered, tried and finally disposed of in any Court having jurisdiction where your Toronto office is located, and you may re-take possession of the machine, implement, or property so sold to me without process of law, and at any time thereafter, without notice to me, may sell the same at public auction or private sale, the proceeds thereof, less proper charges of re-taking possession and sale, to be applied an account of the amount of the purchase price and interest then unpaid: such sale or right to sell shall in no way affect or limit my liability for the full purchase price or your right to sue for and recover from me said full purchase price and interest, except that in the event of such sale I shall receive credit on account, as before provided, and shall thereafter be liable to pay the balance only. Upon such sale, if any, my right to possession and delivery before and after full payment, and all my other rights and claims thereto, shall forever cease. Subject to these provisions, I am to have possession and use of the machine, or implement, or property at my own risk of damage or destruction from any cause whatsoever: but the property therein and the title thereto is not in any event to pass to me, on contrary, shall remain in you until full payment of the purchase price and interest, or any obligations or renewals thereof given therefor.

.....

Witness ..... .....

This machine is purchased and sold subject to the terms of agreement signed by purchaser and to the following

## WARRANTY AND AGREEMENT.

This machine is made of good material, and with proper management it is capable of doing good work. The purchaser shall have one day to give it a fair trial, and if it should not work well, he is to give written notice, stating wherein it fails, to the Agent through whom it was ordered, and also to Toronto, Ont., and allow reasonable time to get it and remedy the defects, if any, the purchaser rendering necessary and friendly assistance, furnishing a suitable team, driver, &c., when, if it cannot be made to do good work, he shall return it to the place where received, free of charge, in as good condition as when received except the natural wear, and a new machine will be given in its place, or the notes and money will be refunded. Should any part of the machine break during the first season through defective material or workmanship, and by fair usage, it shall be replaced free of charge when the broken parts are returned to us or the agent through whom the machine was purchased. Continued possession of the machine or failure to give notice as above shall be conclusive evidence that the machine fulfils the Warranty.

No Agent has authority to change the above Warranty.

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