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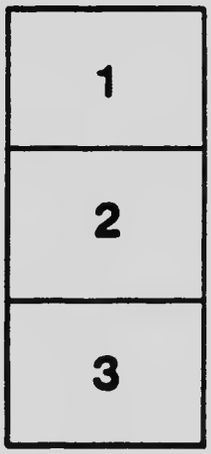

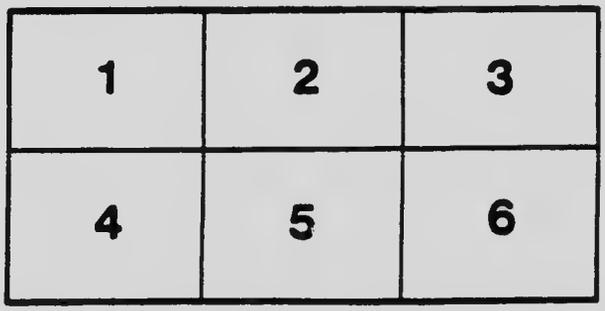

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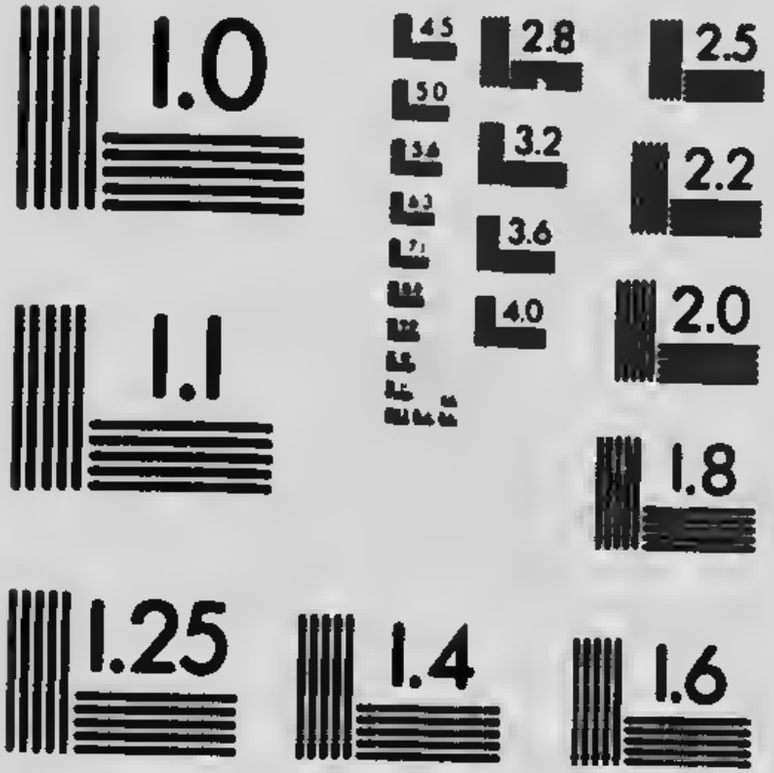

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A COMPLETE ANNOTATION OF THE VARIOUS PROVINCIAL STATUTES

DEALING WITH

MORTGAGES AND SALES OF PERSONAL PROPERTY

AND ALSO SUCH STATUTES OF CANADA AS AFFECT THE SAME,
WITH A TREATISE ON THE GENERAL LAW OF CHATTEL
MORTGAGES AND BILLS OF SALE; AND A
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THE LAW OF BILLS OF SALE
AND
CHATTEL MORTGAGES

CHAPTER I.

Mortgages and Sales Generally.

A BILL of sale is an instrument in writing, generally, but not necessarily, under seal, whereby one man transfers to another the property he has in goods and chattels. It is, properly, a bill to denote a sale: Simpson v. Wood, 21 L.J. (Ex.) 153; Paterson v. Maugham, 39 U.C.Q.B. 371; Halpenny v. Pennock, 33 U.C.Q.B. 229; Flory v. Denny, 7 Ex. 581.

Sales of personal property may be either absolute or conditional. In the case of an absolute sale, the property sold passes *eo instanti* to the buyer, so that he, from that moment, becomes the real and true owner. Of this class is the ordinary sale, for instance, of a horse, of which possession must be taken by the vendee, or else a bill of sale thereof, drawn up and executed so as to fulfil the requirements of the Act, must be filed. An example of a conditional sale is the case of one transferring his furniture to another, so that, if the assignee shall fail to perform the condition named, the furniture shall continue the property of the assignor, and shall not vest in the assignee until the condition be performed from which time the assignee becomes the true owner.

A mortgage of chattels is a contract between parties, where-

by the mortgagor assigns the chattels to the mortgagee upon the terms that the assignment is to be void on the payment of a sum of money, or the performance of a certain condition at an appointed time.

A mortgage is the creation of an interest in property, defeasible or liable to be annulled either upon the payment of money, the fulfilment of a certain condition, or the performance of some act; but should the money not be paid, the condition not be fulfilled, or the act not be performed, then from the moment of default the interest of the mortgagee becomes absolute at law in the property mortgaged, and remains vested in him, but the mortgagor has still the right to redeem: Sands v. Standard Insurance Co., 26 Gr. 116, affirmed in 27 Gr. 167. It is a security founded on the common law and perfected by a judicious and wise application of the principles of redemption of the civil law. The debt is the principal, and the mortgage the incident: Martin v. Bearman, 45 U.C.R. 212. It is not only a lien for a debt, but a transfer of the property itself as a security for the debt, defeasible by the performance of the condition according to its legal effect: Conard v. At. Ins. Co., 1 Pet. 386; Erskine v. Townsend, 2 Mass. 495.

Mortgages of movable or personal property may be divided into four classes:—

(1) Mortgages of goods and chattels of a corporeal nature, other than registered vessels.

(2) Mortgages of registered vessels and shares therein.

(3) Mortgages of stock and shares in companies.

(4) Mortgages of other incorporeal personal property.

It is the purpose of this work to deal with mortgages within the first class, more particularly as they are affected by the statutes relating thereto. Such a mortgage made without deed may be valid although no transfer of possession of the chattel mortgaged has taken place: Manghan v. Sharpe, 17 C.B. (N.S.) 443, 34 L.J.C.P. 19, 11 Jur. (N.S.) 989. It may be valid if made by simple contract: Flory v. Denny, 7 Ex. 581.

Though there may be a verbal mortgage, such a mortgage will be valid only as between the parties to the transaction. For the protection of creditors and others dealing with a mortgagor, the statute law makes it an essential to the validity of such a transaction, that the mortgage shall be in writing, and, in order that they may have notice of the true position of the property, that the instrument shall be registered, or unless the property assumes more the character of a pledge than of a mortgage.

The distinction between a verbal mortgage and a pledge, is that, in the case of a mortgage, title in the property passes to the mortgagee, the possession remaining in the mortgagor, whereas in the case of a pledge the possession of the property passes to the pledgee, who retains a lien thereon, while the title to the property never passes from the pledgor: Beeman v. Lawton, 37 Me. 543; Britt v. Harrell, 105 N.C. 10, 10 S.E. Rep. 902.

In those cases where a verbal mortgage is sufficient in law, any words which serve to transfer the property as security for a debt, or obligation of any kind, will suffice to create a mortgage.

Though a writing, duly registered, is, by the statute law, made necessary to constitute a valid mortgage as against creditors of the mortgagor, or his subsequent purchasers or mortgagees in good faith, yet no particular form of conveyance is requisite, so long as the formalities of the statutes respecting chattel mortgages are complied with.

A parol agreement to give a mortgage may be enforced, as between the parties thereto, provided that money has been advanced upon it, or the condition or agreement on the part of the mortgagee performed; but such an agreement is of course wholly invalid as against those persons protected by the Act: Jones v. Brewer, 1 N.B. Eq. 630.

It is not essential that the condition should be inserted in the bill of sale itself, in order to constitute a legal mortgage; for, if a defeasance be subsequently executed, the two instruments will be construed together, as part of the same transac-

tion, provided the defeasance be executed in pursuance of an agreement to execute it, which formed part of the original transaction. The two instruments then constitute a mortgage as between the parties: Lund v. Land, 1 N.H. 39; Holmes v. Grant, 8 Paige 243; Swetland v. Swetland, 3 Mich. 482. A defeasance, in the absence of statutory provision to the contrary, may be engrafted on a bill of sale by parol: Muchmore v. Budd, 53 N.J.L. 369; Omaha Book Co. v. Sutherland, 10 Neb. 334, 5 Am. & Eng. Encye. 954 contra; see Pennock v. McCormack, 120 Mass. 175; see Fraser v. Murray, 34 N.S.R. 186, 37 C.L.J. 364. The condition may be written at the end of the instrument (Kent v. Allbritain, 4 How. (Miss.) 317), or indorsed upon it, or it may be contained in a separate paper, executed and delivered simultaneously with the absolute bill of sale: Brown v. Bement, 8 Johns. (N.Y.) 96; Barnes v. Hulenmb, 12 Sm. & M. (Miss.) 306; Patterson v. Palmer, 19 W.L.R. 422. But a bill of sale, absolute upon its face, may yet be shewn to be a conditional conveyance, and parol evidence will be received to shew what was the intention of the parties, and all the circumstances in connection with the instrument will be taken into consideration; but the fact of a condition being attached to the conveyance must be established by clear and most positive evidence: Boardman v. Handley, 4 Terr. L.R. 266; Blunt v. Marsh, 1 Terr. L.R. 126; Lamont v. Olson, 18 W.L.R. (Sask.) 200. Such an instrument, although absolute on its face, may be treated as a mortgage, even as against third parties, who, with notice, have purchased for value. If, however, third parties have, without notice and in good faith, purchased the property, confiding in the absolute title, apparently given to their vendor by the instrument under which he claimed to own the property, their title will not be impeached: Greenshields v. Barnhart, 5 Gr. 99; Omaha Book Co. v. Sutherland, 10 Neb. 334, 6 N.W. Rep. 367; Morgan v. Shinn, 15 Wall. 105; Boardman v. Handley, 4 Terr. L.R. 266.

In equity, the rule is, once a mortgage, always a mortgage: Goodman v. Grierson, 2 Ball. & B. 278. Parol evidence will be

received, not that the instrument may thereby be contradicted, but for the purpose of raising an equity paramount to its terms: LeTarge v. DeTuyll, 3 Gr. 369; Holmes v. Matthews, 3 Gr. 379; Dabney v. Green, 4 H. & N. 101; Parks v. Hall, 8 Pick. 206; Tyler v. Strange, 21 Barb. 198; Walker v. Walker, 2 Atk. 99; Dixon v. Parker, 2 Ves. 225; Young v. Peachey, 2 Atk. 256; Langton v. Horton, 5 Beav. 9; Jones v. Statham, 3 Atk. 388; Bell v. Carter, 17 Beav. 11; Murphy v. Taylor, 1 Ir. Ch. 92; Blunt v. Marsh, 1 Terr. L.R. 126; Boardman v. Handley, 4 Terr. L.R. 266. The earlier cases admitted such evidence to establish fraud (Stewart v. Horton, 2 Gr. 45), accident, intimidation, ignorance, undue influence, surprise or mistake (Cook v. Gudger, 2 Jones N.C. Eq. 172; English v. Lane, 1 Porter 328), but it is yet clear that, where none of these elements exist, it might, in some cases, be inequitable not to treat as a mortgage an instrument absolute in form; and the doctrine that now prevails is to admit parol evidence, upon the broad ground of reaching the intention of the parties at the time of the original transaction, after it has been made manifest by written evidence, legally admissible, or by the conduct or admission of the party, that the transaction could not have been such as the deed represents it to be: Madell v. Thomas, [1891] 1 Q.B. 230; Beckett v. Tower, [1891] 1 Q.B. 638; Ex parte Finlay, 10 Morrell 258; Tyler v. Strong, 21 Barb. (N.Y.) 198; Ross v. Norvell, 1 Wash. 14; La Roche v. O'Hagan, 1 O.R. 300; McMullen v. Williams, 5 O.A.R. 518; Papineau v. Gurd, 2 Gr. 512; Barnhart v. Patterson, 1 Gr. 459; Holmes v. Matthews, 5 Gr. 108; Bernard v. Walker, 2 E. & A. 121; Barr v. Barr, 15 Gr. 27; Campbell v. Durkin, 17 Gr. 80; Read v. Jewett, 5 Me. 96.

However, parol evidence is inadmissible to prove payment in goods where a money consideration is expressed: Tyson v. Abercrombie, 16 O.R. 98.

The intention to create an equitable mortgage by delivery or deposit of documents of title may be established by parol evidence alone and it is sufficient if only some or one of the

material documents of title be so delivered or deposited: Zimmerman v. Sproat, 5 D.L.R. 452, 26 O.L.R. 448; see Russel v. Russel, 1 Bro. C.C. 269; Ex parte Haigh, 11 Ves. 403; Ex parte Mountfort, 14 Ves. 606; Ex parte Kensington, 2 V. & B. 79; Ex parte Arkwright, 3 Mont. D. & DeG. 129; Lacon v. Allen, 3 Drew. 579; Acme Co. v. Huxley, 18 W.L.R. (Alta.) 534; Rimmer v. Webster, [1902] 2 Ch. 163.

The law does not presume that any man has acted or desires to act fraudulently, but presumes the contrary until the fraud is shewn: Matthews v. Holmes, 5 Gr. 33; Calvard v. Waugh, 3 Jones (N.C.) Eq. 335; Blackwell v. Overby, 6 Ired. (N.C.) Eq. 38. But inadequacy of consideration (Stewart v. Horton, 2 Gr. 45; Papineau v. Gurd, 2 Gr. 512; Brown v. Dewey, 2 Barb. 28; English v. Lane, 1 Porter 328; Bentley v. Phillips, 2 W. & M. 426; Wilson v. Weston, 4 Jones (N.C.) Eq. 349; Williams v. Owen, 5 M. & C. 303; Langton v. Horton, 5 Beav. 19), the simple existence of a previous debt from the vendor to the vendee, the continuance in possession of the property by the grantor (Le Targe v. De Tuyll, 1 Gr. 227; Barnhart v. Patterson, 1 Gr. 459), the conditions and circumstances of the conveyance (Whitcomb v. Sutherland, 18 Ill. 573), the seeking of a loan by the vendor from the vendee, are all circumstances which may be looked to in order to ascertain the real intentions of the parties, and from which a mortgage may be presumed.

A subsequent writing, reciting that it was agreed between the parties, at the time the deed of sale was executed, that, if the vendor should repay to the vendee by a specified day the amount of the consideration expressed in the deed, the latter would reconvey the property, is not in itself sufficient to negative the absolute sale, yet may so strengthen other evidence of a doubtful nature in that direction, as to give to an absolute conveyance the operation of a mortgage: Locke v. Palmer, 26 Ala. 312.

The intention of the parties is to be arrived at from the evidence, entirely apart from the form of the instrument, and the question whether, from the accompanying circumstances, the

instrument is in substance a mortgage or not, is one of fact that a jury may decide: Bank of Toronto v. McDougall, 15 U.C.C.P 475. For instance, where the consideration in the bill of sale was $200, and the vendor agreed to repay that sum if he could, but, if not, that he would sell to the vendee for $1,000, and, subsequently, further sums were paid which made up this sum of $1,000, it was a question for the jury, from all the circumstances, to say whether the instrument, absolute on its face, was a bill of sale or a mortgage: Goodwin v. Kelly, 42 Barb. (N.Y.) 194.

While the question of intention of the parties, as to whether the instrument was intended to operate as a mortgage or as a bill of sale, may be one for a jury, the question of whether an instrument, in itself, is or is not a mortgage, is one of law for decision by the Court.

A bill of sale of goods to secure a debt, where possession remains with the vendor, is a mortgage, and, as such, is subject to the statutory regulations as to form and registration: McMartin v. McDougall, 10 U.C.R. 399; Bissell v. Hopkins, 3 Cow. (N.Y.) 166; McFadden v. Turner, 3 Jones (N.C.) L. 481; Ross v. Ross, 21 Ala. 322; Moore v. Pumpelly, 46 Wis. 660. The mere fact that an instrument does not contain terms of defeasance, is not at all decisive in determining the question whether it shall be considered a mortgage or not. If, from the entire instrument, either standing alone, or considered in the light of the surrounding circumstances, it appears to have been given as security, it must be considered as a mortgage, and the rules applicable to mortgages will apply thereto: Beckett v. Tower, [1891] 1 Q.B. 638; Cooper v. Brock, 41 Mich. 488, 2 N.W. Rep. 660. A writing in the words following: "Turned out and delivered to A, one white and red cow, which he may dispose of in fourteen days to satisfy an execution," the possession of the cow being left with the debtor, was held to be a mortgage: Atwater v. Mower, 10 Vt. 75. A provision, whereby the vendor shall remain in possession of the property transferred by virtue of a bill of sale, until the expiration of a certain time allowed

for payment of a previous debt, gives to the instrument one of the essential elements of a mortgage: Ford v. Ransom, 39 How. (N.Y.) Pr. 429; Blodgett v. Blodgett, 48 Vt. 32. A bill of sale, with a condition for redemption, makes the instrument a mortgage (Kent v. Allbritain, 4 How. (Miss.) 317; Wilson v. Carver, 4 Hey. 90; Morrow v. Turney, 35 Ala. 131), and so does a bill of sale securing an endorser or surety against liability: Webb v. Patterson, 7 Hump. 431; Marsh v. Lawrence, 4 Cow. 461; Jackson v. Green, 4 Johns. 186. So a judgment for the consideration-money mentioned in the bill of sale will stamp the instrument with the character of a mortgage: Hamet v. Dundas, 4 Penn. 178. The same rule will apply when the vendee retains the right to demand repayment of the money, notwithstanding the purchase, and should the property be lost: Robinson v. Farrelly, 16 Ala. 472.

In those cases where possession to the property is not delivered by the vendor to the vendee, the reason for holding the bill of sale in such cases to be *primâ facie* a mortgage seems to be that in no other way can effect be given to the instrument, or its precise nature properly determined. It could not be a pledge, because the essential requisite in a pledge, namely delivery, is absent.

A provision for redemption in a contract of sale makes the transaction a mortgage: Wilson v. Weston, 4 Jones (N.C.) Eq. 349. A written promise, upon the back of a bill of sale of a cow, signed by the vendor, stipulating that the cow shall remain the property of the vendee until the note is fully paid, makes the transaction a mortgage: Woodman v. Chesley, 39 Me. 45.

An agreement to give a chattel mortgage, duly registered, enables the mortgagee to rely on it as such, where the mortgage subsequently executed is ineffectual for any reason: Fisher v. Bradshaw, 4 O.L.R. 162. In Savard v. Tremblay, 30 Que. S.C. 423, it was held that an agreement to give a chattel mortgage with the right of possession to the chattels to remain in the

debtor, does not entitle the creditor to revendicate the goods upon default in payment of the note.

A writing purporting an absolute transfer of title to property from a debtor to his surety, and securing the latter from all liability as such surety, the possession of the property being retained by the debtor, is a mortgage: McNight v. Gordon, 13 Rich. (S.C.), Eq. 222. So also is a lease, in which is a stipulation that the lessor is to have a lien on the tenant's property as security for the rent: Jackson v. Green, 4 Johns. 186; Polemus v. Trainor, 30 Cal. 685; Johnson v. Crowfoot, 53 Barb. 574; but see Dalton v. Landahan, 27 Mich. 529.

A chattel mortgage executed in blank and filled in according to the mortgagor's instructions is valid: Wade v. Bell Engine and Thresher Co., 1 O.W.N. 1052, 16 O.W.R. 636.

A written agreement between landlord and tenant that, before the crop is removed, the rent for the land should be paid, has been held to be a mortgage of the crop: Weed v. Stanley, 12 Fla. 166. Powers of attorney, authorities, or licenses to take possession of goods and chattels as security for the payment of a debt in money or in some other commodity, or for the performance of a condition, are mortgages: Beecher v. Austin, 21 U.C.C.P. 334; Stephenson v. Rice, 24 U.C.C.P. 245. So also is that class of instruments purporting to convey the property absolutely, and containing stipulations that if the debt is not paid within a stipulated time the vendee may then sell, and with the proceeds liquidate the debt: Frost v. Allen, 57 Ga. 326.

But where it appears from the instrument that no right of redemption in the property is reserved by the debtor, the transaction lacks an essential condition of a mortgage.

For instance, where a lumberman executes a bill of sale to a bank for certain lumber, and the bank undertakes to first sell and dispose of the lumber and apply the proceeds in liquidation of the indebtedness of the lumberman, and then to pay over to him the remainder of the proceeds, if any, the transaction is not in the character of a mortgage, because the rights reserved

to the vendor are not in the property mortgaged, but in the proceeds of the sale thereof, to the extent of the difference between the full amount realized and the debt owing: Prentice v. Consolidated Bank, 13 O.A.R. 69; Camp v. Thompson, 25 Minn. 175, 181; Butler v. White, 25 Minn. 432; see, however, Gage v. Chesboro, 49 Wis. 486, 5 N.W. Rep. 881.

If, at the time of sale, the debt from the vendor to the vendee be, in point of fact, extinguished, and the bill of sale neither creates nor continues a debt, then though the privilege be given of repurchasing within a specified time, the transaction is not a mortgage, but a sale: Weatherby v. Bradford, 7 Ala. 724; Goinez v. Kamping, 4 Daley (N.Y.) 77; Sewal v. Henry, 9 Ala. 24. And it has been held that, where a bill of sale provides for the right to redeem, but that, upon default of redemption, the vendor must pay a sum certain for the use of the property in the meantime, the transaction is not a mortgage, but a sale: Logwood v. Hussey, 60 Ala. 417.

In all those cases in which provision is made that the right to, or title in, the property shall not pass to the vendee, the transaction is a conditional sale, and not a mortgage. There can be no mortgage without a transfer of title, and, if the title to the property does not pass out of the vendor, there is no transfer, and, consequently, no mortgage. Of this class of cases is the ordinary one of renting machinery, or a piano, or other furniture, with the right of purchase: Crawcour v. Salter, 18 Ch.D. 30; Ogg v. Shuter, L.R. 10 C.P. 159; Rogers Locomotive Works v. Lewis, 4 Dill 158; Walker v. Hyman, 1 O.A.R. 345; Nordheimer v. Robinson, 2 O.A.R. 305; Stevenson v. Rice, 24 U.C.C.P. 245; Ex parte Crawcour, 9 Ch.D. 419. Even though the agreement contain a clause, whereby, upon default in payment of the instalments the vendor may sell the property and apply the proceeds in payment of the unpaid debt, and the surplus, if any, to the vendee, the sale is none the less a conditional sale: Brewster v. Baker, 20 Barb. (N.Y.) 364; Grant v. Skinner, 21 Barb. (N.Y.) 581; Pierce v. Scott, 37 Ark. 308.

When one buys wool, and in payment for it gives an endorsed note, and secures the endorser by a writing or receipt declaring that the wool and cloth to be made therefrom should be the property of the endorser until the note was paid, the transaction was held to be a mortgage: Thompson v. Blanchard, 4 (N.Y.) 303. But a written promise to pay for a horse, whereby it was agreed that "the horse stands his own security," has been construed as meaning that the property in the horse should remain in the vendor, and, therefore, that the transaction was a conditional sale, not a mortgage: Clayton v. Hester, 80 N.C. 275. So a note in these words, "Five months after date I promise to pay H. E. the sum of $50 for a horse, said horse to be H. E.'s horse till paid for" is a conditional sale: Ellison v. Jones, 4 Ired. (N.C.) 48. So also when words similar in effect are subscribed beneath a promissory note, identifying the note as part of the transaction: Ballew v. Sudderth, 10 Ired. (N.C.) 176.

A provision in a bill of sale that the grantor shall have a lien for the purchase money on the property sold does not, in law, constitute a mortgage: Shaw v. Wiltshire, 65 Me. 485; Sawyer v. Fisher, 32 Me. 28; Barnett v. Mason, 7 Ark. 253.

A pledge is not so comprehensive as a mortgage, a mortgage is something more than a pledge: Brown v. Bement, 8 Johns. 96, 97, 98; Doak v. State Bank, 28 N.C. 309. A pledge is merely a bailment of goods by a debtor to his creditor to be kept by him until the debt is discharged: First National Bank v. Harkness, 42 W. Va. 156, 32 L.R.A. 408. In the case of a mortgage, the general title is transferred to the mortgagee. In the case of a pledge, the pledgee has a special or qualified property in the goods; the right to detain them for his security until the payment of the stipulated sum; and the right to bring action against a person who wrongfully converts them; the pledgor retaining in himself the general title, subject to the lien of the pledgee: Meyerstein v. Barber, L.R. 4 H.L. 317; Rateliffe v. Davis, 1 Bulst. 29 Yelv. 179; Jones v. Smith, 2 Ves. Jr. 378; Donald v. Suckling (1866), L.R. 1 Q.B. 585, 595. At the time the obli-

gation is contracted the goods must be delivered over to the pledgee and continue in his possession. The transaction begins with the voluntary delivery of possession to the goods by the pledgor to the pledgee: Ex parte Hubbard, 17 Q.B.D. 690; Ex parte Parsons, 16 Q.B.D. 532; Franklin v. Neale, 13 M. & W. 481, but the delivery need not be actual; it may be constructive or symbolical: Jewett v. Warren, 12 Mass. 300; Inglis v. James Richardson, etc., 10 D.L.R. 158; Hilton v. Tucker, 39 Ch.D. 669; Tatham v. Andree, 1 Moore P.C. 386; Martin v. Reid, 11 C.B. (N.S.) 730; Young v. Lambert, 6 Moore P.C. 406.

In making a pawn, or pledge, delivery of the chattels is the main characteristic, a deed or writing being unnecessary, while a mortgage is valid without delivery of the goods mortgaged. By a mortgage the title is transferred; by a pledge the possession but not the title. The delivery, as collateral security, of a bill of sale, copies of gauger's returns, and a warehouse receipt of whisky held in a government bonded warehouse, creates a pledge, and not a chattel mortgage: Conrad v. Fisher, 37 Mo. App. 352, 8 L.R.A. 147.

The document regulating the rights and liabilities of the pledgee does not and cannot give him power to seize or take possession of the property pledged, because it is of the essence of the transaction that the pledgee shall have the possession, and, if he does not get possession, there is no pledge: Re Hall, 14 Q.B.D. 306; Ex parte Parsons, 16 Q.B.D. 532.

Mortgages are sometimes spoken of as collateral security: Conard v. Atlantic Insurance Co., 1 Pet. (U.S.) 448. The term "collateral security" is more comprehensive, and includes pledges, mortgages, indemnifying bonds, and the like, particularly where the thing pledged is a chose in action, such, for instance, as corporate stock, bonds, notes, and other evidences of debt: Mitchell v. Roberts, 17 Fed. Rep. 776; Cortelyou v. Lansing, 2 Cai. Cas. (N.Y.) 200; Munn v. McDonald, 10 Watts (Pa.) 270. A pawn is defined by Sir William Jones on Bailments, pp. 36, 118, to be "a bailment of goods by a debtor to his creditor, to be

kept by him till his debt is discharged''; and by Lord Holt, in Coggs v. Bernard, 2 Ld. Raym, p. 913, to be "a delivery to another of goods or chattels to be security to him for money borrowed of him by the bailor;" and by Lord Stair, Institutions of the Law of Scotland, b. i. tit. 13, sec. 11, a kind of mandate whereby the debtor for his creditor's security gives him the pawn or thing impignorated, to detain or keep it for his own security, or in the case of non-payment of the debt, to sell the pledge and to pay himself out of the price, and to restore the rest, or restore the pledge itself on payment of the debt; all which is of the nature of a mandate, and it hath not only a custody in it, but the power to dispose in the case of non-payment;'' and by Bell, Principles of the Law of Scotland, secs. 1362, 1363; 4th ed., p. 512, "a real right or *jus in re*, inferior to property, which vests in the holder a power over the subject to retain it in security of the debt for which it is pledged, and qualifies so far and retains the right of property in the pledgor or owner'': Donald v. Suckling (1866), L.R. 1 Q.B. 585.

So where one who holds personalty as security may retake it from the owner who had obtained possession from the bailee by falsely representing that he had paid the debt for which it was held as security (Pocock v. Novitz, 4 D.L.R. 105, 21 W.L.R. 418; Wallace v. Woodgate, I.C. and P. 575, and Babcock v. Lawson, 5 Q.B.D. 284), and the pledgor cannot claim the restitution of the thing given in pledge until the debt is wholly paid except in cases of misuse by the pledgee of the thing pledged: Klock v. The Molsons Bank (No. 1), 2 D.L.R. 445, 41 Que. S.C. 370 (affirmed Klock v. The Molsons Bank (No. 2), 9 D.L.R. 877.

The distinction between a pledge and a mortgage of personal property is (1) that in the former the title is retained by the pledgor, while in the latter it passes to the mortgagee; and (2) that the delivery of the possession of the property to the pledgee is absolutely essential to a pledge, while between the parties, but not against creditors or purchasers, such delivery is not necessary to the validity of the mortgage: McCoy v. Lassiter, 95 N.C. 88.

While there exists a broad and clearly defined distinction between the two forms of security, it sometimes happens that both unite in the same transaction; for example, in the deposit of notes or mortgages as collateral security, their possession gives them the character of a pledge, while endorsement or assignment transfers the title in them, which is one of the characteristics of a mortgage. Custom has so regulated things, that constructive possession is sometimes the only possession acquired, and the very act of giving such possession amounts to a transfer of title also, as, for instance, in the case of the transfer of bills of lading. Though delivery is so essential to the creation of a pledge, yet the possession of the pledgor may be deemed sufficient, if, by the agreement between the parties, his possession be made the possession of the pledgee: Reeves v. Capper, 5 Bing. N.C. 136; Martin v. Reid, 11 C.B.N.S. 730; Meyerstein v. Barber, L.R. 2 C.P. 52; Hilton v. Tucker, 39 Ch.D. 669; Tatham v. Andree, 1 Moore P.C. 386; Young v. Lambert, 6 Moore P.C. 406; Inglis v. James Richardson, 10 D.L.R. 158.

The difference between pledging and bailing is that a pawnee has a special property, but a bailee the custody only: Hartop v. Hoare, 3 Atk. 46. In a pledge of goods it is not essential that the advance and delivery of possession should be contemporaneous. It is sufficient if possession be delivered within a reasonable time of the advance in pursuance of the contract to pledge: Hilton v. Tucker, 57 L.J. Ch. 973, 39 Ch.D. 669.

A bailment on trust implies that there is reserved to the bailor the right to claim a re-delivery of the property deposited in bailment. But wherever there is a delivery of property on a contract for an equivalent in money, or some other valuable commodity, and not for return of the identical subject-matter in its original or an altered form, this is a transfer of property for value—it is a sale and not a bailment: South Australian Insurance Co. v. Randell, L.R. 3 P.C. 101.

So when wheat or other merchandise is received in a warehouse or elevator nominally on storage for the person deliver-

ing it, but on such terms that the identical goods are so mixed up with others that they can not be returned, and the well understood course of business is that, unless a price is agreed on, the party delivering the goods can only require an equivalent amount of the same kind and quality to be accounted for to him, the contract between the parties is really one of sale and not of bailment, whether the vendor is to receive the price in money or an equal quantity of goods or has an option to do either, as the property in the goods has passed to the warehouseman: South Australian Insurance Co. v. Randell, L.R. 3 P.C. 101, followed in Lawlor v. Nicol, 12 Man. L.R. 224; Snow v. Wolseley Milling Co., 7 Terr. L.R. 123, distinguishing Cargo v. Joyner, 4 Terr. L.R. 64.

If the user of the property by the pledgor be necessary for the purpose of carrying out the contract between the parties, its actual possession by the pledgor will not affect the character of the transaction as a pledge, provided the property remain under the pledgee's control: Crowfoot v. London Dock Co., 2 Cr. and M. 637.

But it is the duty of the pledgee of shares of stock in selling them upon default to take reasonable means to prevent a sacrifice thereof, and to act as a provident owner would have done: Bartram v. Grice, 4 D.L.R. 682, 3 O.W.N. 1296, 22 O.W.R. 191; Lateh v. Furlong (1866), 12 Gr. 303, applied.

If in its origin the transaction was intended to be a mortgage, and the mortgagee takes possession of the property, he cannot afterwards claim that he holds the property as pledgee, since the doctrine of estoppel applies to a chattel mortgage the same as to any other instrument or transaction: Meyers v. Snyder, 96 Iowa 107; Layson v. Cooper, 174 Mo. 211; Harvey v. Harvey, 13 R.I. 598. Nor can a mortgagor dispute the title of an assignee of the mortgage: Paton v. Browne, 19 U.C.Q.B. 337. The title and the possession in the two transactions are entirely different, and the one cannot be substituted for the other, unless the substitution be made by the consent of the con-

tracting parties: Hyatt v. Argenti, 3 Cal. 151; Johnson v. Smith, 11 Humph (Tenn.) 396, citing Bullard v. Billings, 21 Vt. 309.

It is an essential requisite to a pledge that there should be a debt or some obligation for which the property is held. The debt or obligation need not be that of the pledgor, so long as all parties interested assent to the transaction in all its terms. The debt or obligation need not be a past one or even a present one, for a future debt or obligation is a good consideration: Garth v. Howard, 5 Car. & P. 346. If property be pledged, which the pledgor does not own, he is not permitted afterwards to assert that he does not own the property, and, unless the real owner of the property enforces his own superior right, the pledgor is not permitted to set up the *jus tertii*: Goldstein v. Hart. 30 Cal. 372.

But in an action by the pledgor, the pledgee can set up the title of a third person when he does so by authority of such third person: Palmtag v. Dontrick, 59 Cal. 154, 43 Am. Rep. 245. Although in certain cases a bailee may set up the *jus tertii*, yet if he accepts the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such claim as against his bailor: Ex parte Davies, Re Sadler, 19 Ch.D. 86, distinguishing Biddle v. Bond, 6 B. & S. 225, 34 L.J.Q.B. 137.

CHAPTER II.

The Subject-matter of Mortgages and Bills of Sale.

GOODS AND CHATTELS.

Chattels may be defined as being goods movable and immovable, except such as are in the nature of freehold or parcel of it, and may be divided into two classes, viz., chattels real and chattels personal.

Chattels real are those which either appertain, not immediately to the person, but to something real by way of dependency, or which issue out of some immovable thing, and concern realty, lands and tenements. An estate for years is a chattel real. It is an interest in land, and is known generally as a term.

Chattels real, not being, in their nature, movable, capable of delivery from hand to hand, are not the subject-matter of a chattel mortgage under the Act: Fraser v. Lazier, 9 U.C.R. 679; Booth v. Keehoe, 71 N.Y. 341; Breeze v. Bange, 2 E. D. Smith (N.Y.) 474.

Chattels personal are those 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 a personal action. A mortgage in fee is considered as personal assets: Casborne v. Scarfe, 1 Atk. 605.

Property can be mortgaged although the owner has not in himself the absolute and entire title thereto, or, in fact, the possession thereof (McCalla v. Bullock, 2 Bibb. (Ken.) 288); and property exempt from attachment and execution and sale at the suit of creditors may yet be made the subject of a mort-

gage. Such exemption is a statutory reservation in favour of the debtor, and not a restriction upon a debtor's right to do that which he chooses with his own: Love v. Blair, 72 Ind. 281.

In modern law a man's chattels are equivalent to his personal estate, namely, the property which, upon his death, devolves on his executors or administrators *virtute officii*: Tilley v. Simpson, 2 T.R. 659.

Even after default in payment of a prior mortgage, the owner of chattels mortgaged has still the right to mortgage his interest therein; until foreclosure, an interest—that of redemption—still remains in the mortgagor, and this interest he may mortgage, and the junior mortgagee has the right to redeem: Smith v. Coalbach, 21 Wis. 427.

Though possession is not absolutely essential to enable the owner of goods to create a mortgage thereon, yet the mere fact of having possession does not in itself confer any interest which can be mortgaged, unless some title or interest of some kind accompany the possession, and a mortgagee, without notice, and for valuable consideration, may find his security valueless, from depending on the simple act of possession in his mortgagor, as giving the latter the right to mortgage: Stanley v. Gaylord, 1 Cush. (Mass.) 536; Glaze v. Blake, 56 Ala. 379; Waters v. Cox, 2 Brad. (Ill.) 129; Reed v. Willmott, 5 M. & P. 553.

Where the owner of a moving-picture machine loaned it to another for one night, to be used in giving an exhibition and to be returned the next day, and the latter without the knowledge of the owner took it to other towns and mortgaged it to secure a board bill—the owner in the meanwhile using every effort to find and recover it—such mortgage creates no lien against the owner: Martin v. Armstrong (Tex. Civ. App. 1901), 62 S.W. 83.

But a *bonâ fide* purchaser for value from a person in possession of goods who obtained them fraudulently from the owner, may hold them against the owner, provided the latter voluntarily parted with the possession and intended to part with

the title, although the owner might reclaim them from his immediate vendee at any time before their resale: Malcom v. Lovcridge, 13 Barb. (N.Y.) 372; Babcock v. Lawson, 4 Q.B.D. 394, 5 Q.B.D. 284; Attenborough v. London, etc., Dock Co., 3 C.P.D. 450.

Both the seller and buyer in a conditional sale of goods have such an interest therein as may be mortgaged. If the seller delivers property to the purchaser, under an agreement that the title thereto shall not pass until paid for, the seller may mortgage, and his mortgagee, if acting in good faith and without notice, will acquire a title superior to that of the conditional buyer: Everett v. Hall, 67 Me. 497.

Similarly, a mortgage by a vendor of a quantity of cordwood appropriated subject to an executory contract for the sale thereof will prevail against the vendee, where the change of possession did not reasonably charge the mortgagee with notice thereof: Bernhart v. McCutcheon, 12 Man. L.R. 394.

And, so, such a buyer may mortgage his interests, such as it is, and upon payment of the price of the goods, the mortgage will attach: Crompton v. Pratt, 105 Mass. 255; Allright v. Meredith, 58 Ohio St. 194, 50 N.E. 719.

An engine builder who agrees to construct an engine may mortgage it in its unfinished state, even though the purchaser has advanced money on account during the progress of construction, and such mortgage will pass the property: Wright v. Tetlow, 99 Mass. 397.

All personal property which may be sold may be mortgaged. A limited interest also may be mortgaged, as, for instance, the interest of a farmer, who occupies and cultivates land on shares in the crops and products of the soil; but if the agreement between him and his landlord be that the crops and products of the soil shall belong to the landlord, and that after payment to the latter of certain advances the tenant shall then have a certain proportion of the crop, the tenant has not in this case such an interest as can be made the subject-matter of a chattel mort-

gage until he pays the advances: Ponder v. Rhea, 32 Ark. 435; Leland v. Sprague, 28 Vt. 746.

The word "goods" is less comprehensive in its operation than the word "chattels" (Humbler v. Mitchell, 11 A. & E. 205; Hesseltine v. Siggers, 1 Ex. 856; Tempest v. Kilner, 3 C.B. 249; Bowlby v. Bell, 3 C.B. 284; Bradley v. Holdsworth, 3 M. & W. 422; Duncroft v. Albrecht, 12 Sim. 189; Watson v. Spratley, 10 Ex. 222, 24 L.J. Ex. 53; Powell v. Jessop, 18 C.B. 336; Lawter v. Griffin, 40 Ind. 593), and is limited to what is movable personal property, to things which are tangible and visible, and have a local situation: Hewitt v. Corbett, 15 U.C.Q.B. 39. Whatsoever is capable of delivery, of being handed from one to another, in fact whatever is movable personal property, is within the meaning of the term "goods."

A mortgage of future crops is within the Act, and is superior to a mortgage afterwards given of the crop when in existence, and gathered: Everman v. Robb, 52 Miss. 653; Petch v. Tutin, 15 M. & W. 110; Mehm v. Balcolvski, 1 Sask. L.R. 415.

Bills of exchange are not proper subjects of mortgage: Hilts v. Parker, 14 L.T. 107 (H.L.).

If a seller or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of equity would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of equity would decree specific performance. If it be so, then, immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract: Lord Westbury in Holroyd v. Marshall, 10 H.L.C. 191; Coyne v. Lee, 14 O.A.R. 503, 23 C.L.J. 413; Tailby v. Official Receiver

(1888), 13 A.C. 523; Lazarus v. Andrade, 5 C.P.D. 319; Leatham v. Amor, 47 L.J.Q.B. 581; Re Panama, etc., Mail Co., L.R. 5 Ch. 318.

Hence, specific performance will be decreed of an agreement to give a chattel mortgage upon ascertained furniture sold and delivered upon credit in reliance upon such agreement: Jones v. Brewer, 1 N.B. Eq. 630.

For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.

This is the rule, even when the assignment is one of a hope dependent on a chance, but capable of potential existence, such as the sale, by a fisherman, of a cast of his net for a given price. Thus, an assignment or mortgage of non-existing property (such as a quantity of square timber subsequently to be had and manufactured (Cummings v. Morgan, 12 U.C.Q.B. 565), or that is thereafter to be made (Short v. Ruttan, 12 U.C.Q.B. 79), or such stock as should be purchased thereafter during the currency of the mortgage (Joseph v. Webb, 1 C. & E. 262), or crops to be afterwards raised (Grass v. Austin, 7 Ont. App. R. 511; Clements v. Matthews, 11 Q.B.D. 808; Grantham v. Hawley, H. & C. 132; Nestell v. Hewitt, 19 Abb. N. Cas. (N.Y.) 282), will be upheld.

On a contract or bill of sale purporting to assign goods to be acquired in the future, if the goods be sufficiently described to be identified on acquisition by the seller, the equitable interest in them passes to the buyer as soon as they are acquired (Tailby v. Official Receiver (1888), 13 A.C. 523; Holroyd v. Marshall, 10 H.L.C. 191; McAllister v. Forsyth, 12 Can. S.C.R. 1; A. E. Thomas, Limited v. Standard Bank of Canada, 1 O.W. N. 379; Fraser v. Macpherson, 34 N.B.R. 417 (affirmed by Supreme Court of Canada)), and if not so described the property will not pass until the seller does some act appropriating them to the contract (Langton v. Higgins (1859), 28 L.J. Ex.

252), or unless the buyer takes possession of them under an authority to seize: Hope v. Hayley (1856), 25 L.J.Q.B. 155.

If the mortgage covers future acquired stock, and there is, under the terms of the mortgage, an implied license to the mortgagor to carry on his business and sell the stock, the *bonâ fide* purchasers from the mortgagor will get a good title, notwithstanding that the mortgage was duly registered, and especially when the mortgage provides that until default the mortgagor shall be entitled to make use of the stock without hindrance or disturbance by the mortgagee; but if the mortgagor fraudulently sells the goods to *bonâ fide* purchasers not in the ordinary course of business, the mortgagee will be entitled thereto, because the right of the mortgagor to deal with the goods is subject to the implied condition that the dealing shall be in the ordinary course of business (National Mercantile Bank v. Hampson, 5 Q.B.D. 177; Walker v. Clay, 49 L.J.C.P. 560; Dedrick v. Ashdown, 15 Can. S.C.R. 227, 242); but the goods to be afterwards acquired must be in some way specifically described, for goods which are wholly undetermined, as, for instance, "all my future personalty," will not pass as future acquired property: Tadman v. D'Epineuil, 20 Ch.D. 758; Lazarus v. Andrade, 5 C.P.D. 318; Belding v. Read, 3 H. & C. 955.

A clause in a bill of sale which purports to include after-acquired property confers as to the latter a mere equitable title which must give way to a legal title obtained *bonâ fide* and without notice: Whynot v. McGinty, 7 D.L.R. 618, referring to Holroyd v. Marshall, 10 H.L.C. 191; Reeves v. Barlow, 12 Q.B.D. 436; see Imperial Brewers v. Gelin, 18 Man. L.R. 283.

And, where a mortgage is made upon the whole property, assets, etc., of a company, present and future, except logs on the way to the mill, such exception applies to such logs as may be on the way to the mill, not only at the date of the mortgage, but also at any future time: Imperial Paper Mills v. Quebec Bank, 6 D.L.R. 475, 26 O.L.R. 637.

Where a chattel mortgage conveys the stock-in-trade, shop,

contents, including shop and office fixtures, scales and appurtenances, which had been purchased by the mortgagor from a specified seller with a further provision purporting to include "not only all and singular the present stock of goods and all other the contents of the mortgagor's shop, but also any other goods that may be put in said shop in substitution for, or in addition to those already there, as fully and to all intents and purposes as if the said added or substituted stock were already in said shop and particularly mentioned"; such provision to cover other or after-acquired property is aimed at the "stock-in-trade" and requires clear words in order to cover other property sought to be held, the legal principle of construction being that general words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated: Dominion Register Co. v. Hall & Fairweather, 8 D.L.R. 577; Moore v. Magrath, 1 Cowper 9.

Where a mortgage not specifically mentioning present or future book debts covers the "undertaking . . . together with . . . incomes and sources of money, rights, privileges . . . held or enjoyed by (the mortgagor) now or at any time prior to the full payment of the mortgage," such language is sufficiently comprehensive to create an equitable charge on present and future book debts of the trading corporation by which the mortgage was made: National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 26 O.L.R. 279.

The words "in the ordinary course of business" have an important significance, for a mortgagee may often be defeated in his claim to goods, even such as growing crops, by an instrument impliedly licensing the mortgagor to carry on his ordinary business, and that, notwithstanding the mortgage may be registered.

An assignment of a man's stock-in-trade and effects on the farm, together with all the growing crops, and other crops, "which at any time thereafter should be in or about the same," will be a sufficiently specific description of the future crops in

the farm to make the assignment a valid one in equity: Clements v. Matthews, 11 Q.B.D. 808.

Growing crop, sown by the person in possession, and intended to be reaped at maturity, being *fructus industriales*, are chattels seizable under execution, and the ownership of them is not an interest in land within the 4th sec. of the Statute of Frauds. They are bound by delivery to the sheriff of an execution against the owner, and they must equally be bound by the act of the owner. They are not within the Registry Act (Ont.) because they are chattels, independently of the form of the agreement to transfer them and of the period, before or after severance, at which the property in them is to pass to the purchaser: *per* Street, J., in Cameron v. Gibson, 17 O.R. 233.

And where the owner of an equity of redemption in land gave a chattel mortgage of a growing crop, but before the harvest released his equity to the mortgagee, and the latter rented the place to a tenant, the taking of the conveyance by the mortgagee without reserving the mortgage lien merges his mortgage claim to the crop as part of his security, and the chattel mortgagee therefore had the prior right as against the grantee and as against the tenant: Cameron v. Gibson, 17 O.R. 233, 25 C.L.J. 250.

In some jurisdictions there are statutory restrictions passed in the public interest on the right to mortgage growing crops. For instance in Manitoba a mortgage or bill of sale of a growing crop or of a crop to be grown in the future is not allowed except as security for the price of seed grain: R.S.M. 1902, ch. 11, sec. 39.

In seeking to ascertain what fruits of the soil are, and what are not, chattels independent of the land, it will be well to bear in mind the distinction between *fructus industriales* and *fructus naturales*. The former are fruits produced by the annual labour of man in sowing and reaping, planting and gathering (Jones v. Flint, 10 A. & E. 753; Carrington v. Roots, 2 M. & W. 248; Sainsbury v. Matthews, 4 M. & W. 343; Warwick v. Bruce, 2

M. & S. 205; Forbes v. Shattuck, 22 Barb. 568; Mumford v. Whitney, 15 Wend. 387; Graves v. Weld, 5 B. & A. 105; Evans v. Roberts, 5 B. & C. 829; Westbrook v. Eager, 16 N.J.L. 81; Dunn v. Fergusson, 1 Hayes (Irish) 542; Parker v. Staniland, 11 East 362), for at common law a growing crop, produced by the labour and expense of the occupant of lands, was, as the representative of that labour and expense, considered a chattel independent of the land (Evans v. Roberts, 5 B. & C. 836; Kingsley v. Holbrook, 47 N.H. 318, 326; Dunn v. Fergusson, 1 Hayes (Irish) 542; [illegible] 17th section of the Statute of Frauds would apply [illegible] the natural growth of the soil, as [illegible] and before severance, are an [illegible] and [illegible] embraced within the 4th section of the Statute (Sewell v. Boxall, 1 Y. & J. 396; Crosby v. [illegible] East 602; Carrington v. Roots, 2 M. & W. 248; Teal v. [illegible] Moore 542, 2 B. & B. 97; Rodwell v. Phillips, 9 M. & W. [illegible]), with this exception that, when the fruit or timber [illegible] with a view to its immediate severance from the freehold, and with a view to passing to the vendee an interest in the property when either becomes a chattel, the contract, then, is one for the sale of goods and chattels, and not of an interest in land. It is the same as if the parties had contracted for so much fruit already picked, or for so many feet of timber already felled: Marshall v. Green, 1 C.P.D. 35; Smith v. Surman, 9 B. & C. 568; Rodwell v. Phillips, 9 M. & W. 505; Washbourne v. Burrows, 16 L.J. Ex. 266, 1 Ex. 115; Woodruff v. Roberts, 4 La. 127; Couch v. Smith, 1 Md. Ch. 401; Claflin v. Carpenter, 4 Met. 580; Douglas v. Shumway, 13 Gray 498; Cook v. Stearns, 11 Mass. 533. And so it is that, though hay is sometimes *fructus naturales*, yet an agreement between the landlord and occupant that the hay shall belong to the latter enables the occupant to make a valid transfer thereof by way of a personal or chattel mortgage; but the theory that a mortgage of grass is a mortgage of personal property does not prevail when it is owned by one who owns the lands (Smith v. Jenks, 1

Denio N.Y. 580), and, if allowed to remain in the possession and under the control of the vendor after severance, then the statutory requisites as to bills of sale must be complied with: Ex parte National Mercantile Bank, 16 Ch.D. 104; Steinhoff v. McRae, 3 O.R. 546; McMillan v. McSherry, 15 Gr. 133.

Minerals in the bed of the land is a part thereof and will pass as such with it in the absence of an express reservation to the contrary: Hobbs v. Esquimalt and Nanaimo R. Co., 29 Can. S.C.R. 450. So the interest of a free miner in his mineral claim is an interest in land within the Statute of Frauds: Stussi v. Brown, 5 B.C.R. 380. Likewise, is an interest in a timber limit: Hoeffler v. Irwin, 8 O.L.R. 740. As to rights granted under a Crown license to cut timber in Ontario, see Hoeffler v. Irwin, 8 O.L.R. 740; Thomson v. Playfair, 6 D.L.R. 263, 26 O.L.R. 624.

The gravel in a river bed is *primâ facie* part of the realty; and in the absence of an actual severance with intention to make the gravel a chattel by one having a right to do so, its original character will not be changed: Edmonton Concrete Co v. Cristall, 2 A.L.R. 409.

Fixtures too, may or may not be within the operation of the Act. If a person remains in the possession of fixtures, he cannot pledge them, so as to give a title to a mortgagee, except by an instrument under the provisions of the statute: Ex parte Dalglish, L.R. 8 Ch. 1072; Beghie v. Fenwick, L.R. 8 Ch. 1075; Hawtry v. Butlin, L.R. 8 Q.B. 290.

In the absence of evidence of a contrary intention, machines affixed to the freehold merely for the purpose of steadying them, and used for the purpose of a manufacturing business for which the freehold is occupied, become part of the freehold even though the mode of affixing them is such that they can easily be detached without injury to the machines or to the freehold: but similar pieces of machines standing on the freehold, but not affixed except by belting for motive power, retain the character of chattels notwithstanding that the work done by them is an essential process in the manufacture to which the freehold is

devoted: Sun Life v. Taylor, 9 Man. L.R. 89; Keefer v. Merrill, 6 A.R. (Ont.) 132.

But a fastening by cleats affixed to the building only and not affixed to the machine except by being placed close against it, is not an affixing of the machine at all, and is not sufficient in itself to make the machine a part of the realty: Sun Life v. Taylor, 9 Man. L.R. 89, 101; Crawford v. Findley, 18 Gr. 51.

In order to ascertain whether or not a particular thing is a fixture, it is necessary to apply certain rules which the Courts have agreed upon in decided cases, and if the article in question is covered by these rules it is decided to be a fixture. These rules may be reduced to three, which require that the article under consideration shall be:—

(1) Actually annexed to the realty, or to something appurtenant thereto.

(2) Appropriate to the use or purpose of that part of the realty with which it is connected.

(3) Intended by the party making the annexation to be a permanent accession to the freehold, and what that intention was in making the annexation is inferred from the following facts:—

(a) The nature of the article annexed.

(b) The relation of the party making the annexation.

(c) The structure and mode of annexation.

(d) The purpose or use for which the annexation has been made: Tillman v. Delacy, 80 Ala. 103; Capen v. Reckham, 35 Conn. 88; McRae v. Cent. Nat. Bank, 66 N.Y. 489; Potter v. Cromwell, 40 N.Y. 287.

The intention of the parties in dealing with the fixtures will decide their character, and the circumstances of how fixtures came to be placed on the realty, and what was intended to be their use, are to be inquired: Russell v. Nesbit, 3 Terr. L.R. 437. By agreement of all parties interested in both the realty and the fixtures, things considered fixtures to the realty may become personal property: Smith v. Waggoner, 50 Wis. 155;

Godard v. Gould, 14 Barb. (N.Y.) 662; Gooding v. Riley, 50 N.H. 400; Reed v. Belavance, Q.R. 19 K.B. 369, affirming 36 S.C.R. 392.

The purposes to which premises have been applied should be regarded in deciding the object of the annexation of movable articles in permanent structures, with a view to ascertaining whether or not they thereby became fixtures incorporated with the freehold; and where articles have been only slightly affixed but in a manner appropriate to their use and shewing an intention of permanently affixing them with the object of enhancing the value of mortgaged premises or of improving their usefulness for the purposes to which they have been applied, there would be sufficient ground, in a dispute between a mortgagor and his mortgagee, for concluding that both as to the degree and object of the annexation they became parts of the realty: Haggert v. Town of Brampton, 28 Can. S.C.R. 174. The onus of shewing the object of the annexation and the intention that it should become part of the freehold lies upon the party asserting that they have ceased to be chattels: Bing Kee v. Yick Chong, 43 Can. S.C.R. 334; Canada Permanent v. Merchants Bank, 3 Man. L.R. 285.

Mortgaged chattels afterwards annexed to the realty, may, in like manner, retain their character as personal property, but it is essential that they be so annexed that they can be removed without serious damage to the freehold, and without substantially destroying their own qualities or value: Ford v. Cobb, 20 N.Y. 344; Sisson v. Hibbard, 75 N.Y. 542.

But shop fittings, consisting of shelving affixed to the wall of a building, being readily removable without damage either to the fitting or the building, and gas and electric light fittings, consisting of chandeliers attached to pipes or wires by which the gas and electric currents were respectively conveyed, and removable by being unscrewed or detached without damage to the chandeliers or building, are part of the land, and will pass by a conveyance thereof. Bain v. Brand (1876), 1 App. Cas

762; Holland v. Hodgson (1872), L.R. 7 C.P. 328; Hobson v. Gorringe, [1897] 1 Ch. 182; Haggert v. Town of Brampton (1897), 28 Can. S.C.R. 174; Argles v. McMath (1895), 26 O.R. 224, at 248; Stack v. Eaton Co., 4 O.L.R. 335. A small building of thin board, lathed and plastered inside and divided into three rooms, resting by its own weight on loose bricks laid on the soil, built for and used at first as a booth or shop and then for a time as a dwelling-house, was held to be a fixture: Miles v. Ankatell, 25 A.R. (Ont.) 458, reversing 29 O.R. 21; J. I. Case Threshing Machine Co. v. Berard, 17 W.L.R. 91. Likewise buildings erected by a squatter on Crown lands become the property of the Crown as part of the realty: Dixon v. Mackay, 21 Man. L.R. 762. The tools and implements used for making maple sugar, consisting of vessels and utensils placed permanently on the premises are held in Quebec to be immovable by destination: Peloquin v. Bilodeau, 39 Que. S.C. 388. Windmill machinery affixed by bolts to posts set into the soil and the operative parts appurtenant thereto become part of the freehold, and cannot be recovered by an unpaid seller from the owner of the land: Cockshutt Plow Co. v. McLoughry, 2 Sask. L.R. 259; Kilpatrick v. Stone, 15 B.C.R. 158; see Seeley v. Caldwell, 18 O.L.R. 472, following and applying Hobson v. Gorringe, [1897] 1 Ch. 182; Reynolds v. Ashby, [1904] A.C. 466. And to the like effect, see Andrews v. Brown, 19 Man. L.R. 4, overruling Waterous v. Henry, 2 Man. L.R. 169, and Vulcan Iron v. Rapid City, 9 Man. L.R. 577.

When a stranger owns the goods, a wrongdoer can neither rightfully nor wrongfully give a title to such goods to the owner of the soil by affixing them, so as to become part of the soil, and if the owner of the soil seeks to retain that which has been improperly affixed to his land by one who had not the legal title to the thing so affixed, he must pay for it (Stevens v. Barfoot, 13 A.R. (Ont.) 366); and of course a person who has only the use of property belonging to another cannot, by annexing it to the soil, make it part of the realty: D'Eyncourt v. Gregory,

L.R. 3 Eq. 382; Central Branch R.W. Co. v. Fritz, 27 Am. Rep. 175. But where a person owns chattels, and annexes them to the land of another, which he occupies as a trespasser, he cannot afterwards be heard to claim that the chattels so annexed are not fixtures, so do not pass with the land to a purchaser or mortgagee: Stevens v. Barfoot, 13 A.R. (Ont.) 366. If parties are not dealing with an interest in land, the contract for the sale of fixtures will be a contract for the sale of chattels, and the 17th sec. of the Statute of Frauds will apply to such a contract: Hallen v. Runder, 1 C.M. & R. 266; Wick v. Hodgson, 12 Moo. 213. The owner of land upon which there are fixtures, has the right to sever the fixtures from the freehold, and a mortgage by him upon the fixtures will not be prejudiced by a subsequent mortgage of the land: Rose v. Hope, 22 U.C.C.P. 482; Re Eslick, 4 Ch. D. 503; Stevens v. Barfoot, 13 A.R. (Ont.) 366; Corcoran v. Webster, 50 Wis. 125.

But a chattel mortgage on *de facto* fixtures, although duly filed, will not prevail as against a subsequent purchaser or mortgagee of the land under registered conveyances without notice of the prior chattel mortgage: Bacon v. Rice Lewis, 33 C.L.J. 680. And see article on "Fixtures" in 33 Ch. J. 412, as to the effect of Hobson v. Gorringe, [1897] 1 Ch. 182, in Ontario.

A mortgagee of land will not lose the benefit of his realty mortgage by taking in the same transaction a chattel mortgage on the fixtures: per Hagarty, C.J.O., Stevens v. Barfoot, 13 A.R. (Ont.) 366, at 369.

The mere expression by the owner of an intention to sever a fixture from the freehold and sell it to another, even if communicated to one who becomes a subsequent purchaser of the freehold, will not operate to convert the fixture into a chattel or to alter its character in any way; and in the absence of any reservation in the conveyance everything attached to the freehold passes to the purchaser: Minhinnick v. Jolly, 29 O.R. 238. Hence the making of a document in the form of a chattel mortgage on a building and certain machinery used therewith as

appurtenances to land or as easements thereto, does not change the character of the property into personalty against the maker who was the owner in possession so as to enable him to sue the mortgagee in detinue or replevin for an alleged unlawful taking of possession by the mortgagee: Stimson v. Smith (1889), 1 Terr. L.R. 183.

It was formerly the law that where a person sells chattels to the owner of the soil on an agreement that their character as personal property is not to be changed, and takes a chattel mortgage or lien thereon to secure the purchase money, a prior mortgagee of the freehold could not claim them as subject to his mortgage, although they are subsequently annexed to the freehold; and upon failure to pay the chattel mortgage the chattel mortgagee or vendor was entitled to their delivery: Tift v. Horton, 53 N.Y. 377; Goddard v. Gould, 14 Barb. 662; Mott v. Palmer, 1 N.Y. 564.

In Ontario, however, it has been enacted by statute that where goods which are the subject of a "condition sale" have been affixed to realty they shall remain subject to the rights of the seller or lender as fully as they were before being so affixed, but the owner of such realty or any purchaser or any mortgagee or other encumbrancer thereof shall have the right as against the seller or lender or other person claiming through or under him to retain the goods upon payment of the amount owing on them: 5 Edw. VII. (Ont.) ch. 13, sec. 14, 1 Geo. V. (Ont.) ch. 30, sec. 9.

If the intention of the parties, as shewn by the terms of the instrument, is that fixtures should pass with, and as part of the freehold, then registration of a mortgage, as a chattel mortgage, is not necessary to pass the interest in fixtures fixed to the soil: Sheffield v. Harrison, 15 Q.B.D. 358; Potts v. N. J. Arms Co., 2 Green (N.J.) 395.

A building erected by one person on the land of another, may be mortgaged as personal property, if it was so erected on the understanding or agreement that it might be removed at

any time (Smith v. Benson, 1 Hill (N.Y.) 176), and the character of the building is not changed by the mortgagor removing it on to other land which he has bought, and giving a mortgage on the land to secure part of the purchase money, provided the mortgagee of the land had notice of the mortgage on the house: Simons v. Pierce, 16 Ohio S. 215.

Chattels of the nature of plant or machinery not structurally affixed to the freehold as well as those of a like nature afterwards placed on the mortgaged premises, may, by the express terms of a mortgage of the realty, become fixtures for the purposes of the mortgage, and the mortgagee is entitled to them as against a subsequent chattel mortgagee whose security on such chattels is taken with notice of the prior incumbrance: Canada Permanent Loan and Savings Company v. Traders Bank, 29 O.R. 479.

Where machinery is a part of the freehold, leathern driving belts required for working such machinery will also pass with the realty, as the key of a door passes with the sale of a house: Sheffield v. Harrison, 15 Q.B.D. 358; Goldie & McCullough Co. v. Hewson, 35 N.B.R. 349.

Coal towers forming part of a coal plant and dependent on the power house for power, are immovable objects by destination, although they may be moved over a short distance on tracks built for the purpose: Que. C.C. 379; Nova Scotia Coal and Steel Co. v. City of Montreal, 3 D.L.R. 750.

But although the parties to a real estate mortgage may agree that all building material brought upon the mortgaged lands shall be deemed immediately attached to the freehold, still if a power is also given to sell the material separately from the land it will be deemed, as to it, a mortgage of chattels: Climpson v. Coles, 23 Q.B.D. 465, 25 C.L.J. 591.

Even fixtures of a nature that the vendor must have known must necessarily be built into and become part of the building, none the less retain their character of chattel property in favour of a vendor thereof who retained in himself the right of pro-

perty in the fixtures, and this will apply as against a landlord to whom the vendee of the fixtures has surrendered the lease by reason of forfeiture. The owner of the property would not cease to be the owner, and his right of recaption exists so long as the property retains its legal identity: Hall v. Hazlitt, 11 A.R. (Ont.) 749; see Howell v. Listowel Rink and Park Co., 13 O.R. 476. Machinery placed upon land for the purpose of trade and manufacture, being placed there for the better and more profitable enjoyment of the land, will pass with the freehold (Mather v. Fraser, 2 K. & J. 536; Longbottom v. Berry, L.R. 5 Q.B. 123; Goldie & McCullough Co. v. Hewson, 35 N.B.R. 349), but not so if by so doing it would violate the intention of the parties (Waterfall v. Penistone, 6 E. & B. 876), and so tramways in a mine have been held to be fixtures, and hence are not distrainable: Turner v. Cameron, L.R. 5 Q.B. 306. Where in a mortgage of land the mortgagor, after granting the land, also added, "together with the mills, buildings, steam engines, motive power, plant, fixed and movable machinery, apparatus, rails, sleepers, implements, fittings and fixtures of every description, now or at any time hereafter fixed to, or placed upon, or used in or about the said hereditaments and premises or any part thereof," it was held that it all passed as fixtures, even the removable portion of the machinery, such as guys; and that, too, though the guys may be supplied by one person and the crane by another and different person: Ex parte Moore, 14 Ch. D. 379; see Ex parte Brown, 9 Ch. D. 389; Re Trethowan, 5 Ch.D. 559; Robinson v. Cook, 6 O.R. 590.

Accessions to property mortgaged by the mortgagor in good faith become subject to the mortgage. And it makes no difference, as between the immediate parties to the mortgage, to what extent the property mortgaged may have been improved in value; the improvements come under the operation of the mortgage as accessions to the property mortgaged. A mortgage of saw logs will bind the lumber into which they are sawn, but the mortgagee must prove that such lumber was made out

of the identical logs mortgaged: White v. Brown, 12 U.C.Q.B. 477. A mortgage of leather cut and prepared for the manufacture of shoes, covers shoes subsequently made from it by the mortgagor: Putnam v. Cushing, 10 Gray (Mass.) 334. A mortgage of cucumbers, at the time in bulk and in salt, covers them after they have been greened and bottled, though the bottles and vinegar were not included in the mortgage: Crosby v. Baker, 6 Allen (Mass.) 295. A mortgage of an unfinished locomotive covers the additions made to it by the mortgagor, although the additions were not included in the mortgage: Ex parte Ames, 1 Lowell 561. And by way of accretion also, a mortgage of rolling stock of a railroad covers repairs and improvements thereof: Hamlin v. Jerrard, 72 Me. 62.

A sale of logs necessarily carries the deals and boards into which part of them had been manufactured, and, therefore, are not subject to attachment by execution creditors of the seller: King v. Duprois dit Gilbert, 28 Can. S.C.R. 388; White v. Brown, 12 U.C.Q.B. 477. But logs are not within the purview of a chattel mortgage covering all lumber which might at any time be brought on the premises: Merchants Bank of Halifax v. Honston, 7 B.C.R. 465. The transfer of hotel premises and contents as a going concern will be presumed to include quantities of wood and ice kept on the hotel premises and also the food supplies. Blomquist v. Tymchorak, 6 D.L.R. 337, 22 W.L.R. 205. A chattel mortgage covering a stock in trade and book debts includes the book debts originally assigned to the mortgagor by the person from whom they were purchased: Robinson v. Empey, 10 B.C.R. 466. But a description of "all office fixtures, lamps, desks, chairs, furniture, stationery and all goods, chattels and effects now in the store and office of the mortgagor," will not include a safe, the general words being restricted by the preceding words: Goldie v. Taylor, 2 Terr. L.R. 298. Nor are kitchen supplies and utensils part of a plant, materials or other things provided for the work: Claney v. Grand Trunk Pac. R. Co., 15 B.C.R. 497.

"Securities for money" will include policies of insurance: Lee v. Gorrie, 1 C.L.J. 76; Lawrance v. Galsworthy, 3 Jur. 1049.

Where a mortgage is made to secure bonds upon the whole property, assets, etc., of a company, present and future, except logs on the way to the mill, such exception applies to such logs as may be on the way to the mill, not only at the date of the mortgage, but also at any future time. Imperial Paper Mills v. Quebec Bank, 6 D.L.R. 475, 3 O.W.N. 1544, 26 O.L.R. 637.

A mortgage of a mare will cover a foal in gremio at the time the mortgage was given: Gunn v. Burgess, 5 O.R. 685; compare Hirschfield v. City of Halifax, 22 N.S.R. 52; see Demers v. Graham, 36 Mont. 402, 14 L.R.A. (N.S.) 431. The right of possession of the foal follows the dam, for the reason that the two cannot or ought not to be separated (Temple v. Nicholson, Cassels S.C. Dig. 114); and generally the increase of all tame and domestic animals will be covered by a mortgage of the animals themselves: Roper v. Scott, 16 Man. L.R. 594; Dillaree v. Doyle, 43 U.C.Q.B. 442; Forman v. Proctor, 9 B. Mon. (Ky.) 124; McCarty v. Bleevins, 5 Yerg. (Tenn.) 105; Hughes v. Graves, 1 Litt. (Ky.) 317; Nicholson v. Temple, 20 N.B.R. 248.

The "increase of animals" has been held to mean the natural increase or offspring of the original animals mortgaged, and that it did not include additions made to the flock by purchase: Webster v. Power, 5 Moore P.C. 92.

It is said to be doubtful if a mortgage of a cow would cover her calf beyond the time during which it is necessary for the calf to follow the cow for nurture (Winter v. Landphere, 42 Iowa 471; Kellog v. Lovely, 46 Mich. 131), and there seems to be a limit in point of time when a mortgage of animals will cover the increase, unless the mortgage covers such increase by express terms. And it has been held that a conveyance of such increase by the mortgagor, while in possession thereof, to a purchaser without notice, actual or constructive, will be valid: Winter v. Landphere, 42 Iowa 471.

If a mortgagor so confuses the mortgaged goods with his own that they cannot be distinguished, and refuses to separate them, the mortgagee may take all such goods without becoming a trespasser: Fuller v. Paige, 26 Ill. 358; Burns v. Campbell, 71 Ala. 271; Fleming v. Graham, 34 Mo. App. 160. But where a plaintiff owned a stock of goods and some furniture, and shop fixtures, and sold out to S., taking a chattel mortgage as security, and S. continued the business and brought in other goods, until, becoming involved, he absconded, and the sheriff, upon an attachment being placed in his hands, seized the property in the store, it was held that the goods being of such a nature as could easily be distinguished, the sheriff was liable for trespass (Boys v. Smith, 8 U.C.C.P. 27; Bell v. Lafferty, 3 Terr. L.R. 263), but if the mortgage be of a certain number of articles of furniture, not particularly distinguished, in a house, wherein there are other articles of the same kind belonging to the mortgagor, the mortgagee may select from the whole, although as against judgment creditors the mortgage might be void: Call v. Gray, 37 N.H. 428.

To transfer the right of property in a chattel, the chattel must be ascertained and identified at the time of the transfer: Snell v. Heighton, 1 C. & E. 95; Campbell v. Mersey Docks, etc., 14 C.B. 412; Jenner v. Smith, L.R. 4 C.P. 270. For instance, it is said that, if I have two or more books that can be distinguished from the rest, and I grant one or more of them, the grant is good for this, that it is certain what thing is granted (Lunn v. Thornton, 1 C.B. 379; Gale v. Burnell, 7 Q.B. 850, 14 L.J.Q.B. 340; Robinson v. Macdonell, 5 Man. & Sel. 228); and if a man have five horses in his stable, and he gives to me one of his horses in stable, now I shall take which of the horses I will (Harding v. Colburn, 12 Met. 333; Smith v. McLean, 24 Iowa 322), because the horse given is easily separable from the others; and so a mortgage of two bales of cotton out of a growing crop, will be good as between the parties: Williamson v. Steale, 3 Lea (Tenn.) 527.

If, however, I grant a man twenty books, to be taken out of my library, no right of property in any particular books passes to the grantee, because the subject of the grant was not ascertained and identified. The case of Bryans v. Nix (4 M. & W. 774), fully illustrates the law as to the appropriation of a chattel necessary to a valid grant. In that case, Parker, B., said: "In order to pass the property, the specific chattels must be ascertained which are to pass. Now here the oats were still in T.'s premises, and he might have performed his contract with the plaintiffs by supplying any other oats of the same quality and amount." So where a transfer was made of 100 tons of coal, as security for an endorsement, and the transferor, while he had a certain lot of coal lying on the wharf, supposed to contain that quantity, had in reality only 78 tons, and that was subject to a claim for wharfage; the jury found that the transfer was not confined to this lot, but was of 100 tons, the transferor having more in his yard; it was held that the property in the coals in the yard had not passed, for the quantity transferred had not been ascertained or separated: McDougall v. Elliott, 20 U.C.R. 299; Snell v. Heighton, 1 C. & E. 95; Cunliffe v. Harrison, 6 Ex. 903. But, while a grant of 100 bushels of wheat does not operate as an immediate transfer unless the wheat is measured and set apart (because the transfer has nothing to operate upon) (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), it becomes an executory contract, and amounts to a covenant to deliver 100 bushels of wheat, on breach of which an action is sustainable. When once the appropriation is made and assented to by the vendee, then the property in the goods passes, and their value may be recovered by the vendor under a count for goods bargained and sold, and the action will lie as soon as a selection is made by the vendor, if it is at his option to make the selection. The property passes just as soon as the selection or appropriation is made, although the vendor is not bound to part with the possession until he

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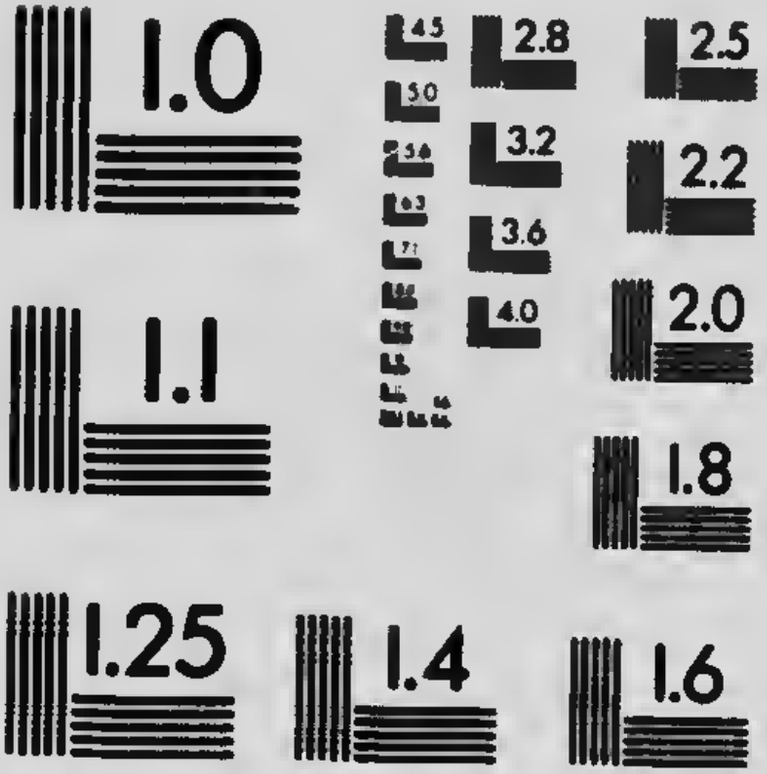

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is paid the price: Rhode v. Thwaites, 6 B. & C. 388; Aldridge v. Johnson, 7 El. & Bl. 885, 3 Jur. N.S. 913; Atkinson v. Beil, 8 B. & C. 277; Re Aheran, 15 Que. S.C. 131; Martineau v. Kitching, L.R. 7 Q.B. 436; Aldridge v. Johnson, 7 El. & Bl. 885, and Langton v. Higgins, 4 H. & N. 402.

A delivery of a designated quantity of cordwood at the railway station grounds appointed by the parties is a sufficient appropriation of the goods to pass title thereto, even though larger quantities of other wood had been piled in different parts of the same grounds: Bernhart v. McCutcheon, 12 Man. L.R. 394. After delivery it becomes an irrevocable appropriation which will prevent their seizure by execution creditors of the vendor: Johnson v. Logan, 32 N.S.R. 28; Wilson v. Shaver, 3 O.L.R. 110, affirming 1 O.L.R. 107; Rhode v. Thwaites, 6 B. & C. 388; Langton v. Waring, 18 C.B. 315. But where the quality of certain articles is to be ascertained by the concurrence of the buyer and the seller, for instance, the picking and culling of apples, no title to them will pass until the agreed method of ascertainment is carried out: Lee v. Culp, 8 O.L.R. 210; Furley v. Bates, 2 H. & C. 200. However, where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer at the time the contract is made unless a contrary intention appears: Craig v. Beardmore, 7 O.L.R. 674; North British, etc., Insurance Co. v. Moffat, L.R. 7 C.P. 25. A sale of all the hay in certain mows or stacks, at a fixed price per ton, is a sale of a specific thing and passes the property of the hay to the purchasers: Brown v. Lauzon, 30 Que. S.C. 178.

The fact that the seller has yet to deliver the goods may, in certain cases, indicate an intention that the property was not to pass until delivery, but such is not always the result. So, where a quantity of tan bark was sold as it lay in piles in the woods and was there measured and classified by the buyers but it was stipulated that the price should include the hauling of same by the seller to the railway siding, the property was

held to have passed to the buyers so as to place upon them the loss when it was destroyed by fire in the woods although they had made only a part payment: Craig v. Beardmore, 7 O.L.R. 674; Gilmour v. Supple (1858), 11 Moore P.C. 551. But where the price of a raft of timber had not been finally ascertained by measurement which was to be made at Quebec on delivery there, the property was held not to have passed where it was lost in a storm at Quebec before delivery had taken place: Logan v. Le Mesurier, 6 Moore P.C. 16.

Failure to comply with a stipulation as to measurements and the loading of certain wood pledged to secure advances does not operate as a transfer of ownership, nowithstanding that it had been stamped with the pledgee's mark: Curtis v. Millier, Q.R. 7 Q.B. 415; Furley v. Bates, 2 H. & C. 200; Chew v. Crocket (No. 2), 7 D.L.R. 730, referring to Castle v. Playford, L.R. 7 Ex. 98.

And the sale or mortgage of crops of specific land is therefore a sale or mortgage of specific crops, although not sown at the time of the sale or execution of the mortgage: Howell v. Coupland, 1 Q.B.D. 258; Grass v. Austin, 7 A.R. (Ont.) 511.

CHAPTER III.

The Consideration.

The system of mortgaging arose from the existence of debts for which security was desired. The very essence of a mortgage is that there shall be a debt, the security for which is the mortgage. Every mortgage requires a consideration, and without a consideration there cannot be a mortgage.

The consideration must be a lawful one, and may be either valuable or good.

A valuable consideration is money or any other thing that bears a known value, or marriage, if the consent to marry comes directly from the promisee and is not dependent on a third party: Dashwood v. Jermyn, 12 Ch.D. 776; Kevan v. Crawford, 6 Ch.D. 29; Wright v. Redgrove, W.N. (1879), 30-32; Williams v. Williams, 18 L.T. 783; Chichester v. Cobb, 14 L.T. 433; Shadwell v. Shadwell, 9 C.B. 159; Viret v. Viret, cited in 17 Ch.D. 365; or some other benefit to the person making a promise, however slight, or to a third person (Bailey v. Croft, 4 Taunt. 811; Williamson v. Clements, 1 Taunt. 523; Magruder v. State Bank, 18 Ark. 9; Davenport v. Bishopp, 2 Y. & Coll. C.C. 451), 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: Shirbyn v. Albany, Cro. Eliz. 67; March v. Culpepper, Cro. Car. 71; Peate v. Dicken, 1 C.M. & R. 422; or the suspension or forbearance of legal proceedings, the prevention of litigation or the settlement of disputes: Watson v. Randall, 20 Wend. 201; Sage v. Wilcox, 6 Conn. 84.

The performance of an act which a person has agreed with another to perform, is a good consideration to support a contract with a third person, if the latter derives a benefit from the performance: Scotson v. Pegg, 6 H. & N. 295.

A "good" consideration may consist of affection for a wife, child, or blood relation.

Mere blood relationship is a good but not sufficient or valuable consideration in law. A stranger to the consideration cannot sue on a contract, although there is privity of blood between him and the contracting parties, and the contract was made for his benefit; *e.g.*, the privity of relationship of father-in-law and son-in-law: Tweddle v. Atkinson, 1 B. & S. 393.

A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other: Fleming v. Bank of New Zealand, [1900] A.C. 577, 69 L.J.P.C. 120; Currie v. Misa, L.R. 10 Ex.D. 153.

Whether the whole of the mortgage money is actually paid by the lender into the hands of the borrower, or whether part of it is with his privity, or by his direction, employed in the payment of a debt due by him, it is equally in a legal sense paid by the lender: Ex parte Challinor, 16 Ch.D. 265.

The consideration may consist of a promise to pay made by a third party subsequent to the execution of a bill of sale at the latter's request: Bradford v. Roulston, 8 Ir. C.L.R. 468.

While the endorsing by a person, not a party to a note, of his name upon it before it has been endorsed by the payee is not an indorsement in the legal sense so as to make that person legally liable to the payee, a chattel mortgage to the intending endorser, to secure him against the liability intended to be incurred, cannot be set aside by the mortgagor's assignee for creditors, after payment of the note by the mortgagee: Robinson v. Mann, 31 Can. S.C.R. 484, 2 O.L.R. 63.

The consideration in a transaction is sometimes such that the

statutes relating to bills of sale and mortgages of personal property have no application. Under these statutes it is only so far as the interest of creditors, subsequent purchasers, and mortgagees in good faith of the bargainor or mortgagor is concerned, that the debt or consideration presents subject-matter for discussion. As between the immediate parties to the instrument, the law remains the same as it was without these statutes, and in those cases wherein the statutes have no application in relation to creditors, subsequent purchasers and mortgagees in good faith of the bargainor or mortgagor, the law respecting the debt or consideration is in no way governed by these statutes.

A voluntary consideration will not, of itself, make a deed void: Holmes v. Penny, 3 K. & J. 90; Thompson v. Webster, 7 Jur. N.S. 531.

Lord Hatherley in Freeman v. Pope, 5 Ch. App. 528, at 540, said: "Persons must be just before they are generous, and debts must be paid before gifts can be made." Hence, a mortgagor cannot convert an act of gratitude towards his blood relatives into a past debt in support of a mortgage on his chattels as against creditors who hold just claims founded on valuable consideration.

A bill of sale founded on a voluntary consideration may yet be good; but if the bargainor be indebted at the time it was executed, it will be deemed fraudulent. To be other than voluntary, the consideration must be valuable; hence services rendered, though beneficial and deserving reward, if they do not form a ground for a legal claim, will not suffice to support a bill of sale: Peacock v. Monk, 1 Ves. 131; Penhall v. Elwin, 1 Sm. & G. 268.

A binding contract arises from the performance, by a woman, of household work, for a man in consideration of his promise to make her a testamentary gift of all his property: Legeas v. Trusts and Guarantee Co., 5 D.L.R. 389; see also McGugan v. Smith, 21 Can. S.C.R. 263; Kinsey v. National Trust Co., 15 Man. L.R. 32.

Natural love and affection, not being a valuable consideration, will not suffice to support a bill of sale against creditors. Hence, a bill of sale by a farmer to his sons, of his live and dead stock, in consideration of natural love and affection, will be an invalid transfer as against the creditors of the parent: Matthews v. Feaver, 1 Cox 278; Raichlin v. Katz (Man.), 16 W.L.R. 1.

Under a family settlement, mere inadequacy of consideration is not sufficient ground to set aside a transfer from a debtor to a third person under the statute 13 Eliz. ch. 5, unless there is such inadequacy as to induce the presumption of collusion, or such, in fact, as might have invalidated the sale as between the vendor and purchaser without the interposition of creditors: Jack v. Kearney, 10 D.L.R. 48; Jack v. Kearney, 4 D.L.R. 836, reversed.

Services rendered by a child during minority may constitute a consideration in support of a transfer by the parent to the child as against the creditors of the parent: Jack v. Kearney, 10 D.L.R. 48; Jack v. Kearney, 4 D.L.R. 836, reversed.

An agreement to support a grantor and his wife during their lives may constitute, as against the grantor's creditors, a consideration upholding a conveyance under a family settlement: *Ibid.*

The Courts in construing the Statute of Elizabeth (13 Eliz. ch. 5), have held it to include deeds made without consideration, as being *primâ facie* fraudulent as against creditors.

Marriage is a valuable consideration, and is the highest consideration recognized by law. A marriage contract differs somewhat from other agreements; for as soon as the marriage is made the estate and capacities of the persons are altered; and as children are usually provided for, they become purchasers equally, under the settlement, with their parents, and are entitled to enforce their rights, although all the named contracting parties to the settlement agree in disregarding it: Leys v. McPherson, 17 U.C.C.P. 266, at 274; Lloyd v. Lloyd, 2

M. & Cr. 192; Ranelliffe v. Parkyns, 6 Dow. 149, 208; Harvey v. Ashley, 3 Atk. 610.

A bill of sale upon a consideration of marriage is a valid instrument within the Act (Leys v. McPherson, 17 U.C.C.P. 266), when the settlement is ante-nuptial, and providing the consideration thereof is truly expressed: Saskatchewan Lumber Co. v. Michand, 1 S.L.R. 412. In Campion v. Cotton, 17 Ves. 271, one I. L., a trader, in an ante-nuptial settlement, declared that in consideration of marriage he settled to the sole and separate use of his intended wife, goods, household furniture, jewels, etc., which it was recited were possessed by the intended wife. I. L. died, and a bill was filed by creditors against the executor and widow, alleging that the recitals in the deed of settlement were false and untrue, and praying that the same might be declared fraudulent and void upon the ground that I. L. had no property of his own, and that the property comprised in the settlement was placed there for the purpose of defeating his creditors. Sir W. Grant, M.R., in his judgment said: "It is clear that supposing the whole to have been I. L.'s property, he might have settled it upon his marriage. According to the cases decided at law, even the movable effects might be so settled, and neither the joint possession which I. L. had of the furniture, nor the want of an inventory, would invalidate the settlement. It is clear also, that the fact of his being indebted at the time, and of his intended wife knowing him to be so, would not affect its validity. Then, assuming the falsehood of the declaration that the property had been purchased with the money of the intended wife, will that circumstance prevent her acquiring as against him, and those claiming under him, all the rights which the settlement acknowledged her to have, and professed to secure to her? I apprehend it to be clear that the husband not only could not controvert her right to any part of the property, but was compellable to do whatever acts might be necessary to invest her with a complete title to it. He expressly covenanted to do so, and the marriage was a suffi-

cient consideration for the covenant. Then how is it fraudulent against the creditors? The utmost they can make of the falsehood in the deed is that the property was in truth Mr. L.'s, though it was asserted to be hers; but if he could settle this property, and has done what bound him to give a title to it, supposing it to be his, how are they advanced by establishing that fact? . . . I do not think that it can be inferred from the evidence that she knew he was in such circumstance as to make his bounty to her a fraud upon any one": 17 Ves. 264; see Kevan v. Crawford, 6 Ch.D. 29; Wright v. Redgrove, W.N. (1879), 30-32; see Saskatchewan Lumber Co. v. Michaud, 1 S.L.R. 412.

A continued indebtedness or liability is a good consideration, "and the ratio of the consideration to the value of the property mortgaged is of no consequence, so far as concerns the validity of the transaction": Jewett v. Warren, 12 Mass. 300.

A client's indebtedness to an advocate for professional services already rendered is a good consideration for a chattel mortgage: Smith v. MacKay, 3 Terr. L.R. 102.

Although an erroneous statement of the amount of the consideration does not invalidate the instrument, an indebtedness of some amount must be stated in order to satisfy the Act; therefore a mortgage, wherein the consideration is "the full sum of the indebtedness now existing or hereafter to be contracted" is void for the reason that the affidavit of *bonâ fides* must state that the mortgagor is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, which would not be possible if the mortgage does not state any indebtedness: Stevens v. Barfoot, 13 A.R. (Ont.) 366; McIntyre v. Union Bank, 2 Man. L.R. 305; Robinson v. Mann, 31 Can. S.C. R. 484, affirming in result 2 O.L.R. 63.

If the omission to state the true consideration is made with the purpose of deceiving, then of course the element of fraud is found in the transaction, and the mortgage becomes void on that account; but fraud may exist without being discovered, and thus the express purpose of a statute, passed for the pro-

tection of creditors, may be destroyed by an incorrect statement of the consideration, purposely made to deceive and mislead: Palmer v. May, 18 W.L.R. (Sask.) 676; Patterson v. Palmer, 19 W.L.R. 422; Boldrick v. Ryan, 17 O.A.R. 253. In the absence of fraud the erroneous statement of the consideration does not avoid a mortgage, for there is no rule of law requiring that the exact nature of the debt, much less the exact amount, should be set forth in the mortgage; but the untrue statement of the consideration becomes a circumstance for the jury to consider when deciding the question of fraud *vel. non*: Walker v. Niles, 18 Gr. 210; Hamilton v. Harrison, 46 U.C.Q.B. 127; Tidey v. Craib, 4 O.R. 696; Griffin v. Cranston, 1 Bosw. 281; Parkes v. St. George, 10 A.R. 496; Wood v. Scott, 55 Iowa 114; Walley v. Harris, 3 Terr. L.R. 161; Hennenfest v. Malchose, 3 W.L.R. 171; Credit Co. v. Pott, 6 Q.B.D. 295; Rogers v. Carroll, 30 O.R. 328; Commercial Bank, etc., v. Fehrenbach, etc., 4 Terr. L.R. 335. The omission to state the correct amount of the debt may be one of mistake, in which case it may be supported for the correct amount where the difference is comparatively small: A. E. Thomas, Ltd. v. Standard Bank, 1 O.W.N. 379, 548.

Forbearance of legal proceedings is a good consideration for a mortgage by a third person, though such person derive no actual benefit (Smith v. Algar, 1 B. & A. 603), but when there is no privity between the mortgagor and the party against whom the forbearance is exercised by the mortgagee, then such forbearance is not a sufficient consideration to sustain a mortgage: McGillivray v. Keefer, 4 U.C.Q.B. 342.

An undertaking to accept payment of a debt at a future date, and give time in the meanwhile to a mortgagor (Morton v. Bernard, Vaux. 7 A. & E. 19), and the abandoning a suit instituted to try a question respecting which the law is doubtful, are each a good consideration for a mortgage for a stipulated sum: Longridge v. Dorville, 5 B. & Ald. 117; Llewellyn v. Llewellyn, 15 L.J.Q.B. 4.

The suspension or withdrawal of an execution against the

goods of a mortgagor or a third person forms a sufficient consideration for a mortgage (Sugars v. Brinkworth, 4 Camp. 46; Road v. Jones, 1 Doug. (Mich.) 188; Radford v. Smith, 3 M. & W. 254, Cowp. 129; Atkinson v. Bayntun, 1 Bing. 444), and an agreement not to foreclose a mortgage is a good consideration for a second mortgage on the same property: Andus v. Nelson, 64 Barb. 362.

Pretended rights and claims which are void in law or equity will not supply a valid consideration. A release of all interest in an estate, reserving a lien for a debt, by a person who in fact had no interest except the lien, was held to be no consideration for a promise to pay the debt: Kaye v. Dutton (1844), 13 L.J. C.P. 183, 7 Man. & G. 807. The giving up of a security for a debt, after the creditor has released the debt, is no consideration to the debtor; because the creditor has no longer any right to retain it: Cowper v. Green (1841), 10 L.J. Ex. 346, 7 M. & W. 633. So forbearance of suit where there is no cause of action or no party liable to be sued is no consideration; as forbearing to sue an heir on the bond of his ancestor in which he was not bound (Barber v. Fox (1670), 2 Wms. Saund. 418); forbearance by the assignee of a bond, upon which by reason of equities subsisting between the obligor and the assignor he has no right to sue: Graham v. Johnson (1869), 38 L.J.C. 374, L.R. 8 Eq. 36.

Forbearance by a creditor to sue the debtor upon the latter's promise to give security for an existing debt prevents the transaction from being *nudum pactum*: Alliance Bank v. Broom, 2 Drew. & Sm. 289. This will also apply to a receiver, who, under authority of Court to enforce claims in behalf of creditors, grants the debtor an extension of time in which to pay the debt: Willatts v. Kennedy, 1 M. & Scott 35.

But the extension of an option is not enforceable unless supported by an additional consideration to that for which the option was given: Archdekin v. McDonald, 1 D.L.R. 664; Adamson v. Vachon, 8 D.L.R. 240.

A promise for the surrender of a lease at will is not a suffi-

cient consideration, for the lessor might determine the lease at any moment, unless there was a doubt whether it was a lease at will or for years. Hence, the giving up of a questionable right is a sufficient consideration to support a chattel mortgage. Any act of the mortgagee, however, from which the mortgagor derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the mortgagee, is a sufficient consideration to support a mortgage: Bunn v. Guy, 4 East 190; Longridge v. Dorville, 5 B. & Ald. 117.

A *bonâ fide* compromise of a real claim is a good consideration, whether the claim would have been successful or not: Greenwood v. Bancroft, 2 D.L.R. 417, following Callisher v. Bischoffsheim, L.R. 5 Q.B. 449; see also Brandon Electric Light Co. v. Brandon, 1 D.L.R. 793; Cook v. Wright, 1 B. & S. 559; Ockford v. Barelli, 25 L.T. 504; Miles v. New Zealand Alford Estate Co., 32 Ch.D. 266.

Though forbearance is generally a good consideration as between the parties to an instrument, it sometimes fails, as between creditors, or an assignee in insolvency. In Ex parte Cooper, 10 Ch. D. 313, a trader executed a bill of sale of substantially the whole of his property to secure a debt for which the grantee had secured a judgment some eight weeks before; and also to secure another debt which he owed the grantee. The grantor had, the day after the judgment was entered, written a letter to the grantee, undertaking, in the event of his not issuing execution on the judgment, to execute to him, on demand, a bill of sale to secure the judgment debt and such other sums as he owed him. It was attempted to sustain the bill of sale as against the trustee in liquidation, on the consideration of forbearance in not issuing execution on the judgment and seizing. But it was held that no equivalent had been given for the bill of sale, and so it was void: Ex parte Cooper, 10 Ch.D. 313: Woodhouse v. Murray, 4 Q.B. 27, Cowp. 129. And the Court, recognizing the authority of this case, in Ex parte Payne, 11 Ch. D. 539, held, that under a bill of sale of the whole of

the grantor's property, given for value, the forbearance of the grantee to seize the property comprised in such bill of sale, was not, as against the trustee in bankruptcy of the grantor, good consideration for the giving of a new bill of sale in lieu of the first; but the new bill of sale given under such circumstances without any fresh advance to the grantor, was an act of bankruptcy, and void as against the trustee in bankruptcy of the grantor. It made no difference to the result of this case, that the first bill of sale was invalid: Ex parte Stevens, L.R. 20 Eq. 786.

This principle will, of course, operate conversely where the bill of sale is made by a third party for the purpose of suspending execution against the judgment debtor: Radford v. Smith, 3 M. & W. 254; Atkinson v. Bayntun, 1 Bing. 444.

But the consideration for a mortgage will fail if it is the abandonment of a suit where the mortgagee has no cause of action; for instance, where the question to be tried is one respecting which the law is certain, and the mortgagor could in no event be made liable: Wade v. Simeon, 15 L.J.C.P. 114; Graham v. Johnson, L.R. 8 Eq. 36; Longridge v. Dorville, 5 B. & Ald. 117. Forbearance to sue is no consideration where clearly there was originally no cause of action: Lloyd v. Lee, 1 Stra. 94; Longridge v. Dorville, 5 B. & Ald. 117.

If a party is illegally arrested, his release is no consideration for a mortgage given under arrest to secure the debt: Atkinson v. Settree, Willes 482.

A mortgage given to a sheriff or warden of a jail to secure the payment of costs in a criminal proceeding, by a person committed to jail, until the sum should be paid, is without consideration and void, because the officer has no authority to take such a mortgage, or to release the prisoner: McCartney v. Wilson, 17 Kans. 294; Moher v. O'Grady, 4 L.R. Ir. 54; Kerr v. Brunton, 24 U.C.Q.B. 390. But a security indemnifying a bailiff making seizure is valid: Robertson v. Broadfoot, 11 U.C. Q.B. 407. Where the consideration is illegal as against public

policy, the mortgage is void, as, for instance, when the real consideration is to secure a member of the legislature to vote in a particular way: Marshal v. Baltimore & Ohio R.R. Co., 16 Howard (U.S.) 314; Pingry v. Ashburn, 1 Aik. (Vt.) 264, 15 Am. Dec. 676; Usher v. McBratney, 3 Dill. (U.S.) 385; Reed v. Pepper Tobacco Warehouse Co., 2 Mo. App. 82; Spalding v. Ewing, 149 Pa. 375; Houlton v. Nichol, 93 Wis. 393; Richardson v. Scotts Bluff County, 59 Neb. 400; see also note to Houlton v. Dunn (Minn.), 30 L.R.A. 737.

But money advanced by railway promoters to a member of Parliament by way of compensation in respect of the damage that may be done to his land by reason of a railway passing through it, and that he should therefore not oppose the passing of the bill to establish the railway, is, in the absence of corrupt motive, a valid consideration: Simpson v. Howden (Lord), 9 Cl. and F. 61; Shrewsbury (Earl) v. North Staffordshire Ry., L.R. 1 Eq. 593, 613; see Can. Cr. Code (1906), sec. 156; see also Taylor v. Chichester, etc., R. Co., L.R. 4 H.L. 628, reversing 16 W.R. 147; Edwards v. Grand Junction Ry., 7 Sim. 337; Vauxhall Bridge Co. v. Spencer, Jac. 64.

Where both parties enter into a contract from an improper and illegal motive, then that motive becomes the real cause of the contract and is therefore illegal: Bedard v. Phœnix Land and Improvement Co. and Drolet, 8 D.L.R. 686, 43 Que. P.C. 50; Gaslight and Coke Co. v. Turner, 5 Bing. 666, affirmed 6 Bing. 324. Hence, where a contract or an instrument which fails in a Court of law by reason of its illegality, it will not be enforced in equity because money has been paid and received in respect of it. Equitable terms can be imposed on a plaintiff seeking to set aside an illegal contract as the price of the relief he asks; but as to any claim sought to be actively enforced, the defence of illegality is as available in a Court of equity as it is in a Court of law: Re Cork and Youghal Ry., L.R. 4 Ch. 748; Thomson v. Thomson, 7 Ves. 470; Roche v. O'Brien, 1 Ball. & B. 338.

A promise to forbear from bidding at a public sale; security to a magistrate by a supposed owner for the restoration of stolen goods or to a sheriff for a fixed salary to be paid to him by his deputy; a sale in furtherance of a fraudulent scheme; a promise to marry by a person already married; the furtherance of an immoral purpose, or the stifling of prosecution, are considerations against public policy and illegal: Waddel v. McCabe, 4 O.S. 191; Ballard v. Pope, 3 U.C.Q.B. 317; Foott v. Bullock, 4 U.C.Q.B. 480; Bonisteel v. Saylor, 17 O.A.R. 505; Moon v. Clarke, 30 U.C.C.P. 417; Clark v. Hagar, 22 Can. S.C.R. 510, affirming 20 O.A.R. 198, 21 O.R. 27; Leggatt v. Brown, 29 O.R. 530, 30 O.R. 225, following Rawlings v. Coal Consumers' Association (1874), 43 L.J.M.C. 111; Windhill Local Board of Health v. Vint, 45 Ch.D. 351; Jones v. Merionethshire Permanent Benefit Building Society, [1891] 2 Ch. 587; People's Bank of Halifax v. Johnson, 20 Can. S.C.R. 541; Miller v. Moore, 17 W.L.R. 548 (Alta.), following Pearce v. Brooks, L.R. 1 Ex. 213, and Clark v. Hagar (*supra*), Chipman v. Whitman, 11 E.L.R. 313; Frigon v. Cossette, 16 Que. S.C. 340; The Queen v. McNutt, 33 N.S.R. 14; McKiggin v. McCone, 16 Que. S.C. 126; Byron v. Tremaine, 31 N.S.R. 425.

So the services of a physician unlicensed to practise are illegal: Rugg v. Lewis, 17 Que. S.C. 206. Likewise services for the procurement of a public office: Belize v. Godbout, 40 Que. S.C. 469; Pickard v. Bonnar, Peake 289; Stackpole v. Earle, 2 Wils. 131; Hanington v. Duchatel, 1 Bro. C.C. 124; Hartwell v. Hartwell, 4 Ves. 815.

A sale or mortgage in violation of the Temperance Act is invalid: St. Charles & Co. v. Vassallo, 45 N.S.R. 195, distinguishing Craigellachie v. Bigelow, 37 N.S.R. 482. Or where the transaction is in furtherance of gambling or wagers or manipulations by chance or margins: Wilks v. Matthews, 7 D.L.R. 395; Marquis v. Cantin, 42 Que. S.C. 1[illegible]; L'Association de St. Jean-Baptiste, etc. v. Brault, 30 Can. S.C.R. 598.

Similarly, where the object aimed at is the formation of a

combination or conspiracy to destroy all competition in any trade or business in an unreasonable manner: Consumers' Cordage Co. v. Connolly, 31 Can. S.C.R. 244; Badische Anilin Fabrik v. Schott, [1892] 3 Ch. 447; Ward v. Byrne, 5 M. & W. 548; Allsopp v. Wheateroft, L.R. 15 Eq. 59; Hinde v. Gray, 1 Man. & G. 195; Mallan v. May, 11 M. & W. 853; Baker v. Hedgecock, 39 Ch. D. 520; Perls v. Saalfeld, [1892] 2 Ch. 149; Davies v. Davies, 36 Ch.D. 359.

But a restraint limited to a partienlar locality wherein the business is carried on for the purpose of obtaining the commodities at cheaper prices is not void at common law: Weidman v. Shragge, 2 D.L.R. 734, 46 Can. S.C.R. 1, reversing 20 Man. L.R. 178; Collins v. Locke, [1879] 4 A.C. 674; Mogul Steamship Co. v. McGregor, [1892] A.C. 25; Nordenfeldt v. Maxim-Nordenfeldt & Co., [1894] A.C. 535; Elliman v. Carrington, [1901] 2 Ch. 275; Rex v. Gage, 18 Man. L.R. 175.

A security to indemnify bail against the consequences of the non-appearance of the accused, even though the latter committed no default, is against public policy and therefore illegal, and cannot be enforced: Wilson v. Strugnell, 7 Q.B.D. 548, overruled as to the last point in Herman v. Jeuchner (or Zeuchner), 15 Q.B.D. 561, reversing 1 Cab. & E. 364; Langlois v. Baby, 11 Gr. 21.

A moral obligation to pay is a sufficient consideration: Ex p. De Gronchy, Re Butler, 3 Mont. & Ayr. 27. A debt which is barred by the Statute of Limitations is of course a good consideration for a mortgage, and it is laid down in Merrills v. Swift (18 Conn. 268), that it will be valid as against creditors.

A mere moral consideration, as such, will not support a contract. It can only revive a precedent good consideration, which might have been enforced at law, through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original cause of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute: Eastwood v. Kenyon, 11 A. & E. 438. The doctrine of moral obligation is

evidently based on the theory that the waiver by a party of a benefit conferred by law, such as obligations discharged in bankruptcy or debts barred by limitations or benefits for which the law implies no use, is not an act of gratitude or naked pact, but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely but principally for the public convenience: Mills v. Wyman, 3 Pick. (Mass.) 207.

A mortgage to secure future advances to be made to a firm, will not cover advances made to the firm's successor after dissolution of the original firm (Monnot v. Ibert, 33 Barb. 24), but it will cover advances made to a firm before and after the introduction of a new member: Lawrence v. Tucker, 23 How. 14. The onus of proving absence of consideration in a chattel mortgage is upon the person setting it up: McLorg v. Cook, 7 Terr. L.R. 371. A mortgagee who lends his paper to the mortgagor, and after the mortgagor is adjudged bankrupt buys up the paper at a discount, cannot hold his security for the full amount of money represented by the paper, but only for the amount actually paid therefor in buying it up: Ex parte Ames, 1 Lowell 561.

It has long been established that a past debt is a valuable and sufficient consideration for a mortgage given in good faith: Gooderham v. Hutchinson, 5 U.C.C.P. 248. There is in general no distinction between a pre-existing debt as a consideration, and an advance of money at the time of the execution of the mortgage (Evans v. Morley, 21 U.C.Q.B. 547; Kranet v. Simon, 65 Ill. 344; McLaughlin v. Ward, 77 Ind. 383), and the consideration is none the less a good one because the mortgage is executed by one of the members of a partnership to secure the debt of the firm: Cooley v. Hobart, 8 Iowa 358; Hale v. The People's Bank of Halifax, 2 N.B. Eq. 433. The money consideration recited in the instrument may be in the nature of an obligation or acknowledgment of debt delivered subsequent to the execution of the instrument: Berry v. Story, 2 C.L.R. (Eng.) 815.

Ordinarily a mortgage given by a debtor who knows that he is unable to pay all his debts in full, is not void as a preference to the mortgagee over other creditors if given as a result of pressure and for *bonâ fide* debt, and if the mortgagee is not aware of the debtor being in insolvent circumstances: McClary v. Howland, 9 B.C.R. 479; Gibbons v. McDonald, 20 Can. S. C.R. 587; Molsons Bank v. Halter, 18 Can. S.C.R. 88; Stephens v. McArthur, 19 Can. S.C.R. 446; Cook v. Rogers, 26 Gr. 599.

But a chattel mortgage for a pre-existing debt, executed three days before an assignment for insolvency, constitutes an unjust preference which will be set aside in a creditors' action, but the mortgagee will be entitled to rank *pro rata* as an ordinary creditor: Spotton v. Gillard, 18 O.W.R. 510.

Though a debt may not be due, yet it will be a good consideration for a mortgage given by a third party to the person to whom the debt is owed (Dickenson v. Clemow, 7 U.C.Q.B. 421), for instance, the execution by a wife of a chattel mortgage on her property as security for the purchase-price of goods sold to her husband: Reeves v. Friel, 4 Sask. L.R. 198; Euclid Ave. Trust Co. v. Hohs, 24 O.L.R. 447, affirming 23 O.L.R. 377, following Bank of Montreal v. Stuart, [1911] A.C. 120, which overrules Cox v. Adams, 35 Can. S.C.R. 393, and distinguishing Chaplin & Co. v. Brammall, [1908] 1 K.B. 233, and Turnbull v. Duval, [1902] A.C. 429.

For the purpose of upholding a mortgage, a past debt, being a consideration, may be regarded as a present debt to be paid at a future time, when the mortgage states the debt in the proviso as becoming due and payable at a future day, and the consideration for the transfer of the property is stated to be money then acknowledged to be paid therefor: Farlinger v. McDonald, 45 U.C.Q.B. 237.

CHAPTER IV.

Fraud and Pressure.

An essential requisite to the validity of conveyances is that they be clear from fraud or collusion, which are things that the law universally abhors.

It is in the consideration of an instrument that the element of fraud, when fraud exists, is generally to be found. Fraud vitiates all things, though it must be remembered that he who perpetrates a fraud cannot claim any benefit through his own act.

No limits to relief against fraud can be prescribed, nor can the species of evidence receivable in support of it be strictly defined, but from time to time statutes have been passed to overcome the ingenuity of mankind, which is ever anxious, ever striving, to entangle in its meshes the unwary and the inexperienced.

The first statute relating to fraud in regard to goods and chattels, is 13 Elizabeth, ch. 5, passed in 1570, and made perpetual by 29 Elizabeth, ch. 5; or the provincial legislation supplemental thereto, giving it an extended application; see R.S.O. 1911, ch. 24, and R.S.O. 1897, ch. 334, secs. 2 and 6. The statute enacts that every conveyance of . . . goods and chattels by writing or otherwise, made with the intent to defraud creditors or others of their actions, suits, debts, accounts, damages, forfeitures, etc., shall be (as against that person, his heirs, executors, administrators and assigns, whose actions, etc., are, or might be, in anywise disturbed, delayed or defrauded) utterly void; but it also provided that nothing contained in the statute

itself should make it extend "to any estate or interest in . . . goods or chattels, had, made, conveyed or assured, or thereafter to be had, made, conveyed or assured, which estate or interest is, or shall be, upon good consideration and *bonâ fide*": Patterson v. Palmer, 19 W.L.R. 422. Thus it was settled that a good consideration alone would not suffice to prevent the application of the statute; the conveyance was also required to be made in good faith. Hence, in Twyne's case (Smith's Leading Cases, 1; 3 Coke 80), it was resolved that, although there was a debt really due from Twyne to Pierce, yet the conveyance was not within the proviso of the Statute of Elizabeth, because it was not also made *bonâ fide*. Under the chattel mortgage Acts conveyances are likewise required to be *bonâ fide*, and for good consideration, and the bargainee must in his affidavit shew these two qualities to exist. For this reason it may not be out of place to here refer more fully to Twyne's case, the facts of which were: One Pearce was indebted to Twyne in £400, and was also indebted to C. in £200. C. brought an action of debt against Pierce, and, pending the writ, Pierce, being possessed of goods and chattels of the value of £300, made in secret a general deed of gift of all his goods and chattels, real and personal, whatsoever, to Twyne, in satisfaction of his debt. Nevertheless, Pierce continued in possession of the said goods, and some of them he sold; he shore the sheep, and marked them with his own mark, and afterwards C. obtained judgment against Pierce, and had a *fieri facias* directed to the sheriff, who, by force of the said writ, came to make execution of the said goods; but divers persons, by command of the said Twyne, did, with force, resist the sheriff, claiming them to be the goods of the said Twyne, by force of the said gift, and openly declared, by the commandment of Twyne, that it was a good gift, and made on good and lawful consideration. And whether this gift, on the whole matter, was fraudulent and of no effect by the said statute of 13 Elizabeth or not, was the question, and in this case divers points were resolved.

(1) That this deed had the signs and marks of fraud, because the gift is general, without exception of his apparel, or any thing of necessity, for it is commonly said "*quod dolosus versatur in generalibus.*"

(2) The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

(3) It was made in secret, "*et dona clandestina sunt semper suspiciosa.*"

(4) It was made pending the writ.

(5) Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud.

(6) The deed contains that the gift was made honestly, truly and *bonâ fide; "et clausulæ inconsuet semper inducunt suspicionem."*

Secondly, it was resolved, that notwithstanding that there was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said statute of 13 Elizabeth, by which it was provided that the said statute shall not extend to any estate or interest in the land, etc.; goods or chattels, made on a good consideration and *bonâ fide*, for although it is on a true and good consideration yet it is not *bonâ fide*, for no gift shall be deemed to be *bonâ fide* within the said proviso which is accompanied with any trust.

It is not difficult to perceive how very easily the statute could be evaded, were an assignment permitted to stand, when based simply upon a good consideration without the accompanying attribute "good faith."

A money consideration might, in any case, be paid, but paid only in order to obtain chattels of the debtor, and preserve them thus from seizure, or the amount might be wholly disproportioned to the value of the goods, which, of itself, is such a suspicious circumstance as to justify a strong conviction that the

object of the assignment was not for the sake of the creditor intended to be secured, but for the convenience and protection of the debtor: Fleming v. McNaughten, 16 U.C.Q.B. 194; Reinhardt Brewery Ltd. v. Nipissing Coca Cola Bottling Works, 8 D.L.R. 261. Formerly, a creditor might be diligent in securing his debt, by chattel mortgage from his debtor, and the instrument could not be impeached, if otherwise unimpeachable, simply because the parties intended to defeat thereby the execution of a judgment creditor: Wood v. Dixie, 7 Q.B. 896, 9 Jur. 798; Eveleigh v. Purssord, 2 Mc. & Rob. 539; Gottwalls v. Mulholland, 15 U.C.C.P. 62, 3 E. & App. R. 194; Dalglish v. McCarthy, 19 Gr. 578. And this was the law under the Statute of Elizabeth, ch. 5 (*per* Boyd, C., Clark v. Hamilton Provident, 9 O.R. 177, at 179); but, now, if a man, knowing that a creditor has obtained a judgment against his debtor, procures the debtor to give him a mortgage upon his goods, to secure a debt due, in order to defeat the creditor's rights, then such mortgage is void. This was the construction put upon the statute 13 Elizabeth, ch. 5, by Lord Mansfield: Worseley v. De Mattos, 1 Burr. 467.

Unless the instrument is protected by reason of *bonâ fides*, and of want of notice or knowledge on the part of the mortgagee or bargainee, of any outstanding equities against, or an intent to defraud by the mortgagor or bargainor the same will be void under the statute, even though it may have been executed upon a valuable consideration, and with the intention, as between the parties thereto of actually transferring to the mortgagee or bargainee the interest expressed to be transferred: Stephens v. McArthur, 19 Can. S.C.R. 446; Cole v. Racine, 4 O.W.N. 1327, 11 D.L.R. 322.

When this statute fails in application, then, in order to work a fraudulent preference of a creditor, there must be concurrence of intent so to do on the part of both debtor and creditor: Burns v. Mackay, 10 O.R. 167; Hepburn v. Park, 6 O.R. 472; Brayley v. Ellis, 9 O.A.R. 565. Even suspicion directed

against the person preferred is not sufficient from which to conclude a fraudulent design. The Court requires affirmative evidence of fraud, or some controlling circumstantial evidence leading to that conclusion, before it will act on mere suspicion: *per* Boyd, C., Burns v. Mackay, 10 O.R. 167; Ross v. Laird, Cassels' S.C. Dig. 351; Coutlée's S.C. Dig. 619.

A mortgagee is a purchaser *pro tanto*, and a purchaser for value in good faith without notice is within the protection of section 6 of the Statute of Elizabeth, or as re-enacted and amended by R.S.O. 1911, ch. 24, and R.S.O. 1897, ch. 334, secs. 2 & 6; Mosher v. O'Brien, 37 N.S.R. 286.

The exact quantum of debt which may invalidate a conveyance or mortgage of goods and chattels may vary according to circumstances; but the insolvent circumstances of a vendor or mortgagor will not, *per se*, invalidate a bill of sale or mortgage: Hersee v. White, 29 U.C.Q.B. 232; Smith v. Pilgrim, 2 Ch.D. 127. It is only a circumstance raising a presumption that the instrument was executed with the intent to defraud, just as is the fact of a mortgagee taking a mortgage on all a debtor's property of the most minute character as security for a debt wholly disproportioned to the value of the property mortgaged: Fleming v. McNaughten, 16 U.C.Q.B. 194; In re Pearson, Ex parte Stephens, 3 Ch.D. 807; Freeman v. Pope, L.R. 5 Ch. 538; Crossley v. Elworthy, L.R. 12 Eq. 158; Mackay v. Douglas, L.R. 14 Eq. 106; Ware v. Gardner, L.R. 7 Eq. 317.

Under the statutes of Elizabeth the circumstance of the mortgaged property covering the whole or part only of a mortgagor's goods is immaterial. If the mortgage is *bonâ fide*, that is if it is not a mere cloak for retaining a benefit to the grantor, it is a good mortgage under the Statute of Elizabeth: Alton v. Harrison, L.R. 4 Ch. 622: Ex parte Games, 12 Ch. D. 314.

And in order to sustain its validity, oral evidence to shew a different consideration from that expressed in the deed is admissible: Halifax Banking Co. v. Matthew, Cameron's S.C. Cas. 251.

The presumption of fraud may be rebutted in various ways: for instance, by a threat of a criminal prosecution or other pressure from his creditor, and therefore it was held that a mortgage by an insolvent, or by one on the eve of insolvency, executed by a debtor under pressure by the creditors, as, for instance, a threat of criminal prosecution to secure a pre-existing debt, was not a fraudulent preference, and that the intent with which the instrument is given, being a question for the jury, the circumstances of pressure attending its execution ought not to have been withdrawn from them: Bank of Toronto v. McDougall, 15 U.C.C.P. 475; Smith v. Pilgrim, 2 Ch.D. 127; see also Molsons Bank v. Halter, 18 Can. S.C.R. 88.

An express power given to a chattel mortgagor to sell certain chattels does not alone raise any presumption of fraud if not in excess of the implied power if the mortgage is of business assets of a going concern: Springer v. Graveley, 3 Terr. L.R. 120, affirming 34 C.L.J. 135.

An absolute bill of sale of the property of a debtor given to a creditor as security for past indebtedness and a further advance is not void under the statute 13 Elizabeth in the absence of an intent to defraud other creditors though it does in fact delay and hinder the other creditors: Beliveau v. Miller, 1 D.L.R. 819; Mulcahy v. Archibald, 28 Can. S.C.R. 523.

Pending an execution, but before seizure by the sheriff, an assignment by an execution debtor of his interest in the assets of a partnership for a past debt exceeding the amount of the assignor's interest in the firm's business is not invalid under the Statute of Elizabeth, in the absence of an intent to defraud: Rennie v. Quebec Bank, 3 O.L.R. 541.

A bill of sale by a husband of his personal assets to his wife in consideration of a mortgage of her separate real estate to secure his creditors, both instruments being executed at the same time, constitutes a *bonâ fide* transaction as against his creditors: Boulton v. Boulton, 28 Can. S.C.R. 592; Fraser v. Macpherson, 34 N.B.R. 417.

Services rendered by a child during minority may constitute a sufficient consideration to support a conveyance under a family settlement by the parent to the child as against the former's creditors: Jack v. Kearney, 10 D.L.R. 48, reversing 4 D. L.R. 836, 4 N.B. Eq. 415; see Dyer v. McGuire, 4 N.B. Eq. 203.

In Campbell v. Patterson; Mader v. McKinnon, 21 Can. S. C.R. 645, the Supreme Court of Canada sustained the validity of a mortgage given by an insolvent debtor for an actual *bonâ fide* advance, though the mortgagee knew of the debtor's insolvency, but had no knowledge of the mortgagor's fraudulent motive in procuring the loan, or the objects for which the money was to be applied. This decision affirmed the Court of Appeal of Ontario as to the validity of the mortgage and overruled it in so far as the case of Commercial Bank v. Wilson, 3 E. & A. Rep. 257, was followed, on the theory that that case was decided under the Statute of Elizabeth, and, therefore, had no application to the Ontario statute; see also Davies v. McM Coutlée's Dig. Can. S.C. (1904), 624.

But where an insolvent firm sells its property, subject to a right of redemption, to a person who is aware of its insolvency, and uses the proceeds to pay certain creditors to the prejudice of the others, the sale will be annulled at the instance of the latter as being in fraud of their rights: Landry v. McCall, 6 D.L.R. 793, 41 Que. K.B. 348; Constantineau v. Buist, 18 Rev. de Jur. 40.

A bill of sale given by a husband to his wife to secure advances made to him out of a fund composed of sums that he had furnished to her for savings will be treated as a gift, and, therefore, void against creditors: Cordingley v. MacArthur, 6 B.C.R. 527. Nor is the validity of a bill of sale established against creditors if it is given by an insolvent debtor to his brother, who knew of his insolvency, upon the latter's undertaking to pay the creditors, in the absence of any actual advance of money or a *bonâ fide* performance of the agreement, and when the amount was not due and owing when the affidavit of *bonâ fides* was made: McCurdy v. Grant, 32 N.S.R. 520.

A mortgage by a trader in insolvent circumstances of his stock-in-trade, or book debts, to secure a debt is void against creditors: McCall v. McDonald, 13 Can. S.C.R. 247; Kloepfer v. Warnock, 18 Can. S.C.R. 701, affirming 15 O.A.R. 324. So, where there is no absolute contract to give a mortgage, i.e., the contract being alternative, either as a hire receipt or a chattel mortgage, a mortgage so given presupposes additional security, from which an intent to defraud creditors is inferable: Brown v. Lamontagne, 1 S.C. Cas. 20, distinguishing Clarkson v. Sterling, 15 O.A.R. 234.

A voluntary conveyance of property is void, under 13 Elizabeth, ch. 5, though the vendor was solvent when it was made, if it results in denuding him of all his property and so rendering him insolvent thereafter: Sun Life Assurance Co. v. Elliott, 31 Can. S.C.R. 91, reversing 7 B.C.R. 189.

The doctrine of pressure, which obtained before the insolvency laws, now occupies the same position since their repeal (Brayley v. Ellis, 9 O.A.R. 565, 18 C.L.J. 96; Gibbons v. McDonald, 20 Can. S.C.R. 587), and the fact that a mortgage is obtained by pressure is evidence that it is free from fraud; but pressure will not validate a security, unless it be a *bonâ fide* pressure to secure a debt, and without a view of obtaining a preference over the other creditors: Powell v. Calder, 8 O.R. 505; Ex parte Topham, L.R. 8 Ch. 614; Ex parte Hall, 19 Ch.D. 580; Molsons Bank v. Halter, 18 Can. S.C.R. 88.

"Pressure" need be nothing more than a request or mere demand by the creditor, without even a threat of legal proceedings, to which the debtor is supposed reluctantly to yield: Ex parte Topham, L.R. 8 Ch. 619; Whitney v. Tobey, 6 O.R. 54; Kenys v. Brown, 22 Gr. 10; McFarlane v. McDonald, 21 Gr. 319; Clemmow v. Converse, 16 Gr. 547; Stephens v. McArthur, 19 Can. S.C.R. 446. Pressure saves a transaction from being voluntary, when it originates in the will of the creditor, at whose instance it is done, and not in the will of the debtor, who only yields to the solicitation of his creditor, and it is not done with intent to prefer, etc.; if the motive is to escape the pres

sure which is exercised, or even to comply with a *bonâ fide* demand which is made, and not to prefer one creditor to another, even though that may be the necessary and obvious effect of what is done (*per* Patterson, J.A., Davidson v. Ross, 24 Gr. 64; Segsworth v. Meriden Silver Plating Co., 3 O.R. 413; Slater v. Oliver, 7 O.R. 158, 20 C.L.J. 173), unless a preference is satisfactorily proved to be the voluntary act of the debtor, it is not to be deemed fraudulent (Ex parte Craven, L.R. 10 Eq. 655; Totten v. Bowen, 8 O.A.R. 602), and where the doctrine of pressure can be applied the transaction cannot be considered voluntary. But when the proposal from the creditor for security is not reluctantly yielded to by the debtor, but his assent only given when he is informed the transaction would protect him against all his creditors, then the doctrine of pressure has no application, and the mortgage is treated as a fraudulent preference: McDonald v. McCall, 9 O.R. 185; 12 A.R. (Ont.) 593, affirmed 13 Can. S.C.R. 247. A material element to be considered in order to ascertain whether the doctrine of pressure applies or not, is whether or not the debt is due, in point of time, to the creditor who obtains the security; if not due then, the power to exercise the pressure is absent, and so the doctrine cannot be invoked: Strachan v. Barton, 11 Ex. 647. Another circumstance which deprives a creditor of the benefit of this doctrine, is his knowing that the state of the debtor is financially hopeless, when, in such a case, the pressure resolves itself into this, that the creditor suggests an evasion of the policy of the law which will enable him to obtain priority and preference over other creditors, and the debtor acquiesces in and adopts the suggestion, then there exists a joint act of such a character as to be held collusive (*per* Boyd, C., Meriden Silver Co. v. Lee, 2 O.R. 451; see Ex parte Hall, 19 Ch.D. 585; Burns & Lewis v. Wilson, 28 Can. S.C.R. 207, distinguishing Gibbons v. Wilson, 17 O.A.R. 1); for, without a concurrence of intent on the part of the debtor and creditor taking the mortgage, the transaction cannot be avoided on the ground of being a fraudulent preference: McRoberts v. Steinoff, 11 O.R. 369.

The execution by an insolvent debtor of a chattel mortgage to his surety or for the latter's benefit, for the purpose of enabling the surety, who had knowledge of the debtor's insolvency, to discharge his guaranty obligation, is an unlawful preference over creditors: Steeher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

But where the mortgage is given as a result of pressure and of a *bonâ fide* debt, and the mortgagee is not aware of the debtor's insolvency, and, even though it be given by a debtor who knows that he is unable to pay all his debts in full, it will not be void as a preferenee: Gibbons v. McDonald, 20 Can. S. C.R. 587, following Molsons Bank v. Halter, 18 Can. S.C.R. 88; Stephens v. McArthur, 19 Can. S.C.R. 446. And this notwithstanding that the mortgage comprises the whole of the debtor's property: Adams and Burns v. Bank of Montreal, 32 Can. S.C.R. 719, 8 B.C.R. 314, from whieh latter deeision the Privy Council refused leave to appeal, see 8 B.C.R. 337.

A mortgage by a debtor to secure the payment of a loan made to assist in the payment of a composition with his creditors, or for the purpose of effecting an extension of time within whieh to pay, constitutes no fraudulent preference, and is therefore valid against creditors: Brossard v. Dupras, 19 Can. S.C.R. 531; Long v. Hancock, 12 Can. S.C.R. 532, reversing 12 O.A.R. 137; see Sutherland v. Beiard, 13 Que. K.B. 128.

An assignment, by way of security, of an interest in profits expected to be earned under a eontract for the performance of work eonstitutes no unjust preferenee if made under pressure, as such profits do not amount to assets seizable by creditors at the time the assignment was made: Blakeley v. Gould, 27 Can. S.C.R. 682.

A chattel mortgage although given under circumstances entitling a creditor to have it set aside as a fraudulent preference, will, nevertheless, be held valid as to any goods covered by it whieh would be exempt from seizure under execution: Bates v. Cannon, 18 Man. L.R. 7.

The giving of a chattel mortgage in pursuance of a pre-existing agreement as security for goods supplied by the mortgagee to a person who is about to engage in a hazardous business constitutes no unjust preference: Power v. Munro, 5 D.L.R. 577.

A creditor holding ample security is not a creditor who requires protection from fraudulent preference, and though another creditor may be otherwise secured by the debtor, the latter transaction will not be deemed a fraudulent preference as against the first creditor; but should the latter be insufficiently secured then as to the deficiency he may invoke the law as to fraudulent preference: Clark v. Hamilton Provident, 9 O.R. 177; Sun Life Assurance Co. v. Elliott, 31 Can. S.C.R. 91, reversing 7 B.C.R. 189.

The statutes relating to bills of sale and chattel mortgages positively make void all instruments within the purview of the Act unless there is a full compliance with its provisions; the result is, therefore, that creditors are not debarred from attacking a mortgage for want of registration, because they already have had notice of the existence thereof: Edwards v. Edwards, 2 Ch.D. 291; National Trust Co. v. Trust and Guarantee Co., 5 D.L.R. 459, 26 O.L.R. 279; Hope v. Parrott, 7 O.L.R. 496.

The utmost good faith must characterize the dealing between mortgagor and mortgagee. If a mortgagor, in violation of the terms of the mortgage, sells any of the property mortgaged, or in any way parts with it, the mortgagee may follow and recover it from anyone purchasing it, provided, of course, that the mortgage under which he claims is duly recorded so as to effect notice.

There is nothing, however, fraudulent or wrong in a mortgagor selling mortgaged property subject to the mortgage; but the terms of a mortgage usually are such as to require the consent of a mortgagee to any such sale. If a mortgagee attempts to take possession before his right to do so accrues, he will be restrained, or the mortgagor will be entitled in an action for damages; but when such an action will lie, the quantum of dam-

ages is not to be estimated as if the action had been against a third party; the value of the goods is not the proper measure of damage, but rather the extent of the mortgagor's interest in the goods and the damages done to such interest: Bingham v. Bettison, 30 U.C.C.P. 438; Chinery v. Viall, 5 H. & N. 288; Brierly v. Kendall, 17 Q.B. 937; McAulay v. Allen, 20 U.C.C.P. 417.

The Statutes of Ontario 1 Geo. V. ch. 25, sec. 51, provide for redress being had in damages by a purchaser or mortgagee against a seller or mortgagor of any chattels, real or personal, for fraudulent concealment of any deeds or incumbrances, or for falsifying pedigree.

The Criminal Code of Canada, 1906 (secs. 417, 419, 521) provides for the punishment criminally of a vendor or mortgagor for fraudulent concealment of deeds, or any incumbrance, or for falsifying any pedigree upon which the title to any chattels, real or personal, depends (see post). In Rex v. McDevitt, 17 Can. Cr. Cas. 331, it was held that sec. 421 of the Criminal Code (1908) has no application to a fraudulent sale for the purpose of defeating an unregistered equity of redemption. The transfer of a bank account to another's name for the purpose of defeating execution is a fraudulent disposition of property, and subject to criminal liability: Henn v. Smith, 6 D.L.R. 48.

In the event of a civil action being brought under the former of these two statutes, the point might arise which came before the Master of the Rolls in Wich v. Parker, 22 Beav. 59. The defendant, in any such action, might decline to answer questions in regard to the transaction, on the ground that he might incriminate himself, and expose himself to prosecution under the provisions of the latter statute. In Michael v. Gay, 1 Fos. & Fin. 410, during the trial, the Court expressly cautioned a witness that he was not bound to answer questions, which might expose him to prosecution under the 3rd section of the Statute of Elizabeth, which rendered a person convicted of a fraudulent

conveyance liable to imprisonment for the term of six months: see, however, Bunn v. Bunn, 12 W.R. 561.

It was held under 13 Elizabeth, ch. 5, that where a bill of sale was executed of chattel property from a debtor to his creditor, and the creditor agreed to leave the property in the possession of the debtor, this alone made the deed fraudulent: Edwards v. Harben, 2 T.R. 587.

There must have been a *bonâ fide* substantial change of possession. It is a mere mockery to put in another person to take possession jointly with the former owner of the goods: Wordall v. Smith, 1 Camp. 334. However, the rule laid down in Edwards v. Harben does not seem to have been followed in the subsequent cases, the tendency of which was to hold that the simple absence of transmutation of property was not of itself fraudulent, but only presumptive evidence of fraud, which could be rebutted, when there were circumstances which clearly showed that no fraud was intended: Latimer v. Batson, 4 B. & C. 652; Martindale v. Booth, 3 B. & Ad. 498; Reed v. Blades, 5 Taunt. 212; Fraser v. Murray, 34 N.S.R. 186, 37 C.L.J. 364; Macdona v. Swiney, 8 Ir. C.L.R. 73; Eastwood v. Browne, R. & M. 312; Weaver v. Joule, 3 C.B. 309.

The question of fraud in these cases is one of fact, and for the decision of a jury. The result of the presumption of fraud from possession remaining in the vendor or mortgagor at common law was such that it became necessary, in order to protect creditors and purchasers as well as the mortgagee, that some method should be adopted by which this presumption might be overcome, and the mortgagor permitted to remain in possession of his property and carry on his business; and in order that the public might have the means of ascertaining the position of a mortgagor with whom they contemplated doing business, the chattel mortgage Acts were passed. By the Act a mortgagor or bargainor is now permitted, without suffering from a presumption of fraud, to retain possession of the mortgaged or sold property; but this permission is dependent upon a due and proper compliance with the Act in all its provisions: Belanger v. Menard, 27 O.R. 209; Cookson v. Swire, 9 App. Cas. 664;

Chamberlain v. Green, 20 U.C.C.P., at p. 311. Where a mortgage is given in pursuance of an agreement that there shall be neither registration nor immediate possession, such mortgage will be held void *ab initio* on grounds of public policy: Clarkson v. McMaster, 25 Can. S.C.R. 96; Bentley v. Morrison, 44 N.S.R. 476. Possession is usually the primary test of ownership, and if a person who contracts for an interest in property fails to take possession or to observe the alternative, by a compliance with the statute, he must stand the consequences of his own neglect, for he would be bringing about the very mischief all the statutes are designed to prevent, viz., that of a man by his possession of property fraudulently appearing to the world as its owner, when in reality he is not: Kirk v. Chisholm 26 Can. S.C.R. 111.

It is obvious that security by way of mortgage, taken upon property perishable or consumable in its nature before the mortgage becomes due, is really of no value if the mortgagor is to have the possession of the property. If, with the knowledge and consent of the mortgagee, the mortgagor is to continue in possession and consume the property, and from his so doing it necessarily follows that the property will be consumed before the period arrives for the mortgagee to enforce his security, then *primâ facie*, the transaction is collusive and fraudulent against creditors: Robbins v. Parker, 3 Met. (Mass.) 117; see Bannon v. Bowler, 33 Alb. L.J. 216; McAllister v. Forsyth, 12 Can. S.C.R. 1. But the fraudulent intent is not so strong where the property, though consumable, is not left with the mortgagor or, if left with him, cannot with reasonable expectation be consumed before the mortgage falls due: Miller v. Jones, 15 N.Y. Bank Reg. 150.

The doctrine of pressure is one which more particularly concerns insolvency law and the law of assignments and fraudulent preferences. An interesting article on this doctrine in which its history in the English and Canadian Courts is exhaustively reviewed by Mr. C. B. Labatt, will be found in vol. Can. Law Journal 322-356.

CHAPTER V

THE PARTIES.

SHEPPARD, in his "Touchstone," Atherley's ed., p. 241, "Perkin's Grant," sec. 90, says: "All chattels personal are grantable from man to man *infinitum*, as trees, oxen, horses, plate and household stuff, and the like; also trees, grass and corn growing and standing upon the ground, fruit upon the trees, and wool upon the sheep's back is grantable."

Alienation is a common law right which is annexed to the property of every man in goods and chattels; and every one, who, at common law, is capable of entering into a contract is capable of being a party to a chattel mortgage or bill of sale.

Sheriffs derive their power from the common law, division Court bailiffs from statutory enactments. While the statute 9 Edw. VII. (Ont.) ch. 47, sec. 9, repealing 29 Car. II. ch. 3, sec. 16, R.S.O. 1897, ch. 338, sec. 11, part 5, Geo. II. (Imp.) ch. 7, sec. 4 (McIntosh v. McDonnell, 4 O.S. 195; Aldjo v. Hollister, 5 O.S. 739; Burnham v. Simmons, 7 U.C.Q.B. 196; [see 56 and 57 Vict. (Imp.) ch. 71, sec. 26(1)], establishes the time from which a superior or County Court writ binds goods, there is nothing in the statute or at common law which makes a Division Court execution bind goods, except from seizure. In Culloden v. McDowell, 17 U.C.Q.B. 359, Robinson, C.J., in his judgment, says: "The writ could not bind the property before it came into the bailiff's hands if indeed it could before an actual seizure was made under it, for it is not to be assumed that an execution from an inferior Court binds from the time of delivery to the bailiff." By sub-section 3 of sec. 9, ch. 47 (Ont.), it is now

expressly provided that an execution against goods issued out of a Division Court shall bind only from the time of seizure.

When goods are under actual levy a mortgage can still be made, the property passing to the mortgagee subject thereto, and the mortgagee will be entitled to any surplus after the execution creditor is satisfied: Appleton v. Bancroft, 10 Met. (Mass.) 231.

If at the time of the delivery of the writ to the sheriff the goods are subject to an overdue chattel mortgage, a *bonâ fide* purchaser from the execution debtor, before actual seizure under the writ, will acquire his interest in the property free from the execution: Allan v. Place, 15 O.L.R. 476.

However, the expression "goods and chattels" means only the tangible or corporeal assets of the execution debtor, and will not include debts or choses in action. A chose in action is not bound by an execution put in the sheriff's hands, but only by actual seizure made thereunder: Rennie v. Quebec Bank, 3 O.L. R. 541, affirming 1 O.L.R. 303; Dundas v. Dutens, 1 Ves. Jr. 196; Sims v. Thomas, 12 A. & E. 536; Read v. McLanahan, 47 N.Y. Sup. Ct. 275. Hence, in Rennie v. Quebec Bank, *supra*, it was held that the interest of a partner in the firm's assets is assignable pending an execution against him, and that no lien will arise against such assets until actual seizure by the sheriff. The effect of placing the execution in the sheriff's hands is to bind the goods of the partnership, so that they are liable to be seized, but where no seizure of any specific assets has been made, and all the assets of the partnership, having been sold, realized, and disposed of, the execution creditor loses any benefit which he might have derived from the seizure of specific assets and the sale thereunder of the undivided interest of the execution debtor therein. But as soon as a seizure by the sheriff is made, the execution creditor thereby acquires a lien, which is protected against the acts of the debtor or his insolvency: Re Hunter, 8 D.L.R. 102.

Conveyances by an infant are generally voidable by him

or his heirs, either before or on attaining majority: Gilchrist v. Ramsay, 27 U.C.R. 500; Featherston v. McDonell, 15 U.C. C.P. 162; Miller v. Ostrander, 12 Gr. 349; Mills v. Davis, 9 U.C.C.P. 510.

The policy of the law is generally to allow an infant to suspend his ultimate decision upon questions of benefit or injury until he is of legal capacity to bind himself as an adult.

In general, independently of statute, an infant's contract might either be void, if prejudicial to his interest; or voidable if for his benefit: Touch v. Parsons, 3 Barr. 1804; Allen v. Allen, 2 Dr. & Wor. 338; Mills v. Davis, 9 U.C.C.P. 510; Featherston v. McDonell, 15 U.C.C.P. 162; McCoppin v. McGuire, 34 U.C.Q.B. 157. It is now established that the deed of an infant, if not clearly prejudicial in his interests, is not void *ab initio*, but voidable on his attaining majority: Foley v. Canada Permanent, 4 O.R. 38; Brown v. Grady, 31 O.R. 73.

Security given by an infant to indemnify against loss or damage in respect of shares in a company purchased on the faith of his representations is void and not merely voidable, and cannot be affirmed by him after he has attained his majority: Beam v. Beatty (No. 2), 4 O.L.R. 554, reversing 3 O.L.R. 345.

If an infant has agreed to the contract on attaining his majority his heirs cannot then avoid it, but if he dies during his minority, they can do so, and also when, after having come of age, the infant dies without having affirmed the contract. Affirmation is merely the consent of the person when of full age.

If an infant purchase goods, and the property therein passes to and vests in him, and the purchase is presumably for his benefit, he takes the goods *cum onere*, that is, with the obligation to pay for them, and, if he gives a chattel mortgage for the whole or part of the purchase money, although he may disavow the mortgage, still the vendor will have a lien on the goods for his purchase money in whole or in part, and such lien will be preserved to the mortgagee through the medium of the mort-

gage: Grace v. Whitehead, 7 Gr. 591; Meyer v. Blackburn, 38 N.S.R. 50. So, if an infant buys a horse, and gives back a mortgage for the balance of the unpaid purchase money, he cannot repudiate the mortgage and keep the horse, or maintain an action against the mortgagee for taking the horse. In other words an infant cannot avoid a contract and at the same time affirm it: Heath v. West, 28 N.H. 101; Roberts v. Wiggins, 1 N.H. 73; Simoneau v. Hebert, 18 Rev. de Jur. 363; Sturgeon v. Starr, 17 W.L.R. 402 (Man.). Therefore, it is the rule that an infant who has bought personal property, and gives back a mortgage to secure the purchase money, may, upon coming of age, avoid the mortgage; but, by so doing, he annuls the sale to himself, and cannot claim the property by virtue of it. However, an infant can disaffirm a mortgage without returning the money borrowed upon it, though not so if the mortgage is given for purchase money, or in the purchase of articles necessary for his use; or rather it should be stated that in the former of these two cases, while the remedy on the covenant against the infant is gone, the subject-matter of the contract furnishes means by which the mortgagee may obtain a remedy; and, in the latter of these two cases, the law establishes the liability of an infant on his own contracts for necessaries, for his own use, to all intents and purposes the same as if he were an adult.

An indorser for an infant, who has paid a judgment upon the notes, and received in security a mortgage upon chattels that had been previously mortgaged as security for the notes, is entitled to hold the property as against a subsequent purchaser from the infant with notice (Knaggs v. Greene, 48 Wis. 601); but it will likely be found that one of a firm, who is an infant, cannot bind his shares by chattel mortgage: Powell v. Calder, 8 O.R. 511.

What acts will be considered a sufficient indication of intention to affirm or disavow a contract made during infancy depend greatly upon the surrounding circumstances of each case. In cases where an act has been actually performed, as where a

conveyance passing an estate has been executed by an infant, or in cases of continuing contract or representation, as when he holds himself out as a partner, he must do some distinct act in avoidance at or soon after he becomes of age or he will be held bound by acquiescence; but acts of less moment and significance may be sufficient to affirm than are required to avoid the conveyance of a minor: Foley v. Canada Permanent, 4 O.R. 38; Saunders v. Russell, 9 B.C.R. 321; London Manufacturing Co. v. Milmine, 15 O.L.R. 53; Great West Implement Co. v. Grams, 1 A.L.R. 411. The acts of avoidance must, however, be performed within a reasonable time after the full age of 21 years is reached, otherwise the lapse of time may be taken as a ratification of the contract made during infancy. Express repudiation of a contract must be made within a reasonable time of coming of age, otherwise silence will be held to be an affirmance of it: Foley v. Canada Permanent, 4 O.R. 38; Murray v. McKenzie, 23 O.L.R. 287; Birmingham v. Brabant, 3 Rev. de Jur. 169. What is a reasonable time must depend upon the circumstances of each case, for it is manifest a variety of preventions to disaffirmance might exist in one case that would be absent in another: Imes v. Blogg, 8 Taunt. 38; Slator v. Brady, 14 Ir. C.L. Ex. 61; Harris v. Wall, 1 Ex. 122; Mowson v. Blane, 10 Ex. 206; Featherston v. McDonell, 15 U.C.C.P. 162; Miller v. Ostrander, 12 Gr. 349; Brown v. Grady, 31 O.R. 73. In Mitchell's case (L.R. 9 Eq. 363) a delay of two years was held sufficient to establish the infant's affirmation by implication of the contract made during infancy. In Ebbett's case (L.R. 5 Ch. 302) fourteen months was held sufficient for the same purpose; in Lumsden's case (L.R. 4 Ch. 31) six months; in Bromfield v. Smith (2 T.R. 436) one year, and in Holmes v. Blogg (8 Taunt. 35, 1 Moo. 466) four months, and we have judicial dicta for the correctness of the general application to all cases of the four months' limit in the last-mentioned case: Richards, C.J., Featherston v. McDonell, 15 U.C.C.P. 166; Taylor v. Johnston, 19 Ch. Div. 403.

If a blind or illiterate person desire to hear read over a mortgage or bill of sale presented to him for execution, and such is not done, and he is induced to execute it, the execution will not be sufficient: Owens v. Thomas, 6 U.C.C.P. 383; Keddy v. Daurey, 7 D.L.R. 118; Sawyer-Massey Co. v. Szlachetka, 4 D.L.R. 442; Vickers v. Bell, 10 L.T. 77; Re Harfall, 6 Man. & G. 732.

A man who is bound to make a deed is not bound to seal and deliver it when tendered him, unless somebody be present who can read it to him, if he requests it to be read: Mauser's Case, 2 Coke's Rep. 3; Thoroughgood's Case, 2 Coke's Rep. 9; Shutter's Case, 12 Coke's Rep. 90.

And so an insane person is not bound by his execution of a bill of sale or chattel mortgage if the vendee or mortgagee knows of his insanity at the time, but the fact that a mortgagor, at the time of executing the mortgage, was insane, is no ground for setting it aside if the mortgagee dealt with him and advanced money on the mortgage in good faith, and without knowledge of his insanity: Campbell v. Hill, 23 U.C.C.P. 473; Bank of Ottawa v. Bradfield, 8 D.L.R. 722.

The unsoundness of mind must be known to the other contracting party (Banks v. Goodfellow, L.R. 5 Q.B. 549) before the Court will interfere to undo a transaction, especially when no advantage has been taken of the lunatic, and when the parties cannot be restored to their original position: Molton v. Camroux, 4 Ex. 17; Beaven v. McDonell, 10 Ex. 184; McGaffigan v. Ferguson, 4 N.B. Eq. 12.

The mere insanity of a mortgagor to whom or to whose agent the mortgage money has been honestly paid, and of whose insanity no advantage was taken in the transaction, does not annul the rights of the mortgagee: Campbell v. Hooper, 3 Sm. & G. 153.

The *onus probandi* is upon those supporting the conveyance to shew that the execution took place during a lucid interval of the grantor, and that he was capable of understanding the nat-

ure of the act he was performing: Hoover v. Nunn, 3 D.L.R. 503, following Russell v. Lefrancois, 8 Can. S.C.R. 335. The same principle will apply when the execution of the instrument is performed by a party suffering from direct or indirect consequences of intoxication: Murray v. Weiler, 3 A.L.R. 180.

A mutual agency exists between members of a trading co-partnership, and therefore one partner has an implied authority to pledge the partnership effects for the purpose of the business, and this, although other partners of the firm be ignorant of what is transpiring. The act of one partner is the act of an agent of them all, and any one partner can borrow money on the credit of the firm; but the mutual agency existing between partners does not empower one partner to bind his co-partners by deed: Cameron v. Stevenson, 12 U.C.C.P. 389. As a chattel mortgage need not be under seal (Reeves v. Capper, 5 Bing. N.C. 136; Flory v. Denny, 7 Ex. 581), a mortgage by one of a firm of partners of all the stock-in-trade to raise money or secure indorsements, or other assistance is perfectly valid; his authority to do the act arises from implication, and cannot be questioned for want of express authority: Paterson v. Maughan, 39 U.C.Q.B. 371; Halpenny v. Pennock, 33 U.C.R. 229; Cooley v. Hobart, 8 Iowa 358; McClary v. Howland, 9 B.C.R. 479. And, because a chattel mortgage is valid without a seal, the addition of a seal by a mortgagor (a member of a partnership) does not vitiate the mortgage: Milton v. Mosher, 7 Met. 244; Paterson v. Maughan, 39 U.C.Q.B. 371.

A partner entrusted with possession of goods of his firm for the purpose of sale may, either as partner in the business or as factor for the firm, pledge them for advances made to him personally, and the lien of the pledgee will remain as valid as if the security had been given by the absolute owner, notwithstanding the pledgee's notice that the pledgor's capacity was that of agent only: Dingwall v. McBean, 30 Can. S.C.R. 441.

The act done by a partner, however, must not be such as, *per se*, puts an end to the business. The power of one partner

to bind the firm arises from implication, which must necessarily exist in partnerships sought to be successfully carried on, hence it is that when the act done terminates and puts an end to the business, the implied authority existing for other purposes is wanting, and such an act is unlawful and of no avail. Therefore, without the express consent of his co-partner, the other partner cannot execute a deed disposing of all the stock in trade for the general benefit of the creditors of the partnership (Cameron v. Stevenson, 12 U.C.C.P. 389); for such an assignment would seem to amount of itself to a suspension or dissolution of the partnership, but having been specially requested by one of a firm to execute an assignment of all the partnership effects for the benefit of creditors, the other one of the firm may do so in the partnership name, and it will be valid and binding: Nolan v. Donnelly, 4 O.R. 440; Lamb v. Durant, 12 Mass. 54; Tapley v. Butterfield, 1 Met. (Mass.) 515. The rule of preferring partnership property for the payment of partnership debts is for the benefit of the partners themselves, and they may waive it, hence a partnership may execute a mortgage on partnership property to secure the individual debt of one of the partners, and the transaction will be upheld in a contest entered upon by a partnership creditor to set it aside (In re Kahley, 2 Biss. 383; Kirby v. Schoomaker, 3 Barb. (N.Y.) Ch. 46), and a mortgage of partnership property by one of a firm, to secure his own individual debt, may, by ratification of his co-partner, be made an effectual mortgage of the partnership: Kennedy v. Nat. Union Bank, 23 Hun. (N.Y.) 494; Tebb v. Baird, 3 D.L.R. 161; Kendal v. Wood, L.R. 6 Ex. 243, 248. Indeed, if the co-partner is cognizant of the transaction, and is present when the mortgage is given and does not disclose his claim to part ownership, he is estopped from afterwards setting up his title against the mortgagee: Robinson v. Cook, 6 O.R. 590.

An assignment by one partner without the consent of the other of the firm's book debts is valid as to the other partner, even though the partner executing the assignment was, by

agreement with the other partner, without power in that regard, where the assignee had no knowledge of such lack of authority: Tebb v. Baird; Tebb v. Hobberlin Bros. & Co.; Hobberlin Bros. & Co. v. Tebb, 3 D.L.R. 161; Marchant v. Morton, Down & Co., [1901] 2 K.B. 829; Hughes v. Chambers, 14 Man. L.R. 163.

The implied authority between partners to bind the partnership only extends to the purposes of the business; therefore it is that one partner cannot bind the partnership effects by chattel mortgage for his own individual debts, though he may so bind his own individual interest, but in such a case the mortgage would be subject to the prior equities of the other partners and of the partnership creditors.

The representatives of a deceased partner cannot be in any better position than was the deceased in his lifetime; therefore, as he, during the partnership, would be bound by the act of his partner in mortgaging the partnership effects for the purposes of the business, so are the representatives bound by such an act where the partnership becomes dissolved by death: Hale v. People's Bank of Halifax, 2 N.B. Eq. 433.

It is not unusual for two or more persons to purchase implements or other personal property on the understanding that each one will have a distinct interest in the property. They then become owners in common, and have merely a unity of possession. The extent of each one's interest may vary, according as they themselves agree, and, in fact, the title of one may be different to that of the other, as, for instance, one may have been originally a joint tenant with a third person, who may have severed the joint tenancy by assigning his moiety to the other. The right of survivorship, consequently, which springs from unity of interest and title does not exist between owners in common. One owner in common, then, can mortgage his interest either to the other owner in common, or to anyone else. If to a stranger, then the latter cannot replevy the property from the other owner in common: Smith v. Rice, 56 Ala. 417; Stuart v. Taylor, 7 How. (N.Y.) Pr. 251; Gaar v. Hurd, 52 Ill. 315.

It has been held in a recent case that the hypothecation of property for his own purposes by a person holding the same in trust for himself and another jointly is tantamount to an alienation thereof, and under the Civil Code (Que.) the co-owner has the right to demand the immediate return of the money he had contributed in the joint venture, if such hypothecation impairs his security: Que. C.C. art. 1092; Frank v. Forman, 2 D.L.R. 8, 41 Que. S.C. 511; Angers v. Geiler, 20 Que. K.B. 351.

A mortgage may be made to several persons jointly to secure them severally as creditors of the mortgagor, or as endorsers for him upon several notes, as well as where they are joint creditors or joint endorsers upon one note.

An agent may execute a mortgage if he possess due authority: Adams v. Hutchings, 3 Terr. L.R. 206. Whether the agent make it in his own name or in that of his principal, and whether he describe himself to be an agent or not, or whether the principal be known or not, the principal will none the less be liable to be sued and be entitled to sue thereon: Calder v. Dobell, L.R. 6 C.P. 486, 498; Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200. And the agent, if he gives a mortgage in his own name, cannot discharge himself from liability by setting up that the mortgage was really made by the authority of, and as agent for, a third person, his principal, and that the mortgagee was aware of such being the case at the time when the mortgage was made and executed: Higgins v. Senior, 8 M. & W. 834; Dagenais v. Modern Realty Co., 5 D.L.R. 315, 41 Que. S.C. 428.

A parol authority to an agent to make a mortgage is sufficient at common law, and the statute requiring registration of chattel mortgages does not alter the common law, as it does in the case of agents taking a mortgage, by requiring a written authority to be filed. The authority may be anterior to the making of the mortgage, or there may be a subsequent ratification thereof, which would be equal in effect to prior authority. Either the authority or ratification may be established by proof

of acts, which raise an estoppel against the principal to deny the agency: Partridge v. White, 59 Me. 564; Halpenny v. Pennock, 33 U.C.Q.B. 229; Agnew v. Davis, 17 W.L.R. 570 (Sask.); Taylor v. Helgerson, 3 Sask. L.R. 461. Authority to sell, however, does not confer authority to mortgage; nor does authority to mortgage confer authority to sell: Switzer v. Wilvers, 24 Kans. 384. But in the case of a bill of sale disaffirmed by the principal for want of authority in the agent, the instrument will be considered in favour of the purchaser as a mere security for so much of the purchase money as was applied to the use of the principal: Coppage v. Barnett, 34 Miss. 621.

In Morgan v. Johnson, 4 D.L.R. 643, the Court, applying the case of Bryant v. La Banque du Peuple, [1893] A.C. 170, held, that, whenever the very act of the agent is authorised by the terms of the power, i.e., whenever, by comparing the act done by the agent with the words of the power, the act is itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent, and are not bound to inquire into facts *aliunde*. Hence, notwithstanding it be stipulated in a power of attorney that any sale should be for "and in the name of" the principal, a sale made by the agent in his own name is enforceable by the purchaser against the principal: see Westfield Bank v. Cornen, 37 N.Y. 322.

A debt due to his principal may be secured by a mortgage to the agent, and the agent may enforce the mortgage in his own name, for and on behalf of the principal; but the more obvious and proper course would be to take the mortgage direct to the principal: Varney v. Hawes, 68 Me. 442; Brodie v. Ruttan, 16 U.C.Q.B. 207. If the agent take the mortgage in his own name, then he may maintain an action against a wrongdoer in his own name for taking the goods, although he may have no beneficial interest in them (Brodie v. Ruttan, 16 U.C.Q.B. 209, approved in Light v. Hawley, 34 C.L.J. 87), and notwithstanding that his fiduciary position did not appear

on the face of the mortgage; and though the agent has no authority in the first instance to take a mortgage, yet, as between the parties, ratification may be sufficient for that purpose, and it will be sufficient ratification by the principal if he bring a suit to recover the value of the goods mortgaged: Partridge v. White, 59 Me. 564.

Incident to the existence of all corporations is the power to mortgage its personal property. There may be statutory limitation to the power, but, apart from such restriction, a corporation has the right, inherent in itself, to mortgage or sell its personal property: Shears v. Jacob, L.R. 1 C.P. 513; Deffell v. White, L.R. 2 C.P. 144; National Trust Co. v. Trust & Guarantee Co., 5 D.L.R. 459, 26 O.L.R. 279.

Commercial Rubber Co. v. St. Jerome, 17 Que. K.B. 274; Savaria v. Paguette, 20 Que. S.C. 314; Trust and Guarantee Co. v. Abbott, etc., Co., 11 O.L.R. 403, following Merchants Bank of Canada v. Hancock, 6 O.R. 285; Macdougall v. Gardiner, 1 Ch.D. 13; Burland v. Earle, 18 T.L.R. 41.

The president or principal officer of a corporation, in taking a mortgage to the body corporate which he represents, is not to be considered as an agent, but as a principal exercising the corporate powers of the corporation: Canadian Bank of Commerce v. Smith, 17 W.L.R. 135 (Alta.); Bank of Toronto v. McDougall, 15 U.C.C.P. 483; Universal Skirt Co. v. Gormley, 17 O.L.R. 114; Newlands v. Higgins, 1 A.L.R. 18.

However, this may not apply where the transaction is out of the ordinary course of the company's business, even, if transacted by its vice-president in the company's name; and in transactions of that nature, a person dealing with the company's officer or agent is bound to ascertain whether or not the latter has in fact been duly authorized: Whaley v. O'Grady, 1 D.L.R. 224, 48 C.L.J. 112, and on appeal 4 D.L.R. 485, where the decision below was reversed on other grounds.

And where the undertaking is entered into by the president in his own behalf and upon behalf of the company and signed in the name of the company only, the document will be regarded

as a personal undertaking on the part of the president: Wood v. Grand Valley R. Co., 5 D.L.R. 428, 26 O.L.R. 441.

A mortgage made by the directors of a company prior to the consent of its shareholders, without which consent there was no power to borrow, may be ratified by the shareholders: Adams and Burns v. Bank of Montreal, 32 Can. S.C.R. 719, affirming 8 B.C.R. 314.

Under the Nova Scotia Companies Act, a sale of the entire undertaking of a corporation to another is *ultra vires*, although ratified by a resolution passed at a meeting of shareholders in the absence of a special resolution called for by the amending Act: R.S.N.S. ch. 128, amended by N.S. Acts 1912, ch. 47: McGregor v. St. Croix Lumber Co., 8 D.L.R. 876.

The power in incorporated or chartered banks to take chattel mortgages, however, is regulated by special legislation which enables them to take hold and dispose of mortgages upon personal property by way of additional security for debts contracted to such banks in the course of its business: R.S.C. 1906, ch. 29, secs. 80-90, 53 Viet. (1890) ch. 31, sec. 68 (D.).

Its statutory powers should be construed liberally and not strictly or critically: Imperial Paper Mills v. Quebec Bank, 6 D.L.R. 475, 26 O.L.R. 637. As to statutory securities given by a customer to a bank, see Townsend v. Northern Crown Bank, 4 D.L.R. 91, 26 O.L.R. 291; Quebec Bank v. Craig, 6 D.L.R. 573, 3 O.W.N. 1635; Bates v. Kirkpatrick, 4 D.L.R. 395, 21 W.L.R. 607; Alfred Thien v. Bank of B.N.A., 4 D.L.R. 388, 21 W.L.R. 192; Bank of Toronto v. Perkins, 8 Can. S.C.R. 603, Klock v. Molsons Bank (No. 2), 3 D.L.R. 521; Northern Crown Bank v. Great West, 11 D.L.R. 395; McHugh v. Union Bank (P.C.), 10 D.L.R. 562.

The Crown may take a mortgage, under our Acts, from any of her subjects to secure a debt, through, and in the name of, the head of the department to which the debt is due: McGee v. Smith, 9 U.C.C.P. 89; Harbour Commissioners v. Foundry Machine Co., 21 Que. K.B. 241.

A married woman has the right to give a mortgage in her own name on personal property which she herself owns (Halpenny v. Pennock, 33 U.C.Q.B. 229), and a husband can give a bill of sale or chattel mortgage direct to his wife, or as agents for one another, and vice versa: Totten v. Bowen, 8 O.A.R. 602; O'Doherty v. Ont. Bank, 32 U.C.C.P. 285; Sanders v. Mulsburg, 1 O.R. 178; Mackay v. Ferris, 14 W.L.R. 107 (B.C.); Everett v. Everett, 38 N.B.R. 390.

In the absence of undue influence or fraud, a mortgage executed by a wife on her personal property for her husband's benefit is enforceable against her, although she had acted without independent advice: Bank of Montreal v. Stuart, [1911] A.C. 120. This case overrules Cox v. Adams, 35 Can. S.C.R. 393, and Stuart v. Bank of Montreal, 41 Can. S.C.R. 516, as to the doctrine of "independent advice," although the appeal was dismissed for different reasons; see Euclid Ave. Trusts Co. v. Hohs, 24 O.L.R. 447; Dominion Permanent v. Morgan, 4 D.L.R. 331; Union Bank v. Crate, 3 D.L.R. 686; Gold Medal Furniture Co. v. Stephenson, 10 D.L.R. 1; Reeves v. Friel, 4 Sask. L.R. 198; Great West Permanent Loan Co. v. Badenoch, 4 S.L.R. 241.

In Sutherland v. Beiard, 13 Que. K.B. 128, it was held, however, under Quebec law that a hypothec given by a married woman upon her separate property to secure payment of a loan made to her husband to enable him to effect a composition with his creditors of whom the lender was one, is void as being against public policy: see Que. C.C. art. 1301.

CHAPTER VI.

The Right to Possession.

A mortgagee oftentimes finds that from some cause his mortgage is invalid as against creditors, purchasers, or mortgagees, and that by reason of the defect he is in danger of losing the benefit of his security.

When such happens, if the mortgage be good and valid between the immediate parties, then there is nothing to prevent the mortgagee making good his title to the goods mortgaged by taking possession (Parkes v. St. George, 10 O.A.R. 496); but this, of course, is required to be done before the rights or liens of others attach upon the property mortgaged.

Having once perfected his title by taking possession under the mortgage he will not be held accountable because of the defect to mortgagees or purchasers claiming under subsequently registered bills of sale (Maughan v. Sharpe, 17 C.B. 443); unless by some statutory provision the taking of possession must be concurrent with the transaction to save the bargainee from the consequences of non-compliance with the registration law.

In Ex parte Saffery, 16 Ch. D. 671, it was held, that if a grantee of a bill of sale chooses not to register it, but takes actual possession within the time allowed for registration, his title is good as if the deed had been registered: McClary v. Howland, 9 B.C.R. 479; Piercy v. Humphreys, 17 L.T. 463; Davies v. Jones, 10 W.R. 779. Possession or apparent possession is generally a question of fact: Gough v. Everard, 2 H. & C. 1.

In Ontario it has recently been enacted that the subsequent taking possession by the mortgagee of the things mortgaged shall not make valid a defective mortgage as against persons

who become creditors, or purchasers or mortgagees before such taking of possession: 10 Edw. VII. ch. 65, sec. 23; Jordan v J. I. Case Thresher Co., 7 D.L.R. 855; Manchester v. Hills, 34 N.S.R. 512; Clarkson v. McMaster, 25 Can. S.C.R. 96.

An entirely new mortgage can be taken which would be as effectual as taking possession (Richards v. James, L.R. 2 Q.B. 285; Ex parte Allan, W.N. (1884), 211), even though the new mortgage is to become effective only in the event of the first mortgage being declared to be invalid and void: Cooper v. Zeffert, 32 W.R. 402; Ex parte Nelson, 35 W.R. 844; Mosher v. O'Brien, 37 N.S.R. 286; provided, of course, that all formalities, statutory or otherwise, with respect to the new mortgage are complied with.

Where an agreement to give a chattel mortgage is duly made and registered under R.S.O. 1897, ch. 148, sec. 11, and subsequently a mortgage is made and registered, the giving of such mortgage whereby the legal title becomes vested in the mortgagee does not revest in the mortgagor the equitable title, which the mortgagee had by virtue of the agreement, but it continues to exist as before, and the mortgagee is enabled to rely on it where the mortgage is ineffectual for any reason (judgment of Boyd, C., 2 O.L.R. 128, affirmed): Fisher v. Bradshaw, 4 O.L.R. 162 (C.A.).

A mere agreement to transfer as security of chattels in the debtor's possession will not entitle the creditor to revendicate them upon default, where no formal mortgage was executed: Savard v. Tremblay, 30 Que. S.C. 423.

Though the mortgage may be good *inter partes*, yet possession taken by the mortgagee, even though to cure defects such as have been mentioned, may be against the consent of the mortgagor, and the further question then arises does possession so taken have the same saving effect? As against the mortgagor, the mortgagee assumes to do that which he is unauthorized to do, and in the doing of it, constitutes himself a wrongdoer: Hannay v. Fraser, 37 N.B.R. 39.

There appears to be some doubt as to the legal effect of a mortgagee taking possession when his act is not acquiesced in by the mortgagor, nor authorized by the mortgage.

If, as against the mortgagor, the right exists, or if the mortgagor becomes privy to the act, then unquestionably all defects in the mortgage are cured, and the mortgagee's title becomes paramount; but if what the mortgagee does is absolutely illegal, it then becomes necessary to consider the degree or kind of possession taken by the mortgagee.

If the mortgagee does not get the actual possession of the thing mortgaged, then his illegal act can give him no new rights, and his position remains unaltered under the defective mortgage; but, if actual physical possession be obtained, even though wrongfully, the operation and effect of the Act may be excluded: Ex parte Fletcher, 5 Ch.D. 809. Thus it will be seen that possession, when taken rightfully, will be extended by construction of law beyond the actual physical possession, but this will not be done in the case of a wrongdoer.

Advertising may be an important circumstance in deciding the sufficiency of the change of possession: Emanuel v. Bridger, L.R. 9 Q.B. 286. A mere demand will not constitute a change of possession, even though default has been made in the mortgage, entitling the mortgagee to take possession (Ancona v. Rogers, 1 Ex.D. 285); nor will diligence in attempting to get possession help the mortgagee, against his defective security, unless he gets possession: Ex parte Jay, L.R. 9 Ch. 697; see Ex parte Lewis, L.R. 6 Ch. 626; Furber v. Finlayson, 24 W.R. 370; Gough v. Everard, 2 H. & C. 8.

The entry of the mortgagee must be open, visible and notorious. Merely suggesting to an agent of the mortgagor the mortgagee's intention to seize is not sufficient: Macdonald v. Doucet, 45 N.S.R. 114.

If the mortgage does not contain a clause giving the mortgagor the right to possession until default, then possession taken under such a mortgage is a possession which the mort-

gagee had a right to acquire without reference to the mortgagor, and would effect the same result as if the possession had resulted from the act of the mortgagor; Osler, J.A., Smith v. Fair, 11 O.A.R. 763; McAulay v. Allen, 20 U.C.C.P. 417; Samuel v. Coulter, 28 U.C.C.P. 240; Merchants Bank v. The Queen, 1 Can. Ex. R. 31; Parkes v. St. George, 10 O.A.R. 496. It becomes important then, from this view, to omit the redemise clause in a mortgage (Porter v. Flintoff, 6 U.C.C.P. 335; Keetch v. Hall, 1 Sm. L. Cas. 523; Bingham v. Bettinson, 30 U.C.C.P. 438; Down v. Lee, 4 Man. L.R. 177), and advisable, also, that the conveyancer should always insert a covenant by the mortgagor that the mortgagee may, at any time during the currency of the mortgage, enter and take possession should he deem it best for his safety to do so.

By the terms of such covenant the mortgagee may be made the sole judge of the happening of the contingency upon which he may take possession, and it is immaterial whether his fears of loss are well or ill founded: Bailey v. Godfrey, 54 Ill. 507; Lewis v. D'Arcy, 71 Ill. 648; Cline v. Libbey, 46 Wis. 123; Fox v. Kitten, 19 Ill. 519; Durfee v. Grinnell, 69 Ill. 371; Hueber v. Koebe, 42 Wis. 319; Roy v. Goings, 96 Ill. 361; Fleming v. Thorp, 78 Kan. 237, 19 L.R.A. (N.S.) 915.

There is a distinction between the mortgagee *being* insecure, and *believing* himself to be insecure, and, if the parties agree to the right being in the mortgagee of taking possession upon the latter contingency, then upon possession being taken and the taking being questioned in law, the contest will be confined to whether in point of fact the mortgagee did really deem himself insecure, not whether he had reasonable ground for so believing, nor whether, in fact, he really was insecure: Werner v. Bergman, 28 Kans. 60, 64; Peterson v. Johnston, 17 W.L.R. (Sask.) 596; Fleming v. Thorp, 78 Kan. 237, 19 L.R.A. (N.S. 915.

A mortgage given as collateral security to a promissory note cannot be enforced for default in payment until the expiration

of the last day of grace. In order to justify entry and seizure before default under such mortgage containing an insecurity clause, it must appear that the mortgagee did actually deem the mortgage insecure at the time of seizure, and that the entry was made on that ground: Westaway v. Stewart, 3 S.L.R. 178.

A mortgagee having the right to take possession under a mortgage containing such a contract, may maintain an action against any person for wrongful detention (Frisbee v. Langworthy, 11 Wis. 375; Welsh v. Sackett, 12 Wis. 243), or for wrongful conversion: Harvey v. McAdams, 32 Mich. 472; Grove v. Wise, 39 Mich. 472; Gates v. Sutherland, 31 N.S.R. 471.

If, however, a sense of insecurity honestly entertained by the mortgagee entitles him to possession of the property, then any act done by or against the mortgagor which impairs the security, unquestionably entitles the mortgagee to possession. And the right of the mortgagee to possession is such, that he may take the property from a pledgee with whom it has been left by the mortgagor, and thus destroy the lien of such pledgee (Bissett v. Pearce, 28 N.Y. 252), unless the creation of the lien is one which may be implied from the necessities of the property, *e.g.*, the case of a mortgagor procuring repairs to be done upon his hacks previously mortgaged, then the repairer could hold the cabs as against the mortgagee until his lien was paid and discharged (Hammand v. Danielson, 126 Mass. 294; Globe Works v. Wright, 106 Mass. 207), or the case of a boat builder's lien regarding which it has been said that the mortgagee having allowed the mortgagor to continue in the apparent ownership of the vessel, making it a source of profit and a means of earning wherewithal to pay off the mortgage debt, the relation so created by implication, entitles the mortgagor to do all that may be necessary to keep her in an efficient state for that purpose: Williams v. Allsup, 10 C.B.N.S. 417.

If a person wrongfully takes possession of chattel property belonging to another, and, whilst in possession thereof, alters,

improves or otherwise deals with it, he is not entitled to compensation for the improvements: Rainy Lake River, etc. v. Rainy River Lumber Co., 6 D.L.R. 401, 27 O.L.R. 131; Hiscox v. Greenwood, 4 Esp. 174; Cheshire R.R. Co. v. Foster, 51 N.H. 490; Purves v. Moltz, 5 Robertson (N.Y.) 653; Silsbury v. McCoon, 6 Hill (N.Y.) 425; Bryant v. Ware, 30 Me. 295.

A second mortgagee, when both mortgages are void from statutory defect, may, by securing possession, so perfect his title as to get in ahead of the prior mortgage; the taking possession is an identification and appropriation to the mortgage of the specific property: Morrow v. Reed, 30 Wis. 81; Frank v. Miner, 50 Ill. 444.

Should the mortgagee, having taken possession of the mortgaged property, again allow it to return to the possession of the mortgagor, the possession of the mortgagee is at an end, and the property becomes liable for the debts of the mortgagor; but should the taking of possession in effect satisfy and discharge the mortgage, which becomes at an end, *functum officio,* and the mortgagee then sell the goods to another person, and that other person register his bill of sale, the transaction, if *bonâ fide,* cannot be impeached: Cookson v. Swire, 9 App. Cas. 653.

However, where the mortgagee has once taken possession of the mortgaged chattels, but afterwards returned them to the mortgagor to be held by him as agent for the purpose of selling or exchanging them and to invest the proceeds in other chattels, which was done, the latter are not subject to seizure by the execution creditors of the mortgagor to any greater extent than the original chattels for which they were substituted: Bell v. Lafferty, 3 Terr. L.R. 263.

The law has generally been conceded to be that, when there is an absolute conveyance from mortgagor to mortgagee, then a defeasance on a certain event, then a provision that the mortgagor will forever warrant and defend the goods unto the mortgagee, then a declaration that the mortgagor doth put the mort-

gagee in possession of the goods by delivery of some kind, that the possession follows the property conveyed, and the mortgagee, though no default has been made, is entitled in law to assume possession at any time: Porter v. Flintoff, 6 U.C.C.P. 335; White v. Morris, 11 C.B. 1015; Ruttan v. Beamish, 10 U.C.C.P. 90; Roylance v. Lightfoot, 8 M. & W. 533; Parsley v. Day, 2 Q.B. 47; McAulay v. Allen, 20 U.C.C.P. 417; Samuel v. Coulter, 28 U.C.C.P. 240; Merchants Bank v. The Queen, 1 Can. Ex. R. 31.

The right of possession is an incident to the right of property; and the right of property being vested in the mortgagee by the conveyance, he becomes entitled to the possession in the absence of stipulation to the contrary: Coles v. Clark, 3 Cush. (Mass.) 399; Hall v. Sampson, 35 N.Y. 274, 277; Boise v. Knox, 10 Met. (Mass.) 40; London v. Emmons, 97 Mass. 37; Whimsell v. Giffard, 3 O.R. 1.

But where a trader gives a chattel mortgage on his stock-in-trade, containing a clause that if the mortgagor should attempt to part with the possession of the goods the mortgagee might take possession, but containing no proviso for possession by the mortgagor until default, an agreement to the latter effect will be implied, there being no express provision to the contrary: Dedrick v. Ashdown, 15 Can. S.C.R. 227, 24 C.L.J. 502, reversing 4 Man. L.R. 139.

Various provisions may give rise to an implication in favour of the mortgagor retaining the right to possession, such as one that the mortgagor is to keep the property in repair, for how can he perform his covenant to repair if he is not to have possession of the property upon which the repairing is to be done (Babcock v. McFarland, 43 Ill. 381); such, also, as giving the mortgagee the privilege of taking possession when and so soon as he finds himself insecure (Hall v. Sampson, 35 N.Y. 274; Chadwick v. Lamb, 29 N.Y. 518); but the reservation to the mortgagee of the right to enter and take possession upon default in payment, and sell to satisfy his debt, does not override the

general rule of law (Ferguson v. Thomas, 26 Me. 499) in favour of a mortgagee: Smith v. Fair, 11 A.R. 763.

But if a mortgagee chooses to act on his strict rights and to take possession before default, he makes himself amenable to the law, should he so act with the goods as to render their redemption by the mortgagor impossible. Under the mortgage, a mortgagor has clearly reserved to himself a special property in the goods, until he has made default, and he has therefore a right of action if the mortgagee sell the goods before default: Albert v. Grosvenor Investment Co., L.R. 3 Q.B. 123. And if, by selling, the mortgagee becomes unable to restore the goods upon payment of the debt, the mortgagor becomes entitled to sue for damages, by reason of that act of the mortgagee, the mortgagee has done a wrong to the mortgagor, and for every wrong accompanied by damage, there must be a remedy: Bingham v. Bettinson, 30 U.C.C.P. 438; Spaulding v. Barnes, 4 Gray (Mass.) 330; Halliday v. Holgate, L.R. 3 Ex. 302. Thus, though in the absence of a redemise clause, and in the absence of conditions implying the contrary, a mortgagee may take possession before default, yet he must not sell, except at the risk of paying damages to the mortgagor for placing the property beyond redemption: *per* Osler, J.A., Smith v. Fair, 11 O.A.R. 763.

The measure of damages for seizure before maturity will be the extent of his interest in the goods, that is, the value thereof less the amount owing upon them, and the value of the right of possession until forfeiture of the condition in the mortgage (Brierly v. Kendall, 17 Q.B. 937; Brown v. Phillips, 3 Bush (Ky.) 656; Brink v. Freoff, 44 Mich. 69; Westaway v. Stewart, 1 Sask. L.R. 200); and in favour of a creditor who lawfully attaches the goods, the measure of damages against a mortgagee who unlawfully takes possession under his mortgage will be the value of the property over and above the mortgage debt: Hamilton v. Williams, 15 Wis. 292; Bingham v. Bettinson, 30 U.C.C.P. 451. And it generally is the case that a mortgagee, who under a power of sale in the general unlimited form, can

though selling when he has no right to sell, confer by the terms of the power, a good title on a *bonâ fide* purchaser, and thus effectually destroy all rights of redemption: Dicker v. Angerstein, 3 Ch.D. 600.

If the mortgage contains a redemise clause, or other provision allowing the mortgagor to remain in possession until default, and the mortgagor sell the goods before default, it becomes a conversion, for which an action at once arises in favour of the mortgagee. The mortgagor prevents the goods being given up upon default, and the possessory title immediately reverts to the mortgagee. The consent to possession remaining in the mortgagor simply amounts to authority to the mortgagor to do no more than use the chattels, not to give the use to third persons, and certainly not for a longer period than his own term: Fenn v. Bittleston, 7 Ex. 152, 159, 160.

If the mortgagor be lawfully in possession and has the right to retain possession for a stipulated period, he may, unless he has forfeited that right by breach of condition, have the mortgagee enjoined from taking possession before the time limited (Ford v. Ransom, 8 Abb. Pr. (N.Y.) N.S. 416); but no one, except the mortgagor, or some one having his title, can make any objection to the mortgagee asserting his right to the possession of the goods, and taking them before the contingency happens which would entitle him to them as against the mortgagor (Gaar v. Hurd, 92 Ill. 315; McConnell v. Scott, 67 Ill. 274); and where a mortgagor is in possession and control of the property, this is *primâ facie* evidence as against third parties of his right of possession: Rogers v. King, 66 Barb. (N.Y. 495.

The ordinary provision that a mortgagee may take possession in case the mortgagor shall attempt to sell or dispose of, or in any way part with the possession of the goods, or remove the same beyond a certain limit, entitles the mortgagee to exercise this right when the mortgagor disposes of the goods to satisfy an existing debt, even though the mortgagor may have the right to make sale of the property in the ordinary course of

business (Laing v. Perrott, 48 Mich. 298; 12 N.W. Rep. 192), and a clause of this nature entitles the mortgagee to take possession or bring suit for the chattels at once upon the mortgagor removing or attempting to remove the property (Whimsell v. Giffard, 3 O.R. 1); or upon a seizure of the mortgaged property on a distress warrant for rent due from the mortgagor (Conkey v. Hart, 14 N.Y. 22; Russell v. Butterfield, 21 Wend. (N.Y.) 300); or upon a levy by way of execution upon the property and removal from the mortgagor's possession: Ashley v. Wright, 19 Ohio 291. And the mortgagee's right in this particular is none the less because the time for payment of the mortgage has not arrived: Russell v. Butterfield, 21 Wend. (N.Y.) 300. This right, however, is an optional one, and cannot be exercised against a person into whose possession the goods have come innocently, without a demand therefor first having been made, and refusal given, the refusal amounting to conversion: Cutter v. Copeland, 18 Me. 127; Caldwell v. Tray, 41 Mich. 307. But, if a purchaser have due notice of the restriction against disposition or removal by the mortgagor, then, without demand, the purchaser becomes liable to the mortgagee: Fisher v. Friedman, 47 Iowa 443; Bailey v. Godfrey, 54 Ill. 507; Ferguson v. Tait, 26 Minn. 327.

A bill of sale, given to secure the balance of a purchase price, although unregistered, cannot be defeated in Nova Scotia by a fraudulent sale to a third party with notice: McLeod v. Douette, 38 N.S.R. 151.

The restriction upon removal must, however, be construed with relation to a reasonable and proper use of the goods mortgaged. A legitimate use of the property, such as a temporary removal from the designated limits with the *animus revertendi* honestly entertained, will not authorize proceedings being taken by the mortgagee for breach of the covenant not to remove the goods: Walker v. Radford, 67 Ala. 446. Of course any consent, either in writing or by word of mouth, or even by implication, to a sale or removal, will estop the mortgagee from afterwards

objecting to such sale or removal, and in case of sale will vest the title in the purchaser, released from the mortgage encumbrance (Loucks v. McSloy, 29 U.C.C.P. 62; Pratt v. Mayuard, 116 Mass. 388; Gage v. Whittier, 17 N.H. 312); and though the purchaser may have been ignorant of the mortgage, yet he can successfully set up the mortgagee's consent to sale if such had been given to the mortgagor (Gage v. Whittier, 17 N.H. 312; Stafford v. Whitcomb, 8 Allen (Mass.) 518; Flemiken v. Scruggs, 15 S.C. 88; Carter v. Fately, 67 Ind. 427); and, likewise, after a sale by a mortgagor, with or without verbal assent or direction, the mortgagee may affirm the sale and take the benefit of it, and so confirm the transfer: Loucks v. McSloy, 29 U.C.C.P. 62.

Sometimes the mortgage provides that in case the mortgagor should attempt to sell, or otherwise part with the goods without the mortgagee's written consent, the mortgagee may enter and take the goods; and where a written consent is given authorizing the mortgagor to proceed to sell the goods mortgaged, "and to continue selling the same until further notice in writing, (subject, nevertheless, to the proviso of the said bill of sale, in other respects)," and the instrument provides that in case of default or in case the mortgagor should attempt to sell or dispose of the goods without the mortgagee's consent first had in writing, it should be lawful for the mortgagee to enter and take the goods, then it will be a violation of the agreement between the mortgagor and the mortgagee for the mortgagor to execute a mortgage to another party, which is not made subject to the first mortgage, and the mortgagee, notwithstanding his written consent, is entitled to enter and take possession of the goods. The authority to sell cannot be a power by which the mortgagor can charge the mortgaged property with a debt he owed, or to enable him to borrow a sum of money upon it: Millar v. Allen, 10 R.I. 49; Closter v. Headley, 12 U.C.Q.B. 364; Whitney v. Lowell, 33 Me. 318. A second mortgagee, however, is not prevented from

asserting his right to the chattel property by virtue of a first mortgage, which he has acquired subsequently to his consent as second mortgagee to a disposal of the property: Stafford v. Whitcomb, 8 Allen (Mass.) 518.

In the event of a sale upon a verbal consent of the mortgagee, the mortgagee will not be permitted afterwards to claim the goods and set up the want of a written consent: Loucks v. McSloy, 29 U.C.C.P. 54; Shearer v. Babson, 1 Allen 486. Where the verbal assent is proved clearly to have been given and acted upon, it is a very intelligible equity to prevent the setting up of the formal provision as to a written assent: *per* Hagarty, C.J., Bunker v. Emmany, 28 U.C.C.P. 442.

This, however, will not apply where the verbal assent was given antecedent to the execution of the mortgage which stipulated for a written consent, since otherwise it would operate as a violation of the well established rule of evidence that parol evidence is inadmissible to vary the written terms thereof: McPherson v. Moody, 35 N.B.R. 51.

A mortgagee may so act as to estop himself from denying that the property passed to the purchaser when even there is neither a verbal or written assent, as, where he acquiesces in a sale by the mortgagor, or knowingly permits the property to be levied on and sold to an innocent purchaser, or receives the proceeds of the sale (Rider v. Powell, 4 Abb. (N.Y.) App. Decisions 63), or by concealing the fact of his security induces another to buy the property: Loucks v. McSloy, 29 U.C.C.P. 54; Waller v. Tate, 4 B. Monroe 529. And the same result arises if the mortgage contains a covenant by the mortgagor to account for the proceeds of sales (Abbott v. Goodwin, 20 Me. 408), or from the general course of dealing of the parties (Pratt v. Maynard, 116 Mass. 388; Thompson v. Blanchard, 4 N.Y. 303), or by the mortgagee being present at the sale of the property and omitting to make known the fact of his mortgage (Brooks v. Record, 47 Ill. 30), or, without being present, permitting the mortgagor to assume the character of absolute owner: Thompson v. Blanchard, 4 N.Y. 303.

But a mortgagee does not waive his rights under his mortgage by consenting to the sheriff selling under his execution, when, being interested also as an execution creditor, the sale by the sheriff can be better carried out by an absolute sale than by a sale of the goods subject to the mortgage: Segsworth v. Meriden, 3 O.R. 413. If the mortgagee buys (which he may do at such a sale), then he occupies the same position as any other purchaser at the sheriff's sale (Edmonson v. Welch, 27 Ala. 578; Richards v. Holmes, 18 How. (N.Y.) 143; Roberts v. Fleming, 53 Ill. 196), and if a mortgagor has notice of a sale to be had by the sheriff under execution, and the mortgagee has consented thereto conditionally upon the proceeds of the sale being first applied in payment of the mortgage, the mortgagor cannot afterwards be heard to oppose the payment of the mortgage debt: McConnell v. People, 71 Ill. 481.

The conduct of the mortgagee in relation to the sale towards a purchaser in no way connected with the mortgagor, may be such as to give assent to a sale previously made: Loucks v. McSloy, 29 U.C.C.P. 54. But when the mortgage requires a written consent, then, though a verbal assent is sufficient on principles of equity, yet there is no equity which will dispense with the written stipulation when one party asserts and the other denies a verbal assent, in the absence of something being done on the faith of a clearly proved assent: Bunker v. Emmany, 28 U.C.C.P. 438. And a mere statement to the effect that the mortgagee was indifferent to a sale already made, and even that he did not want the property and cared nothing about it, will not prevent the mortgagee from taking possession of the property: White v. Philps, 12 N.H. 382. And, of course, mere silence of the mortgagee on hearing of a sale by the mortgagor will not prejudice the mortgagee in his right to possession: Patterson v. Taylor, 15 Fla. 336.

Should a trader give a mortgage upon his stock-in-trade, he is not estopped from selling in the ordinary course of business by reason of a covenant on his part not to dispose of any of the

goods, etc., without the consent of the mortgagee, and a mortgagee cannot therefore insist upon such act of selling as a forfeiture entitling him to take possession. The conclusion to arrive at from the entire transaction is, that there is an implied license to the grantor to continue to carry on his business in the ordinary course of trade, but he is not to dispose of anything in any other sense (Dedrick v. Ashdown, 15 Can. S.C.R. 227; National Mercantile Bank v. Hampson, 5 Q.B.D. 177), as, for example, to secure a pre-existing debt (Lang v. Perott, 48 Mich. 298), or fraudulently, and not in the ordinary course of trade; or by way of putting the goods into a partnership. In any such case the purchaser would acquire no title: Taylor v. McKeand, 5 C.P.D. 358; Payne v. Fern, 6 Q.B.D. 620; Barnard v. Easton, 2 Cush. (Mass.) 294.

There may be a qualified consent, of a nature which would not disentitle the mortgagee to take possession, either when the goods are in possession of the purchaser or in the possession of a vendee of the purchaser; thus, if a mortgagee consent to a sale upon an agreement by the purchaser to apply the purchase money on account of the mortgage, and that until such be done the mortgage lien should continue, and the purchaser dispose of the goods to a third party, the sale to the latter would be subject to the right of the mortgagee to take possession, even though he bought without knowledge of the mortgage: Oswalt v. Hayes, 42 Iowa 104.

While the rights of the mortgagee to take possession arise, as has been stated, when the mortgagor attempts to dispose of the property as owner, if he seeks to dispose simply of his interest, subject to the mortgage, no such rights can be exercised. Until possession is taken by the mortgagee after default, the mortgagor can lawfully sell his interest in the chattels, and the purchaser can sell again, and so forth; but the sale must not be more than simply of the mortgagor's interest. Of course the mortgagee might take possession should the goods be removed, on such a sale, beyond the limits stipulated by the mortgage.

but the possession so taken would be by reason of the breach of the stipulation as to removal, and not, as of right, because of the sale of the mortgagor of his interest, which the law not only permits to be transferred from one to another (Cadwell v. Pray, 41 Mich. 307; Davis v. Blume, 1 Mont. 463; Mechanics v. Conver, 14 N.J. (Eq.) 219), but makes subject to sale under execution: 9 Edw. VII. ch. 47, sec. 17 (Ont.); McKay v. Harris, 32 N.S.R. 150; Wallace v. Smart, 22 Man. L.R. 68, 48 C.L.J. 110, 1 D.L.R. 70, and Annotation to this case.

A sale of such a nature does not amount to a conversion; the purchaser steps into the shoes of the mortgagor taking his position, and obtaining his rights: Hathaway v. Braymean, 42 N.Y. 322.

The consent of a mortgagee to a sale of mortgaged property has the effect only of releasing such property from the mortgage lien, but does not destroy any remedies the mortgagee has by way of redress upon the covenants of the mortgagor to pay the debts: Jones v. Turch, 33 Iowa 246.

It generally is implied in a mortgage of a stock of goods, that the mortgagor shall remain in possession until default, especially when sales of the stock in the ordinary course of business are to afford the means whereby the mortgage debt is to be liquidated. To guard against injury to the mortgagee from the such implied possession by the mortgagor, it is advisable to provide that the mortgagee may take possession upon depreciation of the stock below a certain value, and should the stock fall below such value the mortgagee's right to possession at once vests in him (St. Louis Drug Co. v. Robinson, 10 Mo. App. 588), and is not controlled by an express proviso that until default the mortgagor is to retain possession: Ex parte Nat. Guardian Ass. Co., 10 Ch.D. 408. Nor does an express provision of this kind interfere with the mortgagee's right to possession upon the property being taken in execution, if the mortgage gives the mortgagee the right to take possession upon a levy on execution: Prior v. White, 12 . 261; Breach v. Derby, 19 Ill. 617; Pike v. Calvin, 67 Ill. 27.

If a mortgagee has rightfully obtained possession of the mortgaged property, then, as he has the possession as well as the right of property, no action for its recovery can be successfully brought against him by the mortgagor: McAulay v. Allen, 20 U.C.C.P. 417; Samuel v. Coulter, 28 U.C.C.P. 240; Muyer v. Mackie, 15 W.L.R. 128 (Man.).

Should the plaintiff in execution succeed in getting possession, an action of trover will lie at the instance of the mortgagee, and the measure of damages will be the value of the property or the value of the mortgagee's interest therein: Becher v. Dunham, 27 Minn. 32; Bailey v. Godfrey, 54 Ill. 507; Creed v. Hnensel, 24 Que. S.C. 178; Manchester v. Hills, 34 N.S.R. 512; Mosher v. O'Brien, 37 N.S.R. 286. The right to possession is essential to the mortgagee's right of action against third persons, who have taken the property from the mortgagor: Field v. Earley, 167 Mass. 149. This right to possession is, as has been stated, generally stipulated for upon any such contingency as that of the goods being removed or an attempt being made to remove them; but should such stipulations be omitted, and default not be made in payment, the mortgagor alone can bring an action to recover the property (Fenn v. Bittleston, 21 L.J. (N.S.) Ex. 41), and may recover the value of the property over and above the mortgage debt, as well as damage for the loss of user: Tallman v. Jones, 13 Kans. 438.

Replevin will lie against the mortgagor at the instance of the mortgagee before default in payment, if neither by implication nor by express stipulation the mortgagor has the right to possession: Ashley v. Wright, 19 Ohio St. 291; Simmons v. Jenkins, 76 Ill. 479; Skiff v. Solace, 23 Vt. 279; Frisbee v. Langworthy, 11 Wis. 375; Chadwick v. Lamb, 29 Barb. (N.Y.) 518; Lewis v. D'Arey, 71 Ill. 648; Ferguson v. Thomas, 26 Me. 499; Pickard v. Low, 15 Me. 48. But if the mortgagee chooses to take possession before default, he must take such care of the property as a prudent owner of it would, and do that with it which is most advantageous to the interests of himself and the mort-

gagor. He is subject to the same responsibilities as a hirer, and he must account for and at his own risk take care of the property. So long as the right to redeem exists will the mortgagee be required to exercise reasonable care in the preservation of the property: Overton v. Bigelow, 10 Yerg. 48. He will not be liable if the property is stolen or destroyed without fault on his part; but so long as it is held as security, even after default, he will be accountable for its negligent damage or destruction: Covell v. Dalloff, 31 Me. 104; Morrow v. Turney, 35 Ala. 131; McHugh v. Union Bank, 10 D.L.R. 562 (P.C.), varying 44 Can. S.C.R. 473, 3 A.L.R. 166, and affirming 2 A.L.R 319 on this point.

Possession by the mortgagor is not, however, adverse to that of the mortgagee, and the latter is not bound to take possession upon the first default, or breach of any of the covenants contained in the mortgage, but he may wait until the whole debt matures: Martindale v. Booth, 3 B. & A. 498. This right to possession, however, will not justify a mortgagee in creating a breach of the peace in order to acquire the property: London Co. v. Drake, 6 C.B.N.S. 768. And it is necessary when the mortgagee takes possession that some act of a public character should be done by the mortgagee before he can vest in himself the title, discharged from all equity of redemption on the part of the mortgagor. The change must be *bonâ fide*, and not collusive, or likely to mislead the public. And a mortgagee in possession may, without fraud, re-deliver possession of the property to the mortgagor as his agent, and may bring trover against third person for its conversion: Cotton v. Marsh, 3 Wis. 221. But where, on default, a mortgagee went through the form of taking possession without, however, any change in possession actually taking place, and executed a lease of the goods to the mortgagor, an execution placed in the sheriff's hands after default and before this taking possession by the mortgagee, but not acted on until after the expiration of the mortgage, was held to bind the goods, and the transaction between mortgagor

and mortgagee was held void: Chamberlain v. Green, 20 U.C.C. P. 304; compare Creed v. Huensel, 24 Que. S.C. 178. The case is different, however, when the mortgagee makes a *bonâ fide* sale of the property to a third person, who then honestly sells or leases to the original mortgagor. In that case the mortgage is satisfied *quoad* the goods, by sale, and the possession of the original mortgagor is not his possession, but that of the purchaser: Carlisle v. Tait, 7 O.A.R. 10. Where, also, a party who obtained a bill of sale took possession under it, but suffered the late owner of the goods to interfere and exercise acts of ownership, it was held to avoid the bill of sale as against a subsequent *bonâ fide* execution: Paget v. Perchard, 1 Esp. 205.

It is not enough that a person is put in to keep possession jointly with the assignor: Wordall v. Smith, 1 Camp. 333, *per* Lord Ellenborough. A chattel mortgage usually contains a covenant on the part of the mortgagor, that, upon default in payment of the money secured, or in case the mortgagor shall sell or attempt to sell, or dispose of, or in any way part with the possession of the property mortgaged or any part thereof, or shall remove the same beyond a certain limit, the mortgagee is to be at liberty to enter and take possession of the property. Such conditions are perfectly legal; and covenants might be added to insure (with the same consequences upon default), or to permit the mortgagee to take immediate possession in the event of the mortgagor becoming embarrassed in his affairs, or upon the mortgagor attempting to defraud, or when the mortgagee may deem himself unsafe, or upon suspension of operations by the mortgagor, or in the event of any of the property being taken in legal process at the instance of any creditors: Jamieson v. Bruce, 6 G. & J. (Md.) 72; Wells v. Chapman (Iowa 1882) 7 N.W. Rep. 841; Hall v. Sampson, 35 N.Y. 274; Ex parte National Guardian Ins. Co. et al., 10 Ch. D. 408. This last covenant, however, is unnecessary where the redemise clause is omitted, because, as we have seen, the mortgagee is entitled

possession as against everybody, and may maintain trespass against a sheriff seizing goods covered by such a mortgage: Porter v. Flintoft, 6 U.C.C.P. 335; Ruttan v. Beamish, 10 U.C.C.P. 90; McAulay v. Allen, 20 U.C.C.P. 417; Samuel v. Coulter, 28 U.C.C.P. 240; Merchants Bank v. The Queen, 1 Can. Ex. R. 1.

The limits usually inserted in a mortgage, beyond which the mortgagor is not permitted to remove the property, are the limits of the city, town or other municipal division within which the goods are situate; and though the debt be not due the mortgagee may obtain possession of the property if the mortgagor attempt to remove it beyond the limits specified: Russell v. Butterfield, 21 Wendell 400. This he may also do if the mortgagor sell the property, or in any way part with it, or commit a breach of or fail to perform any of the covenants contained in the mortgage, if the mortgage so stipulates: Nattrass v. Phair, 37 U.C.Q.B. 158; Payne v. Fern, 6 Q.B.D. 620.

It is important, in the interest of a mortgagee, that when the redemise clause is inserted in a mortgage the mortgage should likewise contain stipulations for taking possession upon breach of any of the covenants or conditions contained therein.

If a mortgagee, who has taken possession under an invalid mortgage, sells, does he thereby place his vendee in any better relation than he himself bore towards creditors of the mortgagor who have prior rights under their executions? It is true that as between himself and the mortgagor the mortgage is valid, and, possession being rightfully taken as against the mortgagor, the latter will be estopped from setting up any title as against a purchaser, if the sale is warranted and properly conducted; but the mortgage being invalid as against creditors, and their rights having accrued prior to possession being taken by the mortgagee, the latter cannot perfect his title by such possession, nor can he put the property beyond the reach of creditors by a sale thereof to third parties: Dominion Bank v. Salmon, 23 O.W.R. 608. If the mortgagee sells, the sale will pass a good title to the purchaser, unless the attacking creditors could shew

that the whole transaction was a device to defraud creditors (Allen v. Cowan, 23 N.Y. 502; Maughan v. Sharpe, 17 C.B. N.S. 442), and even then, if the purchaser has again sold to *bonâ fide* purchasers, the rights of the creditors would be effectually extinguished as to the goods: *per* Boyd, C., Davis v. Wickson, 1 O.R. 373.

Because the mortgagee, under such an instrument, has the right of possession as against the mortgagor, so also he has against everybody else, provided, of course, that the mortgage be *bonâ fide;* and, therefore, he may maintain trespass, trover, or replevin against a sheriff seizing the mortgaged goods under a fi. fa. issued at the suit of a creditor: Stewart v. Cowan, 40 U.C.Q.B. 346; Porter v. Flintoff, 6 U.C.C.P. 335; Pickhard v. Low, 15 Me. 48: Coty v. Barnes, 20 Vt. 78; Brackett v. Bullard, 12 Met. 308; Dean v. Davis, 12 Mo. 112; Fraser v. Murray, 34 N.S.R. 186; Mosher v. O'Brien, 37 N.S.R. 286; Gates v. Sutherland, 31 N.S.R. 471; Reinholz v. Cornell, 2 Sask. L.R. 342.

The presumption in a mortgage is that the mortgagor shall remain in possession of the property until default; and where the mortgaged property consists of the stock-in-trade of a going concern, there is an implied right that the mortgagor may continue in the exercise of his business and sell the mortgaged chattels in the ordinary course of business, and there is therefore, in such case, an implied contract that the mortgagor may remain in possession until default, unless such implication be very expressly excluded by the contract: Dedrick v. Ashdown, 15 Can. S.C.R. 227; National Mercantile Bank v. Hampson, 5 Q.B.D. 177; Walker v. Clay, 49 L.J.C.L. 560.

What amounts to a sale in the ordinary course of business is a question of fact to be passed upon by the trial Court: McPherson v. Moody, 35 N.B.R. 51. A sale of the whole stock-in-trade by a trader is not a sale in the ordinary course of business which will give a *bonâ fide* purchaser title as against a prior mortgagee: Taylor v. McKeand, 5 C.P.D. 358. So a sale of farm produce covered by a mortgage for the purpose of applying the-

proceeds of the sale in satisfaction of a rent-distress will not prevail against the mortgagee: Musgrave v. Stevens, 1 Cab. & E. 38. The words "transfer of goods in the ordinary course of business." were construed to be wide enough to include the sale of a stock-in-trade *en bloc* within the meaning of the former phrase as used in R.S.B.C. 1897, ch. 32, and B.C. Stat. 1906, ch. 8, sec. 5, so as to exclude the transfer from the operation of the B.C. Bills of Sale Act: Greenburg v. Lenz, 12 B.C.R. 395.

CHAPTER VII.

The Place of Contract.

Unless a contract is *contra bonos mores*, or is one which is strictly forbidden by the law of the country wherein it is to be performed, a contract, if valid in the country wherein it is made, is valid everywhere: Hope v. Hope, 8 D. M. & G. 731, 26 L.J. Ch. 417; Grey v. Levy, 16 C.B.N.S. 79; Brantley v. S. E. Rail Co., 12 C.B.N.S. 72, 31 L.J.C.P. 286; Sawyer & Massey v. Boyce, 1 Sask. L.R. 230, following Bonin v. Robertson, 2 Terr. L.R. 21. So much of the law of the country where the contract is made as affects the rights and merits of the contract, all that relates *ad litis decisionem* is adopted from the foreign country: Leroux v. Brown, 12 C.B. 803, 22 L.J.C.P. 1; MacFarlane v. Norris, 2 B. & S. 783, 31 L.J.Q.B. 245; Williams v. Wheeler, 8 C.B.N.S. 299; Barker v. Central Vermont Ry. Co., 13 Que. S.C. 2; Black v. The Queen, 29 Can. S.C.R. 693. The law in the province wherein the mortgage is executed governs as to the nature, the validity, the construction, and effect of the mortgage (Peninsular & Oriental v. Shand, 3 Moo. P.C.N.S. 272), and the mortgage will be enforced in another province, though, had it been originally executed in the latter province it would have been declared illegal by reason of some defect under the laws therein. In the absence of a statutory provision to the effect that a mortgage made out of the province upon property not situated within it at the time of the execution of the instrument is to be re-registered within the province in which the goods are subsequently removed, the Bills of Sale Act, in the absence of such provision can not be given an application by reason of the goods afterwards being brought within the limits of the province (River Stave Co. v. Sill, 12 O.R. 570; Bonin

v. Robertson, 2 Terr. L.R. 21; Cammell v. Sewell, 5 H. & N. 728; Fairbanks v. Blomfield, 5 Duer. (N.Y.) 434). Nor is it necessary, after the goods are removed, to execute a new instrument in compliance with the law of the province to which the goods are taken: Beall v. Williamson, 14 Ala. 55. If the mortgage is executed and recorded according to the laws of the province, or country, of its execution, it is effectual to hold the property in the province to which it is removed: Ferguson v. Clifford, 37 N.H. 86; Kanaga v. Taylor, 7 Ohio St. 134; Hall v. Pillow, 31 Ark. 32; Hooper v. Gumm, L.R. 2 Ch. 282. See R.S.S. 1909, ch. 144, sec. 31(2).

If the mortgage is good according to the law of the *situs* of the goods at the time of execution as between the parties, it is good in every other *situs* to which the goods may be removed, even as against subsequent purchasers and creditors; and if registration is only required by the law of the original *situs* to protect creditors and subsequent purchasers, this means creditors and subsequent purchasers seeking to enforce their claims within the judicial territory of the original *situs;* and, consequently, whether registered in either jurisdiction, or not, the mortgage, valid between the parties, is valid to all intents and purposes in any foreign (including other provincial) jurisdiction: Jones v. Twohey, 1 A.L.R. 267, following Cammell v. Sewell, 3 H. & N. 617, 5 H. & N. 728; Castrique v. Imrie, L.R. 4 H.L. 414; Bonin v. Robertson, 2 Terr. L.R. 21; Shapard v. Hynes, 104 Fed. Rep. 449, 52 L.R.A. 675; Handley v. Harris, 48 Kan. 606, 17 L.R.A. 703.

In Ord National Bank v. Massey, 48 Kan. 762, 17 L.R.A. 127, the Court held that the constructive notice imparted by the registration of a chattel mortgage in the county and state where executed, is not confined to that county and state, but protects the interests of the mortgagee when the property is removed by the mortgagor to another state: National Bank of Commerce v. Morris, 114 Mo. 255, 19 L.R.A. 463.

For the protection of creditors and subsequent innocent purchasers for value, the Ontario Bills of Sale Act, 10 Edw. VII.

ch. 65, sec. 19, requires the registration of a certified copy of the instrument, to be filed with the proper officer of the county or district to which the goods are removed, within two months from such removal. This section, however, contains no provision in the event of a removal of mortgaged chattels from other provinces, jurisdictions, or foreign countries; hence, as to the latter, the common law rule of the *lex rei sitæ* still governs. The "subsequent purchaser" in a case to which sec. 19 applies must be one who purchased after the expiration of the period from the time of removal, and though no copy of the mortgage is filed as the statute provides, it is valid as against a purchase made within such limited period: Hulbert v. Peterson, 36 Can. S.C.R. 324.

The place where the bargainor or mortgagor executes or signs the bill of sale or mortgage is the place where the contract is made, the *locus contractus*, the law of which will govern (Smith v. Mingay, 1 M. & S. 92), unless the property mortgaged is in a province other than that in which the instrument is executed, and then the *lex rei sitæ* governs: Fowler v. Bell, 90 Tex. 150, 39 L.R.A. 254.

When the property is situated in a province different to that wherein the mortgagor or bargainor resides, then, however regular the instrument may be under the law of the province of domicile, yet it will be invalid if it fail to conform with the laws of the province wherein the property is situated at the time of the execution of the documents: River Stave Co. v. Sill, 12 O.R. 557.

The *lex domicilii*, in the case of mortgages of chattels, must give way to the *lex sitæ* when the law of the province wherein the property lies prescribes a different rule of transfer from that of the province where the mortgagor lives: Green v. Vanbuskirk, 7 Wall. 139, 150.

Every state has entire jurisdiction over all property, personal as well as real, within its own territorial limits, and the laws of the state regulate and control its sale and transfer, and

all rights which may be affected thereby. If a foreigner, or citizen of another state, send his property within a jurisdiction different from that where he resides, he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects, it has a right to regulate. And if two persons in another state choose to bargain concerning property situate elsewhere of the jurisdiction where the contract is made, they cannot expect that the rights of persons in the country where the chattel is situated, will be permitted to be affected by their contract: Clark v. Tarbell, 58 N.H. 88.

In a New York case, a span of horses, at the time being in the State of New York, were mortgaged by a resident of that state to another. The mortgagor brought the horses to Canada and sold them to one who bought them in good faith without notice. Another resident in New York bought the horses, but never took them from Canada. After demand made upon the latter purchaser the mortgagee brought an action of trover, and was held entitled to recover: Edgerly v. Bush, 81 N.Y. 199. When it is desired to enforce a mortgage, then the remedies must be pursued according to the law of the province in which the action is brought. The *lex fori* determines, "so much of the law as affects the remedy only; all that relates *'ad litis ordinationem'* is taken from the law of that country where the action is brought": Ferguson v. Clifford, 37 N.H. 86; Barker v. Central Vermont Ry. Co., 13 Que. S.C. 2.

Reference on the general law as to the situs of a debt may be made to R. v. Lovitt, [1912] A.C. 212; McMullin v. Traders Bank, 6 D.L.R. 184, 26 O.L.R. 1; and Minot Grocery Co. v. Durick, 10 D.L.R. 126.

The *lex fori* must be presumed to be the law governing a contract, unless the *lex loci* be proved to be different: Canadian Fire Ins. Co. v. Robinson, 31 Can. S.C.R. 488; Black v. Moore, 2 N.B. Eq. 98; Garner v. Wright, 52 Ark. 385, 6 L.R.A. 715.

CHAPTER VIII.

Sale by the Mortgagee.

One of the remedies of a mortgagee upon default, is that of foreclosure, but the remedy most usually exercised is that of sale.

A mortgagee under a second mortgage cannot claim a judicial sale of the interest of the first mortgagee without the latter's consent, but he may sell the equity of the mortgagor subject to the prior mortgage without making the first mortgagee a party: Wallace v. Smart, 1 D.L.R. 70, 19 W.L.R. 787, 48 C.L.J. 110, 22 Man. L.R. 68.

The ordinary mortgage contains a provision empowering the mortgagee to sell by public auction or private sale, and, in order to acquire possession of the property for that purpose, to make entry upon the land of the mortgagor, or wheresoever the goods may be, and if need be to break and force open doors, locks, etc. (Lumley v. Simmons, 34 Ch.D. 698, following Re Morritt, 18 Q.B.D. 222); or if they are found on a public highway (O'Neil v. City, etc., Finance Co., 17 Q.B.D. 234); but the liberties extended to a mortgagee do not embrace the right to commit a breach of the peace, or even to threaten such, in order to obtain possession. The moment resistance is met with, the legal remedy of replevin or trover accrues to the mortgagee, and to these remedies he must resort.

In taking possession after default, it is not absolutely essential that he should make claim under his mortgage, so long as, in point of fact, he acts by virtue of it; but he should not make use of the services of an officer of the law to deceive the mortgagor into believing he is acting under lawful authority.

when such is only a pretence: Murray v. Erskine, 109 Mass. 597; Thornton v. Cochran, 51 Ala. 415.

Having obtained possession, a mortgagee in selling must exercise proper care and discretion, and adopt such means as would be adopted by a prudent man to get the best price that can be obtained. He must use every exertion to sell the property at the best price: Rennie v. Block, 26 Can. S.C.R. 356; Orme v. Wright, 3 Jur. 19, 972; Bird v. Davis, 14 N.J. Eq. 467; Neal v. Rogers, 19 O.W.R. 873, affirming 19 O.W.R. 132; Vanstone v. Scott, 1 Alta. L.R. 462; Grimes v. Gauthier, 1 Sask. L.R. 54; Bartram v. Grice, 4 D.L.R. 682, 22 O.W.R. 191, applying Latch v. Furlong, 12 Gr. 303. He must not barter or exchange the property. He must sell only for money, as the word "sale" implies. This word is one "of precise legal import in law and in equity; it means at all times a contract between parties to pass rights of property for money which the buyer pays or promises to pay to the seller for the thing bought and sold": Williamson v. Berry, 8 How. 495; Edwards v. Cottrell, 43 Iowa 194.

It is well settled that though a mortgagee's power of sale confers a clear right, it must be exercised with a due regard to the purpose for which it is given. He must take all reasonable means to prevent any sacrifice of the property, inasmuch as he is a trustee for the mortgagor of any surplus that may remain (Jenkins v. Jones, 2 Giff. 99, 108; Rennie v. Block, 26 Can. S.C.R. 356); his duty is "to bring the estate to the hammer under every possible advantage to his *cestui que trust*": *per* Lord Eldon, Downes v. Grazebrook, 3 Mer. 205.

It doubtless is the fact that though a mortgagee or his assignee selling under a power of sale, is a trustee for the mortgagor, with respect to the balance of the proceeds thereof, yet he does not, in the technical sense, stand merely in the position of a trustee: Ex parte Rawlings, Re Cleaver, 18 Q.B.D. 489. He has a beneficial interest, which is the realizing of his security, in other words, getting paid his mortgage money, interest and

costs; that is his right, but he will not be allowed to exercise that right without a due consideration of the interest of the mortgagor; and the interest of the mortgagor requires that the sale shall take place as beneficially to the mortgagor as if the mortgagor himself were selling the property: Falkner v. Equitable, 4 Jur. N.S. 1214; Prentice v. Consolidated Bank, 13 O.A.R. 69.

Apart from the implied trust with respect to the surplus of the proceeds realized from the sale, a mortgagee, selling under the power of sale in the mortgage is not a trustee for the mortgagor, and is not liable for any loss by reason of the sale, unless guilty of wilful negligence and default; and when such should occur, and the property be sold at an undervalue, the mortgagee is chargeable with full value thereof: Wilson v. Taylor, 7 D.L.R. 317, 48 C.L.J. 707. In the exercise of his power of sale he is bound merely to act in good faith and avoid conducting the sale proceedings in a recklessly improvident manner calculated to result in a sacrifice of the goods. He is not obliged, regardless of his own interest as mortgagee, to take all the measures a prudent man might be expected to take in selling his own property: *per* Duff, J., British Columbia Land, etc. v. Ishitaka, 45 Can. S.C.R. 302, reversing 16 B.C.R. 299: Kaiserhof Hotel Co. v. Zuber, 25 O.L.R. 194; affirmed 9 D.L.R. 877, 46 Can. S.C.R. 651; Kennedy v. De Trafford, [1897] A.C. 180; Bartram v. Grice, 4 D.L.R. 682, 22 O.W.R. 191, applying Latch v. Furlong, 12 Gr. 303. In McHugh v. Union Bank, 10 D.L.R. 562, 570, the Judicial Committee of the Privy Council held that it is the duty of the mortgagee exercising a sale under a power in the mortgage to act as a reasonable man would act in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold.

If a mortgagee seizes and sells a portion of the mortgaged property, whereby his debt, interest and costs are satisfied, he must not sell the remainder of the property, his title to which is extinguished by his mortgage being already satisfied, and

if he does, the mortgagor will be entitled to an action of trover, and can recover the full value of the goods so wrongfully converted: Charter v. Stephens, 3 Denio 33. And a mortgagee must refund to the mortgagor any balance from the sale, after paying the mortgage debt, interest and costs (Pratt v. Styles, 17 How. (N.Y.) Pr. 211; Collins v. Eaton, 19 W.L.R. (Alta.) 608: Union Bank v. McHugh, 44 Can. S.C.R. 473, 10 D.L.R. 562), for, as to this balance, he stands towards the mortgagor in the relation of trustee, and all the remedies at law or in equity consequent upon such a relationship are open to the mortgagor to recover any such balance from the mortgagee: Davenport v. McChenesy, 86 N.Y. 242.

An action of trover may be at the suit of a mortgagor in possession against a sheriff seizing under a *fi. fa.* against goods of a mortgagor. There may be trespass to the possession of the mortgagor when in possession with the assent and by the will of the mortgagee, for the execution does not bind the goods; then, quoad these goods, the sheriff is a wrongdoer and the mortgagor would be entitled to an action: Corbett v. Shepard, 4 U.C.C.P. 43.

A mortgagee, who has advertised under his power of sale, has the right, in the interest of all parties, to adjourn the sale from time to time: Hosmer v. Sargent, 8 Allen 97.

Indeed, if a mortgagee does not do so, and the property, by reason thereof, is wilfully sacrificed, or from negligence in the mortgagee, the sale fails to realize enough to pay off the mortgage debt, it will be a good defence in an action to recover the balance of such debt, that if the sale had been *bonâ fide* the property would have been sold for more than enough to pay the debt: Howard v. Ames, 3 Met. (Mass.) 308.

In general it may be said that a mortgagee cannot make a mortgagor liable for a deficiency greater than there would be in the instance of an ordinary sale fairly conducted (Stoddan v. Denison, 38 How. (N.Y.) Pr. 296), and it will also be a good defence to an action to recover the balance of a mortgage

debt, that the plaintiff had repurchased at the sale under the power in the mortgage, and sold again at an increased price for more than sufficient to pay the balance sued for. And even when the goods repurchased were subsequently exchanged for land, the necessary enquiries would be directed and steps taken to ascertain the true value of the land, in order that the defendant might derive the benefit of any profit from the exchange after satisfaction of the mortgage debt: Annes v. Dornan, 10 U.C.C.P. 299.

In all cases the mortgagee must strictly follow the terms and stipulations of the mortgage, and if the sale be not conducted regularly the mortgagee will be responsible for any damages the mortgagor suffers by a departure from the terms of the instrument: Freeman v. Freeman, 17 N.J. Eq. 44.

Where loss occurs to mortgaged property in consequence of want of reasonable care in its removal from the place of seizure to the place at which it is sold, the proper measure of damages recoverable by the mortgagor is the amount of depreciation in value caused by the negligent manner in which the removal was effected: Union Bank of Canada v. McHugh, 44 Can. S.C.R. 473, affirmed on this point by Privy Council, 10 D.L.R. 562.

A suit will lie to set aside a sale had under a power of sale in the mortgage, but redress is less easy in such a proceeding than in one wherein it is sought to charge the mortgagee with damage resulting from negligence and want of care in selling the property. In the former case the Court will not interfere if the power of sale has been exercised *bonâ fide*, and for the purpose of realizing the debt, and without collusion with the purchaser, even though the sale be very disadvantageous, unless the price be so low as in itself to be evidence of fraud: Davey v. Bowman, 1 DeG. & J. 535, 577; Warner v. Jacob, 20 Ch.D. 220.

When there exists fraudulent undervalue, which simply means such gross undervalue as shews either actual and inten-

tional fraud, or gross negligence, constituting in equity a fraud on the mortgagor (Latch v. Furlong, 12 Gr. 306; Crawford v. Meldrum, 3 E. & App. R. 113), the sale will be set aside, even though there does not exist the least intention of wrong. The error may be one of judgment, yet the rule is imperative that a mortgagee must act in these matters as a provident owner would. Fraud vitiates all things, and when there is collusion between the mortgagee and mortgagor to so conduct the sale as to lessen the chances of creditors, then it is probable that they would be permitted to contest the sale, if the fraud could be brought home to the purchasers: Gordon v. Clapp, 113 Mass. 335. The mortgagor must act with reasonable promptitude; he cannot, knowing of the wrong, lie by and do nothing. If he does, he may lose his rights, if a sale be made to third parties, innocent of the irregularity or fraud practised in the sale (Baron v. Drewery, 4 S.L.R. 26; Wylder v. Crane, 53 Ill. 490; Williams v. Sun Life Assurance Co., 4 D.L.R. 655; Jones v. North Vancouver, etc., Co., [1910] A.C. 317), and, of course, if he take the benefit of the sale in any way, as by consenting to an application of the surplus proceeds to the satisfaction of an execution against himself, he will be estopped from afterwards objecting to the sale: McConnell v. People, 71 Ill. 481.

It is most important to advertise and to give such publicity to the sale as a prudent proprietor would, so that the sale may be conducted under circumstances of the greatest advantage: Marriott v. Anchor, 7 Jur. N.S. 155. Especially is this important when the power to take possession and sell requires an advertisement, but failure to advertise does not entitle the mortgagor to regain possession of the property, but may be grounds for allowing damages: Whitaker v. Sigler, 44 Iowa 419; Neal v. Rogers, 19 O.W.R. 873, affirming 19 O.W.R. 132. It is the ordinary custom before a sale by auction to give every publicity to it by advertisement in the newspapers, and by hand-bills containing a definite description to attract a rea-

sonable number of bidders: McHugh v. Union Bank, 3 A.L.R. 177, in appeal, Union Bank v. McHugh, 44 Can. S.C.R. 473, and 10 D.L.R. 562 (P.C.); Richmond v. Evans, 8 Gr. 518. And so secure are the rights of a mortgagor to have a sale properly conducted, that it is no defence, when he seeks his remedies, that he disentitled himself to relief, because he employed puffers at the sale (Matthie v. Edwards, 16 L.J. Ch. 405; Richmond v. Evans, 8 Gr. 518); but he must not be guilty of conduct which has the effect of prejudicing the efforts of the mortgagee to secure a good and proper sale. If he interferes with the sale, or serves notices, or otherwise acts so as to discourage bidding, then no remedy is open to the mortgagor, and he must suffer the consequence of his own acts: Hall v. Ditson, 55 How. (N.Y.) Pr. 19, 5 Abb. N.C. 198.

A puffer is a person who bids at a sale, but does not intend, and is not bound, to complete the purchase: Shimmin v. Bellew, Ir. R. 1 Eq. 289. At common law the secret employment of puffers constitutes an invalidating ground of the sale in favour of the purchaser: Wright v. Bentley, 11 D.L.R. 515; Howard v. Castle, 6 Term. R. 642; Green v. Bravestock, 14 C.B. 204; Rex v. Marsh, 3 Y. & J. 331; Crowder v. Austin, 3 Bing. 348; Fuller v. Abrahams, 6 Moore C.P. 316; Wheeler v. Collier, M. & M. 123; Mortimer v. Bell, L.R. 1 Ch. 10; Smith v. Harrison, 3 Jur. 287; Gilliat v. Gilliat, L.R. 9 Eq. 60.

Where the goods are sold by auction it will ordinarily be a reasonable precaution to fix a reserve bid; but unless the auction sale is expressly "without reserve," the seller can at any time before the goods are knocked down withdraw them from the sale. In fact it would be a mortgagee's duty to do so if the highest bid did not reach a proper price for the goods: Warnerstone v. Scott, 1 A.L.R. 462. Hence, where the property is advertised to be sold "without reserve" any interference direct or indirect, by the vendor, which may effect the rights of the highest bidder, will preclude the vendor from the aid of the Court to enforce the sale: Robinson v. Wall, 2 Ph. 372; Meadows

v. Tanner, 5 Madd. 34; Thornett v. Haines. 15 M. & W. 367. Puffing, however, does not invalidate the sale, if the puffer does not bid beyond the fixed reserve price; but the sale is bad, if the puffer is employed for the purpose of running up the purchaser, and not solely to prevent a sale below the reserved price: Mortimer v. Bell, L.R. 1 Ch. 10; Dimmock v. Hallett, L.R. 2 Ch. 21.

The fact that the mortgage contains a power of sale does not compel the mortgagee to pursue that method of realizing upon his security. It is a cumulative remedy. The mortgagee's title becomes absolute, subject to the mortgagor's right to redeem; and even though the mortgage stipulate that upon a sale the mortgagor shall be paid over all the proceeds after payment of the mortgage debt, still the mortgagee is not compelled to resort to sale: Nicholls v. Webster, 1 Chand. (Wis.) 203; Durfee v. Grinnell, 69 Ill. 371; McConnell v. Scott, 67 Ill. 274.

A provision for sale after forfeiture does not extend the time for payment in favour of the mortgagor, nor does it in any way add to, or give to, the interest of the mortgagor greater strength: Durfee v. Grinnell, 69 Ill. 371. The mortgagee is not liable because he retains the property, declining to make sale of it, the simple result of his so doing being that the mortgagor's right to redeem is prolonged: Bradley v. Redmond, 42 Iowa 452; Manitoba Lumber Co. v. Emmerson, 5 D.L.R. 337.

The mere taking of a bill of exchange does not suspend the right to seize under the bill of sale: Bramwell v. Eglinton, L.R. 1 Q.B. 494, affirming 5 B. & S. 39.

It is quite possible for the mortgagor to set up a verbal contract for the extension of time for payment, based upon a new consideration, and if such verbal contract be shewn to exist, then a mortgagee cannot, when there is a redemise clause in the mortgage, or where by implication the mortgagor is to retain possession, take possession before the expiry of such extension without constituting himself a wrong-doer (Williams v. Stern, L.R. 5 Q.B.D. 409, disapproving Albert v. Grosvenor

Investment Co., L.R. 3 Q.B. 123), where it was held that a verbal extension without consideration operates as a waiver of the default. Generally speaking, the mortgage provides that the mortgagee may sell at private sale. This he may do, notwithstanding provision is also made for a sale by public auction. In neither case is notice necessary to the mortgagor, unless the instrument demands it (Ballou v. Cunningham, 60 Barb. (N.Y.) 425; Chamberlain v. Martin, 43 Barb. (N.Y.) 607); but the circumstances surrounding a private sale will be scanned very jealously, to see if fraud or negligence has taken place in the conduct of the sale: Dane v. Mallory, 16 Barb. (N.Y.) 46.

Unless there is fraud to which the purchaser is a party, a private sale will pass to him a good title, even where no notice has been given to the mortgagor, though the proper course is to give formal notice of intention to sell, whether the sale be private or by public auction, but the giving of the notice is optional with the mortgagee: Wylder v. Crane, 53 Ill. 493. Should the mortgage stipulate for notice to be given before a sale is made, generally the mode and time allowed in giving notice is also set forth; but when this is not done, and simply notice required, then the circumstances of each particular case govern the proceedings regarding notice. The notice given, the time fixed for sale, and the conduct of the proceedings might, in one case, be reasonable and proper, yet in another case, from a variety of causes, might be insufficient and unsuitable, and might result in much injury; but the onus is on him who attacks the proceedings to shew wherein they have produced harm: Wilson v. Brannan, 27 Cal. 258; Boehmer v. Zuber, 20 O.W.R. 172.

If the mortgage provides for notice being given, then the form of notice and the mode and manner of giving it, as prescribed by the mortgage, must be followed strictly, though informalities and omissions which cannot detract from the sale, or prejudicially affect the interests of the mortgagor or freeholders will not invalidate the sale; thus, for example, the

omission of the year, when the time fixed was such as thereby to denote the year, or neglecting to state whose property was to be sold, are not such wrongs in the conduct of a sale as would render the notice ineffectual (Waite v. Denison, 51 Ill. 319; Finch v. Sink, 46 Ill. 169; McConnell v. Scott, 67 Ill. 274); nor if the statement of the amount due on the mortgage be inconsiderably or slightly in excess of the true amount will it be fatal: Ramsey v. Merriam, 6 Minn. 168.

Not infrequently because incapable of distinction the property of others is put up and sold at the auction held by a mortgagee. If no injury is worked to the mortgagor then he cannot complain, and it has been held that in a sale of books the sale cannot be invalidated because other books belonging to other persons are put upon the catalogue and sold with the books named in the mortgage: Waite v. Denison, 51 Ill. 319; Boehmer v. Zuber, 20 O.W.R. 172.

Nor is a mortgagor entitled to damages for the wrongful seizure by the mortgagee of other chattels than those covered by the mortgage where the mortgagor assented to the seizure: Thien v. Bank of B.N.A., 4 D.L.R. 388, 21 W.L.R. 192. The substitution of one chattel security for another has the effect of cancelling the first security: Adams v. Hutchings (No. 2), 3 Terr. L.R. 206; Hope v. Hayley, 5 El. & Bl. 830.

When it is self-evident that a sale of the property separately and in parcels would bring more than disposing of the whole in bulk, then the mortgagee will be liable in damages for wrongfully conducting the sale by selling in bulk; and the quantum of damages against the mortgagee will be the difference between the amount brought at the sale and the amount that would probably have been realized had the sale been in detail: Hungate v. Reynolds, 72 Ill. 425.

However, if in the *bonâ fide* exercise of his discretion, where there is a doubt as to whether the property would sell more advantageously in bulk or in parcels, a mortgagee prefers one way and sells accordingly, he is not to be charged with wilful

default, if after the sale, it appears that the other way might have been more advantageous: Wilson v. Taylor, 7 D.L.R. 317, 48 C.L.J. 707; Haddington Island Quarry Co. v. Huson, [1911] A.C. 722.

It is a rule that a trustee must not buy at his own sale, and this applies to a mortgagee selling under a power of sale: Van Volkenberg v. Western Canada Ranching Co., 6 B.C.R. 284; King v. England, 33 L.J.K.B. 146; Moore v. Singer, 72 L.J.K.B. 578, 37 L.J.K.B. 460; Henderson v. Astwood, [1894] A.C. 158, and where a clerk of the mortgagee's solicitor purchased, but paid nothing, and immediately reconveyed to the mortgagee, the sale was held invalid: Ellis v. Dellabough, 15 Gr. 583; Parnell v. Tayler, 2 L.J. Ch. 195.

Such a purchase is none the less illegal because made by a third party for and on behalf of the mortgagee (Pettibone v. Perkins, 6 Wis. 616; Phares v. Barbour, 49 Ill. 370; Alger v. Farley, 19 Iowa 518; Bentley v. Morrison, 44 N.S.R. 476), and if the mortgagee resell at a profit, the mortgagor may claim such profit: Cunningham v. Rogers, 14 Ala. 147.

Of course a consent by the mortgagor to a purchase by the mortgagee overcomes any objection, and the sale will not be set aside when such consent has been given: Godell v. Dewey, 100 Ill. 308; Emmons v. Hawn, 75 Ind. 356.

If the sale is properly conducted, then the mortgagee may recover any deficiency after applying the proceeds of the sale *pro tanto* towards payment of the mortgage debt: Chamberlain v. Martin, 43 Barb. (N.Y.) 607; Acadia Loan Co. v. Legere, 45 N.S.R. 328.

Or if in addition to the chattel mortgage, the mortgagee is also the holder of a second mortgage on the mortgagor's land as additional security, he may, if there is a deficiency upon a sale of the goods and chattels on the mortgagee's default proceed to have it satisfied from the surplus arising from the sale of land under the first mortgage: Great West Life Assurance Co. v. Leib, 4 D.L.R. 392.

A mortgagee who sells property under his mortgage, does not warrant the title to the property, and a purchaser at a sale advertised as being made under power in a mortgage, cannot succeed in an action against the mortgagee, because the property has been taken from him by the rightful owner: Shepherd v. Earles, 13 Hun. (N.Y.) 651; Harris v. Lynn, 25 Kans. 281.

There is generally in every mortgage no express provision entitling the mortgagee to enter upon the premises of the mortgagor to get possession of, and remove, the mortgaged goods; but, apart from such an express provision, the right arises by implication; that is, of course, when the mortgagee is entitled to possession. Having the right to the property, all that remains to entitle him to possession of the chattels, and when he can combine both rights in one, is the privilege to go upon the mortgagor's land to get possession of the mortgaged chattels, as he would be had the mortgagor sold him property situated upon his premises: McGregor v. McKay, 32 U.C.C.P. 538; Woolfe v. Horne, 2 Q.B.D. 355; Saint v. Pilley, L.R. 10 Ex. 137; but the mortgagee, in exercising such right, ought not to do otherwise than in a peaceable and reasonable manner: McNeal v. Emerson, 15 Gray (Mass.) 384; and it appears that he cannot justify an entry upon the land of another for the purpose of taking his own property, unless he shews that it was upon the land by the wrongful act of the person in possession of the land, and without any fault or neglect on his own part: Richardson v. Anthony, 12 Vt. 273.

CHAPTER IX.

Landlord's Rights.

Where the relation of landlord and tenant exists, the law implies a right of distress as necessarily incident thereto: Bell on Landlord and Tenant, 253. By the common law, fixtures, animals *feræ naturæ*, things in actual use, things in the custody of the law, goods delivered to the tenant in the way of his trade, money and straying cattle are exempt from distress for rent: Bell on Landlord and Tenant, 293-298. The statute law of the several provinces made these exemptions more comprehensive, and, in Ontario, for instance, it has been enacted 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; but this restriction shall not apply in favour of a person claiming title under or by virtue of an execution against the tenant, or in favour 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 hiring 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 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, or by any person whose title is derived by purchase, gift, transfer or assignment from any relative to whom such restriction does not apply:" 1 Geo. V. 1911, ch. 37, sec. 31; 1894, Ont. (57 Vict.) ch. 43, sec. 1, 1897, Ont. (60 Vict.) ch. 15, schedule A, item 60; Anderson v. Scott, 8 D.L.R. 816; Battison v. Potvin, 27 Que. S.C. 165.

The word tenant referred to in the statute includes a subtenant, assignee of the tenant and any person in actual occupation under and with consent of the tenant. But an agent appointed by assignees of the tenant for the sole purpose of exhibiting the premises to prospective lessees, and without authority to let or grant possession of them, are not deemed in occupation "under" the assignees, and their goods are therefore exempt from distress: Farwell v. Jameson, 26 Can. S.C.R. 588.

Therefore though a mortgagee may have the right to possession of the mortgaged property, that right may be lost by a distress being regularly made at the instance of a landlord of the premises upon which the goods are at the time of the distress. The reason is that the landlord has a lien upon these goods in respect of the place in which they are found, and not in respect of the person to whom they belong: Woodfall on Landlord and Tenant, 14th ed., 672. But the landlord, even after distress, may lose his right to the goods when the distress is not succeeded by the goods continuing in the custody of the law; as, for instance, where they are allowed to remain in the possession of the tenant for a considerable time, he being constituted the landlord's agent for that purpose; in such a case, a mortgagee who succeeds in removing the goods under his mortgage will be preferred: Roe v. Roper, 23 U.C.C.P. 76; King v. England, 4 B. & S. 784; Langtry v. Clark (1896), 27 O.R. 280, 32 C.L.J. 199.

When the property of another is seized under the large

powers of the landlord, the latter must proceed with regularity, and therefore, when, after distress, the landlord takes no further proceedings for some days—makes no inventory, no appraisement, gives no notice of sale—he cannot then resist a mortgagee's right to the property; and while the tenant has a right to waive all statutory formalities, he cannot do so as regards the property of another: Whimsell v. Giffard, 3 O.R. 1; see Wood v. Nunn, 5 Bing. 10; Cramer v. Mott, L.R. 5 Q.B. 357; Swan v. Lord Falmouth, 8 B. & C. 456; Roe v. Roper, 23 U.C.C.P. 76; Mooers v. Manzer, 36 N.B.R. 205.

A mortgagor is not, by reason of his relationship to the mortgagee, bound to prevent the mortgaged goods from being distrained for rent after the mortgagee has taken possession: England v. Marsden, L.R. 1 C.P. 529. When a mortgagee has taken possession of the mortgaged goods, and allows them to remain on the mortgagor's premises without any request from the mortgagor, and while they so remain (the mortgagor's family residing on the premises) rent falls due, for which the landlord distrains, the mortgagee cannot recover such rent from the mortgagor unless the latter has, in the mortgage or otherwise, agreed with him to pay it. The reason is that the mortgagee having the right of property and also the possession, he is so far like unto an owner of the goods distrained, that his position is that of one who, choosing to place his own goods upon the premises of another, cannot set up as a compulsory payment, a payment he has been obliged to make in order to release his goods. When a mortgagee takes possession the goods become his absolute property, and he not only has a right to take them away, but it is his duty to do so, and, if he leaves them upon the land, his doing so is precisely the same as if he places his own goods upon the demised premises without the mortgagor's consent, and the landlord comes and distrains them: England v. Marsden, L.R. 1 C.P. 531.

But the case is very different when, after seizure by the mortgagee, the goods are left upon the demised premises at the

request or direct instigation of the mortgagor, then, if distrained upon for rent, the mortgagee, having paid the amount, can recover the same from the mortgagor (Exall v. Partridge, 8 T.R. 308); and he likewise can recover the rent from a third person, if such third person is liable therefor, and the goods are left or placed upon the demised premises at the request of such third person, or so far for his benefit that a request will be implied; but if such third person is under no duty or obligation to pay the rent, then no privity arises between the parties, and a payment by the mortgagor to release his goods would so far be, in law, a voluntary payment that no action will lie against such third person for its recovery: Herring v. Wilson, 4 O.R. 607.

However, the payment of rent by the tenant to the mortgagee of the landlord under a threat of legal proceedings amounts to a compulsory payment which relieves the tenant from distress and further liability to the landlord: Puffer v. Ireland, 10 O.L.R. 87.

By 1 Geo. V. ch. 37, sec. 47 (Ont.); 2 Geo. II. (Imp.) ch. 19, sec. 1, it is enacted that: "In case any tenant or tenants, lessee or lessees for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof, any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises, his, her, or their goods or chattels, to prevent the landlord or lessor, from distraining, it shall be lawful for such landlord or lessor or any person by him, for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels wherever the same shall be found, as a distress for the said arrears of rent." But this statute only relates to the goods of the tenant, not to the goods of a stranger (Foulger v. Taylor, 5 H. & N. 202), therefore goods, to the possession of which a mortgagee has the right when once removed from off the demised premises, or when

covered by a bill of sale, are no longer liable to distress: Tomlinson v. Consolidated Credit Corp., 24 Q.B.D. 135. Where, however, default has not been made in the mortgage, and the mortgage contains a redemise clause, then the property mortgaged, if fraudulently or clandestinely removed, can be followed and seized within the thirty days allowed by statute, if removed to evade a distress (Parry v. Duncan, 7 Bing. 243), and the rent must have been in arrear at the time of the fraudulent removal: Watson v. Main, 3 Esp. 15; Rand v. Vaughan, 1 Bing. N.C. 767; Dibble v. Bowater, 2 El. & Bl. 564; Clark v. Green 37 N.B.R. 525; Hoyt v. Stockton, 13 N.B.R. 60.

A tenant is not precluded from setting up his title to goods illegally distrained for alleged fraudulent removal because of a pretended sale of them by him, the effect of which was to vest the possession but not the property in the goods in the alleged purchaser: Whitelock v. Cook, 31 O.R. 463.

In view of the fact that the landlord may so follow the goods, and the mortgagee be powerless to act when the mortgage contains a redemise clause, and in view of the doubt existing as to the mortgagee's right to possession, even when a redemise clause is omitted, it might be judicious to provide for a right to possession in the mortgagee when the goods are removed from off the premises for any such purpose, so that on the instant of removal the mortgagee's rights will arise, the ownership of the property at once pass, and, because the goods are no longer the property of the tenant, the landlord's right to seize the property at once ceases.

The statute enabling a landlord to sell (2 W. & M. sess. 1, ch. 5), implies that there shall be a vendor and a purchaser, and the landlord cannot himself be both vendor and purchaser. The sale must be to a third person: King v. England, 4 B. & S. 782 Moore v. Singer, 72 L.J.K.B. 578, 37 L.J.K.B. 460; Henderson v. Astwood, [1894] A.C. 158. Therefore, if a landlord distrains upon mortgaged goods, and becomes himself the purchaser, the mortgagee may maintain trover for the goods; and because the

property by the sale never vests in the landlord, he cannot successfully set up a lien for his rent: Spain v. McKay, 44 N.S.R. 74; Tingley v. Sharpe, 3 W.L.R. 159; Williams v. Grey, 23 U.C.C.P. 561. The mortgagor's consent to the landlord becoming purchaser would not override the general rule of law, because his consent is not the consent of the owner of the property; but if the tenant, being the owner of the property, consent to the landlord taking the property at an appraised price it will pass to the landlord, and he can hold it as against a creditor whose execution has subsequently issued, provided, of course, there is an immediate delivery followed by an actual and continued change of possession (Woods v. Renkin, 18 U.C.C.P. 44; Ingraham v. McKay, 8 D.L.R. 132, 49 C.L.J. 761); and the law is not different if a bailiff is interposed, and he, after an unsuccessful attempt to sell the property, sell to the landlord with the tenant's consent; then if the tenant remains in possession as before, though a stranger be put in charge, the sale will be of no avail as against creditors, subsequent purchasers and mortgagees, unless a prior bill of sale be registered, or there be an immediate delivery and an actual and continued change of possession: Burnham v. Waddell, 28 U.C.C.P. 263, 3 O.A.R. 288; Tomlinson v. Consolidated Credit Corp., 24 Q.B.D. 135.

The relation of landlord and tenant may be created by proper words between the mortgagee and his mortgagor for the *bonâ fide* purpose of further securing the debt without being either a fraud upon creditors or an evasion of the chattel mortgage Acts; Trust & Loan v. Lawrason, 10 Can. S.C.R. 679, affirming 6 A.R. (Ont.) 286; reversing 45 U.C.Q.B. 176; followed in McDonnell v. Building and Loan Assn., 10 O.R. 580; Thomas v. Cameron, 8 O.R. 441; see Laing v. Ontario Savings Co., 46 U.C.Q.B. 114; Linstead v. Hamilton Provident & Loan Co., 11 Man. L.R. 202; Edmonds v. Hamilton Provident & Loan Soc., 18 O.A.R. 347; Hobbs v. Ontario Loan, etc., Co., 18 Can. S.C.R. 483, 529; Pegg v. Independent Order of Foresters, 1 O.L.R. 97.

If a landlord obtain the surrender of a lease from his tenant, then the whole of the property becomes legally vested in the landlord without the existence of any tenancy, and if, prior to such surrender, the tenant has granted a mortgage on the growing crops, which the landlord is put to expense in cultivating and gathering, then the mortgagee cannot claim as against the landlord a greater sum than the surplus after paying the expense of cultivation and gathering, and if the landlord had, before surrender, distrained for his rent, by reason of which distress the surrender is made, then the amount which would be coming to the mortgagee would be still further reduced by the amount of the rent and the expenses of the distress: Clements v. Mathews, 11 Q.B.D. 808; Foster v. Moss, 4 S.L.R. 421. Where the landlord distrains, but his distress is illegal, and a mortgagee brings an action of trover, the landlord cannot set up the invalidity of the mortgage under the chattel mortgage Acts because he is neither a creditor, subsequent purchaser, nor mortgagee: Griffin v. McKenzie, 46 U.C.Q.B. 93; Moores v. Manzer, 36 N.B.R. 205. Pending a distress, the goods taken are in the custody of the law, and are not liable to seizure under a chattel mortgage, so long as no fraud is on foot and no intention or contrivance exists to prejudice the mortgagee: McIntyre v. Stata, 4 U.C.C.P. 248; Roe v. Roper, 23 U.C.C.P. 76, and Whimsell v. Giffard, 3 Ont. R. 1, distinguished; Laugtry v. Clark, 27 Ont. R. 280, distinguished; Anderson v. Henry, 29 Ont. R. 719. Replevin will also lie to recover goods distrained for rent in arrear under an illegal lease. The maxim "*In pari delicto est conditio possidentis*" is applicable only when the possession results from the act of the parties, and not when it results from some incident attached to a legal instrument: Gallagher v. McQueen, 35 N.B.R. 198. There is nothing to prevent a landlord taking a mortgage to secure his rent. Should he do so, he does not (unless he so expressly agree) waive his rights as landlord, including that of distress; therefore his failure to record his mortgage, or the invalidity of it,

instrument from some defect arising under the statute, may be found to be immaterial when his rights as landlord can be enforced: Pitkin v. Fletcher, 47 Iowa 53.

But to entitle the landlord to such right there must be a real lease, and the rent reserved must be real and *bonâ fide* and not excessive, and there must exist an intention of the parties to create a real tenancy at a real rent, and not merely under colour and pretence of a lease, to give the mortgagee additional security: Stikeman v. Fummerton, 21 Man. L.R. 754, following Imperial Loan v. Clement, 11 Man. L.R. 428; Hobbs v. Ontario Loan & Deb. Co., 18 Can. S.C.R. 483; Waterous Engine Works Co. v. Wells, 4 S.L.R. 48, following In re Bowes, 14 Ch. D. 725; Independent Lumber Co. v. David, 5 S.L.R. 1.

Where the landlord of the mortgagor distrained and impounded the mortgaged goods, but instead of proceeding with the sale at the end of five days, or retaining the bailiff in actual possession, left the goods in the tenant's care, under an undertaking by the mortgagor to the bailiff to produce the goods, the mortgagor having requested a delay of sale proceedings, it was held that after the expiry of five days and of a reasonable time for sale the mortgagee could lawfully retake possession, and the goods could no longer be considered as being in *custodiâ legis:* Langtry v. Clark (1896), 27 O.R. 280, 32 C.L.J. 199; Gosnell v. McTamney, 16 O.W.R. 176.

The acceptance of a promissory note for rent due suspends the landlord's remedy by distress during the currency of the note: Colpitts v. McCullough, 32 N.S.R. 502.

In Ontario, legislation has been enacted by which the right of a mortgagee of real estate to distrain for interest in arrear upon a mortgage is limited to the goods and chattels of the mortgagor, and, as to such goods and chattels, to such only as are not exempt from seizure under execution: 10 Edw. VII. ch. 51, secs. 12, 13; R.S.O. 1887, ch. 102, sec. 16, R.S.O. 1897, ch. 121, sec. 15. That statute, however, has reference

only to a license or power granted by the mortgagor to seize or distrain for interest *qua* interest, and does not apply to a distress by a mortgagee under a validly constituted tenancy, created by the terms of the mortgage, between himself and the mortgagor, although the rent reserved is equivalent to and to be applied in satisfaction of the interest: Edmonds v. Hamilton Prov. (1891), 18 O.A.R. 347.

Where in pursuance of the authority of the mortgagee, a bailiff distrains the goods of a stranger upon the mortgaged premises for arrears due under the mortgage, the liability for his illegal act will be charged to his principal, the mortgagee: McBride v. Hamilton Provident, etc., Society, 29 O.R. 162, following Lewis v. Read, 13 M. & W. 234; Haseler v. Lemoyne, 5 C.B.N.S. 530.

CHAPTER X.

Rights and Remedies of Creditors.

The chattel mortgage Acts do not make valid those conveyances which are void either at common law or by statute: see 13 Eliz. ch. 5; 1 Geo. V. ch. 24, repealing R.S.O. 1897, ch. 115, 10 Edw. VII. ch. 64, repealing R.S.O. 1897, ch. 147. The former statutes lay down further rules and requirements in the interests of creditors, and these requirements must be observed and performed in order to uphold transactions within their purview.

The Statute of Elizabeth makes void fraudulent gifts or conveyances "only as against that of person or persons, his or their heirs, successors, administrators and assigns, whose actions, etc., . . . are, shall, or might be in any wise disturbed, hindered, delayed, or defrauded." Such a conveyance, as against the party making it, remains valid and effectual (Robinson v. McDonnell, 2 B. & A. 134), and a subsequent voluntary conveyance will not be preferred to it: Boughton v. Boughton, 1 Atk. 625; Allen v. Arne, 1 Vern. 365; Clavering v. Clavering, 2 Vern. 473. But when the conveyance is obtained from the settlor by fraud, then the property will pass under a subsequent voluntary conveyance: Young v. Cottle, 1 P. Wms. 102.

It was, at one time, doubted if the Statute of Elizabeth applied to any creditors but those who were such at the time of the conveyance: Kidney v. Coussmaker, 12 Ves. 136. But there is no doubt that that statute makes no distinction between creditors; and a fraudulent assignment is void against both subse-

quent and existing creditors (Graham v. Furbur, 14 C.B. 410; 23 L.J.C.P. 51; Mackay v. Douglas, L.R. 14 Eq. 106), yet a creditor desiring to attack an instrument as being void must put himself in a situation to complain by getting judgment and execution: McGiverin v. McCausland, 19 U.C.C.P. 460; Colman v. Croker, 1 Ves. Jun. 161; Porter v. Flintoff, 6 U.C.C.P. 335; Martin v. Podger, 5 Burr. 2631; White v. Morris, 11 C.B. 1015.

Upon an application by a creditor, under the Assignments Act, R.S.N.S. ch. 145, to set aside a deed of conveyance of property made by the insolvent debtor in contravention of section 4 with intent to hinder and delay the creditor, the deed may be declared void as against the creditor without a finding of the precise amount of the creditor's claim, provided some amount is found to be due, an accounting to follow if necessary: Whitford v. Brimmer, 7 D.L.R. 190.

An ordinary unpaid creditor or one whose goods have not been disposed of by their debtor by means of a bulk sale has no interest in attacking a sale even though made without the due formalities, such creditors having their ordinary common law right guaranteed by C.C. (Que.) 1033 *et seq.*, in case the sale is made in fraud of their rights: Ramsay and Son, Ltd. v. Turcotte, 7 D.L.R. 27, 42 Que. S.C. 459.

One action to set aside as fraudulent as against creditors two successive conveyances of the same property may be brought against both grantees where it is alleged that both conveyances were part of the same fraudulent scheme and that both grantees were parties to the fraud: Burns v. Matejka, 1 D.L.R. 837, 4 A.L.R. 58.

Where a debtor has fraudulently transferred property a non-judgment creditor is entitled to have further transfers enjoined until he can obtain judgment in his action to impeach the conveyance: Albertson v. Secord, 1 D.L.R. 804, 4 A.L.R. 90; Fairchild v. Elmslie, 2 A.L.R. 115.

The fact that a debtor applied some of his own money to the purchase of property in his wife's name would not render the

whole property liable for payment of the creditor's claims, but such liability should be restricted to the amount so applied, with a proportional share of increase if the property has increased in value: Burns v. Matejka, 1 D.L.R. 837, 4 A.L.R. 58.

In Re Rainy River Lumber Co., 15 A.R. (Ont.) 749, it was questioned whether the liquidator in a winding-up proceeding under R.S.C. 1906, ch. 144, can object to the want of registration or other formal defects in a chattel mortgage as a creditor or subsequent mortgagee or purchaser: Re Rainy River Lumber Co., 15 A.R. (Ont.) 749.

In National Trust v. Trusts and Guarantee, 5 D.L.R. 459, 469, relying on the dictum of Street, J., in Re Canadian Camera Optical Co., 2 O.L.R. 677, 679, it was held that a liquidator, though in no sense an assignee for value, being from the beginning *primâ facie* lawfully in possession of the company's assets as an officer of the Court, and being charged with the duty of applying the proceeds in the payment of creditors, is entitled in right of the creditors, to contest the validity of a chattel mortgage without transfer of possession, and without registration under the Bills of Sale and Chattel Mortgage Act.

But in Re Canadian Shipbuilding Co. (1912), 6 D.L.R. 174, 26 O.L.R. 564, Riddell, J., dissenting from the dictum of Mr. Justice Street, held that a liquidator is not a creditor, nor a purchaser for value within the Ontario Bills of Sale and Chattel Mortgage Act. There was a motion for leave to appeal in 7 D.L.R. 304, and it was there contended that the question is of great public importance, and that the Court of Appeal did not decide it, though raised in Re Rainy Lake Lumber Co. (*supra*). The motion was dismissed on the ground that the appeal only raised an academic question, and that even if the trial judgment were reversed by the Appellate Court, there would be no material change of the substantive rights of the parties, since the liquidator could not attack the irregularity of a bill of sale where the creditors could not succeed.

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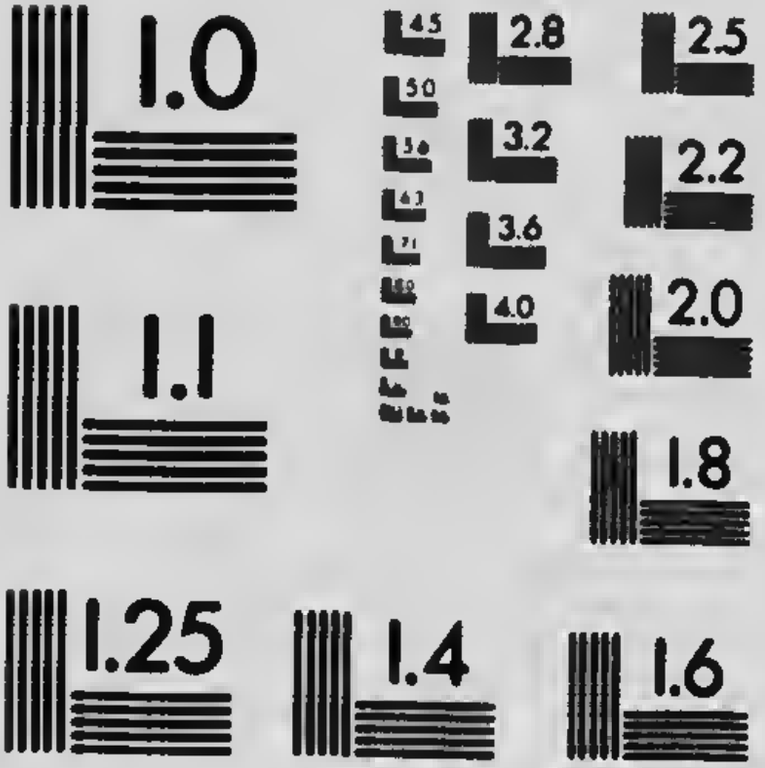

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In 1913, however, the Ontario Bills of Sale Act was amended so as to include in the statutory definition of a "creditor" for the purposes of that Act (10 Edw. VII. ch. 65, sec. 2), the liquidator of a company in a winding-up proceeding under the Winding-up Act of Canada, 3 Geo. V. (Ont.) ch. 18, sec. 28.

Should the mortgagee sue upon the mortgagor's covenant, and obtain judgment, issue execution and seize the mortgaged goods, then his mortgage security is waived, provided the mortgage and seizure be upon the same property, because the two liens are essentially different, and differently affect the interests of third parties: Evans v. Warren, 122 Mass. 303; Whitney v. Farrar, 51 Me. 418; Libby v. Cushman, 29 Me. 429.

Whatever interest the mortgagor has in goods can be sold, and the Ontario statute, 9 Edw. VII. ch. 47, sec. 17, authorizes its sale (Ross v. Simpson, 23 Gr. 552; Allan v. Place, 15 O.L.R. 476); but the property, if sold, must be so disposed of that the mortgagee may find the property, should he find it necessary to take possession: Manning v. Monaghan, 1 Bosw. (N.Y.) 459. Under a similar statute the interest of one who has granted property by bill of sale absolute on its face as the security for the payment of a debt, may be sold under execution: McConegny v. McGaw, 31 Ala. 442.

The purchaser will be placed in the position of the mortgagor, and the sheriff has the right to seize goods in the possession of the mortgagee, so that he may expose them to view, in order to sell the equity of redemption: Smith v. Cobourg, 3 P.P. 113.

Under an execution, the sheriff may seize and sell the interest or equity of redemption in any goods of the party against whom the execution is issued, and such sale shall convey whatever interest the mortgagor has in such goods and chattels at the time of the delivery of the writ to the sheriff: McKay v. Harris, 32 N.S.R. 150.

If a sale is made of the interest of a judgment debtor, subject to a mortgage, then the purchaser acquires the debtor's

interest in the goods as well as that of the creditor, and in consequence the mortgage may be void as against the purchaser, when it would be valid as against the debtor: Porter v. Parmley, 52 N.Y. 185. The interest of a mortgagee in goods mortgaged may also be sold under a *fi. fa.*, as for example, by virtue of the Ontario statute, whereby it is provided that a sheriff shall seize any mortgages or other securities for money belonging to the persons against whose effects the writ of execution has issued: 9 Edw. VII. ch. 47, sec. 18, amended by 1 Geo. V. ch. 17, sec. 34(3), repealing R.S.O. 1897, ch. 77.

The goods covered by a chattel mortgage executed in good faith to secure a debt of the mortgagee are held in Quebec not to be subject to seizure by the judgment creditors of the mortgagor, though their claims be anterior to the one secured: Creed v. Haensel, 24 Que. P.R. 361. Executions against goods placed in the hands of the sheriff subsequent to the making of a valid chattel mortgage by the execution debtor on the goods seized, attach only to the equity of redemption, and are not entitled, under the Creditors' Relief Act, to share with executions placed in the hands of the sheriff prior to the giving of the mortgage: Howard v. High River Trading Co., 4 Terr. L.R. 109, following Roach v. McLachlan, 19 O.A.R. 496; Breithaupt v. Marr, 20 O.A.R. 689. The execution creditor may, of course, take the appropriate proceedings to attack the chattel mortgage, if it be invalid, and this is commonly done by an interpleader between the mortgagee and the creditor after an adverse seizure of the goods themselves under an execution against the debtor.

A mortgagee may maintain an action for damage to his reversionary interest against a person selling mortgaged property, when the right of possession is in the mortgagor, and the reversionary interest in himself (McLeod v. Mercer, 6 U.C.C.P. 197; Googins v. Gilmore, 47 Me. 9); and an action will lie against an execution creditor, if he has authorized or in any way ratified and adopted the action of the sheriff or other officer in seizing the mortgaged goods: Watson v. Henderson, 25 U.C.C.P. 562; Light v. Hawley, 29 O.R. 25.

But where there is no *bonâ fide* change of possession or a bill of sale regularly registered, the rights of execution creditors will be accorded a priority: Dominion Bank v. Salmon, 23 O.W.R. 608.

Hence, if the mortgagee is not entitled to possession when the levy is made, then, until such right of possession accrues, he is not legally prejudiced, for the mortgagor may, when not restrained by the terms of the mortgage, remove it from place to place at his pleasure, and so may the purchaser under the execution. But when the mortgagee's title became absolute he could claim his goods in the hands of the purchaser, and maintain an action if they should be withheld from him (Hull v. Carnley, 11 N.Y. 501; Cotton v. Marsh, 3 Wis. 221; Tannahill v. Tuttle, 3 Mich. 104), and it is generally recognized that the sheriff would then also be liable in an action, subject, of course, to the usual protection afforded him by interpleader proceedings.

The right of a sheriff to an interpleader order depends upon either having the subject-matter of the interpleader in his possession or having the right accompanied with the intention to take possession under an execution: Keenan v. Osborne, 7 O. L.R. 134.

A chattel mortgage valid between the parties will also be binding upon purchasers at an execution sale, when the property is sold by the officer subject to the mortgage. If the terms of the sale are that the sale is subject to a mortgage, and the purchaser buys upon these terms, he cannot afterwards deny the validity of the mortgage; but this will not entail upon him a personal responsibility for the debt secured by the mortgage subject to which the sale took place: Porter v. Parmley, 52 N.Y. 185; Hamill v. Gillespie, 48 N.Y. 556.

A purchaser at a sale under execution is subrogated to all the rights of the execution creditor, and as the latter could impeach the mortgage, the former may also do so if the terms of the sale were not such as to bar the purchaser from such right.

But the validity of a chattel mortgage cannot be impeached

by a simple contract creditor: Empire Sash and Door Co. v. Maranda, 21 Man. L.R. 605, following Parkes and St. George, 10 A.R. (Ont.) 496; Hyman v. Cuthbertson, 10 O.R. 443. A creditor prior to the placing of his execution in the sheriff's hands, has no *locus standi* to attack a mortgage invalid for want of renewal: Heaton v. Flood, 29 O.R. 87, commenting on Clarkson v. McMaster, 25 Can. S.C.R. 96.

But a person who indemnifies the sheriff for seizing goods, does not by that act become liable as a trespasser when there is no other evidence to connect him with the sheriff's act. A person who executes an indemnity bond, when he does nothing and says nothing to shew that he has any interest or desire in the matter, may be assumed to be entirely indifferent whether the sheriff persists in his seizure or not; he neither directs nor procures the act to be done, and the sheriff is left perfectly fr. to act as he thinks proper, and if he can be reasonably held to ratify and adopt the act of seizure, which is the original trespass, he is not ratifying or adopting anything for his own benefit: McLeod v. Fortune, 19 U.C.Q.B. 98. The ordinary course adopted in practice, is for a mortgagee to make claim to the property seized by an execution creditor, which results in an interpleader suit, wherein the rights of the several claimants to the property are disposed of: Sanderson v. Hotham, 1 S.L.R. 501.

A mortgagee, after he obtains a mortgage, is still a creditor; the consideration for the mortgage is the debt; and it remains a debt until discharged or satisfied by payment or sale under the mortgage, or by legal process. The essence and object of a mortgage is that it shall be a mere security for a debt, and it is no more than a lien on a particular subject for a particular debt. Although a creditor, or sheriff representing a creditor, cannot take goods out of the possession of a mortgagee after the mortgagee takes possession of them in conformity with his mortgage, yet, on a sale by the mortgagee under the power of sale ordinarily contained in mortgages, the creditor may recover the balance in the hands of the mortgagee by garnishee process

against him, or by proceedings by way of equitable execution: Pike v. Colvin, 67 Ill. 227. But though the mortgaged property sell for more than enough to pay the mortgage debt interest and costs, if the property is exempt from seizure under execution, then the mortgagor and not the execution creditors, is entitled to the surplus: Michie v. Reynolds, 24 U.C.Q.B. 303; see Re Ferguson and Hill, 4 O.W.N. 1339; Thompson v. Bergland, 3 S.L.R. 470. For a list of exemptions, see 9 Edw. VII. (Ont.) ch. 47, sec. 3.

An exemption of property from seizure under execution does not apply to the proceeds realized from a sale thereof, unless the proceeds are reinvested in other exempt property before a creditor has acquired a charge or lien upon them: Massey-Harris Co. v. Schram, 5 Terr. L.R. 338. The mortgagee is in as good a position as the mortgagor to invoke the provisions of the Exemption Act to procure priority of his mortgage: Baker v. Gillam, 1 S.L.R. 498. The mere fact that the mortgagor might not benefit by the allowance of the exemption because the proceeds of the property are to be applied in satisfaction of mortgages does not change the character of the exemption, so long as he did not convert it into property which would not be exempt: Purdy v. Colton, 1 S.L.R. 288.

CHAPTER XI.

Redemption and Foreclosure.

In every mortgage there is a defeasance or proviso for redemption. The defeasance is the condition by which, when the condition is performed, the mortgage is rendered void. The stipulation in the mortgage that the same shall be void upon payment of the mortgage-money with interest, is what is known as the defeasance; the defeasance may be in a separate instrument, executed at the same time, and constituting with the mortgage one transaction, and means "getting rid of the deed, that is, doing something which will make it cease to be an operative investment," such as the realization of the security by seizure and sale: Con. Credit Corpn. v. Gosney, 16 Q.B.D. 24. The validity of a verbal defeasance has already been discussed under the admissibility of parol evidence, ch. 1.

It is not required that the defeasance shall be expressed in any particular form of words. It is sufficient if it appears that, upon payment of the debt, the conveyance shall become void, or that the grantee will re-convey to the grantor. The mortgage may be made payable on demand, in which case it is due at any time. The mortgagee in such case may commence legal proceedings without previous demand, the commencement of proceedings being a sufficient demand: Gillet v. Balcom, 6 Barb. 370; Re Sovereign Bank v. Keilty, 16 O.W.R. 73. If the mortgage money and interest are punctually paid, then the property revests in the mortgagor, freed and absolutely discharged from the mortgage encumbrance; but, if default be made by the mortgagor, immediately thereupon the mortgagee has the right

to actual possession and control of the mortgaged property. The mortgagor still, however, has a right left, viz., the equity of redemption. At common law, under the ancient system of mortgaging, the right to redeem did not exist; but Courts of equity, looking at the intention of the parties, have established the right. The equity of redemption is the right which the mortgagor has of redeeming his property after default, and before the property passes out of the control of the mortgagee, and the right will only be granted on payment of the debt, and costs if any have been incurred. The right to redeem is an equitable process by which a mortgagor, or other person interested in personal or real property subject to a mortgage or encumbrance, may recover the absolute ownership thereof upon certain terms, which are usually the payment of the principal amount due, with interest thereon, and the costs of the mortgagee; and, in addition he is entitled to set off any damage to the goods caused by the negligent removal: Johnson v. Disprose, 1 Q.B. 512.

If the mortgagee sells, and the mortgage provides the manner in which the goods may be sold upon default, then, to get rid of the right to redeem, the mortgagee must have followed the mode of selling pointed out by the mortgage. If notice has to be given before sale, and no notice is given, or the sale is not fair and *bonâ fide*, the mortgagor's equity to redeem is not thereby extinguished. Indeed, if a mortgagee chooses, he may buy in the property at a bailiff's sale, either for rent or taxes, just as any stranger might do, and stand upon his right as purchaser; but if he chooses to buy as mortgagee, merely to protect his own interest, or to treat his mortgage as still subsisting he may do so, the effect being that the mortgagor's right to redeem still continues: Severn v. Clarke, 30 U.C.C.P. 372; Kelly v. Macklem, 14 Gr. 29.

So inseparable to every mortgage transaction is the right to redeem, that no act of the mortgagor, however formal, performed at the outset of the transaction, will be allowed to bar

a mortgagor from this right, nor from transferring it to another. But the mortgagor may at any time subsequent to the original transaction release his equity of redemption, and, even then, the Courts watch such dealings between mortgagor and mortgagee with the most jealous care, and require the utmost good faith and just dealing to exist.

The onus rests upon a mortgagee in possession of encumbered property of shewing that he had purchased the mortgagor's equity of redemption, since "once a mortgage, always a mortgage:" Manitoba Lumber Co. v. Emmerson, 5 D.L.R. 337; Goodman v. Grierson, 2 Ball. & B. 278.

A mortgagee cannot lawfully provide at the same time as the loan is made, for any event or condition on which the equity of redemption shall be discharged and the conveyance become absolute, nor for an option to purchase, although the option price is far in excess of the loan; and this, although it appears that the lender was not willing to lend unless he had both the security and the option and that the lender and borrower were dealing at arms' length: Arnold v. National Trust Co., Ltd., 7 D. L.R. 754; Vernon v. Bethel (1761), 2 Eden 110, 113; Noakes v. Rice, [1902] A.C. 24; Salt v. Northampton, [1892] A.C. 1.

An instrument, absolute upon its face, may yet be shewn to be a conditional conveyance, and parol evidence will be received to shew what was the intention of the parties; and all the circumstances in connection with the instrument will be looked at in determining this. Parol evidence will be received, not that the instrument may thereby be contradicted, but for the purpose of raising an equity paramount to its terms: Le Targe v. De Tuyll, 3 Gr. 369; Holmes v. Matthews, 3 Gr. 379; Dabney v. Green, 4 H. & N. 101; Parks v. Hall, 8 Pick. 206; Tyler v. Strange, 21 Barb. 198; Walker v. Walker, 2 Atk. 99; Dixon v. Parker, 2 Ves. 225; Young v. Peachy, 2 Atk. 256; Langton v. Horton, 5 Beav. 9; Jones v. Statham, 3 Atk. 388; Bell v. Carter, 17 Beav. 11; Murphy v. Taylor, 1 Irish Ch.R. 92; Blunt v.

Marsh, 1 Terr. L.R. 126; Boardman v. Handley, 4 Terr. L.R. 266; Fraser v. Murray, 34 N.S.R. 186, 37 C.L.J. 364.

The Courts will generally treat a doubtful instrument as a mortgage: Perry v. Meddowcroft, 4 Beav. 197; Williams v. Owens, 10 Sims. 368. "Once a mortgage, always a mortgage" is a well recognized maxim: Manitoba Lumber Co. v. Emmerson, 5 D.L.R. 337; Flanders v. Chamberlain, 24 Mich. 305; Severn v. Clarke, 30 U.C.C.P. 372; Goodman v. Grierson, 2 Ball. & B. 278.

So, where an instrument covering certain property purports to be an absolute assignment but is really given to secure a loan to secure a promissory note of the borrower, such instrument is merely an equitable mortgage, and under the maxim "once a mortgage, always a mortgage," the grantee will be limited strictly to his rights as mortgagee: Arnold v. National Trust Co., 7 D.L.R. 754, following Samuel v. Jarrah, [1904] A.C. 324, and distinguishing Re London & Globe Finance Corp., 18 T.L.R. 661; see Zimmerman v. Sproat, 5 D.L.R. 452, 26 O.L.R. 448; Ex parte Glyn, 1 Mont. D. & DeG. 25, 38; Ex parte Bisdee, Re Baker, 1 Mont. D. & DeG. 333; Lacon v. Allen, 3 Drew. 579; Goodwin v. Waghorn, 4 L.J. Ch. 172; Royal Canadian Bank v. Cummer, 15 Gr. 627; Masuret v. Mitchell, 26 Gr. 435; Acme Co. v. Huxley (Alta.), 18 W.L.R. 534; Rimmer v. Webster, 2 Ch. 163.

The right must be exercised within a reasonable time, because at times, from the perishable nature of personal property, it is impossible that chattels can long remain in the same condition, and to preserve them expenditure must be incurred in their repair. Then, too, they are consumed in use, or in some way destroyed, hence it is that the character of the property, the use they are put to, their condition, and a variety of circumstances all combine, and differ almost in every case, to settle what may be a reasonable time within which the right of redemption may be properly exercised. If the property is sold, the right, of course, is extinguished. It matters not whether the sale was had before or after default by a mortgagee in possession. In either case the possession, coupled with the

right of property, both of which the mortgagee possessed, enables him to give a good title to the purchaser, and the mortgagor has lost his right to redeem: Byrd v. McDaniel, 33 Ala. 18; Perry v. Craig, 3 Mo. 516; Williams v. Sun Life Assurance Co., 19 W.L.R. 564. If, however, he has taken possession before default, then because the mortgagor is entitled to restitution of his property upon performance by him of the condition upon which he granted it, he has an action against the mortgagee, if the latter cannot then return him his property; and, indeed, if by necessary implication the mortgagor be entitled to the possession of the goods until default, then trespass is maintainable against the mortgagee: Brierly v. Kendall, 17 Q.B. 937. But if there is no such implication, and the mortgagee takes the goods, and when the time arrives for him to restore them to the mortgagor, upon payment of the mortgage, he fails in this his engagement, then, inasmuch as the mortgagor's right to redeem has been destroyed, the latter becomes entitled to sue for this act of the mortgagee, which is an abuse of his power and duty, as it prevents the mortgagor from ever redeeming: Bingham v. Bettinson, 30 U.C.C.P. 438; Stoddard v. Denison, 48 How. (N.Y.) Pr. 296, 306. In such a suit the mortgagor would be entitled to recover the value of his interest in the goods over and above the mortgage debt (Blodgett v. Blodgett, 48 Vt. 32; Boyd v. Beaudin, 54 Wis. 193; Bingham v. Bettinson, 30 U.C.C.P. 451), the value being fixed as of the time when the mortgagee took possession (Mowry v. First Nat. Bank, 54 Wis. 38), or, at the option of the mortgagor, the value may be based upon the price realized by the mortgagee.

Should the mortgagee have sold a portion of the goods, whereby he received sufficient to pay the mortgage debt, then the mortgagor becomes entitled to the unsold property (Bragelman v. Dane, 69 N.Y. 69); but for the sale, the mortgagor would be entitled to redeem the entire property, for the equity is an entire whole, and exists as to all the property if possessed as to part: Faulds v. Harper, 2 O.R. 405.

A mortgagor, upon redeeming, is not necessarily entitled to an account of the incomes and profits from the mortgaged property of which the mortgagee was in possession *ex. gr.*, where there is an agreement which required him to pay the mortgagor a stated monthly rental for the property during the time he was in possession: Manitoba Lumber Co. v. Emmerson, 5 D.L.R. 337, 21 W.L.R. 503.

Where a mortgagor, in order to redeem, has paid under protest a larger sum than was legally due, he will be entitled to recover the excess so paid: Collins v. Eaton, 19 W.L.R. (Alta.) 608.

It has been said that the attendant circumstances in each particular case must decide what is a reasonable time within which redemption may be enjoyed: Gentles v. Canada Permanent, etc., 32 O.R. 428. Of course, to compute a period, some fixed date from which to count must be ascertained; the period from which the time begins to run, as against the mortgagor's right to redeem, is the moment of time when the mortgagee's possession becomes adverse to that of the mortgagor, and it is not adverse until forfeiture arises from some default in mortgagor. After forfeiture, the time may be interrupted, and a new period to compute from fixed and ascertained; this will be the result of the mortgagee accepting a payment on account of the mortgage indebtedness, the time for redemption will begin anew from the time of such payment: Bartlett v. Thynes, 2 Hill (S.C.) Eq. 171; Winchester v. Ball, 54 Me. 558.

Redemption may be enjoyed, not alone by the mortgagor, but by his executors, or administrators, or by any one who has a valuable interest in the property, as, for example, a creditor who has placed himself in a position to enforce his claim, and of course a purchaser from the mortgagor, and a second mortgagee, possess the same equities: Chamberlain v. Sovais, 28 Gr. 404; Re Davis, 27 Gr. 199; Waters v. Shade, 2 Gr. 457; Long v. Long, 17 Gr. 251, 16 Gr. 239; Chisholm v. Sheldon, 3 Gr. 655; Crown v. Chamberlin, 27 Gr. 551.

But, though the Courts favour redemption, a mortgagee has his reciprocal remedy. It seldom happens in practice that a mortgagee of personal chattels seeks the assistance of the Court by foreclosure, yet such a course is open to him. Foreclosure is the converse of redemption, and by it a mortgagee may acquire an absolute title in the property mortgaged, in default of payment of the amount of the mortgage money, interest and costs: Cook v. Flood, 5 Gr. 463; Slade v. Rigg, 3 Hare 35; Wayne v. Hanham, 9 Hare 62; Lonquet v. Seawen, 1 Ves. 453. Foreclosure is in default of redemption; where the right to foreclose exists, the right to redeem exists also: Parker v. Vine Growers, 23 Gr. 179.

The mortgagee and mortgagor occupy the relative position of creditor and debtor; the creditor being secured by the debtor through means of a lien. Any holder of a subsequent lien may, therefore, pay off a prior lien to prevent his own lien from being cut off. As a mortgagee of chattels, like a mortgagee of real estate, is entitled to a foreclosure, so a mortgagor of chattels, like a mortgagor of land, is entitled to redemption, and nothing a mortgagor can do (except subsequently to the original transaction) will generally be allowed to impair his power of exercising his right, or of transferring it to another. The right is paramount to the instrument itself, and may be enforced even in opposition to its terms, as, for instance, in defiance of stipulation by the mortgagor in the mortgage to give up all claim to the property upon his failure to pay the debt secured at maturity: Bunaclough v. Poolman, 3 Daly (N.Y.) 236; Lavigne v. Naramore, 52 Vt. 267. As in the case of land, so in the case of chattel property, foreclosure bars all interests in the property subsequent to the mortgage under which the proceedings are taken, provided that the proceedings are regularly conducted, and proper and sufficient notice given to all concerned: Jones v. Dunbar, 32 U.C.C.P. 136; Wylder v. Crane, 53 Ill. 490.

To impeach a sale under powers in a chattel mortgage on the ground that an offer to redeem was made prior to the time

fixed by the notice of sale, the person entitled to redeem is obliged to shew, that the amount due under the mortgage was actually tendered, or that the mortgagee was distinctly informed that the mortgagor was at that time ready and willing to pay the amount due, and, being thus informed, refused to accept payment: British Columbia Land, etc., v. Ishitika, 45 Can. S.C.R. 302, reversing 16 B.C.R. 299.

The right of foreclosure affords a striking distinction between a pledge and a mortgage. The principle upon which the Court acts in the latter case is, that in a regular legal mortgage there has been an actual conveyance of the legal ownership, and then the Court has interfered to prevent that from having its full effect; and when the ground of interference is gone by the non-payment of the debt, the Court simply removes the stop it has itself put on. Then when there is a deposit of title deeds, the Court treats that as an agreement to execute a legal mortgage, and therefore as carrying with it all the remedies incident to such a mortgage. None of this reasoning applies to a pledge of chattels; the pledgee never had the absolute ownership at law, and his equitable rights cannot exceed his legal title: *per* Jessel, M.R., Carter v. Wake, 4 Ch.D. 606; Zimmerman v. Sproat, 5 D.L.R. 452, 26 O.L.R. 448; see supra, p. 5.

In case of foreclosure and sale with the assistance of the Court, then, as in the case of land, the mortgagee of chattels may obtain a personal order against the mortgagor for any deficiency, a right he may lose when he proceeds on his own responsibility to realize from a sale of the chattels: Acadia Loan Co. v. Legere, 45 N.S.R. 328.

CHAPTER XII.

The Operative Parts.

"The operative words of a conveyance should be such as are apt and proper according to the mode in which the instrument is intended to operate:" Leith's Blackstone 258.

In law, chattels are indivisible; therefore, there is no such thing, in the strict sense of the term, as an estate in them.

The intention of the parties in regard to them a Court of equity will, however, carry out; and in a settlement of chattels upon one person for life, with remainder to others, the *cestuis que trustent* have equitable rights, which they can enforce as effectually as can *cestuis que trustent* of lands and tenements: Smith v. Butcher, 10 Ch.D. 113.

A life estate only, and not an absolute gift of the corpus, in money, notes and mortgages, was created by a bequest to a widow in her deceased husband's will, of all of his money, notes and mortgages, and real and personal property, for the term of her natural life, or widowhood, with remainder to his children in the event of her death or re-marriage: Re Johnson, 7 D.L.R. 375, 4 O.W.N. 153, 23 O.W.R. 132; Re Thomson's Estate, Herring v. Barrow, 14 Ch.D. 263.

The operative words in a bill of sale usually are "bargain, sell, assign, transfer and set over," and in a mortgage "grant, bargain, sell and assign."

There is no necessity to use other than the present tense in the operative part of the bill of sale or mortgage any more than in a conveyance of land. If a chattel is sold at one time, and no

delivery made, and at a later period a bill of sale is executed by the vendor to the vendee in pursuance of the former sale, then the past and present tense may both be properly used in analogy to the old system of feoffment and livery of seisin, when a deed "usually accompanied the transaction, which stated as the fact was, that the feoffor had enfeoffed, and then proceeded in the present tense to confirm it:" Leith's Blackstone 259.

If it be the intention to assign all the goods of a bargainor or mortgagor, care should be used to avoid both general and particular words in the assignment, for the latter may have the effect of restricting the operation of the former. This often arises when there is a description of the articles in the instrument, and they are enumerated in a schedule attached. In Wood v. Roweliffe, 6 Ex. 407, 20 L.J. Ex. 285, the bill of sale assigned "all the household goods and furniture of every kind and description whatsoever in the house, No. 2 Meadow Place, more particularly set forth in an inventory or schedule of even date herewith, and given up on the execution thereof." When the deed was executed, one chair was delivered to the defendant in the name of the whole of the said goods. It happened that the inventory did not specify all the household goods and furniture of every kind in the house, and it was held by the Court of Exchequer, upon the authority of Burton v. Dawes, 19 L.J.C.P. 302, and of Morrell v. Fisher, 19 L.J. Ex. 273, that the bill of sale only operated as an assignment of the "goods and furniture specified in the inventory." In Kingston v. Chapman, 9 U.C.C.P. 130, a bill of sale was given, granting "all and singular the goods, chattels, furniture and household stuff now in Sword's Hotel, Toronto, or particularly mentioned and expressed in a certain schedule marked 'A.' hereunder written or hereunto annexed," and in this case it was held the bill of sale did not give the grantee any title in goods not mentioned and described in the schedule: Gunn v. Ruttan, 7 U.C.C.P. 516.

No matter what the intention of the parties to an instrument may be, effect can only be given to words in the conveyance as they are found, and the Court cannot carry out the intention of the parties under such instrument, if the words used do not shew verbatim such intention: Tapfield v. Hillman, 12 L.J.C.P. 311. Therefore, if it be the intention of the parties to affect future acquired property, that intention must clearly appear upon the face of the deed: *per* Gwynne, J., Mason v. McDonald, 25 U.C.C.P. 439.

A general assignment of all a man's goods and chattels in a particular house or place, will not include goods and chattels brought into the house after the assignment was made (Sutton v. Bath, 1 Fos. & Fin. 152), because, by the words of such assignment, it is only intended to pass the property in "all the man's goods on the particular place at the time of the execution of the conveyance." And unless the intention clearly appear, by the instrument, to pass after-acquired property, and to subject it to the rights given by the instrument to an assignee, a power of seizing all goods, etc., will not warrant a seizure of any goods not on the premises at the time of the execution of the bill of sale: Reeve v. Whitmore, 33 L.J. Ch. 63, Tapfield v. Hillman, 6 Scott N.R. 967, 6 Man. & Gr. 245, 12 L.J.C.P. 311.

Power is not property, and a power to seize after-acquired property, when such is not affected by the terms of the deed, will not be construed in equity as an equitable assignment of the property: Belding v. Read, 3 H. & C. 955, 34 L.J. Ex. 212; Reeve v. Whitmore, 33 L.J. Ch. 63.

A valid grant may be made of after-acquired property, and a power to seize such is not revocable (Lepard v. Vernon, 2 Ves. & B. 51; Bromley v. Holland, 7 Ves. 3), not even by the death of the grantor (Spooner v. Sandilands, 1 Y. & C. 390), and though the goods assigned be not *in esse*, no *novus actus* is needed to give effect to the words of the assignment, and where a chattel mortgage conveyed the stock-in-trade of the mortgagor, and "all goods which at any time may be owned by the mort-

gagor and kept in the said store for sale, and whether now in stock or hereafter to be purchased and placed in stock" it was held that after-acquired stock brought into the business in the ordinary course thereof became subject to the chattel mortgage as against execution creditors of the mortgagor, notwithstanding that their writs were in the hands of the sheriff at the time such stock was brought into the business; the equitable right of the mortgagee attaching immediately on the goods reaching the premises: Coyne v. Lee, 14 A.R. (Ont.) 503.

Goods capable of specific description must be so described, but if not so capable, it will be sufficient if after the enumeration in general words the premises or locality where they are situated is definitely described. Household effects, stock-in-trade, or other articles of a general nature which are in most instances incapable of a specific description, makes it necessary for the purpose of identification to describe their locality. Hence, furniture at certain rooms in a hotel, or in a certain warehouse, was held sufficient as to the goods which were in point of fact there; and a description "1 omnibus" being the only chattel of its kind amongst the others is specific without any local description: Mills v. King, 14 U.C.C.P. 223, following Fraser v. Bank, 19 U.C.Q.B. 381; Powell v. Bank, 11 U.C.C.P. 303. So, goods in possession of a certain named person on a named day, and the rooms wherein they are contained, is sufficient without mentioning the locality of the house: Powell v. Bank, 11 U.C.C.P. 303, Fraser v. Bank, 19 U.C.Q.B. 381; Muttyloll Seal v. O'Dowda, 6 Moore P.C. 324.

Where goods are specifically described in specie and referred in the schedule as being on the grantor's premises, the omission to specify the house or place at which the assigned goods are situated does not invalidate the instrument: Ex p. Hill, Re Lane, 17 Q.B.D. 74. Specifying the weight of the stone, the style of setting, and the house where the owner resides, and where the ring is to be kept has been held a sufficient description of a diamond ring for the purpose of a chattel mortgage: Salabes v. Castelberg, 98 Md. 645, 64 L.R.A. 800.

In an assignment of household effects and stock-in-trade, the schedule specified "stable and coach-house; 3 horses, 3 sets harness, 1 straw-cutter, 2 buggies, etc., lumber yard; 2 waggons, 1 pair bob-sleighs, 4 wheelbarrows, trestles and scaffolding," and in italics, "old lumber, etc., 2000 feet of oak and hardwood plank and boards, 60,000 feet of prime assorted sizes, 2,000 feet flooring, 1 pair of timber wheels, 1 hand-cart, two yard dogs, cut stone." It was held that the articles in italics were sufficiently described and passed as stock-in-trade, and that the description as to the others was insufficient without identification as to their locality: Haworth v. Fletcher, 20 U.C.Q.B. 278.

Describing merely a definite quantity, for instance, "14,415 feet of prepared molding" is sufficient: Noell v. Pell, 7 U.C.L.J. 322. But the general words "one single buggy" is not: Holt v. Carmichael, 2 O.A.R. 639; Boldrick v. Ryan, 17 O.A.R. 253, 264. But if the locality of the chattels be specified, such as "1 kitchen table, 4 chairs, all contained in and about the dwelling-house and barn of the mortgagor, situate at and on, etc.," the description will be sufficient: Nattrass v. Phair, 37 U.C.Q.B. 153. "One piano, 'Dominion' make, No. 2773," is sufficient where the word "Dominion" is used as a trade name for pianos made by one company only. For a sufficient description of locomotives, see Burton v. Bellhouse, 20 U.C.Q.B. 60.

Where the goods are described as being located on the north-east corner but were in point of fact on the north-west corner, the erroneous part of the description might be rejected, and the statement that they were contained in the mortgagor's dwelling-house will govern: Accountant, etc. v. Marcon, 30 O.R. 135.

A description of "2 sets of blacksmithing and 1 set of waggon-maker's tools complete" is insufficient: Mason v. McDonald, 25 U.C.C.P. 435.

It is important that the locality of the property should be specified. Mere general words make the mortgage indefinite and uncertain. A description enumerating certain articles and specifying their locality will be effective as to the goods so

described and inoperative as to the others: Rose v. Scott, 17 U.C.Q.B. 385; Sutherland v. Nixon, 21 U.C.Q.B. 629; Balkwell v. Beddome, 16 U.C.Q.B. 437; Harris v. Commercial Bank, 16 U.C.Q.B. 437; Hovey v. Whiting, 14 Can. S.C.R. 515, 13 A.R. (Ont.) 7, 9 O.R. 314, following McCall v. Wolff, 13 Can. S.C.R. 130; Mathers v. Lynch, 28 U.C.Q.B. 354; Fisher v. Brock, 8 Man. L.R. 137; Hiscott v. Murray, 12 U.C.C.P. 315. And where a chattel may not be sufficiently described in the schedule it will be given effect under the general words in the mortgage, if it described the place where it was located: Fitzgerald v. Johnston, 41 U.C.Q.B. 440. The general words in the body of the deed are not limited by the specific words in the schedule describing only part of the goods: Baker v. Richardson, 6 W.R. 663; see also Wood v. Roweliffe, 6 Ex. 407. The description of goods as "in bond," means in the customs warehouse, and may be a sufficient description as regards locality: May v. Security Loan, etc., 45 U.C.Q.B. 106. Describing the premises where the goods are situated is sufficient to all the goods, though some are not on them: Bertram v. Pendry, 27 U.C.C.P. 371.

The words "now in and upon" expressly limit the goods to the locality to which they refer and cannot be extended to adjacent or similarly known premises: Donnelly v. Hall, 7 O.R. 581. So, stock-in-trade and effects "in, about, upon, and belonging to an inn," passes nothing but what was in, upon, or about the inn at the time of the assignment: Tapfield v. Hillman, 6 Man. & G. 245; and see Mee v. Parren, 15 L.T. 320; Grass v. Austin, 7 A.R. (Ont.) 511.

Goods "in course of delivery" will apply to goods lying at the wharf, though not actually delivered: McPherson v. Reynolds, 6 U.C.C.P. 491; Sladden v. Sergeant, 1 F. & F. 322.

In describing a stock-in-trade it is necessary, apart from describing their locality, to specify the kind and character of the articles. For instance, "all my stock, goods, wards and merchandise in my store situate at, etc.," is insufficient: Hutchison v. Roberts, 7 U.C.Q.B. 470; Howell v. McFarlane, 16 U.C.Q.B.

469; Nolan v. Donnelly, 4 O.R. 440; Wilson v. Kerr, 17 U.C.Q.B. 168, 18 U.C.Q.B. 470. But "all the stock of dry goods, hardware, crockery, groceries, and other goods, wares and merchandise in the store and premises occupied by the mortgagor at, etc.," is sufficient for identification: Ross v. Conger, 14 U.C.Q.B. 525. "Stock-in-trade, used in or pertaining to their business as general merchants, situated in the store, at, etc.," is a sufficient description: Thomson v. Quirk, 18 Can. S.C.R. 695, affirming 1 Terr. L.R. 159, distinguishing McCall v. Wolff, 13 Can. S.C.R. 130, and following Hovey v. Whiting, 14 Can. S.C.R. 515.

Articles described as "the stock of gold and silver watches, jewellery, and electro-silver plate in the possession of the mortgagor at his store, etc.," which could be identified as they were numbered, was held sufficient: Segsworth v. Meriden Silver Co., 3 O.R. 413.

Failure to annex a schedule or inventory does not invalidate the instrument if it contains a specific description: England v. Downs, 2 Beav. 522; Baker v. Richardson, 6 W.R. 663.

In the absence of an inventory a description "household furniture and effects, implements of husbandry" is insufficient: Roberts v. Roberts, 13 Q.B.D. 794. A bill of sale purporting to assign "all and singular the several chattels and things specifically described in the schedule thereto annexed." The description in the schedule was "at 47 Mortimer street; 450 oil paintings in gilt frames, 300 oil paintings unframed, etc." It was held that it was not specific enough to gratify the requirements of the English Act, and was inoperative against execution creditors: Witt v. Banner, 20 Q.B.D. 114. So the words "21 milch cows" is bad for indefiniteness: Carpenter v. Deen, 23 Q.B.D. 566.

In the absence of evidence of facts shewing that the description was not specific, the description, "roan horse, 'Drummer;' brown mare and foal; three road carts" is sufficient: Hickley v. Greenwood, 25 Q.B.D. 277, distinguishing the two cases *supra*. Where the bill of sale covers furniture and other

chattels in the bargainor's house and the schedule specifies the furniture in each room, and under the heading "study" is an item, "1,800 books, as per catalogue," the description is deemed sufficient, [1893] Q.B. 82. Nor is it indefinite to describe "all my crop of corn, cotton or other produce that I may raise, or which I may in any manner have an interest for the year 1884, in Faulkner County, Ark." where the description can be made certain by extrinsic facts: Johnston v. Grizard, 51 Ark. 710, 3 L.R.A. 795.

All goods consisting of horses, cows and several articles of household furniture described as being in and upon and around the premises and appurtenances used and occupied by a certain person containing the city street number of the premises is sufficient for identification: Connell v. Hickock, 15 O.A.R. 518, 530, distinguishing McCall v. Wolff, 13 Can. S.C.R. 130, where it was held that in the absence of a statement that such goods were all the goods on the said premises, such description will be deemed insufficient. Following Hovey v. Whiting, 14 Can. S.C.R. 515, and distinguishing McCall case, *supra*, the Court affirming 1 Terr. L.R. 88, upheld the sufficiency of a description where after the enumeration clause it designated the property as "now being in the store of the mortgagors on the north half of sec. 6, township 19, range 28, west of the 4th principal meridian:" Thomson v. Quirk, 18 Can. S.C.R. 695.

A bill of sale describing the property as "stock of general merchandise as set out in the stock list attached hereto and all of which stock, chattels, and effects now situate and being in the two storey frame building situated on lots 1 and 2 in block 299, city of Regina," is void against creditors if no schedule is filed therewith: Svaigher v. Rotaru, 3 W.L.R. 486. The schedule must be filled out and filed at the same time as the original assignment. Filing it later will not defeat the equities of third persons that intervened meanwhile: Crawford v. Brown, 17 U.C.Q.B. 126.

The schedule must specify the goods mentioned in the mort-

gage. A mortgage of a manufactory and the machinery does not include stock-in-trade described in the schedule but not mentioned in the mortgage: Ex parte Jardine, Re McManus, L.R. 10 Ch. 322.

Goods bought and inserted in the schedule before, but not received until after the execution of the bill of sale, may pass: Sutton v. Bath, 1 F. & F. 152.

An assignment of "all the stock-in-trade, merchandise, goods and effects," in the "shop occupied by the assignor, situate on the south side of King street, in the city of Toronto, and known and numbered 77, which said goods and chattels are particularly mentioned in the schedule annexed hereto" which schedule began as follows, "stock in workshops," and went on describing what was therein; and next described what is in the front store was held sufficient to pass not only what was contained in the front workshop first described, but what was contained in a continuous shop consisting of the front store and the two workshops at the address stated: Noell v. Pell (1861), 7 U.C.L.J. 322.

The "increase of animals" has been held to mean the natural increase or offspring of the original animals mortgaged, and that it did not include additions made to the flock by purchase: Webster v. Power, 5 Moore P.C. 92. The legal estate in the offspring of mares comprised in a chattel mortgage covering them, and also the increase from them is in the mortgagee: Roper v. Scott, 16 Man. L.R. 594. Under the maxim "*partus sequitur ventrem*" the right of possession of the foal follows the dam: Temple v. Nicholson, Cass. Dig. (2nd ed.) 114.

A change of the colour of a horse, which was correctly described in a mortgage when it was given, as a bay horse, but which, from natural or unnatural causes, became a white and sorrel spotted horse, without any appearance of bay whatever, does not defeat the rights of the mortgagee as against a person who purchased the horse after his change of colour, without any notice of the mortgage: Turpin v. Cunningham, 127 N.C. 508, 51 L.R.A. 800. A description of "1 brown stallion, 10 years

old; 1 bay horse, 8 years old; 1 black mare, 9 years old" is sufficient: Corneill v. Abell, 31 U.C.C.P. 107. But "2 horses, 4 cows, and 1 calf" is not: Davies v. Jenkins, [1900] 1 Q.B. 133.

A description in a bill of sale with a redemption clause of "one horse or mare, three cows, two heifers, sheep, cart, all my farming implements" is sufficiently definite to transfer the property to the mortgagee as against the judgment creditors of the mortgagor: McAskill v. Power, 30 N.S.R. 189. So where property covered by a chattel mortgage in a ranching district was described as "all cattle and horses of whatever age and sex branded 5 on the left side and all increase thereof, together with the same brand and branding irons," was held sufficient, though the locality where the cattle were at the time of the mortgage had not been mentioned: Graveley v. Springer, 2 N.W.T. Rep. 306, similarly, a description of "one bay gelding, 6 years old, weight about 1,450 lbs., now in the possession of the mortgagor," was held sufficient: Ward v. Serrell, 3 A.L.R. 138, following Corneill v. Abell, 31 U.C.C.P. 107. But see Jordan v. J. I. Case Thresher Machine Co., 7 D.L.R. 855. Where there are some items that can be identified and others that cannot, such mortgage will be declared void *in toto* as against creditors only if the items that can be distinguished are few and insignificant; but where such items are neither few nor insignificant the mortgage is *quoad* such items valid: Adams v. Hutchings (No. 2), 3 Terr. L.R. 206.

Crops which may be sown during the currency of the mortgage covers crops sown after the mortgage falls due, but remains unpaid: Canada Permanent, etc., v. Todd, 22 O.A.R. 515; Clements v. Mathews, 47 L.T. 251, affirmed on this point, 11 Q.B.D. 808. A mortgage on crops situated on the north-east half of lot 14 and north half of lot 14 will not be operative as to crops upon lot 13: Grass v. Austin, 7 A.R. (Ont.) 511; Mee v. Parren, 15 L.T. 320.

A clause in a bill of sale purporting to include after-acquired property confers as to the latter a mere equitable title which

must give way to a legal title obtained *bonâ fide* without notice: Whynot v. McGinty, 7 D.L.R. 618, applying Holroyd v. Marshall, 10 H.L.C. 191, and commenting on Reeves v. Barlow, 12 Q.B.D. 436. See McAllister v. Forsyth, 12 Can. S.C.R. 1; Belding v. Read, 3 H. & C. 955; Joseph v. Lyons, 15 Q.B.D. 280; Hallas v. Robinson, 15 Q.B.D. 288.

The Bills of Sale Act, R.S.N.S. 1900, ch. 142, does not by registration protect the grantee as to property to be acquired by the grantor after the making of the bill of sale, and which the latter thereby purports to transfer in advance of his obtaining title thereto: Whynot v. McGinty, 7 D.L.R. 618, referring to Thomas v. Kelly, 13 A.C. 519.

When on the face of an assignment of personalty it is plain that it is intended to operate as a continuing security, and to apply to property afterwards acquired and substituted for that which was originally assigned, it will, if the words are capable of such construction, be so applied: Carr v. Allatt, 27 L.J. Ex. 385.

A mere power to seize future chattels does not operate in equity as an assignment of such future chattels, nor give the assignee a present interest in them: Reeve v. Whitmore, 4 De G. J. & S. 1; Cole v. Kernot; Thompson v. Cohen, L.R. 7 Q.B. 527; Holroyd v. Marshall, 10 H.L. Cas. 191.

Substituted, or added stock-in-trade should be specifically mentioned if it is to be covered and the premises whereon the goods were or were to be brought should be specifically described: Kitching v. Hicks, 6 O.R. 739; A. E. Thomas v. Standard Bank, 1 O.W.N. 379, 548; Thomas v. Kelly, 13 A.C. 506, Chidell v. Galsworthy, 6 C.B. 471; Carr v. Aeraman, 11 Ex. 566; Collyer v. Isaacs, 19 Ch.D. 342; Re D'Epineuil; Tadman v. D'Epineuil, 20 Ch.D. 758; Levy v. Polack, 52 L.T. 551; Roberts v. Roberts, 13 Q.B.D. 794; Carpenter v. Deen, 23 Q.B.D. 566; Lazuras v. Andrade, 5 C.P.D. 318; Hope v. Hayley, 5 El. & Bl. 830.

Although a contract which purports to transfer property

which is not in existence, does not, in equity, operate as an immediate alienation; still if a vendor or mortgagor agrees to sell or mortgage specific property of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, a Court of equity will, in this case, compel him to perform his contract; and the contract will, in equity, transfer the beneficial interest to the mortgagee or purchaser, immediately on the property being acquired: Re Thirkell, Perrin v. Wood (1874), 21 Gr. 492 at 509.

If the instrument contains so far as all the goods referred to are concerned, such a description as that a person desiring to deal with these goods and chattels, or the sheriff seeking to enforce an execution against the mortgagor, could, without any doubt or difficulty, satisfy himself on the point whether there were any, and if so, what, goods not covered by the instrument in question; and this should be the test of the sufficiency or insufficiency of a description which covers a stock-in-trade with after-acquired goods replenishing the stock: Re Thirkell, Perrin v. Wood (1874), 21 Gr. 492.

The equitable right attaches on the goods immediately upon their reaching the premises, and will prevail over writs in the hands of the sheriff at the time they were brought in: Coyne v. Lee, 14 A.R. (Ont.) 503; Holroyd v. Marshall, 10 H.L.C. 191.

A mortgage contained the following description: "All and singular the goods, chattels, and property mentioned and set out in the schedule hereunto annexed, which is to be read in connection with these presents and form a part thereof, and also any and all the property that may hereafter during the continuance of these presents be brought to keep up the same in lieu thereof, and in addition thereto, either by exchange or purchase, which so soon as obtained, and in actual or constructive possession, etc., shall be subject to all the provisions of this indenture." The schedule in detail specified "8 horses and harnesses now in livery stable owned by the mortgagor," etc. A second

mortgage to another party described the goods in detail as in the first and in the schedule thereto, after enumerating specifically the articles, concluded: "Also all other goods, furnishings, articles and materials now or hereafter during the continuance of these presents used in connection with the livery stable now owned by the mortgagor, and all property hereafter acquired therein. It was held that the second mortgage was sufficient to cover after-acquired property, but that the first was not: Fraser v. Macpherson, 34 N.B.R. 417.

So a provision in a chattel mortgage that it should cover all after-acquired goods and chattels brought upon the premises owned or occupied by the mortgagors or used in connection with their business during the currency of the mortgage operates as a valid lien and charge upon all the after-acquired goods brought upon the premises: Imperial Brewers v. Gelin, 18 Man. L.R. 283.

Where a mortgage not specifically mentioning present or future book debts covers "undertakings together with incomes and sources of money, rights, privileges held or enjoyed by the mortgagor, now or at any time prior to the full payment of the mortgage," such language is sufficiently comprehensive to create an equitable charge on present and future book debts: National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 26 O.L.R. 279: see Tailby v. Official Receiver, 13 A.C. 523, approving Re Clarke, Coombe v. Carter, 36 Ch.D. 348, and overruling Belding v. Read, 3 H. & C. 955, and Re D'Epineuil, 20 Ch.D. 758; see Ex parte Burton, 13 Ch.D. 102; Ex parte Field, Re Marlow, 13 Ch.D. 106.

General words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated. Hence, where a chattel mortgage conveys the stock-in-trade, shop, contents, fixtures, scales and appurtenances purchased by the mortgagor from a specified seller, with a further provision to include "not only all and singular the present stock of goods and all the other contents of the mort-

gagor's shop, but also any other goods that may be put in said shop in substitution for, or in addition to those already there, as fully and to all intents and purposes as if said added or substituted stock were already in said shop and particularly mentioned"—such provision is limited to the things enumerated and will not cover a cash register subsequently acquired: Dominion Register Co. v. Hall & Fairweather, 8 D.L.R. 577; Moore v. Magrath, 1 Cowper 9.

A description of after-acquired goods as "all other ready-made clothing, tweeds, trimmings, gents' furnishing, furniture and fixtures and personal property, which shall at any time during the currency of this mortgage be brought in or upon the said premises or in or upon any other premises in which the said mortgagor may be carrying on business," is sufficient, and binds goods of the kinds mentioned in premises to which the mortgagor moves after making the mortgage. Horsfall v. Boisseau, 21 O.A.R. 663.

A provision covering after-acquired property of the business of manufacturing cannot be extended to the goods in a mercantile business, and *vice versa*: Milligan v. Sutherland, 27 O.R. 235, 238.

Debts are not included in the expression "goods, wares and merchandise:" Rennie v. Quebec Bank, 3 O.L.R. 541; Browne v. Fryer, 46 L.T. 636.

A schedule specifying "all machines in course of construction, or which shall hereafter be in course of construction or completed" could not extend to goods wholly manufactured on premises other than those described in the mortgage: Williams v. Leonard, 26 Can. S.C.R. 406.

A mortgage of an electro-plating factory "together with all the plant and machinery at present in use in the factory" does not cover patterns used in the business, sent from time to time from the factory to foundries to have mouldings made, and not in the factory at the time of the making of the mortgage: McCosh v. Barton, 2 O.L.R. 77, reversing 1 O.L.R. 229.

The word "plant" does not include horses used in the business: London and Eastern, etc. v. Creasy, [1897] 1 Q.B. 768.

A piano on board of a vessel will not pass under the words "with her boats, guns, ammunition, small arms, and appurtenances:" St. John v. Bullivant, 45 U.C.Q.B. 614. But a clause "with all her apparel, furniture, etc., as part of the vessel," is sufficient to cover glass, crockery, table linen, beds, etc., on board of a passenger vessel: Patton v. Foy, 9 U.C.C.P. 512.

The phrase "personal estate," in an assignment of stock-in-trade and household effects, is too general to cover the grantor's term or interest in a dwelling-house: Harrison v. Blackburn, 17 C.B. 678.

A description of "looms, and other things and effects belonging thereto" will cover the healds, reeds, wefts and waste cans attached though no part of them: Cort v. Sagar, 3 H. & N. 370.

A mortgage on fixtures will cover those affixed before the execution of the mortgage or subsequently affixed in place of the others of the same description: Irish Civil, etc. v. Mahony, Ir. R. 10 C.L. 363.

An assignment by partners of "all and singular the stock-in-trade, goods, merchandise, sum and sums of money, bills, bonds, drafts, mortgages, books of account, of what nature or kind soever, belonging to or due or owing to the said parties (mortgagors) is large enough to include both the individual and joint property: Heward v. Mitchell, 10 U.C.Q.B. 535.

A sale of logs necessarily carries the deals and boards into which part of them had been manufactured, and, therefore, are not subject to attachment by execution creditors of the seller: King v. Dupuis dit Gilbert, 28 Can. S.C.R. 388; White v. Brown, 12 U.C.Q.B. 477. But logs afterwards brought on saw mill premises, and lumber there manufactured therefrom, are not within the purview of a chattel mortgage covering all lumber which might at any time be brought on the premises: Merchants Bank of Halifax v. Houston, 7 B.C.R. 465. A contract for the

transfer of "hotel premises and contents as a going concern" will be presumed to include quantities of wood and ice kept on the hotel premises and also the food supplies: Blomquist v. Tymchorak, 6 D.L.R. 337, 22 W.L.R. 205; but a more detailed description should be given for the purposes of a bill of sale. A chattel mortgage covering a stock in trade and book debts includes the book debts originally assigned to the mortgagor by the person of whom they were purchased: Robinson v. Empey, 10 B.C.R. 466. But a description of "all office fixtures, lamps, desks, chairs, furniture, stationery and all goods, chattels and effects now in the store and office of the mortgagors," will not include a safe, the general words being restricted by the preceding words: Goldie v. Taylor, 2 Terr. L.R. 298. Nor are kitchen supplies and utensils part of a plant, materials or other things provided for railway construction work: Clancey v. Grand Trunk Pacific R. Co., 15 B.C.R. 497. "Securities for money" will include policies of insurance: Lee v. Gorrie, 1 C. L.J. 76; Lawrence v. Galsworthy, 3 Jur. 1049.

Where a mortgage is made to secure bonds upon the whole property, assets, etc., of a company, present and future, except logs on the way to the mill, such exception applies to such logs as may be on the way to the mill, not only at the date of the mortgage, but also at any future time: Imperial Paper Mills v. Quebec Bank, 6 D.L.R. 475, 3 O.W.N. 1544, 22 O.W.R. 703, 26 O.L.R. 637.

The entire goodwill and right to use trademarks may pass to the purchaser of a business without any express mention of them being made in the deed of assignment, but it is desirable that a bill of sale or some other document should specify them: Shipwright v. Clements, 19 W.R. 599; Wilmer v. Thomas, 74 Md. 485, 13 L.R.A. 380; Boon v. Moss, 70 N.Y. 473; Hutchinson v. Nay, 183 Mass. 355; Fite v. Dorman (Tenn.) 57 S.W.R. 129; Steinfield v. National Shirt Waist Co., 99 N.Y. App. D. 286; Shafer v. Sloan, 3 Call. App. 335; see also Mitchell v. Read, 19 Hun (N.Y.) 418; Williams v. Errand, 88 Mich. 473; Thomas Bank

v. Warren, 94 Wis. 151; Lane v. Smythe, 46 N.J. Eq. 443; Fish Bros. Wagon Co. v. Fish, 82 Wis. 546, 16 L.R.A. 453.

The goodwill of a business comprises all the advantages identified with the name of a particular firm: Churton v. Douglas, 7 W.R. 365; O'Keefe v. Curran, 17 Can. S.C.R. 596; Ginesi v. Cooper, 14 Ch.D. 596.

The goodwill of a trade established in a particular place means nothing more than the sum of money which any person would be willing to give for the chance of being able to keep the trade connected with the place where it has been carried on: Austen v. Boys, 2 DeG. & J. 626. The goodwill of a public-house, store, and the like passes as an incident to the mortgage or subject-matter of sale: Rutter v. Daniel, 30 W.R. 801, affirming 46 L. T. 684; Ex parte Punnett, Re Kitchin, 16 Ch.D. 226; King v. Midland R. Co., 17 W.R. 113; Kelly v. Montague, 29 L.R. Ir. 429; Robertson v. Quidington, 28 Beav. 529. The goodwill of a victualler's business was held to be incident to the stock and license, and not to the premises in which the business was carried on: England v. Downs, 6 Beav. 279; but see Santa Fe El. Co. v. Hitchcock, 9 N. Mex. 156, 50 Pac. 332.

Although in some cases the goodwill of trade premises passes to a mortgagee, that does not apply when the goodwill depends wholly on the personal skill of the owner: Cooper v. Metropolitan Board of Works, 25 Ch.D. 472. The business of a solicitor has no local existence but is entirely personal: Arundell v. Bell, 31 W.R. 477; Austin v. Boys, 2 DeG. & J. 626. The goodwill of a surgeon attaches to his person as a result of confidence in his skill and ability. It is therefore an asset of the estate distinct in itself to be accounted for in the ordinary course of administration: Christie v. Clark, 27 U.C.Q.B. 21, affirming 16 U.C.C.P. 544.

CHAPTER XIII.

The Date.

In the form of a mortgage the first thing to be considered is the date, as that generally, though not necessarily, is inserted at the beginning rather than at the end of the instrument.

When the instrument is dated, the presumption is that delivery was made upon that date (Hayward v. Thaeker, 31 Q.B. 427), but, because a deed is good, though it mentions no date, or has a false or impossible date, this presumption can be rebutted, and the parties may, by parol evidence, shew the true time of delivery: Davis v. Jones, 17 C.B. 625, 4 W.R. 248; see Hubert v. Moreau, 2 Car. & P. 528; Burdett v. Hunt, 25 Me. 419; Partridge v. Swazey, 46 Me. 414; McLean & Pinkerton, 7 A.R. 490; Burdett v. Hunt, 25 Me. 419.

The expression "delivery" is not to be taken in its popular sense, as meaning a manual delivery, for the instrument may be completely executed, and yet not handed to the mortgagee; but there must be some act on the part of both parties to the instrument, which in legal contemplation will be equivalent to manual delivery. Disputes may arise on the point of delivery between a mortgagor and mortgagee, as to whether or not there was "delivery," but, under the statute there must be an affidavit of *bona fides* both in the case of a mortgage, and of a sale, and this being so it would then be less a question whether there was a delivery, than a question as to when it took place, as settling the moment of time from which the instrument came into force, as against the persons intended to be protected by the statute.

In Ontario it is provided that the affidavit of execution of mortgages shall contain the date of the execution of the mortgage: 10 Edw. VII. ch. 65, sec. 5, R.S.O. 1897, ch. 148, sec. 2. There is, however, no provision in the Act which requires the date to be inserted in the affidavit of execution of an absolute bill of sale (10 Edw. VII. ch. 65, sec. 8, R.S.O. (1897), ch. 148, sec. 6), nor in the case of an agreement to make a sale; but if the agreement be to make a mortgage, it would appear that such date must be inserted, for the affidavit of execution must be in the manner "prescribed in respect of bills of sale and mortgages:" 10 Edw. VII. ch. 65, secs. 16, 17, R.S.O. 1897, ch. 148, secs. 11, 12.

In consequence of the statute requiring bills of sale to be registered within a limited time from their execution, and the date being *primâ facie* evidence of the time when execution took place (Foster v. Perkins, 42 Me. 168), it often becomes material to determine the real date of execution. To admit testimony shewing the date to be incorrect does not tend to vary or contradict the instrument, and therefore parol evidence is admitted to shew that a mistake has been made in the date: Stone-breaker v. Kerr, 40 Ind. 186.

It sometimes is important to establish the moment of time of the day when such instruments are executed. The date inserted affords no indication as to the hour of the day when execution took place, and, since instruments under the Act relate back and take effect from their execution, it is possible for a conflict to arise between an execution creditor and a mortgagee wherein a fraction of a day would have to be considered. In such cases, when the justice of the cause so requires, the Courts will consider a fraction of a day: Beckman v. Jarvis, 3 U.C.Q.B. 280.

It therefore, might not be undesirable for the conveyancer to preserve evidence of the time of the day when instruments under the Act were executed. A purchaser of property may be inclined to rely upon the evidence in the clerk's office that

an instrument on file against such property was so filed more than five days after its date; but such purchaser, relying on such evidence, may be delayed in his rights: it is presumed that he knows the law to be that the date of the instrument is not conclusive evidence as to when it was executed, and the party seeking to uphold the instrument might be able to shew that it was in fact executed within the five days prior to its being placed on file: Holman v. Doran, 56 Ind. 358; Hoadley v. Hoadley, 48 Ind. 452.

Where the transaction was made in good faith and there was no intent to defeat or delay creditors, it is no ground to impeach a bill of sale because of nonconformity with the provisions of the Bills of Sale and Chattel Mortgage Act (Ont.), that the bill of sale was dated 16th, while it was not in fact executed till the 26th of March, if it were duly registered within five days from that time, and before any execution was in the sheriff's hands. The nominal date is immaterial—the instrument takes effect from and after the date and time of execution. There is no requirement that the bill of sale shall be completed by execution of the instrument within so many days of the actual sale, and the delay in the preparation of the instrument for ten days is not fatal to its validity under the statute: McDonald v Gamut (1899), 30 Ont. R. 398, 401.

The omission of the date and the words "before me" from the jurat of an affidavit accompanying a bill of sale is an invalidating defect which cannot be supplied by parol evidence: Archibald v. Hubley, 18 Can. S.C.R. 116. The execution of a bill of sale at the foot of the annexed schedule is sufficient: Melville v. Stringer, 12 Q.B.D. 132. The affidavit need not be made on the day the mortgage is executed: Perry v. Ruttan, 10 P.C.Q.B. 637. A bill of sale and the affidavit of the time at which it was made must be filed simultaneously: Grindell v. Brendon, 6 C.B. 698. An affidavit of *bona fides* sworn prior to the execution of the mortgage is insufficient: Building and Loan Association v. Betzner, 10 C.L.T. Occ. N. 112, affirming Reid v. Gowans, C.A.

15th October, 1885 (not reported). The affidavit of execution of a bill of sale not intended to operate as a mortgage need not state the date on which it was executed: McLeod v. Fortune, 19 U.C.Q.B. 100. Failure to set forth the date of a payment credited in a renewal statement is not fatal to its validity: Christin v. Christin, 1 O.L.R. 634. A clerical error in substituting 1806 for 1876 was held not to render the document defective where the real date could be ascertained from the body of the instrument: Banbury v. White, 11 W.R. 785. Such error in the jurat of an affidavit might be amended: Hollingsworth v. White, 10 W.R. 619; Lamb v. Bruce, 24 W.R. 645; Thomas v. Roberts, 1 Q.B. 657. Registration of a bill of sale as of the day of its execution, is not invalidated by reason of the deed not being attested nor the consideration money paid until two days after the execution: Darvill v. Terry, 6 H. & N. 807. The time for payment to be made on a chattel mortgage for a debt may be extended beyond a year from its date: O'Neill v. Small, 15 C.L.J. 114; Kerry v. James, 21 O.A.R. 338; although it involves the filing of a renewal before maturity. In computing the year within which the renewal of a chattel mortgage must be filed, the day on which the mortgage was filed is to be excluded: McCann v. Martin, 15 O.L.R. 193. Independently of statute, Sunday would be included although it be the last day of the time limited for the registration of the instrument: McLean v. Pinkerton, 7 O.A.R. 490; but see Re Parke, 13 L.R. Ir. 85; Williams v. Burgess, 12 Ad. & E. 635; see R.S.M. 1908, ch. 11, secs. 16; see R.S.B.C. 1911, ch. 20, sec. 26; R.S.S. 1909, ch. 144, sec. 34.

For the purposes of the statute the word "holiday" includes Sunday, New Year's Day, Good Friday, Easter Monday, Christmas Day, the birthday, or the day fixed by proclamation of the Governor-General for the celebration of the birthday of the reigning sovereign, Victoria Day, Dominion Day, Labour Day, and any day appointed by proclamation of the Governor-General or the Lieutenant-Governor as a public holiday, or for a

general Fast or Thanksgiving: 2 Edw. VII. ch. 12, sec. 1; 7 Edw. VII. ch. 2, sec. 7 (16).

By statute in Ontario, 7 Edw. VII. ch. 2, sec. 7 (18), if the time limited by an Act for any proceeding, or for the doing of anything under its provisions, expires or falls on a holiday, the time so limited shall extend to, and such thing may be done on, the day next following which is not a holiday.

And whenever any other holiday falls on a Sunday, the day next following shall be in lieu thereof a holiday: 3 Edw. VII. ch. 7, sec. 2; 7 Edw. VII. (Ont.) ch. 2, sec. 7 (17).

CHAPTER XIV.

Insurance.

The mortgagor and mortgagee have each an insurable interest in the property mortgaged (Richards v. Liverpool and London Ins. Co., 25 U.C.Q.B. 401), and each may insure for his own benefit independently of the other: French v. Rogers, 16 N.H. 177; Fullon v. Brooks, 4 Cush. 203; Conover v. Ins. Co., 23 Pick. 413; Ayers v. Home, 21 Iowa 185. The insurable interest of a mortgagor extends to the full value of the goods or property mortgaged, while that of the mortgagee is limited to the amount of his mortgage debt (Glover v. Black, 1 Bl. R. 396; Robertson v. Hamilton, 14 East 529 593; Crawford v. Hunter, 8 T.R. 16; Stockdale v. Dunlop, 6 M. & W. 224; Powles v. Innes, 11 M. & W. 10), and the circumstance of the mortgagor continuing in possession does not diminish or in any way affect the right of the mortgagee to insure on his own account: Ogden v. Montreal Ins. Co., 3 U.C.C.P. 497.

A mortgagor is the sole and unconditional owner within the terms of a policy requiring the ownership of the property to be truly stated: Western Assurance Co. v. Temple, 31 Can. S.C.R. 373.

A mortgagee, who is not in possession, cannot tack on to his mortgage debt subsequent advances not secured by the mortgage or other claims upon parol agreements, so as to increase his insurable interest in the goods or subject-matter of his mortgage (Ogden v. Montreal Ins. Co., 3 U.C.C.P. 497); but if he be in possession, then, inasmuch as he may be responsible to the mortgagor as bailee of the goods, he has an insurable interest in

the property to the full value thereof; he must, however, in the event of loss, account to the mortgagor for everything over and above his own mortgage claim, interest and costs.

While a mortgagee has in himself an insurable interest, and so may insure for his own benefit simply, he yet is at liberty to insure for the joint benefit of himself and the mortgagor.

The contract of insurance usually stipulates that the extent and nature of the interest insured should be clearly set out, but in the absence of conditions to this effect it is unnecessary that the mortgagee should state either the nature of his interest, or for whose benefit the insurance is made. The rule is that the subject-matter of insurance must be particularly described, but the interest of the insured may be left at large: Richardson v. Home, 21 U.C.C.P. 291; Ogden v. Montreal Ins. Co., 3 U.C.C.P. 497.

The usual practice is for the mortgagor to covenant that he will insure and keep insured the property given in security, and when he insures in pursuance of such a covenant the insurance is effected in his own name, and the loss (if any) is made payable to the mortgagee, according to his interest; or the policy issued is assigned to the mortgagee, not absolutely, but as collateral security to the extent of the mortgagee's interest. Though a limited interest will be implied from an assignment by a mortgagor to a mortgagee of a policy of insurance, it yet is advisable always to expressly define the nature and extent of the assignment, so as to guard against the mortgagor being deprived of any interest in the surplus he might have, after satisfaction of the mortgage debt. When the policy is assigned by the mortgagor to the mortgagee, and the assignment assented to by the insurers, then an equitable contract of insurance is created between the mortgagee and insurers to the extent that the mortgagee's interest will not be prejudiced or defeated by a subsequent act of forfeiture on the part of the mortgagor (Burton v Gore District Ins. Co., 12 Gr. 156); but when the loss (if any) is merely made payable to the mortgagee, such may not be the

case: see Livingstone v. Western Ins. Co., 16 Gr. 9. In either case it is always advisable to have a mortgage clause attached making the policy valid as to the mortgagee's interest, independent of any act of the mortgagor.

The policies of many companies are so framed that a mortgagee is quite unsafe in taking their policies unless a mortgage clause is attached. An assignment by way of mortgage is not within the statutory condition against assignment, and notice of such an assignment seems unnecessary: Burton v. Gore District Ins. Co., 12 Gr. 156; Sands v. Standard Ins. Co., 27 Gr. 167; Sovereign Ins. Co. v. Peters, 12 Can. S.C.R. 33; McQueen v. Phœnix Mutual Ins. Co., 4 Can. S.C.R. 660, 668. A condition in a policy of insurance that "the interest of the assured in this policy or any part thereof or in the property hereby insured or any part thereof is not assignable without the consent of the company in writing," refers to an absolute assignment, and does not prohibit a transfer by way of mortgage: Pritchard v. Merchants, 26 N.B.R. 232; Keefer v. Phœnix Ins. Co., 31 Can. S.C.R. 144, followed in Trotter v. Calgary F. I. Co., 12 W.L.R. 672, 678.

But that will not apply in the case of a mortgage of the policy itself, or where there is a condition in the policy against a "change of title": Salterio v. City of London F. Co., 23 Can. S.C.R. 32; Citizens' Ins. Co. v. Salterio, 23 Can. S.C.R. 155. So the surrender of the equity of redemption by the mortgagor to the mortgagee operates as a total assignment to which the assurer's assent is a pre-requisite: Pinhey v. Mercantile Fire Ins. Co., 2 O.L.R. 296.

The fact that the insurable interest of the mortgagor had expired by reason of his surrender of the equity of redemption to the mortgagee, will not necessarily affect the rights of the mortgagee to recover from the insurer, who, with knowledge of the assignment, accepted the premiums paid by the latter: Wyman v. Imperial Ins. Co., 16 Can. S.C.R. 715.

In all cases, however, it is advisable that the company's as-

sent to such an assignment should be procured. The policies of most companies are conditional so as to require notice. A covenant to insure in a mortgage operates as an equitable assignment of any policy of insurance that might be effected by the mortgagor: Western Bank v. Courtemanche, 27 O.R. 213; Greet v. Citizens' Ins. Co.; Greet v. Royal Ins. Co., 5 A.R. 596; compare Lees v. Whiteley, L.R. 2 Eq. 143.

When there is such a covenant, and the mortgagor makes default in insurance, the mortgagee may insure and charge the premiums to the mortgagor, if reasonable (Leland v. Colliver, 34 Mich. 418); but it should be provided by the mortgage that the goods mortgaged shall stand charged with the repayment of the premiums so paid in the same manner as, and as part of the principal money, or the mortgagee may find himself with no other security therefor than the mortgagor's personal covenant.

In all such cases the insurance money is payable to the mortgagee, who must apply it to the discharge of the debt and return any balance to the mortgagor. But the mortgagee is not bound so to apply the money until the maturity of the mortgage (Austin v. Storey, 10 Gr. 306; Green v. Hewer, 21 U.C.C.P. 531; Trust and Loan Co. v. Drennan, 16 U.C.C.P. 321), when in the absence of such a condition or otherwise the mortgagee insures for his own benefit. The nature of his insurable interest is a question of considerable difficulty, and the decisions are not reconcilable. The better opinion seems to be that the insurers are in the same position as a surety who has paid the principal debt, and therefore that they are entitled to subrogation of the security, so as to stand, with reference to it, in the same position as did the insured. There can be no doubt that the mortgagee's insurable interest depends upon his debt so that where a mortgagee, without any agreement with the mortgagor, insures, he insures his debt, and, when the debt is paid, his insurable interest ceases: Carpenter v. Ins. Co., 16 Pet. 495; Ins. Co. v. Woodruff, 2 Dutch 541; Smith v. Ins. Co., 17 Penn. St. 253.

A mortgagee to whom payment is to be made in case of loss "as his interest may appear" cannot recover on the policy when his mortgage has been assigned: West Ass. Co. v. Temple, 31 Can. S.C.R. 373.

In case of loss the insurer is entitled to be subrogated to the mortgagee's claim: Sussex v. Woodruff, 26 N.J. Eq. 541; Honore v. Lamar Ins. Co., 51 Ill. 409; Norwich v. Boomer, 52 Ill. 442; Blaauwpot v. Da Costa, 1 Eden 130; Randal v. Cockran, 1 Ves. Sen. 98; Mason v. Sainsbury, 3 Doug. 61; Yates v. White, 4 Bing. N.C. 272.

The principle of subrogation is applied to cases where the owner of the goods has a remedy in tort against a third person for the destruction of the goods. In any such case the fact of the owner being indemnified by the insurers is no defence to an action against the wrongdoer, but the insurers, to the extent of the amount they have paid, are entitled to be subrogated to the rights of the owner against the wrongdoer: Mason v. Sainsbury, 3 Doug. 61; Yates v. White, 4 Bing. N.C. 272.

The right of an insurance company to be subrogated to the mortgage rights of the mortgagee in the case of a policy of insurance containing the usual subrogation clause referred to below, depends upon whether they have a good defence against the claim of the mortgagor, who as between himself and the insurance company is the party insured: Ommium Securities Co. v. Canada Fire and Marine Ins. Co., 1 O.R. 494; Ball v. North British Canadian Investment Co., 15 O.A.R. 421, affirmed *sub nom.* Imperial Fire Ins. Co. v. Ball, 1 Cameron S.C. Cas. 1 (correcting the report in 18 Can. S.C.R. 697).

Where a statutory condition provides that if the property insured is assigned without the written permission of the company the policy shall be avoided, the assignment meant is one by which the assignor divests himself of all title and interest. The condition is directed against a change of title, not the creation of an encumbrance, and therefore a mortgage by the person named is not a breach of the condition: Sands v. The

Standard Ins. Co., 26 Gr. 113, 27 Gr. 167; Bull v. North British, etc., Co., 15 O.A.R. 421; Imperial Fire v. Bull, 1 Cameron's C Cas. 1.

The amount of the mortgage debt must be actually paid or tendered to the mortgagee to entitle the insurer to be subrogated to the rights of the mortgagee: Montreal Loan, etc., Co. v. Denis, 14 Que. S.C. 106; see also Klein v. Union Fire Insurance Co., 3 O.R. 324; McKay v. Norwich Union Ins. Co., 27 O.R. 251; Howes v. Dominion Fire, etc., Ins. Co., 8 O.A.R. 644; Anderson v. Saugeen Mutual Fire Ins. Co., 18 O.R. 355; National Insurance Co. v. McLaren, 12 O.R. 682.

Where the property is subject to several mortgages, each containing a covenant to insure, the subsequent mortgagees are entitled, subject to the prior mortgagees' claims, to payment of the insurance money, and to be subrogated to their rights against the mortgaged property: Goldie v. Bank of Hamilton, 27 O. A.R. 619.

The question between the mortgagee and the insurers is not whether the mortgagee has lost his debt, but whether he has lost his security, so that it is no answer to an action on a policy that the mortgagor is still solvent and able to pay the mortgage debt in full.

The relying upon and waiting for another party from whom the insurance has been taken, to effect and keep in force an insurance upon the property mortgaged, is never satisfactory. Hence, it is suggested that insurance should in all mortgages be a condition, on the non-performance of which the right to possession should accrue to the mortgagee; and when, in a mortgage it is provided that a default in insuring renders the whole amount secured by the mortgage at once due and payable, and gives to the mortgagee a right of action on the contract, the procuring of the insurance by the mortgagee, after the default of the mortgagor, does not inure to the mortgagor's benefit so as to cure or discharge the breach on his part to insure: Power v. Hoffman, 31 Mich. 215.

The clause in a fire policy issued to the mortgagor but providing for the payment of the loss to the mortgagee as his interest may appear does not make the latter the assured; and a subsequent breach by the mortgagor of the conditions of the policy avoids the policy against the mortgagee as well as the mortgagor: Livingstone v. Western Ins. Co., 16 Gr. 9, reversing 14 Gr. 461. To obviate this difficulty mortgagees frequently obtain from the insurance company a "mortgage clause" which is attached to the policy.

The mortgage clause attached to a policy of insurance against fire, providing that "the insurance as to the interest only of the mortgagees therein shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, etc.," applies only to acts of the mortgagor after the policy comes into operation, and cannot be invoked as against the concealment of material facts by the mortgagor in his application for the policy: Liverpool, etc., Ins. Co. v. Agricultural, etc., Loan Co., 33 Can. S.C.R. 94, reversing 3 O.L.R. 127, following Omnium Securities Co. v. Canada Fire, etc., 1 O.R. 494, and rejecting the American decisions to the contrary.

It was also questioned in the case *supra*, as to whether the mortgage clause entitles the mortgagee to bring an action in his own name alone on the policy. In Haslem v. Equity Fire Ins. Co., 8 O.L.R. 246, the Court sustained the right of the mortgagee to sue the insurance company in his own name for the amount due under the policy, though the policy did not contain any mortgage or subrogation clause, nor any direct agreement with the mortgagee, but which was effected by the mortgagor pursuant to a covenant in the mortgage, and by a policy the loss was made payable to the mortgagee; Teetzel, J., applying McQueen v. Phœnix Mutual, 4 Can. S.C.R. 660, and Greet v. Citizens' Ins. Co., 27 Gr. 121, 5 O.A.R. 596, made the following observations: "As soon as all things have been done by the assured to make the defendant (insurer) liable to pay the amount of the insurance money, then this money is stamped with

a trust in favour of the mortgagees, and under the authority of the above cases . . . they have a direct beneficial interest in and a lien upon the insurance money in defendant's hands, as soon as it becomes applicable to the payment of the loss, and are entitled to bring an action against the company for the same."

The assignee for creditors of the assured is entitled to maintain a joint action with the beneficiary to whom the loss is made payable by the policy, notwithstanding that the transfer of the policy to the assignee has not been consented to by the insurers: Strong v. Crown Fire Ins. Co., 1 D.L.R. 111, 3 O.W.N. 481, as varied 4 D.L.R. 224, 3 O.W.N. 1534.

A policy cannot be cancelled by the insurance company, at the request of the mortgagee, as the equitable beneficiary thereunder, without notice to the mortgagor. Likewise, insurance effected by the mortgagee, without the mortgagor's assent, after an attempted cancellation, does not affect the mortgagor's right of recovery on the policy effected by him: Morrow v. Lancashire Ins. Co., 26 O.A.R. 173, affirming 29 O.R. 377.

It has also been held that the failure of a mortgagee to carry out his undertaking to continue an insurance policy on the mortgaged property renders him liable in damages to the mortgagor, ignorant of such failure, for the amount of such insurance in case the property is burned after the policy lapses: Campbell v. Canadian Co-op. Ins. Co., 16 Man. L.R. 464, following Skelton v. L. & N.W. R. Co., L.R. 2 C.P. 636.

CANADA

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AN ACT RESPECTING MONEY-LENDERS.

(R.S.C. 1906, ch. 122.)

Short Title.

1. This Act may be cited as the *Money Lenders Act*, 6 Edw. VII. ch. 32, sec. 1.

Usury legislation.

The Parliament of the former "Province of Canada" in 1858 followed the example set by the Imperial Parliament which had in 1854 passed an Act repealing all usury laws then in force whether based on the common law or statute. It enacted that "except as otherwise provided by this or any other Act of the Parliament of Canada, any person may stipulate for, allow and exact on any contract, or agreement whatsoever, any rate of interest or discount which is agreed upon." A similar proviso is still in force, subject, however, to the provisions of the Money Lenders Act subseqnent thereto. See R.S.C. 1906, ch. 120, sec. 2.

The above section remained in force for a period of nearly half a century to the time when the original of the present Act (6 Edw. VII. ch. 32) was passed. It follows to some extent the provisions of the English Money Lenders Act of 1900. This Act is a re-enactment with a limitation as to amount of the old usury laws by which the rate of interest on money lent was expressly limited to a fixed percentage and the addition of criminal law features. The English Act, however, does not amount to a re-enactment of the old usury laws which were repealed in 1854. It does not define what the maximum rate of interest shall be, but applies only in a general way to cases in which the Court is satisfied that excessive interest has been charged, and that the "transaction is harsh and unconscionable" or is otherwise such that a Court of equity would give relief. See Carringtons Ltd. v. Smith, [1906] 1 K.B. 79 and Samuel v. Newbold, 22 Times L.R. 703.

The repeal of the usury laws did not affect the power of a Court of equity to review and set aside usurious transactions where they are founded on fraud, or to grant relief from unconscionable bargains: Howley v. Cook, Ir. R. 8 Eq. 570; Teeter v. St. John, 10 Gr. 85.

The Court under its former equity jurisdiction did not relieve against an usurious contract so as to forfeit the principal, as well as the illegal interest: Pitt v. Cholmondely, 2 Ves. 564, 567. And in order to be entitled to equitable relief, a Court of equity required that it should be on terms of paying what is fairly due, with legal interest: Scott v. Nesbitt, 2 Cox 183; Mason v. Gardiner, 4 Bro. C.C. 436; Whitmore v. Francis, 8 Price 616; Lodge v. National Union Co., [1907] 1 Ch. 300.

The Money Lenders Act is of non-retroactive effect: Tapley v. Marks, (Que.) 2 E.L.R. 555.

The assignment of a chattel mortgage as security for an usurious loan does not affect the right of redemption of the mortgagor as against the mortgagee or his assignee: Johnson v. Williamhurst, 1 L.J. Ch. 112.

Definition of "Money-lender."

2. "Money-lender" in this Act includes any person who carries on the business of money-lending, or advertises, or announces himself, or holds himself out in any way, as carrying on that business, and who makes a practice of lending money at a higher rate than ten per centum per annum but does not comprise registered pawnbrokers as such: 6 Edw. VII. ch. 32, sec. 2.

A conviction under the Money Lenders Act, R.S.C. 1906, ch. 122, will be quashed if no evidence is given that the accused made a practice of lending money at a higher rate than ten per cent. Oral evidence is admissible on a prosecution under the Money Lenders Act to shew that the true transaction was one of loan and not, as claimed by the defence, a purchase of unearned salary from the party to whom the money was given. The King v. Clegg, 14 Can. Cr. Cas. 217, 18 Man. L.R. 9.

Statute not Applicable to Yukon.

3. This Act shall not apply to the Yukon Territory, 6 Edw. VII. ch. 32, sec. 11.

Limitation as to Small Loans.

4. This Act shall not apply to any loan or transaction in which the whole interest or discount charged or collected in connection therewith does not exceed the sum of fifty cents. 6 Edw. VII. ch. 32, sec. 10.

Act not to Increase Existing Rate of Interest.

5. Nothing in this Act shall operate to increase the rate of interest that may be recovered in any case where by law the rate is fixed at less than twelve per centum per annum. 6 Edw. VII. ch. 32, sec. 8.

Limitations of the rate of interest chargeable by chartered banks are contained in the Bank Act (Can.).

Interest, when Limited to 12 per cent. per Annum.

6. Notwithstanding the provisions of the Interest Act, no money-lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement, concerning a loan of money, the principal of which is under five hundred dollars, a rate of interest or discount greater than twelve per centum per annum; and the said rate of interest shall be reduced to the rate of five per centum per annum from the date of judgment in any suit, action or other proceeding for the recovery of the amount due. 6 Edw. VII. ch. 32, sec. 3.

In West v. Diprose, [1900] 1 Ch. 337, the plaintiff had given the defendant a bill of sale of chattels as security for a loan of £500 and interest thereon at the rate of 60 per cent. per annum, the principal to be repaid by monthly instalments. One monthly instalment only was paid, when the parties entered into an agreement that the mortgaged property should be sold, and the loan paid out of the proceeds. The sale having been made, the defendant claimed to hold the purchase-money and apply it in payment of his principal and interest as it fell due, according to the proviso for repayment, to which the plaintiff objected, and contended that he was only entitled to his principal and interest up to the date of sale. Cozens-Hardy, J., held that the defendant, having elected to proceed on the plaintiff's authority to sell the goods and apply the proceeds in payment of the debt, was bound to carry out the direction.

and that from the moment the money was received interest ceased to run: see 36 C.L.J. 300.

Powers to Court for Inquiry into Transaction and Relief of Debtor.

7. In any suit, action or other proceeding concerning a loan of money by a money-lender the principal of which was originally under five hundred dollars, wherein it is alleged that the amount of interest paid or claimed exceeds the rate of twelve per centum per annum, including the charges for discount, commission, expenses, inquiries, fines, bonus, renewals, or any other charges, but not including taxable conveyancing charges, the Court may re-open the transaction and take an account between the parties, and may, notwithstanding any statement or settlement of account, or any contract purporting to close previous dealings and create a new obligation, re-open any account already taken between the parties, and relieve the person under obligation to pay from payment of any sum in excess of the said rate of interest; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it, and may set aside, either wholly or in part, or revise, or alter, any security given in respect of the transaction: 6 Edw. VII. ch. 32, sec. 4.

Recovery of Excess.

Any remedy provided for the relief of borrowers against usury by the Money Lenders Act, R.S.C. 1906, ch. 122, is cumulative to and not in substitution for the common law right to recover the excess.

A borrower who has paid interest in excess of the maximum rate for which a contract may legally be made under the provisions of the Money Lenders Act, R.S.C. 1906, ch. 122, has a right of action at common law to recover such excess: Watts v. Tolman, 6 D.L.R. 5, 22 W.L.R. 55, affirmed, 7 D.L.R. 811: Browning v. Morris, 2 Cowp. 790, 98 Eng. Rep. 1364, and Smith v. Bromley, 2 Doug. 696, 99 Eng. Rep. 441, applied; Barnhart v. Robertson, 6 Q.B.O.S. (Ont.) 542, specially referred to.

The English statute requires a money lender to register as such, and it has been held under it that a bill of sale taken by

an unregistered money lender, or one who has otherwise failed to comply with the requirements of the Act, is unenforceable: Bonnard v. Dott, [1906] 1 Ch. 740; Gadd v. Provincial Union Bank, [1909] 2 K.B. 353. The Court may declare such security illegal under the Act even without any prayer for ancillary relief, without making the repayment of the advance a condition of such judgment: Chapman v. Michaelson, [1909] 1 Ch. 238, affirming [1908] 2 Ch. 612, and distinguishing Lodge v. National Union Investment Co., [1907] 1 Ch. 300.

Exception in Case of Negotiable Instrument of Bona Fide Holder.

8. The *bonâ fide* holder, before maturity, of a negotiable instrument discounted by a preceding holder at a rate of interest exceeding that authorized by this Act, may nevertheless recover the amount thereof, but the party discharging such instrument may reclaim from the money-lender any amount paid thereon for interest or discount in excess of the amount allowed by this Act: 6 Edw. VII. ch. 32, sec. 5.

Negotiable Instruments.

The Money Lenders Act does not in any way forbid the negotiation of notes discounted at a forbidden rate, but on the contrary provides for the right of action to the *bonâ fide* holder for the face value of said notes, reserving only the privilege to the party discharging said notes to reclaim from the money lender any amount paid for interest illegally charged. A petition for an injunction to restrain the transfer of said promissory notes will be dismissed: Friedenberg v. Eaves, 13 Que. P.R. 329 (Sup. Ct.).

A party who signed promissory notes discounted at a rate of interest exceeding that allowed by the Money Lenders Act has no right to ask by a conservatory attachment, under the Quebec practice, so as to place the notes under judicial custody for the purpose of reducing their amounts, especially if it is not alleged that the defendant is insolvent: Friedenberg v. Bailey, 13 Que. P.R. 312 (Sup. Ct.).

Act to Apply to Existing Contracts and to Existing Judgments.

9. The principal of any sum of money, originally under five hundred dollars, due and payable before the thirteenth day of

July, one thousand nine hundred and six, in virtue of any negotiable instrument given to a money-lender, or of any contract or agreement entered into with such money-lender in respect of money lent by him, shall not, from and after the said date, bear a rate of interest greater than twelve per centum per annum; and from and after the said date no rate of interest greater than five per centum per annum shall be recovered upon any judgment, rendered before the said date, upon any such negotiable instrument, contract or agreement for the payment of money lent by a money-lender, and which allows a greater rate than five per centum per annum: 6 Edw. VII. ch. 32, sec. 6.

As to Instruments and Contracts not yet Matured.

10. In the case of any such negotiable instrument made before the thirteenth day of July, one thousand nine hundred and six, and maturing after the said date, and in the case of any such contract or agreement made before the said date and to be performed thereafter, the foregoing provisions of this Act shall apply only from the date of maturity or performance, as the case may be: 6 Edw. VII. ch. 32, sec. 7.

Indictment; Penalty.

11. Every money-lender is guilty of an indictable offence and liable to imprisonment for a term not exceeding one year, or to a penalty not exceeding one thousand dollars, who lends money at a rate of interest greater than that authorized by this Act. 6 Edw. VII. ch. 32, sec. 9.

Criminal Offence; who is a "Money Lender."

On a prosecution for usury under the Money Lenders Act, R.S.C. 1906, ch. 22, it is a question of fact whether the accused himself lent the money which the borrower received from him or whether he acted as the borrower's agent or broker to procure the loan and deliver the proceeds less his brokerage charges. Where the transaction charged as an usurious discount under the Money Lenders Act was a colourable one taking the form of

a discount procured by the accused at a chartered bank upon his guarantee of payment, but the proceeds, less alleged brokerage fees, were advanced in cash by the accused to the borrower prior to the pretended discount made by the accused at the bank on the borrower's behalf, the magistrate may convict if he finds there was in fact no brokerage arrangement and that the alleged discount at the bank was merely a blind to cover up the real transaction: The King v. Dubé, 14 Can. Cr. Cas. 436, 18 O.L.R. 367.

Where a money lending business is carried on through a corporation which collects from the borrower out of the money advanced a commission for procuring the loan in addition to the maximum contract rate payable on the securities which are taken payable to an individual, and both the individual lender and the corporation are represented by the same person, evidence is admissible on a prosecution of the latter for an infraction of the Money Lenders Act to shew that there were not in fact two separate businesses and that the methods adopted were colourable and a mere attempt at evasion of the provisions of the statute. An employee of a money lender may be convicted of a criminal usury under the Money Lenders Act if he carries on the business of money lending for his employer and makes for him contracts for prohibited interest and commissions, or if he aids and abets in the illegal transactions: The King v. Smith and Luther, 17 Can. Cr. Cas. 445, 46 C.L.J. 498, 16 O.W.R. 542.

If it is shewn there is a lending of credit by endorsing a promissory note for a consideration to be paid the endorser which is larger than is lawful as interest upon a loan, and that this method of doing business in collusion with the third party, who discounted the note, is a device to evade the Money Lenders Act the endorser is a money lender, under the statute, and may be held liable for criminal usury. The local manager of an endorsing corporation who, on behalf of the corporation, makes the usurious bargain for endorsement charges, and directs the borrower to the discounter who makes a further charge of the full legal rate of discount, is an aider and abettor of the offence and is criminally liable under Code sec. 69 as a principal offender: The King v. Kehr (No. 2), 18 Can. Cr. Cas. 57 (Denton, Co.J.). [See on appeal, R. v. Kehr (No. 3), 18 Can. Cr. Cas. 202.]

As by Code sec. 69 every one is a party to, and guilty of, an offence, who abets any person in the commission of it, a clerk or manager in a money lender's office, who takes part in an act which amounts to the offence of usury, is guilty as a principal, and it is no defence to the charge that he acted merely as an agent: Lalonde v. The King, 17 Can. Cr. Cas. 72, 18 Que. K.B. 267; followed in R. v. Kehr (No. 2), 18 Can. Cr. Cas. 66; see also The King v. Glynn, 15 Can. Cr. Cas. 243, 19 Man. L.R. 63, followed in R. v. Kehr (No. 2), 18 Can. Cr. Cas. 66.

Where the endorsement of the borrower's note is offered for a consideration as a means of obtaining a loan and the borrower uniformly directed to the same discounter, there is evidence of collusion which will support a conviction of the endorsing party as an aider and abettor in the usury constituted by grouping the two transactions, when the whole sum paid or to be paid by the borrower for the guarantee and for the interest upon a loan of less than $500, exceeds twelve per cent. Sec. 69 of the Criminal Code as to aiders and abettors applies to a charge of criminal usury under the Money Lenders Act, R.S.C. 1906, ch. 122. To support a conviction as an aider or abettor of an offence under the Money Lenders Act, it is not essential that the accused should be a "money lender" as defined by the statute: The King v. Kehr (No. 3), 18 Can. Cr. Cas. 202 (Ont.), affirming The King v. Kehr (No. 2), 18 Can. Cr. Cas. 57.

Disposal of Property with Intent to Defraud.

417. Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who,—

(*a*) with intent to defraud his creditors, or any of them,

(i) makes or causes to be made any gift, conveyance, assignment, sale, transfer or delivery of his property or

(ii) removes, conceals, or disposes of any of his property; or,

(*b*) with the intent that any one shall so defraud his creditors, or any one of them, receives any such property; or,

(*c*) being a trader and indebted to an amount exceeding one thousand dollars, is unable to pay his creditors in full and has not, for five years next before such inability, kept such books of account as, according to the usual course of any trade or business in which he may have been engaged, are necessary to exhibit or explain his transaction, unless he be able to account for his losses to the satisfaction of the Court or Judge and to shew that the absence of such books was not intended to defraud his creditors. 55-56 V. ch. 29, sec. 368; 4 E. VII. ch. 7, sec. 1.

"Property" Defined.

The expression "property" includes: (*a*) every kind of real and personal property, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods;

(*b*) not only such property as was originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise. Cr. Code, 1906, sec. 2(32).

Transfer with Intent to Defraud.

It is not essential that the debt of the creditor should at the time of assignment be actually due: R. v. Henry (1891), 21 O.R. 113, following Macdonald v. McCall, 12 A.R. 393.

It is properly left to the jury to say whether the defendant put the property out of his hands, transferred or disposed of it for the purpose of defrauding his creditors, although in the course of that transaction he satisfied a debt due to the creditor to whom the property was assigned: R. v. Potter (1860), 10 U.C.C.P. 39 (Draper, C.J., and Hagarty, J.).

In a case where the nature of the proceedings and the evidence clearly shewed that criminal process issued against S. was used only for the purpose of getting S. to Montreal to enable his creditors there to put pressure on him, in order to get their claims paid or secured, a transfer made by S.'s father of all his property for the benefit of the Montreal creditors was set aside as founded on an abuse of the criminal process of the Court: Shorey v. Jones (1888), 15 Can. S.C.R. 398, affirming the decision of the Supreme Court of Nova Scotia, 20 N.S. Rep. 378.

In Nova Scotia it is held that the disposition of the property under this section must be such as would, if not interfered with, deprive the creditors of any benefit whatever therefrom: R. v. Shaw (1895), 31 N.S.R. 534.

In a proceeding of a penal nature involving deprivation of liberty, and brought under a provincial statute for an alleged concealment of property in fraud of creditors, the rules and principles of the criminal law as to the evidence and its effect are applicable, and there must be clear and conclusive evidence to justify a conviction. A finding that an insolvent has secreted a part of his property with the intent of defrauding his creditors is not supported by evidence merely of a discrepancy between two financial statements made by him a few months apart, and the failure of the insolvent to account for the deficit in his affairs otherwise than as being the result of an extravagant expenditure of assets in living expenses: Bryce v. Wilks (1902), 5 Can. Cr. Cas. 445 (Que.).

The depositions of a bankrupt debtor upon his examination as to means may be proved in evidence against him upon a criminal charge of disposal of property in fraud of creditors, unless at the time of the examination he objected to answer on

the ground that his answer might tend to criminate him. If the examination were before a duly authorised authority, the admissions then made in answer to questions not objected to, may be afterwards used against the accused although such questions were not properly within the scope of the examination: The King v. Van Meter, 11 Can. Cr. Cas. 207.

Upon an indictment under 22 Viet. ch. 96, for making an assignment to defraud creditors, it was held that a money bond is personalty seizable on an execution under the statutes 13 and 14 Viet. ch. 53 and 20 Viet. ch. 57; and, further, that a transfer made by a party to a creditor, who accepted the same in full satisfaction and discharge of his debt, did not render the party making such assignment less liable under this indictment: The Queen v. Potter (1860), 10 U.C.C.P. 39.

Where the Court of Appeal on a case reserved, after conviction on a charge of receiving property with intent to defraud creditors, is of opinion that upon the facts as found in the Court below the prisoner should have been acquitted, it need not order a new trial, but may quash the conviction and discharge the prisoner: The King v. Ayoup, 16 Can. Cr. Cas. 375.

The transfer of a bank account to another's name for the purpose of defeating an execution is a fraudulent disposition of property and subject to criminal liability: Penn v. Smith, 6 D.L.R. 48.

The Court construing a similar section (sec. 354 Can. Cr. Code, 1892, sec. 397, Can. Cr. Code 1906), held, that the gist of the offence is the concealing for a fraudulent purpose, and it is not incumbent on the prosecution to shew that the fraudulent purpose was accomplished: R. v. Goldstamb, 5 Can. Cr. Cas. 357, 10 Man. L.R. 497.

A conviction on a charge of fraudulent concealment of goods with intent to defraud an insurance company will not be set aside because it appears in evidence that a part of the goods had been removed a month before the date of removal of the remainder, which latter removal took place on the date charged in the indictment as the date of concealment. The date of removal is not necessarily the date of concealment, and the conviction would be valid if the accused were still keeping the goods in concealment on or about the date charged in the count, although the removal took place a month prior thereto: R. v. Hurst (1901), 5 Can. Cr. Cas. 338, 13 Man. R. 584.

On a further count for fraudulent removal of goods with intent to defraud, a removal of part of the goods a month prior to the time of the offence as charged is not to be presumed to be a part of one continuous taking with the removal of the remainder on the date charged. Although evidence of the first taking was admissible to shew the intent on the second taking which constituted the charge against the accused, the Judge should not have told the jury that they could convict for either the first or the second taking or for both, and the Judge having certified his opinion that the jury were materially influenced by the evidence of the first taking the conviction on the count for fraudulent removal should be set aside: R. v. Hurst (1901), 5 Can. Cr. Cas. 338, 13 Man. R. 584.

The offence of fraudulent removal of a tenant's goods to evade distress for rent under R.S.O. ch. 342, does not extend to a removal and surrender of possession taking place after the termination of the tenancy by the landlord's notice to quit: The King v. Davitt, 7 Can. Cr. Cas. 514.

Sec. 417 is in effect a bankruptcy law enactment within the provisions of the extradition convention with the U.S.A. dealing with offences against bankruptcy law where criminal by the laws of both countries: R. v. Stone (No. 2), 17 Can. Cr. Cas. 377; Re Webber, 6 D.L.R. 805, 19 Can. Cr. Cas. 515.

Falsification of Books or Documents of Security.

418. Every one is guilty of an indictable offence and liable to ten years' imprisonment who, with intent to defraud his creditors or any of them, destroys, alters, mutilates or falsifies any of his books, papers, writings or securities, or makes, or is privy to the making of, any false or fraudulent entry in any book of account or other document: 55-56 Vict. ch. 29, sec. 369.

Concealment of Deeds or Encumbrances, or the Falsification of Pedigree by the Vendor or Mortgagor.

419. Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both, who, being a seller or mortgagor of land, or of any chattel, real or personal, or chose in action, or the solicitor or agent of any such seller or mortgagor (and having been served with a written demand of

an abstract of title by or on behalf of the purchaser or mortgagee before the completion of the purchase or mortgage) conceals any settlement, deed, will or other instrument material to the title, or any encumbrance, from such purchaser or mortgagee, or falsifies any pedigree upon which the title depends, with intent to defraud and in order to induce such purchaser or mortgagee to accept the title offered or produced to him: 55-56 Vict. ch. 29, sec. 370.

Consent to Prosecution.

No prosecution for concealing any settlement, deed, will, or other instrument material to any title, or any encumbrance, or falsifying any pedigree upon which any title depends, shall be commenced without the consent of the Attorney-General, given after previous notice to the person intended to be prosecuted of the application to the Attorney-General for leave to prosecute. Code sec. 597.

CANADA INTEREST ACT.

(R.S.C. 1906, cu. 120.)

Stipulated Rate of Interest.

2. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon: R.S. ch. 127, sec. 1.

See the Money Lenders Act, R.S.C. 1906, ch. 122 (post

Although the Court will not interfere with any bargain that parties, competent to contract, may make for the payment of interest still it is the duty of the Court to see that the parties to an agreement for the payment of exorbitant rates of interest clearly understood what the bargain was before effect will be given to it: Teeter v. St. John, 10 Gr. 85.

Statutory Rate of Five per Centum.

3. Except as to liabilities existing immediately before the seventh day of July, one thousand nine hundred, whenever any interest is payable by the agreement of the parties or by law and no rate is fixed by such agreement or by law, the rate of interest shall be five per centum per annum: R.S. ch. 127, sec. 2; 63 and 64 Vict. ch. 29, sec. 1.

The Statutory Rate of Interest.

The proper construction of the word "liabilities" is liabilities respecting the rate of interest, and where a mortgage made in 1884 was payable in 1900, bearing interest at 7 per cent., but there was no provision for the payment of interest after maturity, the damages allowable as interest after maturity are not within the proviso: Plenderleith v. Parsons, 14 O.L.R. 619.

The rate of interest is not restricted to five per centum where the contract was entered into before the passage of the Act: Mays v. Connolly, 35 N.B.R. 701.

The interest for any period since the passing of the Act is only recoverable at the rate of five per centum, for the word "liabilities" in the Act (63 and 64 Vict. (D) ch. 29), does not

refer to the principal debt but only to the obligation to pay interest as damages: British Canadian Loan, etc., Co. v. Farmer, 15 Man. L.R. 593, following Freehold Loan v. Barker, 8 Man. L.R. 116; Manitoba & N.W. Loan Co. v. Barker, 8 Man. L.R. 296.

In construing 3 and 4 Wm. IV. (Imp.) ch. 42, sec. 28, it was held, that the written instrument, under which interest is claimed, must shew by its terms that there was a debt certain payable at a certain time. It is not sufficient that the same may be made certain by some process of calculation or some act to be performed in the future: Sinclair v. Preston, 31 Can. S.C.R. 408, affirming 12 Man. L.R. 228; Mayes v. Connolly, 35 N.B.R. 701.

Under ordinary circumstances a mortgagee can claim interest only from the time the money is advanced: Edmonds v. Hamilton Provident, etc., Co., 18 A.R. (Ont.) 347, varying 19 O.R. 677.

Interest will not be allowed after the amount due has been tendered: Ferguson v. Domville, 19 N.B.R. 576.

Where the principal and interest are paid for another, interest may be recovered on the whole payment: Municipal Council of County of Wellington v. Township of Wilmot, 17 U.C.Q.B. 82.

Where the borrowing of the principal sum is established, the stipulated interest on a promissory note as collateral security therefor is recoverable notwithstanding that owing to the form of the note the action may not be maintainable thereon: Secor v. Gray, 3 O.L.R. 34.

A parol agreement to increase the rate of interest reserved by a mortgage will not be enforced as against the subject matter of the mortgage: Murchie v. Theriault, 1 N.B. Eq. 588; Collins v. Eaton, (Alta.) 19 W.L.R. 608.

Where a note does not bear any interest on its face, evidence of a prior agreement as to interest payable thereon is inadmissible: Dombroski v. Laliberté, 27 Que. S.C. 57. Interest on a demand note runs from the date thereof: Bank of Ottawa v. McLean, 26 Que. S.C. 27.

Under the Judicature Act (R.S.O. 1897, ch. 51, sec. 113), interest may be allowed for such time and at such rate as the Court may deem right in all cases where the payment of a just debt has been improperly withheld, and compensation therefor seems fair and equitable: Toronto Ry. Co. v. City of Toronto, [1906] A.C. 117, 24 C.L.J. 295.

A clause providing a rate of interest on balance due applies only to instalments from time to time due and unpaid, and not to the principal sum: D'Hart v. McDermaid, 44 N.S.R. 546.

The principal sum becoming due for the non-compliance of any provisoes in a mortgage is not an "instalment in arrear" to entitle the mortgagee to the stipulated interest as upon an instalment: Biggs v. Freehold Loan, 31 Can. S.C.R. 136, reversing 26 A.R. (Ont.) 232. But where the stipulated interest covers the entire sum and was to be current for a period of ten years a declaration calling in the principal and interest under an acceleration clause within that period made by the mortgagee will not deprive him of the stipulated rate for the period between the giving of the notice under the acceleration clause and the time of actual payment: Eastern Trust Co. v. Cushing Sulphite Fibre Co., 3 N.B. Eq. 392.

If the interest at a stipulated rate is by the terms of the mortgage carried to the time fixed for the payment of the principal only, the mortgagee, after that date, can recover no more than the statutory rate on the unpaid principal in the absence of a contract to pay interest *post diem*: Peoples Loan, etc., Co. v. Grant, 18 Can. S.C.R. 262, affirming 17 A.R. (Ont.) 85.

An improvident sale by a mortgagee of the mortgaged chattels entitles the mortgagor, apart from an accounting for the full value of the proper[illegible]to interest on such amount at a legal rate: Grimes v. Gant[illegible] 1 S.L.R. 54, 58; Ely v. Read, [1897] 76 L.T.R. 79.

If the document on a printed form provides for the payment of interest although the space for filling in the rate has been left blank, the absolute promise to pay interest as gathered from the entire document may be given effect to by allowing the legal rate of five per cent. but it seems that if the space for the rate per cent. is filled in with a dash or a dotted line, such will be taken as an indication that no interest was to be charged before the due date: Cross v. Douglas (1909), 3 S.L.R. 97, 11[illegible]. Coupland v. Paris Plow Co., 14 W.L.R. 689 (Sask.), varying 13 W.L.R. 682.

Interest by Banks.

In McHugh v. Union Bank, 10 D.L.R. 562, [1913] A.C. 299, it was held by the Judicial Committee, that where a bank's customer for about six years ran accounts with his bank, by which he was charged interest in excess of that permitted by the Bank Act (Can.) and where these accounts were then asser-

tained between the parties and covered by a chattel mortgage at excessive interest, and where three years later this chattel mortgage and concurrent additional accounts at excessive interest were all ascertained between the parties and covered by a new chattel mortgage stipulating for excessive interest, the latter mortgage amounted to a settlement of accounts between the bank and its customer having the same effect as payment would have had with regard to the question of excessive interest on the accounts and earlier mortgage and estopping the customer from disturbing such settlement as he must have known that the bank had no right to stipulate for or exact the excessive interest and he voluntarily assented to such settlement and thereby gave up his right to recover back any excess: McHugh v. Union Bank, 2 A.L.R. 319, affirmed; McHugh v. Union Bank, 3 A.L.R. 166; Union Bank v. McHugh, 44 Can. S.C.R. 473, reversed in part).

Notwithstanding prior dealings between the bank and its customer by which he had for a number of years acquiesced in the payment to the bank of interest on advances at a higher rate than seven per cent., the rate limited by the Bank Act, R.S.C. 1906, ch. 29, sec. 91, his subsequent mortgage to the bank settling the balance of indebtedness and containing a stipulation for the like excessive interest contravenes sec. 91 of the Bank Act, R. S.C. 1906, ch. 29, and the insertion by the bank of such a stipulation was *ultra vires* on its part and the stipulation itself was inoperative; the interest collectable in respect of such mortgage must be calculated at the rate of five per cent. as being the legal rate where no special rate has been legally fixed and not the intermediate rate of seven per cent. for which the bank was entitled to contract. On the surcharging and falsifying of an account with respect to arithmetical errors in the calculation of interest, the parties should not be limited to a period of six years before the action was commenced, where the Statute of Limitations was not pleaded, such errors being of a character which common honesty would demand should be rectified whenever they are discovered: *Ibid.*

Method of Computing Interest.

The proper mode of computing interest, in the absence of payments made specially on account of the principal, is to compute it on the amount due up to the time of each payment, making rests, deducting the payments, and charging interest on the balance: Bettes v. Farewell, 15 U.C.C.P. 450; Montgomery v. Ryan, 16 O.L.R. 75. But where various payments had been

made upon a note payable with interest, not always sufficient to cover the interest due at each time of payment, the usual mode of adding the interest to the principal, deducting the payment, and charging interest on the balance, cannot be adopted; but the interest can only be computed on the balance of the principal, remaining due at each payment: Barnum v. Turnbull, 13 U.C.Q.B. 277.

Statutory Limitation for the Recovery of Interest.

The limitation of the recovery of arrears of interest to six years which is made under the statute applicable to real estate has no application where the mortgaged property is personal estate; Mellersh v. Brown, 45 Ch.D. 225; unless it is included in the same mortgage with realty so as to form one security: Charter v. Watson, [1899] 1 Ch. 175. See also London & Midland Bank v. Mitchell, [1899] 2 Ch. 161; see 10 Edw. VII. ch. 34, sec. 18; R.S.O. 1897, ch. 133, sec. 17.

Rate of Interest on Contracts not Mortgages on Real Estate.

4. Except as to mortgages on real estate, whenever any interest is, by the terms of any written or printed contract, and whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per cent. per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which such other rate or percentage is equivalent: 60-61 Vict. ch. 8, secs. 2 and 4; 63-64 Vict. 29, sec. 1.

Stating the Rate per Annum.

This section renders it necessary that chattel mortgages drawn at a rate of interest per month shall shew also the yearly rate to which the monthly or other rate is "equivalent" at the time of negotiating.

If a chattel mortgage is drawn with a yearly rate of interest reserved, but the interest is payable in instalments, it is not within the Act.

In the cases to which the Act applies, where the interest is not only payable at periods of less than a year's duration, but is reserved at a rate or percentage for such less periods, a

clause should be added to the interest proviso in the following or similar terms:—

"And it is hereby expressly stated that the interest aforesaid is equivalent to the yearly rate or percentage of —per cent."

The real monetary "equivalent" of twelve monthly instalments of interest at say one per cent. per month, is more than twelve per cent. if the interest on each instalment were considered, but what appears to be required is the sum total only of the lesser rates if continued for the year.

If a real estate mortgage also covers machinery and plant not affixed to the realty, so as to form a part thereof, or includes chattels or stock in trade, the Act would appear to apply to such part of the security as is chattel property.

A chattel mortgage provided for the payment of $125 principal money in consecutive monthly instalments of $5 each and for payment of $5 more with each instalment for interest and did not state the yearly rate to which this was equivalent, but there was a clause in the mortgage waiving in explicit terms the necessity for stating the yearly rate and waiving also the benefit of the Interest Act, 1897. It was held, that this being an Act passed on grounds of public policy for the benefit of borrowers its application could not be waived and that the mortgagee was entitled to interest only at the legal rate: Dunn v. Malone, 6 O.L.R. 484, 39 C.L.J. 788; and see the Money Lenders Act (post).

5. If any sum is paid on account of any interest not chargeable, payable or recoverable under the last preceding section, such sum may be recovered back or deducted from any principal or interest payable under such contract. 60-61 Vict. ch. 8, sec. 3.

Payments made under a mistake of law on account of interest on a mortgage accruing after maturity of the principal, but, at the rate payable before maturity and in excess of the amount legally collectable (there being no agreement to pay interest after maturity) cannot, in the absence of fraud or of a fiduciary relationship between the parties, be recovered back: Kerr v. Colquhoun, 2 O.W.N. 521, 18 O.W.R. 174; Stewart v. Ferguson, 31 O.R. 112, distinguished; Daniel v. Sinclair, 6 A.C. 181; Prenderleith v. Parsons, 14 O.L.R. 619, 9 O.W.R. 265, 10 O.W.R. 387, 658, 680, considered.

ALBERTA.

ALBERTA BILLS OF SALE ACT.

(Ordinances, Alta., 1911, cu. 43.)

An Ordinance respecting Mortgages and Sales of Personal Property.

Note.—Notwithstanding anything contained in the *Bills of Sale Ordinance* or in the *Ordinance respecting Hire Receipts and Conditional Sales of Goods*, and amendments thereto, any bill of sale, chattel mortgage, conditional sale, lease or other agreement of or respecting rolling stock and equipment for use on railways may be registered in the office of the registrar of joint stock companies for the province, on payment of a fee of five dollars by filing in such office a copy thereof, certified by a notary public and by the secretary of the railway company, the stock or equipment in connection with which is affected thereby, to be a true copy, and no other registration or filing shall be necessary, and upon being so filed the same shall be valid and effectual as if filed or registered in accordance with the provisions of the said Acts and amendments respectively, and no renewal thereof shall be required, and any discharge or partial discharge of any such bill of sale, chattel mortgage, conditional sale or other agreement may be registered in the said office in the same manner and on payment of a like fee. Alta. Stat., 1909, ch. 4, sec. 3, am.

The Lieutenant-Governor, by and with the advice and consent of the Legislative Assembly of the Territories, enacts as follows:—

Short Title.

1. This Ordinance may be cited and known as "*The Bills of Sale Ordinance.*" C.O. ch. 43, sec. 1.

Origin.

The Bills of Sale Acts of Saskatchewan and Alberta are practically identical, both adopted from the Consolidated Ordinances of the North-West Territories 1898, ch. 43. In consulting the notes to the particular sections both Acts should be resorted to in so far as they do not differ by reason of any amendments enacted by the respective provinces. The Ordinances of the North-West Territories continued in force by the Alberta Act and the Saskatchewan Act respectively in each of these provinces, have no different or more extensive effect than if they were Acts of the Legislature of each Province respectively: Jones v. Twohey, 1 A.L.R. 267.

Where one province adopts the legislative provisions of another province without change after an authoritative interpretation of these provisions has been made by a Court of that province, the Courts of the adopting province should follow the decision unless very strong reasons exist for a contrary view: Ward v. Serrell, 3 A.L.R. 138.

Bulk Sales of Stock of Goods.

Sales in bulk of substantially an entire stock in trade are subject also to the Bulk Sales Act of Alberta, 1913, 4 Geo. V. ch. 10.

Registration Districts.

2. For the purposes of the registration of mortgages and other transfers of personal property in the Territories the following shall be registration districts:—

1. The registration district of "Moosomin" comprising that part of the Provisional District of Assiniboia as is defined by the Order of the Privy Council of Canada passed on the eighth day of May, A.D. 1882, eastward of the eleventh range of townships west of the second meridian and south of a line which may be described as follows: Commencing at a point where the line between townships twenty and twenty-one in the Dominion Lands system of survey intersects the western boundary of the

Province of Manitoba, thence westerly following the said line between townships twenty and twenty-one to its intersection with the line between ranges seven and eight west of the second meridian, thence northerly along the line between ranges seven and eight to its intersection with the line between townships twenty-two and twenty-three, thence westerly along the line between the said townships twenty-two and twenty-three to its intersection with the line between ranges ten and eleven west of the second meridian in the Dominion Lands system of survey;

2. The registration district of "Yorkton," comprising that part of the said Provisional District of Assiniboia, eastward of the eleventh range of townships west of the second meridian and north of the north boundary of the registration district of Moosomin;

3. The registration district of "Regina," comprising that part of the said Provisional District of Assiniboia west of the registration district of Moosomin and east of the west line of the twenty-third range of townships west of the second meridian;

4. The registration district of "Moose Jaw," comprising that part of the Provisional District of Assiniboia west of the registration district of Regina and east of the west line of the twenty-third range of townships west of the third meridian;

5. The registration district of "Medicine Hat," comprising all that portion of the said Provisional District of Assiniboia west of the registration district of Moose Jaw;

6. The registration district of "Macleod," comprising all that portion of the Provisional District of Alberta as defined by the said Order of the Privy Council lying south of township seventeen;

7. The registration district of "Calgary," comprising all that part of the said Provisional District of Alberta lying between townships sixteen and forty-three;

8. The registration district of "Edmonton," comprising all that portion of the said Provisional District of Alberta lying north of township forty-two;

9. The registration district of "Battleford," comprising all that portion of the Provisional District of Saskatchewan as defined by the said Order of the Privy Council lying west of the fifth range of townships west of the third meridian;

10. The registration district of "Prince Albert," comprising all that portion of the said Provisional District of Saskatchewan lying east of the Battleford registration district.

[(2) The Lieutenant-Governor in Council shall have power to alter the boundaries of any registration district now or hereafter established by adding thereto or taking therefrom; and to establish new districts and to appoint registration clerks therefor who shall hold office during pleasure; and designate at what places the offices of such clerks shall be kept.] C.O. ch. 43, sec. 2; 1900, ch. 12, sec. 1.

Registration Clerks.

3. The registration clerks for the existing registration districts are hereby continued in office and shall severally hold office during pleasure and their offices shall be kept at places to be designated by the Lieutenant-Governor in Council.

(2) In the event of any vacancy occurring in the office of registration clerk by reason of death, resignation or otherwise the vacancy shall be filled by the Lieutenant-Governor in Council. C.O. ch. 43, sec. 3.

See note to sec. 3 of Saskatchewan Act.

Office Hours.

4. The registration clerks under this Ordinance shall keep their respective offices open between the hours of ten in the forenoon and four in the afternoon on all days excepting Sundays and holidays and except on Saturdays and during the period of vacation prescribed by *The Judicature Ordinance* when the same shall be closed at one o'clock in the afternoon and during office hours only shall registrations be made. C.O. ch. 43, sec. 4.

Registration Officer not to Prepare Document.

5. No registration clerk shall draw or prepare any document or conveyance which may be filed or registered in his office under the provisions of this or any other Ordinance. C.O. ch. 43, sec. 5

Mortgages of Chattels; Form and Registration.

6. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged shall within thirty days from the execution thereof be registered as hereinafter provided together with the affidavit of a witness thereto of the due execution of such mortgage or conveyance and also with the affidavit of the mortgagee or one of several mortgagees or the agent of the mortgagee or mortgagees if such agent is aware of all the circumstances connected therewith and is properly authorized by power in writing to take such mortgage in which case a copy of such authority shall be attached thereto (save as hereinafter provided under section 21 hereof) such last mentioned affidavit stating that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor or of preventing the creditors of such mortgagor from obtaining payment of any claim against him; and every such mortgage or conveyance shall operate or take effect upon, from and after the day and time of the filing thereof. C.O. ch. 43, sec. 6.

See sec. 5 of the Ontario Act, and note to sec. 7 of Sask. Act

Chattel Mortgages.

The execution of a chattel mortgage by the mortgagor and its delivery to and acceptance by the mortgagee or his agent constitutes such mortgage a valid and binding instrument as

between the parties thereto, without any further act on the part of the mortgagee: Adams v. Hutchings, 3 Terr. L.R. 206.

Where the mortgagee has once taken possession of the mortgaged chattels, but afterwards returned them to the mortgagor to be held by him as agent for the purpose of selling or exchanging them and to invest the proceeds in other chattels, which was done, the latter are not subject to seizure by the execution creditors of the mortgagor to any greater extent than the original chattels for which they were substituted: Bell v. LaTerty, 3 Terr. L.R. 263.

An admission that a chattel mortgage was "registered" on a certain date is an admission both of the execution and registration, as under this section and sec. 13 proof of due execution is necessary for the registration of the instrument thereunder: Ross v. Pearson, (N.W.T.) 1 W.L.R. 338.

As to the distinction between "registering" and "filing" see note to sec. 8 British Columbia Act.

The expressions "against *the*" or "against *any* creditors of the bargainor" are substantially synonymous, and the employment of either in the affidavit of *bonâ fides* is not a fatal variation from the statutory form: Emerson v. Bannerman, 19 Can. S.C.R. 1, affirming 1 N.W.T. (part 2) 36; followed in Meighen v. Armstrong, 16 Man. L.R. 8; applied in Morse v. Phinney, 22 Can. S.C.R. 563; referred to in Phinney v. Morse, 25 N.S.R. 507; relied on in Roper v. Scott, 16 Man. L.R. 599, 5 W.L.R. 341; see note to sec. 11 of Susk. Act.

The registration of a mortgage without an affidavit of *bonâ fides* does not affect the right of the mortgagee to exercise the powers reserved by the mortgage, as against the mortgagor: Collins v. Eaton, (Alta.) 19 W.L.R. 608. But a mortgagee of chattels cannot validly repudiate the mortgage without giving proper notice to the mortgagor: Adams v. Hutchings, 3 Terr. L.R. 206.

A cable ferry boat with pulleys and machinery, and log buildings used therewith, appurtenant to the ferry, are not goods and chattels, and a mortgagor who executes a chattel mortgage which purports to include them, is not thereby estopped from asserting that they are not chattels but real estate: Stimson v. Smith, 1 N.W.T.R. part 1, p. 109, 1 Terr. L.R. 183.

Under the former section 3, N.W.T. Ord. 1889, which was expressly limited to mortgages "made in the Territories" it was

held that it did not apply to a foreign mortgage, and where goods were mortgaged while situate in Minnesota, in the form and under the conditions required by the laws of that State, and were subsequently removed to the North-West Territories and sold there to a *bonâ fide* purchaser for value without notice, the foreign mortgagee was held entitled as against the purchaser, there being no evidence that the mortgagee slept upon his rights for an unreasonable time after knowledge of the removal, and no consequent presumption of laches arising: Bonin v. Robertson (1893), 1 N.W.T.R. part 4, p. 89, 2 Terr. L.R. 21; followed in Sawyer & Massey v. Boyce, 1 S.L.R. 236; referred to in Clive v. Russel, 2 A.L.R. 79; relied on in Jones v. Twohey, 1 A.L.R. 269.

It is submitted that the amendment has not changed the law in this respect, and has had the effect merely of including instruments relating to chattels in the Territories, but which are executed and delivered elsewhere. The laws in force where property is situate, and where the contracting parties reside, must govern as to the passing of the property. When the chattels are in a foreign country the law of that country governs, and title passes to the foreign mortgagee. At the time the goods are removed therefrom the time has in all probability passed during which registration could be effected in the country to which removal takes place: Cammell v. Sewell, 5 H. & N. 728; Bonin v. Robertson (*supra*); River Stave Co. v. Sill, 12 O.R. 557; Marthinson v. Patterson, 19 A.R. (Ont.) 188; see note to sec. 29.

By sec. 22 it is declared that the expressions "mortgagee," "bargainee" or "assignee" in sections 6, 8, 9, and 17 shall include the agent or manager of the latter, if either of them be an "incorporated company."

An express power given to a mortgagor in possession of the mortgaged chattels to sell those chattels does not *per se* raise any presumption of fraud where it does not exceed the implied power of the mortgagor to sell them in the ordinary course of business, and where there is no evidence of a fraudulent intention: Springer v. Graveley, 34 C.L.J. 135, referring to McAllister v. Forsyth, 12 Can. S.C.R. 1, 16; National Bank v. Hampson (1880), 5 Q.B.D. 177, 49 L.J.Q.B. 480; Walker v. Clay, 49 L.J.C.P. 560, affirmed in Graveley v. Springer, 3 Terr. L.R. 120, 2 N.W.T. 306.

A mortgage taken in the name of the debtor's wife, and which is alleged to have been so taken in fraud of creditors, will not be declared in a creditors' action to have been taken with intent to defeat, hinder or delay the husband's creditors, if it appears that all the wife did with the mortgage when she got it was to assign it to certain of her husband's creditors as security for his debt: Canada Law Book Co. v. Fieldhouse, (Alberta) 11 D.L.R. 384.

To constitute a chattel mortgage a preference it must be "the spontaneous act or deed" of the insolvent, and must have been given "of his own mere motive and as a favour or bounty proceeding voluntarily from himself:" Molsons Bank v. Halter, 18 Can. S.C.R. 88, and Stephens v. McArthur, 19 Can. S.C.R. 446, applied; Adams v. Hutchings, 3 Terr. L.R. 206, followed in Ontario & West Lumber Co. v. Coté, 3 Terr. L.R. 457.

Where there is lacking a knowledge of insolvency and intent to prefer, delay, defeat, hinder or prejudice creditors, on the part of either the mortgagor or the mortgagee, the mortgage not being attacked within sixty days from the date of its execution, is not invalid under the Assignments Act. Where a mortgagee is a director and one of the shareholders of a company mortgagor, concurrence of intention will be presumed: Barthels v. Winnipeg Cigar Co., 2 A.L.R. 21.

On the much-disputed question whether a chattel mortgage fraudulent as to a portion of the property may be upheld as to the remainder, it is held, in Eastman v. Parkinson, (Wis.) 113 N.W. 649, 13 L.R.A. (N.S.) 921, that a chattel mortgage of stock-in-trade and other property, not characterised by actual fraud as to creditors of a mortgagor, may be constructively fraudulent as to them respecting the stock, and valid as to the other property: see 44 C.L.J. 592.

Statutory Form.

7. Except as to cases provided in the next following section of this Ordinance a mortgage or conveyance intended to operate as a mortgage of goods and chattels may be made in accordance with Form A in the schedule to this Ordinance. C.O. ch. 43, sec. 7.

Statutory Form of Chattel Mortgage.

Under this section no form of affidavit of execution is provided. Form A, in the place intended for the witness's signature

has the words: "*Add name, address and occupation of witness.*" It has been held that the omission to state the address and occupation of the witness after his signature; or the omission of the deponent's name and occupation in the body of the affidavit of execution, signed by him; or the omission to state in the jurat a more definite place than "the North-West Territories," does not render the registration of the instrument invalid, and that such particulars may be amended: Commercial Bank v. Fehrenbach, 4 Terr. L.R. 335, distinguishing Archibald v. Hubley, 18 Can. S.C.R. 116, and Parson v. Brand, 25 Q.B.D. 110, as the Imperial Bills of Sale Act (1878) expressly declared void a bill of sale given by way of security unless both the address and the description of the attesting witness appear in the attestation clause, and the defect is not cured under the English Act by the fact that such address and description appear in the affidavit filed on registering the bill of sale. The cases of Ex parte Johnson; Re Chapman, 32 W.R. 693, 26 Ch.D. 338; Cheney v. Courtois, 13 C.B.N.S. 643; Moyer v. Davidson, 7 U.C.C.P. 521; De Forest v. Bunnell, 15 U.C.Q.B. 370, were specially referred to; see also Bird v. Davey, [1891] 1 Q.B. 29; Sims v. Trollope, [1894] 1 Q.B. 24. "Both of these cases," said Wetmore, J., in distinguishing Archibald v. Hubley and Parsons v. Brand, "were decided upon statutes that made it imperative to substantially follow the forms prescribed, and the prescribed forms had not been followed:" Commercial Bank v. Fehrenbach, 4 Terr. L.R. 335.

For Future Advances or Indemnity.

8. In case of an agreement in writing for future advances for the purpose of enabling the borrower to enter into and carry on business with such advances and in case of a mortgage of goods and chattels for securing the mortgagee repayment of such advances or in case of a mortgage of goods and chattels for securing the mortgagee against the endorsement of any bills or promissory notes or any other liability by him incurred for the mortgagor not extending for a longer period than two years from the date of the mortgage and in case the mortgage is executed in good faith and sets forth fully by recital or otherwise the terms, nature and effect of the agreement and the amount of liability

intended to be created and in case such mortgage is accompanied by the affidavit of a witness thereto of the due execution thereof and by the affidavit of the mortgagee or one of several mortgagees or in case the agreement has been entered into and the mortgage taken by an agent duly authorized by writing to make such agreement and take such mortgage, in which case a copy of such authority shall be attached thereto, and if the agent is aware of the circumstances connected therewith, then, if accompanied by the affidavit of such agent, such affidavit whether of the mortgagee or his agent, stating that the mortgage truly sets forth the agreement entered into between the parties thereto and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage and that such mortgage is executed in good faith and for the express purpose of securing the mortgagee repayment of his advances or against the payment of the amount of his liability for the mortgagor, as the case may be, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor nor to prevent such creditors from recovering any claims which they may have against such mortgagor and in case such mortgage is registered as hereinafter provided within thirty days from the execution thereof the same shall be as valid and binding as mortgages mentioned in the sixth section of this Ordinance. C.O. ch. 43, sec. 8.

Future Advances and Indemnity Mortgages.

It is not essential to the validity of a chattel mortgage to secure future advances that such advances should be made to enable the mortgagor to enter into business as well as to carry it on: Newlands v. Higgins, 1 A.L.R. 18, following Gould v. Deering, 15 O.R. 201.

See sec. 22 (post) as to the application of sec. 8 to the agent or manager of an incorporated company.

For a construction of the expression "the creditors" and "any creditors" see note to sec. 6 (ante).

See sec. 6 of the Ontario Act.

Sales without Change of Possession.

9. Every sale, assignment and transfer of goods and chattels not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold shall be in writing and such writing shall be a conveyance under the provisions of this Ordinance and shall be accompanied by an affidavit of a witness thereto of the due execution thereof and an affidavit of the bargainee or one of the several bargainees or of the agent of the bargainee or bargainees duly authorized in writing to take such conveyance (a copy of which authority shall be attached to the conveyance) that the sale is *bonâ fide* and for good consideration as set forth in the said conveyance and not for the purpose of holding or enabling the bargainee to hold goods mentioned therein against the creditors of the bargainor; and such conveyance and affidavits shall be registered as hereinafter provided within thirty days from the execution thereof otherwise the sale shall be absolutely void as against the creditors of the bargainor and as against subsequent purchaser or mortgagees in good faith. C.O. ch. 43, sec. 9.

Bills of Sale.

See sec. 22 (post) as to the inclusion of the agent or manager of an incorporated company for the purposes of the affidavit of *bonâ fides.*

See note to Sask. Act, sec. 11, and see section 8 of the Ontario Act.

In Hopkin v. Gudgeon, [1906] 1 K.B. 690, there was an interpleader issue. T. W. Gudgeon, the execution debtor, was in 1903 the owner of certain chattels the subject of the issue, and in that year sold them *bonâ fide* to a company by an agreement which was not registered. In 1904, the company *bonâ fide* sold them to the claimant also by an agreement which was not registered. Gudgeon always continued in possession of the chattels, and there was never any actual or continued change of possession, and while thus in his possession they were seized under an execution against T. W. Gudgeon under a judgment recovered in 1905, and they were claimed by the second vendee. The County Court Judge who tried the issue disallowed the

claim of the claimant on the ground of non-registration of the transfer to her and the want of any change of possession; and the Divisional Court affirmed his decision: see 42 C.L.J. 502.

Bulk Sales.

Any sale or transfer of a stock of goods, wares or merchandise out of the usual course of business or trade of the vendor, or whenever substantially the entire stock-in-trade of the vendor shall be sold or conveyed, or whenever an interest in the business or trade of the vendor is sold or conveyed, such sale transfer or conveyance is a "sale in bulk" within the meaning of "the Bulk Sales Act of Alberta," 4 Geo. V. (Alta. 1913), ch. 10, and is subject also to its provisions.

Assignments for Creditors.

The Alberta Assignments Act, 1907, ch. 6, secs. 11, 12, excepts from the operation of the Bills of Sale Ordinance assignments for the general benefit of creditors, and prescribes a separate mode of procedure which governs transfers of that character. The sections read as follows:—

11. No assignment for the general benefit of creditors under this Act shall be within the operation of the Bills of Sale Ordinance, but a notice of the assignment shall as soon as conveniently possible be published at least once in *The Alberta Gazette* and not less than twice in at least one newspaper having a general circulation in the judicial district in which the property assigned is situate: 1907, ch. 6, sec. 11.

12. A duplicate original copy of every such assignment shall also within ten days from the execution thereof be registered (together with an affidavit of a witness thereto of the due execution of such duplicate original or of the assignment of which the copy filed purports to be a copy) in the office of the clerk of the registration district for mortgages and other transfers of personal property, where the assignor if a resident in Alberta resides at the time of the execution thereof, or if he is not a resident then in the office of the clerk of the said registration district where the personal property so assigned is or where the principal part thereof (in case the assignment includes property in more registration districts than one) is at the time of the execution of such assignment; and such clerks shall file all such instruments presented to them respectively for that purpose, and shall indorse thereon the time of receiving the

same in their respective offices and the same shall be kept there for the inspection of all persons interested therein. The said clerks respectively shall number and enter such assignments and be entitled to the same fees for services in the same manner as if such assignments had been registered under the Bills of Sale Ordinance, 1907, ch. 6, sec. 12.

Where Registration Effective.

10. Such registration shall only have effect in the registration district wherein such registration has been made. C.O. ch. 43, sec. 10.

Omission to Register; True Consideration.

11. In case such mortgage or conveyance and affidavit are not registered as hereinbefore provided or in case the consideration for which the same is made is not truly expressed therein the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for valuable consideration. C.O. ch. 43, sec. 11.

Accuracy in Stating Consideration.

A bill of sale, the expressed consideration of which was a present payment, but of which the real consideration was partly a present payment and partly a past indebtedness, is void under this section: Hennenfest v. Malehose, 7 Terr. L.R. 404.

The consideration for a chattel mortgage, which was given to secure payment of two notes for $31,000 and $3,000 respectively, and an overdraft of $2,233, which notes were given for a past indebtedness, and which, at the time the mortgage was given, were current, was stated as follows: "In consideration of $36,233 paid by the mortgagee to the mortgagor at or before the sealing and delivery of these presents," was held to fail to set forth the consideration for which it was given: Wood v. Dominion Bank, 2 A.L.R. 205.

Where a chattel mortgage has been taken to an advocate to secure his client's indebtedness to him for professional services the books and papers of the advocate are not privileged from [illegible]

duction so far as they are required to shew the propriety and amount of the charges made: Smith v. MacKay, 3 Terr. L.R. 102.

A contemporaneous agreement under seal by which the mortgagor agreed for three years to give his whole time and attention to looking after the horses and cattle, and the mortgagee agreeing to allow the mortgagor to sell sufficient to pay running expenses, does not affect the correctness of the statement of consideration, which was stated as $3,000, the purchase price of the cattle: Graveley v. Springer, 3 Terr. L.R. 120.

As to the true expression of consideration, see also note to Sask. Act, sec. 13.

Description of Property.

12. All the instruments mentioned in this Ordinance whether for the mortgage or sale, assignment or transfer of goods and chattels shall contain such sufficient and full description thereof that the same may be readily and easily known and distinguished except in the case of assignments for the general benefit of creditors in which case the description shall be sufficient if it is in the following words: "All my personal property which may be seized and sold under execution," or words to that effect. C.O. ch. 43, sec. 12.

See sec. 10 of the Ontario Act. and note to sec. 14 Sask. Act.

Description of Goods and Chattels.

A description in a chattel mortgage as follows:—

"All and singular goods, chattels, stock-in-trade and fixtures of the mortgagors used, in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise now being in the store of the said mortgagors (describing the locality of the store)" is a sufficient description: Thomson v. Quirk (1889), 18 Can. S.C.R. 695, affirming Quirk v. Thomson, 1 N.W.T.R., part 1, p. 88, 1 Terr. L.R. 159; distinguished in Adams v. Hutchings, 3 Terr. L.R. 218; relied on in Clarke v. Moore, 1 A.L.R. 53; Hovey v. Whiting, 14 Can. S.C.R. 515, followed: McCall v. Wolff, 13 Can. S.C.R. 130, distinguished.

The original of this section was also incorporated with section 2 of Ordinance No. 8 of 1889, and conditional sale con-

tracts under the latter section had to be described in accordance therewith; and although the mere description "one team of oxen" would be insufficient in a chattel mortgage, yet if such description appears in a document such as a conditional sale contract shewing on its face that the title and ownership were to "remain" with the vendor, thereby indicating whence the animals were procured, and that on certain contingencies the vendor might take possession, it will be inferred that they are in the actual possession of the conditional purchaser, and the description will be sufficient. Thus it will be seen that words of description which would not be sufficient in a bill of sale or chattel mortgage may be sufficient in a lien note or contract of conditional sale, because in the former class of transactions the chattels ordinarily remain in the possession of the person who had them and in the same place where they were before the instrument was executed, whereas in the latter class there has been a "change of possession from the vendor to the vendee and usually a corresponding change of locality, both of which circumstances furnish ready means of identifying and distinguishing them from all others of the same kind:" Western Milling Co. v. Darke (1894), 2 N.W.T.R., part 1, p. 34, 2 Terr. L.R. 40; discussed in Ross v. Wright, 3 Terr. L.R. 367, 370; relied on in King v. Kennan, 3 Terr. L.R. 256.

A description need not be such that with the deed in hand, without other enquiry, the property could be identified, and it is sufficient if the subject-matter is pointed out by the instrument "so that a third person by its aid, together with the aid of such enquiries as the instrument itself suggests, may identify the property covered:" *per* Strong, J., in McCall v. Wolff, 13 Can. S.C.R. 130; adhered to in Hovey v. Whiting, 14 Can. S.C.R. 520; considered in Western Milling Co. v. Darke, 2 Terr. L.R. 48; relied on in Quirk v. Thomson, 1 Terr. L.R. 159, 160; distinguished in Thomson v. Quirk, 18 Can. S.C.R. 695; Cooper v. Hickok, 15 A.R. (Ont.) 518; Fraser v. MacPherson, 3 N.W.T.R. 426; referred to in Accountant v. Marcon, 30 O.R. 135; Banks v. Robinson, 15 O.R. 618; Graveley v. Springer, 3 Terr. L.R. 122.

A chattel mortgage contained the following description of mortgaged property: "One bay gelding, 6 years old, weight about 1450 lbs., one bay gelding, 8 years old, weight about 1450 lbs., now in the possession of the mortgagor." It was held,

following Corneill v. Abell, 31 U.C.C.P. 107, that the description was sufficient: Ward v. Serrell, 3 A.L.R. 138; see also Fuller v. Hunker Mercantile Co., (Y.T.) 7 W.L.R. 80.

The property covered by chattel mortgage described as "all cattle and horses of whatever age and sex of a specified brand, on the left side, and all increase thereof, together with the said brand and branding irons, is a description sufficient for identification, and that no mention of the locality where the cattle were at the time mortgage was given is necessary: Graveley v. Springer, 3 Terr. L.R. 120.

A description in a chattel mortgage, "all office fixtures, lamps, desks, chairs, furniture, stationery, and all goods, chattels and effects now in the store and office of the mortgagors," does not include a safe, the general words being restricted by the preceding words: Goldie v. Taylor, 2 Terr. L.R. 298.

The description in a chattel mortgage, "all and singular the goods, chattels, stock-in-trade, fixtures and store building of the mortgagors, used in or pertaining to their business as general merchants, said stock-in-trade consisting of a full stock of general merchandise now being in the store of said mortgagors on the north half of section six, township nineteen, range twenty-eight, west of the fourth initial meridian has been held, affirming 1 Terr. L.R. 159, to be sufficient: McCall v. Wolff, 13 Can. S.C.R. 130, distinguished; Hovey v. Whiting, 14 Can. S.C.R. 515, followed; Thomson v. Quirk (1889), 1 S.C. Cas. 436.

Where, in a chattel mortgage, there are some items that can be identified and others that cannot, such mortgage is void *in toto* only if the items that can be distinguished are few and insignificant, but where such items are neither few nor insignificant the mortgage is *quoad* such items valid: Adams v. Hutchings (No. 2), 3 Terr. L.R. 206. The substitution of one chattel security for another has the effect of cancelling the substituted security: *Ibid.*

Where there are two mortgagees named in one mortgage and the property is mortgaged to them severally in certain ascertainable proportions, and the security to one mortgagee is declared valid and to the other invalid, the valid security will only be enforceable against the proportion mortgaged to that mortgagee: Barthels v. Winnipeg Cigar Co., 2 A.L.R. 21.

A bill of sale describing the property as "stock of general merchandise as set out in the stock list attached thereto and all

of which stock, chattels, and effects now situate and being in the two storey building situated on lots 1 and 2 in block 299, city of Regina," without any stock list being filed, is void against creditors, under this section as not containing a full and sufficient description: Svaigher v. Rotaru, 3 W.L.R. 486.

As to what constitutes a sufficient description, see ch. 12 of the text, and note to sec. 14, Sask. Act.

Future Acquired Property.

At law non-existing property to be acquired at a future time is not assignable. In equity there may be a valid assignment of property not *in esse*, or property to be subsequently acquired, even where the acquisition depends upon possibilities: Holroyd v. Marshall, 10 H.L. Cas. 191. This principle was followed in Springer v. Graveley, 34 C.L.J. 135, where it was held, that, although there is a sufficient interest in the increase of mortgaged cattle in favour of the mortgagor to give title to them free from the mortgage to a *bonâ fide* purchaser, an execution creditor is not in the same position, and can only take the legal title charged with the mortgage. The case was affirmed *sub nomine* Graveley v. Springer, 3 Terr. L.R. 120, 2 N.W.T. 306. As to the principle of assignment of non-existing or future-acquired property the following cases were also referred to by the Court: McAllister v. Forsyth, 12 Can. S.C.R. 1; Eyre v. Macdonald, 9 H.L.C. 618; Coyne v. Lee, 14 A.R. (Ont.) 503, 512; Canada Permanent v. Todd, 22 A.R. (Ont.) 515; see also Langton v. Horton, 1 Hare 549; Rodick v. Gandell, 12 Beav 325.

Where to Register.

13. The proper registration officer for instruments being mortgages and transfers of personal property shall be the clerk of the registration district in which the property described in the mortgage or transfer is at the time of the execution of the instrument; such registration clerk shall file all such instruments presented to them respectively for that purpose and shall endorse thereon the time of receiving the same in their respective offices and the same shall be kept there for the inspection of the public, subject to the payment of the proper fees. C.O. ch. 43, sec. 13.

Index of Registration.

14. Every such clerk shall number each instrument or copy filed in his office and shall enter in alphabetical order in a book to be provided by him the names of all the parties to such instrument with the number endorsed thereon opposite to each name; and such entry shall be repeated alphabetically under the name of every party thereto. C.O. ch. 43, sec. 14.

See sec. 20 of the Ontario Act.

Conveyance of Growing or Future Crops.

15. No mortgage, bill of sale, lien, charge, encumbrance, conveyance, transfer or assignment hereafter made, executed or created and which is intended to operate and have effect as a security shall in so far as the same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future in whole or in part, be valid except the same shall be made, executed or created as a security for the purchase price and interest thereon of seed grain.

(2) Every mortgage or encumbrance upon growing crops or crops to be grown, made or created to secure the purchase price of seed grain shall be held to be within the provisions of this Ordinance and the affidavit of *bona fides* among the other necessary allegations shall contain a statement that the same is taken to secure the purchase price of seed grain.

(3) No mortgage or encumbrance to secure the price of seed grain shall be given upon any crop which is not sown within one year of the date of the execution of the said mortgage or encumbrance.

(4) Every registration clerk shall keep a separate register of such seed grain mortgages and shall be entitled to receive the same fees for his services as provided for under section 33 of this Ordinance.

(5) Every such seed grain mortgage so taken and filed shall not be affected by or subject to any chattel mortgage or bill of sale previously given by the mortgagor or by any writ of execu-

tion against the mortgagor in the hands of the sheriff at the time of the registration of such seed grain mortgage but such seed grain mortgage shall be a first and preferential security for the sum therein mentioned. The date of the purchase of seed grain, the number of bushels and price per bushel must be stated in the mortgage as well as in the affidavit of *bona fides*. C.O. ch. sec. 15.

See note to sec. 17, Sask. Act.

Procedure under Mortgage on Default.

16. Unless it is otherwise specially provided the goods and chattels assigned under a mortgage or conveyance to operate as a mortgage of goods and chattels shall be to be seized or taken possession of by the grantee for the following causes:—

1. If the grantor shall make default in payment of the sums of money thereby secured at the time therein provided payment or in the performance of any covenant or agreement contained in the mortgage or conveyance intended to operate as a mortgage and necessary for maintaining the security;

2. If the grantor shall without the written permission of the grantee either remove or suffer the goods or any of them to be removed from the registration district within which they are situate;

3. If the grantor shall suffer the said goods or any of them to be distrained for rent, rates or taxes or shall suffer the said goods or any of them to be liable to seizure for rent by reason of default of the grantor in paying the same when due;

4. If execution shall have been levied against the goods of the grantor under any judgment at law.

5. If the grantor shall attempt to sell or dispose of or otherwise part with the possession of the said goods. C.O. sec. 16.

Seizure by Mortgagee.

See note to sec. 18, Sask. Act.

Although a mortgagee may have no right to take possession

of the mortgaged chattels, still if he does do so, and the mortgagor assents thereto, the possession is lawful *quoad* the mortgagor, and such assent may be implied from conduct: Adams v. Hutchings, 3 Terr. L.R. 206; Dedrick v. Ashdown, 15 Can. S.C.R. 227, distinguished.

In Ex parte Ellis (1898), 2 Q.B. 79, a chattel mortgagee had taken possession of the mortgaged property for default in payment of an instalment of interest, whereupon the mortgagor claimed the right to redeem the mortgage, which did not become due until the end of two years. Darling, J., held that he was so entitled; but the Court of Appeal held, that as the mortgagee had merely taken possession for the purpose of enforcing payment of the interest in arrear, and not for the purpose of recovering the principal, the mortgagor had no right to accelerate the payment of the principal: see 34 C.L.J. 650.

Where a bank's representative gives instructions to seize horses covered by a lien note assigned to the bank as security for money borrowed by the payee thereof, and the person so instructed seizes horses other than those covered by the note, at two different times, and the bank's representative ratified the act of such person in the second seizure and detaining of horses and instructed him not to take back the first horses seized until he saw that he had the right ones, the bank is liable for the acts of such person in seizing such horses. But where the agent of the bank seized an old crippled team for the horses covered by the note and the plaintiff admitted that he was willing that the bank should take such team in place of the one covered by the note, he is not entitled to damages for the illegal seizure or detention of that team: Thien v. Bank of British North America et al., 4 D.L.R. 388, 4 A.L.R. 228.

Costs of Seizure.

Ch. 34, secs. 2 and 3 of the Consolidated Ordinances as amended by ch. 4, secs. 2, 1909, and ch. 2, sec. 4, 1910, of the Statutes of Alberta regulate the costs of seizure under chattel mortgages and provides statutory penalties for exacting any charges not in accordance with the statutory schedule. The amended section and amended schedule are as follows:—

2. No person whosoever making any seizure under the authority of any chattel mortgage, bill of sale, or any other extra judicial process whatsoever, nor any person whosoever employed

in any manner in making such seizure or doing any act whatsoever in the course of such seizure or for carrying the same into effect shall have, take or receive out of the proceeds of the goods and chattels seized and sold from the person against whom the seizure may be directed or from any other person whomsoever any other or more costs or charges for and in respect of such seizure or any matter or thing done therein or thereunder than such as are fixed in the schedule hereto and applicable to each act which shall have been done in course of such seizure and no person or persons shall make any charge whatsoever for any act or matter or thing mentioned in the said schedule unless such act, matter or thing shall have been really performed and done: C.O. 1898, ch. 34, sec. 2.

3. If any person making any distress or seizure referred to in sections 1 and 2 of this Act shall take or receive any other or greater costs or charges than are set down in the said schedule or make any charge whatsoever for any act, matter or thing mentioned in the said schedule and not really performed or done the party aggrieved may cause the party making the said distress or seizure to be summoned before the District Court of the judicial district in which the goods and chattels distrained upon or seized or some portion thereof lie and the said Court may order the party making the distress or seizure to pay to the party aggrieved treble the amount of moneys taken contrary to the provisions of this ordinance: C.O., ch. 34, sec. 3, amended 1910, ch. 2, sec. 4.

SCHEDULE.

1. Levying distress $1.00
2. Man in possession, per day 1.50
3. Appraisement, whether by one appraiser or more, two cents on the dollar on the value of goods up to $500 and one per cent. on the dollar for each additional $500 or fraction thereof up to $2,000, and one-half per cent. on all sums over that amount.
4. All reasonable and necessary disbursements for advertising.
5. Catalogue, sale, commission and delivery of goods [illegible] per cent. on the net proceeds of the goods up to $2,000 and one and one-half per cent. thereafter.

6. For mileage for every mile (over two miles) necessarily travelled and sworn to in making any seizure under the authority of any chattel mortgage, bill of sale, or in retaking possession of goods under a hire receipt, or conditional sale agreement, when the sheriff is employed, from the place where the warrant or authority is received, or from the sheriff's or his bailiff's office (whichever is nearest) to the place of execution of same and return 0.10
1909, ch. 4, sec. 2.

7. All necessary and reasonable disbursements for removing and storing goods and removing and keeping live stock, and all disbursements which, in the opinion of the Judge before whom a question as to the amount of the fees to be allowed under this Act may come for decision, are reasonable and necessary: 1910, ch. 2, sec. 4.

It is the duty of a chattel mortgagee when realizing the mortgaged property by sale under the power contained in the mortgage, to act in the realization by sale as a reasonable man would act in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold. The mortgagee is allowed to deduct from the amount realized the reasonable expenses of such realization, *ex. gr.*, the necessary costs for care and removal of horses from quarantine and keeping them in good condition. Section 2 of ch. 34, of the North-West Territories Consolidated Ordinances, 1898, merely fixes a statutory scale of costs for certain acts which ordinarily must be performed in connection with any seizure or sale, but it does not interfere with the rights of the parties to a chattel mortgage to deal with reference to other expenses of realization which are reasonable and necessary in the interests of both parties. The infliction of the penalty provided in sec. 3, of ch. 34, of the North-West Territories Consolidated Ordinances, 1898, to the effect that if greater or other than statutory costs be taken by the person making a distress, the Court "may" order such person to pay the party aggrieved treble the amount of moneys taken in excess, is permissive only: section 8, sub-sec. 2 of Interpretation Ordinance, ch. 1 of the Consolidated Ordinance (N.W.T.), referred to: McHugh v.

Union Bank (P.C.), 10 D.L.R. 562; see also Collins v. Eaton, (Alta.) 19 W.L.R. 608, following Robson v. Biggar, 1 K.B 690, and case *supra* in 44 Can. S.C.R. 473.

Renewal of Mortgages.

17. Every mortgage filed in pursuance of this Ordinance shall cease to be valid as against the creditors of the persons making the same and against subsequent purchasers or mortgagees in good faith for valuable consideration after the expiration of two years from the filing thereof unless, within thirty days next preceding the expiration of the said term of two years, a statement exhibiting the interest of the mortgagee, his executors, administrators or assigns in the property claimed by virtue thereof and a full statement of the amount still due for principal and interest thereon and of all payments made on account thereof is filed in the office of the registration clerk of the district where the property is then situate with an affidavit of the mortgagee or of one of several mortgagees or of the assignee or one of the several assignees or of the agent of the mortgagee or assignee or mortgagees or assignees duly authorized for that purpose, as the case may be, stating that such statements are true and that the said mortgage has not been kept on foot for any fraudulent purpose, which statement and affidavit shall be deemed one instrument. C.O. ch. 43, sec 17; 1900, ch. 12, sec 2

See sec. 21 (1) of the Ontario Act, and note to sec. 19, Sask Act.

Chattel Mortgage Renewals.

The fact that the time for payment extends beyond the time within which a renewal should be filed, does not render the mortgage void: Springer v. Graveley, 34 C.L.J. 135, not following the Ontario case, O'Neil v. Small, decided in County Court of Simcoe (Ont.), 1879, and reported 15 C.L.J. 114, affirmed in Graveley v. Springer, 3 Terr. L.R. 120, 2 N.W.T. 306.

In computing the time mentioned in this section the day of the original filing should be excluded and the whole of the last day included, without fractioning any part of the day so that

it precisely equals the statutory period in hours and minutes: Thomson v. Quirk, 1 S.C. Cas. 436, 18 Can. S.C.R. 695, affirming 1 N.W.T.R., part 1, p. 88.

See sec. 22 (post) as to affidavits made by the agent or manager of an incorporated company.

A mortgage dated 8th February, 1907, whereby the time fixed for repayment is 8th February, 1909, does not extend the liability beyond two years from its date: Newlands v. Higgins, 1 A.L.R. 18.

Form of Renewal.

18. Such statement and affidavit shall be in the following form or to the like effect:—

(*Renewal statement.*)

Statement exhibiting the interest of *C.D.* in the property mentioned in the chattel mortgage dated the day of , A.D. 1 , made between *A.B.*, of , of the one part, and *C.D.*, of , of the other part, and filed in the office of the registration clerk of the registration district of (*as the case may be*) on the day of , 1 , and of the amount due for principal and interest thereon and of all payments made on account thereof.

The said *C.D.* is still the mortgagee of the said property and has not assigned the said property (*or* the said *E.F.* is the assignee of the said mortgage by virtue of an assignment thereof from the said *C.D.* to him dated the day of , 1 , *or as the case may be*).

No payments have been made on account of the said mortgage (*or* the following payments and no other have been made on account of the said mortgage:

1. (Jan. 1.—Cash received $.

The amount still due for principal and interest on the said mortgage is the sum of dollars computed as follows: (*here give the computation.*)

C.D.

(*Affidavit.*)

North-West Territories,
To Wit:

I, , of , the mortgagee named in the chattel mortgage mentioned in the foregoing (*or* annexed) statement (*or* assignee of , the mortgagee named in the chattel mortgage mentioned in the foregoing *or* annexed statement, *as the case may be*) make oath and say:—

1. That the foregoing (*or* annexed statement) is true.

2. That the chattel mortgage mentioned in the said statement has not been kept on foot for any fraudulent purpose.

Sworn before me at
in the North-West Territories
this day of , 19 .

Company's Mortgage to Secure Debentures.

[(2) Where such mortgage or conveyance is made as security for debentures and the by-law or resolution authorizing the issue of debentures as a security for which the mortgage or conveyance was made, or a copy thereof, certified under the hands of the president or vice-president and secretary of the company and verified by an affidavit of the secretary thereto attached or endorsed thereon, and having the corporate seal attached thereto, together with a copy of the mortgage or conveyance certified and verified as aforesaid is filed with the registrar of joint stock companies within the time limited for filing a renewal statement in accordance with sec. 17 hereof, it shall not be necessary to renew the said mortgage or conveyance, but the same shall in such case continue to be valid as if the same had been duly renewed within this Ordinance provided.

Register of Debenture Mortgages, etc.

(3) The registrar of joint-stock companies shall keep an alphabetical register of all such by-laws, mortgages or convey-

ances indexed under the names of the companies executing the same, and the said register shall be open to inspection by any person on payment of such fees as may be from time to time prescribed by order in council in that behalf.] C.O. ch. 43, sec. 18; 1907, ch. 5, sec. 10.

Debenture Mortgages.

It has been held that sec. 98 of the Companies Ordinance relating to the powers of a company to borrow and mortgage, applies only to mortgages and other securities to secure money borrowed, and does not restrict the implied power of a trading company to give security for existing debts; the unanimity of the members of a company in authorizing a mortgage obviates the necessity of any meeting: Barthels v. Winnipeg Cigar Co., 2 A.L.R. 21.

Further Renewal Yearly.

19. Another statement in accordance with the provisions of sec. 17 hereof duly verified as required by that section shall be filed in the office of the registration clerk of the district where the property is then situate within thirty days next preceding the expiration of the term of one year from the day of the filing of the statement required by the said section 17 and in default thereof such mortgage shall cease to be valid as against the creditors of the person making the same and as against purchasers and mortgagees in good faith for valuable consideration and so on from year to year; that is to say another statement as aforesaid duly verified shall be filed within thirty days next preceding the expiration of one year from the day of the filing of the former statement and in default thereof such mortgage shall cease to be valid as aforesaid. C.O. ch. 43, sec. 19.

See sec. 21 (7) of the Ontario Act.

Renewal by Personal Representative or Assignee.

20. The affidavit required by sec. 17 of this Ordinance may be made by any next of kin, executor or administrator of any de-

ceased mortgagee or by any assignee claiming by or through any mortgagee or any next of kin, executor or administrator of any such assignee; but if the affidavit is made by any assignee, next of kin, executor or administrator of any such assignee the assignment or the several assignments through which such assignee claims shall be filed in the office in which the mortgage is originally filed at or before the time of such refiling by such assignee, next of kin, executor or administrator of such assignee. C.O. ch. 43, sec. 20.

See secs. 14 and 21 (8) of the Ontario Act.

Agent's Authority to take Conveyances.

21. An authority for the purpose of taking or renewing a mortgage or conveyance intended to operate as a mortgage or sale, assignment, or transfer of goods and chattels under the provisions of this Ordinance may be a general one to take and renew all or any mortgages or conveyances to the mortgagee or bargainee; and provided such general authority is duly filed with the clerk it shall not be necessary to attach a copy thereof to any mortgage filed. C.O. ch. 43, sec. 21.

See secs. 12 and 13 of the Ontario Act.

Agent of Mortgagee.

The execution of a chattel mortgage by the mortgagor and its delivery to and acceptance by the mortgagee or his agent constitutes such mortgage a valid and binding instrument as between the parties to it, without any further act on the part of the mortgagee. A mortgagee's solicitors are his agents for accepting such delivery: Adams v. Hutchings, 3 Terr. L.R. 200.

The affidavit of *bonâ fides* of a chattel mortgage may be sworn before a solicitor acting for the mortgagee: Bartlett v. Winnipeg Cigar Co., 2 A.L.R. 21.

Agent or Manager of Company Mortgagee.

22. For the purpose of making the affidavit of *bona fides* required by sections 6, 8 and 9 of this Ordinance and the affidavit

required by section 17 of this Ordinance the expressions "mortgagee," "bargainee" or "assignee" shall, in addition to their primary meaning, mean and include the agent or manager of any mortgagee, bargainee or assignee being an incorporated company. C.O. ch. 43, sec. 22.

Company Mortgagee.

Where the affidavit of *bonâ fides* is made by an officer of an incorporated company, the company is, like an individual, bound by the recitals in the mortgage, *e.g.*, a recital of an agreement in writing for future advances. The affidavit of *bonâ fides*, where the mortgagor is an incorporated company, may be made by the company's vice-president, who need not be described as agent: Newlands v. Higgins, 1 A.L.R. 18.

Omissions and Errors.

23. Subject to the rights of third persons accrued by reason of such omissions as are hereinafter defined [a judge of the District Court of the judicial district within which any mortgage or transfer or authority to take or renew the same is or should be registered or renewed] on being satisfied that the omission to register a mortgage or other transfer of personal property or any authority to take or renew the same or any statement and affidavit of renewal thereof within the time prescribed by this Ordinance or the omission or misstatement of the name, residence or occupation of any person was accidental or due to inadvertence or impossibility in fact, may in his discretion order such omission or misstatement to be rectified by the insertion in the register of the true name, residence or occupation or by extending the time for such registration on such terms and conditions if any as to security, notice by advertisement or otherwise or as to any other matter as he thinks fit to direct. C.O. ch. 43, sec. 23; 1910 (2nd Session), ch. 2, sec. 5.

As to rectification of register, see note to sec. 21 of British Columbia Sales Act.

Mortgages when New Districts Formed.

23a. All chattel mortgages relating to property within any

newly established district shall (until their renewal becomes necessary to maintain their force against creditors, subsequent purchasers or mortgagees in good faith) continue to be as valid and effectual in all respects as they would have been if the new district had not been established; but in the event of a renewal of any such chattel mortgage after the establishment of such new district the renewal statement shall be filed in the office of the registration clerk of such new district together with a certified copy of the chattel mortgage to which such renewal statement relates and of any renewals thereof under the hand of the registration clerk in whose office the same were filed; and no chattel mortgage in force and filed at the date of the establishing of such new district shall lose its priority by reason of its not being filed in the office of the registration clerk of such new district prior to its renewal.] 1900, ch. 12, sec. 3.

See sec. 22 of the Ontario Act.

Assignment of Mortgages.

24. In case any registered chattel mortgage has been assigned such assignment may upon proof by the affidavit of a subscribing witness be numbered and entered in the book mentioned in sec. 14 hereof in the same manner as a chattel mortgage and the proceedings authorized by sections 26 and 27 of this Ordinance may and shall be had upon a certificate of the assignee proved in manner aforesaid. C.O. ch. 43, sec. 24.

See sec. 29 (4) of the Ontario Act.

Discharge of Mortgages.

25. Where any mortgage of goods and chattels is registered under the provisions of this Ordinance such mortgage may be discharged by the filing in the office in which the same is registered of a certificate signed by the mortgagee, his executors or administrators in form B in the schedule hereto or to the like effect. C.O. ch. 43, sec. 25.

See sec. 28 of the Ontario Act.

Entry of Discharge.

26. The officer with whom such chattel mortgage is filed upon receiving such certificate duly proved by the affidavit of a subscribing witness shall at each place where the number of such mortgage has been entered with the name of any of the parties thereto in the book kept under section 14 of this Ordinance or wherever otherwise in the said book the said mortgage has been entered, write the words "Discharged by certificate number (stating the number of certificate)"; and he shall also endorse the fact of such discharge upon the instrument discharged and shall affix his name to such endorsement. C.O. ch. 43, sec. 26.

See sec. 29 (1) of Ontario Act.

Entry of Discharge.

The Ordinance of 1889 contained also the words, "and to the said entry such officer shall affix his name," after this word "certificate." Although the practice of signing or initialing the entry will no doubt be continued in practice, this change in the wording of the Ordinance makes it clear that its omission will not affect the validity of the discharge.

Certificate of Discharge.

27. Any person filing a discharge of mortgage or a partial discharge of mortgage as aforesaid shall be entitled to ask for and receive from such clerk a certificate (other than the certificate which might be endorsed on a copy or duplicate of the mortgage as aforesaid) of such discharge or partial discharge in the form following or to the like effect:—

(*Certificate of discharge.*)

North-West Territories,
Registration District of
.....

This is to certify that an instrument purporting to be a discharge in full (*or* a partial discharge) of a certain chattel mortgage bearing the date the day of , and filed the day of following, made between *A.B.*, of , as mortgagor and *C.D.*, of , as mort-

gagee, has been filed in the office of the clerk of the registration district of on the day of (*and in case of a partial discharge* that the goods or property mentioned in such partial discharge consists of *describing the chattel or property*).

E. M., Clerk.

C.O. ch. 43, sec. 27.

Removal of Chattels Mortgaged.

28. No goods or chattels under mortgage shall be removed into another registration district without a notice of the intention to remove be mailed postpaid and registered to the mortgagee at his last known place of address not less than twenty days prior to such removal. C.O. ch. 43, sec. 28.

Removal of Goods to Another District.

29. In the event of the permanent removal of goods and chattels mortgaged as aforesaid from the registration district in which they were at the time of the execution of the mortgage, to another registration district before the payment and discharge of the mortgage a certified copy of such mortgage under the hand of the registration clerk in whose office it was first registered and of the affidavit and documents and instruments relating thereto filed in such office, shall be filed with the registration clerk of the district to which such goods and chattels are removed within three weeks from such removal otherwise the said goods and chattels shall be liable to seizure and sale under execution and in such case the mortgage shall be null and void as against subsequent purchasers and mortgagees in good faith for valuable consideration as if never executed. C.O. ch. 43, sec. 29.

See sec. 19 of the Ontario Act, and note to sec. 31, Sask. Act.

Mortgage or Bill of Sale before Removal from another District in same Province.

The "subsequent purchaser" in such case must be one who purchased after the expiration of the three weeks from time of

removal, and that though no copy of the mortgage is filed as provided, it is valid as against a purchase made within such period: Hulbert v. Peterson, 36 Can. S.C.R. 324, followed in Roper v. Scott, 16 Man. L.R. 594.

Mortgage or Bill of Sale before Removal from another Province or Country.

This section, which requires a certified copy of the mortgage to be filed in the registration district to which the goods are removed, being inoperative as a law beyond the boundaries of the Province, it follows that, if the mortgage is good according to the law of the situs of the goods at the time of execution as between the parties, it is good in every other situs to which the goods may be removed, even as against subsequent purchasers and creditors; and if registration is only required by the law of the original situs to protect creditors and subsequent purchasers, this means creditors and subsequent purchasers, seeking to enforce their claims within the judicial territory of the original situs; and, consequently, whether registered in either jurisdiction or not, the mortgage, valid between the parties, is valid to all intents and purposes, in any foreign (including other provincial) jurisdiction: Jones v. Twohey, 1 Alta. R. 267; see Bonin v. Robertson, 2 Terr. L.R. 21; followed in Sawyer & Massey v. Boyce, 1 S.L.R. 236; referred to in Clive v. Russel, 2 A.L.R. 79; see also note to Sask. Act, sec. 31.

Evidence—Certified Copies.

30. Copies of any instrument filed under this Ordinance, certified by the registration clerk, shall be received as *primâ facie* evidence for all purposes as if the original instrument was produced and also as *primâ facie* evidence of the execution of the original instrument according to the purport of such copy and the clerk's certificate shall also be *primâ facie* evidence of the date and hour of registration and filing. C.O. ch. 43, sec. 30.

Certified Copies of Instruments.

See sec. 27 of the Ontario Act, and note to sec. 32, Sask. Act.

Affidavits—Officers for Oaths.

31. All affidavits and affirmations required by this Ordinance may be taken and administered by the registration clerk or any

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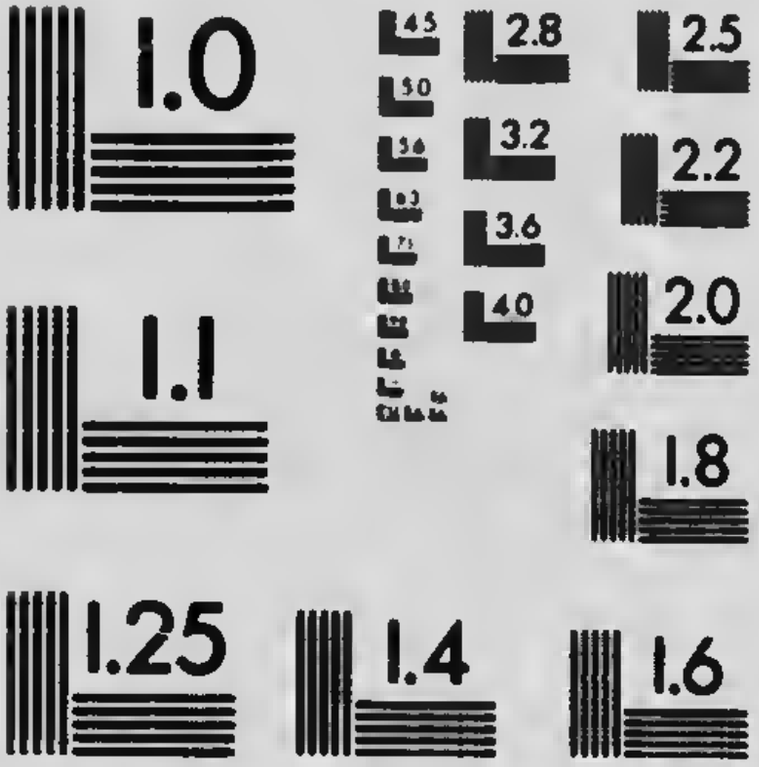

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person whether in or out of the Territories authorized to administer oaths or take affidavits for use in the Supreme Court of the Territories and the sum of 25 cents shall be payable for every oath thus administered. C.O. ch. 43, sec. 31.

Commissioners to take Affidavits.

Chapter 14 of 6 Edw. VII. 1906, Statutes of Alberta, respecting commissioners to administer oaths provides (1) all duly enrolled advocates of the territories residing in the province, shall be commissioners for taxing affidavits in the province.

(2) All persons heretofore appointed as commissioners for taking affidavits in the North-west Territories, who are at the date of the passing of this Act resident in the province, shall continue to be commissioners for taking affidavits in the province.

The other sections of the chapter provide the manner in which the Lieutenant-Governor-in-Council may issue commissions empowering certain persons to administer oaths and take and receive affidavits, declarations or affirmations within the province, and for the appointments of commissioners for taking affidavits without the province in and for the Supreme Court of the North-west Territories.

Expiry on Holiday of Time for Filing.

32. Where under any provisions of this Ordinance time for registering or filing any mortgage, bill of sale, instrument, document, affidavit or other paper expires on a Sunday or other day on which the office in which the registering or filing is to be made or done is closed and by reason thereof the filing or registering cannot be made or done on that day the registering or filing shall so far as regards the time of doing or making the same be held to be duly done or made if done or made on the day on which the office shall next be open. C.O. ch. 43, sec. 32.

Clerk's Fees.

33. For services under this Ordinance each clerk aforesaid shall be entitled to receive the following fees:—

1. For filing each instrument and affidavit, including the

certificate on a duplicate, if any, and for entering the same in a book as aforesaid, 50 cents;

2. For filing assignment of each instrument and for making all proper endorsements in connection therewith, 50 cents:

3. For filing certificate of discharge of each instrument and for making all proper entries and endorsements connected therewith, 50 cents;

4. For searching for each paper, 25 cents;

5. For copies of any document filed under this Ordinance with certificate thereof, 10 cents for every hundred words:

6. For every certificate under section 27 of this Ordinance, 50 cents. C.O. ch. 43, sec. 33.

SCHEDULE TO THE BILLS OF SALE ORDINANCE (ALTA.)

FORM A.

(Section 7.)

MORTGAGE OF CHATTELS.

This Indenture made the day of , A.D. 1 , between *A.B.*, of , of the one part, and *C.D.*, of , of the other part.

Witnesseth that in consideration of the sum of $ now paid to *A.B.* by *C.D.*, the receipt of which the said *A.B.* hereby acknowledges (*or whatever else the consideration may be*) he the said *A.B.* doth hereby assign to the said *C.D.*, his executors, administrators and assigns all and singular the several chattels and things specifically described as follows (*or* in the schedule hereto annexed) by way of security for the payment of the sum of $ and interest thereon at the rate of per cent. per annum (*or whatever else may be the rate*) and the said *A.B.* doth further agree and declare that he will duly pay to the said *C.D.*,

the principal sum aforesaid together with the interest then due on the day of , A.D. (*or whatever else may be the stipulated time or times for payment*). And the said *A.B.* doth agree with the said *C.D.*, that he will (*here insert terms as to insurance, payment of rent, collateral securities, or otherwise which the parties may agree to for the maintenance or defeasance of the security*).

Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said *C.D.* for any cause other than those specified in section 16 of *The Bills of Sale Ordinance* except as is otherwise specially provided herein.

In witness whereof the said *A.B.* has hereunto set his hand and seal.

Signed and sealed by the said *A.B.* in the presence of me, *E.F.*
(*Add name, address and occupation of witness.*) } *A.B.*

FORM B.

(Section 25.)

Discharge of Chattel Mortgage.

To the registration clerk of the registration district of

I, *A.B.*, of , do certify that has satisfied all money due on or to grow due on a certain chattel mortgage made by to which mortgage bears date the day of , A.D. 1 , and was registered (*or in case the mortgage has been renewed* was renewed) in the office of the registration clerk of the registration district of on the A.D. 1 , as number (*here mention the day and date of registration of each assignment thereof and the names of the parties or mention that such mortgage has not been assigned as*

the fact may be) and that I am the person entitled by law to receive the money; and that such mortgage is therefore discharged.

Witness my hand this day of , A.D. 1 .
Witness (*stating residence and occupation*). }
E.F. } *A.B.*

SEIZURE UNDER EXECUTION OF CHATTEL MORTGAGES AND EQUITIES OF REDEMPTION THEREUNDER.

THE JUDICATURE ORDINANCE.

(CON. ORDINANCES, CH. 21 (ALBERTA).)

When Execution has Priority.

356. Except as hereinafter mentioned every writ of execution against goods and chattels shall, at and from the time of its delivery to the sheriff to be executed, bind all the goods and chattels, or any interest in all the goods and chattels, of the judgment debtor within the judicial district of the said sheriff and shall take priority to any chattel mortgage, bill of sale, or assignment for the benefit of all or any of the creditors of the judgment debtor executed by him after the receipt by the sheriff of such writ of execution or which, by virtue of the provisions of the Bills of Sales Ordinance, has not taken effect prior to such receipt as against the creditor or creditors' interest under the execution, but shall not take priority to a *bonâ fide* sale by the judgment debtor followed by an actual and continual change of possession of any of his goods and chattels without actual notice to the purchaser that such writ is in the hands of the sheriff of the judicial district wherein the said judgment debtor resides or carries on business. C.O. ch. 21, R. 356.

Sale of Equities in Chattels.

358. On any writ of execution against goods and chattels, the sheriff charged with the execution of the same may seize and sell

the interest or equity of redemption, in any goods or chattels, including leasehold interests in any lands of the party against whom the writ has been issued and such sale shall convey whatever interest the mortgagor had in such goods and chattels at the time of the seizure. C.O. ch. 21, R. 356.

Execution against Mortgagee.

360. The officer charged with the execution of any writ of execution against goods may seize thereunder any registered mortgage in favour of the execution debtor whether upon lands or chattels by delivering a notice in writing of such seizure to the registrar or clerk in the office where such mortgage is registered; but no such mortgage shall be affected or charged by any writ of execution until delivery of such notice.

(2) Upon receipt of such notice the clerk or registrar shall make an entry thereof in the registrar for which he shall be entitled to a fee of fifty cents: Provided that unless and until personal service of a notice of seizure on the mortgagor is made he shall not be affected thereby and any payments made by him to the mortgagee before service of such notice shall be deemed good and valid. C.O. ch. 21, sec. 360.

BRITISH COLUMBIA.

AN ACT FOR PREVENTING FRAUDS UPON CREDITORS BY SECRET BILLS OF SALE OF PERSONAL CHATTELS.

(R.S.B.C. 1911, ch. 20, and Amendments.)

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

Short Title.

1. This Act may be cited for all purposes as the "Bills of Sale Act" 1905, ch. 8, sec. 1.

Application of Act.

2. This Act shall apply to every bill of sale executed after the eighth day of April, 1905 (whether the same be absolute or subject or not subject to any trust), whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or made subject to such bill of sale: 1905, ch. 8, sec. 2.

What are Bills of Sale.

Whatever documents are included in the expression "bill of sale," as defined by the Bills of Sale Acts, they must still be limited to documents "whereby the holder or grantee has power to seize or take possession of any personal chattels comprised or made subject to such" document. The Acts therefore do not include letters of hypothecation accompanying a deposit of goods, or pawn tickets given by a pawnbroker, or in fact any

case, where the object and effect of the transaction are immediately to transfer the possession of the chattels, from the grantor to the grantee. Hence the delivery order of a consignment of goods given to a bank as security for advances and the minutes of the transaction whereby an immediate transfer of possession is intended does not require registration as a bill of sale: Ex parte Close, Re Hall, 14 Q.B.D. 386; Grigg v. National Guardian Assurance Co., [1891] 3 Ch. 206.

Where goods are pledged and delivered to the pledgee a document explaining the transaction containing the terms of repayment and a power of sale, and stating the rights of the pledgee is not a bill of sale within the Act: Hilton v. Tucker, 39 Ch.D. 669; Ex parte Hubbard, Re Hardwick, 17 Q.B.D. 690.

A wharfinger's warrant indorsed over to a lender with an accompanying memorandum of the terms of security including a power of sale is a security with possession and need not be registered: Re Cunningham & Co., Re Attenborough's Case, 28 Ch.D. 682.

The *ratio decidendi* of Ex p. Close, 14 Q.B.D. 386, and Re Cunningham, 28 Ch.D. 682, were disapproved in Ex p. Parsons, Re Townsend, 16 Q.B.D. 532, where it was held that a document giving a license to take immediate possession as security for a debt is a bill of sale within the meaning of the Act, and must follow the statutory form.

To impeach a sale under powers in a chattel mortgage on the ground that an offer to redeem was made prior to the time fixed by the notice of sale, the person entitled to redeem is obliged to shew that the amount due under the mortgage was actually tendered or that the mortgagee was distinctly informed that the mortgagor was then and there ready and willing to pay what was so due and, being thus informed of the intention to redeem, refused to accept payment. In the exercise of his power of sale, a mortgagee of chattels is bound merely to act in good faith and avoid conducting the sale proceedings in a recklessly improvident manner calculated to result in sacrifice of the goods. And, *per* Duff, J., he is not obliged (regardless of his own interests as mortgagee) to take all the measures a prudent man might be expected to take in selling his own property: judgment of the Court of Appeal for British Columbia, Ishitaka v. B.C. Land & Investment Agency, 18 W.L.R. 310.

16 B.C.R. 299, appealed from, reversed (the Chief Justice and Idington, J., dissenting); British Columbia Land and Investment Agency v. Ishitaka, 45 Can. S.C.R. 302.

The bidding in by the mortgagee at a sale of the mortgaged chattels avoids the sale, and the mortgagor's right to redeem continues: Van Volkenberg v. Western Ranching Co., 6 B.C.R. 284.

Bill of Sale Defined.

3. In this Act the following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction, that is to say:—

"Bill of sale" shall include bills of sale, assignments, transfers, declarations of trust without transfers, inventories of goods with receipts thereto attached, or receipts for purchase moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred, but shall not include the following documents, that is to say: Assignments for the benefit of the creditors of the person making or giving the same; marriage settlements; transfers or assignments of any ship or vessel or any share thereof; transfers of goods in the ordinary course of business of any trade or calling; bills of sale of goods in foreign parts or at sea; bills of lading; any securities that may be taken under ch. 29 of the Revised Statutes of Canada, known as the "Bank Act"; warehousekeepers' certificates; warrants or orders for the delivery of goods; or any other documents used in the ordinary course of business as proof of the possession

or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive goods thereby represented.

Personal Chattels.

"Personal chattels" means goods, furniture, and other articles capable of complete transfer and delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate nor fixtures (except trade machinery as hereinafter defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed; nor growing crops, when assigned together with any interest in the land on which they grow; nor shares or interest in the stock, funds, or securities of any government, or in the capital or property of incorporated or joint-stock companies; nor choses in action; nor any stock or produce upon any farm or lands which, by virtue of any covenant or agreement or of the custom of the country, ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale.

Apparent Possession.

Personal chattels shall be deemed to be in the "apparent possession" of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person.

"Prescribed" means prescribed by rules made pursuant to this Act.

"Grantee" shall include assignee: 1905, ch. 8, sec. 3; and 2 Geo. V. (1912) ch. 2, sec. 2.

Registration of Bills of Sale.

See sec. 2 of the Nova Scotia Act, and sec. 28 of the New Brunswick Act.

It will be observed that verbal sales are not included because there is nothing in such a case than can be registered, and there is nothing in the Act to require that verbal sales shall be evidenced by some written document: Esnouf v. Gurney (1895), 4 B.C.R. 144.

If a document were intended as part of the bargain to pass the property, then, in whatever form it was, it might be deemed a bill of sale: Charlesworth v. Mills, [1892] A.C. 231.

But if the bargain was complete without it, so that the property passed independently of it, then registration is not required, though the chattels are suffered to remain in the vendor's apparent possession, and are in fact relet to him by the purchaser in writing: Esnouf v. Gurney, 4 B.C.R. 144; Ramsay v. Margrett, [1894] 2 Q.B. 18; North Central v. Manchester, 35 Ch.D. 191, 205, 13 App. Cas. 554; Re Watson, 25 Q.B.D. 27, 33.

Occupation may be of varying degrees; if a man pays rent and taxes for a building, he may ordinarily be said to occupy it, although he is never present; but not if he has absconded: Brackman v. McLaughlin (1894), 3 B.C.R. 265.

The meaning to be attributed to the term, as used in the Act, is limited to that occupation which is a personal possession either by the debtor or his agent. Whenever the debtor has had free access to, and use of the chattels assigned, then they have been held to be in the apparent possession of the assignor: *per* Drake, J., *ib.*, at p. 267.

"Formal possession" means nothing more than nominal possession: Brackman v. McLaughlin (1894), 3 B.C.R. 265. As where the grantor went in and out of the place where the goods were, at his pleasure, and although a man had been put in possession, nothing more was done than to tell the clerk not to remove the goods (Seal v. Claridge, 7 Q.B.D. 516); or where a man is put in possession of furniture in a residence, not interfering with or removing it, and the assignor continued to live in the house and use the furniture as before: Ex parte Hooman, L.R. 10 Eq. 63; Ex parte Lewis, L.R. 6 Ch. App. 626.

Ramsay v. Margrett, [1894] 1 Q.B. 18, is a decision of the Court of Appeal under the English Bills of Sales Act, 1878

(41 & 42 Vict. ch. 31), and inasmuch as that Act differs in many respects from the Ontario Act, it is somewhat difficult to apply English cases in the construction of the latter Act. In this respect the British Columbia Act is in *pari materia* with the Imperial Act, and therefore susceptible of the same construction. The transaction in question arose between husband and wife, who were living together. The husband was in embarrassed circumstances, and his wife, in order to enable him to pay some of his debts, agreed to buy his household furniture. She paid him the stipulated purchase money, and took a receipt therefor, which wound up with the words, referring to the chattels, "which I now acknowledge are now absolutely her property." No formal delivery of possession of the goods took place, which remained in the house, and were used by husband and wife as before the sale. Under sec. 4 of the English Act every "receipt for purchase money of goods and other assurances of personal chattels" is a bill of sale, and by sec. 8, if not registered, is void as against creditors of the vendor. After the goods had been sold to the wife they were seized in execution at the suit of one of the husband's creditors, and, being claimed by the wife, an interpleader issue was directed, which was tried before Wright, J., who decided it in favour of the wife and from his decision the appeal was had to the Court of Appeal (Lord Esher, M.R., and Lopes, and Davey, L.JJ.), who affirmed his decision, on the ground that the receipt in this case was not a bill of sale within the Act, because it was not intended to be nor did it operate as an assurance of the goods. And Lord Esher and Davey, L.J., were also of opinion that the wife had a sufficient possession of the goods to take the case out of the Bills of Sales Act, because the possession being equivocal the Law would attribute the possession to the wife who had the legal title. On this point, however, Lopes, L.J., did not express any opinion. It is very doubtful, however, whether, under the Ontario Act, sec. 5, or statutes similar to it, it would be held that there had, in such a case, been such an actual and continual change of possession as to satisfy that Act: see Snarr v. Smith, 45 U.C.Q.B. 156; see 30 C.L.J. 556.

A hypothecation note reciting an undertaking to hold a shipment of goods in trust for the lender, is a declaration of trust without transfer and liable to the registration provisions unless the goods have not arrived at the date of the execution, as

to come within the exception as "to goods at sea" contained in the same definition: Reg. v. Townshend, 15 Cox C.C. 466.

The written memorandum or the entry in the book of an auctioneer, in compliance with sec. 17 of the Statute of Frauds governing contracts for the sale of goods, is an "assurance of personal chattels" requiring registration: Re Roberts, Evans v. Roberts, 36 Ch.D. 196.

The written agreement by the owner of chattels surrendering their possession to an auctioneer who was to sell them by auction and deduct from the proceeds the latter's payment to the sheriff of the amount for which the goods had been seized is not an "assurance" or a "license to take possession," or in any other respect a bill of sale within the English Act: Charlesworth v. Mills, [1892] A.C. 231, reversing 25 Q.B.D. 421, and approving Ex parte Hubbard, 17 Q.B.D. 690.

A dump barge, propelled by oars, and carrying goods, wares, and merchandise, is a "vessel" within the exception of the Act: Gapp v. Bond, 19 Q.B.D. 200.

The assignment of a ship or vessel is exempt from the operation of this Act, even though the document is not registered under a similar provision contained in the Merchant Shipping Act: Union Bank of London v. Levanton, 3 C.P.D. 243.

The words "transfer of goods in the ordinary course of business," is wide enough to include the sale of a stock-in-trade *en bloc*: Greenburg v. Lenz, 12 B.C.R. 395. But in Ex parte Close, Re Hall, 14 Q.B.D. 386, it was held that a pledge by a trader of stock-in-trade which he had bought on credit, and not paid for, is not a "transfer in the ordinary course of business of his trade or calling," within the exception contained in the Act.

A deed purporting to transfer as security to a bank certain goods which "in the ordinary course of business" are sent to a bleaching establishment to be bleached, the latter agreeing to hold them for the bank, is within the exception of the Act, which need not be registered: Merchants Banking Co. v. Spotten, Ir. R. 11 Eq. 586.

A chattel mortgage covering a stock-in-trade and book debts includes the book debts originally assigned to the mortgagor by the person of whom they were purchased: Robinson v. Empey, 10 B.C.R. 466.

The plant and materials used in connection with railway con-

struction cannot be considered articles capable of "complete transfer and delivery," where their identity could not be established at the time of the execution of the mortgage: Clancy v. Grand Trunk Pacific R. Co., 15 B.C.R. 497.

Logs and lumber manufactured therefrom at the owner's mill are not within the purview of a chattel mortgage covering all lumber which might at any time be brought on the premises: Merchants Bank of Halifax v. Houston, 7 B.C.R. 465, affirmed on this point in Houston v. Merchants Bank, 31 Can. S.C.R. 361, 37 C.L.J. 459.

The case of Great Eastern R. v. Lord, [1909] A.C. 109, has given rise to a difference of judicial opinion which has extended even to the House of Lords. The facts were that a railway company by what was called "a ledger agreement," opened a credit account with a coal merchant for the carriage of his coal whereby it was agreed that the company was to have a continual lien upon the coal conveyed on their lines, or being on the ground rented by the merchant from the company, for all charges due them, and were to be at liberty to sell and dispose of any of the coal to satisfy the lien, with the right to close the account at any time on a day's notice. By separate agreements the railway company let to the merchant allotments within the railway yard where the coal was stacked, and dealt with by the merchant. The account being in arrear the railway closed it, and took possession of the coal and sold it, and the merchant consequently was declared bankrupt, and an action was brought by the trustee in bankruptcy for damages occasioned by the railway so acting. Phillimore, J., dismissed the action, [1908] 1 K.B. 195. The majority of the Court of Appeal (Cozens-Hardy, M.R., and Buckley, L.J.) reversed his decision, on the ground that the agreement in question amounted to a bill of sale, and was void for want of registration (Moulton, L.J., dissenting, [1908] 2 K.B. 54. The majority of the House of Lords (Lords Loreburn, L.C., and Lords Macnaghten and Atkinson) have restored the judgment of Phillimore, J., Lords Collins and Robertson dissenting. In the result therefore there were five Judges in favour of the defendants and four in favour of the plaintiffs. The majority of the Lords regarded the agreement as in effect one for the continuance of the carriers' lien, notwithstanding the delivery of the goods. The minority, on the other hand, considered that the carriers' lien was at an end as soon

as delivery was made, and that any agreement for a lien thereafter must be regarded as in the nature of a bill of sale: see 45 C.L.J. 236.

The case of Mellor v. Maas, [1903] 1 K.B. 226, is a decision of the Court of Appeal, affirming the judgment of Wright, J., [1902] 1 K.B. 137. The facts were briefly as follows: The defendant Maas advanced £2,000 to one Mellor, who was purchasing a hotel and furniture, and took by way of security an absolute conveyance of the furniture from Mellor's vendor, and Maas then purported to sell the chattels to Mellor on a hire purchase agreement for £2,412.16, payable in instalments. This agreement was in the usual form and included a license to seize. It was not registered under the Bills of Sale Act. Mellor became bankrupt, and his trustee in bankruptcy claimed the chattels on the ground that they were merely a security to Maas for a loan and the security was void for want of registration. Wright, J., upheld this contention, and his decision was affirmed by the Court of Appeal, mainly on the ground that it was simply a question of fact as to what the real transaction was between the parties, and with the Judge's finding on that point there was no ground for the Court to interfere: see 39 C.L.J. 345.

Future-acquired Property.

3a. The provisions of this Act shall extend to mortgages and sales of goods and chattels, notwithstanding that such goods and chattels may not be the property of, or may not be in the possession, custody, or control of, the mortgagor or bargainor, or any one on his behalf, at the time of the making of such mortgage or sale, and notwithstanding that such goods or chattels may be intended to be delivered at some future time, or that the same may not at the time of the making of said mortgage or sale be actually procured or provided, or fit or ready for delivery, and notwithstanding that some act may be required for the making or completing of such goods and chattels, or rendering the same fit for delivery: 2 Geo. V. (1912) ch. 2, sec. 5.

See sec. 11 of the Ontario Act.

Trade Machinery.

4. From and after the eighth day of April, 1905, trade machinery shall, for the purposes of this Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this Act.

For the purposes of this Act—

"Trade machinery" means the machinery used in or attached to any factory or workshop—

(1) Exclusive of the fixed motive powers, such as the water-wheels and steam-engines and the steam-boilers, donkey-engines, and other fixed appurtenances of the said engines and motive powers; and

(2) Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive powers to the other machinery, fixed and loose; and

(3) Exclusive of the pipes for steam, gas, and water in the factory or workship.

The machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this Act:

"Factory or workshop" means any premises on which any manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them, that is to say:—

(*a*) In or incidental to the making any article or part of an article; or

(*b*) In or incidental to the altering, repairing, ornamenting, finishing of any article; or

(*c*) In or incidental to the adapting for sale any article: 1905, ch. 8, sec. 4.

Fixtures.

"Trade machinery" affixed to the realty will pass under a mortgage on the freehold, without any specific mention thereof in the mortgage or the registration of a bill of sale of the same; but such mortgage does not empower the mortgagee to sell the trade machinery apart from the freehold: Re Yates, Batcheldor v. Yates, 38 Ch.D. 112. But a power to seize building materials upon the mortgaged premises, independent of the power of entry under the mortgage on the realty, is an "assurance of personal chattels" or a "license to take possession of personal chattels as security for any debt," and therefore a bill of sale within the Act requiring registration: Climpson v. Coles, 23 Q.B.D. 465; Small v. National Provincial Bank, [1894] 1 Ch. 686, 30 C.L.J. 498.

In Johns v. Ware, [1899] 1 Ch. 359, the plaintiff claimed to be mortgagee of certain trade fixtures under a mortgage of land with the machinery. The mortgage contained a power to sell the machinery separately from the freehold. The mortgage was not registered under the Bills of Sale Act, 1854 (17 & 18 Vict. ch. 36). The plaintiff sought to restrain the defendant, who was assignee of the mortgagor, for the benefit of creditors, from selling the fixtures, on the ground that they were covered by his mortgage. The defendant contended that the mortgage was void as to chattels for want of registration under the Bills of Sale Act, and Romer, J., decided that this contention was well founded, and that according to the test laid down in Ex parte Barclay, L.R. 9 Ch. 576, a mortgage of land, coupled with a power to the mortgagee to sell separately from the land all or any part of the trade fixtures, is a mortgage of chattels which must be registered to be valid. In Robinson v. Cook, 6 O.R. 590, a mortgage of land and trade fixtures was held to be valid as to the fixtures without registration as a chattel mortgage, but it does not appear from the report that there was any power in the mortgage there in question to sell the chattels apart from the land: see 35 C.L.J. 359.

The case of Re Brooke, Brooke v. Brooke, [1894] 2 Ch. 600, turned upon the construction of a conveyance of certain lands by way of mortgage. On the lands were certain trade fixtures, consisting of machinery, etc., affixed to the freehold, which were specifically mentioned in the mortgage, but the mortgage had not been registered as a bill of sale. The question was whether the

mortgagee, under the circumstances, was entitled to the fixtures. Kekewich, J., on the authority of Re Yates, 38 Ch. D. 128, held that he was, being of opinion that the specification of fixtures, which would have passed under a conveyance of the land itself without any reference to the fixtures, did not differ the case from Re Yates, where the fixtures were not specified; but distinguished it from Small v. National Provincial Bank (1894), 1 Ch. 686, where the fixtures were specified and the mortgage was expressed to cover not only fixtures, but also "movable" plant and machinery there or thereafter placed on the premises. Part of the fixtures in question had been sold, and it was alleged that out of the proceeds more fixtures had been placed on the mortgaged premises, and it was held that, although the mortgagees were entitled to the proceeds of the sale, yet that they were not also entitled to the fixtures which had been substituted: see 30 C.L.J. 708; see also sec. 6 of this Act (post).

The phrase "deemed to be a bill of sale" has been construed to make the instruments to which it is applied bills of sale for the purpose of registration, and not for all purposes of the Act (Green v. Marsh, 2 Q.B.D. 330); and by analogy a similar construction might probably be placed on the expression "deemed to be personal chattels," or to similar expressions in the Act.

The pledging of a contractor's plant and materials as security for the completion of the work, without intending an absolute sale does not require registration: Clancy v. Grand Trunk Pac. R. Co., 15 B.C.R. 497.

Kitchen supplies and utensils are not the plant materials or other things provided for railway construction work: *Ibid.*

Rules of Construction; Agreements with Power of Distress.

5 Every attornment, instrument, or agreement, not being a mortgage, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale within the meaning of this Act of any personal chattels which may be seized or taken under such power

of distress: Provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditaments which the mortgagee being in possession shall have demised to the mortgagor as his tenant at a fair and reasonable rent: 1905, ch. 8, sec. 5.

Power of Distress.

In Re Roundhead Colliery Co., [1897] 1 Ch. 373, a company were lessees from separate lessors, at certain rents, of two adjoining coal mines, A and B. In each of the leases the lessor reserved power to distrain for rent in arrear not only upon chattels belonging to the lessees on the demised property, but also on chattels belonging to the lessees on "any adjoining or neighbouring collieries." The property of the company was charged as security for certain debentures issued by the company and before any effective proceedings had been taken to enforce the security, and while it was still "a floating security," the lessors of mine B levied a distress on chattels of the lessees in mine A, and the next day the company went into voluntary liquidation and a receiver was appointed at the instance of the debenture-holders. A motion was then made to Stirling, J., to restrain the distress under the Companies Act, 1862, secs. 85 and 87 (see R.S.C. 1906, ch. 144, secs. 22 and 23), and also on the ground of the non-registration of the lease under the Bills of Sale Act, and that learned Judge, while holding that a distress properly levied by a landlord before the winding-up had been commenced could not be restrained, nevertheless restrained it on the ground that the lease came within the Bills of Sale Act and was void for non-registration, but the Court of Appeal were unable to adopt the latter view and held that the lease was not affected by the Bills of Sale Act, and the decision of Stirling, J., was therefore reversed: see 33 C.L.J. 454.

Fixtures and Growing Crops.

6. No fixtures or growing crops shall be deemed under this Act to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking

possession of or dealing with such land or building, or land if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which the crops grow, is also conveyed or assigned to the same persons or person.

The same rule of construction shall be applied to all deeds or instruments, including fixtures or growing crops, executed before the eighth day of April, 1905, and then subsisting and in force, in all questions arising under any liquidation, assignment for the benefit of creditors, or execution of any process of any Court, which shall take place or be issued after the said date: 1905, ch. 8, sec. 6.

See note to sec. 4 of this Act (ante).

Attestation and Registration.

7. Every bill of sale to which this Act applies shall be duly attested and registered under this Act in the manner and within the time hereinafter prescribed, and shall set forth the true consideration for which the bill of sale was given, otherwise such bill of sale shall—

(*a*) As against all assignees, receivers, or trustees of the estate and effects of the person whose chattels or any of them, are comprised in such bill of sale, or under any assignment for the benefit of the creditors of such person; and

(*b*) As against all Sheriffs and Sheriff's officers and other persons seizing any chattels comprised in such bill of sale in the execution of any process of execution lawfully sued out of any Court of competent jurisdiction in that behalf authorizing the seizure of the chattels of the person by whom or of whose chattels such bill of sale shall have been made or given; and

(*c*) As against every person by whom or on whose behalf such process shall have been issued; and

(*d*) As against subsequent *bonâ fide* purchasers or mortgagees for valuable consideration,—

be null and void to all intents and purposes whatsoever so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which at or after the time of the execution by the debtor of such assignment for the benefit of his creditors, or of the execution of such process of execution as aforesaid, or of such purchase or mortgage, as the case may be, and after the expiration of the time hereinafter prescribed, shall be in the possession, or apparent possession, of the person making and giving such bill of sale, or of any person against whom the process shall have issued under or in the execution of which such bill of sale shall have been made or given, as the case may be: 1905, ch. 8, sec. 7, sub-sec. (1).

See secs. 6, 7, 8, of the Ontario Act.

Validity of Instrument against Creditors.

The expression "Bill of Sale" is partly interpreted by section 3 of the Act.

The Act, however, does not affect parol contracts of purchase and sale: Esnouf v. Gurney (1895), 4 B.C.R. 144, at p. 146. A bill of sale of the bulk of the settlor's property, made without a valuable consideration, shortly before the settlor engages in a trade of a hazardous character, may be set aside on behalf of creditors who became such after the settlement, although at the time of the settlement there was no certainty that the proposed arrangements for the future business would take effect, and it is not necessary to shew that the settlor contemplated becoming indebted at the time he made the settlement: Lai Hop v. Jackson (1895), 4 B.C. R. 168; Mackay v. Douglas, L.R. 14 Eq. 106; Ex parte Russell, 19 Ch.D. 588.

Fraudulent Preferences.

The question of the validity of a bill of sale alleged to constitute a fraudulent preference as against creditors, is governed by the Fraudulent Preferences Act, C.S.B.C. ch. 15 (R.S.B.C. 1911, ch. 94), under which it has recently been held that a

bonâ fide demand by a creditor upon his insolvent debtor for payment or security is pressure sufficient to rebut any inference of "intent to prefer" in the execution of a bill of sale by way of mortgage given in response to the demand, and that the bill of sale was valid: Brown v. Jowett (1895), 4 B.C.R. 44; and see Stephens v. McArthur, 19 Can. S.C.R. 446.

It is settled law that a mortgage given by a debtor who is unable to pay his debts in full is not void as a preference if given as the result of pressure and for a *bonâ fide* debt, if the mortgagee is not aware of the debtor being in insolvent circumstances: Stewart v. Wilson (1894), 3 B.C.R. 369, *per* Drake, J.; Molsons Bank v. Halter, 18 Can. S.C.R. 88, 95; Stephens v. McArthur, 19 Can. S.C.R. 446; Gibbons v. McDonald, 20 Can. S.C.R. 587; Doll v. Hart, 2 B.C.R. 32.

Where the grantee under a bill of sale took possession of the goods, consisting of the contents and fittings of a bakery carried on by the grantor in a building distinct from his residence, and engaged a former employee of the grantor to work for him, this employee holding the key of the premises, it was held that the premises were not "occupied by" the grantor, who had absconded from the province, and were not in his "apparent possession," although his name had not been removed from the door: Braekman v. McLaughlin (1894), 3 B.C.R. 265.

The fact of the debtor being tenant of the premises in which the goods were, is insufficient if he had ceased to be the actual occupier: *Ibid.*

See also definition of "apparent possession," of section 3, and notes thereto. The question is, if anyone went there would he conclude that the debtor was in sole possession: *per* Drake, J., in Braekman v. McLaughlin, 3 B.C.R., at p. 268.

The policy of this section is to compel the registration of bills of sale in cases where the property remains in the possession of the grantor, for the better protection of creditors, and property of which possession is delivered is not affected by it: Matheson v. Pollock (1893), 3 B.C.R. 74; Fisher on Mortgages, 1st ed., 20.

A creditor who had himself advised in respect to and had drawn a bill of sale has no *locus standi* to attack the bill of sale as fraudulent against creditors, he being the only creditor and on the evidence the transaction being perfectly *bonâ fide*: Boldbee v. Rolls, 4 B.C.R. 137.

Time and Place of Registration.

8. Every bill of sale, or a true copy thereof, shall, within the period of five days in cases where the goods referred to therein are within the corporate limits of a city or town in which is situate an office of the County Court prescribed for the registration of bills of sale, and in all other cases within a period of twenty-one days after the making thereof next ensuing, be registered by the filing of such bill of sale or copy thereof, as the case may be, together with such affidavits as are herein required, in the County Court registry of such county or place within which the chattels referred to and dealt with in and by such bill of sale are situate, as hereinafter mentioned, that is to say:—

For the County of Victoria—In the office of the Registrar of the County Court at Victoria:

For the County of Nanaimo—In the office of the Registrar of the County Court at Nanaimo:

For the County of Vancouver—In the office of the Registrar of the County Court at Vancouver:

For the County of Atlin, except that part thereof contained within the following boundaries: Commencing at a point on the boundary-line between Alaska Territory and British Columbia at the height of land separating the waters flowing south into Stikine river from the waters flowing north into the Taku river; thence following said height of land northerly and easterly to a point on the sixtieth parallel at its intersection with the one hundred and thirtieth meridian; thence due west along the sixtieth parallel to its intersection between Alaska Territory and British Columbia; thence south and east following the said boundary to the point of commencement—In the office of the Registrar of the County Court at Prince Rupert:

For the remainder of the County of Atlin—In the office of the Registrar of the County Court at Vancouver:

For the County of Westminster—In the office of the Registrar of the County Court at New Westminster:

For the County of Cariboo—In the office of the Registrar of the County Court at Clinton:

For the Grand Forks Mining Division—In the office of the Registrar of the County Court at Grand Forks:

For the Greenwood Mining Division—In the office of the Registrar of the County Court at Greenwood:

For the Vernon Mining Division—In the office of the Registrar of the County Court at Vernon:

For the Osoyoos Mining Division—In the office of the Registrar of the County Court at Fairview:

For the remainder of the County of Yale—In the office of the Registrar of the County Court at Kamloops:

For those portions of Kootenay County being the territory covered by the Slocan and Kaslo Electoral Districts—In the office of the Registrar of the County Court at Kaslo:

For those portions of Kootenay County being the territory covered by the Nelson and Ymir Electoral Districts—In the office of the Registrar of the County Court at Nelson:

For that portion of Kootenay County being the territory covered by the Rossland City Electoral District—In the office of the Registrar of the County Court at Rossland:

For that portion of Kootenay County being the territory covered by that portion of the Columbia Electoral District lying north of a line commencing at a point on the western boundary of the said Columbia Electoral District which is the source of Bugaboo Creek; thence easterly following the line of Bugaboo Creek to the mouth of said creek; thence due east to the boundary of the Pro-

vince—In the office of the Registrar of the County Court at Golden:

For that part of the County of Kootenay being the territory covered by that portion of the Columbia Electoral District lying south of said line—In the office of the Registrar of the County Court at Wilmer:

For that part of the County of Kootenay being the territory covered by the Cranbrook Electoral District—In the office of the Registrar of the County Court at Cranbrook:

For that part of the County of Kootenay being the territory covered by the Fernie Electoral District—In the office of the Registrar of the County Court at Fernie:

For the remainder of the County of Kootenay—In the office of the Registrar of the County Court at Revelstoke:

Provided, however, that the Lieutenant-Governor-in-Council may from time to time subdivide or alter the said districts, and provide for the registration of bills of sale in the office of any Registrar of a County Court for a district or at a place different from those above mentioned: 1905, ch. 8, sec. 7, sub-sec. (2).

Registration and Filing.

The word "filing" might be understood of bringing a writ into the office for the purpose of its being entered on the record: Hunter v. Caldwell, 10 Q.B. 69. The expressions "filing" and "entering of record" are not synonymous, and convey distinct ideas: "Filing" originally signifies placing papers in order on a thread or wire for safe keeping, or depositing them in due order in the proper office. "Entering of record" uniformly implies writing: Naylor v. Moody, 2 Blackf. (Ind.) 247, 248; State v. Lamm, 9 S.D. 418, 419; Brothers v. Mundell, 60 Tex. 244. But see Wood v. Union Gospel Church Bldg. Ass'n., 63 Wis. 13, where it was held that an averment of "filing" is equivalent to saying that it has been "left for record." A deed left with the register for record, and which has the date of its reception indorsed thereon, but which is neither spread on record nor entered in the general index, is not "re-

corded" within the meaning of a redemption statute:" International L. Ins. Co. v. Scales, 27 Wis. 640; Oconto Co. v. Jerrard, 46 Wis. 317; see note to sec. 10 Nova Scotia Act.

Possession by Grantee.

Where the goods comprised in a bill of sale are within 21 days after its execution *bona fide* taken possession of by the grantee, the Act does not apply, and it is immaterial even though the bill of sale was given subject to a defeasance not contained in it: McClary Mfg. Co. v. Howland, 9 B.C.R. 479.

Change in Registration Districts.

9. Save as in this Act prescribed, the registration districts established, or hereafter to be established, shall not be altered by any change that may hereafter be made in the counties, electoral districts, or mining divisions thereon mentioned: 1905, ch. 8, sec. 7, sub-sec. (3).

See note to sec. 3 of Sask. Sales Act.

Chattels Situated in Different Registration Districts.

10. If the chattels comprised in and dealt with, or purporting to be dealt with or affected by, any bill of sale shall be situate partly within the limits of one County Court registry and partly in one or more other County Court registries, it shall only be necessary to register such bill of sale in one such registry, but the person effecting such registration shall, at the time thereof, furnish such number of full and complete copies of the bill of sale and affidavits as may be necessary to the Registrar in whose office registration shall be effected, and such Registrar shall forward one such copy, verified by him in the Form B. in the Schedule to this Act, to each registry in which such bill of sale would, but for this provision, require to be registered, to be there filed and the sum of one dollar shall be paid to the Registrar for each certificate of verification: 1905, ch. 8, sec. 7, sub-sec. (4).

Affidavit of Attesting Witness.

11. To every bill of sale or copy thereof, as the case may be, to which this Act applies there shall be annexed an affidavit made by the attesting witness, or one of the attesting witnesses, to the execution of such bill of sale, identifying such bill of sale or copy, as the case may be, and setting forth the time of such bill of sale being made or given, and a description of the residence or place of business and occupation of the person making and giving the same, a description of the residence or place of business and address of every attesting witness, and, in case such bill of sale shall be made or given by any person under or in execution of any process of execution, a description of the residence and [illegible]ation of the person against whom such process shall have issued. Every such affidavit may be in the Form A contained in the Schedule to this Act, with such variations as circumstances may require. "Provided, that where such bill of sale is made by an incorporated company, an affidavit in the Form E in the schedule to this Act, with such variations as circumstances may require, shall be attached to the same, and such last-mentioned affidavit may be made by the president, vice-president, director, manager, secretary, or other officer of the company duly authorized for such purpose:" 1905, ch. 8, sec. 7, sub-sec. (5); am., 2 Geo. V. (1912) ch. 2, sec. 3.

Validity of Affidavit.

See sec. 8 of the Ontario Act.

Partnerships.

A partner has implied authority to execute a bill of sale in the firm's behalf for the purpose of securing the debts of the firm: McClary Mfg. Co. v. Howland, 9 B.C.R. 479; see also Kay v. Chapman, (Sask.) 11 D.L.R. 726, 24 W.L.R. 80, following Kirk v. Burton, 9 M. & W. 283; Ex parte Darlington, 4 DeG. J. & S. 581; McCombie v. Davies, 6 East 538.

See note to Sask. Act, sec. 11.

The form is as follows: "Subscribed to and sworn before me this day of A.D., 19 ."

Although it is preferable that the place where the affidavit is sworn should be inserted, such is not necessary under this Act, and it will be presumed—from the fact that the officer administering the oath was a commissioner for taking affidavits in British Columbia—that he acted within the territorial limits of his authority, and not elsewhere: Brown v. Jowett (1895), 4 B.C.R. 44; French v. Bellew, 1 M. & S. 302; Meek v. Ward, 10 Hare 709; Regina v. Atkinson, 17 U.C.C.P. 295; Ex parte Johnson, 50 L.T.N.S. 214.

It was held, under the Ontario Act, that the affidavit of *bona fides* need not be made on the day the mortgage is executed: Perry v. Ruttan, 10 U.C.Q.B. 637.

The omission of the date and the words "before me" from the jurat of an affidavit accompanying a bill of sale is an invalidating defect which cannot be supplied by parol evidence: Archibald v. Hubley, 18 Can. S.C.R. 116.

See note to sec. 7 Alberta Sales Act, and sec. 11 Sask. Act; see also text, ch. XIII.

Stokes v. Spencer, [1900] 2 Q.B. 483, was a rather unusual case touching the validity of a bill of sale. An unmarried woman named Ott lived with a man named Spencer, whose name she assumed. After his death she continued to be known as Mrs. Spencer, and whilst so known she executed a bill of sale in her name of Ott, and without any reference to her assumed name. Its validity was attacked by a creditor of Mrs. Spencer. Grantham, and Channell, JJ., held, that the bill of sale was valid, as there is nothing in the English Bills of Sale Act requiring the grantor's correct name to be mentioned in the register: see 36 C.L.J. 702.

Since there is no legal obligation binding upon a husband to repay a sum of money which he had given his wife, but afterwards received back from her, a bill of sale executed by the husband to his wife for the purpose of securing the same is of no more binding effect, and therefore void: Cordingley v. McArthur, 6 B.C.R. 527.

Proof of Bill of Sale.

12. In case the attesting witness or witnesses to any bill of sale shall, before the making of the affidavit by the last preceding section required to be made, die or leave this Province, or become incapable of making or refuse to make such affidavit, it

shall be lawful for any Judge of the Supreme or County Court to make an order permitting the filing of such bill of sale or a copy thereof, upon such proof of the due execution and attestation thereof, as the Judge by such order may require and allow. An office copy of such order shall be annexed to the bill of sale or copy, as the case may be, and filed therewith; and the registration of the bill of sale or copy, under and in compliance with the terms of such order, shall have the like effect as the registration thereof with the affidavit required by the last preceding section, or as the case may be: 1905, ch. 8, sec. 7, sub-sec. (6).

Affidavit by Grantee.

13. Every bill of sale shall further be accompanied by an affidavit by the grantee, or one of several grantees, his or their agent, that the assignment is *bonâ fide* for valuable consideration, and that the consideration is duly set forth in the bill of sale, and that it is not for the purpose of enabling the grantee to hold the goods mentioned therein as against the creditors of the grantor; or, in the case of security for a debt, that the grantor is justly and truly indebted to the grantee in the sum therein mentioned, that it was executed in good faith, and for the express purpose of securing the payment of money justly due or accruing due; and in all cases that the bill of sale is not given for the purpose of protecting the goods and chattels mentioned therein against the creditors of the grantor, or of preventing the creditors of said grantor from obtaining payment of any claim against him; and the said affidavit shall be filed along with the said bill of sale, otherwise the registration of the bill of sale shall be void. This section shall not apply to the bills of sale mentioned in section 5: 1905, ch. 8, sec. 7, sub-sec. (8): 1908, ch. 6, sec. 5.

Recitals as to Sums.

A recital in a bill of sale that a certain sum was due from the mortgagor to the mortgagee, and a covenant by the mort-

gagor to pay that sum and also any other sum which, on taking account might appear to be due thereon, does not operate as an estoppel against a claim that the debt due at the date of the bill of sale was larger than the sum therein recited: Rithet v. Beaven, 5 B.C.R. 457.

Where the money consideration as set forth in a bill of sale has been actually paid to the grantor, it is not necessary to refer to the payment off of a prior bill of sale out of the proceeds: Re Davies, Ex p. Equitable Ins. Co., 77 L.T. 567.

A statement in a bill of sale that it is granted "in consideration of a sum of £90 now due and owing" does not truly set forth the consideration for which it is given, within the meaning of sec. 8 of the Imperial Act, 1882, when the grantor already owes £40 of the £90 to the grantee, and only receives the additional £50 on execution of the bill of sale: Davies v. Jenkins, [1900] 1 Q.B. 133.

The consideration for a bill of sale is none the less truly set forth to be "now paid" because part is applied by the grantee in pursuance of a contemporaneous agreement in retiring a current promissory note upon which the grantor and grantee are jointly and severally liable: Re Wiltshire Ex p. Eynon, [1900] 1 Q.B. 96, distinguishing Richardson v. Harris, 22 Q.B.D. 263.

Incorporated Company.

14. If any bill of sale as aforesaid be made to an incorporated company, the several affidavits and statements in the last preceding section mentioned may be made by the president, vice-president, secretary, manager, or assistant manager, or a director of such grantee company, or any other officer of the company authorized for such purpose: 1905, ch. 8, sec. 7, sub-sec. 7; 1908, ch. 6, sec. 4.

Substituted Bill of Sale.

15. Where a subsequent bill of sale is executed after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which

it is a security for the same debt or part thereof, and so far as respects the personal chattels, or part thereof, comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the Court having cognizance of the case that the subsequent bill of sale was *bonâ fide* given for the purpose of correcting some material error in the prior bill of sale and not for the purpose of evading this Act: 1905, ch. 8, sec. 7, sub-sec. (9).

Priorities.

16. Every bill of sale which hereafter shall be registered in accordance with the provisions hereof shall, subject to the provisions hereof, have and take precedence and priority over any unregistered bill of sale of the same chattels: 1905, ch. 8, sec. 7, sub-sec. (10).

Assignments.

17. A transfer or assignment of a registered bill of sale need not be registered: 1905, ch. 8, sec. 7, sub-sec. (11).

Cumulative Bills of Sale.

18. In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels: 1905, ch. 8, sec. 9.

Defeasance or Condition.

19. If the bill of sale is made or given subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the original or copy filed under this Act therewith, and as part thereof, otherwise the registration shall be void: 1905, ch. 8, sec. 8.

Condition or Defeasance.

This section follows *verbatim* sub-sec. 3 of sec. 10 of the Imperial Act, 1878. Thus, if a bill of sale is subject to a con-

dition or defeasance not contained in the body thereof, nor written on the same paper therewith as required by this section, the registration of the bill of sale is void; and if the defeasance or condition is one which is not in accordance with the form in the schedule to this Act, not only is the bill of sale void in respect of the chattels comprised therein under sec. 8 of the Act 1882 (similar to sec. 7 of British Columbia Act), but under sec. 9 (1882), of the Imperial Act it is void *in toto*, so that a covenant by the grantor contained therein for the payment of interest at a certain rate is void as against him: Smith v. Whiteman, [1909] 2 K.B. 437.

Where a bill of sale absolute in form is given, which, according to the evidence, the parties intended when it was given should be effectual only as a mortgage, it is a mortgage with all the incidents of one, and the condition of defeasance not being embodied in it, it becomes void under this section: Matheson v. Pollock (1893), 3 B.C.R. 74.

Similarly where a chattel mortgage is given to secure a promissory note of $725, amount of overdue account, and it was admittedly agreed at the time the mortgage was given that it was done on condition that if $500 were paid the mortgage should be given up, but no such condition was written in the document, and therefore void: Doll v. Hart, 2 B.C.R. 32.

It is immaterial that the bill of sale was given subject to a condition not contained therein, where possession of the goods is *bonâ fide* taken within 21 days after the execution of the bill of sale: McClary Mfg. Co. v. Howland, 9 B.C.R. 479.

Protection of Creditors.

20. Every creditor of the grantor of a bill of sale may, from time to time, in writing, require the grantee of such bill of sale to furnish a full statement of the accounts as between the grantor and grantee of such bill of sale:—

(1) Such demand for an account shall be accompanied by a statement shewing in full the accounts as between the grantor of the bill of sale and the applicant, and that the relationship of debtor and creditor exists between them, which statement shall be verified by a declaration pursuant to the "Canada Evidence Act;"

(2) Within fifteen days after such demand as aforesaid, the grantee of the bill of sale shall furnish the applicant with a full and complete statement of the accounts as between himself and the grantor in relation to the bill of sale, verified pursuant to the "Canada Evidence Act," otherwise the registration of the bill of sale shall be void. The person furnishing such statement shall be entitled to receive from the person demanding the same thirty cents per folio for such account and declaration, upon delivery of the same;

(3) The grantee of any bill of sale may be relieved from compliance with this section by order of a Judge of the Supreme or County Court, upon petition, upon said Judge being satisfied that the application is frivolous or not made in good faith, or for any other reason that to the Judge may seem just; and the Judge may award and order the costs occasioned by such demand and the petition to be paid by either party to the other after taxation thereof: 1905, ch. 8, sec. 10.

Verified Statement of Account.

The statutory declaration under sec. 36, ch. 145, R.S.C. 1906, is as follows: "Any Judge, notary public, justice of the peace, police or stipendiary magistrate, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or Dominion Courts, or any other functionary authorized by law to administer on oath in any matter, may receive the solemn declaration of any person voluntarily making same before him, in the form following, in attestation of the execution of any writing, deed or instrument or of the truth of any fact, or of any account rendered in writing:—

Canada,
Province of British Columbia,
To wit:

I, A.B., do solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of the Canada Evidence Act.

Declared before me at this day of A.D. 19 .

56 Vict. ch. 31, sec. 26, and sch. A.

See also the Evidence Act of British Columbia, R.S.B.C. 1911, ch. 78, sec. 66, and schedule thereto.

Rectification of Register.

21. Within one month from the date of the execution of any bill of sale, any Judge of the Supreme Court, on being satisfied by affidavit that the omission to register a bill of sale within the time prescribed by this Act, or to file the affidavit of *bona fides*, as required by sections 13 or 14, or the omission or mis-statement of the name, residence, or occupation of any person, was accidental or due to inadvertence, may, in his discretion, order such omission or mis-statement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration, on such terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter as he thinks fit to direct; and in the case of an extension of time being granted, such order shall be without prejudice to the rights of parties acquired prior to the actual date of registration. An office copy of any order made as aforesaid shall be annexed to the bill of sale or any copy thereof, as the case may be, and registered therewith: 1905, ch. 8, sec. 11; am., 2 Geo. V. (1912) ch. 2, sec. 4.

Power of Rectification.

The amendment to sec. 21 is practically an enactment of the principle enunciated in Re Ellis & Co., 14 B.C.R. 271, where it was held that the order extending the time of registration should contain a provision protecting intervening rights: see also Crew v. Cummings, 21 Q.B.D. 420.

The power of rectification of the "register" by this section is limited by its description in sec. 25 (1) providing for a description in the register of the party making the bill of sale, and that the term "any person" must be limited to the party giving the bill of sale and not to the attesting witness or witnesses. Therefore, a Judge has no power, in the case of an in-

advertent omission to describe the residence and occupation of an attesting witness, to allow a supplemental affidavit to be filed supplying such particulars: Crew v. Cummings, 21 Q.B.D. 420.

The time limited for the registration of a chattel mortgage may, on an ex parte application, under sec. 104 of the Companies Act, 1910, R.S.B.C. 1911, ch. 39, be extended when failure to record it at the proper place was due to inadvertence, though after a lapse of 60 days of its execution: Morrison-Thompson Hardware Co. v. West Bank Trading Co., 16 B.C.R. 314, 19 W.L.R. 294, affirming 16 B.C.R. 33.

To maintain an action to set aside an order for extension, if there are grounds warranting such action, it is necessary that there should be creditors in existence, at the time the order was made, who could maintain an action to set aside the chattel mortgage: *Ibid.*

Satisfaction.

22. The Registrar in whose office registration shall be effected as aforesaid is hereby empowered to enter satisfaction upon any bill of sale, or copy thereof, upon being satisfied that the debt (if any) or cause for which such bill of sale is given as security has been discharged, and upon payment of a fee of one dollar; but in all cases where the consent of the mortgagee, grantee, or assignee or person interested as such, as the case may be, has not been obtained, satisfaction shall not be entered without an order from a Judge of the Supreme or County Court obtained for that purpose: 1905, ch. 8, sec. 12.

Chattels in Several Districts.

23. Whenever any such Registrar shall enter satisfaction upon any bill of sale, and the goods or chattels comprised therein have been situate partly in one or more districts or registries, he shall, without extra charge, forward a notice in the Form D to the Schedule hereto to each of the registries in which the bill of sale has been filed, and each Registrar of such registries shall, on receipt of such notice, write the word "satisfied" on the duplicate or copy of such bill of sale filed in his office: 1905, ch. 8, sec. 13.

Affidavits.

24. All affidavits required by this Act to be taken and made may be taken by and made before the Registrar appointed under the provisions of this Act, or by and before any Judge, Registrar, Deputy Registrar, or Clerk of a Court having a seal, or by and before any Notary Public practising within the Province, Justice of the Peace, or Commissioner empowered to take affidavits; and if such affidavits are made without the Province, then such affidavits may be taken by and made before any person authorized by the "Evidence Act" for the making of affidavits without the Province for the purpose of any proceedings in any Court in the Province: 1905, ch. 8, sec. 14.

Commissioners to take Affidavits.

Where the commissioner's name is not signed to the jurat of the affidavit, the registration will be defective: Brown v. London & County Advance Co., 5 T.L.R. 199.

The omission in the jurat to describe himself as a commissioner will not invalidate the affidavit in the absence of proof that he was not a commissioner: Ex parte Johnson, Re Chapman, 26 Ch.D. 338.

If on the face of the affidavit it is shewn that it was sworn before a commissioner for taking affidavits in British Columbia, it will be presumed that the official acted within the territorial limits of his authority and not elsewhere: Brown v. Dowett, 1 B.C.R. 44.

The Evidence Act of British Columbia, R.S.B.C. 1911, ch. 78, sees. 55, 56, respecting affidavits and statutory declarations made without the Province, contains the following provisions.

55. The Lieutenant-Governor-in-council may, by one or more commission or commissions under his hand and seal, from time to time empower such and as many persons as he may think fit and necessary to administer oaths, and take and receive affidavits, declarations, and affirmations without the Province, in or concerning any cause, matter, or thing depending or in anywise concerning any of the proceedings to be had in the Supreme Court or any other Court in the Province.

The persons so appointed shall be styled "Commissioners for taking Affidavits in and for the Courts of British Col-

umbia;" and for every such commission the sum of twenty dollars shall be charged.

Every oath, affidavit, declaration, or affirmation taken or made before any such Commissioner shall be as valid and effectual, and shall be of the like force and effect, to all intents and purposes as if such oath, affidavit, declaration or affirmation had been administered, taken, sworn, made or affirmed before a Commissioner for taking affidavits within the Province, or other competent authority: R.S. 1897, ch 3, secs. 11, 12; 1911, ch. 1, sec. 5.

56. Oaths, affidavits, declarations, or affirmations administered, sworn, made, or affirmed, out of the Province, before some one of the following persons:—

A Commissioner authorized to administer oaths in the Supreme Court of Judicature in England;

A Judge of any of the Superior Courts in England, Ireland or Scotland;

A Judge of any of the County Courts in England or Ireland within his county;

A Sheriff or Sheriff's Substitute of any County of Scotland within his county;

A Notary Public and certified under his hand and official seal;

The Mayor or Chief Magistrate of any city, borough, or town corporate in the United Kingdom, or in any Colony of His Majesty without Canada, or in any foreign country, and certified under the common seal of such city, borough or town corporate.

A Judge of any Court of Record, or of supreme jurisdiction in any Colony without Canada, belonging to the Crown of the United Kingdom, or any dependency thereof, or in any foreign country;

Or, if made in the British possessions in India, before any Magistrate or Collector certified to have been such under the hand of the Governor of such possession;

Or, if made in Canada, before any Judge, Prothonotary, Notary Public, or Commissioner for taking Affidavits or authorized to administer oaths in, or the Clerk of, a Court of Record in the Dominion of Canada, or in any Province thereof, or before any Stipendiary Magistrate in the Territories of Canada;

Or before any Consul, Vice-Consul, or Consular Agent of His Majesty, exercising his functions in any foreign place—for the purposes of and in or concerning any cause, matter or thing depending or in anywise concerning any of the proceedings in any Court in the Province, shall be as valid and effectual and shall be of like force and effect, to all intents and purposes, as if such oath, affidavit, affirmation, or declaration had been administered, sworn, made, or affirmed in the Province before a Commissioner for taking Affidavits therein, or other competent authority: R.S. 1897, ch. 3, sec. 13.

Rules and Regulations.

25. The following rules and regulations shall be observed: Provided, however, that the Lieutenant-Governor-in-Council may from time to time repeal, alter, and vary the said rules, and make, repeal, alter and vary rules for giving effect to the provisions of this Act:—

Register.

1. Every Registrar shall cause every bill of sale and every such copy, and every affidavit filed in his office, to be numbered; and shall keep a book or books, in which he shall cause to be entered a numerical list of every such bill of sale, and copy, and affidavits, containing therein the name, addition, and description of the person making or giving the same; or, in case the same shall be made or given by any person under or in the execution of process as aforesaid, then the name, addition, and description of the person against whom such process shall have issued, and also of the person to whom or in whose favour the same shall have been given together with the number affixed to the said bill of sale, or copy, or affidavits; and the date of the said bill of sale, or copy, and of the registration thereof, and all such particulars, shall be entered according to the Form C given in the Schedule to this Act; and the said book, and every bill of sale, or copy, and affidavit filed as aforesaid, may be searched and

viewed by all persons, at all reasonable times, upon payment for every search of the fee of twenty-five cents:

Index Book.

2. Every Registrar shall keep an index-book shewing in alphabetical order the names of all persons making or giving bills of sale, and of all persons against whom process shall have issued as aforesaid, together with a cross-reference to the volume and folio of the book directed to be kept as in the last preceding sub-section, and every Registrar shall also keep an index-book in manner aforesaid, of all duplicates of bills of sale, or copies thereof, and affidavits as aforesaid, transmitted to him as hereinbefore provided:

Fees.

3. Every Registrar shall be entitled to receive for filing and registering every bill of sale, or a copy thereof, as aforesaid (including the taking of any affidavit) the sum of two dollars, and no more; and any person shall be entitled to have an office copy or an extract of every bill of sale, or of the copy thereof, upon paying for the same at the rate of twenty-five cents per folio of one hundred words:

4. In respect of any matter not hereinbefore provided for, the Registrar shall exact such fees as are prescribed by rule:

5. All moneys received by any Registrar under this Act shall be dealt with and accounted for in such manner as the Lieutenant-Governor-in-council may by order-in-council from time to time direct and appoint: 1905, ch. 8, sec. 15.

Saving Clauses.

26. When the time for registering a bill of sale expires on a Sunday or other day on which the Registrar's office is closed, the registration shall be valid if made on the next following day on which the office is open: 1905, ch. 8, sec. 16.

SCHEDULE.

"BILLS OF SALE ACT."

FORM A.

I, , of , make oath and say as follows:—

1. That the paper writing hereunto annexed, and marked "A," is a true copy of a bill of sale, and of every [*or where the original is filed*, is the bill of sale and every] schedule or inventory thereto annexed, or therein referred to, and of every attestation of the execution thereof, as made and given and executed by .

2. That the bill of sale was made and given by the said on the day of , in the year of our Lord one thousand nine hundred and .

3. That I was present and did see the said in the said bill of sale mentioned, and whose name is signed thereto, sign and execute the same on the said day of , in the year aforesaid.

4. That the said at the time of making and giving the said bill of sale resided and still resides [*if such be the fact*] at and then was and still is [*if such be the fact*]

[*If there has been a change of residence or occupation since execution of bill of sale, give particulars, or, if place of business be given, alter accordingly.*]

5. That the name set and subscribed as the witness attesting the due execution thereof is of the proper handwriting of me, this deponent, and that I reside at [*give number of house, street, and town*], and am .

Subscribed to and sworn before me this day of , 19 .

FORM B.

To the County Court Registrar at :

I hereby certify that the document hereunto annexed is a duplicate (or copy) of the bill of sale [*or* of the copy of the bill of sale, *as the case may be*] and of the affidavit, as filed in this office on the day of , 19 .

A. B.

FORM C.

No.	By whom given.			To whom given	Nature of Instrument.	Date of Instrument.	Date of Registration.	Amount of Purchase or Mortgage Money.	Short Particulars of Property sold or mortgaged	Date of Satisfaction entered.
	Name.	Address.	Occupation.							

FORM D.

To the County Court Registrar at :

Take notice that a bill of sale, bearing date the day of , A.D. 19 , made between , of , and , of , in consideration of the sum of dollars, has been satisfied, and satisfaction thereof was duly entered by me on the day of , 19 .

A. B.

1905, ch. 8, Sch.

FORM E.

For an Incorporated Company.

I, , of , president [secretary, director, *or as the case may be*] of the [*name of company or corporation,*] make oath and say as follows:—

1. That the paper writing hereunto annexed and marked "A" is a true copy of a bill of sale, and of [*or, when an original bill of sale is filed,* is a bill of sale together with] every schedule or inventory thereto annexed or therein referred to as made, given and executed by the said [*name of company or corporation.*]

2. That I, as president [secretary, director, *or as the case may be*] of the said company [*or* corporation,] being duly authorized so to do, did affix the seal of the said company [*or* corporation] to the said bill of sale, did sign the said bill of sale as president [secretary, director, *or as the case may be*] of the said company [*or* corporation,] and did duly deliver the said bill of sale as the act and deed of the said company [*or* corporation] on the day of , 19 .

3. That the head office or chief place of business of the said company [*or* corporation] in British Columbia is situate at [*here state fully the whereabouts of the head office or chief place of business, such as street and number* (*if any*)], in the said Province.

Subscribed to and sworn before me this day of 19 .

2 Geo. V. (1912) ch. 2, sec. 6.

REVISED STATUTES OF BRITISH COLUMBIA, 1911.

CHAPTER 79.

AN ACT TO FACILITATE AND EXPLAIN THE REMEDIES OF CREDITORS AGAINST THEIR DEBTORS.

Short Title.

1. This Act may be cited as the "Execution Act," R.S. 1897, ch. 72, sec. 1.

Interest of a Mortgagor in Goods.

17. Under any writ of execution against goods, the Sheriff, or other officer to whom the same is directed, may seize and sell the interest or equity of redemption in any goods or chattels of the execution debtor, and such sale shall convey whatever interest the execution debtor had in the goods and chattels at the time of the seizure: R.S. 1897, ch. 72, sec. 24.

Definitions.

Section 2 of this Act defines that "execution creditor" shall include every person and corporation in whose name or on whose behalf a writ of execution shall be issued on any judgment, or in whose favour an order for sale of land has been made under this Act.

"Execution debtor" shall include every person or corporation against whom or against whose property other than land a writ of execution shall be issued on any judgment, or against whose land an order for sale has been made under this Act.

"Writ of execution" means and shall include writs of *fieri facias*, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto; and also, for the purposes of this Act, means and shall include every warrant or other process of execution sued out of any County or Inferior Court in the Province having jurisdiction to grant and issue such warrant or process of execution.

"Execution" shall include an order for the sale of land under this Act: R.S. 1897, ch. 72, sec. 2 (part); 1908, ch. 26, sec. 2 (part).

REVISED STATUTES OF BRITISH COLUMBIA, 1911.

CHAPTER 166.

AN ACT TO AMEND THE LAW RELATING TO COSTS ALLOWED TO MORTGAGEES.

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

Short Title.

1. This Act may be cited as the "Mortgagees' Legal Costs Act": 1900, ch. 22, sec. 1.

Interpretation.

2. In this Act—

"Mortgage" includes any charge on any property for securing money or money's worth. [58 and 59 Vict. ch. 25, sec. 4] 1900, ch. 22, sec. 4.

Legal Costs.

3. Any solicitor to whom, either alone or jointly with any other person, a mortgage is made, or the firm of which such solicitor is a member, shall be entitled to receive for all business transacted and acts done by such solicitor or firm negotiating the loan, deducing and investigating the title to the property, and comparing and completing the mortgage, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and to do such acts; and such charges and remuneration shall accordingly be recoverable from the mortgagor. [58 and 59 Vict. ch. 25, sec. 2, sub-sec. (1)] 1900, ch. 22, sec. 2, sub-sec. (1).

Solicitor's Charges.

4. Any solicitor to or in whom, either alone or jointly with any other person, any mortgage is made or is vested by transfer or transmission, or the firm of which solicitor is a member, shall be entitled to receive and recover from the person on whose behalf the same is done or to charge against the security for all business transacted any acts done by such solicitor or firm subsequent and in relation to such mortgage, or to the security thereby created or the property therein comprised, all such usual professional charges and remuneration as he or they would have been entitled to receive if such mortgage had been made to and had remained vested in a person not a solicitor, and such person had retained and employed such solicitor or firm to transact such business and to do such acts, and accordingly no such mortgage shall be redeemed except upon payment of such charges and remuneration. [58 and 59 Vict. ch. 25, sec. 3, sub-sec. (1)] 1900, ch. 22, sec. 3, sub-sec. (1); amended 1913, ch. 45, sec. 2.

MANITOBA

ACT RESPECTING MORTGAGES AND SALES OF PERSONAL PROPERTY.

(R.S.M. 1902, CH. 11, AND AMENDMENTS.)

Short Title.

1. This Act may be cited as "*The Bills of Sale and Chattel Mortgage Act.*" 63 and 64 Vict. ch. 31, sec. 1.

Origin of Enactment.

This statute is apparently framed after that of Ontario: Bernhart v. McCutcheon, 12 Man. L.R. 394.

Bulk Sales.

The sale of a stock-in-trade when made in bulk is subject so to the provisions of the "Bulk Sales Act" of Manitoba, 1909, ch. 60.

Interpretation.

2. In this Act, unless the context otherwise requires, —

(*a*) The expression "actual and continued change of possession" shall be taken to be such change of possession as is open and reasonably sufficient to afford public notice thereof;

(*b*) The expression "clerk of the County Court" or "clerk" includes a deputy clerk or acting clerk;

(*c*) The expression "judicial division" includes such territory as by any provision in any statute or order-in-council is now assigned to any County Court, or that shall hereafter, by any Act or by order-in-council, be assigned to any County Court;

(*d*) The expression "creditors" extends to and includes any assignee for the general benefit of creditors of the mortgagor or bargainor: 63 and 64 Vict. ch. 31, sec. 2.

Creditors; Assignees.

A simple contract creditor has not, before obtaining judgment for his debt, a status to make an attack upon a chattel mortgage under the Bills of Sale and Chattel Mortgage Act for non-compliance with its provisions: Empire Sash and Door Co. v. Maranda et al., 21 Man. L.R. 605.

An assignment to an official assignee, under the statute, 49 Viet. (Man.) ch. 45, was held to make the assignee a purchaser for value: Bertrand v. Parkes, 8 Man. L.R. 175, and see Cox v. Schack, 14 Man. L.R. 174.

Compare sec. 2 of this Act with sec. 2 of the Ontario Act.

Actual and Continued Change of Possession.

Prior to the enactment of this sub-section in this Act, the Manitoba Court referring to the Ontario Act, R.S.O. 1897, ch. 148, sec. 39 (now sec. 2 (*a*), ch. 65, of the Act of 1910), placed the same construction on the expression "actual and continued change of possession" as is now expressly provided: see Bernhart v. McCutcheon, 12 Man. L.R. 394.

The handing over the keys of the building, the giving the combination of the safe, and the former proprietors going out of possession, the securing by the grantee of a license in his own name, and the conducting of the business by him thereafter, are all acts of a notorious character within the meaning of the statutory expression of "immediate delivery followed by an actual and continued change of possession," as to dispense with registration of a bill of sale under the Bills of Sale and Chattel Mortgage Act: Berg v. Kern, (Man.) 6 W.L.R. 755, 757, following Trust and Loan Co. v. Wright, 11 Man. L.R. 314, where the same principle was applied where the seller, at the request of the purchaser remained in possession of the chattels, and subsequently, at the former's leaving, told the purchaser that he was going away, but that a boy who had been employed in his service would take care of everything, and thereafter the purchaser, by her servants, remained in possession of the chattels.

Sales.

3. Every sale made of goods and chattels, situated in the Province of Manitoba, not accompanied by an immediate delivery, followed by an actual and continued change of possession

sion, of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of this Act, and shall be accompanied by an affidavit of a subscribing witness thereto of the due execution thereof, and an affidavit by the bargainee or his agent that the sale is *bonâ fide* and for good or valuable consideration, as set forth in the said conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, and the conveyance and affidavits shall be registered, as by this Act provided, within twenty days from the date thereof, otherwise the sale shall be absolutely null and void as against the creditors of the bargainor, and as against subsequent purchasers or mortgagees in good faith for good or valuable consideration: 63 and 64 Vict. ch. 31, sec. 3; 1 and 2 Edw. VII. ch. 28, sec. 1.

Object of Statute.

The object of the statute is to guard creditors from being deceived and defrauded by their debtors remaining in the possession of goods and chattels that they have disposed of by a bill of sale or a chattel mortgage: *per* Bain, J., Robertson v. Wrenn (1895), 10 Man. L.R. 378. Compare sec. 8 of the Ontario Act.

If, however, a creditor was aware that there had been a sale, and an actual and continued change of possession following the sale, he cannot be prejudiced by the fact that a written bill of sale or mortgage had not been filed, whether or not such change of possession was apparent to the public generally: Robertson v. Wrenn (1895), 10 Man. L.R. 378, and see Danford v. Danford, 8 A.R. (Ont.) 518.

Although a grantee cannot, by any act of his own in seizing the goods, give himself a better title than he had before, yet the grantor may, by making a delivery which would operate in law as a conveyance of goods capable of passing by delivery, effectually cure a prior defective conveyance, or a prior defective parol contract: Hovey v. Whiting, 14 Can. S.C.R. 515; Trust & Loan v. Wright (1895), 11 Man. L.R. 314.

The case of Jackson v. Bank of Nova Scotia (1893), 9 Man. L.R. 75, is distinguishable from the latter decision, for in the

former the connection of the vendor with the transaction of sale ceased entirely with the making of the agreement for sale, and the subsequent act of the purchaser in taking possession was not such as to justify an inference that the possession might be referred to a new contract of sale actually or impliedly made between him and the vendor. His claim to possession, being there referable solely to the original invalid contract, was invalid as against the execution creditors of the vendor, although possession was taken before execution was issued: Trust & Loan v. Wright (1895), 11 Man. L.R. 314.

Consideration; Party Taking in Good Faith.

The consideration of natural love and affection which a parent has for his child, or one has for any of his relatives, is a good consideration.

The former Act, R.S.M. 1891, ch. 10, mentioned only a "valuable" consideration, while, by the present Act, either a "good" or "valuable" consideration is sufficient in order to sustain the validity of the instrument as against a subsequent purchaser or mortgagee. Another variance is that the words "without actual notice" as they appear in sec. 2 of the Act of 1891, ch 10, are omitted in sec. 2 of the present Act, thus making the section more closely conformable with sec. 6 of the former Ontario Act, R.S.O. 1897, ch. 148; see sec. 8 of the present Ontario Act. The fact of having notice, either express or implied, does not necessarily debar a subsequent purchaser from claiming that he holds that status "in good faith." For instance the title of a chattel mortgagee without possession of the goods is a merely statutory one, and if the description of some of the goods in the mortgage fails to specify the goods so that they could be readily and easily known as demanded by the statute, the result may be the same as if such goods had not been mentioned at all in the mortgage: Moffatt v. Coulson, 19 U.C.Q.B. 341; Edwards v. English, 7 E. & B. 564. Notice of the existence of a mortgage insufficient to pass the property, would not make the subsequent purchaser taking without collusion and for a fair consideration, a purchaser, other than in good faith, where he bought from the mortgagor in possession: Moffatt v. Coulson, 19 U.C.Q.B. 341.

Change of Possession.

Brown v. Peace (1897), 11 Man. L.R. 409, is authority for the rule that, notwithstanding an ante-nuptial settlement made

by the husband, including the household furniture in question, in favour of the intended wife, and the furniture having been in use in the house occupied by the husband and wife since the marriage, the possession must be presumed to have been his and not hers, and that there was no change of possession at the marriage. It may be doubted if Brown v. Peace correctly decides the law. In that case the husband, just before marriage, executed an agreement to convey all his property to the intended wife forthwith after marriage, to pay the expenses of the household, and to make certain other transfers within five years of future acquired property of a fixed amount, which the Court seemed to consider as practically a settlement of all his after-acquired property. Two years later a bill of sale was made to the wife, when the husband was admittedly insolvent, to protect her as a creditor, the furniture conveyed having been from the time of the marriage in the house occupied by them. The Court (Taylor, C.J., Dubuc, and Bain, JJ.), attempted to distinguish the case as to sufficiency of possession from Ramsay v. Margrett, [1894] 2 Q.B. 18, where it was held that the wife, who had purchased the furniture from her husband and paid the money therefor, had the legal title and possession sufficient to take the case out of the Act. The *ratio decidendi* of Ramsay v. Margrett was that the situation of the goods being consistent with their being in the possession of either the husband or the wife, the law would attribute the possession to the wife, who had the legal title. That may now be considered as settled law, and, it is submitted, was fully applicable to the facts in Brown v. Peace. Marriage being a valuable consideration in law, the settlement should have been supported, in the absence of evidence of fraud on the part of the intended wife who was found not to have been a party "to the intention to commit a fraud on the creditors," and her legal rights should not have been affected by a finding of fraud as against her husband, and her possession, supported by her equitable title, is within the principle of Ramsay v. Margrett (*supra*); see also Bank of B.N.A. v. McIntosh, 11 Man. L.R. 503.

The making of the bill of sale was taken by Dubuc, J., in Brown v. Peace (at p. 414), to be evidence that both husband and wife considered that she was not at the date thereof in possession of the goods; but it is difficult to see where estoppel arises if the usual form is used, which evidences not only a pre-

sent transfer, but states that the bargainor "hath bargained, sold and assigned," etc., and "by these presents doth bargain, sell, assign," etc.

In the case of Munroe v. Ferguson, 6 W.L.R. 755 (Man.), plaintiff purchased goods and chattels from the owner and assumed payment of a chattel mortgage thereon, and it was held as against an execution creditor, that the giving over of the keys by the seller, disclosing the safe combination and going out of possession, and the securing of a hotel license by plaintiff who continued the business, were absolute evidences of an actual and continued change of possession.

An agreement to deliver at a certain place a number of cords of wood out of two piles, the price of which has been paid, but no delivery or the setting apart of the wood so sold being made, does not transfer title of the wood to the buyer as against the assignee for the benefit of creditors of the seller, unless there be a compliance with sec. 3 of the Bills of Sale and Chattel Mortgage Act, and that, although the buyer agrees to bear the loss if the wood so bought were destroyed by fire: Haverson v. Smith, 6 Man. L.R. 204.

While an appropriation and setting apart by the seller of ascertained future goods by description, in a deliverable shape—*e.g.*, the setting aside a designated number of orders of wood in a designated place—and the acceptance thereof by the buyer might tend to shew an "immediate delivery" within the meaning of this section, still, it does not warrant the conclusion that there had been the "actual and continued change of possession" necessary to satisfy the Act, which must be such change, as is openly and reasonably sufficient to afford public notice thereof, as expressly provided in sec. 2 (*a*) of this Act: Bernhart v. McCutcheon, 12 Man. L.R. 394. The Court based its decision on the language of sec. 39, ch. 148 of R.S.O. 1897, now sec. 2 (*a*), ch. 65, of the present Ontario Act, 1910, the identical section of which having been enacted as sec. 2 (*a*), ch. 11, R.S.M. 1902.

An instrument transferring goods in the hands of a warehouseman, who becomes the agent of the transferee and agrees to hold the goods for him, is not an instrument within this Act requiring registration: Jones v. Henderson, 3 Man. L.R. 433

Assignments for Benefit of Creditors.

The Assignment Act, R.S.M. 1902, ch. 8, sec. 11, provides, that "no assignment made for the general benefit of creditors under this Act (the Assignment Act) shall be within the operation of the Bills of Sale and Chattel Mortgage Act."

Mr. Justice Bain, in delivering the judgment of the Court in Bathgate v. Merchants Bank, 3 Man. L.R. 210, said: "I can come to no other conclusion than that this section requires the full and true consideration for which a bill of sale is given to be set out in it with substantial accuracy, and, if it is not so set out, the bill of sale is void."

This decision is followed and approved in Boddy v. Ashdown 1897), 11 Man. L.R. 555, 33 C.L.J. 407; see also Darlow v. Bland, [1897] 1 Q.B. 125; Parkes v. St. George, 10 A.R. (Ont.) 496.

Affidavits with Bill of Sale.

The signature of a person having authority to administer the oath is an essential part of an affidavit, and where, by inadvertence, the Commissioner had omitted to sign on the copy which was sent for filing and accepted by the officer, the instrument was held invalid as against execution creditors: Inman v. Rae (1895), 10 Man. L.R. 411; and see Farmers and Traders v. Conklin, 1 Man. L.R. 181; Ford v. Kettle, 9 Q.B.D. 143.

The affidavit of an attesting witness to a bill of sale need not state in so many words that he did attest it. If such inference can be drawn from such affidavit it is sufficient: Yates v. Ashcroft, 47 L.T.R. 337.

The affidavit filed with a bill of sale stating that the bill of sale was executed "on the day of which the same bears date," and, in another part, stating the day, with a clerical error in substituting 1806 for 1876, is a sufficient affidavit of the time of execution: Lamb v. Bruce, 45 L.J.Q.B. 538.

For affidavits of *bona fides* in case of bills of sale by corporations for the purpose of securing bonds or debentures, see sec. 45 and sub-secs. thereto of this Act.

Agreements of Sale.

4. Every covenant, promise or agreement for the sale of goods and chattels, in whatsoever words the same may be ex-

pressed, shall be deemed to be a sale of goods and chattels within the meaning of this Act, and, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession, of the said goods and chattels, shall be in writing, and such writing, accompanied by affidavits of execution and *bonâ fides*, shall be registered within the time and in the manner prescribed in the next preceding section otherwise the said covenant, promise or agreement shall be absolutely void as against creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith for good or valuable consideration: 63 and 64 Vict. ch. 31, sec. 1

Agreements of Sale.

See secs. 16 and 17 of the Ontario Act, and note to the preceding section.

Mortgages.

5. Every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels situate in the Province of Manitoba, which is not accompanied by immediate delivery and an actual and continued change of possession of the things mortgaged, shall be registered, as by this Act provided, within twenty days from the date thereof, together with an affidavit of a subscribing witness thereto of the due execution of such mortgage or conveyance, and with an affidavit of the mortgagee or his agent that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith, and for the express purpose of securing the payment of money justly due or accruing due, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor or of preventing the creditors of such mortgagor from obtaining payment of any claim against him, otherwise such mortgage or conveyance shall be absolutely null and void as against the creditors of the mortgagor and as against subsequent purchasers or mortgagees in good faith for good or valu-

able consideration: 63 and 64 Viet. ch. 31, sec. 5; 1 and 2 Edw. VII. ch. 28, sec. 2.

Chattel Mortgages Must be Filed.

See sec. 5 of the Ontario Act.

Application of the Statute.

If the transaction is in fact a transfer simply as security, the provisions of this section should be followed, and not those of section 3, and a bill of sale absolute in form and registered with an affidavit of *bonâ fides*, pursuant to section 3, will not be valid as against an execution creditor unless there is an immediate delivery and actual and continued change of possession of the goods. Not only is it bad for non-compliance with this section, as "a conveyance intended to operate as a mortgage," coming within its terms, but there would not be a setting forth of the true consideration, as is implied from the language of section 3: Boddy v. Ashdown (1897), 11 Man. L.R. 555; Bathgate v. Merchants Bank, 5 Man. L.R. 210; Matheson v. Pollock, 3 B.C.R. 74.

As between a party claiming machinery in a planing mill under a hire and sale receipt, and another claiming the same under a mortgage of the realty from the purchaser under the same receipt, such machinery is personalty: Waterous v. Henry, 1 Man. L.R. 36.

The Filing.

It has been held in Manitoba that a chattel mortgage is good though the word "him" be omitted at the conclusion of the affidavit of *bonâ fides*: Ontario Bank v. Miner, Armour's Man. R., Temp. Wood, p. 162, 167; but the Ontario authorities are the other way: Re Andrews, 2 A.R. (Ont.) 24.

"Such mortgage" means one that has been filed together with the affidavits of execution and *bonâ fides*.

The former provision in the Consolidated Statutes of Manitoba from which this section is taken, made it clear that the two affidavits were to be filed with the mortgage itself, and the change of language has not affected that requirement, as the statute still shews the intention that the affidavits are to be filed with the mortgage in manner similar to what is required

in the case of a bill of sale under section 3: Inman v. Rae (1895) 10 Man. L.R. 411.

Chattel mortgages take effect only from filing, as against executions, creditors and subsequent purchasers, and if the mortgage or affidavits filed be defective, the mortgage does not operate to pass an interest in the goods: Massey v. Clement (1893), 9 Man. L.R. 359.

Mortgagee in Good Faith.

The notice of the prior unfiled mortgage does not prevent the second mortgagee from being a mortgagee "in good faith" within the meaning of the statute, if the mortgage is taken for a fair consideration and not for a collusive purpose: Roff v. Kreeker (1892), 8 Man. L.R. 230, overruling King v. Kuhn, 4 Man. L.R. 413; see also Moffatt v. Coulson, 19 U.C.Q.B. 341; Tidey v. Craib, 4 O.R. 696; Marthinson v. Patterson, 20 O.R. 720.

A second chattel mortgage made in good faith and for valuable consideration now takes priority over a prior unfiled mortgage even though the second mortgagee had actual notice of the prior mortgage: Roff v. Kreeker (1892), 8 Man. L.R. 230.

Non-compliance.

Where an assignee is given statutory powers analogous to those of a trustee in bankruptcy he is not barred from setting up the want of registration: Bertrand v. Parkes (1892), 8 Man. L.R. 175.

The mortgagor cannot resist a claim under the mortgage because of the want of filing, nor can his assignee in trust for creditors, in the absence of a statutory title so as representing creditors: Burland v. Moffatt, 11 Can. S.C.R. 76.

A simple contract creditor cannot attack the validity of a chattel mortgage for non-compliance with this section: Empire Sash and Door Co. v. Maranda, 21 Man. L.R. 605, following Parkes v. St. George, 10 A.R. (Ont.) 496; Hyman v. Cuthbertson, 10 O.R. 443; see sec. 2 (*d*) of this Act.

A request by a mortgagee of the mortgagor to delay delivery of cordwood, the performance of which depended on an agreement secured by a chattel mortgage, does not suspend the mortgagee's right, as against the mortgagor, to seize the chattels under the insecurity clause or for instalments in fact ove

particularly where the default takes place after the period allowed for the delay and the request is not fully established by the evidence: Mayer v. Mackie, (Man.) 15 W.L.R. 128.

A lien note defective by reason of non-compliance with the Lien Notes Act, R.S.M. 1902, ch. 99, will be treated as between the parties, as an instrument intended to operate as a mortgage of goods, and in the absence of an actual and continued change of possession prior to the debtors' assignment for insolvency it will be held null and void, for want of registration under this section and sec. 2(*d*), as against the creditors of the latter or the assignee for their general benefit: Cox v. Schack, 14 Man. L.R. 174, 38 C.L.J. 389.

Under the Bank Act, R.S.C. 1906, sec. 80, security may be taken from the owner of horses for an existing debt by a bill of sale of the horses which expressly states that it is taken only "by way of additional security for the debt," and sec. 80 of the Act does not prevent the bank from recovering on promissory notes made in its favour by a person who purchased the horses from the transferor: Bank of Hamilton v. Donaldson, 13 Man. L.R. 378.

Affidavits.

The affidavit of *bona fides* under section 5 is not required in the event of a "mortgage or conveyance" made by a company incorporated under an Imperial, Dominion or Manitoba Act or charter for the purpose of securing bonds or debentures to a bond holder or trustees of such company, where an affidavit in lieu thereof is provided for. (See section 45 *infra*.)

The insertion in the affidavit of a clause reading, "That I am the duly authorized agent of the mortgagee," was an apparent mistake and did not vitiate it, although it was the affidavit of the mortgagees themselves. The fact that it is stated in the jurat that the affidavit has been "sworn," whereas the deponents affirmed, is not a fatal objection, as by the Interpretation Act the expressions "swear" and "sworn" respectively include "affirm solemnly" and "affirmed solemnly." The Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, ch. 11, sec. 5, does not require that the occupation of the mortgagee should be stated in the affidavit of *bona fides*: Dyck v. Graening, 17 Man. L.R. 43, 43 C.L.J. 547.

An error in the statement of the indebtedness in the affidavit of *bona fides* sworn to by the mortgagee, in the absence of fraud, does not invalidate the chattel mortgage: Bernhart v McCutcheon, 12 Man. L.R. 394, following Martinson v. Patterson (1892), 19 A.R. 188; Martin v. Sampson (1896), 24 A.R. 1. But to totally omit the amount of the indebtedness from the affidavit of *bona fides* is fatal; for instance, a recital that "the mortgagor in the foregoing bill of sale by way of mortgage is justly and truly indebted to me this deponent, Alexander McIntyre, the mortgagee herein named, in the sum of ———— dollars mentioned therein:" McIntyre v. Union Bank, 2 Man. L.R. 305.

A chattel mortgage is invalid and of no effect as against the execution creditors of the mortgagor when the jurat on the affidavit of execution filed with the mortgagee was not signed by the commissioner before whom it was sworn: Inman v. Rae, Ramsay, claimant, 10 Man. L.R. 411. Where the party before whom the affidavit was sworn, signed over the jurat the mortgage is not vitiated: Mowat v. Clement, 3 Man. L.R. 585

The filing of a chattel mortgage without an affidavit of *bona fides* invalidates the registration but does not affect the right of the mortgagee to exercise the powers reserved to him by the mortgage, as against the mortgagor: Collins v. Eaton, (Alta.) 19 W.L.R. 608.

The manager of a branch of an incorporated bank to which a chattel mortgage is made for a debt due the bank at that branch is an agent authorized to make the affidavit of *bona fides*: Ontario Bank v. Miner (Man. R.), Temp. Wood 167.

Erroneous Names.

A chattel mortgage is void as against creditors where the mortgagor is described as "Abraham B. Beeksted" when his name is "Abraham V. Beeksted," and although he executed the mortgage by signing his name correctly: Van Whort v. Smith, 4 Man. L.R. 421. In the same case it was decided that describing the addition of the mortgagee in the affidavit of *bona fides* as a trader, when in fact, he was not a trader, did not vitiate the mortgage.

In Downs v. Salmon, 57 L.J.Q.B. 454, 20 Q.B.D. 775, a bill of sale by husband and wife shewed the husband's name as "Alfred Salmon" and stating the wife to be the "wife of Al-

fred." The true name of the husband was "George Henry Arthur" and it further appeared the misdescriptions were made purposely to hide the fact that they had given a bill of sale, and it was held by the Court that registration of the instrument was not thereby rendered invalid.

The case of Central Bank v. Hawkins, 62 L.T. 901, holds that a bill of sale was duly registered where it was signed by the grantor with an assumed name, known under such name to the grantee, and in the neighbourhood for several years and under which name he carried on business and under which the instrument was registered; it was also held to be valid, and that under sec. 10 of the Bills of Sale Act, 1878, it was not necessarily required to execute the instrument, nor to register it under the real name of the grantor.

Consideration.

The subject-matter of a mortgage may be such as to make it good in part and bad in part, and will be sustained as to the good part if severable from the other: Mowat v. Clement, 3 Man. L.R. 585; see also Kitching v. Hicks, 6 O.R. 739; Hughes v. Little, 18 Q.B.D. 32. See note to sec. 5 of the Ontario Act.

The true consideration of a bill of sale must be set out in it with substantial accuracy: Bathgate v. Merchants' Bank, 5 Man. L.R. 210. But a chattel mortgage reciting the consideration as $912.20, whereas $612.20 was made up of notes given by the mortgagor to the mortgagee, but then under discount in a certain bank, and not due, accompanied by the usual mortgagee's affidavit, stating that the mortgagor was justly and truly indebted to the mortgagee in the amount mentioned, was held by a full Court, Taylor, J., dissenting, to be a valid mortgage: Fish v. Higgins, 2 Man. L.R. 65.

Following Fish v. Higgins (*supra*), it was held that a chattel mortgage expressly securing the payment of a certain amount alleged owing by the mortgagor to the mortgagee, while a large portion of the amount was represented by notes which the mortgagee had previously transferred to a bank as security for his own debt, was not, on that account, invalid: Stephens v. McArthur, 6 Man. L.R. 496; reversed on other grounds in 19 Can. S.C.R. 446.

The consideration for a bill of sale was stated to be "the sum of £182 now paid by the grantee to the grantor." That sum,

at the request of the grantor, was in fact paid by discharging three several debts of the grantor and paying the balance to him. There was no suggestion of any fraud, and it was held to be a sufficient statement of the consideration within sec. 8 of the Imperial Bills of Sale Act, 1878: Hamlyn v. Betteley, 49 L.J.C.P. 465.

Where a bill of sale was stated to be made in consideration of £120 advanced, whereas, in fact, only part was so paid, the balance being retained for costs and expenses, and appended to the bill of sale was a receipt stating that the part advanced with the amount retained "made up the sum of £120," the expressed consideration, the Court ruled the instrument did not set forth the consideration for it under sec. 8 of the Imperial Bills of Sale Act, 1878, and was void as against a liquidator, and that the receipt was not part of deed: Charing Cross Bank, In re Parker, 50 L.J. Ch. 157; Ex parte Beetenson, In re Rogers, 42 L.T. 808; and see Ex parte Challinor, In re Rogers, 16 Ch.D. 260.

Similarly a bill of sale given to secure a past debt contracted by instalments states that the consideration is "now paid" the consideration is not truly set forth within sec. 8 of the Imperial Bills of Sale Act, 1878: Ex parte Berwick, 43 L.T. 576; Criddle v. Scott, 59 J.P. 119.

But a chattel mortgage given to secure an agreement to make a loan and reciting the total amount then due, was held to be given partly in respect of the original agreement and partly in respect of a subsequent advance, actually made to such an amount as to constitute a substantial equivalent as set forth in the recital, and therefore valid as against the assignee in bankruptcy: Mercer v. Peterson, L.R. 3 Ex. 104.

Fraudulent Preferences.

A chattel mortgage, although given under circumstances entitling a creditor to have it set aside as a fraudulent preference under sec. 41 of the Assignments Act, R.S.M. 1902, ch. 8, will nevertheless, be held valid as to any goods covered by it which would, under sec. 29 of the Executions Act, R.S.M. 1902, ch. 58, be exempt from seizure under execution: Bates v. Cannon, 18 Man. L.R. 7.

The mere taking of a chattel mortgage, without taking possession of the mortgaged goods, although it may constitute a

fraudulent preference under the Assignments Act, R.S.M. 1902, ch. 5, cannot be said to be a tort within the meaning of paragraph (*e*) of rule 201 of the King's Bench Act, R.S.M. 1902, ch. 40, and there is no jurisdiction to serve a statement of claim out of the jurisdiction in an action against a non-resident to set aside such a chattel mortgage, although given to him by a resident debtor on goods within the jurisdiction: Anchor Elevator Co. v. Heney, 18 Man. L.R. 96.

Agreements for Future Advances.

6. In case of an agreement for future advances for the purpose of enabling the borrower to enter into and carry on business with such advances, the time of repayment thereof not being longer than two years from the making of the agreement, and in case of a mortgage of goods and chattels for securing to the mortgagee the repayment of such advances, or in case of a mortgage of goods and chattels for securing the mortgagee against the indorsement of any bills or promissory notes, or any other liability incurred by him for the mortgagor, not extending for a longer period than two years from the date of such mortgage, and in case the mortgage is executed in good faith and sets forth fully, by recital or otherwise, the terms, nature and effect of the agreement and the amount of the liability intended to be created, and in case such mortgage is accompanied by an affidavit of a subscribing witness thereto of the due execution thereof, and by the affidavit of the mortgagee or his agent stating that the mortgage truly sets forth the agreement entered into between the parties thereto, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage, and that such mortgage is executed in good faith and for the express purpose of securing to the mortgagee the repayment of his advances, or against the payment of the amount of his liability for the mortgagor, as the case may be, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor nor to prevent such creditors from recovering any claims which

they may have against such mortgagor, and in case such mortgage is registered, as by this Act provided, within twenty days from the date thereof, the same shall be as binding as mortgages mentioned in the fifth section of this Act: 63 and 64 Viet. ch. 31, sec. 6, part.

Mortgage for Future Advances.

In the former statute ch. 10, 1891 (Man.), section 5, a mortgage for future advances or for securing endorsers, was required to be filed with the clerk of the County Court, as provided by former sec. 14 of R.S.M. 1891, ch. 10, but no time was specified within which the filing should be made. It became effective "only from and after the time of filing." But a change has been made in the present statute, ch. 11, R.S.M. 1902, sec. 6, that if such mortgages are registered as now provided they should be as binding as mortgages mentioned in sec. 5, if they are so registered within 20 days from their date.

A mortgage to secure future advances must be re-payable within two years: Mowat v. Clement, 3 Man. L.R. 585.

Excessive Security.

The mere fact that the mortgaged chattels are treble the value of the advances for which the mortgage is given as security, does not necessarily affect the *bona fides* of the transaction where the money was advanced in good faith, even though in small proportions, for the purpose of enabling the mortgagor to carry on his business: Bittlestone v. Cook, 6 El. & Bl. 296.

See sec. 6 of the Ontario Act.

Agreements for Mortgage.

7. Every covenant, promise or agreement entered into to make, execute or give a mortgage or conveyance intended to operate as a mortgage of goods and chattels, in whatever words the same may be expressed, shall be deemed to be a mortgage or conveyance within the meaning of this Act, and, unless accompanied by an immediate delivery and an actual and continued change of possession of the goods and chattels mortgaged, shall be registered within the time and in the manner prescribed in the next preceding section, together with affidavits of *bona*

fides and execution, otherwise such covenant, promise or agreement shall be absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for good or valuable consideration: 63 and 64 Viet. ch. 31, sec. 7.

Agreements for Chattel Mortgages.

See secs. 16 and 17 of the Ontario Act.

Verbal Agreements for Sale or Mortgage.

8. Every verbal agreement to the effect mentioned in the fourth and seventh sections of this Act, and not reduced to writing, shall be absolutely null and void to all intents and purposes whatsoever, as against creditors or subsequent purchasers or mortgagees in good faith for good or valuable consideration: 63 and 64 Viet. ch. 31, sec. 8.

When Sales and Mortgages Shall Take Effect.

9. Every sale or mortgage or agreement for sale or mortgage of goods and chattels made, executed or given under the provisions of this Act shall only be operative and take effect, except as between the parties thereto, from and after the day and time of the registration thereof as required by this Act: 63 and 64 Viet. ch. 31, sec. 9.

When Documents Effective.

This section differs from the Ontario Act in that the Manitoba Act makes the instruments operative from the time of registration, whereas, under the Ontario Act they relate back to the time of execution: see sec. 9 of the Ontario Act.

Description of Goods.

10. All the instruments mentioned in this Act for the sale or mortgage (or for the agreement for the sale and mortgage) of goods and chattels shall contain such sufficient and full description thereof that such goods and chattels may be thereby readily and easily known, distinguished and identified: 63 and 64 Viet. ch. 31, sec. 10.

Sufficiency of Description.

See sec. 10 of the Ontario Act, and ch. 12 of the text, as to what constitutes a sufficient description under the Act.

A description of a stock of goods by reference to a schedule annexed, made up in the following form:—

5 yds. ¾ com. panting	1.50	3.75
2½ yds. ¾ fine do.	1.15	2.88

etc., etc., was held a sufficient description, it being shewn by parol evidence of the mortgagor's clerk, who had made out the list, that he was accustomed to making stock lists, and that the goods were so described in the schedule that business men accustomed to making up their annual sheets would have no difficulty in understanding what was meant by such description: Fisher v. Brock (1892), 3 W.L.T. 74, *per* Taylor, C.J., and Dubue, J.; and see Hovey v. Whiting, 14 Can. S.C.R. 515.

On the common law principle "*partus sequitur ventrem*," the legal estate in the offspring of mares comprised in a chattel mortgage covering them and also "the increase" from them is in the mortgagee, and title to such offspring cannot be acquired by one who purchases them in good faith for value although he receives delivery from the mortgagor before the mortgagee attempts to get possession: Roper v. Scott, 16 Man. L.R. 594, following Dillaree v. Doyle, 43 U.C.Q.B. 442; Temple v. Nicholson. Cassel's Sup. Ct. Digest, 114; see 43 C.L.J. 373.

It was held that horses are not included in the words "all machinery, and other plant, materials, and things whatsoever," where it is apparent from the wording of another clause of the same contract that they are to be regarded as distinctive, by reason of their inclusion in specific words in the enumeration of particulars in the latter clause: Bloomstein v. McArthur, (Man 8 W.L.R. 753, 757.

A chattel mortgage assumed by a corporation which had been executed by its predecessor to the person who became the controlling shareholder and president, on the incorporation of the company, as security for a loan, of all the plant and stock-in-trade, containing a provision that it should cover all after-acquired goods and chattels brought upon the premises owned or occupied by the company or used in connection with their business during the currency of the mortgage, creates, as between the parties, a valid lien and charge upon all after-acquired

goods brought upon the premises in question by the company and is as binding upon the company as purchasers of the mortgaged property with notice; the mortgage is not to be considered void as to the after-acquired goods because of the generality and vagueness of the description: Imperial Brewers v. Gelin, 18 Man. L.R. 283.

Affidavits.

11. All affidavits required by this Act may be taken and administered by any justice of the peace in Manitoba, or by any of the persons authorized by the Manitoba Evidence Act to take affidavits in Manitoba: 63 and 64 Viet. ch. 31, sec. 11.

Validity of Affidavits.

A mortgage is not rendered invalid or void by reason of the affidavit of execution being sworn before the mortgagee himself, where he is a commissioner for taking affidavits: Ineh v. Simon, 12 Man. L.R. 1, distinguishing Seal v. Claridge, 7 Q.B.D. 516.

An affidavit of *bona fides* in a chattel mortgage sworn before one who is in fact a commissioner authorized to take affidavits but who places after his jurat only, "A Commissioner, etc.," is good; and it is not an objection that such Commissioner is employed in the office of the mortgagee's solicitors: Can. Permanent Loan and Savings Co. v. Todd, 22 A.R. (Ont.) 515.

The signature of the person having authority to administer the oath is an essential part of an affidavit. A chattel mortgage is invalid and of no effect as against the execution creditors of the mortgagor, where the jurat of the affidavit of execution filed with the mortgage has not been signed by the commissioner before whom it was sworn, although the mortgage is executed in duplicate and the witness had sworn and signed the affidavits of execution on both originals, and the commissioner had signed the jurat on one of the originals, omitting, by inadvertence, to sign the other, and both had been sent to the clerk of the County Court, the clerk having retained for registration the one with the defective affidavit: Inman v. Rae, 10 Man. L.R. 411; see also Nisbet v. Cock, 4 A.R. (Ont.) 200.

The position of the signature of the administering officer, for instance, the signing of his name above in place of below the jurat, does not vitiate the instrument: Mowat v. Clement, 3 Man. L.R. 585.

Several Mortgagees; Agent.

12. All affidavits of *bona fides* required by this Act may be made by any one of two or more bargainees or mortgagees, and if by an agent the same shall state that he is aware of all the circumstances connected with the sale or mortgage, as the case may be: 63 and 64 Vict. ch. 31, sec. 12.

Agent of Bargainee or Mortgagee.

See sec. 12 of the Ontario Act.

A chattel mortgage will not be held void under this section because the affidavit of *bona fides* made by an agent stated that he had "a knowledge of all the facts connected with the said mortgage," instead of saying, in the words of the section, that he was "aware of all the circumstances:" Meighen v. Armstrong, 16 Man. L.R. 5.

The affidavit of *bona fides* on a chattel mortgage is sufficient, although it purports to be the joint affidavit of two mortgagees and the jurat does not shew that they were severally sworn: Dyck v. Graening, 17 Man. L.R. 158, following Moyer v. Davidson (1858), 7 U.C.C.P. 521; see 43 C.L.J. 547.

Assignments.

13. (*As amended* 1908.) Any assignment of a chattel mortgage may be filed in the office in which the mortgage is filed, accompanied by an affidavit of the due execution of such assignment and payment of the same fee as is required on filing the chattel mortgage. [Am. 1908, ch. 1, sec. 2.]

Assignments of Mortgages, etc.

See sub-sec. 4 of sec. 29 of the Ontario Act.

Registration.

14. The instruments mentioned in the preceding sections of this Act shall be registered in the office of the clerk of the County Court of the judicial division where the property sold or mortgaged, or agreed to be sold or mortgaged, is at the time of the execution of such instruments; and every such clerk shall register all such instruments presented to him for that

purpose, and shall at the time of his receipt thereof indorse thereon the day, hour and year of receiving the same in his office: 63 and 64 Vict. ch. 31, sec. 14.

Place of Registration.

See also sec. 18 of the Ontario Act.

Seed Grain Mortgages.

Seed grain mortgages are to be entered or registered in a separate book or register to be kept by every County Court clerk in Manitoba: see section 42, *infra*.

The "Judicial Divisions."

The County Courts Act, R.S.M. 1902, ch. 38, secs. 4 and 5 provides for altering the judicial divisions and establishing new County Courts by order-in-council of the Lieutenant-Governor of the province.

"Instruments." This word is intended to include affidavits, where it is required by the statute that they are to be filed: Inman v. Rae (1895), 10 Man. L.R. 411.

Railway Rolling Stock Mortgages and Trust Deeds.

All instruments affecting the rolling stock and equipment of railways do not come exclusively under the provisions of section 14, concerning registration, but are permitted, by the provisions of sec. 44 *infra*, but by the amending statute, ch. 2, 1905 (Man.), may instead be registered in the office of the Provincial Secretary, and in such case no other filing or registration is required.

Section 1 of that statute, ch. 2 of the Statutes of Manitoba, 1905, amending the "Bills of Sale and Chattel Mortgage Act," and the "Lien Notes Act," provides as follows:—

1. Notwithstanding anything contained in the "Bills of Sale and Chattel Mortgage Act" and the "Lien Notes Act" and amendments thereto, any bill of sale, chattel mortgage, conditional sale, lease or other agreement of or respecting rolling stock and equipment, for use on railways, may be registered in the office of the Provincial Secretary of the Province of Manitoba, on payment of a fee of two dollars, by filing in such office a copy thereof, certified by a notary public to be a true copy,

and no other registration or filing shall be necessary, and upon being so filed the same shall be as valid and effectual as if filed or registered in accordance with the provisions of the said Acts and amendments, and the same shall have priority from the time of such filing, and no renewal thereof shall be required, and any discharge or partial discharge of any such bill of sale, chattel mortgage, conditional sale or other agreement may be registered in the said office in the same manner on payment of a like fee: 4-5 Edw. VII. 1905, ch. 2.

Time for Registration.

15. No instruments shall be received or registered by any County Court clerk after the time limited by this Act for the registration thereof, and the words "within twenty days from the date thereof," defining the time within which such instruments shall be registered, shall be deemed to exclude either the first or the last day: 63 and 64 Viet. ch. 31, sec. 15, part.

Sundays and Holidays.

16. Where, under the provisions of this Act, the time for registering any instrument mentioned in this Act expires on a Sunday, or other day upon which the office in which the registering is to be made is closed, and by reason thereof the registering cannot be made or done on that day, the registering shall, so far as regards the time of doing or making the same, be held to be duly done or made if done or made on the day on which the office shall next be open: 63 and 64 Viet. ch. 31, sec. 16.

Manner of Registration.

17. County Court clerks shall number every instrument registered under the provisions of this Act, and shall enter in alphabetical order, in books to be provided them by the Municipal Commissioner, the names of all parties to such instruments, with the numbers indorsed thereon opposite to each name; and such entry shall be repeated alphabetically under the name of every party thereto: 63 and 64 Viet. ch. 31, sec. 17.

Duties of Clerks on Registering.

See sec. 20 of the Ontario Act.

Books and Records.

18. Every person shall have access to and be entitled to inspect the several books of the County Courts, containing records or entries of instruments registered under the provisions of this Act: and no person desiring such access or inspection shall be required, as a condition to his right thereto, to furnish the names of the parties in respect of whom such access or inspection is sought; and all clerks of the County Courts of the Province shall respectively, upon demand or request, produce for inspection any instrument filed in their respective offices or of which records or entries are by law required to be kept in such several books aforesaid: 63 and 64 Viet. ch. 31, sec. 18.

Inspection of Records.

See sec. 31 of the Ontario Act.

Certified Copies.

19. A copy of any original instrument registered or statement made under the provisions of this Act, certified to by the clerk in whose office the same has been registered, under the seal of the Court, shall be received in evidence in all Courts, but only of the fact that the instrument or statement was received and registered according to the indorsement of the clerk thereon, and of no other fact; and in all cases the original indorsement by the clerk, made in pursuance of this Act upon any such instrument, shall be received in evidence only of the fact stated in the indorsement: 63 and 64 Viet. ch. 31, sec. 19.

Certified Copies.

See sec. 27 of the Ontario Act.

Renewal of Mortgages.

20. Every mortgage registered in pursuance of this Act shall cease to be valid, as against the creditors of the person or

persons making the same and against subsequent purchasers and mortgagees in good faith for good or valuable consideration after the expiration of two years from the day of the registration thereof, unless, within thirty days next preceding the expiration of the said term of two years, a statement exhibiting the interest of the mortgagee, his executors, administrators or other assigns, in the property claimed by said mortgage, and shewing the amount still due for principal and interest thereon, and shewing all payments on account thereof, with an affidavit of the mortgagee, or one of several mortgagees, or of the assignees, or one of several assignees, or of the agent of the mortgagee or assignee, or mortgagees or assignees (as the case may be), that the statement is true, and that the mortgage has not been kept alive for any fraudulent purpose, is filed in the office of the clerk of the County Court wherein such mortgage was originally registered (except in case the goods and chattels mortgaged, or the mortgage, shall have been removed to another judicial division or other judicial divisions, in which case such statement and affidavit shall be filed in the County Court office for such other division). For the purpose of filing, the statement and affidavit shall be deemed one instrument: 63 and 64 Vict. ch. 31, sec. 21.

Statutory Renewals of Mortgages.

This section is sufficiently complied with by the use of the expression "kept on foot," in the mortgagee's affidavit for renewal of a chattel mortgage, instead of the words "kept alive" used in that section, as the two expressions mean the same thing. Emerson v. Bannerman (1891), 19 Can. S.C.R. 1, followed; Roper v. Scott, 16 Man. L.R. 594; see 43 C.L.J. 373.

See also sec. 21 of the Ontario Act.

Time for Renewal.

21. Another statement in accordance with the provisions of the last preceding section, and likewise verified, shall be filed in the office of the clerk of the County Court of the judicial division wherein the mortgage was originally registered, ex-

cept as aforesaid, within thirty days next preceding the expiration of the said term of two years from the day of the registering of the statement required by said last preceding section, otherwise such mortgage shall cease to be valid as against creditors of the person or persons making the same, and as against purchasers and mortgagees in good faith for good or valuable consideration; and so on every two years, as long as it is desired to keep such mortgage alive: 63 and 64 Viet. ch. 31, sec. 22.

Subsequent Renewals.

See sec. 21 (7) of the Ontario Act.

Affidavit for Renewal.

22. The affidavits required by the two last preceding sections may be made by any next of kin, executor or administrator of any deceased mortgagee, or by any assignee claiming by or through any mortgagee or any next of kin, executor or administrator of any such assignee, or by the agent of such next of kin, executor, administrator or assignee; but if the affidavit is made by any assignee, next of kin, executor or administrator of any such assignee, or by the agent of such next of kin, executor, administrator or assignee, the assignment or the several assignments through which such assignee claims shall be registered in the office in which the mortgage is registered, except as aforesaid, at or before the time of such re-filing by such assignee, next of kin, executor or administrator of such assignee: 63 and 64 Viet. ch. 31, sec. 23.

Renewal Affidavits.

See sec. 21 (8) of the Ontario Act.

Registration.

23. All renewals of mortgages under the provisions of this Act shall be duly and punctually recorded by County Court clerks in some one or more of the books required to be kept under the provisions of the seventeenth section hereof. All as-

signments of mortgages shall likewise be similarly recorded: 63 and 64 Vict. ch. 31, sec. 24.

Recording Renewals and Assignments.

See sec. 32 (1) of the Ontario Act.

Limitations.

24. No renewals of mortgages shall be received or registered by any County Court clerk after the time limited by this Act. 1 and 2 Edw. VII. ch. 28, sec. 3.

Rectification.

It would seem that the Court may refuse rectification of the maturity date of a mortgage so as to make it conform to the agreement of the parties, where, if rectified, the mortgagor would still have been in default, and the variance could not affect his rights in an action claiming premature seizure: Mayer v. Mackie (Man.), 15 W.L.R. 128.

See sec. 21 of the British Columbia Act.

Omissions and Errors.

24a. Subject to the rights of third persons, accrued by reason of such omissions or misstatements as are hereinafter defined, any Judge of the County Court in which any such instrument has or should have been registered, on being satisfied that the omission to register a mortgage or other transfer of personal property, or any assignment thereof, or any statement and affidavit of renewal thereof, within the time prescribed by this Act, or the omission or misstatement of the name, residence or occupation of any person in any such instrument, was accidental or due to inadvertence or impossibility in fact, may, in his discretion, order such omission or misstatement to be rectified by the insertion, in the register of the true name, residence or occupation, or by extending the time for such registration, on such terms and conditions, if any, as to security, notice by advertisement or otherwise, or as to any other matter as he thinks fit to direct. [As amended by ch. 1, 1908 (Man.).]

Discharge of Mortgages.

25. Where any mortgage of goods and chattels is registered under the provisions of this Act, such mortgage may be discharged or partially discharged by filing, in the office of the clerk of the County Court of the judicial division in which such mortgage is in force and effect, a certificate signed by the mortgagee, his executor or administrator, or by his or their assignee under an assignment or assignments registered as by this Act provided, or by the executor or administrator of any such assignee, or by any of the class of persons authorized to make affidavits under the provisions of the twenty-second section hereof, which certificate shall be in the form following, or to the like effect:—

(*Form of Discharge.*)

To the Clerk of the County Court of

I, A.B., of do certify that C.D., of has satisfied all money (*or* the sum of dollars on account of the amount) due or to grow due on a certain chattel mortgage made by him (*or* by one E.F., *as the case may be*) to me (*or* to one G.H., and duly assigned to me); which mortgage bears date the day of , 19 , and was registered (*or in case the mortgage has been renewed under the twentieth and twenty-first sections of this Act*, was re-filed) in the office of the clerk of the County Court of on the day of as No. (*here mention the date of registering each assignment, again naming the parties if more than one assignment, or mention that such mortgage has not been assigned, or further assigned, as the case may be*); and that I am the person entitled by law to receive the money; and that such mortgage is therefore discharged (*or* and that, *describing the chattel or chattels to be released*, of the goods and chattels mentioned in such mortgage, is or are hereby released): 62 and 63 Vict. ch. 31, sec. 26.

Discharge of Chattel Mortgage.

See secs. 28 and 29 of the Ontario Act.

Discharge without Payment.

If the discharge be given without actual payment or satisfaction, and merely to prevent attachment of the mortgage debt, it is fraudulent and void; and it is doubtful whether in a *bonâ fide* transaction it would be a release of the debt as well as of the security: Manitoba v. Bolton (1893), 4 W.L.T. 114.

Attestation of Discharge.

26. The said certificate of discharge or partial discharge shall have indorsed thereon an affidavit of the subscribing witness to the execution thereof by the person entitled or empowered by this Act to sign the same, which shall also state the date on which the same was executed; and such certificate of discharge or partial discharge shall have no force and effect, except as between the parties, until the same has been registered as by this Act provided: 63 and 64 Vict. ch. 31, sec. 27.

Registration of Discharge.

Compare sec. 29 of the Ontario Act.

Entry of Discharge.

27. The clerk of the County Court of the judicial division with whom the chattel mortgage is registered or in which the same is in force and effect, upon receiving such certificate of discharge or partial discharge, shall enter opposite to or across the original entry of registering the mortgage, in the book or books kept for that purpose as aforesaid, the following words "discharged" (*or* "partially discharged") "by certificate number" (*stating the number of the certificate*), to which the County Court clerk shall affix his name; and he shall also indorse the fact of the discharge or partial discharge upon the instrument affected, to which he shall also affix his name: 63 and 64 Vict. ch. 31, sec. 28.

Entry of Discharge.

See sec. 29 of the Ontario Act.

Certificate of Discharge.

28. Any person registering a discharge or partial discharge of mortgage, as aforesaid, shall be entitled to ask for and, upon payment of the statutory fee in that behalf, receive from the clerk a certificate of such discharge or partial discharge of such mortgage in the form following or to the like effect:—

(*Certificate of Discharge of Mortgage.*)

Province of Manitoba, }
County Court of }

This is to certify that an instrument purporting to be a discharge in full (*or* a partial discharge) of a certain chattel mortgage bearing date the day of and registered day of , made between A.B., of as mortgagor, and C.D., of as mortgagee, has been filed in the office of the County Court of on this day of (and, *in case of a partial discharge*, that the goods or property mentioned in such partial discharge consist of, *describing the chattels or property*).

Given under my hand and the seal of said Court.

E. M.,
Clerk.

(Seal.)

63 and 64 Vict. ch. 31, sec. 29.

Removal of Goods.

29. In the event of the permanent removal of goods and chattels mortgaged, from one judicial division, in which the goods and chattels were at the time of the execution of the mortgage, to another judicial division or other judicial divisions, before the payment and discharge of the mortgage, a certified copy of the mortgage, under the hand of the clerk in whose office it was first registered and under the seal of the Court, and of the affidavits and documents and instruments relating thereto registered in such office, shall, within six months from such removal, be registered with the clerk of the County Court of the judicial division to which the goods and chattels, or any portion thereof, are removed; otherwise the said goods and chat-

tels shall be liable to seizure and sale under execution, and in such case the mortgage shall be null and void as against creditors of the mortgagor and against subsequent purchasers and mortgagees in good faith for good or valuable consideration, as if never executed: 63 and 64 Vict. ch. 31, sec. 25, part.

Subsequent Purchasers.

The "subsequent purchaser" mentioned in this section against whom a chattel mortgage will cease to be valid upon goods removed out of the division where it is registered, unless a certified copy is registered in the division to which the goods have been removed within six months after the removal, must be one who purchased after the expiration of such period of six months: Hulbert v. Peterson (1905), 36 Can. S.C.R. 324, followed; Roper v. Scott, 16 Man. L.R. 594; see 43 C.L.J. 373.

See also sec. 19 of the Ontario Act.

Record of Removal.

30. The clerk of the County Court of the judicial division from which any goods and chattels mortgaged shall be removed to another judicial division or other judicial divisions, shall note in some one or more of the books required to be kept by him under the provisions of the seventeenth section hereof, the fact of the delivery to any mortgagee or assignee of the certified copy of the mortgage for the purpose in the last preceding section mentioned: 63 and 64 Vict. ch. 31, sec. 25, sub-sec. *a*; 1 Edw. VII. ch. 22, sec. 3.

Record of Removal.

See sec. 20 of the Ontario Act.

Renewals.

31. Every mortgage upon goods and chattels removed from one judicial division to another judicial division or other judicial divisions shall be renewed in like manner as required by the twentieth and twenty-first sections hereof to all intents and purposes as if such mortgage in the first instance had been first registered in the County Court office or offices of the judicial

division or divisions in which said goods and chattels are at the time of such renewal: 63 and 64 Vict. ch. 31, sec. 25, sub-sec. (*b*).

Renewals after Removal.

See sec. 21 (2) of the Ontario Act.

Changes in Judicial Divisions.

32. In all cases where a portion of any judicial division has been or shall be hereafter taken away or withdrawn from said judicial division to form a part of a new judicial division, it shall be the duty of the clerk of every such judicial division so reduced in extent of territory to transfer to the clerk of the new judicial division so created or set apart, all bills of sale, chattel mortgages and other documents registered or filed under this Act or any former Act requiring the registration or filing of such instruments and relating to any goods or chattels, growing grain or other property situated in such part of the territory so taken away or withdrawn from his jurisdiction, whenever so requested by any of the parties interested in any such bills of sale, chattel mortgages or other instruments, and upon payment of a fee of twenty-five cents for each such instruments so transferred, which fee shall include the postage thereon; and every County Court clerk who shall so transfer any such instrument shall make a proper entry of such transfer in the books of his office; and every County Court clerk receiving any such instrument so transferred shall file the same in his office and make the proper entries thereof in his books on payment of a fee of twenty-five cents: 1 Edw. VII. ch. 22, sec. 2, part; 1 and 2 Edw. VII. ch. 28, sec. 4, part.

Change in District Boundaries.

See sec. 22 of the Ontario Act.

Limitations of Time.

33. Unless such transfer shall be made and completed on behalf of any of the said interested parties within six months from the time of such change of territory, the goods and chattels cov-

ered by any of such instruments and situated in the territory so removed shall be liable to seizure and sale under execution, and in such case the bill of sale, chattel mortgage or other instrument shall, as to such goods, be null and void as against creditors of the bargainor or mortgagor and against subsequent purchasers and mortgagees in good faith for good or valuable consideration as if never executed: 1 and 2 Edw. VII. ch. 28, sec. 4, part.

Chattels in Several Judicial Divisions.

34. In case any such instrument related to goods and chattels, some of which are in the territory remaining in such first-mentioned judicial division, and others in such new judicial division, a certified copy of such instrument and of the affidavits and documents and instruments relating thereto, under the seal of the Court and under the hand of the clerk in whose office it may be on file, shall be prepared and transferred, on request of any of the parties interested therein, to the clerk of such new judicial division in lieu of the original instrument or instruments, in order that all the goods and chattels covered by any such instrument or instruments may continue to be bound thereby in the said respective judicial divisions. The clerk for preparing such copy or copies shall be entitled to the usual fees therefor, to be paid by the mortgagee or person requesting such transfer: 1 and 2 Edw. VII. ch. 28, sec. 4, part.

Abolition of Judicial Division.

35. When the territory comprised in any judicial division becomes absorbed by the transference by an order of the Lieutenant-Governor-in-council of the whole of such territory to a contiguous judicial division or divisions, and the judicial division comprising such territory thus transferred becomes abolished, all the bills of sale, chattel mortgages and other instruments and documents registered or on file in the office of such judicial division under this Act or any former Act requiring

the registration or filing of such instruments, and all books of record relating thereto, shall be removed by the inspector of County Courts, or other person designated by him, to the office or offices of such other judicial division or divisions as shall be directed by the order-in-council authorizing the change so made; and all bills of sale, chattel mortgages and other instruments originally registered or filed under this Act or such other Act in the judicial division so abolished, covering goods or chattels situated in the territory so transferred to the judicial division to which such instruments shall have been so removed, shall be deemed to have been re-registered in such judicial division to all intents and purposes, and all the requirements of this Act relating to such instruments shall, for all the purposes of this Act, be deemed to have been complied with: 1 and 2 Edw. VII. ch. 28, sec. 5, sub-sec. 1.

Orders-in-council.

36. The Lieutenant-Governor-in-council may from time to time make such further provisions and directions respecting any of the matters referred to in the last preceding section as may be deemed necessary, and the provisions of any order of the Lieutenant-Governor-in-council already made in such a case are hereby ratified and confirmed: 1 and 2 Edw. VII. ch. 28, sec. 5, sub-sec. 2.

Fees of Clerks of County Courts.

37. For services under this Act, County Court clerks shall be entitled to receive the following fees:—

(*a*) For filing each instrument and affidavit, and entering the same in a book as provided by the seventeenth and twenty-third sections of this Act, fifty cents;

(*b*) For a general search, twenty-five cents;

(*c*) For filing each certificate of discharge or partial discharge, and making all proper entries in connection therewith, fifty cents;

(*d*) For any certificate of registration or discharge or partial discharge, twenty-five cents;

(*e*) For any certificate under the nineteenth section of this Act, twenty-five cents;

(*f*) For the production and inspection of any instrument or statement registered or filed under the provisions of this Act, or any former Act on the same subject, ten cents;

(*g*) For copies of any document, with certificate, registered or filed under this Act, or any former Act on the same subject, ten cents for every hundred words;

(*h*) For any other service not herein specifically provided for, such sum as may be determined by the Lieutenant-Governor-in-council: 63 and 64 Vict. ch. 31, sec. 20.

Corporations.

38. (*As amended* 1910.) In case the grantee or mortgagee under the third, fourth, fifth, sixth and seventh sections of this Act be a corporation, the affidavit of *bona fides* required under such sections, and the affidavit required by sections 20 and 21 of this Act, may be made, and a certificate of discharge or partial discharge of any such mortgage, under section 25, may be signed, by the president, vice-president, manager, assistant-manager, secretary or treasurer of such corporation, or by any other officer or agent of the corporation duly authorized by resolution of the directors in that behalf, or, if the head office of the corporation be outside the Province, then the said affidavit may be made by any general or local manager, secretary or agent of the corporation within the Province, and such certificate so signed shall be a valid and effectual discharge or partial discharge without the seal of said corporation being affixed thereto. Any such affidavit made by an officer or agent shall state that the deponent is aware of the circumstances and has a personal knowledge of the facts deposed to. [Am. 10 Edw. VII (Man.) ch. 6.]

Affidavits for Corporation.

Section 38 of ch. 11, R.S.M. 1902, was amended by ch. 3 of the Act of 1906, by striking out the words "third and fifth" from the first and second lines, and inserting instead the words "third, fourth, fifth, sixth, and seventh," the obvious intention being that corporations, theretofore being restricted to bills of sale and chattel mortgages proper, and to the provisions as to the execution of the accompanying affidavits, might be permitted to take advantage of the provisions as to covenants, promises and agreements to execute bills of sale or chattel mortgages, as contained in sections 4 and 7 of ch. 11, of the Act, 1902, and also of the provisions as to agreements for future advances, for the purpose of entering into and carrying on business, and of the security for the same, as contained in section 6.

The Statute of Manitoba as above amended was again added to by ch. 6 of the Act 1910 (Man.) by further extending the privileges and powers of corporations to the execution of the affidavits necessary to the renewal of chattel mortgages and to subsequent renewals, as provided for by sections 20 and 21, ch. 11, Act 1902 (Man.); and also extending those powers and privileges to the execution of any and all discharges or partial discharges of such mortgages as provided for by section 25.

The section as it now reads includes "assistant managers" among those who may execute the instruments referred to, and also any other officer or agent, outside of those named, duly authorized by a resolution passed for that purpose by the directors of the corporation.

It also provides that in the case of a foreign corporation the execution of such instruments may be made by any general or local manager, secretary or agent within the province, and that the seal of the corporation is not necessary to the validity of the discharge, in whole or in part, of a chattel mortgage.

When executed by an officer or agent of the corporation, it must be done only when he has personal knowledge concerning the facts he is deposing to.

Where an affidavit of *bona fides* is made by a person described as "accountant of the mortgagees," it must be shewn that such person is in fact an agent or other representative of the company mentioned in the section, as it will not be presumed

that the accountant of a company is its agent: Massey v. Clement, 9 Man. L.R. 359.

Growing Crop Mortgages.

39. Every mortgage, bill of sale, lien, charge, incumbrance, conveyance, transfer or assignment, executed or created, and which it is intended to operate and have effect as security, shall, in so far as the same assumes to bind, comprise, apply to or affect any growing crop, or crop to be grown in the future, in whole or in part, be absolutely void, except the same be made, executed or created as a security for the purchase price, and interest thereon, of seed grain: 63 and 64 Vict. ch. 31, sec. 31; 1 Edw. VII. ch. 22, sec. 1.

Mortgages of Growing Crops.

It was held that this section will include a chattel mortgage given to a person on whose order the seed grain is supplied to the mortgagor, and by whom the grain dealer was paid: Kirchhoffer v. Clement (1897), 11 Man. L.R. 460, and it is no objection to a mortgage on growing crops to secure the price of seed grain supplied, that the grain had not been sold to the mortgagor by the mortgagee himself, but was purchased by him for the mortgagor from a third party: Meighen v. Armstrong, 16 Man. L.R. 5.

But, under this section of the Act, it is a fatal objection to a mortgage on growing crops or crops to be grown, if it is taken for anything beyond the price of the seed grain furnished and interest thereon: Meighen v. Armstrong, 16 Man. L.R. 5.

A lessor's right under the terms of a farm lease to retain from the share of the crop deliverable to the lessee a sufficient amount to cover taxes and to repay advances and other indebtedness is a charge or lien upon crops to be grown in the future and therefore void under this section: Campbell v. McKinnon, 14 Man. L.R. 421.

In the case of Mowat v. Clement, 3 Man. L.R. 585, the mortgage, so far as it related to the delivery of one half of the crop, and the fall plowing, was not within the statute at all, and was therefore valid without registration. The chattel mortgage expressed to be void "if the mortgagors do cultivate all the broken

land upon all the said sections during the present season and thresh all the grain produced therefrom in a proper and workmanlike manner, and after the course of good husbandry, and to deliver for the benefit of the mortgagee at V., not later than the 31st day of March next, one-half of all the grain arising from said sections 23 and 25; and, if the mortgagors shall fallplow the said portions of all the said sections in a proper manner during the present season," was held not to be within the Manitoba Bills of Sale and Chattel Mortgage Act: Mowat v. Clement, 3 Man. L.R. 585.

It has been also held that the Act does not apply to a sale of grain in the stack when the bargain requires the vendor to thresh and afterwards deliver it: Parenteau v. Harris, 3 Man. L.R. 329.

After default in the payment of a mortgage upon land a mortgagor is to be regarded as a tenant of the mortgagee as far as growing crops are concerned, and cannot confer a title thereto by means of a chattel mortgage to the prejudice of the mortgagee of the land, or any of his privies in title, who has entered into possession of the land before the crop is harvested: Bloomfield v. Hellyer, 22 A.R. (Ont.) 232, but see Laing v. Ontario Loan and Savings Co., 46 U.C.Q.B. 114; Grass v. Austin, 7 A.R. (Ont.) 511; Cameron v. Gibson, 17 O.R. 233.

It is sometimes contended that a mortgage upon growing crops is confined to those crops that are planted during the period for which the mortgage is to run or rather to crops put in the ground or planted before the mortgage became payable, but that limited theory of construction was put an end to in Can. Permanent, etc., Co. v. Todd, 22 A.R. (Ont.) 515, at 519, where it was held, that a chattel mortgage of "crops which may be sown during the currency of this mortgage," covers crops sown after the mortgage falls due but remains unpaid.

Seed Grain Mortgages.

40. (*As amended* 1908.) Every mortgage or incumbrance upon growing crops, or crops to be grown, made, executed, or created to secure the purchase price of seed grain, with or without interest, shall not be affected by or be subject to any chattel mortgage or bill of sale previously given by the mortgagor, any landlord's claim for rent in respect of the land

upon which such seed grain has been used for sowing the crop during the year in which it is supplied, or any claim of a mortgagee of the said land arising under any term or covenant or condition contained in any such mortgage upon said lands, or by any writ of execution against the mortgagor in the hands of the sheriff or County Court bailiff at the time of the registration of such seed grain mortgage; but such seed grain mortgage shall be a first and preferential security for the sum therein mentioned upon the crop covered by such seed grain mortgage against any and every other claim, security or process to which it might otherwise be liable. [As amended by 8 Edw. VII. (Man.) ch. 2

Crop Payments on Lease.

Under a lease for a year, dated 6th April, reserving as rent one-third of the crops and providing that the lessee should thresh the grain and draw it to the elevator or cars to be stored and shipped as might be agreed between the parties in the name of the lessor, but fixing no time when that was to be done, there is no rent due until the end of the year, and a distress by the landlord in November following, is illegal. A distress for rent is unlawful if the tenant is not in possession at the time: Meighen v. Armstrong, 16 Man. L.R. 5.

Affidavit of Bona Fides.

41. Every mortgage or incumbrance upon growing crops or crops to be grown, made or created to secure the purchase price of seed grain, shall be held to be within the provisions of this Act; and the affidavit of *bona fides* of the mortgagee or his agent shall contain an additional or further statement that the same is taken to secure the purchase price of seed grain: 63 and 64 Viet. ch. 31, sec. 33.

Affidavit on Seed Grain Mortgages.

This section is not complied with if the affidavit of *bona fides*, instead of following the words of the statute, namely, "that the same is taken to secure the purchase price of seed grain" contains a statement that the mortgage is taken "for seed grain;" and the Interpretation Act, R.S.M. 1902, ch. 89, sec. 8, does not cure the defect: Kirchhoffer v. Clement, 11 Man. L.R. 460. A

divergence from a statutory form is not necessarily immaterial because it does not alter the effect of the instrument: Thomas v. Kelly, 13 A.C. 506, distinguished in Seed v. Bradley, [1894] 1 Q.B. 319, and approved in De Braam v. Ford, [1900] 1 Ch. 142; see also Re Heseltine, [illegible] v. Heseltine, [1891] 1 Ch. 464. This section is [illegible] to the decision in Clifford v. Logan, 9 Man. L.R. 423 [illegible] held that, under the Act, as it then stood, chattel mortgages covering crops to be grown did not require filing and renewal within the Act, it being considered that [illegible] shews that they apply only to [illegible] there can be an immediate delivery [illegible] continued change of possession. Chattel mortgages on crops are no longer to be effectual unless given [illegible] seed grain, and by this section, must be proved and registered. Other personalty not capable of complete transfer by delivery remains unaffected by the Act; see also Hamilton v. Dickson, 16 U.C.Q.B. 127.

The repeal and substitution effected by this section do not affect an instrument existing prior to the Act; and where the claimants held a chattel mortgage by which the mortgagor agreed that all the crops of grain which the mortgagor might from time to time grow on the land, until the whole principal and interest secured thereby should be fully paid, should be included in the mortgage, "and that the mortgagor would, from time to time, upon request execute such further mortgage or mortgages of such crops, to the intent that such crops should be effectually held as security for the payment of the debt thereby secured," it was held that an instrument creating only an equitable charge upon property not at the time in existence, did not, prior to this Act, come under the Bills of Sale Act. While the instrument could give no title by itself at law, yet the agreement to give the further security was enforceable in equity, and such a title would be attributed to the mortgagee as to warrant the Court in restraining others from interfering with it to his injury. Such equitable title to future acquired chattels can be asserted in interpleader against an execution creditor: Bank of British North America v. McIntosh (1897), 11 Man. L.R. 503.

Separate Register.

42. Every County Court clerk shall keep a distinct and separate register or book, in which all seed grain mortgages re-

gistered shall be entered, and shall furnish any information with regard thereto on payment of a fee of twenty-five cents: 63 and 64 Vict. ch. 31, sec. 34.

Separate Register for Seed Grain Mortgages.

See note to sec. 39 of this Act.

Certificates.

43. Every County Court clerk shall, upon payment of a fee of fifty cents, give a certificate setting forth the chattel mortgages registered in his office against any person or corporation, and shall be responsible for the correctness of the information contained in such certificate: 63 and 64 Vict. ch. 31, sec. 35.

Railway Equipment Mortgages and Trust Deeds.

44. (*Added* 1904.) The provisions of this Act, as to filing and registration of bills of sale and chattel mortgages in the offices of clerks of County Courts, shall not apply to mortgages by railway companies including cars, equipment, rolling stock or other chattel property of railway companies, but such mortgages may be filed and registered in the office of the Provincial Secretary of the Province of Manitoba, and on such filing and registration shall have priority from the date of such filing and shall remain in force until the same have been discharged and satisfied, and without the necessity of renewal, or any affidavits of execution or *bonâ fides*, and discharges of such mortgages may be registered in such office. [4 Edw. VII. (Man.) ch. 2, sec. 1.]

Office of Registration.

The above section was practically amended, at least in effect, and without the section being specifically mentioned by ch. 2, 1905 (Man.): see note to sec. 14, *supra*. Such amending Act, in addition to the instruments named in sec. 14, viz., mortgages by railway companies added bills of sale, conditional sales, leases or other agreements of or respecting rolling stock and equipment, for use on railways.

It must also be noticed by the practitioner that, whereas

section 44 permitted the mortgage to be filed and registered, the amending statute, ch. 2, 1905(Man.), permits the instruments named therein to be registered by filing a true and certified copy of the original instrument.

This amending statute in effect, if not in terms, includes registration and filing in the same Act, as, if it means anything it evidently is, that the original instrument need not be filed nor registered, but that it shall be considered as registered on filing a certified copy of it that the physical act of filing the copy is a registration of the original.

It further provides that a discharge, in whole or in part, may be registered in the said office in the same manner, viz., by filing a copy certified to be a true copy of the original discharge. So it appears from the amending statute that neither an original chattel mortgage, bill of sale, conditional sale, lease or other agreement of or respecting rolling stock or equipment of a railway, need now be filed or registered itself, but that it is automatically done by filing certified copies of them respectively and the same procedure applies to discharges in whole or in part, of the same instruments.

See also sec. 26 of the Ontario Act.

Affidavit of Bona Fides.

45. (*Added* 1904.) (1) In the case of a mortgage or conveyance of goods and chattels of any company incorporated by or under any Imperial Act or charter, or by or under any Act or charter of the Dominion of Canada, or incorporated or licensed by or under any Act or charter of the Province of Manitoba, made to a bondholder or bondholders, or to a trustee or trustees, for the purpose of securing the bonds or debentures of such company, instead of the affidavit of *bona fides* required by sections 3 and 5 of this Act, it shall be sufficient for the purposes of the Act if an affidavit be filed as thereby required, made by the mortgagee or one of the mortgagees, to the effect that the said mortgage or conveyance was executed in good faith and for the express purpose of securing the payment of the bonds or debentures referred to therein, and not for the purpose of protecting the goods and chattels mentioned therein

against the creditors of the mortgagors, or of preventing the creditors of such mortgagors from obtaining payment of any claim against them.

Time for Filing.

(2) In the case of any such conveyance or mortgage made by an incorporated company, the head office whereof is not within the Province of Manitoba, such mortgage or conveyance may be filed within thirty days instead of twenty days, and the same shall be of like force, effect and priority as if the same had been filed within such twenty days.

Renewals.

(3) Any such mortgage may be renewed in the manner and with the effect provided by section 20 and subsequent sections of this Act, upon the filing of a statement by the mortgagee or one of the mortgagees exhibiting the interest of the mortgagee or mortgagees in the property claimed by virtue of the said mortgage, and shewing the amount of the bond or debenture debt which the same was made to secure, and shewing all payments on account thereof which, to the best of the information and belief of the person making such statement, have been made or of which he is aware or has been informed, together with an affidavit of the person making such statement that the statement is true to the best of his knowledge, information and belief, and that the mortgage has not been kept on foot for any fraudulent purpose, and such statement shall be filed instead of the statement required by said section 20 of this Act.

Corporations.

(4) If any mortgage as aforesaid be made to an incorporated company the several affidavits and statements hereinmentioned may be made by the president, vice-president, manager or assistant-manager of such mortgagee company, or any other officer of the company authorized for such purpose.

Certified Copy of By-law.

(5) Where such mortgage or conveyance is made as a security for debentures and the by-law authorizing the issue of the debentures, as a security for which the mortgage or conveyance was made, or a copy thereof, certified under the hand of the president or vice-president and secretary of the company and verified by an affidavit of the secretary thereto attached or endorsed thereon, and having the corporate seal attached thereto, is registered with the mortgage or conveyance it shall not be necessary to renew the said mortgage or conveyance, but the same shall in such case continue to be as valid as if the same had been duly renewed as in this Act provided.

Effect on Accrued Rights.

(6) The preceding sub-section shall apply to every such mortgage or conveyance made and registered after the first day of January, 1902, but nothing herein contained shall affect any accrued rights or any litigation pending on the day this Act shall come into force. [Sec. 45 added by 4 Edw. VII. (Man.) ch. 2.]

ACT RESPECTING DISTRESS AND EXTRA-JUDICIAL SEIZURE.

(R.S.M. 1902, cn. 49.)

Costs of Seizure.

8. No person whosoever making any seizure under the authority of any chattel mortgage, bill of sale, or any other extra-judicial process whatsoever, nor any person whosoever, employed in any manner in making such seizure or doing any act whatsoever in the course of such seizure or for carrying the same into effect, shall have, take or receive out of the proceeds of the goods and chattels seized and sold, or from the person against whom the seizure may be directed or from any other person whomsoever, any other or more costs and charges for and in respect of such seizure or any matter or thing done therein or

thereunder than such as are fixed in Schedule A to this Act, and applicable to each act which shall have been done in course of such seizure, and no person or persons whosoever, shall make any charge whatsoever for any act, matter or thing mentioned in the said schedule, unless such act, matter or thing shall have been really performed or done.

Penalty.

9. If any person making any distress or seizure referred to in the seventh and eighth sections of this Act, shall take or receive any other or greater costs than are set down in the said schedule or make any charge whatsoever for any act, matter or thing mentioned in the said schedule and not really done or performed the party aggrieved may cause the party making the said distress or seizure to be summoned before the judge of the County Court of the judicial division in which the goods and chattels distrained upon or seized, or some portion thereof, lie, and the said judge may order the party making the distress or seizure to pay the party aggrieved treble the amount of the moneys taken contrary to the provisions of this Act and the costs of said summons; and in default of immediate payment of said moneys, together with costs as aforesaid, the judge may order execution to be issued against the goods and chattels of the party ordered to pay the said moneys.

Agreements as to Fees.

10. Nothing contained in this Act shall invalidate any express agreement entered into for the object of varying the fees set down in the schedule to this Act.

SCHEDULE A.

(*Sections 7, 8.*)

Tariff of Fees.

(1) Levying distress, one dollar ($1.00).

(2) Man in possession per day, one dollar and fifty cents ($1.50).

(3) Appraisement, whether by one appraiser or more, two cents on the dollar on the value of the goods up to one thousand dollars, and one cent on the dollar for each additional one thousand dollars or portion thereof.

(4) All reasonable and necessary disbursements for advertising.

(5) Catalogue, sale, commission and delivery of goods, five per cent. on the net proceeds of the goods up to one thousand dollars, and two and one-half per cent. thereafter.

(6) Mileage in going to seize, fifteen cents per mile one way.

(7) All necessary and reasonable disbursements for removing and storing goods and removing and keeping live stock, and all other disbursements which in the opinion of the judge before whom any question as to the amount of the fees to be allowed under this Act may come for decision, are reasonable and necessary.

THE EXECUTIONS ACT

(R.S.M. 1902, ch. 58.)

Executions Against Personal Property.

11. Except as hereinafter mentioned or as otherwise provided by the Assignments Act, every writ of execution against goods and chattels shall, at and from the time of its delivery to the sheriff, bind all the goods and chattels or any interest in all the goods and chattels, of the judgment debtor within the bailiwick of the said sheriff, and shall take priority to any chattel mortgage, bill of sale or assignment for the benefit of all or any of the creditors of the judgment debtor executed by him after the receipt by the sheriff of such writ of execution, or which, by virtue of the provisions of the Bills of Sale and Chattel Mortgage Act, has not taken effect prior to such receipt as against the creditor or creditors interested under the execution, but shall not take priority to a *bonâ fide* sale by the judgment debtor, followed by an actual and continued change of possession, of any of his goods and chattels, without actual notice to the purchaser that such writ is in the hands of the sheriff of the judicial district wherein the said

judgment debtor resides or carries on business: R.S.M., ch. 53, sec. 20; 1 and 2 Edw. VII. ch. 2, sec. 11.

Seizure of Equity of Redemption.

12. On any writ of execution against goods and chattels, the sheriff or other officer to whom such writ is directed, or who may have the execution of such writ, may seize and sell the interest or equity of redemption of the party against whom such writ has issued, in any goods and chattels, and such sale shall be held to convey whatever interest the mortgagor had in such goods and chattels at the time of the seizure: R.S.M., ch. 53, sec. 21.

The Word "May."

It is clearly the sheriff's duty, notwithstanding the use of the word "may" in the statute, to seize and sell the equity of redemption in mortgaged chattels when such equity is valuable: Massey Mfg. Co. v. Clement, 9 Man. L.R. 359.

Mortgages Liable to Seizure.

13. Any sheriff, by virtue of any writ against goods heretofore or hereafter sued out of the Court of King's Bench for Manitoba, may and shall seize and take any mortgage or mortgages of real or personal estate, cheques, bills of exchange, bonds, promissory notes or other securities for money of the judgment debtor against whom such writ issued, or in which he has any interest; and in addition to the remedy given for realizing on the same by the Act of the Parliament of the United Kingdom passed in the first and second years of the reign of Her late Majesty Queen Victoria chaptered one hundred and ten and amending Acts, in cases where it appears that a suit on such mortgage or security under said Act might be of no benefit by reason of the insolvency of the person liable to pay the money payable under such mortgage or other security, or if for the same or any other reason such suit might be more onerous than beneficial to the judgment creditor in such suit, the said sheriff shall sell the said mortgages or other securities by public auction in the same manner and after such advertisement thereof as is

required for the sale of any goods or chattels seized under any writ against goods issued out of said court, and apply the proceeds of such sale in the same manner as on a sale of goods and chattels; and the purchaser of any mortgage or other security as aforesaid shall by such sale to him become the owner of the interest of the judgment debtor in such mortgage or security at the time of its seizure, and, in the case of a mortgage on lands, shall by such sale to him acquire the interest of the mortgagee in the lands comprised in said mortgage at the time of such seizure and be entitled to the benefit of all the covenants and powers contained in such mortgage or other security, and to use all the remedies, either by suit in his own name or other proceeding, allowed or given by such mortgage or security or by any law or statute, for the collection of the debt secured by such mortgage or security or for the sale of the lands or goods covered by said mortgage or security; but no warranty shall be created by such sale and conveyance by said sheriff, not even that the debt is due:

Provided that the purchaser of any such mortgage from the sheriff shall be bound to register the assignment thereof in the proper registry office or land titles office: R.S.M., ch. 53, sec. 22.

THE COUNTY COURT ACT.

(R.S.M. 1902, ch. 38.)

Execution Against Equitable Interest in Goods.

182. On any writ, precept or warrant of execution, or process in the nature of execution, against goods and chattels, the bailiff or officer to whom the same is delivered for execution may seize and sell the interest or equity of redemption in any goods or chattels of the party against whom the same has issued, and such sale shall convey to the purchaser thereof whatever interest the party against whom such process has issued had in such goods or chattels at the time of the seizure thereof: R.S.M., ch. 33, sec. 146.

Equitable Interest; Crops.

In an interpleader issue between an execution creditor and the claimant of a quantity of grain seized in stack, unthreshed, it appeared that the claimant let to the execution debtor the farm on which the grain had been grown by an indenture reserving as rent "the —— share or portion of the whole crop which shall be grown upon the demised premises as hereinafter set forth," and the lease provided that the lessor might retain from the share of the crop that was to be delivered to the lessee a sufficient amount to cover taxes and to repay advances and other indebtedness; that the lessee, immediately after threshing, should deliver the whole crop, excepting hay, in the name of the lessor, at an elevator to be named by the lessor; that all crops of grain grown upon the said premises should be and remain the absolute property of the lessor until all covenants, conditions, provisoes and agreements therein contained should have been fully kept, performed and satisfied; and that the lessor should deliver to the lessee two-thirds of the proceeds of the crop to be stored in the elevator, less any sum retained for taxes, advances, indebtedness or guaranties previously mentioned. The grain in question had, until its seizure under the plaintiff's execution, remained on the farm in the possession of the lessee. The claimant claimed it as owner under the terms of the lease, and not for rent: It was held, that the lease did not operate to prevent the lessee from ever having any property in the grain to be grown. That, even if the legal ownership of the grain was to be in the lessor, it was still, as to two-thirds, held for the benefit of the lessee subject to the lessor's charge for taxes and advances, etc., and the lessee had an equitable interest in it, and the lessor's lien or charge would be void under the Bills of Sale and Chattel Mortgage Act, now chapter 11, R.S.M. 1902, sec. 39, as being a charge upon crops to be grown in the future. That the interest of the lessee in the grain, whether legal or only equitable, was subject, under section 182 of the County Courts Act, R.S.M. 1902, ch. 38, to seizure and sale under execution, and that the claimant's interest could not prevail over that of the plaintiff: Campbell v. McKinnon, 14 Man. L.R. 421.

Seizure of Securities.

186. The bailiff or other officer shall, for the benefit of the plaintiff, hold any cheques, bills of exchange, promissory notes,

bonds, specialties or other security for money, so seized or taken as aforesaid, as a security for the amount directed to be levied by the execution, or so much thereof as has not been otherwise levied or raised; and the plaintiff when the time of payment had arrived, may sue in his own name, or in that of the defendant, or in the name of any person in whose name the defendant might have sued, for the recovery of the sum or sums secured or made payable thereby; and the defendant in the execution shall not discharge such action in any way without the consent of the plaintiff in the execution or of a judge: R.S.M., ch. 33, sec. 179.

Enforcement of Securities; Costs.

187. The party who desires to enforce payment of any security so seized or taken as aforesaid, shall first pay or secure all costs that may attend the proceeding; and the moneys realized, or sufficient part thereof, or so far as the estate will go, shall be paid over by the officer receiving the same to apply on the plaintiff's demand, and the overplus, if any, shall be forthwith paid to the defendant in the execution, under the direction of any judge: R.S.M., ch. 33, sec. 180.

NEW BRUNSWICK.

BILLS OF SALE ACT.

(C.S.N.B. 1903, ch. 142, and Amendments.)

Short Title.

1. This chapter may be cited as the "*Bills of Sale Act*," 56 Vict. ch. 5, sec. 30, am.

Constitutionality of Act.

The point was raised, on one occasion, whether the original statute respecting bills of sale was not *ultra vires* of provincial legislation, inasmuch as it was legislation upon the subject of insolvency within the meaning of the "British North America Act," 1867, but the majority of the Court held against such a contention: Re De Veber, 21 N.B.R. 397.

Mortgages of Chattels.

2. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged, or a true copy thereof, shall within thirty days from the execution thereof, be filed as hereinafter provided, together with the affidavit of a witness thereto of the due execution of such mortgage or conveyance or of the due execution of the mortgage or conveyance of which the copy filed purports to be a copy, and also with the affidavit of the mortgagee, or of one of several mortgagees, or of the agent of the mortgagee or mortgagees, if such agent is aware of all the circumstances connected therewith: 56 Vict. ch. 5, sec. 1.

Change of Possession.

This Act does not apply to a case which is consummated and completed by a change of actual possession, as, for example, when, prior to the sheriff levying and seizing, the grantee en-

ters and takes possession of the personal property described in the bill of sale: McLean v. Bell, 5 Rua. & Geld., 17 N.S.R. 128; *see ante* ch. VI. of the text. And the mere fact of some of the debtor's family being on the premises would not defeat the possession of the grantee: Davies v. Jones, 7 L.T.N.S. 130; Graham v. Wilcockson, 46 L.J.Ex. 55.

Secret Trade Agreement.

A conditional sale agreement when the property in the goods sold is to remain in the vendor until full payment is made, is not within the provisions of the Act: Trueman v. Bain (1885), 25 N.B.R. 298; Wheeler & Wilson v. Charters, 21 N.B.R. 480.

A written agreement that the goods supplied to a person should remain the property of the supplying person, and if, at any time the latter considers the business of the buyer not being conducted in a proper way he should be at liberty to take possession of the stock, book debts and other assets and dispose of the same, does not constitute a sale within the meaning of sec. 6, as to goods supplied, nor an agreement intended to operate as a mortgage within sec. 2, as to goods not supplied, but is a mere license to take possession to which the Act does not apply: Gault Brothers v. Morrell (No. 3), 3 N.B. Eq. 543. It was also held in the case, *supra*, that under that agreement, right to take possession of the goods was not limited to the goods supplied, but extended also to the book debts, though the agreement to take possession of them did not amount to an assignment.

Subject-matter of Mortgage.

The words "goods and chattels" are defined by section 28 to mean goods, furniture, pictures and other articles capable of complete transfer by delivery; and the same section indicates the classes of transactions which are excepted from the operation of the Act.

Where a person purchased an engine and boiler in the State of Maine, giving there a chattel mortgage on the same, which was duly registered according to the law of that state, and the engine and boiler were then moved to New Brunswick by the mortgagor, who mortgaged to another person there, the Maine mortgagee and his assigns are entitled to the chattels, although the mortgage was not filed in New Brunswick, this Act not

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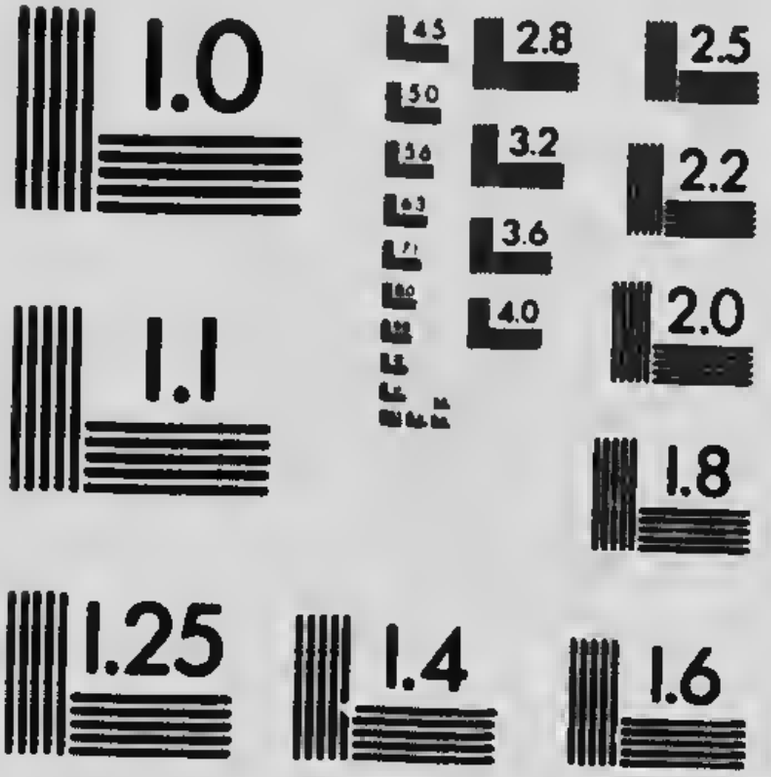

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applying to a bill of sale made in a foreign country of chattels then there: Gosline v. Dunbar (1894), 32 N.B.R. 325; Singer Machine Co. v. McLeod, 20 N.S.R. 341.

The intention of the parties and not alone the description of the goods themselves must be considered; and where there is an express agreement to assign after-acquired property, a present agreement that the mortgagee should have the right and an interest attaching immediately upon all the property which might be brought upon the premises, and that he should have the power of entering on the premises for the purpose of seizing and taking possession of that future property, for "more effectually securing payment" of his debt, then such an agreement operates as a security on the property, both present and future, accompanied with a power to enter and seize the property (Vassie v. Vassie, 22 N.B.R. 76, discussing Holroyd v. Marshall, 10 H.L.C. 191), the leading case respecting the assignment of future-acquired property under a bill of sale, and is something more than a mere naked power to seize after-acquired property as was the construction put upon a power to seize in Congreve v. Evetts, 10 Ex. 298, and Hope v. Hayley, 5 E. & B. 830. Though after-acquired property can be conveyed by an instrument under this Act—at least equity will act upon such an instrument so as to transfer to the vendee the beneficial ownership in the property as soon as it is acquired by the grantor: Lloyd v. European, etc., Ry. Co., 18 N.B.R. 194—yet such a description as the following: "And all property owned or to be owned by me, and including all renewed stock or stocks to be purchased by me," will not pass to the grantee in a bill of sale the property in a horse purchased by the grantor some three years after the execution of the instrument, and a symbolical delivery thereof by the grantor in the words: "I deliver to you this horse to hold on the terms of the bill of sale," or words to that effect, will not engraft the horse on the instrument, or amount to a sufficient *novus actus* within the meaning of a *novus actus interveniens,* to pass the horse at law to the grantee in the bill of sale. As to symbolical delivery, see McNab v. Sawyer, 9 N.S.R. 38. But a colt which is the progeny of a mare mentioned in and covered by the bill of sale, though at the time of the execution of the instrument the mare was not in foal, will pass under such a description as above mentioned in accordance with the civil law rule "*partus sequitur ventrem*:" Nicholson v.

Temple, 20 N.B.R. 248, affirmed by the Supreme Court of Canada: see Cas. Dig. (S.C.) 114.

Personal property may become altered in its character, so as to become a fixture, but a person cannot, by affixing personal property to the land of another where he has no right to affix it, alter its character as a chattel: Alexander v. Cowie, 19 N.B. R. 599. Its character, however, will be altered if such be the intention of the parties, and therefore a building erected on land, but no further attached to it than by its own weight, will become part of the freehold, if it is apparent that it was erected with that intention: Doran v. Willard, 14 N.B.R. 358. Manure lying in heaps in the barnyard is a chattel, and it is none the less a chattel because it is not produced upon the land: Foshay v. Barnes, 1 Han. (N.B.) 452; Thomson v. Walsh, 2 All. 369; but if it be scattered upon the ground so that it cannot be gathered without gathering part of the soil with it, then the manure is part of the freehold, and consequently not a personal chattel: Yearworth v. Pierce, Aleyn, 32 Can. S.C.R. 31. So with timber: when such is sold with the right to cut, it becomes, so soon as severed, a personal chattel: Murray v. Gilbert, 1 Han. (N.B.) 545.

A sale of 50,000 bricks out of a kiln containing 100,000, to one who pays the price and hauls away a portion, is an executed contract, and therefore, the property in the bricks passes to the purchaser at the time of the sale, notwithstanding that the balance of the bricks remain in the kiln in the vendor's yard, and are never in any way separated from the rest of the kiln or appropriated to the purchaser: Close v. Temple, 20 N.B.R. 234. And there may also here be added in support of the principle "*omne principalis trahit ad se accessorium,*" that repeated repairs upon a boat one year after another, so that really none of the original materials to the boat, except the machinery, at last remained, does not take the title to the boat out of the original party entitled thereto, who, if he hold title under a bill of sale duly registered under this Act, would still be preferred, as against a third party registering his title thereto subsequently under the Merchant Shipping Act. The reason is that only the owner has power to register under this latter Act, and at the time of registering the ownership was in the vendee under the bill of sale: Gibson v. Gill, 19 N.B.R. 565. It must, however, be remembered that the title to ferry boats running in the

harbour of St. John must be transferred according to the provisions of the Merchant Shipping Act: Lloyd v. European, etc., Ry. Co., 18 N.B.R. 194; but a ship which has been wrecked may be transferred without a bill of sale, as there is a distinction founded on the law merchant between a transfer of a registered vessel by the owner, which must be in writing, and the conveyance of a wrecked vessel by the master: Orange v. McKay, 1 Oldright, 5 N.S.R. 444. The mere continuance in possession by a grantor of a bill of sale, absolute in form, though it be evidence of fraud, does not necessarily make the transfer void. The case of Edwards v. Harben, 2 T.R. 587, does not seem to be supported by the current of later authorities: Sheriff v. McKeen, 23 N.B.R. 184.

Sale or Return.

A validly executed mortgage of chattels which had been delivered to the mortgagor on option of purchase or return invests the mortgagee with a superior title as against the person who delivered them to the mortgagor on those conditions: Ward v. Cormier (N.B.), 8 E.L.R. 466, referring to Moss v. Sweet, 16 Q.B. 493; Ex parte Wingfield, 10 Ch.D. 591; Kirkham v. Attenborough, 1 Q.B. 201.

While the rule, that, in the absence of agreement the purchaser of a specific chattel cannot return it on breach of warranty, may not apply to a sale providing that the property shall not pass until payment of the purchase price, it will apply in such case where the vendee, in addition to keeping the chattel a longer time than reasonable or necessary for trial, has exercised the dominion of an owner over it, as by giving a chattel mortgage of it to the vendor: Petropolous v. Williams Company (No. 2), 3 N.B. Eq. 346, 42 C.L.J. 691.

Adverse Seizure; Claim of Mortgagee.

The seizure or sale under an illegal distress for rent of goods covered by a chattel mortgage, is an act of trespass which entitles the mortgagee to recover from the wrongdoer the full value of the chattels so seized: Clarke v. Green (N.B.), 1 E. L.R. 552.

The seizure under a distress for rent, or horses covered by a bill of sale to secure the return of a quantity of grain and the payment of money constitutes, as against the mortgagee, an

act of conversion for which trover is maintainable even though the horses were in the debtor's possession: Coate v. Gosling, 20 N.B.R. 323.

Estoppel.

Where a horse, given to a woman for the support of herself and her child, was afterwards seized as the property of the donor under an absconding debtor's warrant, a bill of sale of the horse to secure the amount for which the horse was seized, given by persons who professed to have acted for her in order to discharge the levy, does not estop her from recovering in an action for the conversion of the horse on its seizure under the powers of the bill of sale for the non-payment of the amount secured: *Hannay* v. *Fraser*, 37 N.B.R. 39.

Substituted Chattels.

Where a bill of sale by way of chattel mortgage on a mill engine contained no provision for the substitution of a new engine by the mortgagor, and the mortgagor purchased a new engine giving the old one in exchange as part payment, and a bill of sale on the new one as security for the balance, the first mortgagee, by remaining silent respecting the change when he learned of the same shortly afterwards, is not estopped from claiming the old engine, it appearing that he did not know of the second bill of sale: Stewart v. Muirhead (1890), 29 N.B.R. 273, *per* Wetmore, King and Tuck, JJ., (Allen, C.J., and Palmer, J., dissenting).

If the mortgagee supposed that a new engine, without any lien or claim upon it, was being substituted, he might well ratify the change; while if he was aware that the new engine was subject to a prior charge he might decline. He must know the facts in order to be estopped, and if ignorant of the facts his conduct would neither estop him nor prove a ratification: Stewart v. Muirhead, 29 N.B.R. 273 at 282; see also Polak v. Everett, 1 Q.B.D. 669; Freeman v. Cooke, 2 Ex. 654.

A proviso in a chattel mortgage stipulated that the mortgagor should remain in possession of the mortgaged property until default with power to use the same in the ordinary way while so in possession, but with full power, right and authority to the mortgagee to enter and take possession of the property in case of default of payment, or on the death of the mortgagor

or in the event of the seizure of the property at the suit of any creditor, or in the event of the mortgagor disposing of or attempting to dispose of or make away with said property or any part thereof without the written consent of the mortgagee. It was held, that it was clearly a condition of the mortgage and the intention of the parties thereto that the mortgagor should be allowed to sell or exchange the mortgaged property, provided such sale or exchange was in the ordinary course of the mortgagor's business, and as to whether the exchange of a horse covered by the mortgage had been in the ordinary course of the mortgagor's business or not was a question of fact, which had not been passed upon by the Court below, and there should be a new trial in order to have that point determined: MePherson v. Moody, 35 N.B.R. 51, 36 C.L.J. 186.

The same case also held, that a verbal license given to the mortgagor before the execution of the mortgage by the agent of the mortgagee whereby the mortgagor was authorized in general terms to use the mortgaged property in the way he had, cannot be given effect in face of the mortgage, which must be taken to contain the whole contract entered into between the parties.

Chattel Mortgage when Collateral to Note.

In a suit by the mortgagor to set aside a bill of sale by way of mortgage, an interim injunction order to restrain a sale by the mortgagee had been granted upon condition of the mortgagor paying into Court the amount due the mortgagee. It was contended that the bill of sale was collateral security for promissory notes, some of which had been indorsed over for value; but the Court held that the amount to be paid into Court should not be reduced by the amount of such notes: Petropolous v. Williams Co., 3 N.B. Eq. 267.

Fraudulent Preferences.

A creditor has a right to save his debt by getting any legitimate security. But that can not be done when the creditor knows of the debtor's insolvent condition and that he is aware that he is being pressed with claims by all creditors, and if under those conditions a creditor obtains a mortgage from the debtor it will be declared void under the Fraudulent Preference Act: Tooke Bros. v. Brock, etc., (N.B.) 3 E.L.R. 271.

If an assignment is made by an insolvent to his creditor

by way of preference and that assignment is his own voluntary act, done on his own motion, it is a prohibited act where it is given to secure an overdue indebtedness. If, however, it is not done voluntarily, but on the demand of the creditor, and under pressure from him, the transaction loses its fraudulent character, and the preference is not unjust. Barker, J., in Edgett v. Steeves, (N.B.) 2 E.L.R. 131, referring to Stephens v. McArthur, 19 Can. S.C.R. 446; Amherst Shoe Co. v. Sheyn, 2 N.B. Eq. 250; National Bank of Australia v. Morris, [1892] A.C. 287; Webster v. Crickmore, 25 A.R. (Ont.) 97; Beattie v. Wenger, 24 A.R. (Ont.) 72.

Actual and Continued Change of Possession.

See sec. 5 of the Ontario Act.

Affidavit of Bona Fides.

3. Such last-mentioned affidavit, whether of the mortgagee or his agent, shall state that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage; that it was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claims against him: 56 Vict. ch. 5, sec. 2.

Discrepancy in Amount.

If a mistake has been made innocently in filling in the consideration in the affidavit or the mortgage so that there is an apparent discrepancy, it would seem that such error is not necessarily fatal: Fraser v. McPherson, 34 N.B.R. 417 at 427.

Effect of Filing.

4. Every such mortgage or conveyance shall only operate and take effect upon, from and after the day and time of filing thereof: 56 Vict. ch. 5, sec. 3.

Failure to File.

5. In case such mortgage or conveyance and affidavits are not filed as hereinbefore provided, the mortgage or conveyance shall be absolutely null and void, as against subsequent purchasers or mortgagees in good faith for valuable consideration, the assignee of the mortgagor under any law relating to insolvency or insolvent, absconding or absent debtors, or an assignee for the general benefit of the creditors of the mortgagor, or as against the execution creditors of the mortgagor, or any sheriff, constable or other person levying on or seizing the property comprised in such mortgage under process of law: 56 Viet. ch. 5, sec. 4.

Estoppel; Creditors.

When one disclaims an interest in chattels and represents that the property is that of another, whereby a third person is induced to accept a bill of sale as security for the advances which he makes, then such a person so representing will not be permitted afterwards to claim the property as against the grantee of the bill of sale, at least until the claim of the grantee is paid, and the statute is not designed to protect such a person: Carr v. Carey, 9 N.S.R 70.

The term execution creditors is here used. The absence in the former Ontario Act of the word "execution" resulted in a judgment to the effect that simple creditors without execution were of a class designed by the Act to be protected, (Barker v. Leeson, 1 O.R. 114), but such judgment was not subsequently sustained by authority: Parkes v. St. George, 10 A.R. (Ont.) 498, followed in Empire Co. v. Maranda, 21 Man. L.R. 605. See also Hyman v. Cuthbertson, 10 O.R. 443. But in Clarkson v. MeMaster, 25 Can. S.C.R. 96, a more liberal construction was placed upon the word "creditors" as it appears in the Ontario Act. See sec. 2(*b*) of the Ontario Act.

Levy and Seizure.

The legal meaning of the word "levy" is simply the act of raising money (Whart. Law Lex.), hence it differs somewhat in meaning from the word "seizing." There may be a levy and yet no seizure, and if upon seizure the money is not raised, then

though there has been a seizure there yet has been no levy: Bissicks v. Bath Colliery Co., 32 L.T.N.S. 800; Consolidated Bank v. Bickford, 7 P.R. 172; Mortimer v. Craig, 3 C.P.D. 216; McRoberts v. Hamilton, 7 P.R. 95, 13 C.L.J. 107: Hamilton, etc., R. Co. v. Gore Bank, 10 C.L.J. 45; see Brockville & Ottawa R. Co. v. Central Canada R. Co., 7 P.R. 372; Corbett v. McKenzie, 6 U.C.Q.B. 605; Thomas v. Cotton, 12 U.C.Q.B. 148; Buchanan v. Frank, 15 U.C.C.P. 197.

The levy or seizure must be "under process of law." Strictly speaking by process of law is meant the summons or first proceedings or step in the action, but it is now largely taken for all proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end: Whart. Law Lex.

The words in the section are not restricted to executions issued out of the Supreme or County Court, and a creditor with an execution from a parish Court is included: Le Vasseur v. Beaulieu (1896), 33 N.B.R. 569.

Bills of Sale.

6. Every sale of goods and chattels not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of this Act, and shall be accompanied by an affidavit of a witness thereto of the due execution thereof, and an affidavit of the bargaince or his agent duly authorized in writing to take the conveyance, a copy of which authority sha.' be attached to the conveyance, that the sale is *bonâ fide* and for good consideration as set forth in the said conveyance and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, and the conveyance and affidavits shall be filed as hereinafter provided within thirty days from the execution thereof, otherwise the sale shall be absolutely void as against subsequent purchasers or mortgagees in good faith, the assignee of the grantor under any law relating to insolvency or insolvent, absconding

or absent debtors, or an assignee for the general benefit of the creditors of the maker or as against the execution creditors of the maker, or any sheriff, constable or other person levying on or seizing the property comprised in such bill of sale under process of law: 56 Vict. ch. 5, sec. 5.

Bills of Sale; Filing.

See sec. 8 of the Ontario Act.

Where A being indebted to B, an account was made out by B shewing the indebtedness and crediting a waggon upon same, which account was signed by A, who retained possession of the waggon to complete the manufacture of same in consideration of the balance of the account, it was held that as there was no sale independent of the written document, it amounted to a bill of sale, and not being registered the waggon was liable to seizure under an execution against A: Shirreff v. Vye, 24 N.B.R. 572.

A written agreement that the goods supplied to a person should remain the property of the supplying person, with a right to retake possession of them in the event the business for which they are supplied is not properly conducted, does not amount to a sale of goods within the meaning of this section, but a mere license to take possession, to which the provisions of this Act have no application: Gault Brothers v. Morrell (No. 3), 3 N.B. Eq. 453. See note to sec. 2 of this Act.

Assignments for Creditors.

In Douglas v. Sanson, 1 N.B. Eq. 122, 131, Barker, J., said "This and one or two other sections of this Act (sec. 6) seem to be substantially copied from the Chattel Mortgage Act of Ontario (referring to Robertson v. Thomas, 8 O.R. 20); and whether an assignment for the benefit of creditors, such as this, is such a sale as is contemplated by the Act, is a question which has been much discussed in Ontario; and, though the weight of judicial opinion there seems to be in favour of that view, the point can scarcely be said to be settled even there." Referring to Whiting v. Hovey, 13 A.R. (Ont.) 7, 14 Can. S.C.R. 515; Archibald v. Hubley, 18 Can. S.C.R. 116 "The point is not an important one in this case, for there does not seem to have been any goods or chattels . . . to assign." But the doubt raised in this case is set at rest by sec. 12, ch. 141,

Consolidated Statutes of New Brunswick (1903) respecting Assignments and Preferences by insolvent persons, and it reads as follows:—(1) No assignment for the general benefit of the creditors under this chapter shall be within the operation of "The Bills of Sale Act, chapter 142, of these Consolidated Statutes," but a notice of the assignment shall, as soon as conveniently may be, be published at least once in the *Royal Gazette*, and in one newspaper at least having a general circulation in the county in which the property assigned is situate, (if any newspaper is published in the county) not less than twice.

(2) A counterpart or copy of every such assignment shall also within five days from the execution thereof, be registered (together with an affidavit of a witness thereto, of the due execution of the assignment, or of the due execution of the assignment of which the copy filed purports to be a copy), in the office of the registrar of deeds of the county where the assignor, if a resident in New Brunswick, resides at the time of the execution thereof, or if he is not a resident then in the office of the registrar of deeds in the county where the personal property so assigned is, or where the principal part thereof, (in case the same includes property in more counties than one), is at the time of the execution of the assignment, and such registrars shall file all such instruments presented to them respectively for that purpose, and shall endorse thereon the time of receiving the same in their respective offices, and the same shall be kept there for the inspection of all parties interested therein. The said registrars respectively shall number and enter such assignments and be entitled to the same fees for services in the same manner as if such assignments had been registered under chapter 142, of these Consolidated Statutes: 58 Viet. ch. 6, sec. 12.

Specific Performance.

Specific performance may be decreed of an agreement to give a bill of sale upon ascertained furniture sold and delivered upon credit in reliance upon such agreement: Jones v. Brewer, 1 N.B. Eq. 630.

Future Advances; Indorsements.

7. (1) In case of an agreement for future advances for the purpose of enabling the borrower to enter into or carry on busi-

ness with such advances (the time of repayment thereof, not being longer than three years from the date of the mortgage, and the time for the making of the whole advances not being longer than two years from such date); and in case of a mortgage of goods and chattels for securing the mortgagee the repayment of such advances, or in case of a mortgage of goods and chattels for securing the mortgagee against the endorsement on any bills or promissory notes, or any other liability by him or by any other person, incurred, or to be incurred for a mortgagor, not extending longer than three years from the date of the mortgage; and in case the mortgage is executed in good faith, and sets forth by recital or otherwise the terms, nature and effect of the agreement, and the amount of liability created, or intended to be created, and in case the mortgage is accompanied by the affidavit of a witness thereto, of the due execution thereof, and by the affidavit of the mortgagee, or in case the agreement has been entered into, and the mortgage taken by an agent duly authorized in writing to make such agreement and to take such mortgage, and if the agent is aware of the circumstances connected therewith, then, if accompanied by the affidavit of such agent, such affidavit, whether of the mortgagee or his agent, stating that the mortgage truly sets forth the agreement entered into by the parties thereto, and truly states the extent of the liability created or intended to be created by the agreement and covered by such mortgage, and that the mortgage is executed in good faith and for the express purpose of securing the mortgagee repayment of such advances or to secure the liability created, or intended to be created for the mortgagor, as the case may be, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor, nor to prevent such creditors from recovering any claims which they may have against the mortgagor; and, in case the mortgage is filed, as hereinbefore provided, the same shall be as valid and binding as mortgages mentioned in the preceding

sections of this chapter: 61 Vict. ch. 32, sec. 1 (1); 1 Edw. VII. ch. 29.

Mortgages.

(2) Every mortgage of goods and chattels to secure repayment of future advances, or to secure any person against the indorsement of any bills or promissory notes, or any other liability incurred or to be incurred for the mortgagor, or for any other person, shall be null and void as against the persons mentioned in sec. 5, unless executed in accordance with the provisions of this section, and filed as hereinbefore provided: 61 Vict. ch. 32, sec. 1 (2).

Mortgages for Future Advances and Endorsements.

If a mortgage which in fact is given for securing the mortgagee against the endorsement of promissory notes, is made in form for a debt, not reciting the terms, nature and effect of the agreement and the amount of the liability intended to be created, such mortgage will be invalid: Le Vasseur v. Beaulieu (1896), 33 N.B.R. 569.

Not only would this be so because the mortgage does not correctly or truthfully set out the transaction, but because the affidavit of *bona fides* in the form for debt is in no sense a compliance with the provisions of this section, and is therefore defective.

Whether the alleged indebtedness for which a chattel mortgage is given exists or not, it is still a question for the jury whether or not the substantial and real object of the transfer was to hinder and delay creditors, although it may also have been to enable the mortgagor to carry on his business: Flanagan v. Wheran, *per* Palmer, J., 31 N.B.R. 607.

See also sec. 6 of the Ontario Act.

Affidavi. of One Bargainee.

8. The affidavit of *bona fides* required by the preceding two sections, may be made by one of two or more bargainees or mortgagees: 56 Vict. ch. 5, sec. 7.

Affidavit for Joint Bargainees or Mortgagees.

See sec. 12(1) of the Ontario Act.

Registration.

9. The instruments mentioned in the preceding sections shall be filed with the registrar of deeds of the county where the maker resides, if resident within the province, and, if not so resident, then with the registrar or registrars of the county or several counties in which the goods may be, and such registrar shall file all such instruments presented to him for that purpose, and shall endorse thereon the day, hour and minute of receiving the same in his office, and the same shall be kept there for the inspection of all persons interested therein, or intending or desiring to acquire any interest in or of any portion of the property covered thereby: 56 Vict. ch. 5, sec. 8, am.

See sec. 18 of the Ontario Act.

Though he may neglect to mark it filed, or to file it as a bill of sale, or number, or to enter or index it in the book kept by him for entry of bills of sale, yet the filing will be good within the Act if the instrument be left with the registrar with instructions so to file it, and this is so even if the instrument be delivered to the registrar at his private residence, and even though the registrar keep the instrument for some time and then return it to the grantee unfiled as a bill of sale: Fisher v. Bishop, 17 N.S.R. 451.

Numbering and Indexing.

10. The registrar shall number every such instrument or copy filed in his office, and he shall enter in alphabetical order in a book to be kept by him for that purpose, the names of all the parties to such instruments, with the numbers endorsed thereon opposite to each name, and such entry shall be repeated alphabetically under the name of every party thereto: 56 Vict. ch. 5, sec. 9.

This section follows closely the wording of the Ontario Act, section 20, which see.

Registrar's Index.

See sec. 20 of the Ontario Act.

Renewals.

11. Every mortgage or copy thereof filed in pursuance of this chapter shall, before the expiration of one year from the filing thereof, be renewed by filing in the office of the registrar in which such instrument was originally filed, a statement exhibiting the interest of the mortgagee, his executors, administrators or assigns, in the property claimed by virtue thereof, and shewing the amount still due for principal and interest thereon, and shewing all payments made on account thereof, or if the mortgage has been given under the provisions of section 7, the amount of advances made as well as the amount remaining to be made, likewise the amount still due for principal or interest on such advances, and shewing all payments made on account thereof, or shewing the amount of liability incurred, and the amount due in respect thereof, and also all payments made on account thereof, as the case may be, together with an affidavit of the mortgagee, or one of several mortgagees, or of the assignee, or one of several assignees, or of the agent of the mortgagee or assignee, or mortgagees or assignees, as the case may be, that the statement is true, and that the mortgage has not been kept on foot for any fraudulent purpose; and in case of failure to file such statement and affidavit within the time aforesaid, any creditor of the mortgagor, may, by a written notice served upon such mortgagee or mortgagees, or upon such assignee or assignees, require him or them to file such statement and affidavit, and if the same are not filed, as required by this section, within thirty days after service of such notice, then such mortgage shall cease to be valid as against any execution against the goods and chattels of the mortgagor issued at the suit of such creditor: 61 Vict. ch. 32, sec. 2.

Renewal Statements.

See sec. 21(1) of the Ontario Act.

Form of Renewal.

12. The statement and affidavit mentioned in the next preceding section may be in the form given in Form (B) to this chap-

ter, or to the like effect: 56 Vict. ch. 5, sec. 11, am.; 61 Vict. ch. 32, sec. 3 (1).

Renewal Statement to be Filed.

13. The statement and affidavit shall be deemed one instrument, and be filed and entered in like manner as the instruments in this chapter mentioned are by section 9 required to be filed and entered, and the like fees shall be payable for filing and entering the same as are payable for filing and entering such instruments: 56 Vict. ch. 5, sec. 12.

Subsequent Renewals.

14. Another statement in accordance with the provisions of section 11, duly verified as required by that section, shall be filed in the office of the registrar in which the original instruments were filed, within thirty days next preceding the expiration of the term of one year from the day of the filing of the statement required by the said section 11, and so on from year to year; that is to say, another statement as aforesaid, duly verified, shall be filed within thirty days next preceding the expiration of one year from the day of the filing of a former statement. In case of failure to file the statement and affidavit from time to time, as required by this section, any creditor of the mortgagor may, by a written notice served upon such mortgagee or mortgagees, assignee or assignees, require him or them to file such statement and affidavit, and if the same are not filed, as required by this section, within thirty days after service of the notice herein provided for, then such mortgage shall cease to be valid as against any execution against the goods and chattels of the mortgagor issued at the suit of such creditor: 56 Vict. ch. 5, sec. 13.

Subsequent Renewals.

See sec. 21(7) of the Ontario Act.

Affidavits; By Whom Made.

15. The affidavit required by section 11 may be made by

gagee, or by any assignee claiming by or through any mortgagee, or any next of kin, executor or administrator of any such assignee; but if the affidavit is made by any assignee, next of kin, executor or administrator of any such assignee, the assignment, or the several assignments through which the assignee claims, shall be filed in the office in which the mortgage is filed, at or before the time of such refiling by the assignee, next of kin, executor or administrator of the assignee: 56 Vict. ch. 5, sec. 14.

Renewal Affidavits.

See sec. 21(8) of the Ontario Act.

Mortgages and Trust Deeds to Secure Company Bonds.

16. (1) In the case of a mortgage or conveyance of personal property of any company incorporated by or under Imperial Act or charter, or by or under any Act or charter of the Dominion of Canada, or by or under any Act or charter of the Province of New Brunswick, made to a bondholder or bondholders, or to a trustee or trustees, for the purpose of securing the bonds or debentures of such company, instead of the affidavit of *bona fides* required by sections 2 and 3 of this chapter, it shall be sufficient for the purposes of this Act if an affidavit be filed as thereby required, made by the mortgagee or one of the mortgagees, to the effect that the said mortgage or conveyance was executed in good faith, and for the express purpose of securing the payment of the bonds or debentures referred to therein, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him.

Renewals.

(2) Any such mortgage may be renewed in the manner and with the effect provided by section 11 and following sections of this chapter, upon the filing of a statement by the mortgagee or

one of the mortgagees exhibiting the interest of the mortgagee or mortgagees in the property claimed by virtue of the said mortgage, and shewing the amount of the bond or debenture debt that the same was made to secure, and shewing all payments on account thereof which to the best of the information and belief of the person making such statement have been made, or of which he is aware or has been informed, together with an affidavit of the person making such statement that the statement is true to the best of his knowledge, information and belief, and that the mortgage has not been kept on foot for any fraudulent purpose, and such statement shall be filed instead of the statement required by the said sections of this chapter.

Affidavits.

(3) If any mortgage as aforesaid be made to an incorporated company, the several affidavits and statements herein mentioned may be made by the president, vice-president, manager or assistant manager of such mortgagee company, or any other officer of the company aforesaid for such purpose.

Filing.

(4) For the purpose of the filing or registering of any conveyance under this chapter, the head office within the Province of any incorporated company shall be deemed the domicile or place of residence of the company: 56 Vict. ch. 5, sec. 15.

Sundays and Holidays; Expiry Dates.

See sec. 24 of the Ontario Act.

Proof of Filing.

A copy of such original instrument or a copy thereof so filed as aforesaid, including any statement made in pursuance of this chapter, certified by the registrar in whose office the same has been filed, shall be received in evidence in all Courts, but only of the fact that the instrument or copy and statement were received and filed according to the endorse-

ment of the registrar thereon, and of no other fact, and in all cases the original endorsement by the registrar made in pursuance of this chapter upon any such instrument or copy shall be received in evidence only of the fact stated in the endorsement: 56 Vict. ch. 5, sec. 16.

Evidence of Filing.

Compare sec. 27 of the Ontario Act.

Evidence of Instruments.

For proof of instruments filed under the Bills of Sale Act, the Evidence Act, ch. 27, sec. 70, of the Consolidated Statutes of New Brunswick, 1903, makes the following provisions:—

When a party may be desirous of giving evidence in any Court of an instrument filed under chapter 142 of these consolidated statutes, respecting bills of sale, he may produce in evidence a copy thereof and of the affidavits filed therewith, certified by the registrar in whose office the same are filed as being true copies, compared by him with the originals, which copies shall, in the absence of the original instrument and affidavits, be received and allowed as *primâ facie* evidence of the execution of the originals, and of all matters of which the original instrument and affidavits would be proof, but before any such copies shall be allowed in evidence under the aforegoing provisions, it shall appear to the Court by affidavit that such originals, or a duplicate thereof, are not under the control of the party, and that at least six days' notice in writing shall have been given to the adverse party, his attorney or agent, of the intention to offer the same, such notice to be accompanied by a copy of such certified copies, and of the said last-mentioned affidavit, the due service thereof being also proved to the satisfaction of the Court: 60 V. ch. 11.

Certificate of Discharge.

18. Where any mortgage of goods and chattels is registered under the provisions of this chapter, such mortgage may be discharged by the filing in the office of the registrar in which the same is filed, of a certificate signed by the mortgagee, his executors or administrators in Form (A) hereto, or to the like effect: 56 Vict. ch. 5, sec. 17.

Certificate of Discharge.

Compare sec. 28 of the Ontario Act.

Entry of Discharge.

19. (1) The registrar with whom the chattel mortgage is filed, upon receiving such certificate, duly proved by the affidavit of a subscribing witness, shall at each place where the number of the mortgage has been entered, with the name of any of the parties thereto in the book kept under section 10 of this chapter, or wherever otherwise in the said book the said mortgage has been entered, write the words "Discharged by certificate number (*state the number of the certificate*)," and to the said entry the said registrar shall affix his name, and he shall also endorse the fact of the discharge upon the instrument discharged, and shall affix his name to the endorsement.

(2) Instead of the certificate above provided for, the mortgagee or assignee of the mortgagee may appear before the registrar with whom the mortgage is filed, and sign a memorandum of discharge in his presence, either on the mortgage or the copy filed, and such registrar shall subscribe the same as a witness; and the registrar shall thereupon enter the discharge of such mortgage as provided in the preceding sub-section: 56 Vict. ch. 5, sec. 18.

Entry of Discharge.

See sec. 29(1) of the Ontario Act.

Entries of Renewals.

20. Where a mortgage has been renewed under section 11 of this chapter, the endorsement or entries required by the preceding section to be made need only be made upon the statement and affidavit filed on the last renewal, and at the entries of the statement and affidavit in the said book: 56 Vict. ch. 5, sec. 19.

Entering Discharge upon Renewal Statement.

Compare sec. 29(2) of the Ontario Act.

Assignments of Chattel Mortgage.

21. In case a registered chattel mortgage has been assigned, the assignment may, upon proof by the affidavit of a subscribing witness, be numbered and entered in the alphabetical chattel mortgage book in the same manner as a chattel mortgage, and the proceedings authorized by next preceding three sections of this chapter may and shall be had upon a certificate of the assignee proved in manner aforesaid: 56 Viet. ch. 5, sec. 20.

Indexing Assignments of Mortgage.

See sec. 29(4) of the Ontario Act.

Defeasances.

22. In case any bill of sale is subject to any defeasance, the same shall be considered as part thereof, and such defeasance, or a copy thereof, shall be filed with the bill of sale or copy, otherwise such bill of sale shall be null and void as against the same persons, and as regards the same property and effects as if such bill of sale, or copy thereof, had not been filed according to the provisions of this chapter: 56 Viet. ch. 5, sec. 21.

Filing Defeasance where there is a Separate Stipulation for Defeasance.

It is absolutely necessary that the statute should be obeyed in the filing of the defeasance. Should a bill of sale, absolute on its face, be made subject to a defeasance or equity of redemption, but the defeasance be not filed under the Act respecting bills of sale, then the bill of sale will be inoperative, and not vest any title in the grantee thereof as against a party entitled to set up non-compliance with the statute: Re De Veber, 21 N.B.R. 397. The English Act says that the defeasance shall be in writing. This Act merely states that the defeasance shall be filed; but, as it cannot be filed unless it is in writing, there is practically no difference between the two Acts in this respect: *per* Allen, C.J., Sheraton v. Whelpley, 20 N.B.R. at p. 77.

The persons meant are those stated in sections 5 and 6. It is only as against such persons that the instrument is void and for no other purpose.

Fees for Filing.

23. For services under this chapter the registrar shall be entitled to receive the fees provided by chapter 188 of these Consolidated Statutes: R.S.N.B. 1903, ch. 142, sec. 23.

Registrar's Fees.

Chapter 188, part 13, provides the following fees to be charged for the filing under the Bills of Sale Act, ch. 142:—

(1) For filing each instrument and affidavit, and for entering the same in a book, as aforesaid, twenty-five cents.

(2) For filing assignment of each instrument, and for making all proper endorsements in connection therewith, twenty-five cents.

(3) For allowing inspection of any instrument filed under the provisions of this Act, twenty cents.

(4) For administering every oath under this Act, twenty cents.

(5) For filing certificate of discharge of each instrument, and for making all proper entries and endorsements connected therewith, twenty-five cents.

(6) For copies of any document, with certificate prepared, filed under this Act, five cents per folio.

Sundays and Holidays.

24. Where, under any of the provisions of this chapter the time for registering or filing any mortgage, bill of sale, instrument, document, affidavit or other paper expires on a Sunday or public holiday, on which the office of the registrar in which the filing is to be done is closed, and by reason thereof the filing cannot be done on that day, the filing shall, so far as regards the time of doing the same, be regarded to be duly done if done on the next day on which the office shall be open: 56 Viet. ch. 5, sec. 23.

Authority to Take or Renew.

25. An authority for the purpose of taking or renewing a mortgage or conveyance under the provisions of this chapter may be a general one, to take or renew all or any mortgages or

conveyances to the mortgagee or bargainee: 56 Vict. ch. 5, sec. 24.

Authority to Take and Renew.

Compare sec. 15 of the Ontario Act.

Description of Chattels.

26. All the instruments mentioned in this chapter whether for the sale or mortgage of goods and chattels, shall contain such sufficient description thereof that the same may be thereby readily and easily known and distinguished: 56 Vict. ch. 5, sec. 25.

Sufficiency of Description.

The Ontario Act (section 10) is in the same words, except that in the latter the words "and full" follow the word "sufficient" as applied to the description; but, in view of the qualification in the latter part of the section it can hardly be contended that it has any different construction or effect.

When a bill of sale professes to convey all the goods and merchandise of the grantors contained in their store, situate, etc., consisting of dry goods and groceries mentioned in the schedule annexed, and there is no schedule at all, then it is probable that the bill of sale would be incomplete and inoperative, because the schedule is virtually part of the instrument itself, and is intended to designate the property to be transferred: Re De Veber, 21 N.B.R. 392.

Future-acquired Property.

A chattel mortgage purporting to assign the stock in a livery stable business to cover "all and singular the goods, chattels, and property mentioned and set out in the schedule hereunto annexed . . . . which is to be read in connection with these presents and form a part thereof and also any and all the property that may hereafter during the continuance of these presents be brought to keep up the same in lieu thereof, and in addition thereto, either by exchange or purchase, which as soon as obtained, and in actual or constructive possession of the said party . . . shall be subject to all the provisions of this indenture," and the annexed schedule enumerating "eight horses and harnesses now in livery stable owned by said J. E. F., six

waggons in storehouse; four pungs, couch harness, buffaloes and robes now in said stable," without mentioning after-acquired property, is insufficient to cover after-acquired property. But where the schedule, after enumerating specifically the number of articles, provides for "also all other goods, furnishings, articles and materials now or hereafter during the continuance of these presents used in connection with the *livery stable* now owned by said J. E. F., and all property hereafter acquired therein," a sufficient description of the mortgaged property is set forth to satisfy sec. 26 of the Bills of Sale Act, and amply sufficient to cover after-acquired property: Fraser v. Macpherson, 34 N.B.R. 417.

Discussing the description of the latter, Tuck, C.J., in case *supra*, at page 427, said: "I do not see how much better horses, buggies, rugs, sleds and wraps can be described. In a livery stable (with the exception of the horses), sleighs, waggons and wraps of the same make and pattern look very much alike. Besides it looks here as if all the material in the livery stable was meant to be conveyed by the bill of sale."

As to the former mortgage, the Court explains its insufficiency, at page 428, *supra*, in the following words: "Such a contract, if made with respect to the sale or mortgage of future-acquired property, being capable of specific performance, transfers the beneficial interest in the property, as soon as it is acquired, to the vendee or mortgagee, who may have an injunction to restrain its removal. And Lopes, J., in Lazarus v. Andrade, 5 C.P.D. 318, referring to Holroyd v. Marshall, 10 H.L.C. 191, Leatham v. Amor, 47 L.J.Q.B. 581, and Belding v. Reed, 3 H. & C. 955, says, 'The principle deducible from these decisions is that property, to be after-acquired, if described so as to be capable of being identified, may be, not only in equity, but also at law, the subject-matter of a valid assignment for value. The contract must be one which a Court of equity would specifically enforce. Further on in his judgment he says: 'In this case the property is to be brought into the premises or to be appropriated to the use thereof, either in addition to or in substitution for property then on the premises.' Taking these decisions, as, of course, I must, to be a correct statement of the law, then the question here is, is the after-acquired property in the Cooper bills of sale sufficiently described so as to be capable of being identified, and is the contract one which a Court of equity would specifically enforce?

Looking at the bill of sale itself and the schedule, I am not prepared to say that the description is sufficient or that the contract could be specifically enforced. In Lazarus v. Andrade, 5 C.P.D. 318, the after-acquired property is to be brought into the premises or to be appropriated to the use thereof. There is no such language in the Cooper bill of sale. The words there are, 'which (that is the property) so soon as obtained, and in actual or constructive possession of the said party of the first part shall be subject to all the provisions of this indenture.' The following is the schedule, to wit: 'Eight horses and harnesses, now in livery stable owned by said James E. Fraser, six waggons in store house, four pungs, coach harness, buffaloes and robes now in said stable.' Suppose Fraser got other horses, waggons, and robes and brought them into other premises, could it be said that they had been brought to keep up the goods and property conveyed by the bill of sale, and could they be identified? I think not."

A phaeton buggy purchased on credit by a husband for his wife with funds which she supplied him for that purpose, constitutes her separate estate, and cannot be seized by the mortgagee of the husband under a chattel mortgage on the [illegible]r's livery business: Fraser v. Macpherson, 34 N.B.R. 417.

See sec. 10 of the Ontario Act and ch. XIII. of the text.

Affidavits; Commissioners.

27. All affidavits and affirmations required by this chapter shall be taken and administered by any Judge, notary public, commissioner or other person in or out of the province authorized to take affidavits to be read in the Supreme Court, or by the registrar of deeds or a justice of the peace, and the sum of twenty cents shall be paid for any oath thus administered: 56 Vict. ch. 5, sec. 26.

What Instruments Excepted; "Goods and Chattels" Defined.

28. This chapter does not apply to bills of sale, or mortgages of vessels registered under the provisions of any Act in that behalf, nor to transfers of goods in the ordinary course of business of any trade or calling, sales of goods in foreign ports or at sea, bills of lading, warehouse keepers' certificates, warrants

or orders for the delivery of goods, or any other documents used in the ordinary course of business, as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such documents to transfer or receive goods thereby represented, or assignments of personal property to creditors under proceedings for the relief of insolvent debtors, nor any transaction, agreement or contract made or entered into by any bank under section 74 of "The Bank Act" of the Parliament of Canada.

The expression "goods and chattels" in this Act shall mean goods, furniture, pictures and other articles capable of complete transfer by delivery, and shall not include chattel interests in real estate, nor shares nor interests in the stock, funds or securities of any Government or municipal corporation, or in the capital stock or debentures of any incorporated or joint-stock company, or choses in action: 56 Vict. ch. 5, sec. 27, am

Assignment for Creditors.

By sec. 12, ch. 141, C.S.N.B. 1903, a further exception is made of assignments for the general benefit of creditors made under the provisions of that Act. See note to sec. 6 of this Act

Statutory Receipts to a Bank.

A statutory receipt in the nature of a warehouse receipt, given under sec. 88 of the Bank Act, R.S.C. 1906, ch. 29, to a chartered bank as security, is not a "chattel mortgage" within a warranty condition of a fire insurance policy avoiding the policy of the insured property be or become encumbered by a chattel mortgage. Dictum *per* Duff, J., in Guimond v. Fidelity Phœnix Fire Ins. Co., 9 D.L.R. 463, 47 Can. S.C.R. 216.

Compare sec. 3 of the British Columbia Act and sec. 2 (a) of the Nova Scotia Act.

Renewals of Mortgages Before the Act.

29. Every chattel mortgage and every conveyance intended to operate as a mortgage of goods and chattels, filed before the passing of this chapter, and which has not been accompanied by delivery and an actual and continued change of

possession of the things mortgaged, shall be renewed in the manner provided by sections 11 and 12, within twelve months from the passing of this chapter; and so on from year to year thereafter as provided by section 14, otherwise the same may cease to be valid in the manner specified in sections 11 and 14 respectively, as against a creditor of the mortgagor serving the notices provided for by the said sections: 56 Viet. ch. 5, sec. 28 (1).

Forms of Affidavits.

30. The forms of affidavits contained in schedule (c) to this chapter or forms to the like effect, may be used in the cases to which they are applicable under this chapter: 61 Viet. ch. 32, sec. 4.

Affidavit for Company.

31. Any affidavit or statement required by the Bills of Sale Act, or any Act in amendment thereof, to be made by or on behalf of a bargainee or mortgagee may, in the case of an incorporated company being the bargainee or mortgagee, be made by the president, vice-president, manager or assistant manager, or any other officer of the company: 1 Geo. V. (1911) ch. 39.

See sec. 12(2) of the Ontario Act.

FORM (A).

(SECTION 18.)

Form of Discharge of Mortgage.

To the Registrar of Deeds of the County of

I, A. B., of do certify that has satisfied all money due on, or to grow due on a certain chattel mortgage made by to which mortgage bears date the day of A.D. 19 . and was filed *(or in case the mortgage has been renewed,* was renewed) in the office of the Registrar of Deeds of the County of on the

day of A.D. 19 , , as No. (*here mention the day and date of registration of each assignment thereof, and the names of the parties, or mention that such mortgage has not been assigned, as the fact may be*), and that I am the person entitled by law to receive the money, and that such mortgage is therefore discharged.

Witness my hand this day of , A.D. 19 .

Witness:
(*stating residence and occupation*). } (*Signature*).

56 Vict. c. 5, schedule (A), C.S.N.B. 1903, c. 142, s. 18.

FORM (B).

(SECTION 12.)

Statement with respect to Bill of Sale by Mortgagee.

Statement exhibiting interest of C. D. (or E. F.) in the property mentioned in the chattel mortgage dated the day of A.D. 19 . made between A. B. of of the one part and C. D. of of the other part and filed in the office of the Registrar of Deeds of the County of on the day of A.D. 19 , and of the amount due for principal and interest thereon and of all payments made on account thereof; (*or if the mortgage has been given under the provisions of sec.* 7, the amount of advances made as well as the amount remaining to be made; likewise the amount still due for principal and interest on such advances and shewing all payments made on account thereof; *or* shewing the amount of liability incurred and the amount due in respect thereof and also all payments made on account thereof).

The said C. D. is still the mortgagee of the said property (*or*, the said E. F. is the assignee of the said mortgage by virtue of an assignment thereof from the said C. D. to him dated the day of A.D. 19) (*or as the case may be*).

No payments have been made on account of the said mortgage (*or* the following payments and no other have been made on account of said mortgage):

1903
January 1. Cash received $100.00

or the amount of advances made under said mortgage is as follows:—

1903
January 1. Cash $500.00
February 1. Cash 300.00

Amount of advances remaining to be paid... 1,000.00

or the amount of liability incurred for which said mortgage was given as security is as follows:—

Payments have been made on account thereof as follows:—

(*here set out the payments*).

And the amount in respect thereof is $

(*here set out the amount*).

The amount still due for principal and interest on the said mortgage is the sum of $ computed as follows:

(*here give the computation*).

(*Affidavit*).

County of
to wit:

I, of in the County of the mortgagee named in the chattel mortgage mentioned in the foregoing (*or* annexed) statement (*or* assignee of the mortgagee named in the chattel mortgage mentioned in the foregoing (*or* annexed) statement (*as the case may be*) (or I, of, etc., agent of the said , etc.) make oath and say:—

(1) That the foregoing (*or* annexed) statement is true.

(2) That the chattel mortgage mentioned in the said statement has not been kept on foot for any fraudulent purpose.

Sworn to before me at the of
day of A.D. 19 .
in the County of this

(*Signature*).

(*Signature*).
Commissioner, etc.

61 Vict. c. 32—Schedule (B), Con. St. N.B. 1903, c. 142, s. 12.

SCHEDULE (C).

Affidavit by Witness to Execution of a Chattel Mortgage.

(Section 2.)

New Brunswick,
County of
To wit:

I, G. H., of the of in the County of (*here insert occupation of deponent*) make oath and say:—

That I was personally present and did see the written bill of sale by way of mortgage, duly signed, sealed and executed by A. B., one of the parties thereto, and that the name G. H. set and subscribed as a witness to the execution thereof is of the proper handwriting of me, this deponent, and that the same was executed at the of in the said county of on the day of , A.D. 19 .

Or, that I was personally present and did see the bill of sale by way of mortgage, of which the written is a true copy, duly, signed, etc.

Sworn before me at the
of in the county of (*Signature*).
this day of A D 19 .

(*Signature*).
Commissioner, etc.

61 Vict. c. 32—Schedule (C) C.S.N.B. 1903, c. 142, s. 2.

Affidavit of Bona Fides.

(Section 3.)

New Brunswick
County of
To wit:

I, C. D., of the of in the county of the mortgagee in the foregoing bill of sale by way of mortgage named, make oath and say:—

That A. B., the mortgagor in the foregoing bill of sale by way of mortgage named, is justly and truly indebted to me, this deponent, C. D., the mortgagee therein named, in the sum of dollars, mentioned therein, that the said bill of sale by way of mortgage was executed in good faith, and for the express purpose of securing the payment of the money so justly due, or accruing due, as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in the said bill of sale by way of mortgage against the creditors of the said A. B., the mortgagor therein named, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him, the said A. B.

Sworn before me at the
of in the county of
this day of A.D. 19 .

(*Signature*).

(*Signature*).
Commissioner, etc.

61 Vict. c. 32—Schedule (C) C.S.N.B. 1903, c. 142, s. 3.

Affidavits of Bona Fides by Agent of Mortgagees.

(Section 3.)

New Brunswick
County of
To wit:

I, E. F., of the of in the county of make oath and say:—

(1) I am the duly authorized agent of C. D., the mortgagee in the foregoing bill of sale by way of mortgage named, for the purpose of the said bill of sale by way of mortgage, and I am aware of all the circumstances connected therewith.

(2) That A. B., the mortgagor in the said bill of sale named, is justly and truly indebted to C. D., the mortgagee therein named, in the sum of dollars mentioned therein.

(3) That the said bill of sale was executed in good faith, and for the express purpose of securing the payment of the money so justly due, or accruing due as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in the said bill of sale against the creditors of the said A. B. the mortgagor therein named, or of preventing the creditors of such mortgagor from obtaining payment of any claims against him, the said A. B.

Sworn before me at the of in the county of this day of A.D. 19 . } (*Signature*).

(*Signature*).
Commissioner, etc.

61 Vict. c. 32—Schedule (C) am. C.S.N.B., c. 142, s. 3.

Affidavit of Witness to Execution of Bill of Sale.
(Section 6.)

New Brunswick
County of
To wit:

I, of the of in the county of make oath and say:—

That I was personally present and did see the within bill of sale duly signed, sealed, and executed by the parties

thereto; and that I, this deponent, am a subscribing witness to the same, and that the name (*signature of witness*) set and subscribed as a witness to the execution thereof, is of the proper handwriting of me, this deponent, and that the same was executed at the of in the County of

Sworn before me at the
of in the county of (*Signature*).
this day of A.D. 19 .

(*Signature*).
Commissioner, etc.

61 Vict. c. 32—Schedule (C).

Affidavit of Bona Fides by Bargainee.

(Section 6.)

New Brunswick
County of
To wit:

I, C. D., of the of in the of the bargainee in the foregoing bill of sale named, make oath and say:—

That the sale therein made is *bonâ fide*, and for good consideration, namely: in consideration of the sum of dollars (*or as the case may be*) as set forth in the said conveyance, and is not for the purpose of holding or enabling me, this deponent, to hold the goods mentioned therein against the creditors of the said bargainor.

Sworn before me at the
of in the county of (*Signature*).
this day of A.D. 19 .

(*Signature*).
Commissioner, etc.

61 Vict. c. 32—Schedule (C).

Affidavit of Bona Fides by Agent of Bargainee.
(Section 6.)

New Brunswick
County of
To wit:

I, of the in the county of make oath and say: –

(1) I am the duly authorized agent of the bargainee in the foregoing bill of sale named, for the purposes of the said bill of sale, and I am aware of all the circumstances connected therewith.

(2) I am duly authorized in writing to take such said conveyance or bill of sale, and a true copy of such authority is attached to such conveyance or bill of sale, and is marked with the letter A.

(3) That the sale made therein is *bonâ fide*, and for good consideration, namely: in consideration of the sum of dollars (*or as the case may be*) as set forth in the said conveyance, and is not for the purpose of holding or enabling the said bargainee to hold the goods mentioned therein against the creditors of the said bargainor.

Sworn before me at the
of in the county of (*Signature*).
this day of A.D. 19 .

(*Signature*).
Commissioner, etc.

61 Vict. c. 32—Schedule (C).

Affidavit of Bona Fides to Chattel Mortgage to Secure Advances.
(Section 7.)

New Brunswick
County of
To wit:

I, C. D., of the of in the of

the mortgagee in the foregoing bill of sale by way of mortgage named, make oath and say:—

That the foregoing mortgage truly sets forth the agreement entered into between myself and A. B., therein named, and truly states the extent of the liability intended to be created by such agreement, and covered by the foregoing mortgage;

That the foregoing mortgage is executed in good faith, and for the express purpose of securing me, the said mortgagee, the repayment of the said advances which I have agreed to make as in said mortgage set out;

That the foregoing mortgage is not executed for the purpose of securing the goods and chattels mentioned in the said bill of sale by way of mortgage against the creditors of the said A. B., nor to prevent such creditors from recovering any claim which they may have against the said A. B.

Sworn before me at the of in the county of this day of A.D. 19 . } (*Signature*).

(*Signature*).

Commissioner, etc.

61 Vict. c. 32—Schedule (C).

Affidavit of Bona Fides to Chattel Mortgage to Secure against Indorsement of a Note, etc.

(Section 7.)

New Brunswick
County of
To wit:

I, C. D., of the of in the county of the mortgagee in the bill of sale by way of mortgage named, make oath and say:—

That the foregoing mortgage truly sets forth the agreement entered into between me C. D., and the said mortgagor therein

named, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage, and that the same was executed in good faith, and for the express purpose of securing me the said mortgagee therein named, against my indorsement of the promissory note mentioned in said mortgage for dollars, or any renewals of the said recited promissory note as therein set out, and against the payment of the amount of such liability as therein set out, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the said mortgagor, nor to prevent such creditors from recovering any claims which they may have against such said mortgagor.

Sworn before me at the of in the county of this day of A.D. 19 . } (*Signature*).

(*Signature*).
Commissioner, etc.

61 Vict. c. 32—Schedule (C).

THE MEMORIAL AND EXECUTION ACT.

(C.S.N.B. 1903, CH. 128.)

Sale of Equity of Redemption in Personal Property.

25. Under an execution against goods the sheriff may seize and sell the goods and chattels of the party against whom the writ is issued and may seize and sell the equity of redemption in any goods or chattels (including leasehold interests in any lands) of the party against whom the writ is issued, and such sale shall convey whatever interest such party had in the goods and chattels at the time of the seizure.

NOVA SCOTIA.

OF THE PREVENTION OF FRAUDS ON CREDITORS BY SECRET BILLS OF SALE.

(R.S.N.S. 1900, CH. 142, AND AMENDMENTS.)

Short Title.

1. This chapter may be cited as "*The Bills of Sale Act.*"

Interpretation; Bills of Sale.

2. In this chapter, unless the context otherwise requires:—

(*a*) The expression "bill of sale" includes bills of sale, chattel mortgages, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities or licenses to take possession of personal chattels as security for any debt; but does not include the following documents, that is to say: assignments for the general benefit of the creditors of the person making or giving the same, deeds of trust or mortgages made or given by any incorporated company for the purpose of securing its bonds or debentures, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, warehouse keepers' certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or by delivery, the possessors of such documents to transfer or receive goods thereby represented, or assignments of personal property to creditors under proceedings for the relief of indigent debtors

or assignments made pursuant to an order of an examiner under the Collection Act. 9 Edw. VII., 1909, ch. 10, sec. 2, am.

(*b*) The expression "personal chattels" means goods, furniture, fixtures and other articles capable of complete transfer by delivery, and does not include chattel interests in real estate, nor shares or interests in the stock, funds or securities of any government, or municipal body, or in the capital or property of any incorporated or joint stock company, nor choses in action.

(*c*) The expression "purchasers" means *bonâ fide* purchasers, and includes the assignee of the grantor under the Indigent Debtors Act, the official assignee, or an assignee for the general benefit of creditors.

(*d*) The expression "creditors" includes execution creditors, and sheriffs, constables and other persons levying on or seizing under process of law personal chattels comprised in a bill of sale.

(*e*) The expression "filing" when applied to a bill of sale includes filing a copy of a bill of sale under the provisions of this chapter. R.S. ch. 92, sec. 10, part; 1886, ch. 32, sec. 7; 1888, ch. 23, sec. 1; 1893, ch. 39, sec. 1.

What Included in Term "Bill of Sale."

See sec. 3 of the British Columbia Act, and sec. 28 of the New Brunswick Act.

Exception of Assignments for Benefit of Creditors.

The mischief sought to be remedied by the provisions requiring filing of a bill of sale, etc., is confined to cases in which the title is to be in one person and the possession in another. And, therefore, an assignment for the benefit of creditors where the delivery of possession to the trustee is immediate and apparent, need not be accompanied by an affidavit under the Act. McMullin v. Buchanan, 26 N.S.R. 146.

An assignment of personal property in trust to sell the same and apply the proceeds to the payment of debts due to certain named creditors of the assignor is a bill of sale within the meaning of the Act, not being an assignment for the "general benefit

of creditors" as to be excepted from its operation: Archibald v. Hubley, 18 Can. S.C.R. 116, 27 C.L.J. 188.

Though an assignment contains preferences in favour of certain creditors, yet if it includes, subject to such preferences, a trust in favour of all the creditors, it is an "assignment for the general benefit of creditors" and does not require an affidavit of *bona fides*, and consequently excepted from the Act: Kirk v. Chisholm, 26 Can. S.C.R. 111, following Durkee v. Flint, 19 N.S.R. 487, and distinguishing Archibald v. Hubley, 18 Can. S.C.R. 116.

Apparent Possession.

Where there is a valid consideration, and no fraud, the question of apparent possession, or visible change of possession, or merely formal possession can not arise, the Nova Scotia statute in that particular, differing substantially from the English and Ontario Acts: Eastern Canada Savings and Loan Co. v. Curry, 28 N.S.R. 323. See note to sec. 11, Sask. Act, also sec. 3, British Columbia Act.

The turning over of cattle to a creditor in satisfaction of a claim which are branded with the grantee's mark, but allowed to remain in the grantor's possession for the purpose of pasture, constitutes, in the absence of fraud or of an attempt to delay creditors, a complete sale, delivery and appropriation of the property, not depending in any way on a bill of sale: Kennedy v. Whittie, 27 N.S.R. 460.

Future-acquired Property.

The Bills of Sale Act does not by registration protect the grantee as to property to be acquired by the grantor after the making of the bill of sale and which the latter thereby purports to transfer in advance of his obtaining title thereto. A clause in a bill of sale which purports to include after-acquired property confers as to the latter a mere equitable title which must give way to a legal title obtained *bonâ fide* and without notice: Whynot v. McGinty, 7 D.L.R. 618, 12 E.L.R. 116; Thomas v. Kelly, 13 A.C. 519, referred to; Reeves v. Barlow, 12 Q.B.D. 436, commented on; Holroyd v. Marshall, 10 H.L.C. 191, applied.

Where a chattel mortgage conveys the stock in trade, shop, contents, including shop and office fixtures, scales and appurtenances, which had been purchased by the mortgagor from a specified seller with a further provision purporting to cover and

include "not only all and singular the present stock of goods and all other the contents of the mortgagor's shop, but also any other goods that may be put in said shop in substitution for, or in addition to, those already there, as fully and to all intents and purposes as if said added or substituted stock were already in said shop and particularly mentioned"; such provision to cover other or after-acquired property is aimed at "stock in trade" and requires clear words in order to cover other property sought to be held, the legal principle of construction being that general words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated, and will not, therefore, include a cash register Dominion Cash Register v. Hall, (N.S.) 8 D.L.R. 577, referring to Moore v. Magrath, 1 Cowper 9. This case was affirmed in Dominion Cash Register v. Hall (Decision No. 2), 11 D.L.R 366, where the court held that where a chattel mortgage instrument assumes to cover in a shop (*a*) a stock of hardware, crockeryware and groceries, (*b*) the shop and office fixtures, scales and appurtenances, (c) all other goods that may be put in said shop in substitution for or in addition to those already there, the same and as fully to all intents and purposes as if said "added or substituted stock" were already in said shop; the "stock" and the "fixtures" are distinct *genera*, and only within the latter can an "account register" properly come, hence it cannot be included in the "added or substituted stock."

Chose in Action.

The assignment of a reversionary interest in a chose in action, has been held to be exempt from the operation of the Imperial Bills of Sale Act, 1878, sec. 4: Re Thynne, Thynne v. Grey, [1911] 1 Ch. 282, 47 C.L.J. 255.

Fixtures.

The word "fixtures" has been held to mean in this connection only such articles as are not made a permanent portion of the land, and may be passed from hand to hand without reference to and without affecting the land; and the word "delivery" refers only to such delivery as can be made without a trespass or a tortious act: Warner v. Don, 26 Can. S.C.R. 388, affirming 28 N.S.R. 202.

An engine permanently affixed to the freehold is a fix-

and consequently an instrument conveying an interest in lands and also fixtures thereon does not require to be registered under the provisions of this section, and there is no distinction, in this respect, between a licensee's or tenant's mortgage and those covered by a mortgage made by the owner of the fee: *Ibid.*

The mortgaged growing crops which are taken possession of by the mortgagee after they were severed from the soil cannot be reached by the execution creditors of the mortgagor, under an execution levied subsequent to their removal, notwithstanding that the transfer of the crops had not been registered: Eastern Canada Loan Co. v. Curry, 28 N.S.R. 323.

Increase of Animals.

It was said in Hirschfield v. City of Halifax, 22 N.S.R. 52, that there is no satisfactory authority for saying that the holder of a bill of sale of a mare which foals a colt, is owner of the colt, especially where the bill of sale is merely held as security for a loan of money, and the mare has never been in the possession of the party asserting property. But see text, ch. 2 and ch. 12 on "Increase of Animals." See also Nicholson v. Temple, 20 N.B.R. 248, and note to sec. 2, New Brunswick Act.

See text, ch. 2 on "Goods and Chattels."

Filing the Instrument.

For the distinction between "filing" and "registering," see note to sec. 8, British Columbia Act.

Filing and Affidavit of Bona Fides.

3. (1) (i) Every bill of sale of personal chattels made either absolutely or conditionally, or subject or not subject to any trust, and whereby the grantee has power either with or without notice on the execution thereof, or at any subsequent time, to take possession of any property and effects comprised in or made subject to such bill of sale; or (ii) A true copy thereof, shall be filed in the registry of deeds for the registration district in which the grantor, if a resident of Nova Scotia, resides at the time of the execution thereof, or if he is not a resident of Nova Scotia, then in the registry of deeds for the registration district in which the personal chattels are at the time of the execution of the bill of sale.

(2) Every schedule annexed to a bill of sale or referred to therein shall be deemed to be part thereof, and shall be filed with such bill of sale.

(3) If a bill of sale is subject to any defeasance the same shall be deemed to be part thereof, and such defeasance shall be filed with such bill of sale.

(4) If a copy of the bill of sale is filed, such copy shall include a copy of every such schedule and of every such defeasance, and shall be accompanied by an affidavit of the execution of the original bill of sale.

(5) And every bill of sale shall, as against purchasers and creditors, only take effect and have priority from the time of filing such bill of sale. R.S., ch. 92, secs. 1, 2; 1886, ch. 32, sec. 2.

A bill of sale purporting to convey "one red cow four years old, valued at $21," was held void for uncertainty, as it did not distinguish the cow so that third persons, by inquiry, could identify it; but there would not be that uncertainty if the words were "my red cow," or "the red cow now in my possession," unless the grantor had more cows than one, and the description "one horse or mare, three cows, two heifers, sheep, cart, all my farming implements," is insufficient: Hughan v. McCollum, 20 N.S.R. 202; McAskill v. Power (1897), 33 C.L.J. 571.

Where a creditor obtained from the debtors three cows, which he accepted in satisfaction of the debt, and took delivery of the cattle and put his mark on them, but at the same time arranged to leave them with the debtors until the following fall, it was held that the property passed by reason of the sale and delivery, and it was not necessary to produce a bill of sale, which it appeared had been executed at the same time: Kennedy v. Whittie, 27 N.S.R. 460; Ramsay v. Margrett (1894), 2 Q.B. 18, followed.

After default there is an implied license to the grantee to enter upon the grantor's premises for the purpose of removing the property covered by the bill of sale; and where the grantor occupies under a lease, the grantees are entitled, for the purposes of entry, to all the rights that the grantor enjoyed; but the entry must be made in a reasonable and proper manner, and without force or violence: Boston Marine v. Longard, 26 N.S.R.

387; England v. Marsden, L.R. 1 C.P. 529; McNeal v. Emmerson, 15 Gray 384.

Where at the time of making the bill of sale there was an execution in the sheriff's hands under which no levy had been made, but which bound the property and took precedence of the bill of sale, unless the grantee had acquired his title *bonâ fide* for valuable consideration, and without notice of the execution, actual notice must be shewn to defeat the grantee's claim, and he is not affected by notice to the grantor: Cunningham v. Morse, 20 N.S.R. 110; Hobson v. Thelluson, L.R. 2 Q.B. 642, distinguished.

The fact that the grantor of an absolute bill of sale remains in possession of the goods did not amount to fraud, but should be taken with other circumstances, such as the amount of security granted being excessive. The question of *bona fides* is one of fact in each particular case. No verbal agreement for the redemption of property between parties amounts in law to a "defeasance" and is not within the provisions requiring a defeasance to be filed under the Act: Fraser v. Murray, 34 N.S.R. 186.

Instruments under this statute are made to bind only from the filing, and not from the moment of their execution. Indeed, it could not well be otherwise when no time is fixed by statute within which instruments under the Act must be filed. The statute is cited as one for the prevention of frauds on creditors by secret bills of sale, yet for a length of time, it may be, no one, except the immediate parties, may know of an encumbrance against the property of a debtor. This want of knowledge may secure a debtor in a fictitious position, and a creditor may be deceived as to his debtor's standing until about to issue execution for his debt, a debt which, perhaps, the creditor permitted his debtor to incur on the faith of a financial standing which he did not possess; for it does not appear even that there is anything *per se* fraudulent in an agreement not to record a bill of sale until default is made in order that the credit of the grantor may not be affected: McAllister v. Forsyth, 17 N.S.R. 151; Creighton v. Jenkins, *ib.*, 353.

Bill of Sale by Non-resident.

Section 1, ch. 92, R.S.N.S., 1884, provided for the filing of a bill of sale "with the registrar of deeds of the county or district

wherein the maker resides." This provision had been construed as not to apply where the grantor resides outside of the province: Don v. Warner, 28 N.S.R. 202, affirmed in 26 Can. S.C.R. 388. The present section supplies this particular, that, in the event, the grantor is a non-resident of the province, the bill of sale is to be registered in the registration district wherein the chattels are situated.

Levy without Removal.

The levy under execution on, but without actual or physical removal of, the goods and chattels covered by a chattel mortgage containing a condition that if "any of the property should be attached or levied on . . . then it should be lawful for the grantee to take possession of the whole granted property," has been held by an equally divided court to amount to an act of conversion: Gates v. Bent, 31 N.S.R. 544.

Taking Possession.

The mortgagee may protect himself in case the mortgage be defective under this Act, by taking possession in good faith of the mortgaged chattels, before they are levied on by the creditors of the mortgagor; and, when possession under the bill of sale is once obtained, it will be quite sufficient, in the absence of fraud, to enable the mortgagee to maintain an action for their wrongful seizure and detention: Mosher v. O'Brien, 37 N.S.R. 286, 292. See, also, Manchester v. Hills, 34 N.S.R. 512, 517, referring to Ex p. Saffery (1881), 16 Ch. D. 671; Marples v. Hartley, 30 L.J.Q.B. 92; McLean v. Bell, [1895] A.C. 625.

The license to enter and take possession of the mortgaged chattels under the power contained in a chattel mortgage may be exercised by the mortgagee, where the chattels are contained in certain rooms of an office building, to the same extent as that of the mortgagor or the tenant, and it is no trespass against the owner of the building to make such entry: Boston Marine Ins. Co. v. Longard, 26 N.S.R. 387.

If the mortgagee buys out his mortgagor and takes possession but later re-sells to the mortgagor and the latter resumes possession and treats the chattels as his own, the claim of the mortgagee-vendor for unpaid purchase money would seem not to be protected against an execution creditor of the mortgagor-vendee: McAskill v. Power, 30 N.S.R. 189.

A symbolical delivery of chattels under a registered bill of sale entitles the grantee to immediate possession thereof, and he may maintain an action of replevin against the sheriff or other officer for the taking of such goods under a writ of execution: McNab v. Sawyer, 9 N.S.R. 38, following White v. Morris, 11 C.B. 1015.

Accommodation Indorsements.

A provision in an assignment for the security and indemnity of makers and endorsers of paper not due, for the accommodation of the debtor, under which the chattels are assigned to a trustee under an absolute trust to sell all the property and to apply the proceeds of sale in payment of such maturing paper, does not make it a chattel mortgage under this section, the chattels not being redeemable and no property interest being retained by the mortgagor, although there was a reverting trust as to surplus proceeds: Kirk v. Chisholm, 26 Can. S.C.R. 111, overruling 28 N.S.R. 111; Archibald v. Hubley, 18 Can. S.C.R. 116, was distinguished from the Kirk case.

Advances; Indorsements.

4. (1) If the bill of sale is given to secure the grantee:—

(*a*) Repayment of any advances to be made by him under an agreement therefor; or

(*b*) Against loss or damage by reason of the indorsement of any bills or promissory notes; or

(*c*) Against loss or damage by reason of any other liability incurred by the grantee for the grantor; or

(*d*) Against loss or damage by reason of any liability to be incurred under an agreement by the grantee for the grantor,

such bill of sale shall set forth fully by recital or otherwise, and be accompanied by an affidavit of the grantor stating that it truly sets forth the terms, nature and effect,

(*a*) Of the agreement entered into between the parties in respect to the advances; or

(*b*) Of such indorsements; or

(*c*) Of such other liability incurred by the grantee for the grantor; or

(*d*) Of such agreement in respect to the liability to be incurred by the grantee for the grantor; and

in all cases the amount of the liability created or by such agreement intended to be created and to be covered by such bill of sale.

(2) The affidavit accompanying such bill of sale shall also state that such bill of sale was executed in good faith and for the purpose of securing the grantee,

(*a*) Repayment of such advances; or

(*b*) Against loss or damage by reason of such indorsements; or

(*c*) Against loss or damage by reason of the liability incurred by the grantee for the grantor; or

(*d*) Against loss or damage by reason of the liability to be incurred by the grantee for the grantor, under the agreement therefor,

as the case may be, and not for the mere purpose of protecting the personal chattels therein mentioned against the creditors of the grantor, or of preventing such creditors from recovering any claims which they have against such grantor.

(3) Such affidavit shall be as nearly as may be in the form "A" in the schedule.

(4) And every bill of sale in this section mentioned shall, as against purchasers and creditors, only take effect and have priority from the time of the filing of such bill of sale accompanied by such affidavit. R.S., ch. 92, secs. 5, part, 11, part. 1886, ch. 32, sec. 4.

Validity against Creditors.

Where a chattel mortgage was given for an alleged consideration of $1,500, the real consideration being $1,203, in promissory notes, and an agreement on the part of the grantee to supply goods for the balance, and the affidavit of *bona fides* set out that the sum of $1,203 was justly and honestly due, and "as regards the balance the parties have agreed to supply goods for the full value thereof," the affidavit is defective, not only because it does not follow either form provided by the Act (Archibald v. Hubley, 18 Can. S.C.R. 116), but because of the omission

of a most material requirement, *i.e.*, a statement that the whole of the consideration money mentioned was justly and honestly due and owing, and of the omission of the requirements as to future advances: Levy v. Logan, 24 N.S.R. 412.

Where the mortgage is given to secure a debt, and also to secure against liability on accommodation endorsements, two separate affidavits should be made: Lantz v. Morse, 28 N.S.R. 535, 32 C.L.J. 486.

In the case of an assignment for creditors, which by reason of a provision for a preference to certain creditors is not excepted from the operation of the Act (Archibald v. Hubley, 18 Can. S.C.R. 116), and must, therefore, be accompanied by the affidavit required by this section, unless the assignment be for the benefit of creditors generally and excepted under sec. 2(*a*) of this Act: Kirk v. Chisholm, 26 Can. S.C.R. 111, overruling 28 N.S.R. 111.

Where there is a valid consideration and no fraud, the apparent possession or merely formal possession does not arise, the Nova Scotia Act in that particular differing from the Ontario and English Acts: Eastern Canada v. Curry, 28 N.S.R. 323.

The fact that a chattel mortgage covers even the fuel and similar articles designed for the daily consumption of the grantor's family, and of no use as a security, is an indication to a court that it is intended as a device to protect the goods for the grantor's benefit: Pineo v. Gavaza, 20 N.S.R. 249.

If a fraudulent purpose on the part of the transferor and transferee to defeat and delay the former's creditors appears, the transaction will not stand, although a good consideration or indebtedness is shewn: Mulcahy v. Archibald (1897), 33 C.L.J. 545; McCurdy v. Grant, 32 N.S.R. 520.

A bill of sale made without the knowledge or consent of the grantee may be repudiated by the latter. So it has been held that a voluntary conveyance made by a deceased debtor, shortly before his death, to his wife, may be attacked by a creditor, notwithstanding that the deceased had executed a bill of sale in his favour for the purpose of securing him if such bill of sale were made without the creditor's knowledge or assent: Shortell v. Sullivan, 21 N.S.R. 257.

A bill of sale by which one creditor is unjustly preferred over the others is void under the Assignment and Preference Act: see Pitts v. Campbell, (N.S.) 9 E.L.R. 469.

The intent to prefer may be inferred from the creditor's knowledge of the debtor's insolvency at the time the security is given, whether given voluntarily or under pressure: Shediac Boot, etc., Co. v. Buchanan, (N.S.) (1898) 39 C.L.J. 118.

Affidavit of Bill of Sale.

5. (1) If the bill of sale is other than a bill of sale mentioned in the next preceding section, it shall be accompanied by an affidavit of the grantor, stating that the amount set forth therein as being the consideration thereof was at the time of making such bill of sale justly and honestly due or accruing due from the grantor to the grantee, as the case may be, that the bill of sale was executed in good faith and for the purpose of—

(*a*) securing to the grantee the payment of such amount: or

(*b*) payment to the grantee of such amount,

and was not made for the mere purpose of protecting the personal chattels therein mentioned against the creditors of the grantor, or of preventing such creditors from recovering any claims which they have against such grantor.

(2) Such affidavit shall be as nearly as may be in the form "B" in the schedule.

(3) And every bill of sale in this section mentioned shall, as against purchasers and creditors, only take effect and have priority from the time of the filing of such bill of sale accompanied by such affidavit. R.S., ch. 92, secs. 4, part, 11, part 1886, ch. 32, sec. 3.

Defective Affidavits.

An objection that the consideration for the bill of sale was not as sworn to in the affidavit should be raised in the pleadings: McCurdy v. Grant, 32 N.S.R. 520.

An affidavit to a bill of sale containing the words "I am the rightful owner and possessor of said personal property as mentioned in the accompanying bill of sale," instead of the words "I am the grantor mentioned in the accompanying bill of sale," is bad, as it does not identify the deponent as the grantor: Kilenp v. Belcher, 23 N.S.R. 462.

A bill of sale will not be void because the occupation of the

grantor is omitted in the accompanying affidavit, if the latter refers in terms to the instrument itself, when his occupation is stated: Smith v. McLean, 21 Can. S.C.R. 355, 28 C.L.J. 620; Cunningham v. Morse, 20 N.S.R. 110.

But where a mortgage is given to secure both a present and a future indebtedness and is accompanied by a single affidavit containing the main features of both forms, such is not "as nearly as may be" in the form prescribed; and there being no difficulty in complying strictly with the requirements of the Act by using the first form in relation to the existing debt and the second form in relation to the accommodation notes, the mortgage is avoided, notwithstanding that the legal effect of the wording may be the same: Reid v. Creighton, 24 Can. S.C.R. 69, 31 C.L.J. 274; Thomas v. Kelly, 13 App. Cas. 506.

When, however, the jurat to the affidavit was in the following form "sworn to at Middleton this 6th day of July, A.D. 1891," etc., without naming the county, the mortgage was void, notwithstanding that the affidavit was headed with the name of the county: Morse v. Phinney, 22 Can. S.C.R. 563, 30 C.L.J. 359; Smith v. McLean, 21 Can. S.C.R. 355, distinguished; Archibald v. Hubley, 18 Can. S.C.R. 116, followed.

The omission of the date and the words "before me" from the jurat of an affidavit accompanying a bill of sale is an invalidating defect which cannot be supplied by parol evidence: Archibald v. Hubley, 18 Can. S.C.R. 116.

The substitution in the affidavit of a bill of sale of the words "I am the rightful owner and possessor," in place of the words of the statutory form, "I am the grantor," and where the description of the grantor is omitted and the words, "said Hiram B. Ward" appearing in the second clause instead of the word the "grantor," was held to invalidate the affidavit as not clearly disclosing the identity of the deponent with the grantor, and the *bona fides* of the bill of sale not clearly appearing: Kileup v. Belcher, 23 N.S.R. 462.

Good Faith and not to Protect.

Where the fact of insolvency is once established, the presumption is against the *bona fides* of such bill of sale, and must be rebutted by the party claiming thereunder: McCurdy v. Grant, 22 N.S.R. 520; Muleahy v. Archibald (1897), 33 C.L.J. 545.

A bill of sale given as security for a sum of money fraudu-

lently obtained by the mortgagor, from a trust fund belonging to the mortgagee, does not affect the validity of consideration or title to the mortgaged chattels as against the mortgagee who is no privy to the fraud: Hains v. Leblanc, 38 N.S.R. 528.

A bill of sale of a horse, given to secure a balance due on the purchase price, although unregistered, cannot be defeated by a fraudulent sale to a third party with notice: McLeod v. Doucette, 38 N.S.R. 151.

The hirers or bargainors of chattels subject to a hiring agreement which had not been registered in accordance with the provisions of section 8 of this Act are neither purchasers nor creditors within the meaning of this section to attack the validity of a mortgage on such chattels by reason of non-compliance with this section: Lapierre v. McDonald, 39 N.S.R. 24, 47 C.L.J. 27.

An agreement between the mortgagor and mortgagee under which the bill of sale is not to be recorded renders the transfer void as against creditors, even where the instrument is subsequently registered: Bentley v. Morrison, 44 N.S.R. 476.

A mortgage may be valid under the Bills of Sale Act, and may still be assailable under the Statute of 13 Elizabeth. But a complaint alleging that the mortgage was made in fraud of creditors, and that it was also paid off, praying for a decree to set it aside or declared satisfied, is in effect an approbation and reprobation of the same transaction, and, therefore, demurrable. A bill to set aside a mortgage as fraudulent under 13 Elizabeth, and asking for an account should be coupled with an offer to redeem, and to rebut the fraud, oral evidence to shew a different consideration from that expressed in the deed is admissible: Halifax Banking Co. v. Matthew, 1 S.C. Cas. 251.

Agents.

6. Where a bill of sale is executed by an agent or attorney, duly authorized in writing to execute the same, and such agent or attorney has a personal knowledge of the matters to be deposed to, the affidavits mentioned in the next two preceding sections may be made by such agent or attorney. R.S., ch. 92, secs. 4, part, 5, part.

Renewal of Bills of Sale.

7. (1) Bills of sale shall be renewed by filing in the registry of deeds of the registration district in which the grantor, if

resident of Nova Scotia, resides at the time of the renewal, but if he is not a resident of Nova Scotia then in the registry of deeds for the registration district in which the personal chattels then are, a renewal statement shewing,—

(*a*) The interest of the grantee, his executors, administrators or other assigns in the property claimed by the grantee of the bill of sale;

(*b*) The amount due for principal and interest on the bill of sale; and

(*c*) All payments made on account thereof.

(2) Such statement shall be accompanied by an affidavit stating that the renewal statement is true, and that the bill of sale has not been kept on foot for any fraudulent purpose.

(3) Such affidavit may be made by—

(*a*) The grantor or grantee or one of several grantors or grantees;

(*b*) The assignee or one of several assignees if the bill of sale has been assigned;

(*c*) Any next of kin, executor or administrator of a deceased grantee or of a deceased assignee; or

(*d*) The agent of a grantee or of any next of kin, executor, administrator or assignee duly authorized.

(4) The renewal statement and affidavit shall be in the form "C" in the schedule, or to the like effect, provided that if any *bonâ fide* error is made in such statement either by the omission to give any credit, or by any miscalculation in the computation of interest or otherwise, the said statement and the said bill of sale shall not be invalidated if the grantee, his executors, administrators or other assigns, within two weeks after the discovery of the error, files an amended statement and affidavit in the said form "C," and referring to the former statement, and clearly indicating the error therein and correcting the same.

(5) If prior to the filing of such amended statement and affidavit any creditor or purchaser in good faith and for valuable consideration has made any *bonâ fide* advance of money or

given any valuable consideration to the grantor, or has incurred any costs in proceedings taken on the faith of the amount due on any bill of sale being as stated in the renewal statement filed, the said bill of sale as to the amount so advanced or the valuable consideration so given, or costs incurred by such creditor or purchaser, shall stand good only for the amount mentioned in the renewal statement in which the error was made.

(6) A renewal statement and affidavit shall be filed within thirty days next preceding the expiration of the term of three years from—

(*a*) The filing of every bill of sale or copy, and

(*b*) The filing of every renewal statement and affidavit or amended renewal statement.

(7) And every bill of sale shall cease to be valid as against the creditors of the persons making the same and against subsequent purchasers, if any renewal statement and affidavit required by this section are not filed in accordance with the provisions hereof.

(8) In the case of bills of sale filed before the first day of January, 1900, the first of such renewal statements and affidavits shall be filed within thirty days next preceding the first day of January, 1902.

Renewal.

A bill of sale validly filed before the passage of the Bills of Sale Act is nevertheless subject to the special clause as to the filing of a renewal statement: Fraser v. Murray, 34 N.S.R. 186.

Substituted Bills of Sale.

The execution of a second bill of sale to replace one which has expired in consequence of failure to renew it under the provisions of this section does not, where there is no question of insolvency on the part of the maker at the time the second bill of sale is given, and it is not otherwise intended for the furtherance of a fraudulent purpose, make such instrument void under the Statute of Elizabeth: Mosher v. O'Brien, 37 N.S.R. 285; 4 C.L.J. 538.

But it is presumptive fraud against creditors where the

substituted bill of sale is intended to include after-acquired property which had been omitted from the previous bill of sale, although it was understood and agreed that such provision should be included, where the original bill of sale contained no reference to after-acquired property, nor did the evidence tend to establish that fact: Farlinger v. Thompson, 37 N.S.R. 513.

Hiring and Purchase Agreements.

8. (1) Every hiring, lease, bailment, or bargain for the sale of personal chattels, accompanied by an immediate delivery, and followed by an actual and continued change of possession, whereby it is agreed:—

(*a*) That the property in the personal chattels; or

(*b*) In case of a bargain for sale, that a lien thereon for the price thereof, or any portion thereof, shall remain in the person letting to hire, the lessor, the bailor, or the bargainor, until the payment in full of the hire, rental or price, agreed upon, by future payments or otherwise, and whether the personal chattels so delivered be the identical subject-matter of the hiring, lease, bailment, or bargain for sale, or otherwise, shall be evidenced by instrument or instruments in writing shewing the terms of such agreement and be signed by the person to whom such personal chattels are hired, the lessee, bailee, bargainee, or his agent thereunto duly authorized, in writing and shall have written or printed therein, the post office address of the person letting to hire, lessor, bailor or bargainor.

(2) Within ten days after the delivery of such chattel or chattels a true copy of such instrument or instruments in writing shall be filed in the registry of deeds for the registration district in which the person to whom such personal chattels are hired, the lessee, bailee, or bargainee, resides at the time of the execution thereof, and the same shall be accompanied by an affidavit of either of the parties thereto, or, if such hiring, lease, bailment, or bargain for sale was made, by, with, or to an agent thereunto duly authorized in writing, the affidavit of such agent stating:—

(*a*) That the said copy or copies of such instrument or instruments truly sets forth the terms, nature and effect of the agreement between the parties thereto with respect to the personal chattels therein mentioned; and

(*b*) That said instrument or instruments was, or were executed in good faith, and for the purpose of securing to the person letting to hire, the lessor, the bailor, or the bargainor, the payment in full of the amount therein mentioned as to be paid, and not for the mere purpose of protecting the personal chattels therein mentioned against the creditors of the person to whom such personal chattels are hired, the lessee, bailee, or bargainee, or of preventing such creditors from recovering any claim which they may have against him.

(3) Such affidavit shall be as nearly as may be in the form "D" in the schedule.

(4) The Registrar on receipt of such copy or copies and affidavit shall duly file the same, and cause them to be properly entered in the index book kept for that purpose.

(5) The person letting to hire, lessor, bailor, or bargainor, shall leave a copy or copies of such instrument or instruments, in writing, with the person to whom such personal chattels are hired, the lessee, bailee, or bargainee, at the time of the execution of such writing or within twenty days thereafter.

(6) If a copy or copies of such instrument or instruments in writing, and affidavit, be not filed as required by sub-section (2) of this section, the agreement between the parties that such property or such lien shall remain in such person letting to hire, lessor, bailor, or bargainor, as aforesaid, shall as against the creditors, purchasers and mortgagees of the person to whom such personal chattels are hired, of the lessee, of the bailee, or of the bargainee, be null and void.

(7) Every person letting to hire, lessor, bailor, or bargainor shall on demand by any creditor or interested person file with said Registrar, within twenty days from the making of such demand, a sworn statement of the amount due on such

ment, and on failure to file such statement shall forfeit all rights accruing under the same as against such creditor or interested person, and as to such creditor or interested person, the agreement between the parties that such property or such lien shall remain in such person letting to hire, such lessor, bailor, or bargainor as aforesaid, shall thenceforth be null and void. It shall be sufficient to make such demand by mailing the same, postage prepaid and registered, to the post office address of the person letting to hire, lessor, bailor, or bargainor, as stated in the instrument or instruments filed in the Registry of Deeds, under the provisions of this Act.

(8) In case any person letting to hire, lessor, bailor, or bargainor, of any personal chattels, as aforesaid, or his successors in interest, takes or take possession thereof for breach of any condition, he or they shall retain the same for three months, and the person to whom such personal chattels are hired, the lessee, bailee, or bargainee or his successor in interest may redeem the same within such period on payment of the full amount then in arrears, together with interest.

(9) When personal chattels have been let to hire, leased, bailed or bargained, originally as aforesaid, and a copy of the agreement between the parties filed according to the provisions of this Act, and the same have been taken possession of as in the next preceding sub-section mentioned, such chattels shall not be sold without twenty days' notice of the intended sale being first given to the person to whom such personal chattels are hired, the lessee, bailee, or bargainee, or his successor in interest. The notice may be personally served, or may, in the absence of such person to whom such personal chattels are hired, the lessee, bailee, or bargainee, or his successor in interest, be left at his residence, or last known place of abode in Nova Scotia, or be sent by registered letter deposited in the post office at least twenty-one days before the time when the said twenty days will elapse, addressed to the person to whom such personal chattels are hired, the lessee, bailee, or bargainee, or his successor in interest,

at his last known post office address in Canada. R.S., ch. 92, sec. 3; 1886, ch. 32, sec. 1; 1893, ch. 40, sec. 1; am. 7 Edw. VII., 1907, ch. 42, sec. 1; am. 8 Edw. VII., 1908, ch. 24, secs. 1, 2.

The provisions of this Act shall extend to contracts made outside the Province of Nova Scotia. 7 Edw. VII., 1907, ch. 42, sec. 2.

Lien and Lease Contracts for Chattels.

The object of this section, said the court, in construing sec. 3, ch. 92, R.S.N.S., 1884, 5th series—similar to the present one in this particular—is obvious. It contemplates that the provision in the agreement will be that the lien for the price is to remain in the bargainor. It is to provide for cases of the vendor of an article delivering it, but retaining the property in that article until all the purchase-money is paid: Manchester v. Hills, 34 N.S.R. 512, 525, 526. Therefore, an agreement that the property should not pass until the instalments are all paid, the instrument, although affording security, is not an instrument which requires filing as a bill of sale: McEntire v. Crossley Bros., [1895] App. Cas. 457; Ex parte Crawcour, 9 Ch. D. 419.

The expression "lien" in this statute, of course, only means an equitable lien, namely, a conditional delivery of goods upon a sale, the condition being that the goods should be paid for, before the passing of title: Manchester v. Hills, 34 N.S.R. 512, 525; Haggarty v. Palmer, 6 Johnson Ch. 437.

An instrument evidencing a purchase of a stock in merchandise in bulk, upon condition of yielding up possession to the goods and those subsequently acquired in the course of trade, in the event of default in any of the payments, negatives the idea of the reservation of any lien or property in the vendor, but, rather, imports an absolute sale and a gift back by way of mortgage, and, therefore, such vendor does not come within the category of a "hirer, lessor, or bargainor," thus dispensing with the registry requirements under this section, but such document comes within the term "bill of sale" defined by sec. 2(*a*) of this Act: Manchester v. Hills, 34 N.S.R. 512, referring to Haggerty v. Palmer, 6 Johnson Ch. 437.

But where a sale of a chattel is coupled by immediate delivery, and the vendor reserves title to the particular chattel in the event of default or insolvency of the purchaser, a sale thereof

by the purchaser to an innocent third party will give the latter an indefeasible title, unless the provisions of the Act are complied with: Miller Bros. v. Blair, 37 N.S.R. 293.

An agreement by which the owner of cattle allows another the use of them for a specified time for their keep, is not within this section: Lewis v. Denton, 19 N.S.R. 235.

This section has been held not to apply in the case of an agreement for hiring which, instead of providing that on the completion of the payments agreed the hired piano should become the property of the party paying, stipulated for no option on that particular instrument, but that he should receive "one piano equal in value to the above-mentioned piano, with a receipted bill of sale thereof: Guest v. Diack (1897), 33 C.L.J. 497, 29 N.S.R. 504.

It has been said that the expression used in this section, that the property shall be null and void, is too vague and meaningless to affect vested rights, and that the section does not touch the remedy, but only the validity of contract, and, therefore, does not invalidate a contract made out of the jurisdiction concerning chattels also out of the jurisdiction at the time of the contract: Singer v. McLeod, 20 N.S.R. 341.

Where a tenant purchased a piano under an agreement by which the vendors retained the title until full payment of the purchase price, but did not file it under the Act, and the piano was distrained upon by the landlord, but the distress was void because of the breaking open of an outer door in order to effect an entry, and the original vendors purchased it at the landlord's sale and took possession, they were held entitled to the piano as against the sheriff levying under execution against the tenant, it being considered that the sheriff could not set up the illegality of the landlord, for without that or a similar illegality on his own part he could not have seized: Miller v. Curry, 25 N.S.R. 537.

Where a cash register is sold to a purchaser under a hiring and purchase agreement within the meaning of this section, and where such agreement was neither accompanied by an affidavit nor filed in the registry of deeds, the agreement, although valid as between the parties, is null and void as against the creditors, purchasers, and mortgagees claiming under the purchase in question: Dominion Register v. Hall, (N.S.) 8 D.L.R. 577, affirmed 11 D.L.R. 366.

The execution of a mortgage by the bargainee of chattels

subject to an unrecorded hiring agreement vests in the mortgagee under this section the legal title to them as against the bargainor or hirer, notwithstanding that such mortgage had not been registered in accordance with the provisions of sec. 5 of this Act: Lapierre v. McDonald, 39 N.S.R. 24.

The title acquired by a purchaser of goods and chattels by reason of non-compliance with this section may be defeated where the sale, on which his title depends, is in contravention of the Statute of Frauds; and under these circumstances, the retaking possession of such chattels by the original hirer, does not constitute, as against the latter, an act of conversion for which trover may be maintainable: Kent v. Ellis, 31 Can. S.C.R. 110, affirming 32 N.S.R. 549.

Sub-sec. (2) of this section requires the filing of the instrument within ten days after the delivery of the chattels, otherwise it is by sub-sec. (6) declared null and void as against creditors, purchasers and mortgagees. Construing a similar provision, the Supreme Court of Canada held, that the "subsequent purchaser," etc., must be one who purchased after the expiration of the statutory period for filing, and it can not effect any rights under the instrument for any acts of the grantee done within such period: Hulbert v. Peterson, 36 Can. S.C.R. 324, reversing 6 Terr. L.R. 114.

This section, as it formerly obtained, was held not to apply to a contract made outside of the province, relating to chattels then also outside of the province, but which are afterwards brought into it: McGregor v. Kerr (1896), 29 N.S.R. 45, 32 C.L.J. 593; Singer Sewing Machine Co. v. McLeod, 20 N.S.R. 341, reviewed. See also, Goslin v. Dunbar, 32 N.B.R. 325; National Cash Register Co. v. Lovett, 39 N.S.R. 540.

But the present section supplies this particular by extending its application to contracts made outside of the Province of Nova Scotia.

The new provision under this section, that it shall extend to contracts made outside of the Province of Nova Scotia is evidently intended for cases, either where the chattels to be hired are within the province and their owners are resident without the province, or where the chattels are immediately upon the execution of the agreement to be removed to Nova Scotia. In view of the limitation on each province not to extend its laws extra-provincially it would seem, and logically so, that unless

the parties to the transaction contemplated the immediate removal of the chattels to the Province of Nova Scotia, it could not, under decision of Singer v. McLeod, 20 N.S.R. 341, effect vested rights validly entered into in the place where the contract is made, unless the bargainor is aware of their removal, in which instance, this section, on the principle of *lex loci sitæ*, will automatically apply.

In the case of Re Isaacson, [1895] 1 Q.B. 333, the assignor, by a bill of sale of a piano, also assigned to the assignee the benefit of a hire and purchase agreement in reference to the same piano. The bill of sale not being registered it was contended that it was void *in toto;* but the Court of Appeal (Lord Esher, M.R., Lopes and Rigby, L.JJ.) held that the assignment of the hire and purchase agreement was severable from the assignment of the piano, and was valid, notwithstanding the bill of sale of the piano was void: see 31 C.L.J. 202.

General Provisions; Registration Districts.

9. Where the grantor is not a resident of Nova Scotia, in the event of the permanent removal of personal chattels from the registration district in which they were at the time of the execution of the bill of sale or other instrument to another registration district before the payment and discharge of the bill of sale or instrument, a copy of the same and of the affidavits and documents relating thereto, certified under the hand of the registrar in whose registry the same were first filed, shall be filed in the registry of deeds for the registration district to which the personal chattels are removed within two months from such removal, otherwise the bill of sale or instrument as against creditors or purchasers shall be null and void.

Indexes and Records.

10. The registrar of deeds shall cause the bills of sale or copies and instruments required by this chapter to be filed, to be numbered and indexed, and a list thereof to be made in a book kept by him for that purpose, containing the names and descriptions of the parties in alphabetical order, the date of execution and filing, and the amounts of the consideration for which the same have been given. R.S., ch. 92, sec. 7, part.

Filing and Registration.

It will be observed that there is no time of the day limited in the statute for leaving the instrument with the registrar; and so, if he receives it, even though it be at his private residence, with the fee for filing, and with the directions to file the same, the instrument is sufficiently filed within the provisions of this section. The absence of the instrument from the office cannot, if there be no fraud in the case, be taken advantage of by an attaching creditor who knows of the bill of sale having been in the office and of its having been sent away while so absent. This law seems to accord with the view that the registrar's duties as to filing, etc., are directory only, and that parties interested, having fulfilled the statutory requirements devolving upon them, cannot be prejudiced by failure in the registrar to do his duty: Fisher v. Bishop, 17 N.S.R. 451.

A party who has taken every step incumbent on him to secure registry is not to be prejudiced if the registrar of deeds fails or neglects to enter such deed in his books. The delivery to and the reception by the registrar of the instrument to be recorded, and the pre-payment of the necessary registry fees, raises a presumption of the regularity as to proof of execution, even though no proof of attestation is apparent on the face of the instrument to qualify it for registration: Jost v. McCuish, 25 N.S.R. 519, distinguishing Grindley v. Blakie, 19 N.S.R. 27.

See note to sec. 8, British Columbia Act, distinguishing the words "filing" and "registering."

Discharges or Releases.

11. Where a bill of sale or other instrument is discharged or released, an entry of such discharge or release may be made in the registry list upon the production of a certificate from the holder of such bill of sale, duly attested to by the affidavit of a subscribing witness, and such certificate or release shall be indexed and entered on the list and on the files kept by the registrar. R.S., ch. 92, sec. 8, part; 1886, ch. 32, sec. 6.

Affidavits; Commissioners.

12. (1) The affidavits mentioned in this chapter may be made before the registrar of deeds, a judge of any court, a barrister of Supreme Court, a commissioner for taking affidavits, a justice

of the peace, or any notary public, whether within the province or abroad.

(2) If the affidavit is made by the agent or attorney of the person required to make the same, it shall be set out in such affidavit that such agent or attorney making the same has a personal knowledge of the matters deposed to. R.S., ch. 92, secs. 6, 8, part; 1886, ch. 32, sec. 5; 7 Edw. VII., 1907, ch. 42, sec. 3, am.

Before whom Affidavits to be Sworn.

The affidavit to a bill of sale is not invalid because sworn before a solicitor by whom the bill of sale is prepared: Mosher v. O'Brien, 37 N.S.R. 286, distinguishing the rule in the Judicature Act (O. 36, r. 16) as referring only to matters litigated in court, and not to outside matters, such as affidavits to bills of sale: Creighton v. Reid, 27 N.S.R. 72, followed.

Fees.

13. The registrar shall for his services under this chapter be entitled to the fees mentioned in the chapter "Of Costs and Fees." R.S., ch. 92, secs. 7, part, 9, part.

SCHEDULE.

(A.)

(Section 4.)

AFFIDAVIT OF BONA FIDES.

Canada,
Province of Nova Scotia,
County of

I, A.B., of , in the county of , (*occupation*), make oath and say as follows:—

1. I am the grantor mentioned in the bill of sale (*or* the bill of sale a copy of which is) hereto annexed [*or* I am the agent or attorney of the grantor mentioned in the bill of sale (*or* the bill of sale, a copy of which is) hereto annexed, duly authorized

in that behalf in writing, and have a personal knowledge of the matters hereinafter deposed to.]

2. Such bill of sale truly sets forth—

The terms, nature and effect of the agreement entered into between the parties in respect to the advances therein mentioned, (*or*

The terms, nature and effect of the indorsements made or given by the grantee for the grantor, *or*

The terms, nature and effect of the liability incurred by the grantee for the grantor, *or*

The terms, nature and effect of the agreement in respect to the liability to be incurred by the grantee for the grantor).

And truly states the amount of the liability created (*or* by such agreement intended to be created) and to be covered by the bill of sale.

3. Such bill of sale was executed in good faith, and for the purpose of securing the grantee,

Repayment of his advances, *or*

Against loss or damage by reason of his indorsements, *or*

Against loss or damage by reason of the liability incurred by the grantee for the grantor, *or*

Against loss or damage by reason of such agreement in respect to the liability to be incurred.

And not for the mere purpose of protecting the personal chattels therein mentioned against the creditors of the grantor, or of preventing such creditors from recovering any claims which they have against such grantor.

Sworn to at , in the county of , this day of , A.D. 19 . Before me, } (Sgd.) A.B.

R.S.N.S. 1900, ch. 142, sec. 4.

(B.)

(Section 5.)

AFFIDAVIT OF BONA FIDES.

Canada,
Province of Nova Scotia,
County of

I, A.B., of , in the county of , (*occupation*), make oath and say as follows:—

1. I am the grantor mentioned in the bill of sale (*or* the bill of sale, a copy of which is) hereto annexed [*or* I am the agent or attorney of the grantor mentioned in the bill of sale (*or* the bill of sale, a copy of which is) hereto annexed, duly authorized in that behalf in writing, and have a personal knowledge of the matters hereinafter deposed to.]

2. The amount set forth therein as being the consideration thereof was at the time of making such bill of sale justly and honestly due (*or* accruing due, *as the case may be*) from the grantor to the grantee.

3. The bill of sale was executed in good faith and for the purpose of securing to the grantee the payment of such amount (*or* payment to the grantee of such amount).

4. Such bill of sale was not made for the mere purpose of protecting the personal chattels therein mentioned against the creditors of the grantor, or of preventing such creditors from recovering any claims, which they have against such grantor.

Sworn to at , in the county of , this day of , A.D. 19 . Before me,

(Sgd.) A.B.

R.S.N.S. 1900, ch. 142, sec. 5.

See note to section 5 of this Act.

(C.)

(Section 7.)

RENEWAL STATEMENT AND AFFIDAVIT.

Statement exhibiting the interests of C. D., in the property mentioned in a bill of sale, dated the day of , 19 , made between A. B., of , of the one part, and C. D., of , of the other part, and filed in the registry of deeds for the registration district of , on the day of , 19 , and of the amount due for principal and interest thereon, and of all payments made on account thereof.

The said C.D., is still the grantee of said property, and has not assigned the bill of sale (*or* the said E. F., is the assignee of the said bill of sale) by virtue of an assignment thereof from the said C. D., to him, dated the day of , 19 (*or as the case may be*).

No payments have been made on account of the said bill of sale (*or* the following payments and no others have been made on account of the said bill of sale).

19 . January 1. Cash received ($).

The amount due for principal and interest on the said bill of sale is the sum of $, computed as follows (*here give the computation*).

County of
To wit:

I, , of , in the county of , the grantee named in the bill of sale mentioned in the foregoing (*or* annexed) statement [*or* assignee of the grantee named in the bill of sale mentioned in the foregoing (*or* annexed) statement] make oath and say:—

That the foregoing (*or* annexed) statement is true.

That the bill of sale mentioned in the said statement has not been kept on foot for any fraudulent purpose.

Sworn before me at , in the County of , this day of , 19 .

R.S.N.S. 1900, ch. 142, sec. 7.

(D.)

(Section 8(3).)

AFFIDAVIT OF BONA FIDES.

Canada,
Province of Nova Scotia,
County of

I, A.B., of , in the county of , (*occupation*), make oath as follows:—

1. I am (*name*) , one of the parties mentioned in the written instrument, a true copy of which is hereto annexed (*or*, I am the agent or attorney of (name) , one of the parties mentioned in the written instrument, a true copy of which is hereto annexed, duly authorized in that behalf, in writing, and have a personal knowledge of the matters hereinafter deposed to).

2. Such written instrument truly sets forth the terms, nature and effect of the agreement between the parties thereto with respect to the personal chattels therein mentioned.

3. Such written instrument was executed in good faith and for the purpose of securing unto (*name*) , one of the parties thereto, payment in full of the amount therein mentioned as to be paid, and not for the mere purpose of protecting the personal chattels therein mentioned against the creditors of the said , the person to whom such chattels are hired (*or* the lessee, bailee, or bargainee), or of preventing such creditors from recovering any claims which they may have against said person to whom said personal chattels are hired (*or*, the lessee, etc.).

Sworn to at , in the county of , this day of , A.D. 19 .
Before me,

(7 Edw. VII., 1907, ch. 42.)

ONTARIO.

BILLS OF SALE AND CHATTEL MORTGAGE ACT.

10 Edw. VII. ch. 65; R.S.O. 1914, ch. 135.

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

Short Title.

1. This Act may be cited as "*The Bills of Sale and Chattel Mortgage Act.*" R.S.O. 1897, c. 148, s. 1.

Object of Statute.

At common law no valid chattel mortgage could be made unless the custody and possession of the property were delivered to and retained by the mortgagee: McFadden v. Blocker, 2 Ind. Terr. 260, 58 L.R.A. 878; see also Jones, Chattel Mortgage, ch. 5, sec. 176, 5th ed. The general rule of the civil law is, that possession of movables is not necessary to the validity of a lien, whether created by contract or act of law, and that such lien will attach upon movable property even in the hands of a *bonâ fide* purchaser without notice. This rule has been modified by the Roman-Dutch law to this extent—that if the goods left in possession of the mortgagor are sold, or mortgaged by him to another, they cannot be followed into the hands of such transferee for value; but the contract is binding on the debtor and the goods themselves may be taken if they remain in his hands: Tatham v. Andree, 1 Moore P.C. (N.S.) 386.

The law of bills of sale and chattel mortgages as it obtains now is purely of statutory derivation, and in the broadest sense, it is intended for the protection of creditors and innocent purchasers without notice, requiring an observance of statutory formality and publicity of instruments of that character, where there is no actual change of possession. As far as the rights of the parties *inter se* are concerned, the common law applicable to

that class of transactions is practically not affected by the statute law.

Lord Halsbury in Charlesworth v. Mills, [1892] A.C. 231 at 235, speaking of the object in passing these statutes, makes the following observation: "That the Bills of Sale Acts (Imperial) of 1854 and 1878 were intended to prevent false credit being given to people who had been allowed to remain in possession of goods which apparently were theirs, the ownership, however, of which they had parted with, is manifest enough by the language of those statutes. The Acts intended, in a case with creditors, that if people were allowed to remain in possession of goods, of which, nevertheless, the ownership was no longer theirs, those goods and chattels should be subject to the execution of *bonâ fide* creditors who ought not to have been induced to give credit by the apparent ownership of the goods being in those persons, and who were, therefore, entitled to have their debts satisfied when by the default of the assignees of those goods they had been allowed to continue in the possession of persons to whom the property in them no longer belonged. That was the intended policy; and for such purposes it is manifest that the legislature would desire to give the widest possible interpretation to every one of the documents by which the ownership was really intended to be practically changed, while the goods still remained in the apparent possession and dominion of the persons from whom the ownership had, nevertheless, really passed away."

Interpretation.

2. In this Act,

(*a*) "Actual and continued change of possession" shall mean such change of possession as is open, and reasonably sufficient to afford public notice thereof. R.S. O. 1897, c. 148, s. 39.

(*b*) "Creditors" shall include creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, an assignee in insolvency of a mortgagor or bargainor, the liquidator of a company in a winding up proceeding under the Winding-up Act of Canada, and an assignee for the general benefit of

creditors, as well as creditors having executions against the goods and chattels of the mortgagor or bargainor in the hands of a Sheriff or other officer. R.S.O. 1897, c. 148, s. 38; amended 1913, c. 18, s. 28.

(*c*) "Mortgage" shall include a conveyance intended to operate as a mortgage. *New.*

(*d*) "Rolling stock" shall mean and include any locomotive, engine, motor car, tender, snow plough, flanger, and every description of car or of railway equipment designed for movement on its wheels, over or upon the rails or tracks of a railway. *New.*

Actual and Continued Change of Possession.

In a case occurring before the passing of this section where goods in a shop, or other occupied building, under lock and key, were sold by the owner, and the key delivered to the purchaser, who examined and checked over the goods, and then locked up the place again, it was held that such was an actual and continued change of possession, and that the purchaser need not, either personally or by some one for him, remain in possession, or remove the goods: McMartin v. Moore, 27 U.C.C.P. 397; Kerr v. Canadian Bank of Commerce, 4 O.R. 652, but now the bargainee must see that sufficient precautions are taken to constitute public notice, a question of fact which it would be within the province of a jury to decide. The statute may be complied with, even though the vendor is employed to remain, and does remain in the employment of the vendee, and even though the name of the establishment (not being the name of the vendor) is permitted to remain over the door, provided the change of business is advertised, and becomes well known in the neighbourhood: Scribner v. McLaren, 2 O.R. 265, affirmed in 12 A.R. (Ont.) 367, 14 Can. S.C.R. 77; McPartland v. Read, 11 Allen (Mass.) 231; Doyle v. Stevens, 4 Mich. 87. Where the grantor was tenant of rooms where goods comprised in a bill of sale were placed, but resided elsewhere, and, having made default in paying the sum secured gave the keys of the rooms to the grantee, who opened them and put his name on some of the goods, but did not remove them, such would probably not be sufficient: Robinson v. Briggs, L.R. 6 Ex. 1, 40

L.J.Ex. 17, and it is submitted that where goods are in an unoccupied shop or warehouse, under lock and key, the mere delivery of the key, which formerly was held to constitute a sufficient compliance with the Act, would no longer suffice, though, if notice to the landlord or his agent in charge of the building were also given such might be considered as an open and sufficiently public change of possession: Gough v. Everard, 11 W.R. 702, 2 H. & C. 1, 32 L.J.Ex. 210, 8 L.T.N.S. 363; West v. Skip, 1 Ves. Sen. 240; Ryall v. Rowles, 1 Ves. Sen. 349, 1 Atk. 171; Ward v. Turner, 2 Ves. Sen. 431.

Where the assignee under a bill of sale of household furniture immediately sent a person to the house to take and keep, and who took and kept possession, but the assignor, down to the date of the bankruptcy, continued to live in the house and use the furniture as he had previously been accustomed to do, it was held that the goods were in the apparent possession of the assignor: Ex parte Lewis, L.R. 6 Ch. 626; Ex parte Hooman, L.R. 10 Eq. 63; and it has so been held even though the grantor did not continue to live in the house, but merely, during the daytime, went backwards and forwards at his pleasure: Seal v. Claridge, 7 Q.B.D. 516.

And so, when the debtor assigned all his property to trustees for the benefit of his creditors, with the most minute accuracy, and his sign was taken down, but he remained on with his clerks in possession of the goods, selling them as before the assignment as if they were his own property, yet still accounting to the vendee, the jury having negatived the possession of the trustees, it was held that their verdict should not be interfered with: Armstrong v. Moodie, 6 U.C.O.S. 538. This decision was anterior to any of our chattel mortgage Acts.

The earlier statutes may here be mentioned as shewing the foundation upon which the numerous authorities are based, prior to the chattel mortgage Acts. In Heward v. Mitchell, 10 U.C.Q.B. 535, a step further was made than in Armstrong v. Moodie, *supra*, to perfect the change of possession, and the transferee travelled and took possession, but at once re-delivered to the debtor as agent of the creditors, and still the change of possession was not sufficient; for the delivery to the agent was held only equivalent to a symbolical delivery, and therefore of a character upon which the title to personal property, capable of

delivery from hand to hand, should, for the future, depend. Furthermore (as shewing the insufficiency of symbolical delivery to take assignments out of the operation of the Act), in a case where it was witnessed by the writing that the mortgagor thereby gave to the mortgagee possession of a quantity of goods by delivery to him on the day of the date thereof of one black horse, which was not taken away but continued to remain as formerly in the possession and use of the mortgagor, it was held that there was no change in possession: McMartin v. McDougall, 10 U.C.Q.B. 399; Steele v. Benham, 84 N.Y. 634; Otis v. Sill, 8 Barb. (N.Y.) 102; Hanford v. Archer, 4 Hill. (N.Y.) 271; and, even had the horse been taken away, and from the time of delivery continued in the actual possession of the mortgagee, there would still not have been a sufficient delivery of the whole of the goods capable of actual delivery: *per* Pollock, C.B., Tanner v. Scovell, 14 M. & W. 28, at p. 37, correcting a dictum of Taunton, J., 2 A. & E. 57.

An immediate delivery may be made within the meaning of the statute, notwithstanding that an interval of time, greater or less according to circumstances, elapsed between the execution of the instrument and the actual taking possession by the vendee or mortgagee: Haight v. Munro, 9 U.C.C.P. 464.

Mere words of delivery are insufficient, where, for instance, a mortgagor points out a drove of cattle, and says "I deliver the property to you:" Porter v. Parmley, 52 N.Y. 185; Bullis v. Montgomery, 50 N.Y. 252; Doyle v. Stevens, 4 Mich. 87; Smith v. Moore, 11 N.H. 55; Menzies v. Dodd, 19 Wis. 343. It has been held that if one of two partners in trade mortgages the plant, stock-in-trade, debts and profits to secure the re-payment of a sum of money lent the other, and the mortgagor is allowed to continue in possession of the things mortgaged and to retain the management and visible ownership of them, the mortgage will be void as against creditors if lacking registration: Longman v. Tripp, 2 B. & P.N.R. 67; Ex parte Foss, 2 DeG. & J. 230; West v. Skipp, 1 Ves. Sen. 240. Though timber may be delivered by marking it with the initials of the assignee (Stoveld v. Hughes, 14 East 308), our statute requires, in addition to delivery, an actual and continued change of possession of the things mortgaged. Hence, in Short v. Ruttan, 12 U.C.Q.B. 79, a delivery, if such it could be called, of saw logs

by marking with the transferee's mark, was considered but a symbolical delivery, the assignor continuing in possession as before, and therefore the delivery, not being followed by an actual and continued change of possession of the thing mortgaged, the necessity for registering the assignment arose under the same express words of the Bills of Sale Act, 12 Vict. c. 74. Both Cummings v. Morgan, 12 U.C.Q.B. 565, and Middlebrook v. Thompson, 19 U.C.Q.B. 307, are distinguishable from Short v. Ruttan, *supra*. In the former case, though the timber remained in the possession of the assignor as it had done previously, and the mortgagees were not otherwise in possession than by the marking it with their mark, the defendant (execution creditor), on the trial, admitted the plaintiffs' (mortgagees') right to this portion of the timber, and confined the contest between the parties to "whatever further quantity of square timber the said party of the first part should manufacture during the remainder of the season." And, in the latter case, the person who marked the logs was clearly the agent of the grantees, his possession being their possession: MacPherson v. Fredericton Boom Co., 1 Han., 12 N.B.R. 337; and there had been a further delivery of some, in the name of those previously marked with the grantee's mark. To make valid against creditors of the vendor a sale of timber to be cut down by the vendor, there must be an actual delivery to the purchaser after the timber is cut down, followed by an actual and continued change of possession, as in the case of other chattels: McMillan v. McSherry, 15 Gr. 133. But a person who, having a license to cut, employs another to fell the timber, cannot be deprived of the timber by such other wrongfully selling it, for the moment it is cut, it becomes vested in the licensee without delivery: Segee v. Perley, 3 N.B.R., 1 Kerr 439.

Where the possession is in point of fact changed, it is not required that it be given personally to a creditor, purchaser, or mortgagee; it may equally be given to a purchaser from or bailee for him: Wilson, C.J., MeMaster v. Gurland, 31 U.C.C.P. 329; McPartland v. Read, 11 Allen (Mass.) 231; Wheeler v. Nicols, 32 Me. 233; Jones v. Swayze, 42 N.J. (L.) 279.

The possession of one of two mortgagees or vendees is possession for the other mortgagee or vendee, unless such other dissents from the act of possession, or asserts any right or title in-

dependent of the assignment by which the property was conveyed to them all: Haight v. Munro, 9 U.C.C.P. 462.

Immediate delivery must be "accompanied by" an actual and continued change of possession of the things mortgaged, and, however decided the delivery may be, without the subsequent requirements the statute will not be complied with: Osler, J., Scribner v. McLaren, 2 O.R., at p. 265. The possession must be actual, as contra-distinguished from constructive possession; it must be open and unequivocal, carrying with it the usual indications of ownership, and it must be accompanied with such unmistakable acts of control and ownership, as a prudent man would exercise. Hence it is, that when articles are bought and paid for, but allowed to remain in the vendor's possession as before, beyond a reasonable time for their removal, they may yet be taken as the vendor's, under a *fieri facias* against the latter's goods delivered to the sheriff: Carruthers v. Reynolds, 12 U.C. C.P. 596. And even when removed to a different part of the vendor's premises, and separated from other articles of the same kind, and marked with the purchaser's mark, but the vendor still remaining in possession, there is yet not such a sufficient, actual, and continued change of possession as to satisfy the statute: Doyle v. Lasher, 16 U.C.C.P. 263.

Nor is the change of possession sufficient when one purchases a horse, cutter and harness, and absenting himself two or three days returns and puts the horse in its former stable on the private property of the vendor to be fed as previously: Pettigrew v. Thomas, 12 A.R. (Ont.) 577; but such result should not follow if the vendor is the proprietor of a sale or boarding stable, and ordinarily keeping the horses of others for hire, particularly if a portion of the stable is expressly set apart for the horses of others, and the horse on being brought back is placed in the portion so assigned.

Where members of a family live together, and one of them sells a chattel to another in perfect good faith, though, perhaps, there is as much a change of possession as the position of the parties admit of, yet it seems that if the chattel is used as before the sale of it, there is not such a change of possession as will satisfy the statute: Suarr v. Smith, 45 U.C.Q.B. 156.

But in Ramsay v. Margrett, [1894] 2 Q.B. 18, it was held that when a wife purchases from the husband certain furniture

of the house in which they live together, without actual delivery of the particular chattels, the law attributes the possession to the one who had the legal title, namely the wife, and the apparent possession of the husband is excluded. This decision is based on the Imperial Bills of Sale Act which contains the expression of "apparent possession," differing substantially from the Ontario Act which provides for "an immediate delivery followed by an actual change of possession:" Hogaboom v. Graydon, 26 O.R. 298, 31 C.L.J. 100.

It is necessary, also, to pay attention to the nature of the delivery, which is required to be immediate, when such can be had. Immediate delivery is only excused when the circumstances prevent it: Haight v. Munro, 9 U.C.C.P. 462. The bargainee, or mortgagee, must go into possession at the time of the execution of the assignment, and the possession must be held continually after delivery, or the instrument be registered, one or other of which requirements must be shewn to have been complied with, whenever the Act applies: Fraser v. Lazier, 9 U.C.Q.B. 679.

Where the sheriff's bailiff is in possession of household goods under an execution, and the debtor obtains a third party, an auctioneer, to pay off the sheriff's claim under agreement with the sheriff, to retain the bailiff in possession as security for the advance, the debtor still continuing to reside where the goods and bailiff were, it was held by the House of Lords, that the surrendering of possession by the sheriff to the auctioneer constituted an actual change of possession: Charlesworth v. Mills, [1892] A.C. 231, reversing 25 Q.B.D. 421, and approving Ex parte Hubbard, 17 Q.B.D. 690.

The "actual and continued change of possession" here referred to does not apply to the possession taken by a mortgagee after default; and where a mortgagee whose mortgage was not registered had taken possession and sold under the power of sale in the mortgage, and the purchaser had obtained possession, such purchaser was held entitled as against execution creditors of the mortgagor: Gillard v. Bollert, 24 O.R. 147.

The words of the Act seem to require that the change of possession as well as the delivery should immediately accompany the mortgage, and should be continued from that time, but not that the actual change of possession must invariably

accompany the execution of the mortgage, and be continued from that time forward to be of any avail, although the mortgage must be "accompanied by an immediate delivery" of the things mortgaged: Wilson, J., Ontario Bank v. Wilcox, 43 U.C.Q.B. 489.

We have seen, however, that though an interval of time elapses, perhaps even a few weeks, greater or less according to the circumstances of the transaction, between the time of the execution of the instrument and the actual taking possession by the vendee or mortgagee, nevertheless that the delivery may be immediate within the meaning of the statute: Haight v. Munro, 9 U.C.C.P. 462.

The change of possession is to be open, or in other words a visible change; but even that will not suffice if the character of the change be not consistent with an honest transaction: Wilson v. Kerr, 17 U.C.Q.B. 170, affirmed in 18 U.C.Q.B. 470; Reid v. McDonald, 26 U.C.C.P. 147. And although it has been said that visible possession cannot be put higher than actual possession: Jessel, M.R., Ex parte Sefferey, 16 Ch.D., at p. 670, it would seem from the statutory definition here given that the legislatures have overridden that doctrine, and that there is required something more than actual change of control, for goods may be in the true and actual possession of one person and in the apparent possession of another: Robinson v. Tucker, 1 C. & E. 173. Where, for instance, notwithstanding actual relinquishment of possession, the former owner continued his residence, his presence about the place and occasional user of the subject-matter of the mortgage, in the eyes of the public the same as formerly so that they could see nothing to indicate a change, then the statute is not complied with: Danford v. Danford, 8 A.R. (Ont.) 518; Flagg v. Pierce, 58 N.H. 348. If there has been a change of possession, upon an actual sale, and knowledge of the change of possession is possessed by the particular creditor who invokes the aid of the statute, then it is immaterial whether or not the change was apparent to casual on-lookers, and the statute will be complied with: Danford v. Danford, *supra;* Gibbons v. Hickson, 55 L.J.Q.B. 119, 53 L.T. 910, 34 W.R. 140.

And where material is sold and delivered, to be worked up by the purchaser's foreman in repairing a vessel, as well

as by the vendor, and is left on the vendor's premises, where the work is to be performed, and apparently in his possession as before, possession would not be sufficiently changed to do away with the necessity of a registered instrument, although formerly, a different rule obtained: Gildersleeve v. Ault, 16 U.C.Q.B. 401, and see McPartland v. Read, 11 Allen (Mass.) 231; Laflin v. Griffiths, 35 Barb. 58; Wheeler v. Nichols, 32 Me. 233; Weld v. Cutler, 2 Gray (Mass.) 195; Patrick v. Meserve, 18 N.H. 300; Doyle v. Stevens, 4 Mich. 87.

In cases where the vendor has not the property in his possession, nor yet the right to its possession until the happening of a subsequent event or something on his part to be performed, the Act will now apply. See sec. 11, *infra*: Gurney v. James, 19 U.C.Q.B. 157, no longer applicable.

The Act will also apply to goods in customs; but if they are warehoused in a bonded warehouse under the provisions of the Customs Act, no transfer of property therein is valid for the purposes of that Act, unless the transfer is in writing, signed by the importer or his duly authorized agent, or is made by process of law, and unless such transfer is produced to the collector or other proper customs officer, and is recorded by him: R.S.C. 1906, c. 48, s. 87, and see Harris v. Commercial Bank, 16 U.C.Q.B. 437; May v. Security L. & S. Co., 45 U.C. Q.B. 106. But registration of a bill of sale of goods is not necessary when the goods are in the hands of a warehouseman, who becomes the agent of the transferee and agrees to hold the goods for him: Jones v. Henderson, 3 Man. L.R. 433; Re Cunningham, 28 Ch.D. 682; Com. Nat. Bank of Chicago v. Corcoran, 6 O.R. 527, 20 C.L.J. 272. And the Act does not apply to letters of hypothecation accompanying a deposit of goods by merchants or factors, or pawn tickets given by pawnbrokers, or in fact to any case where the object and effect of the transaction are immediately to transfer the possession from grantor to grantee or mortgagor to mortgagee: Re Hall, 14 Q.B.D. 386.

Strict compliance with the Act is necessary, notwithstanding that there may have been as much a change of possession as the position of the parties admits of: Snarr v. Smith, 45 U.C. Q.B., at p. 159.

Whether or not there has been an immediate delivery and sufficient change of possession to satisfy the statute, is not a

question of law, but one of fact, and, as such, a question for the jury: Waldie v. Grange, 8 U.C.C.P. 431; Swift v. Thompson, 9 Conn. 63; Howe v. Kelly, 27 Conn. 538; Warren v. Carlton, 22 Ill. 415, but see Young v. McClure, 2 W. & S. 147; Carpenter v. Meyer, 5 Watts 243; Milne v. Henry, 40 Penn. 302; Cadbury v. Nolan, 5 Penn. 320; Burrows v. Stebbins, 26 Vt. 659. But when the fact is tried by a Judge there is strong aversion to interfering with the conclusions reached by him upon the evidence at the trial regarding such fact: Scribner v. McLaren, 2 O.R. 265. When, however, there is no conflict of evidence, and no controversy as to the fact, it becomes a pure question of law, and as such is to be decided by the Court: Burton, J.A., Pettigrew v. Thomas, 12 A.R. (Ont.), at p. 578: see Scribner v. Kinlock, 12 A.R. (Ont.) 367.

The actual change which must immediately follow a sale is the same change which must continue; it therefore cannot be said that the change continues when the vendor apparently resumes his place in the shop containing the goods in question, one day after the sale, though in reality as clerk or salesman for the purchaser: Scribner v. Kinlock, 12 A.R. (Ont.) 367.

Actual possession, taken by the grantee on an unregistered bill of sale, even though taken wrongfully, and, even under circumstances which, *per se*, would amount to a fraudulent preference, may exclude the operation of the Act as to parties who subsequently acquire rights. When possession is taken rightfully the possession will be extended by construction of law beyond the actual physical possession, but this will not be done in the case of a wrong-doer. His possession will not be extended beyond his actual physical possession: Ex parte Fletcher, 5 Ch.D. 809. When taken rightfully, before any other rights have accrued, the mortgage becomes good, though the filing be irregular, or even there be no filing at all, though the description be insufficient, and though there be other defects which, had such possession not been taken, would have been fatal to the mortgage. The taking possession amounts to an identification and appropriation of the property; Morrow v. Reid, 30 Wis. 81, 84; and where property passes by a bill of sale, and the mortgagee takes possession, and has actual possession with such change as the statute requires, though before the mortgage becomes due, he still has the right to retain the goods as against

a creditor who became such only after possession had been taken, subject, however, to the mortgagor's right of action, if any, for taking possession before default: Robins v. Clark, 45 U.C.Q.B. 362: see sec. 23 of this Act, *infra*.

Where, according to the terms of the instrument, the grantee, upon default made by the grantor, is entitled to the possession of the goods, upon demand, and makes demand, but does not take the goods out of the grantor's possession, there is not such a change of possession as to prevent the application of the Act: Ancona v. Rogers, 1 Ex.D. 285. If a bargainee, or mortgagee, does not actually get possession, diligence in attempting to get it will not help him: *per* Mellish, L.J., Ex parte Jay, L.R. 9 Ch., at p. 705. Nor will an ineffectual attempt to get possession be sufficient to satisfy the Act; nothing short of taking the property out of the actual possession of the mortgagor, or equivalent acts, will prevent the statute from applying: McKellar v. McKibbon, 12 A.R. (Ont.) 221, 21 C.L.J. 414, and although an action be brought by a mortgagee for recovery of goods founded on the wrongful act and refusal of the mortgagor to give them up, the demand, followed by the action, is for some purposes construed as possession taken of the goods mortgaged, yet such is only constructive possession, and as the change is not an open one affording public notice it will not suffice: Hyman v. Bourne, 5 O.R. 430.

A landlord who, by arrangement with his tenant, purchases the latter's chattels at a bailiff's sale under distress for rent, though he may be a purchaser in good faith within the meaning of the statute, must do something more towards taking possession than merely hiring the tenant as his servant, at so much a month, and putting him in charge of the chattels, and leaving him in possession of them upon the place, to all appearances as he had previously lived thereon while he was tenant. The fact that the landlord may be a purchaser brings his case within the operation of the statute in regard to the strict need for an actual change of possession: Farlinger v. McDonald, 45 U.C. Q.B. 233.

A sale of chattels consisting of household furniture in their residence between a married woman and her husband living and continuing to live together, without a duly registered bill of sale, is void as against creditors, for there cannot be said to

be an actual and continued change of possession within this definition: Hogaboom v. Graydon, 26 O.R. 298, 31 C.L.J. 100; compare Ramsay v. Margrett, [1894] 2 Q.B. 18, previously referred to.

So where a purchaser of a piano under a hire receipt before payment thereof agreed with his wife that she should purchase his interest and pay the balance due the vendors, the transaction was held invalid as against execution creditors, by reason of the non-registry of a bill of sale and not followed by an actual and continued change of possession as required by the Act: Eby v. McTavish, 32 O.R. 187. It might, however, be otherwise were the original contract of conditional sale to be cancelled by the conditional vendor and a new conditional sale made to the substituted party although at the instance of the original purchaser, if the facts constituted a complete novation of contract.

Assignee for Creditors.

A chattel mortgage which cannot be supported by reason of failure to comply with the Bills of Sale and Chattel Mortgage Act, and is therefore void both as to an assignee for the benefit of creditors of the mortgagor, and as to an execution creditor may be so declared in the one proceeding and the assignee may, for that purpose, be added as a party to an interpleader issue being tried between the mortgagee and an execution creditor: Pulos v. Soper, 4 O.W.N. 1559.

Rights of Liquidators.

Prior to the amendment of 1913, 3 Geo. V., making the expression "creditors" applicable to a liquidator of a company under the Winding-up Act, the question as to the status of a liquidator had been discussed in a number of Ontario decisions. It was first questioned, but not decided, in Re Rainy River Lumber Co., 15 A.R. (Ont.) 749. Later, Street, J., in a dictum in Re Canadian Camera, etc., Co., 2 O.L.R. 677, 679, held that a liquidator in a compulsory winding-up, while in no sense an assignee for value of the company, still stands for the creditors and is therefore entitled to enforce their rights. Substantially the same conclusion was reached in a decision by Teetzel, J., referring to the above dictum in National Trust v. Trust & Guarantee, 5 D.L.R. 459, 26 O.L.R. 279.

Riddell, J., in Re Canadian Shipbuilding Co., 6 D.L.R. 174, 26 O.L.R. 564, dissented from the dictum of Street, J., and held a liquidator of an incorporated company not to be a "creditor" nor a "purchaser for value" within the meaning of the Bills of Sale and Chattel Mortgage Act. There was a motion for leave to appeal to the Supreme Court of Canada for a final decision of the question, but leave was refused because, under the circumstances of that case, it would only have raised an academic question: see 7 D.L.R. 304. Afterwards the statute 3 Geo. V. (Ont.) 1913, ch. 18, amended sec. 2, sub-sec. (*b*), by inserting after the word "bargainor," the words "the liquidator of a company in a winding-up proceeding under the Winding-up Act of Canada."

Rights of Creditors not Having Executions.

The words "suing in behalf of themselves and other creditors" indicate only the nature of proceedings necessary to set the mortgage aside, and that the same will enure to the benefit of the general body of creditors: Clarkson v. McMaster, 25 Can. S.C.R. 96; sub-section (*b*) of this Act now interprets the word "creditors" so to include creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, "as well as creditors having executions," fixing upon the statute the theory advanced in Clarkson v. McMaster, *supra*, and by Riddell, J., in Universal Skirt Mfg. Co. v. Gormley, 17 O. L.R. 114, in preference to the opinion of Britton, J., in the latter case.

An instructive memorandum of the history of the legislative amendments in this regard was appended to the opinion of Riddell, J., in the last-mentioned case and is printed with the report: 17 O.L.R. 139-144.

Assignment for Benefit of Creditors Excepted.

3. This Act, except section 32, shall not apply to an assignment for the general benefit of creditors to which the *Assignments and Preferences Act* applies. *New.*

Mortgages of Vessels.

4. This Act shall not apply to mortgages of vessels registered under the provisions of any Act in that behalf. R.S.O. 1897, c. 148, s. 34.

Exception of Registered Vessels.

This section has a much wider application than is implied by the mere words it contains. Whatever is on board a vessel, and is indispensably necessary for the traffic and business in which the vessel is engaged, constitutes a part of the vessel herself, and falls within the spirit and intent of the exception made by this section to the "Bills of Sale and Chattel Mortgage Act." If it should be held otherwise, that nothing is considered as part of the ship which is not necessary for her navigation or motion on the water, a door would be opened for many nice questions, and much discussion and cavil. It was held, therefore, that a mortgage of a vessel, with all her apparel, furniture, etc., passed all the furniture, glass, crockery, beds, bedding, plate, etc., etc., as part of the vessel, and that the mortgage being of a registered vessel was exempt from registry under the Chattel Mortgage Act: Patton v. Foy, 9 U.C.C.P. 512: see Gale v. Laurie, 5 B. & C. 157, but articles on a vessel simply used for mere amusement, such, *e.g.*, as a piano, could scarcely be held as passing to a mortgagee of a vessel: St. John v. Bullivant, 45 U.C. Q.B. 614.

The word used is "vessel." In the Imperial Act, 1878, the word "ship" is used, and it has been held that this word does not mean what in ship-building is technically called a ship, for that would confine it to a vessel of a particular rig; but the expression must include whatever in popular language is called a ship. So it is, that, under this Act, the word "vessel" can hardly be confined to what is technically called a vessel. At any rate the word "vessel" has a more extended meaning than the word "ship," and includes anything that in popular language is called a vessel. Anything beyond a mere boat is ordinarily called a vessel; therefore a scow propelled by oars, carrying lumber or other goods is a vessel within the Act: Gapp v. Bond, 19 Q.B.D. 200. And even though the assignment is not registered under the provisions of the Merchants Shipping Act, the exception of the Bills of Sale Act would still apply: Union Bank of London v. Lenanton, 3 C.P.D. 243.

Registration of Chattel Mortgages.

5. Every mortgage of goods and chattels in Ontario, which is not accompanied by an immediate delivery and an actual and

continued change of possession of the things mortgaged, or a true copy thereof, shall be registered as hereafter provided, together with

(*a*) The affidavit of an attesting witness thereto of the due execution of such mortgage, or of the due execution of the mortgage of which the copy filed purports to be a copy, which affidavit shall also state the date of the execution of the mortgage, and

(*b*) The affidavit of the mortgagee that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that the mortgage was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him. R.S.O. 1897, c. 148, ss. 2, 3.

Instruments within Statute.

The words "every mortgage or conveyance intended to operate as a mortgage" have been held, under the provisions of the Imperial Bills of Sale Act, to include assignments, transfers, and assurances of goods and chattels; leases with conditions giving the lessor a lien on the tenant's property as security for the rent (North Central Wagon Co. v. Manchester Ry. Co., 13 App. Cas. 554, affirming 35 Ch. D. 191; see also Jackson v. Green, 4 Johns. 186; Palemns v. Trainor, 30 Cal. 685; Johnson v. Crofoot, 53 Barb. 574); and all powers of attorney authorities or licenses to take possession of goods and chattels as security for the payment of a debt in money or some other commodity, unless, of course, the transaction is accompanied by an actual change of possession: Ex parte Parsons, 16 Q.B.D. 532. A mortgagor, after default, is, as to crops growing upon the mortgaged land, a tenant at sufferance, and cannot, by giving a chattel mortgage upon the crops, confer a title to the prejudice of the land mortgagee, unless the mortgagee acquires

by a conveyance from the mortgagor of the latter's rights, in which case a merger of the legal and equitable title is effected, and a mortgage on the crops to a third party prior to the merger will take priority in point of time even though such mortgage be executed subsequent to the execution of the first mortgage: Bloomfield v. Hellyer, 22 A.R. (Ont.) 232; McDowell v. Phipen, 1 O.R. 143; Cameron v. Gibson, 17 O.R. 233; see Sexton v. Breise, 135 N.Y. 387. A power of attorney to an appointee of several mortgagees, by a mortgagor, to sell the goods, and with the proceeds pay the mortgage debts, is not a transaction in the nature of either a mortgage or sale within the meaning of the statute: Patterson v. Kingsley, 25 Gr. 425. Nor is a pledge of goods as security for a loan; and a document signed by the pledgor recording the transaction and regulating the rights of the pledgee as to the sale of the goods, and filed, will not make it such, so as to be void for want of compliance with the requirements of the statute: Ex parte Hubbard, 17 Q.B.D. 690. Book debts are not within the operation of the Act: National Trust v. Trust and Guarantee, 5 D.L.R. 459, 26 O.L.R. 279.

A mortgage by an incorporated company as security for bonds is a "mortgage or conveyance intended to operate as a mortgage of goods and chattels" within the meaning of sec. 5 and also sec. 24, of this Act, where the same covered the mortgagor's "undertakings then made or in course of construction, or thereafter to be constructed, together with all the property, real and personal, tolls, incomes, and sources of money, rights, privileges and franchises, owned, held, or enjoyed by it" and "all machinery of every nature and kind including all tools and implements used in connection therewith," although it stipulated that for the purpose of the mortgage security "all machinery, plant, and personal property of the mortgagor were to be considered fixtures to the realty" and that the mortgage was not to be registered as a bill of sale or chattel mortgage; and, therefore, if such mortgage is not accompanied by an immediate delivery for an actual and continued change of possession of the things mortgaged, or is not registered as a chattel mortgage, as required by sec. 5 of the Act, it is absolutely null and void as against creditors of the mortgagor under sec. 7 of this Act: National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 26 O.L.R. 279.

Where a machine is sold to a company upon an order signed

by the latter the conditions of which were that the company should pay a part of the price in cash and the balance in instalments, with interest on such instalments payable with the last of them, and that the title should not pass to the company until the moneys payable by them under the order, as well as under any other orders which might be given by the company to the seller should be paid, such transaction is neither a mortgage nor a conveyance intended to operate as a mortgage and is, therefore, not affected by the [illegible] Sale and Chattel Mortgage Act, nor by the sale of the company's liquidator and the seller is entitled to recover the [illegible] the terms of the order out of the estate [illegible] Re Canadian Camera and Optical Co., A. R. W. [illegible] R. 677.

Such [illegible] within the operation of sec. 8 of [illegible] companied by immediate delivery and [illegible] change of possession, and, therefore [illegible] operation.

A mortgage of [illegible] registered under the provisions of any Act in that behalf, is not within the Act: see sec. 4 of this Act. Nor is a mortgage of a [illegible] with all her apparel, furniture, etc., as part of the vessel: [illegible] Foy, 9 U.C.C.P. 512; and a dump barge, propelled by oars, has been held to be a vessel, so that a mortgage thereof is excepted from the statute: Gapp v. Bond, 19 Q.B.D. 200. The property in an unregistered ship may be transferred by parol and delivery of possession like any other personal chattel (McLean v. Grant, 1 Kerr, 3 N.B.R. 50), or by a bill of sale under the Act. Neither is an instrument evidencing a conditional sale; but such is subject to the Act respecting conditional sales of personal property: see Statutes of Ontario, 1 Geo. V. 1911, ch. 30, R.S.O. 1914, ch. 136; Rogers Locomotive Works v. Lewis, 4 Dill. 158; Nash v. Weaver, 23 Hun. (N.Y.) 513. Nor is this section applicable to an instrument which conveys an interest in land, and also conveys machinery affixed to the land: Robinson v. Cook, 6 O.R. 590; Mather v. Fraser, 2 K. & J. 536; Holland v. Hodgson, L.R. 7 C.P. 328, 340; Longbottom v. Berry, L.R. Q.B. 123. But every covenant, promise and agreement to give a chattel mortgage is by sec. 16 brought under the Act, and must be in writing and registered in manner similar to chattel mortgages, unless accompanied by an immediate delivery and followed by an actual and continued change of possession, and in like manner by sec.

17 of this Act, every covenant, promise or agreement to make a sale of chattels is deemed a sale under the Act. A mortgage of growing timber (Steinhoff v. McRae, 13 O.R. 546), or the ordinary rent receipt of a piano or furniture, with right of purchase (Crawcour v. Salter, 18 Ch. D. 30; Stevenson v. Rice, 24 U.C.C.P. 245; Banks v. Robinson, 15 O.R. 620; McDonald v. Forrestal, 29 Gr. 300, 19 C.L.J. 241; Forristal v. McDonald, 9 Can. S.C.R. 12; Lincoln Waggon Co. v. Mumford, 41 L.T. 655; Polson v. Degeer, 12 O.R. 275; Ex parte Crawcour, 9 Ch. D. 419, is not within the Act; because, in the former instance it is an interest in land, while in the latter the property does not pass to, or vest in the lessees, or pass from the lessors: Tomlinson v. Morris, 12 O.R. 311; Frye v. Milligan, 10 O.R. 509.

But a conveyance of growing timber to be immediately felled is not an assignment of an interest in land, but a transfer of goods and chattels and, therefore, subject to the operation of this Act: Marshall v. Green, 45 L.J.C.P. 153, 1 C.P.D. 35.

Before the amendment of 1894 it was held that a sale of stock in trade by one trader to another, the agreement being that the property therein should remain the property of the vendor until the stock in trade was paid for, was not within the Act: Banks v. Robinson, 15 O.R. 618; but now such agreements in respect of goods intended for re-sale are governed by the Conditional Sales Act, 1 Geo. V. ch. 30, R.S.O. 1914, ch. 136. But a general assignment of property, by deed, will pass cut timber in the possession of a pound-keeper, so as to entitle the assignee to bring trover for the timber after demand therefor and refusal (Jack v. Eagles, 7 N.B.R. 95); and so such an assignment may be within the Act.

A building agreement, in which is contained a provision that all materials brought upon the ground shall be considered as attached to the premises, and not removable without the landlord's assent, and that the landlord may enter and take possession of the material upon certain specified default, is not within the Act: Reeves v. Barlow, 12 Q.B.D. 436; Ex parte Newitt, 16 Ch. D. 522; Brown v. Bateman, L.R. 2 C.P. 272, 15 W.R. 350; Blake v. Izard, 16 W.R. 108. Nor again is an equitable assignment of goods and chattels, when there is an immediate delivery and an actual and continued change of possession, but without the latter, such an assignment may be within the Act, though the goods are in the custody of one person, and the equitable as-

signment in favour of another: McMaster v. Garland, 8 A.R. (Ont.) 1; Walrond v. Goldmann, 16 Q.B.D. 121; Chapman v. Knight, 5 C.P.D. 308; see Patterson v. Kingsley, 25 Gr. 425; Duncan v. Cashin, L.R. 10 C.P. 554; Engleback v. Nixon, L.R. 10 C.P. 645; Pollock v. Fisher, 1 All., 6 N.B.R. 515; Jack v. Eagles, 2 All., 7 N.B.R. 95. So far as the debtor's interest in same is concerned the statute will, by reason of sec. 11 of this Act, apply in cases where the goods in dispute, when first they come into possession of the debtor, come so charged with or subject to the title of a third person, in this respect abrogating the former rule: Dominion Bank v. Davidson, 12 A.R. (Ont.) 90.

Nor does the Act apply to an agreement to manufacture staves to the joint account of both parties, where, by the agreement, the staves are to be considered at all times, whether marked or not, the property of the person making the advances: Kelsey v. Rogers, 32 U.C.C.P. 624; Burnett v. McBean, 16 U.C. Q.B. 466. But a contract in the following terms: "That upon all materials upon which the parties of the second part shall have made any advances, the said parties of the second part shall have and retain a first lien and preference for all moneys advanced upon the same, or under this contract, and the same shall become from the time of their preliminary construction the absolute property of the parties of the second part, subject to the right of the parties of the second part to reject the same should the same be rejected as hereinbefore mentioned; nor shall the same, unless afterwards rejected, be removed by the said parties of the first part, or appropriated to any other use than that of the said works; but it is distinctly understood that all such materials, as well as tools, instruments, and other things, shall be in the charge and at the risk of the party of the first part," appears to be an instrument within the Act requiring registration: Howitt v. Gzowski, 5 Gr. 555.

A simple receipt for purchase money of chattels, not at the time separated or appropriated from a greater number of the same kind, was held a document requiring registration, and is probably subject to the provisions of the statute under section 11: Snell v. Heighton, 1 C. & E. 95.

A mortgage of that which passes by a grant of the land need not be registered (Ex parte Beleher, 4 D. & Ch. 703; Ex parte Reynal [illegible] D. & D. 443; Hutchinson v. Kay, 23 Beav. 413; but an agreement for giving a future mortgage, or a covenant for a

right to take possession of chattels on a prescribed default, or contingency, may be defeated, as against creditors, for non-compliance with section 16 of this Act. An executory contract (as when a vendor agrees to manufacture and deliver certain timber to a vendee, or a tradesman agrees to make up and supply articles for a customer) is within the combined effect of sections 11 and 17 of the Act.

Letters of hypothecation are not within the Act, nor are pawn tickets, nor in fact any transaction wherein the possession of the chattels is immediately transferred from grantor to grantee: Re Hall, 14 Q.B.D. 386, *per* Cave, J.; Ex parte North Western Bank, L.R. 15 Eq. 69; Marsden v. Meadows, 7 Q.B. D. 80.

To be within the fifth section of the Act the mortgage must be given to secure an existing debt; the legislature contemplating that, at the date of the transaction, there should be a *bonâ fide* existing debt (Beecher v. Austin, 21 U.C.C.P. 334; Middlebrook v. Thompson, 19 U.C.Q.B. 307), and a mortgage is properly taken under this section when the creation of the debt and the execution of the mortgage are simultaneous, and part of one and the same transaction: Ex parte Bolland, 21 Ch. D. 543.

When a transaction is, in fact, a security for an existing debt, the parties cannot evade compliance with section 5, relating to such a transaction, merely by adopting the form of an absolute sale. If, however, the real transaction is a sale with a right of repurchase upon certain terms, the vendor can only be required to observe the requirements of section 8 of that Act: Hope v. Parrott, 7 O.L.R. 496.

It has been held that the owner of land upon which there were fixtures, such as machinery in a mill, had the right to sever the chattels from the realty, and, therefore, that a chattel mortgage upon the fixtures was within the operation of the Act: Rose v. Hope, 22 U.C.C.P. 482. But in the case of Bacon v. Rice Lewis (1897), 33 C.L.J. 680, it was held (following a decision of the English Court of Appeal) (Hobson v. Gorringe, [1897] 1 Ch. 182, 33 C.L.J. 311; also Landed Banking Co. v. Clarkson, decided by Boyd, C., Feb. 23rd, 1897, at Toronto Non-jury Sittings, not reported), that a chattel mortgage on *de facto* fixtures, although duly filed, will not prevail as against a subsequent purchaser or mortgagee of the land who registers his conveyance and has not actual notice of the prior chattel mortgage.

A mortgagor of land may give a chattel mortgage on manure lying in heaps on the land (not the produce thereof), and if the purchaser of the equity of redemption in the land use the manure he makes himself liable in trover to the mortgagor as well as to the chattel mortgagee: Thompson v. Walsh, 2 All., 7 N. B.R. 369. And, indeed, since manure lying in heaps in a barnyard is a chattel which may be taken away by an outgoing tenant (unless the contrary is stipulated), it may in like regard also be mortgaged: Foshay v. Barnes, 1 Han., 12 N.B.R. 450.

An instrument, in the form of an absolute bill of sale, is within this section of the Act, if it appears that the intention of the instrument was to secure a debt (McMartin v. McDougall, 10 U.C.Q.B. 399; Kuhn v. Graves, 9 Iowa 303; Bird v. Wilkinson, 4 Leigh. (Va.) 266; Dukes v. Jones, 6 Jones (N.C.) L. 14; Sanders v. Pepoon, 4 Fla. 465; Shaw v. Wiltshire, 65 Me. 485), and evidence can be gone into to shew what the intention was, but the proof should be clear and convincing: Dabney v. Green, 4 H. & N. 101; Ex parte Odell, 10 Ch. D. 76; Ex parte Cooper, 10 Ch. D. 313.

The absence of words of transfer from an instrument does not prevent it from being a chattel mortgage: Ellington v. Charleston, 51 Ala. 166. Where a writing, purporting on its face to be a bill of sale, reserved the right to the vendor to take possession in case of default it was held that the agreement constituted the vendor a mortgagee: Baldwin v. Owens, 21 Ky. L. Rep. 352.

An invoice of goods sent by a vendor on receiving an advance of money from the purchaser with a contemporaneous agreement by the purchaser to let the goods to the vendor at a rental exceeding the purchase money, in which it was stipulated that upon a sale of the goods realizing more than was due thereunder and expenses, the surplus should go to the original bargainor, has been held not to be within the Imperial Bills of Sale Act, since the transaction amounted to a complete sale under which title to the goods passed to the purchaser independently of the invoice and receipts: North Central Wagon Co. v. Manchester, etc., Ry. Co., 35 Ch. D. 191; affirmed 13 App. Cas. 554.

It sometimes is the case that a mortgage as to a portion only of the property mortgaged, or part only of the consideration, is not within the operation and effect of the statute requiring registration, on the principle of the maxim "*lex non cogit ad im-*

possibilia," while, as to another portion of the property, or a different part of the consideration, the mortgage is within the application of the Act. When such happens, then, if that part of the instrument which brings it within the statute can be severed from the rest, the mortgage, as to the rest, is not invalid for want of registration (Kitching v. Hicks, 6 O.R. 739; Mowat v. Clement, 3 Man. L.R. 585; Hughes v. Little, 18 Q.B.D. 32); but if the one part cannot be severed from the other, then the whole is void; if it can be severable, whether the illegality be created by statute or common law, the bad part may be rejected and the good retained: Pickering v. Ilfracombe Ry. Co., L.R. 3 C.P. p. 250; Ex parte Browning, L.R. 9 Ch. 583.

Where the mortgage was given to secure both a debt and also a liability by the mortgagee for the mortgagor, and the affidavit of *bona fides* was not in the form prescribed for either, but an attempted combination of both, it was held wholly void as against creditors under the Nova Scotia statute which sets forth a schedule to be followed "as nearly as may be": Reid v. Creighton, 24 Can. S.C.R. 69.

If a mistake has been made innocently in filling in the consideration in the affidavit or the mortgage so that there is an apparent discrepancy in the amount, it would seem that such error is not necessarily fatal. For example, where a chattel mortgage is first drawn to secure the sum of five hundred dollars, but afterwards and before execution, the sum is changed to six hundred dollars in every place except the recital where the word "five" is inadvertently left in place of "six," such omission does not amount to an untrue statement of the consideration in the attached affidavit as to invalidate the mortgage, where the evidence affords a satisfactory explanation of the mistake in the recital: Fraser v. Macpherson, 34 N.B. Eq. 417, affirmed by the Supreme Court of Canada.

And it may be on the principle of rejection and retention, when the contract is severable, that a mortgage made by two persons may be invalid, so far as the interest of one mortgagor is concerned, yet valid so far as concerns the interest of the other: Ex parte Brown, 9 Ch. D. 389.

An agent advancing a principal's money, even for the purpose of the latter's business, can be a mortgagee, so long as he is personally responsible to his principal for the money he advances: the fact that the debt is not due to the mortgagee him-

self does not prevent the mortgage from being registered under the statute: White v. Brown, 12 U.C.Q.B. 477.

A treasurer of a mutual insurance company may take a mortgage to himself for a debt due to the company; but the more obvious and proper course would be to take the mortgage direct to the company or corporation, for they have power to take it: Brodie v. Ruttan, 16 U.C.Q.B. 207. Such treasurer, as mortgagee, may maintain an action against a wrongdoer for taking the goods mortgaged, although, in point of fact, he has no beneficial interest in them whatever; and so can any other mortgagee who is not the beneficial holder of the mortgage, but holds it simply in trust for others, provided the transaction be not invalid on any ground of public policy or otherwise.

A joint stock company, established for trading purposes, may give a mortgage as security for goods sold to, or work done for it: Re Cunningham, 28 Ch.D. 682; Shears v. Jacobs, L.R. 1 C.P. 513; Deffell v. White, L.R. 2 C.P. 144. It is a power generally incident to a corporate body to borrow money for corporate purposes, and to give security on corporate property for repayment, by way of chattel mortgage. Therefore, the trustees of a Methodist congregation of the Methodist Church of Canada, with the sanction of the official bodies constituting the managers of the temporalities of the church, had authority to borrow money by way of chattel mortgage "to enable the quarterly board to defray urgent claims": Brown v. Sweet, 7 A.R. (Ont.) 725.

The Crown may take a mortgage from any of her subjects to secure a debt (under our Acts) through, and in the name of, the head of the department to which the debt is due (McGee v. Smith, 9 U.C.C.P. 89), and banks may take, hold and dispose of mortgages upon personal property, by way of additional security for debts contracted to the bank in the course of its business: see R.S.C. 1906, ch. 29, sec. 80. A transfer of goods, when they are in the hands of a warehouseman, who becomes the agent of the transferee and agrees to hold the goods for him, is not an instrument within the Act requiring registration: Jones v. Henderson, 3 Man. L.R. 433.

Blank Mortgages.

A chattel mortgage may be signed in blank and be filled in later according to the instruction of the mortgagor, and in the absence of fraud it will be deemed a sufficient compliance with

the Act: Wade v. Bell Engine Co., 1 O.W.N. 1052, 16 O.W.R. 636.

There is no necessity for a chattel mortgage to be under seal: Hall v. Collins Bay Co., 12 A.R. (Ont.) 65; Wade v. Bell, 16 O.W.R. 637, 1 O.W.N. 1052.

Goods and Chattels.

The fact of actual physical attachment is the principal question to be decided in ascertaining whether or not an article is a fixture, and the intention of the person affixing is material only so far as it can be presumed from the degree and object of the annexation: Hobson v. Gorringe, [1897] 1 Ch. 182, 33 C.L.J. 311.

In the older case the test as to change from personalty to realty was one of physical annexation only, the question being in all of them whether the fixture could be distrained or whether severance of it might not constitute waste: 5 Bacon Abr. Waste (c) 6; 2 Rolle Abr. Waste. As time went on other authorities held that use or purpose or adaptability was the test, and what was known as constructive annexation followed: Farrar v. Stackpole, 6 Me. 154. A leading American case seems to sum up all that is now required to constitute the change as (1) actual annexation either to the freehold or to something thereunto appurtenant; (2) adaptability to that part of the realty with which it is connected, and (3) the intention of the party making the annexation—this intention being inferred from the character of the article so affixed, the use for which it is done, and the relation of the party annexing it: Teaff v. Hewitt, 1 Ohio St. 511; Hacker v. Munroe, 176 Ill. 384; Ward v. Kilpatrick, 85 N.Y. 413.

A trade fixture attached to the freehold becomes part thereof, subject to removal by the tenant if done in proper time, but until such severance it remains part of the freehold: Searth v. Ontario Power Co., 24 O.R. 446, following Menx v. Jacobs, L.R. 7 H.L. 490.

Saws and other machinery of a saw-mill are not trade fixtures: Richardson v. Ranney, 2 U.C.C.P. 460.

The parties to a contract may specially agree as to the nature and character of trade fixtures and such characterization will govern: Searth v. Ontario Power Co., 24 O.R. 446, following Davey v. Lewis, 18 U.C.Q.B. 30.

A stamp mill erected by licensees of a mining area upon Crown lands, for testing ores, the mill resting on the soil by its

own weight and steadied with bolts for that purpose, and could be removed without disturbing the freehold, was held to be a chattel, or, at least a trade fixture removable by the licensees at any time during their tenure, and for that reason was subject to seizure under an execution and might be sold thereunder: Liscombe Falls Gold Mining Co. v. Bishop, 35 Can. S.C.R. 539, affirming 36 N.S.R. 395. Leave to appeal to the Privy Council was refused.

Where machinery of a mill is disconnected therefrom and taken down to be altered and repaired, intended to replace it again, it cannot be regarded nor treated as a chattel, for the purpose of execution, while in such situation: Grant v. Wilson, 17 U.C.Q.B. 144; see also Walton v. Jarvis, 13 U.C.Q.B. 616.

The rule of law applicable when grain or other such chattel is so mixed and confused as to be impossible of separation, also applies when timber belonging to two persons becomes mixed and incapable of being distinguished through the fault of one of them. The person so wrongfully confusing the property is then estopped from setting up a claim as against what should be delivered to the other, and to that extent the latter becomes entitled, and does not, by taking the whole, make himself liable for conversion: Tucker v. Muirhead, 6 All., 11 N.B.R. 420. But when a portion of timber out of a large quantity has been properly distinguished and appropriated, such portion vests in the vendee at once; and a letter written to the purchaser of the timber by the maker thereof, stating that a part of a quantity of timber in the river (which part was distinguished by a particular mark) was for the purchaser, and such letter is assented to by the purchaser, then the letter and assent amount to an appropriation in law: Macpherson v. Fredericton Boom Co., 1 Han., 12 N.B.R. 337; see also Pollock v. Fisher, 1 All., 6 N.B.R. 515.

Location and Removal of Goods.

In R.S.O. 1887, ch. 125, the word "made" appeared before the words "in Ontario," the inference therefrom possibly being that the Act only applied to instruments executed within the province. This was apparently not contemplated to be the law, and the word "made" was therefore omitted in 57 Vict. ch. 37. If the goods are in Ontario, though the parties to the mortgage all reside in another province, the law of Ontario governs, and the mortgage must in all respects comply with the statutory re-

quisites: River Stave Co. v. Sill, 12 O.R. 557; Marthinson v. Patterson, 19 A.R. (Ont.) 188.

When the property mortgaged is beyond the limits of the province at the time when the mortgage is made, the law of the place of contract governs as to the nature, validity, construction and effect of a mortgage; and if the property is removed to another province, though the mortgage be not executed according to the law of that province, yet if executed and recorded according to the laws of the province where executed, it will be effectual to hold the property in the province to which it is removed: Jones v. Twohey, 1 A.L.R. 267; River Stave Co. v. Sill, 12 O.R. 570; Gosline v. Dunbar, 32 N.B.R. 325; Singer Machine Co. v. McLeod, 20 N.S.R. 341; Bonin v. Robertson, 2 Terr. L.R. 21; Ferguson v. Clifford, 37 N.H. 86.

Possession of Goods.

If personal things are in the visible possession of a vendor, and sold by him to another, if the vendee would have the contract to be clear of the imputation of fraud, actual delivery ought to be instantly made, or as near a delivery thereof as the nature of the thing admits of, and an actual and continued change of possession of the things had, or the Act complied with as regards registration: Belanger v. Menard, 27 O.R. 209; Cookson v. Swire, 9 App. Cas. 664; Purshall v. Eggart, 52 Barb. 367.

Our statute is possibly founded on the doctrine in Twyne's case, 1 Sm. L.C. 3, namely, that it is a sign of fraud for the donor to continue in possession, and to use the goods as his own, and to trade and traffic with others, and to defraud and deceive them, and that it becomes necessary, immediately after the gift, to take possession of the goods "for continuance of the possession in the donor is the sign of trust"; but while this is presumably so, it does not follow, as, of course, that because goods are found in a debtor's possession that they can legally be taken at the instance of an execution creditor to the disadvantage of others interested therein: Osler, J.A., in Dominion Bank v. Davidson, 12 A.R. (Ont.) 92.

An agreement that a chattel mortgage shall not be registered and the possession shall not change thereunder renders the mortgage void from the beginning: Clarkson v. McMaster, 25 Can. S.C.R. 96.

Whether or not there has been an actual and continu-

change of possession of the things mortgaged, in order to obviate the necessity of registering an instrument under this Act, depends upon the nature and position of the property, as well, also, as upon the nature and purposes of the assignment: Fry v. Miller, 45 Penn. 441; Morse v. Powers, 17 N.H. 286. When the property mortgaged is of such a nature as to be incapable of being delivered, as in the case of growing crops, unless the mortgagee enters into possession of the land, there is no alternative for registration. Chattels not in existence, or not acquired at the time of the transaction concerning them, are subject to the Act by virtue of section 11, but book debts are not within the Act: National Trust Co. v. Trusts & Guarantee Co., 5 D.L.R. 459, 26 O.L.R. 279, following Thibaudeau v. Paul, 26 O.R. 385; Kitching v. Hicks, 6 O.R. 739; Tailby v. Official Receiver, 13 App. Cas. 523. In endeavouring to reach the meaning of the words in the Ontario Act, to say what is an immediate delivery of the goods, which are the subject of the mortgage or sale, as the case may be, we are to look at the nature of the goods and their locality, and the place at which the mortgagee or purchaser is to receive them, and consider of what kind of delivery the goods and chattels are capable: *per* Spragge, C.J.O., McMaster v. Garland, 8 A.R. (Ont.) at p. 5; Ex parte Morrison, 42 L.T. 158. From the very diversity of things, what in one instance, would be possible, in another would be impossible. The law is reasonable, and requires not that which is impossible (McMartin v. Moore, 27 U.C.C.P. 397; Maulson v. Commercial Bank, 17 U.C.Q.B. 30), but it insists upon every precaution against fraud by persons remaining in actual possession of goods and chattels, and keeping up the appearance of being the owners after they disposed of them by bill of sale absolutely, or by way of mortgage: Hamilton v. Harrison, 46 U.C.Q.B. 127.

Precautions are wisely necessary, when it is remembered that the statute makes the title by possession a perfect title in favour of creditors, and in favour of subsequent mortgagees and purchasers who do register, as against the secret title of the actual owner or prior mortgagee who does not register: *per* Wilson, C.J., McMaster v. Garland, 31 U.C.C.P. 328.

In many cases it is not possible to make an immediate and complete delivery, and then the only safe course is to effect registration under the Act.

"Actual and continued change of possession" is now defined

by section 2(a) to be such change of possession as is open and reasonably sufficient to afford public notice thereof.

Notwithstanding the making of a chattel mortgage which transfers the legal title to the goods to the mortgagee, the mortgagor may maintain an action against a wrong doer who illegally takes possession (*e.g.*, a landlord distraining for rent before it is due him), and the latter cannot set up *jus tertii* of the mortgagee as a defence, but the person out of whose possession the goods are taken may shew it; and, if the mortgagor's own case discloses the mortgagee's claim, he will be required to procure the latter's release from any action for the same cause by the mortgagee, before enforcing a judgment for conversion of the goods: Williams v. Thomas, 25 O.R. 536.

A deed, though it may be void with respect to one parcel of property for want of registration, is not, therefore, avoided in *toto*, or rendered invalid as to goods which go with, and remain in, the possession of the assignees: Taylor v. Whittemore, 10 U.C.Q.B. 440.

Where the transaction is of such a nature that it was probably not contemplated that the document would be affected by the statute, the tendency is to endeavour to uphold it, if it be possible (Cameron, J., Scribner v. McLaren, 2 O.R. 279); for if any class of Acts ought to be construed strictly it should be those, which, having for their object the prevention of fraud, though such policy had in certain cases a tendency to invalidate *bonâ fide* transactions. Where, however, fraud does not exist, this Act should at all events receive no more than its true construction: Gough v. Everard, 2 H. & C., Pollock, C.B., at p. 8

Copies of Mortgages.

As the alternative of filing the mortgage itself, this section gives the power of filing a true copy thereof. Section 7, however, makes no reference to a *copy*. The latter section states that "in case such mortgage or conveyance and affidavits are not registered as hereinbefore provided, the mortgage or conveyance shall be absolutely null and void." It is possible that the words "as hereinbefore provided" might be held to allow the registration of a copy, but, in the absence of an interpretation of these words, it would be safer in all cases to register the original mortgage. It is a common practice to register the mortgage itself, the party entitled keeping the copy. This course, however,

is open to the objection that, in the event of the instrument being questioned in a Court of law, the expense and trouble of obtaining the attendance of the officer who has the original is necessitated. By section 27 a certified copy is evidence only of the receiving and filing in the clerk's office.

To prove the execution of the instrument, the original must be produced, and to do this, under the system of registering the original, the clerk of the Court, with whom it is filed, must be subpœnaed to attend, unless more than one copy was signed. It is, therefore, usual to make duplicate originals, filing one and retaining the other.

The word "true copy" is used; but this does not necessarily mean "an exact copy." It will be sufficiently accurate where, for instance, in the copy, Gardnor's name was spelt with an "e" instead of an "o": Gardnor v. Shaw, 24 L.T.N.S. 319. The Act does not require the copy filed to be an absolutely exact copy, so long as any errors or omissions in the copy filed are merely clerical, but that it shall be so true that anybody reading it could not by any possibility misunderstand it: Re Hewer, 21 Ch. D. 871; Sharp v. McHenry, 38 Ch.D. 428; Emerson v. Bannerman, 19 Can. S.C.R. 1; Smith v. McLean, 21 Can. S.C.R. 355.

Time for Filing.

The words "within five days from the execution thereof" exclude either the first or the last day, so that a mortgage executed upon the 12th of July may be properly registered upon the 17th of July following and Sunday, it has been decided, counts as a day: McLean v. Pinkerton, 7 A.R. (Ont.) 490.

Section 30 of chapter 148 of R.S.O. 1897 provided, that if the last day for filing instruments under the Act expires on a day when the office is closed, registration on the next day will suffice, similar to the provision contained in the Interpretation Act as governing periods of time limited by statute: see 7 Edw. VII. 1907, ch. 2, sec. 7, sub-secs. 16, 18, R.S.O. 1914, ch. 1.

The former section 30 was repealed by the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. 1910, ch. 65, R.S.O. 1914, ch. 135, evidently on the supposition that the Interpretation Act is wide enough to cover such contingency. This provision of the Interpretation Act, namely, sub-sec. 18 of sec. 7, ch. 2, 7 Edw. VII. [R.S.O. 1914, ch. 1], chronologically dates back to and was

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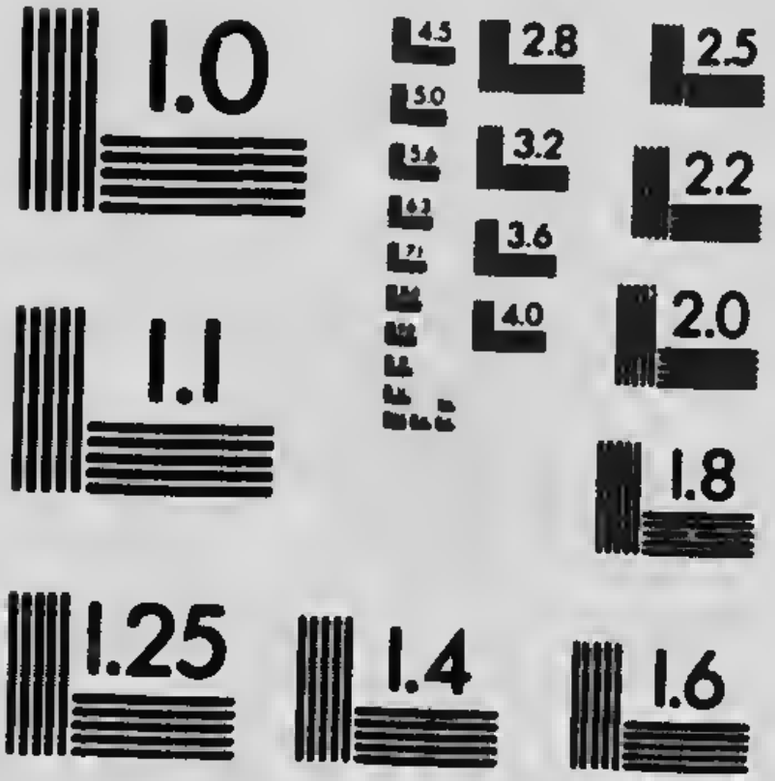

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first enacted in the Ontario Statutes in 50 Vict. ch. 7, sec. 2 (R.S.O. 1887, ch. 1, sec. 8, sub-sec. 17), subsequent to the case of McLean v. Pinkerton, *supra*, which had been decided in 1882, Apart from former rule 457 of the Judicature Act then in force containing a similar provision as to Court proceedings no such provision was then to be found in the Interpretation Act. Wilson, C.J., in McLean v. Pinkerton, *supra*, followed Morris v. Richards, 45 L.T.R. (N.S.) 210, and rejected the Judicature Rule as being inapplicable in the case of a filing of a chattel mortgage. The same case settled the Ontario law at that time, that apart from a statutory enactment such as is contained in the Interpretation Act, where the time for the filing of an instrument expires on a Sunday or holiday when the registration office is closed the registration could not be validly effected on the following day: see also In re Parke, 13 L.R. Ir. 85; Williams v. Burgess, 12 Ad. & E. 635.

A fraction of a day will sometimes be reckoned. 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: In re Sheriff of Newcastle, Drap. K.B. Rep. 503; Pugh v. Duke of Leeds, 2 Cowp. at p. 720; Pewtress v. Annan, 9 Dowl. 828; McMartin v. McDougall, 10 U.C.Q.B. 399; Thomas v. Desanges, 2 B. & Ald. 586.

A mortgage or bill of sale that has been ineffectually registered may, during the five days, be taken off the file and re-registered (In re Wright, 27 L.T. 192); but not after the time for registering has elapsed: McTaggart v. Rose, 14 Ind. 230. In the latter case a new mortgage or bill of sale must be made and filed with a fresh affidavit (In re O'Brien, 10 Ir. C.L.R. app. xxxiii.), and if a mortgagee take possession under his mortgage before the expiration of the five days, which he may do, his possession before others have acquired rights in respect to the property will make his mortgage effectual, and he need not register the mortgage at all: *per* Sir A. Cockburn, C.J., in Marples v. Hartley, 30 L.J.Q.B. 92; McTaggart v. Rose, 14 Ind. 230, *per* Lush, L.J.; Ex parte Saffery, 16 Ch. D. at p. 671; see sec. 23 of this Act.

The time from which the five days is to be computed is not the date of the instrument, but the date of the execution. The presumption of law is that an instrument was executed upon the day of its date, but this may be rebutted. 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 as the date, which may sometimes be an impossible day: Beckman v. Jarvis, 3 U.C.Q.B. 280.

Parol evidence is admissible to shew that a mistake was made in the insertion of the date, and it is not material that the date inserted in the body of the instrument differs from the date sworn to in the affidavit of execution as being the date of execution. The insertion of the date of execution in the affidavit must mean the correct date, and it is submitted that an error would be fatal: Shaughnessey v. Lewis, 130 Mass. 355; Stonebreaker v. Kerr, 40 Ind. 186; Hoadley v. Hoadley, 48 Ind. 452; Holman v. Doran, 56 Ind. 358. When asserting any rights under the mortgage, it is incumbent on the mortgagee to prove its validity as to filing; and though section 27 makes the clerk's certificate evidence of registration, it is only *primâ facie* so, and therefore evidence can be gone into to shew when the mortgage was in fact filed.

A mortgage under this Act executed on a Sunday is not void, the giving or taking in security not being a buying or selling within the Act to prevent the profanation of the Lord's Day: Lai v. Stall, 6 U.C.Q.B. 506; Wilt v. Lai, 7 U.C.Q.B. 535.

The words "as hereinafter provided," refer to the provisions in section 18, whereby additional time is allowed for registration in the various districts and provisional counties.

The omission from the affidavit of "the date of execution" is a fatal defect: Wood v. Brunt, 32 C.L.J. 775, Ketchum, Co.J.

The meaning of the words "shall be registered" is the doing of that which section twenty, *infra*, requires to be done.

Attestation.

The attesting witness cannot be the mortgagee: Seal v. Claridge, 7 Q.B.D. 516.

The Act requires that, together with the mortgage or conveyance, there must be filed an affidavit of execution thereof by an attesting witness thereto. The words "together with" in this section mean not merely, "also" but "simultaneously" or "along with:" Grindell v. Brendon, 6 C.B.N.S. 698, 5 Jur. N.S. 142, 28 L.J.C.P. 333. The affidavit is only required to shew the due execution of the instrument, and to give the date of execution; apart from this it is not stated what the affidavit should

contain. Though it be wide of technical form, it will be sufficient if it gives the above particulars.

Failure to mention in the affidavit of execution the year as well as the day of the month when the chattel mortgage was signed, is a fatal error: Cole v. Racine, 11 D.L.R. 322, 4 O.W.N. 1327.

The affidavit should not only verify the signature of the witness, but state that the deponent was present and saw the mortgagor execute the mortgage, and when, and also that the deponent himself signed as a witness: Ford v. Kettle, 9 Q.B.D. 139; Sharpe v. Birch, 8 Q.B.D. 111.

A mistake in the name of one of the mortgagors in the affidavit as to execution will not vitiate a chattel mortgage, where such affidavit recites that the witness saw the mortgage executed by the parties thereto and that such executing parties are the parties named in the mortgage: Fisher v. Bradshaw, 2 O.L.R. 128, affirmed in 4 O.L.R. 162.

The proof of the due execution under this Act is required for the same purpose as that required of conveyances of land; namely, for the purpose of registration, and, it is for the clerk to satisfy himself of the sufficiency of the affidavit upon receiving an instrument to file. The intention of legislation requiring registration is, primarily, that the public should have notice, and this notice is given when the instrument, proved by sufficient affidavit of execution, is filed by the clerk. If the clerk should know the affidavit to be untrue in fact, he should not receive the instrument, and thus passively lend himself to a fraud, and he ought not to receive and file an instrument under the Act without an affidavit of execution: DeForrest v. Bunnell, 15 U.C. Q.B. 370; Grindell v. Brendon, 6 C.B.N.S. 698, 28 L.J.C.P. 333.

Delivery.

Execution of a document under seal consists of three acts, viz., "signing, sealing and delivery." The latter completes the efficacy of the deed, and it is from that occurrence that the deed takes effect, though there be a false, or impossible, or no date; writings not under seal may be said to be executed when they are made and delivered: Bogley v. McMickle, 9 Cal. 430.

The witness is required to be an "attesting," *i.e.*, "subscribing" witness. This differs from the Imperial Act, where

the execution of every bill of sale must be attested by one or more "credible" witnesses, not being a party thereto, and the affidavit must be of the "due execution and attestation:" Imp. Act 1882, s. 10, amending Act 1878, 41-42 Vict. c. 31, s. 10.

Without delivery an instrument will pass no title to a mortgagee, either as against the mortgagor, or third parties; and with delivery but without registration, title will pass to a mortgagee as against the mortgagor, but not so as to exclude the rights acquired by third parties under the Act.

In order to complete delivery, acceptance by a mortgagee or bargainee is necessary, and, therefore, if after delivery and before acceptance, a creditor has acquired an interest in the property mortgaged, the mortgagee cannot set up a title anterior to the creditor by reason of the delivery: Miller v. Blinebury, 21 Wis. 676; Welch v. Sackett, 12 Wis. 243. It cannot often happen that the question of acceptance by the mortgagee can arise under the Ontario Act, for he must be taken to accept when he makes the affidavit of *bona fides*. Even where the affidavit is made by the mortgagee's agent a copy of the latter's written authority must be attached for purposes of registration: see sec. 13 of this Act. It is not necessary to a valid acceptance that the instrument should come into the hands of the mortgagee, for oftentimes the facts are such as to constitute the mortgagor himself agent of the mortgagee, so that manual acceptance is unnecessary: for instance, an agreement beforehand, in pursuance of which the mortgagor executes and files a mortgage to secure a debt to the mortgagee is a compliance with the rule of law as to acceptance: Thayer v. Stark, 6 Cresh. (Mass.) 11; but, if the act of execution and filing by the mortgagor is delayed for a long period after the agreement, the delay may negative the inference of acceptance: Jordan v. Farnsworth, 15 Gray (Mass.) 517. Mere knowledge is not acceptance. The mortgagee must do some act, directly or indirectly, ratifying the mortgage: Cobb v. Chase, 54 Iowa 253. A mortgage executed and filed in pursuance of a prior agreement so to do by the mortgagor, may be sufficient in law so far as acceptance is concerned, though done unknown to the mortgagee, yet if the mortgage be upon property different to that agreed upon, the execution and filing will fail from amounting to acceptance by the mortgagee: Day v. Griffith, 15 Iowa 104.

Affidavit of Execution.

It is no objection to the affidavit of execution that the second Christian name of the deponent is not written in full, or at all, as the common law recognizes but one Christian name, and the omission of the deponent's addition is no objection to the affidavit; Brodie v. Ruttan, 16 U.C.Q.B. 207; Rex v. Newman, 1 Ld. Raym. 562.

If, in fact, the mortgage is duly executed, the statute complied with, its object answered, and there be no suggestion of fraud, the Court will uphold a mortgage even though the affidavit of the attesting witness states that he saw both mortgagors execute it when, in fact, he only saw one: DeForrest v. Bunnell, 15 U.C.Q.B. 370.

Should the party administering the affidavit omit to sign the jurat, the mortgage will be void: Ex parte Heymann, L.R. 7 Ch. 488; Nisbet v. Cock, 4 A.R. (Ont.) 200. On the same reasoning, a mortgage will be void if the jurat omit the word "sworn," or the word "affirmed:" Pollard v. Huntingdon, 16 C.L.J. 168. The Interpretation Act applies to the expressions "swear" and "affirm" the same meaning: 7 Edw. VII. ch. 2, sec. 7 (19). Affidavits of this nature will not be treated with the same particularity as affidavits used in proceedings before the Court. Objections which rest on a non-compliance in the affidavit with certain rules of Court established to regulate the practice and proceedings thereon, are not sustainable, for in affidavits sworn under a statute it is not necessary to conform to the technicalities required by rules of Court: Moyer v. Davidson, 7 U.C.C.P. 521.

Should a copy be filed as permitted by the Act, in place of the original, then it should also be shewn by affidavit that the copy is a true copy of such original.

In the second edition of this work (p. 323) it was suggested that it would be better if the legislature required the affidavit to shew the true date of the execution of the mortgage. The Imperial Act required that the time of the mortgage being given should be shewn, and this is now necessary under the present Act.

Where the members of a firm loaned moneys, taking the securities in the name of the individual partner who, in each case, agreed to accept the security offered as between himself

and the firm, a chattel mortgage so made to the individual partner will be supported as against creditors, although, in equity, it is the property of the firm, and although the partner who did not appear as a mortgagee acted as witness and made the affidavit of execution: Hobbs v. Kitchen, 17 O.R. 363, 25 C.L.J. 251.

The question was raised in McLeod v. Fortune, 19 U.C.Q.B. 98, and the Court there held that, when a bill of sale was made to two jointly, and filed on an affidavit of *bona fides* made by one, the evidence shewing that the consideration was made up of two debts due the vendees separately, that the affidavit was still sufficient. This section is not limited to the case of joint mortgagees who are connected in business, either of whom would be aware of all the circumstances connected with the mortgage; but that one of two mortgagees, even if not connected in business, is capable of making the affidavit if he have a full knowledge of the circumstances: Severn v. Clarke, 30 U.C.C.P. 363: see Melville v. Stringer, Houghton v. Stringer, 12 Q.B.D. 132, 13 Q.B.D. 392: see sec. 12 of this Act.

Sometimes it happens that an omission of a statutory requisite in the affidavit is supplied by information to a more full extent found in the instrument itself. If, by reference therein made to the instrument itself the affidavit is made sufficiently intelligible, then the objection to the affidavit will not generally be permitted to prevail: Jones v. Harris, L.R. 7 Q.B. 157.

Section 12 now contains in words what, previous to the Act of 1894, was inferential only, namely, that "the affidavit of the agent shall state that he is aware of all the circumstances connected with the mortgage."

R.S.O. 1887, ch. 125, sec. 1, required that a copy of the agent's authority should be registered, and did not permit, apparently, the registration of the original authority. This was changed by sec. 12 of this Act to allow the registration of the original, by adding after the words "a copy of such authority," the words, "or the authority itself."

It was not until the passing of the statute 20 Viet. ch. 3, that an agent could make the affidavit of *bona fides*, the Act 13-14 Viet. ch. 62, imperatively requiring that, in case of a mortgage, the mortgagee himself (and, in case of a sale, the bar-

gainee himself) should make the affidavit. Hence a mortgage filed under that Act on the affidavit of an agent, was held bad: Holmes v. Vancamp, 10 U.C.Q.B. 510. The Act, 40 Vict. ch. 7, went still further in favour of the agent, and gave to him the power to make the affidavit when acting for several mortgagees. The affidavit can now be made:—

First, by the mortgagee.

Second, by one of several mortgagees.

Third, by an agent of the mortgagee.

Fourth, by an agent of the several mortgagees.

Fifth, by one of the next of kin, the executor or administrator of a deceased mortgagee or bargainee: see sec. 14 of this Act. It seems that, under the provisions of sec. 12 (1), namely, "by his or their agent," that an agent of one only of several joint mortgagees can make it, but an agent with power to make such an affidavit cannot delegate to another his powers derived by him from his principal.

If the agent make the affidavit, it must state, besides the requirements necessary under section 5, the fact that he has been duly authorized in writing, and that the copy of such authority attached to and registered with the mortgage is a true and correct copy of the authority to him from his principal to take such mortgage in the name of his principal: see sec. 12. The authority of the agent is not required to be under seal: Beecher v. Austin, 21 U.C.C.P. 342, and it will, by operation of law, be revoked by the death of the principal: Jacques v. Worthington, 7 Gr. 192; Wallace v. Cook, 5 Esp. 118, unless by statute it is provided otherwise: 10 Edw. VII. 1910, ch. 47, sec. 2. But, independently of any provision to the effect that the authority shall not be revoked by the death of the person executing the same, every payment made by, and every act done under and in pursuance of any such authority shall, notwithstanding such death, be valid, as respects every person party to such payment, to whom the fact of the death was not known at the time of such payment, and as respects all claiming under such person: 10 Edw. VII. 1910, ch. 47, sec. 3, as amended by 1 Geo. V. 1911, ch. 17, sec. 32. Until the "Mortgages and Sales of Personal Property Amendment Act, 1880," it was necessary for the agent to have a new authority each time he took or renewed a mortgage, but this statute made the necessary amendments to enable an agent to take and renew mortgages on a general auth-

ority for that purpose: see 15, *infra*. It was held formerly that when a mortgage was made to an incorporated company and the affidavit of *bona fides* made by the secretary-treasurer, although he is a shareholder in the company, without the written authority mentioned in the statute being filed with the mortgage that the mortgage was void; and, similarly, an affidavit made by the manager of a loan company on a chattel mortgage to the company was likewise held insufficient: Greene v. Castleman, 25 O.R. 113; Freehold L. & S. Co. v. Bank of Commerce, 44 U.C. Q.B. 284. But it was held that the president of the institution taking such a security, does not act as an agent. He is exercising the corporate powers in the only way in which they can be exercised at all. He acts directly and in chief, and not by delegation. The affidavit could be thus considered as the affidavit of the mortgagee made in the only way the mortgagee could make the affidavit, namely, through its administrative officer: Bank of Toronto v. McDougall, 15 U.C.C.P. 475. But the manager of a company stands in a different position to its president. The latter is one of the corporation, the chief partner, and in a sense, its organ and representative. The manager is an executive officer, not a corporator, a mere agent, with certain specified executive functions, acting under the authority and direction of the president and board of directors; and it is impossible on any principle of construction to regard him in such a matter as in any other position than that of an agent: *per* Hagarty, C.J., Freehold L. & S. Co. v. Bank of Commerce, 44 U.C.Q.B. 284.

But sub-sec. 2 of sec. 12 of the present Act settles these questions by providing that if the mortgage is made to a corporation the affidavit may be made by the president, vice-president, manager, assistant-manager, secretary, treasurer, or by any other officer, authorized to do so by resolution of the directors: 10 Edw. VII. 1910, ch. 65, sec. 12 (2) [R.S.O. 1914, ch. 135]. But the affidavit must state that the deponent is aware of all the circumstances connected with the mortgage or conveyance and has personal knowledge of the facts deposed to: sub-sec. 3, sec. 12, *ibid*.

Affidavit of Bona Fides.

It is not necessary that the affidavit of the truth of the debt and *bona fides* required by this section should be made on the same day that the mortgage is executed. The decision in

Perry v. Ruttan, 10 U.C.Q.B. 637, was under 13-14 Vict. ch. 62, the provisions of which statute was that the mortgage "shall be accompanied with an affidavit of the mortgagee." The statute was complied with if the affidavit accompanied the mortgage when it was registered. By Con. Stat. U.C. ch. 45, the words "together with" were substituted for the word "accompanied," making the latter statute read according to the construction put by the Court upon the words of the earlier statute. The words "together with," mean "simultaneously" or "along with." So far from the objection taken in Perry v. Ruttan being fatal, the nearer to the moment of registration the affidavit is made, the more satisfactory it must be; because the question at the time of registration is not merely whether there was a debt due at the time of the execution of a mortgage, but whether the debt continues due at a later period, namely, at the time of registration. If this were not so the statute might easily be evaded, and a mortgage kept on foot for protecting the goods of the debtor, for his benefit, long after it had been satisfied wholly or in part. It is not necessary in affidavits sworn under a statute to conform to the technicalities required by a rule of Court: Moyer v. Davidson, 7 U.C.C.P. 521; DeForrest v. Bunnell, 15 U.C.Q.B. 370; Cobbett v. Oldfield, 16 M. & W. 469. Where, therefore, the jurat to the affidavit of *bona fides* used the words "sworn and affirmed," without saying which of the two deponents swore and which affirmed, and omitting the word "severally," the affidavit was still held sufficient: Moyer v. Davidson, 7 U.C.C.P. 521; so also where the commissioner signed a jurat over the words "A Com'r, etc.:" Canada Permanent v. Todd, 22 A.R. (Ont.) 515. And an affidavit may be sworn before a solicitor employed in the office of the mortgagee's solicitors: Canada Permanent v. Todd, 22 A.R. (Ont.) 515, and presumably it may be sworn before the mortgagee's own solicitor. It is no objection that the second Christian name of the deponent is not written in full, but the initial only given (DeForrest v. Bunnell, 15 U.C.Q.B. 370), or that the deponent's addition is wanting: Brodie v. Ruttan, 16 U.C.Q.B. 207; Allen v. Thomson, 1 H. & N. 15, 2 Jur. (N.S.) 451, 25 L.J. Ex. 249. It is sufficient if the affidavit identifies the deponent as being the mortgagee, or the mortgagee as being the deponent: Sladden v. Sergeant, 1 F. & F. 322, Willes, J.; Nicholson v. Cooper, 3 H.

& N. 384, 27 L.J.Ex. 392; Brodie v. Ruttan, 16 U.C.Q.B. 207. If the signature of the commissioner, or other person before whom the affidavit is made, be omitted, the omission is fatal to the instrument, which will thereby be rendered invalid as against subsequent execution creditors; and this will be the case even though the omission of the signature be through inadvertence, and even though it be satisfactorily proved that the oath really was in fact administered, and in every respect the security be an honest one. It has also been held under the Nova Scotia Act that the omission of the date of swearing and of the words "before me" from the jurat is fatal: Archibald v. Hubley, 18 Can. S.C.R. 116. The Courts have uniformly manifested a disposition to uphold an honest transaction in preference to destroying it on account of a slip or omission; but the legislature has not been content that a chattel mortgage should be merely stamped with good faith, but has required the mortgagee to pledge his oath to its character. Still further, it has required this oath to be recorded in the form of an affidavit, which must be sworn before one of certain named officers, and must then be filed along with the mortgage. This was obviously for the purpose of enabling creditors to satisfy themselves not merely of the existence of claims against the goods of the debtor, but of the existence of a statement made under the sanction of an oath, and in compliance with the terms of the statute. To the attainment of this end it seems indispensable that it should appear that the affidavit was sworn before some officer having authority to administer the oath. It never could have been intended that the creditor should be left at his peril to assure himself by extrinsic evidence of the presence or absence of this requisite. A paper purporting to be an affidavit, but not authenticated as sworn, is quite consistent with the supposition that at the last moment the mortgagee had shrunk from swearing to the necessary statements (Nisbet v. Cock, 4 A.R. (Ont.) 200); but when, in point of fact, the affidavit is sworn before a person authorized to take the same, and he signs his name as so doing, his omission to add the character in which he swore the affidavit, will not invalidate the mortgage, at all events not so if the character in which he took the affidavit appears elsewhere in the instrument: Hamilton v. Harrison, 46 U.C.Q.B. 127; Blaiberg v. Parke, 10 Q.B.D. 90; Canada Permanent v. Todd, 22 A.R.

(Ont.) 515. Nor is an instrument rendered void under this Act if the officer administering the oath chances to sign his name above, in place of below the jurat (Mowat v. Clement, 3 Man. L.R. 585); but it is a serious omission to omit from the jurat the word "sworn" or "affirmed," for such an omission is as fatal to the instrument itself as the omission altogether of the signature of the person administering the oath: Pollard v. Huntingdon, 16 C.L.J. 168; Archibald v. Hubley, 18 Can. S.C.R. 116.

The affidavit of *bona fides* must not be sworn before the execution of the mortgage, or the mortgage will be invalid: Reid v. Gowans, Ont. Ct. of Appeal, 1885, not reported; Building and Loan v. Betzner, 26 C.L.J. 189.

The test as to the sufficiency of the affidavit is not, as has been supposed, whether or not perjury could be assigned, but whether the paper filed with the chattel mortgage is such an affidavit as the statute requires: Nisbet v. Cock, 4 A.R. (Ont.) 200; Regina v. Atkinson, 17 U.C.C.P. 295; Ex parte Heymann, L.R. 7 Ch. App. 488; Bill v. Bament, 8 M. & W. 317.

It might be, and sometimes is the case, that the nature of the transaction between the parties is such as not to be within the application of the statute, and it is impossible, under the circumstances, for the mortgagee to make the affidavit which this section requires. No chattel mortgage can be registered without the affidavit, and it would be repugnant to reason to hold that a chattel mortgage is within the Act, so as to make registry with the county clerk indispensable to its validity, and yet that it is a mortgage of such a kind that the affidavit positively required by the statute cannot be properly made or legally received for the purpose of registration. If a mortgage, otherwise legal, cannot be registered by reason that the directions of the Act cannot be complied with, then it cannot be held illegal for want of registration: Baldwin v. Benjamin, 16 U.C. Q.B. 52; Mathers v. Lynch, 28 U.C.Q.B. 354; Walker v. Niles, 18 Gr. 212.

Agents' Authority.

There is nothing in the statute inconsistent with a mortgage being given to, and the affidavit of *bona fides* made by, a person to whom the debt is due for another whom he represents, or for whom he is acting, even though he have no beneficial interest in

the transaction whatsoever: White v. Brown, 12 U.C.Q.B. 477; Hewar. v. Mitchell, 11 U.C.Q.B. 625. Hence it is, that the manager or treasurer of a corporation can, in certain cases where, by statute, such officer is enabled so to do, take a mortgage direct to himself for a debt due to the corporation, and can make the affidavit required by this section. The better course would be for the manager or treasurer to take the mortgage in the name of the corporation itself wherever possible, in which event he would make the affidavit as agent, and a copy of his authority would require to be registered. This authority may be a general one to take and renew mortgages under the Act: see sec. 15, *post*.

A chattel mortgage made to an agent or nominee of a creditor, in whose charge the debt is placed for collection is valid, even though the fiduciary relation of the mortgagee does not appear upon the face of the mortgage: Light v. Hawley, 29 O.R. 25, 34 C.L.J. 87, following Brodie v. Ruttan, 16 U.C.Q.B. 209.

When, however, the president of a corporation makes the affidavit, he does not act as agent; he acts directly and in chief, and not by delegation, and therefore the authority to an agent in such case need not be given: Taylor v. Ainslie, 19 U.C.C.P. 78; Brodie v. Ruttan, 16 U.C.Q.B. 207; Wych v. Meal, 3 P. Wms. 310; Grant on Corporations 57; Bank of Toronto v. McDougall, 15 U.C.C.P. 475, Baldwin v. Benjamin, 16 U.C.Q.B. 52. One of the firm of co-partners may take this affidavit on behalf of the firm: Randall v. Baker, 20 N.H. 335. Ministers of the Crown may make the affidavit required by this section, in mortgages taken to them as the heads of their respective departments for and on behalf of the Queen: McGee v. Smith, 9 U.C.C.P. 89, and in the State of New Hampshire it has been held that a similar affidavit may be taken by one of the selectmen on behalf of the town, he being intrusted with its financial affairs: Sumner v. Dalton, 58 N.H. 295.

The words "or of one of several mortgagees, or the agent of the mortgagee or mortgagees" added by the Act of 1894, or as they now appear in sec. 12 (1) of this Act "by one of two or more bargainees or mortgagees, or by his or their agent," were suggested in the first edition of this work, on the ground that their absence might encourage a contention that the re-

quirements in the affidavit, when made by a mortgagee, or his agent, were not made necessary in (and their absence thus would not invalidate) the affidavit when made by one of several mortgagees, or of the agent of the mortgagees. This contention was indeed since advanced. The contention, however, was overruled: Tidey v. Craib, 4 O.R. 696, the cases of McLeod v. Fortune, 19 U.C.Q.B. 100, and Severn v. Clarke, 30 U.C.C.P. 363, having already decided the point in the affirmative.

Statement of Affidavit.

Three things are required by the affidavit:—

(i) That the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage (sec. 5 (*b*));

(ii) That the mortgage was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due: *Ibid.*

(iii) And not for the purpose of protecting the goods and chattels mentioned in the mortgage against the creditors of the mortgagor, or of preventing the creditors of such mortgagor from obtaining payment of any claim against him: *Ibid.*

If the affidavit is made by an agent, it should, in addition, state:—

(iv) That the agent is aware of all the circumstances connected with the mortgage and properly authorized in writing to take the mortgage, and that he has personal knowledge of the facts deposed to, unless he be the president of a corporation, in which event, it has been held, that he acts as its executive head and not as its appointee or delegate, and, consequently, that his affidavit need not state that the deponent is aware of all the circumstances connected with the mortgage, and has personal knowledge of the facts deposed to: Universal Skirt Co. v. Gormley, 17 O.L.R. 114.

It was held in Carlisle v. Tait, 7 A.R. (Ont.) 10, that, should the affidavit be made by an agent, it need not state that he is aware of the circumstances connected with the mortgage. It is, however, always open to a creditor, subsequent purchaser or mortgagee in good faith, to shew that the agent is not possessed of this qualification. Whether he is or is not, is a question of fact, and if he is not so possessed, then the mortgage will be invalid because it is not filed with the affidavit of an agent

who is authorized in writing to take the mortgage: Cameron, J., Carlisle v. Tait, 7 A.R. (Ont.) 10, 35, reversing 32 U.C.C.P. 43; Ex parte Bolland, 21 Ch.D. 543.

True Expression of Consideration.

The first requisite of the affidavit of *bona fides* involves the question as to what consideration will sustain a mortgage. This can best be ascertained by knowing under what state of existing facts the affidavit of *bona fides* can be properly made.

A person who assumes the debt of or incurs a liability for another may take a chattel mortgage in security from that other, for his own indemnity, under section 6, for which a different form of affidavit is provided.

It has been held necessary that the amount of the indebtedness be inserted in the affidavit of *bona fides*. To omit it entirely is fatal. Such a particularly important feature of the affidavit should be stated with great strictness and accuracy, leaving nothing to inference, vagueness or ambiguity, and it does not render the instrument less fatal that such a defect might be explained by referring the affidavit to the consideration in the body of the mortgage, and the late C. J. Cameron, at the London Fall Assizes in 1885, strongly intimated his opinion in favour of upholding a mortgage, in the face of the objection that it was fatal by reason of the omission of any sum in the affidavit of *bona fides*: McIntyre v. Union Bank of Lower Canada, 2 Man. L.R. 305. With the amount left blank, the affidavit would still read in the words of the statute itself, by treating the word "of" as surplusage, and would be presumed to refer to the consideration in the body of the instrument: Oliver v. Robinson, not reported. It has also been held that an affidavit of *bona fides* attached to a chattel mortgage, stating that the mortgagor was justly and truly indebted to the mortgagee in the sum of £800, or "thereabouts," as fully set forth in the chattel mortgage; "that the mortgage was executed in good faith, and for the express purpose of securing the payment of the money so justly due as aforesaid, and of securing the (mortgagee) for his said endorsement, and not for the purpose of protecting the goods against the creditors of the mortgagor," is sufficient where the mortgage itself fully sets forth the consideration, so that the true transaction between the parties is disclosed: Valentine v. Smith, 9 U.C.C.P. 59; Jones v. Harris, L.R.

7 Q.B. 157; Blaiberg v. Parke, 10 Q.B.D. 90. But should the affidavit state that the mortgagor was justly indebted to the mortgagee in the sum of $1,000, or thereabouts, and the consideration in the mortgage be $1,000, it is doubtful if the affidavit would be sufficient; the words "or thereabouts" might easily enable a person, so disposed, to evade swearing to the indebtedness of the mortgagor in the sum mentioned in the mortgage: Knox v. Meldrum, Dean, Co.J., not reported. Where the amount is certain as to the consideration mentioned, it matters not that the recital contemplates the possibility of the mortgagor becoming indebted to the mortgagee in a still larger amount, which it is the intention to secure. Therefore, the consideration in the chattel mortgage being stated as £10,000 and upwards, it was held good because it was certain as to the £10,000, and it was shewn that there were more goods than would satisfy that amount: McGee v. Smith, 9 U.C.C.P. 89; Biddulph v. Goold, 11 W.R. 882: see Elliott v. Freeman, 7 L.T. N.S. 715; and again, where the consideration in the mortgage was stated as $1,148, while the real consideration was only $1,030.80, the mortgage was, in the absence of fraud, not held to be void as against an execution creditor on the ground that the consideration was not truly stated: Hamilton v. Harrison, 46 U.C.Q.B. 127; Biddulph v. Goold, 11 W.R. 882; Parkes v. St. George, 10 A.R. (Ont.) 496; Marthinson v. Patterson, 19 A.R. (Ont.) 188. The word "consideration" is a legal term, meaning that for which the mortgage is given, not necessarily the amount actually paid by the mortgagee to the mortgagor: *per* James, L.J., Ex parte Challinor, 16 Ch.D. 265. Yet it is not desirable that the consideration, as stated in the affidavit of *bona fides*, should include the whole amount of interest, calculated in a lump sum, and not earned when the money is lent; and especially should the interest not be so lumped when the mortgage is repayable by instalments, with liberty to the mortgagee to take possession on default in any of the instalments: Re Johnstone, 50 L.T. 184.

Though an erroneous statement of consideration in the mortgage may be a circumstance to be considered by a jury in deciding the issue of fraud or no fraud, it is not in itself sufficient, as a matter of law, to avoid the mortgage: Marthinson v. Patterson, 19 A.R. (Ont.) 188; Parkes v. St. George, 10 A.R. (Ont.)

496; Hamilton v. Harrison, 46 U.C.Q.B. 133; Hughes v. Shull, 32 Alb. L.J. 337; Jaffray v. Robinson, not reported, but referred to in Marthinson v. Patterson, *ante;* and where the affidavit of *bona fides* to a bill of sale stated that the "sale was *bonâ fide* and for good consideration, namely, $830, advanced by the bargainee by way of loan," the addition of the latter words did not render the affidavit defective: Ormsby v. Jarvis, 22 O.R. 11. In a case wherein a mortgage is discovered to be void under the Act, and then cancelled, and a new mortgage executed in substitution for the first and duly registered and the second mortgage contain the same consideration, and described it as "in consideration of £500 now paid," the consideration is truly stated, and the affidavit is properly made under this section: Ex parte Allam, 14 Q.B.D. 43; Ramsden v. Lupton, L.R. 9 Q.B. 17. And where the new mortgage is in substitution of the first, it is sufficient, if the second is duly registered, to preserve its validity against execution creditors: Ramsden v. Lupton, L.R. 9 Q.B. 17, limited in Re Stevens, L.R. 20 Eq. 786, which followed Re Sparke, Ex parte Cohen, L.R. 7 Ch. 20; the last two cases were distinguished in Re Jackson, Ex parte Hall, 4 Ch.D. 682; see also Re Cross, Ex parte Payne, 11 Ch.D. 539. And it does not render the second mortgage less valid, because it is intended to be effective in the event of the first being invalid and void: Cooper v. Zeffert, 32 W.R. 402; Ex parte Nelson, 35 W.R. 264.

In the case of a debt, the debt must be a *bonâ fide* subsisting one; such a debt is a valuable and sufficient consideration for a mortgage: North v. Crowell, 10 N.H. 151; Cooly v. Hobart, 8 Iowa 358; De Wolfe v. Strader, 26 Ill. 225; Maitland v. Citizens' National Bank, 40 Md. 540. But a mortgage will, as against unpaid creditors, be invalid, when taken in great part for a debt not actually existing at the time it is given: Robinson v. Paterson, 18 U.C.Q.B. 55. And when a debtor mortgages all his personal property of every description, including the most trifling things, to secure a sum of money wholly disproportioned in amount to the value of the property mortgaged, it becomes a suspicious circumstance for the consideration of a jury, apart from the question of the validity of the debt, whether the mortgage is made, not for the security of the creditor, but for the purpose of protecting the debtor, and to shield his

property from other creditors; Fleming v. McNaughten, 16 U.C.Q.B. 194; Twynne's Case, 3 Coke 81 (*b*); Benton v. Thornhill, 7 Taunt. 149, 2 Marsh. 427.

Where the object of a chattel mortgage made by an insolvent debtor is to withdraw all his assets from the reach of the other creditors in order to enable a surety to pay a debt of the insolvent, which the surety had guaranteed, a chattel mortgage is invalid as against creditors under the Assignments and Preferences Act, 10 Edw. VII. (Ont.) ch. 64, as having been made for an unlawful purpose: *per* Idington, J., in Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

Knowledge, or opportunity for knowing, that when a chattel mortgage is given the mortgagor is insolvent, is sufficient to condemn the instrument as having been given with the intent that the mortgagee should have an unjust preference: Spotton v. Gillard, 47 C.L.J. 233, affirmed 18 O.W.R. 510; Cole v. Racine, 11 D.L.R. 322, 24 O.W.R. 622.

It is not absolutely necessary that the money should all be advanced from the mortgagee to the mortgagor at the time of the execution of the mortgage, or the making of the affidavit of *bona fides*, and where the consideration money was not actually paid over until five days after the filing, the mortgage was upheld: Martin v. Sampson, 24 A.R. (Ont.) 1, reversing 27 O.R. 545. It is sufficient if the consideration is owing at the date of the mortgage: Beecher v. Austin, 21 U.C.C.P. 339. This word "consideration" has a legal significance, and means not necessarily the amount which the bill of sale is intended to secure, but the sum advanced, or which the mortgagor receives for giving the mortgage: Ex parte Challinor, 16 Ch.D. 260; Credit Co. v. Pott, 6 Q.B.D. 295; and it has been held that a mortgage given to a mortgagee to secure a debt that is barred by the Statute of Limitations is still a valid security as against creditors: Murillo v. Swift, 18 Conn. 268. Where a chattel mortgage is given by the mortgagor to the mortgagee to secure an existing debt which the mortgagor has the option of repaying, according to the proviso for redemption, either in money or some other commodity, the affidavit, under this section, of the indebtedness of the mortgagor to the mortgagee in the sum mentioned, is sufficient; and notwithstanding the fact that th

defeasance clause in the mortgage provides for the repayment of the mortgage in the sum advanced, or in some other commodity, and refers to another agreement between the parties as shewing the manner in which such other commodity is to be delivered, the affidavit must be made under this section, and the mortgage can be upheld against the objection that the affidavit and mortgage do not correctly shew the real transaction between the parties: Beecher v. Austin, 21 U.C.C.P. 339; Clarke v. Bates, 21 U.C.C.P. 348; Baldwin v. Benjamin, 16 U.C.Q.B. 52.

When the mortgage transaction is one in which a loan is made by and secured to the mortgagee by the mortgagor, the mortgage is properly taken, and the affidavit properly made for the full amount, where the amount of the loan is made up in part of a note made and given by the mortgagee to the mortgagor at the time of the execution of the mortgage, and not paid for some months afterwards: Walker v. Niles, 18 Gr. 210. The mere fact that as to part of the consideration the mortgagee has not made an actual advance, but is merely liable on promissory notes, does not invalidate the mortgage, this Act not requiring, as does the corresponding English Act, that the consideration should be truly expressed: Tidey v. Craib, 4 O.R. 696, at 703; and it appears that the affidavit of *bona fides* has still to be taken under section 5, when part of the consideration is to secure payment of notes already given by a mortgagor to a mortgagee, and at the time under discount: Fish v. Higgins, 2 Man. L.R. 65; Hepburn v. Park, 6 O.R. 472. And where the consideration of the mortgage was covered by a draft drawn by the mortgagee, a merchant, in the course of his business, on the mortgagor, his customer, and discounted at a bank, the mere fact of the draft being discounted does not lead to the assumption that the debt represented by such draft is paid, and that the remedy on the draft alone is to be looked to: Hepburn v. Park, 6 O.R. 472; Hyman v. Cuthbertson, 10 O.R. 443.

The provision of the Act, requiring the consideration of a mortgage to be expressed therein, is satisfied when the instrument states that the indorsement of a note is the consideration and then proceeds to set out the note in full. it only being necessary to state the facts and not their legal effect: Robinson v. Mann. 31 Can. S.C.R. 484.

Where part of the consideration money was paid to the mortgagor by cheque of the mortgagees under an arrangement by which the mortgagor was to hold the cheque and draw upon the mortgagees from time to time until the whole amount had been paid, it was held that the mortgage was one to secure a present actual advance and was valid: Ross v. Dunn, 16 A.R. (Ont.) 552, 25 C.L.J. 604.

And where a mortgage was given to one of three creditors to secure the whole amount of debts due each with the intention that he should act as trustee for the other two, but no trust appeared on the mortgage, and the affidavit of *bona fides* asserted that the whole sum was due to the mortgagee, the omission of the trust was held to be an informality only: Bank of Hamilton v. Tamblyn, 16 O.R. 247, 24 C.L.J. 343; Light v. Hawley, 29 O.R. 25, 34 C.L.J. 87.

The fact that a part of the consideration for a mortgage is illegal will not invalidate the whole instrument, and it may be supported as to the remainder: Campbell v. Patterson, 21 Can. S.C.R. 645, 29 C.L.J. 196; Commercial Bank v. Wilson, 3 E. & A. (Ont.) 257, overruled.

In an action against a bank for conversion of goods covered by a chattel mortgage to the plaintiffs, an incorporated company, it appeared that the affidavit of *bona fides* was made by the president of the plaintiffs, and stated that the mortgagor was justly and truly indebted to the mortgagee in the sum of $5,000, instead of $5,066.74, which was the amount stated in the mortgage. The mortgage was given in good faith, and was intended to secure $5,066.74 actually advanced. It was held that the mortgage was not invalidated by the mistake, but should be considered as so limited as to be a security for $5,000 only: Thomas v. Standard Bank, 1 O.W.N. 379, 548.

A contemporaneous agreement under seal whereby the mortgagor agrees to give his whole attention to looking after the mortgaged chattels, and the mortgagee agrees to allow the mortgagor to sell a sufficient portion thereof to pay the running expenses does not affect the correctness of the statement of consideration in the mortgage: Graveley v. Springer, 3 Terr. L.R. 120.

By sec. 13, R.S.B.C. 1911, ch. 20, it is made necessary in the case of a bill of sale given as security for a debt that the same

shall be accompanied by an affidavit of *bonâ fides* "that the grantor is justly and truly indebted in the sum therein mentioned," it was held, that an undertaking to advance a certain sum of money by the mortgagee to pay off a creditor of the mortgagor and to enable him to pay off certain promissory notes is a debt in the true sense of the word and should have been verified by the affidavit required by that section: Winter v. Gault (B.C. 1913), to be reported in 13 D.L.R.

Security of Bills or Notes.

The manner in which the bill is taken by the mortgagee, and the terms upon which it is discounted, may differ materially in each case, and is a fact for determination by a jury: Grant's Law of Banking, 4th ed., 145.

Where part of the consideration of the mortgage is covered by a draft drawn by the mortgagee, a merchant, in the course of business, on the mortgagor, his customer, and discounted at a bank, the mere fact of the draft having been discounted does not justify the assumption that the debt represented by the draft was paid: Hepburn v. Park, 6 O.R. 472.

When a mortgage is taken to secure payment of a note made by the mortgagor, it is immaterial that a variance exists between the note itself and its description in the mortgage, so long as the note and mortgage can be reasonably connected one with another as embracing one and the same transaction: Colby v. Everett, 10 N.H. 429; Robertson v. Stark, 15 N.H. 109; Webb v. Stone, 24 N.H. 282. Parol evidence is, of course, admitted to identify a note with the one secured by the mortgage: Holmes v. Hinkle, 63 Ind. 518; and, if it can be shewn by such evidence that the note, signed by two or more persons, but described in the mortgage as signed only by the mortgagor, is really the note intended to be secured, the variation in description will not be material: Robertson v. Stark, 15 N.H. 109, or that the note set up is really the note secured by mortgage, though the latter varies from the note in not stating when the interest was payable: Windrell v. Coney, 34 Alb. L.J. 210. But a totally false description of the note in the mortgage will not be allowed to prevail: Fallet v. Heath, 15 Wis. 601; for instance, notes described in the mortgage as of different dates and for different amounts than the dates and amounts they contain, cannot be

said to be identified by the mortgage: Jewett v. Preston, 27 Me. 400. If, however, such notes be renewals of the notes originally secured by the mortgage, and the latter notes can be properly connected with the mortgage, the variance may not invalidate the mortgage, and parol evidence on the point of renewal is admissible: Barrows v. Turner, 50 Me. 127.

Statement of Indebtedness.

It is not necessary that the affidavit should state either the debt to be wholly due, or wholly accruing due, or partly one, and partly the other, according to the circumstances of the case, but it is sufficient when it states that the mortgage was executed for the purpose of securing the payment of the money so justly "due or accruing due," being in accordance with the terms of the Act: Squair v. Fortune, 18 U.C.Q.B. 547. But where the mortgagee under a mortgage for an existing indebtedness made the affidavit of *bona fides* under section 6 in the form required as to future advances, it was held that the affidavit was defective, and that the mortgage could not be looked at to aid the affidavit in respect of the omission to swear to a just and true indebtedness: Midland v. Cowieson, 20 O.R. 583.

When the money is really due according to the mortgage, it may be so stated in the affidavit, without adding the words "accruing due." The omission of the words "accruing due" in such case is not a fatal objection to the mortgage, even though the proviso in the mortgage states the debt as becoming due and payable at a future day. If the evidence shews the mortgage to have been given to secure an overdue debt, the mortgage will be regarded as given to secure a present debt, to be paid at a future day: Farlinger v. McDonald, 45 U.C.Q.B. 233. A mortgage may be given as collateral security for a debt of the mortgagor, already secured by mortgage, and it will be sufficient to take the mortgage under the fifth section of the Act describing the debt as an absolute debt, namely, "for the purpose of securing the payment of money justly due," and so swearing to it in the affidavit of *bona fides*.

The words "estate and effects" are more comprehensive than the words "goods and chattels," the former including, besides the latter, realty debts and choses in action; therefore, where an affidavit of *bona fides* to a mortgage stated that it was *bona fide*, etc., etc., and not for the purpose of holding, etc., "the estate

and effects mentioned therein," instead of "the goods and chattels," it was held that the substituted words sufficiently complied with the Act: Mason v. Thomas, 23 U.C.Q.B. 305.

Omissions in Forms.

The omission in the affidavit to state that the mortgage was not made for the purpose of protecting the goods "against the creditors of the mortgagor" is fatal to the sufficieney of the affidavit: Boulton v. Smith, 17 U.C.Q.B. 400, 18 U.C.Q.B. 458. An affidavit that the chattel mortgage was not made for the purpose of preventing "the creditor" instead of "creditors" of such mortgagor obtaining payment of any claims against him, is insufficient, even though the omission of the letter "s" be a mere mistake by the person who wrote the affidavit; it being the duty of the Court to guard against any artful attempts at evasion, by insisting upon such affidavit being made as the statute requires: Harding v. Knowlson, 17 U.C.Q.B. 564; Nisbet v. Cock, 4 A.R. (Ont.) 200. But when there is more than one mortgagor the affidavit will not be held insufficient because it states that the mortgage was not executed for the purpose of preventing the creditors of such mortgagors from obtaining payment of their claims against "him" instead of against them: Bertram v. Pendry, 27 U.C.C.P. 371.

Nor will it be fatal to the mortgage should the affidavit, besides containing the word "him," instead of "them," further use the word "mortgagor," instead of the word "mortgagors." Where the two grantors are first called "mortgagors," and then the affidavit mentions the "creditors of the said mortgagor," it would seem right to hold that under the singular "mortgagor" each mortgagor is included, and that "any claims against him, the said mortgagor," includes all claims against either or both. When the two are first specially mentioned and described as "mortgagors," then when "mortgagor" is spoken of it necessarily means both the persons called or described previously as "mortgagors": Farlinger v. McDonald, 45 U.C.Q.B. 233; Tyas v. MacMaster, 8 U.C.C.P. 446.

A fatal error in the affidavit, often met with, is the statement that the mortgage was not executed for the purpose of preventing the creditors of such mortgagor from obtaining payment of any claim against ——, without saying against whom,

this arising when a blank form is used in which the blank to be filled in with the word "him" or the word "them" comes at the end of a paragraph and is often overlooked unless specially starred or otherwise designated. Words cannot be added to the affidavit, any more than to an Act of Parliament, to supply an omission which may be thought, on merely conjectural grounds, to have been unintentional: Re Andrews, 2 A.R. (Ont.) 24; Morrow v. Rorke, 39 U.C.Q.B. 500; Nesbit v. Cock, 4 A.R. (Ont.) 200.

The omission does not, of course, impair the security as between the immediate parties to the instrument; it only destroys the security as against an execution creditor, or as against a subsequent purchaser or mortgagee: Davis v. Wickson, 1 O.R. 369.

Sale by Mortgagee.

A mortgagee under a chattel mortgage in the event of default, is entitled to take all the property covered by the mortgage, and he has a right to sell, but he must not sell in a reckless and improvident manner, if he does so he is accountable not only for what he actually receives, but for what he might have obtained for the goods, had he acted with a proper regard for the interest of the mortgagor. Under certain circumstances it may be reasonably prudent to sell the mortgaged articles by private sale. Where a sale is not sufficiently advertised it may be grounds for allowing damages: Neal v. Rogers, 19 O.W.R. 873, 2 O.W.N. 1482, affirming 19 O.W.R. 132, 2 O.W.N. 1107; Ward v. Dickerson, 2 D.L.R. 903, 3 O.W.N. 1153; British Columbia Land Co. v. Ishitaka, 45 Can. S.C.R. 302; Rennie v. Block, 26 Can. S.C.R. 356.

The point of decision in the above cases was set at rest by the Privy Council in the case of McHugh v. Union Bank, 10 D.L.R. 562, [1913] A.C. 299, 44 Can. S.C.R. 473, 3 A.L.R. 166, 2 A.L.R. 319. The Privy Council laid down the rule that, under a chattel mortgage, a mortgagee taking possession of chattels, and selling them for realization, must act as a prudent and reasonable man would act if he were instead seeking to realize upon his own property with a view that, at least, the fair and reasonable value of the chattels sold may be obtained. That case originated in the Courts of Alberta and raised several contentions, of which the most important was the question of damages. The defendant

bank as mortgagee by its agent, took possession of a large number of horses under the power of sale contained in the chattel mortgage and drove them a considerable distance to Calgary for sale at public auction. It appeared from the case the horses were in quarantine at the time of seizure, and under the provincial regulations the horses could not be removed for any purpose unless treated to a dipping process of sulphur and lime; and this the bank caused to be done. Some of the horses died on the journey to Calgary and others were put out of condition, the result of, as plaintiff claimed, their being driven fast in hot weather. There was never, in any of the Courts through which the case passed, any doubt but that damages should be awarded, the main contention being as to the method of assessing damages.

Mr. Justice Beck, the trial Judge, gave damages resulting from hard driving so soon after being dipped. The Supreme Court of Alberta, on appeal, set aside this amount as lacking any basis or method from which it could be deduced, but referred the question of damages to the Court Clerk at Calgary, and limited the amount of damage to the difference between the total amount received by defendant from the sale and the fair value of the horses as they [illegible] before being taken from plaintiff's possession while still in quarantine.

The Supreme Court of Canada, on appeal (44 Can. S.C.R. 473), modified the last named mode of assessing by providing that the measure of damages should be the reduction in value, if any, caused by the manner in which they were driven from the ranch to the place of sale. (Duff and Anglin, JJ., minority Judges, were of opinion that the judgment of the trial justice should be restored.)

Lord Moulton, delivering the judgment of the Privy Council on a further appeal, said: "Their Lordships are of the opinion that the assessment of damages by the learned Judge at the trial should stand." After referring to the fact that some evidence existed for Justice Beck's conclusion as to damages, and that he having seen the witnesses when testifying (classing that fact "as a matter of grave importance" on the question of damages), Lord Moulton concluded by saying: "Their Lordships cannot see anything to justify them in coming to the conclusion that Mr. Justice's Beck's *assessment* of the damages was erroneous."

A mortgagee, selling under a power of sale in a mortgage, is

not, strictly speaking, a trustee for the mortgagor, and he may, in good faith, sell to his own solicitor who has acted for him in the mortgage, though not in the sale. Such a sale may be voidable, though not void, and while it may be impeached by the selling mortgagee under some circumstances, it cannot by the mortgagor, who never stood in the relation of client to the solicitor, and more specially where the mortgagor stands by for years, having full knowledge of the facts, without taking any steps to impeach the sale: Nutt v. Easton, 68 L.J. Ch. 367, affirmed 69 L.J. Ch. 46; [1900] 1 Ch. 29.

A mortgagee of chattels, who takes possession of them under a power of sale in the mortgage and no sale in fact takes place and he appropriates the same to his own use, cannot thereafter enforce payment of the mortgage debt, unless he restores the chattels to the mortgagor in their original condition: McDonald v. Grundy, 8 O.L.R. 113.

An offer to redeem made prior to a sale under a chattel mortgage may be the basis of impeaching the sale, where the mortgagor or owner shews the amount secured was in fact tendered, or that the mortgagee knew or had *bonâ fide* information that such mortgagor or owner was able, ready and willing to redeem, but still refused payment: The British Columbia Land and Investment Agency v. Ishitaka, 45 Can. S.C.R. 302, reversing the Court of Appeal of British Columbia and restoring the judgment of the trial Court, Fitzpatrick, C.J., and Idington, J., dissenting.

Rate of Interest.

The Canada Interest Act (R.S.C. 1906, ch. 120) regulates the rate of interest to be charged on chattel mortgages. It has been held that that Act being passed on grounds of public policy for the benefit of borrowers, its application could not be waived by the parties to the transaction. Hence, where a chattel mortgage provided for the payment of $125, the principal sum, in consecutive monthly instalments of $5 each, and for $5 more with each instalment as interest, without stating the yearly rate to which it was equivalent, but containing a clause waiving in explicit terms the necessity for such statement, that the mortgagee was entitled to interest only at the legal rate: Dunn v. Malone, 6 O.L.R. 484; see also the Interest Act treated in this book.

Mortgage to Secure Future Advances or Endorsements.

6. (1) A mortgage of goods and chattels made

(*a*) To secure the mortgagee for advances made in pursuance of an agreement in writing to make fu .re advances for the purpose of enabling the borrower to enter into or to carry on business with such advances, the time of repayment thereof not being longer than one year from the making of the agreement; or

(*b*) To secure the mortgagee against the endorsement of any bill of exchange or promissory note o other liability by him incurred for the mortgagor, such liability not extending for a longer time than one year from the date of the mortgage,

may be registered in the manner prescribed by this Act if accompanied by

(*c*) The affidavit of an attesting witness to the execution thereof, and,

(*d*) The affidavit of the mortgagee stating that the mortgage truly sets forth the agreement and truly states the extent and amount of the advances intended to be made or liability intended to be created by the agreement and covered by the mortgage, and that the mortgage is entered into in good faith and for the express purpose of securing the mortgagee repayment of his advances or against the liability intended to be created, as the case may be, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor nor to prevent such creditors from recovering any claims which they may have against the mortgagor. R.S.O. 1897, c. 148, ss. 7 and 8.

Security for Future Advances.

A mortgage that is given to secure an exist ig debt only, will come under the operation of the fifth section of the Act;

but by this section it is intended to afford a mortgagor an opportunity of securing, by way of mortgage, advances to be made at a future time, and to be made upon an agreement in writing to assist him in business: Patterson, J.A., Barber v. MacPherson, 13 A.R. (Ont.) 356.

Money to be advanced was always a good consideration for a chattel mortgage, and when the security was upon all a debtor's personal effects it would be sustained when the advances were *bonâ fide* asked for, and made with the view to carrying on the debtor's business: Bittlestone v. Cooke, 6 El. & Bl. 296; Mercer v. Peterson, L.R. 2 Ex. 304, L.R. 3 Ex. 104; Lomax v. Buxton, L.R. 6 C.P. 107; Hutton v. Cruttwell, 1 E. & B. 15.

When the agreement can be looked upon as one really for a present advance, though the amount is to be paid out as the mortgagor requires it, then the mortgage may not be within the operation of this section, so as to require the agreement to be fully set out: *per* Osler, J.A., Parkes v. St. George, 10 A.R. (Ont.) 496 at 538.

It is to be observed that the statute speaks of the advances being for the purpose of enabling the mortgagor to enter into and carry on business. A mortgage is none the less within the Act because it omits the words "to enter into" in the recital, and contains only the words "carry on business:" McLean v. Pinkerton, 7 A.R. (Ont.) 490; Goulding v. Deeming, 15 O.R. 201 at 207.

The purpose of the future advances must be to enable the borrower to carry on business, and nothing can be more fair than a consideration of that kind, or of the assistance by endorsement, or other liability incurred by one person for another: Risk v. Sleeman, 21 Gr. 250. But, because under this section one is capable of giving or taking a valid mortgage when no debt actually exists at the time the security is given, it becomes the more necessary that instruments of such a nature should be watched with the most jealous care, and safeguards be provided, the observance of which will be necessary to their validity. A compliance with these statutory safeguards can never interfere with an honest transaction, while it gives to the public that protection which it is the policy of the law to secure against fraudulent and covinous transactions. It is of the first necessity to secure good faith, and prevent error and imposition in deal-

ing, and the statute therefore makes it requisite that the mortgage should state the true consideration, and should set forth "truly, the agreement," besides requiring affidavits of good faith to be made by parties interested: Arnold v. Robertson, 8 U.C.C.P. 147. No particular form of words is necessary to create the agreement in writing, so long as it embraces all the requisites and formalities of the Act. Being a conveyance upon condition, it is properly made by deed, but there is no necessity for its being made under seal: Flory v. Denny, 7 Ex. 581, 21 L.J. Ex. 223; Patterson v. Maughan, 39 U.C.Q.B. 371; Reeves v. Capper, 5 Bing. N.C. 136; Halpenny v. Pennoch, 33 U.C.Q.B. 229; Gerry v. White, 47 Me. 504.

Should a mortgage be given for two purposes, partly to secure future advances under this section, and partly for an advance of money under section five, if the Act is otherwise complied with the mortgage will not be invalid. The instrument should be considered as divided into parts, relating respectively to these two purposes, and as if each of such parts were a separate instrument; but as to each part the requirements of the statute must be carried out as if each part were in a separate document: Hughes v. Little, 17 Q.B.D. 204.

What advances are within the statute is no longer a matter of doubt. The weight of opinion was always with the view that the Act extended to advances, either in money or in goods, but the inference from the word "borrower" is that the advances made are intended to be returned: and when the advance is of goods, not of money, the mortgagor does not usually return goods (especially when the goods so advanced are to be sold and disposed of), but returns the value of the goods in money. McLean, C.J., reasoned that "an advance to a party may be in goods, or flour, or any commodity in which a person is dealing, but the kind of advance to be made under an agreement for which security may be taken on goods, appears to be an advance in money," but in the same case both Burns, J., and Hagarty, J., held that the statute was not confined to mere money advances: Sutherland v. Nixon, 21 U.C.Q.B. 629 *et seq.* Hence, a creditor, who is a merchant, may furnish his goods and wares to a certain amount, and it will be just the same as if the money was advanced with which to purchase the property, a liberal rather than a literal construction of the Act must, however, prevail.

and so it is that notwithstanding the strong reasons of McLean, C.J., advances of goods are now held to be within the terms of this section: Goulding v. Deeming, 15 O.R. 201 at 207; Brooks v. Lester, 36 Md. 65; Carpenter v. Blote, 1 E. D. Smith 491.

It will be observed that the words of the section are: "In case of an agreement in writing to make future advances," therefore a mortgage will be invalid, as against creditors, if it is taken in great part for a debt not yet actually existing, or for advances which the mortgagee has not agreed in writing to make, but has merely talked of making, and has not made any when the mortgage was executed: Robinson v. Paterson, 18 U.C.Q.B. 55. The purpose in view in making the advances, in order to make the instrument valid as against creditors, must be to enable the borrower to enter into and carry on business with such advances: Risk v. Sleeman, 21 Gr. 250. If the fresh advances are made by the lender, with the intention of enabling the borrower to continue his business, and if there be reasonable grounds for believing that the advance would enable the borrower to do so, the transaction will be unimpeachable: Ex parte Johnson, 26 Ch.D. 338. And advances may be agreed to be made to a person already in business, and a mortgage given to secure the same will still be within the Act. McLean v. Pinkerton, 7 A.R. (Ont.) 490.

Time for Repayment.

The time for the repayment of the advances made must not be for a longer period that one year from the making of the agreement, and this must be fully shewn by recital or otherwise upon the face of the mortgage itself: O'Donohoe v. Wilson, 42 U.C.Q.B. 329; Kough v. Price, 27 U.C.C.P. 309; Ontario Bank v. Wilcox, 43 U.C.Q.B. 460; May v. Security L. & S. Co., 45 U.C.Q.B. 106; Barber v. MacPherson, 13 A.R. (Ont.) 356. An agreement to repay the advances "on demand," will not be an agreement to repay within one year. The demand might not be made until after the year expired, and unless the time for repayment be stipulated to be within the year, the mortgage is void: Hetherington v. Groome, 13 Q.B.D. 789; Sibley v. Higgs, 15 Q.B.D. 619; Melville v. Stringer, 13 Q.B.D. 392. But where an agreement is entered into for advances to be made in sums and at times specified, and a mortgage is taken to secure their repayment, a departure from the agreement, in the times and

manner of such advances, cannot alone defeat the mortgage, though it may be urged to a jury as against the *bona fides* of the transaction: Strange v. Dillon, 22 U.C.Q.B. 223.

The making of an advance of money by a bank on a demand note which was given for the purpose of creating an indebtedness for which additional security may be taken by way of a chattel mortgage is a violation of the Bank Act, sec. 76, subsec. 2, ch. 29, R.S.C 1906, and such security cannot be upheld under sec. 80 of the said Act, as one given for additional security for a debt in the ordinary course of business: Bates v. Kirkpatriek, 4 D.L.R. 395, 21 W.L.R. 607; affirmed 7 D.L.R. 806, without opinion.

Written Agreement.

If the registered instrument refer to another instrument, and provides that the mortgagor will perform the covenants and stipulations contained in the latter, the registered instrument could not be said to contain the terms, nature and effect of the agreement: Lee v. Barnes, 17 Q.B.D. 77.

Affidavit of Bona Fides.

It is provided by sec. 12, that the affidavit may be made by an agent if he is aware of all the circumstances connected with the mortgage, and if made by such an agent or officer of a corporation it shall state that the deponent is aware of all the circumstances connected with the mortgage, and has personal knowledge of the facts deposed to.

The affidavit must state:—

(i) That the mortgage truly sets forth the agreement entered into between the parties thereto.

(ii) That the mortgage truly states the extent and amount of the advances intended to be made, or liability intended to be created by such agreement, and covered by such mortgage.

(iii) That such mortgage was executed in good faith, and for the express purpose of securing the mortgagee repayment of his advances thereunder.

(iv) That the mortgage was not executed for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor, nor to prevent such creditors from recovering any claims which they may have against such mortgagor.

Unless a mortgage is filed with an affidavit embracing all these requisites, it will be absolutely null and void as against creditors and subsequent purchasers and mortgagees.

Security for Indorsements of Notes.

It is not customary in practice to insert recitals where the security is given for a pre-existing debt; but it is absolutely necessary to the validity of instruments executed under this section that they should set out fully, by recital or otherwise, the terms, nature and effect of the agreement between the parties, and the amount of liability intended to be created. Recitals are inserted to shew what the consideration is, and upon the genuineness of the consideration depends the validity of the instrument. It does not follow that any variance, however slight, between the real consideration and the recital of it in the body of the instrument, will necessarily invalidate a mortgage. Clerical inaccuracies in the recital will not prejudice the mortgage, so long as the debt or full consideration be fully identified: Wadsworth v. Townley, 10 U.C.Q.B. 579; Rutledge v. McLean, 12 U.C.Q.B. 205; Roe v. McNeil, 14 U.C.C.P. 424; Thompson v. Bennett, 22 U.C.C.P. 393.

The provisions of the Act requiring the consideration of a mortgage to be expressed therein is satisfied when the mortgage recites that the indorsement of a note is the consideration and then sets out the note. Only the facts need be stated, not their legal effect: Robinson v. Mann, 31 Can. S.C.R. 484, affirming in result 2 O.L.R. 63.

The object which the statute has in view in inserting recitals, is that third parties desirous of dealing with a mortgagor may, by an inspection of the mortgage, acquire a full and truthful knowledge of the transaction to which the mortgage relates. It is sufficient if a mortgage states correctly the facts from which to identify with reasonable certainty the notes or other instruments which it is intended to secure, and if, to an adequate description, the recital contains that which is inapt and erroneous, the latter will not thereby invalidate the former: Throssell v. Marsh, 53 L.T. 321. But the true character of the debt or consideration must be set out. If the mortgage is given in consideration of a contingent liability assumed by the mortgagee, it will not suffice to state the consideration as being a debt: Belknap v. Wendell, 31 N.H. 92.

Agreement to Indorse or to give Guaranty.

The indorsements and liabilities here referred to are past or concurrent, not future indorsements or liabilities. The statute, in language, applies to a liability "incurred," not "to be incurred"; it follows, therefore, that a mortgage given to secure a mortgagee against a future indorsement, or liabilities to be incurred, is not within the operation of this section: Mathers v. Lynch, 28 U.C.Q.B. at p. 354; Turner v. Mills, 11 U.C.C.P. 366; Paterson v. Maughan, 39 U.C.Q.B. 371; O'Donohoe v. Wilson, 42 U.C.Q.B. 329. Renewals of an indorsement or undertaking of suretyship may, however, be secured, for they are not in fact new liabilities. There is nothing said in the statute concerning an agreement to indorse, or to assume in the future any liability for the mortgagor: *per* Patterson, J.A., Barber v. MacPherson, 13 A.R. (Ont.) at pp. 358-9.

Security given for Person not the Mortgagor.

The indorsements and liabilities here mentioned must be made or incurred for the mortgagor, in order to bring the instrument within this section, and when the liability was incurred for one person, and security by way of mortgage, given by some one else, the mortgage was held to be not affected by the Act: Baldwin v. Benjamin, 16 U.C.Q.B. 52; Valentine v. Smith, 9 U.C.C.P. 59; Mathers v. Lynch, 28 U.C.Q.B. 354; Walker v. Niles, 18 Gr. 210; Clarke v. Bates, 21 U.C.C.P. 348. Where a security is good independently of the statute it will not be held void, unless the statute clearly apply to it and make it void: *per* Harrison, C.J., Paterson v. Maughan, 39 U.C.Q.B. 371 at 379.

Limit of Time.

The statute imperatively requires that the liability, incurred by indorsement or otherwise, shall be limited in duration to a period of one year from the date of the mortgage, and the instrument must shew on its face that the notes indorsed, or any renewals thereof, will fall due within the year, otherwise the mortgage will be invalid as against creditors or purchasers: Ontario Bank v. Wilcox, 43 U.C.Q.B. 460; Kough v. Price, 27 U.C.C.P. 309· May v. Security L. & S. Co., 45 U.C.Q.B. 106; Barber v. Macpherson, 13 A.R. (Ont.) 356; and so strict is the law in this regard that the days of grace on a promissory note are counted, and if they extend the liability over the year the mort-

gage is bad: Elliott v. Gladstone, 4 C.L.T. 405. Hence, where, in a chattel mortgage to secure the plaintiff, the mortgagee, against certain notes on which he was an indorser, the notes were set out, and were all payable within the year; but, in the recital the mortgage was stated to be executed not only as security against these notes, but also against any note or notes thereafter to be indorsed by the plaintiff for the mortgagor's accommodation, by way of renewal of the said recited note, or otherwise howsoever, and the proviso was for the payment of the said notes and all and every other note or notes which might thereafter be indorsed by the mortgagee for the plaintiff by way of renewal of the aforesaid note or otherwise, and the covenant was to pay the said note and all future and other promissory notes which the said mortgagee should thereafter indorse for the accommodation of the mortgagor, it was held that the mortgage was, on its face, invalid in not shewing that the liability of the mortgagor was limited in duration to one year: Kough v. Price, 27 U.C.C.P. 309; Ontario Bank v. Wilcox, 43 U.C.Q.B. 460; May v. Security L. & S. Co., 45 U.C.Q.B. 106; Barber v. Macpherson, 13 A.R. (Ont.) 356.

But where the agreement, as recited in the mortgage, is that the endorsement was made upon the agreement that the mortgage should be given as security against that endorsement, and that it should extend to any renewal thereof that should not extend the liability of the mortgagee beyond one year from the date of the mortgage, and the affidavit, in all other respects strictly in accordance with the statute, has the additional words, "or any future note or notes which he the mortgagee may indorse for the accommodation of the mortgagor, whether as renewals of the said recited note or otherwise," then the affidavit, by reason of these additional words, will not have the effect of avoiding the mortgage, if otherwise good: Driscoll v. Green, 8 A.R. (Ont.) 366. This is not so much because the affidavit is inconsistent with the mortgage; but because the mortgage in its entirety is good without the additional words in the affidavit: Re Hewer, 21 Ch.D. 871.

And it has also been held that the reference in the mortgage to a possible future renewal or extension of the liability which has not been agreed upon, and which the mortgagee is not bound to accede to, does not invalidate the mortgage: Embury v. West, 15 A.R.(Ont.) 357, 24 C.L.J. 616.

The mortgage must shew the liability by indorsement or otherwise to be limited in duration to one year from the date of the mortgage, not from the execution thereof, which may not be on the day of the date. If the limitation in time appear by the recital, though the proviso be silent as to time, the proviso will not control the recital if it refer in terms to the note mentioned in the recital, and renewals thereof. The recital and the proviso will then be read together, and, if the recital complies with the statute, the duration of time mentioned therein applies to both. Probably the same rule may be followed in ascertaining the effect upon a mortgage within this section of the statute, of the covenant of the mortgagor "that he will pay the note and all future and other promissory notes which the mortgagee shall hereafter indorse for the accommodation of the mortgagor;" but whether so or not becomes immaterial when it is remembered that the covenant is only personal, and does not affect the property mortgaged, that the covenant, not being a part of the mortgage, as a security upon the property itself, it becomes immaterial for these reasons that it does not set forth fully "the amount of the liability intended to be secured:" Spragge, C.J.O., Driscoll v. Green, 8 A.R. (Ont.) 366.

It has been intimated that a mortgage given to secure indorsements might stand as against creditors, etc., for the indorsements of those notes which would fall due within the year, and be void as to others: Burton, J.A., Driscoll v. Green, 8 A.R. (Ont.) at p. 374; see Kitching v. Hicks, 6 O.R. 739; Mowat v. Clement, 3 Man. L.R. 585.

If it be the intention that the mortgage should stand as security also for possible renewals of the endorsed notes the mortgage should so state, and should limit the renewals, endorsation of which is intended to be secured, with a like limitation as to the time of their maturity as does the section of the statute. A mortgage cannot be renewed under section 21 so as to keep alive the security in favour of indorsements on renewal notes which do not mature within a year from the date of the mortgage: Turner v. Mills, 11 U.C.C.P. 366.

Mortgage Entered into in Good Faith.

The good faith to be considered is that of the person from whom the consideration moves: *per* Wood, V.-C., Holmes v. Penney, 3 K. & J. 90; Thompson v. Webster, 4 Drew. 628.

Setting Forth the Agreement.

The mortgage must set forth fully by recital or otherwise the terms, nature and effect of the agreement, and the amount of the liability intended to be created; and further the mortgagee's affidavit must state that the mortgage truly states the extent of the liability intended to be created by the agreement, and covered by such mortgage: Barber v. MacPherson, 13 A.R. (Ont.) 356; Parker v. Morrison, 46 N.H 280; Ex parte Webster, 22 Ch.D. 136.

It has been held that the fact that as to part of consideration for the mortgage the mortgagee had not made an actual advance, but merely liable on promissory notes, will not, *per se*, invalidate the mortgage under R.S.O. 1877, ch. 119, since that Act, unlike the Imperial Act, did not require the consideration to be truly expressed: Tidey v. Craib, 4 O.R. 696; Parkes v. St. George, 10 A.R. (Ont.) 496; Wood v. Scott, 55 Iowa 114. But the meaning of the reference to the consideration in cases under this section is that it must truly set forth the amount of the liability, similar to the provisions of the Imperial statute: Hamilton v. Chaine, 7 Q.B.D. 1, 319: see Parker v. Morrison, 46 N.H. 280; Sumner v. Dalton, 58 N.H. 295; Belknap v. Wendall, 31 N.H. 92.

Stating Extent of Liability.

Where there is a collateral agreement to the mortgage which does not appear as part of the consideration, as, for instance, a verbal agreement by the mortgagee not to register or not to renew his mortgage if the mortgagor pays a higher rate of interest, which the latter agrees to do, then such collateral agreement is not part of the consideration, and the consideration cannot be said to be untruly set forth because reference thereto is omitted: Ex parte Popplewell, 21 Ch.D. 73. But if the instrument recite another and former conveyance, and provides that the mortgagor will "perform the covenants and stipulations contained in the said recited indenture," it is apparent that the instrument does not contain the terms, nature and effect of the agreement between the parties, and must therefore be invalid, though a collateral agreement between mortgagor and mortgagee as to the application of the consideration money need not be set forth: Ex parte National Bank, 15 Ch.D. 42; Lee v. Barnes, 17 Q.B.D. 77.

The object in requiring the mortgage fully to set forth the amount of the liability intended to be created, is to give the public notice of the encumbrance existing against the property, and to enable it to ascertain the full extent to which the mortgagor has incurred an indebtedness.

Literal exactness in describing the indebtedness is not required: it suffices if the description be correct as far as it goes, and be distinct so as to direct attention to the sources of correct and full information, without danger that the language used will deceive or mislead parties: Heseltine v. Simmons, [1892] 2 Q.B. 547; Shepard v. Shepard, 6 Conn. 37; Pettibone v. Griswold, Conn. 158; Frink v. Branch, 16 Conn. 260; Michigan Ins. Co. v. Brown, 11 Mich. 266; Hurd v. Robinson, 11 Ohio S. 232; Hough v. Bailey, 32 Conn. 288; Paine v. Benton, 32 Wis. 491; Tousley v. Tousley, 5 Ohio S. 78; Porter v. Smith, 10 Vt. 492; Gill v. Pinney, 12 Ohio S. 38; Ricketson v. Richardson, 19 Cal. 330; North v. Crowel, 11 N.H. 251; Utley v. Smith, 24 Conn. 219. The Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, (35) [R.S.O. 1914, ch. 1] expressly provides that where forms are prescribed, deviations therefrom not affecting the substance, or calculated to mislead, shall not vitiate them.

It should be noticed that the words "*extent* and *amount* of the liability" are here used; and, although there is probably no real difference in meaning, it will be well to follow the statutory words, "extent and amount of the liability" in the affidavit of *bona fides*.

In the case of Rogers v. Carroll, 30 O.R. 328, 35 C.L.J. 235, the affidavit of *bona fides* made by the mortgagee in respect of a chattel mortgage given to secure the mortgagee against liability in respect of his indorsement of certain promissory notes for the mortgagor employed the expression, "and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage," instead of the statutory words "and truly states the extent of the liability intended to be created and covered by such mortgage." It also contained this clause, "and for the express purpose of securing me, the said mortgagee therein named, aginst the payment of the amount of such notes indorsing liability for the said mortgagor," instead of the words, "and for the express purpose of securing the mortgagee against the payment of the amount of his lia-

bility for the mortgagor." It was held, distinguishing Boldrick v. Ryan, 17 A.R. (Ont.) 253, that the mortgage was not void by reason of these variations from the statutory form.

Authority of Agents.

Where the affidavit of *bona fides* is made by an agent the latter must be aware of all the circumstances connected with the taking of the mortgage. It is open to anyone attacking the mortgage to shew that the agent is not possessed of this knowledge, and if such want of knowledge is established the mortgage may be declared invalid: Cameron, J., Carlisle v. Tait, 7 A.R. (Ont.) 10 at 35. It is also necessary, under sec. 12(3) that the agent's affidavit shall state that he is aware of *all* the circumstances connected with the mortgage, and has personal knowledge of the facts deposed to in the event of such an affidavit being made by an officer or agent of a corporation.

The affidavit of *bona fides*, whether made by an agent or by the mortgagee, must accompany the mortgage when registered. The word "accompany" is here used in the same sense as that in which the words "together with" are used in sec. 5 meaning "simultaneously," or "along with": Grindell v. Brendon, 6 C.B.N.S. 698.

Affidavit of Bona Fides.

Where an affidavit stated that the mortgage was made to secure a mortgagee against the payment of such liability "of" instead of "for" the mortgagor by reason of the notes, the language was held to be equivalent, and an objection that the liability referred to was that of the mortgagor instead of the mortgagee, was overruled: Mathers v. Lynch, 28 U.C.Q.B. 354. An affidavit is insufficient which complies in all respects with the requirements of the section but omits the words "against the creditors of the mortgagor" in that part wherein it is necessary to state that the mortgage was not executed for the purpose of securing the goods and chattels mentioned therein "against the creditors of the mortgagor." And it will make no difference that the omission was unintentional: Boulton v. Smith, 18 U.C.Q.B. 4[illegible]. No effect will be given to the objection that the affidavit uses the phrase "for the purpose of 'protecting' the goods and chattels mentioned in the mortgage against the creditors," etc., [illegible] instead of the phrase "for the purpose of 'securing' the goo[illegible]

and chattels against the creditor," etc.: *per* Harrison, C.J., O'Donohoe v. Wilson, 42 U.C.Q.B. 329 at 336. And an affidavit that a chattel mortgage, by two mortgagors, was executed in good faith, and not for the purpose of securing the goods and chattels against the creditors of the mortgagors, is sufficient without adding the words "or either of them" as regards the mortgagors, or "any or either of them" as regards the creditors: Fraser v. Bank of Toronto, 19 U.C.Q.B. 381; Bertram v. Pendry, 27 U.C.C.P. 371; Taylor v. Ainslie, 19 U.C.C.P. 78. The words "or either of them" as regards mortgagors, and "any or either of them" as regards creditors, are implied, following the maxim, "*omne majus continent in se minus: minus in se complectitur.*"

Where, by a clerical error, the affidavit contained the word "his" instead of "my" preceding the word endorsement in referring to the liability incurred, it was held that there was no ambiguity in the expression, and that such error alone will not invalidate the security: Boldrick v. Ryan, 17 A.R. (Ont.) 253, 26 C.L.J. 313.

Security for Dower.

A chattel mortgage may be given by the husband to the wife, on obtaining her bar of inchoate dower in a mortgage of his lands, to secure her from any loss which she might thereby sustain, and it will be sufficient to state in the chattel mortgage as nearly as possible the amount of the liability that is to be incurred. It being impossible in such a case to state precisely the amount of liability to be incurred, an approximation must either be made to satisfy the provisions of this section, or such transaction be considered as not within the Act: Morris v. Martin, 19 O.R. 564.

Effect of Non-registration.

7. If the mortgage and affidavits are not registered as by this Act provided, the mortgage shall be absolutely null and void as against creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith for valuable consideration. R.S.O. 1897, c. 148, s. 5.

Place and Time of Registration.

The proviso "as by this Act provided" evidently refers to the time limited for registration as specified in section 18 relating to the place of registration.

Affidavits.

The affidavits referred to in this section are: (i) The affidavit of execution, and (ii) the affidavit of *bona fides*, as provided by sections 5 and 6.

The mortgagee cannot validate as against existing creditors a mortgage invalid for want of change of possession, or failure or defect of registration, by taking possession of the mortgaged property. As the mortgage becomes absolutely null and void at the expiration of five days, the void security cannot be revived as against creditors generally by the mortgagee simply taking possession: Clarkson v. McMaster, 25 Can. S.C.R. at p. 105; Barker v. Leeson, 1 O.R. 114, *per* Boyd, C.; see Heaton v. Flood, 29 O.R. 87, 34 C.L.J. 30.

The meaning of the words "as against" found in this statute, when read with the subsequent words "creditors," "purchasers," "mortgagees," etc., is, that the mortgage shall be void in order to give effect to the claim of a creditor, purchase by a purchaser, or mortgage of a subsequent mortgagee, but no further, and so soon as the claims of the persons protected by the statute are satisfied, the original mortgagee becomes entitled, *eo instanti*, to any benefits that may remain thereafter: In re Artistic Color Printing Co., 21 Ch. D. 510; Ex parte Blaiberg, 23 Ch. D. 254.

Creditors and Subsequent Purchasers.

There are three classes of persons, as against each of which an unregistered mortgage shall be absolutely null and void. These are:—

(i) Creditors of the mortgagor (as to which see the statutory definition in sec. 2).

(ii) Subsequent purchasers in good faith for valuable consideration.

(iii) Subsequent mortgagees in good faith for valuable consideration.

The reason for the statute declaring a mortgage void as against these three classes of persons, unless the requisites of the statute are complied with, will be obvious, when it is considered for a moment how easily a dishonest person could continue an assumed credit by being the apparent owner of considerable effects, whilst, in reality, he owed upon them more than he could pay; and how easily honest traders might be defeated in the

just rights by fraudulent encumbrances put upon a debtor's property. To invoke the aid of the statute, however, a person must establish himself in the character of one of the three persons sought to be protected by the statute: see Hall v. Coll ns Bay Co., 12 A.R. (Ont.) 65.

The law requires either possession or registration; one or other of these requisites must exist, and he who fails to provide either, must suffer for improperly enabling another to appear to the world as absolutely owning property which in reality he does not. Between the mortgagor and the mortgagee, however, no injury could result from a non-compliance with the statutory requirements; and, therefore, so far as they are concerned, and all claiming under the mortgagor, the administrator, or the representatives of the mortgagor, the mortgage is valid without change of possession or registration, and it is valid as between the parties to it, even though it was executed by the mortgagor to the mortgagee with the express intent to defraud, hinder and delay the creditors of the mortgagor, since the Statute of Elizabeth does not apply as between the grantor and grantee, or privies or consenting parties, or as between strangers other than creditors: Robinson v. McDonnell, 2 B. & Ald. 134; Boughton v. Boughton, 1 Atk. 625; Oliver v. King, 25 L.J. Ch. 427; White v. Morris, 11 C.B. 1015; Bessey v. Windham, 6 Q.B. 166, 14 L.J. Q.B. 7; Steele v. Brown, 1 Taunt. 381. Neither party to the instrument could succeed in invalidating the instrument when they each combined with the other to commit a fraud. A man cannot set up an illegal act of his own, in order to avoid his own deed, and no man shall set up his own iniquity, as a defence, any more than as a cause of action: Scoble v. Henson, 12 P.C. C.P. 65; Watts v. Brooks, 3 Ves. 612; Cottington v. Fletcher, 2 Atk. 155, 162; Curtis v. Perry, 6 Ves. 739, 747; Montefiori v. Montefiori, 1 W. Bl. 364; Hawes v. Leader, Cro. Jac. 270; Phillpotts v. Phillpotts, 10 C.B. 85, 20 L.J.C.P. 11.

But as regards the three classes of persons above mentioned, the law is very different. The mortgage, as to them, can only be made effectual by registration, or change of possession of the property mortgaged, either of which occurrences the statute, in effect, settles, as being sufficient and proper notice to those classes of persons who might be prejudiced were they not put upon their guard. But, though the object and effect of registration is to give notice to all those who desire to avail themselves of the opportunity given them by statute, it does not follow that

because notice is given by registration the mortgage is necessarily valid. Such legislation is not with a view of making good a title which would not have been good before, but simply for the protection of creditors, purchasers and mortgagees: Mercer v. Peterson, L.R. 2 Ex. 304; Darvill v. Terry, 6 H. & N. 807; Oriental Banking Co. v. Coleman, 3 Giff. 11.

Unless the mortgage, when registered, complies in all particulars with the requisite technicalities of the statute, it will be invalid. Hence, should a mortgage not contain a sufficient description of the goods mortgaged, it is void as against subsequent purchasers in good faith, and notice of such mortgage to the purchaser will not affect his right: Moffatt v. Coulson, 19 U.C.Q.B. 341; Edwards v. English, 7 E. & B. 564; Otley v. Manning, 9 East 59.

Secret Agreements.

If there be a distinct agreement between mortgagor and mortgagee that there should be neither registration nor immediate possession, such would amount to an agreement to contravene the statute, the policy of which is to make transactions open and notorious, and the mortgage would be void *ab initio* on grounds of public policy, so far as creditors are concerned: Clarkson v. McMaster, 25 Can. S.C.R. 96, *per* Strong, C.J.

By "creditors of the mortgagor" is meant any persons to whom a debt is owed by the mortgagor. It makes no difference whether the debt be one created by the mortgagor before or after the execution of the mortgage (Graham v. Furber, 14 C.B. 410, 23 L.J.C.P. 51; Ex parte Stephens, 3 Ch. D. 807; Mackay v. Douglas, L.R. 14 Eq. 106; Kidney v. Coussmaker, 12 Ves. 136, *per* Lord Hardwicke; Walker v. Burrows, 1 Atk. 94; Beaumont v. Thorpe, 1 Ves. Sen. 27; Taylor v. Jones, 2 Atk. 600; Jenkyn v. Vaughan, 3 Drew. 419), and the creditor must be an opposing creditor: Bank of Montreal v. McWhirter, 17 U.C.C.P. 506. It was at one time doubted if the Statute of Elizabeth applied to any creditors but those who were such at the time of the conveyance: Kidney v. Coussmaker, 12 Ves. 136. But there is no doubt that the Act makes no distinction between creditors; and a fraudulent assignment is void against both subsequent and existing creditors: Graham v. Furber, 14 C.B. 410, 23 L.J.C.P. 51; Mackay v. Douglas, L.R. 14 Eq. 106. But the chattel mortgage Act does not make void the instrument as against "strangers," they not coming within any of the three classes of per-

sons mentioned. And a sheriff, seizing under a *fi. fa.*, will be a stranger, and not entitled to the benefit of the statute, unless he shews that he represents a creditor, and he can only do this by shewing a judgment: Martyn v. Podger, 5 Burr. 2631; White v. Morris, 11 C.B. 1015; Porter v. Flintoff, 6 U.C.C.P. 338; Grant v. McLean, 3 O.S. 443; Powers v. Ruttan, 4 O.S. 58; Colman v. Croker, 1 Ves. Jun. 160. The latter should be formally proved by an exemplification or otherwise, as the recital of the judgment in the writ of *fi. fa.* is not alone considered sufficient.

The "potential invalidity of a mortgage exists as to all creditors in existence," if the mortgage is defective for want of proper compliance with the Act: Barker v. Leeson, 1 O.R. 114, *per* Boyd, C. An individual creditor, unless suing on behalf of the general body of creditors as well as on his own behalf, may not be able to enforce his claim, or attack the mortgage, without first proceeding to judgment and execution, but this right he has in himself simply from his being a creditor: Barker v. Leeson, 1 O.R. 114; Clarkson v. McMaster, 25 Can. S.C.R. 96; Heaton v. Flood (1897), 29 O.R. 87, 34 C.L.J. 30.

"Where no fraud has been committed, the Court will not restrain a defendant from dealing with his property at the instance of a creditor or person who has not established his right to proceed against that property; but where a fraudulent disposal has been made of the defendant's property, then the Court will intercept the further alienation of the property, and keep it in the hands of the grantee under the impeached conveyance, until the plaintiff can obtain a declaration of its invalidity and a recovery of judgment for the amount claimed": *per* Boyd, C., Campbell v. Campbell, 29 Gr. 254. A person who claims a lien for advances upon goods under a parol agreement, and who does not obtain possession of them, acquires no title, and does not come within the character of a creditor, subsequent purchaser or mortgagee, to defeat the claim of an innocent mortgagee for value, to whom title passed, although the latter's instrument was not registered: Hall v. Collins Bay Co., 12 A.R. (Ont.) 65. Such person, however, has an interest which he could enforce against the person receiving the advances, and may be granted an injunction to restrain the debtor from disposing of the property without first satisfying the lien: Rusden v. Pope, L.R. 3 Ex. 269; Engleback v. Nixon, L.R. 10 C.P. 645.

Assignee for Creditors.

An assignee in insolvency may object to the non-registration of a bill of sale on an alleged sale by the insolvent, just as an execution creditor or a subsequent purchaser for value may do (Snarr v. Smith, 45 U.C.Q.B. 156), and by section 2(h) it is specially provided that an assignee, under a deed of assignment in favour of creditors, can attack a mortgage as representing creditors, and take advantage of the want of registration; and the creditors themselves may do so, though not creditors by judgment and execution at the time of the assignment: Kitching v. Hicks, 6 O.R. 739.

Purchaser in Good Faith.

It will be observed that in this section it is required that a purchaser or mortgagee should be such in good faith. Actual knowledge is not inconsistent with good faith, but where collusion exists, the purchaser acquires no title whatever; hence it is that where a purchase is made with intent to defraud the mortgagee, the purchase transaction as to the mortgagee will be void, even though the statutory formalities have been neglected by the defrauded mortgagee: McLeod v. Doucette, 38 N.S.R. 151; Gooding v. Riley, 50 N.H. 1400; Patten v. Moore, 32 N.H. 382; Fuller v. Paige, 26 Ill. 358; Sage v. Browning, 51 Ill. 217; McDowall v. Stewart, 83 Ill. 538. A purchaser or mortgagee, for valuable consideration, though he may have notice of the existence of a mortgage, may still be a purchaser in good faith. Where, for instance, a mortgage is invalid from defects in the affidavit of *bona fides*, or for want of proper description, a purchaser for value with full notice of the invalid mortgage, cannot, it has been held, be defeated as being a purchaser in bad faith: Edwards v. English, 7 E. & B. 564; Morrow v. Rorke, 39 U.C.Q.B. 500; Moffatt v. Coulson, 19 U.C.Q.B. 341; Kaplin v. Anderson, 88 Ill. 120; Porter v. Dement, 35 Ill. 478.

In New Jersey, Vice-Chancellor Van Fleet held that purchasers or mortgagees, to be in a position to avail themselves of an omission by an antecedent mortgagee, must have acted without notice of the rights of the holder of the antecedent security; but not so with creditors. A creditor may know that an antecedent mortgage has been given, yet if it is not filed according to the requirement of the statute, and he obtains a judgment and procures a levy to be made, his lien, by force of the statute, is entitled to preference in payment: Sayre v. Hewes, 32 N.J. Eq.

652, 656. Under a similar New York statute, it was held that purchasers and mortgagees are not such "in good faith" if they have actual knowledge of the existence of an antecedent mortgage: Farmers Loan Co. v. Hendrickson, 25 Barb. (N.Y.) 484; Tyler v. Strong, 21 Barb. (N.Y.) 198; Tiffany v. Warren, 37 Barb. (N.Y.) 571; Sayre v. Hewes, 32 N. J. Eq. 652. The words "good faith" are confined simply to purchasers and mortgagees and are not extended to creditors, hence proof of actual notice of an unregistered mortgage to a creditor does not estop him from setting up that such mortgage is invalid: Farmers Loan Co. v. Hendrickson, 25 Barb. (N.Y.) 484. To afford protection to a purchaser, it is necessary that his purchase should be actually completed; if it be only an agreement for purchase, it will not be sufficient: Patten v. Moore, 32 N.H. 382; Cummings v. Tooly, 39 Iowa 195; Kessey v. McHenry, 54 Iowa 187.

The circumstance that a mortgagee knew of the existence of the mortgagor's liability to another, and in protecting his own interests prejudiced those of the creditor, is not a good and sufficient reason for saying that the mortgage was not made in good faith, nor can it be urged that mortgagees who take a mortgage with notice of an unpaid prior mortgage void as against creditors when their claims arose, by reason, for instance, of failure to renew such prior mortgage are not subsequent mortgagees in good faith: Tidey v. Craib, 5 O.R. 696. But one who buys property mortgaged, during the currency of a valid mortgage, and with knowledge of it, is not a *subsequent* purchaser in good faith so as to entitle him to hold the property as against the mortgagee on the ground that the mortgage was not renewed at the time when the mortgagee instituted his action to recover the property under his mortgage: Patten v. Moore, 32 N.H. 382; Sanger v. Eastwood, 19 Wend. (N.Y.) 514; Lewis v. Palmer, 28 N.Y. 271. The statute is not intended for the protection of persons who purchase or take mortgages while a prior mortgage appears to be in full vitality, but it applies to purchasers becoming such after the time when the mortgage should, in order to preserve its validity, be renewed: Hodgins v. Johnston, 5 A.R. (Ont.) 449; Latimer v. Wheeler, 30 Barb. 480; Dillingham v. Ladue, 35 Barb. 38; Meech v. Patchin, 14 N.Y. 71; Gardner v. Smith, 29 Barb. 68; Hill v. Beebe, 3 Kernan 556.

A landlord may become a purchaser in good faith from his tenant, within the meaning of this section, of goods mortgaged by the tenant under an invalid mortgage, either by taking the

goods of his tenant as so much payment of his rent, or by purchase in pursuance of arrangement, providing there is an actual and continued change of possession to meet the claim of creditors and subsequent purchasers or mortgagees. In either case, as between them, the property would pass. It seems, too, that the landlord would still be a purchaser in good faith within the Act should he, with the tenant's consent, purchase the tenant's goods at a bailiff's sale, instituted by the landlord by way of distress in order to realize his rent (Farlinger v. McDonald, 45 U.C.Q.B. 233); but, in order to be a purchaser in good faith, he must become a purchaser after the mortgage has expired by reason of not being renewed, or unless the mortgage is void *ab initio*. A landlord who illegally distrains is neither a creditor, subsequent purchaser or mortgagee, and is liable in trover to a mortgagee for goods covered by the mortgage and illegally distrained, although the registration of the mortgage is invalid (Griffin v. McKenzie, 46 U.C.Q.B. 93), unless, of course, he acquires by purchase the chattels covered by the defective mortgage, as referred to above.

A purchaser who assumes payment of a mortgage, is not a purchaser within the Act for the purpose of taking advantage of alleged defects in the mortgage (Greither v. Alexander, 15 Iowa 470); and of course when the amount of the mortgage forms part of the consideration of the purchase, the purchaser cannot deny the validity of the mortgage: Kellog v. Secord, 42 Mich. 318. But this does not preclude either a purchaser or subsequent mortgagee from shewing that the prior mortgage was absolutely void, or that it has been paid, or that the property was, in point of fact, never subject to the prior mortgage: Barry v. Bennett, 7 Met. (Mass.) 354; Housatonic v. Martin, 1 Met. (Mass.) 294. A mortgagee who sells the property under his mortgage, and derives a surplus, cannot invoke the doctrine of consolidation of mortgages and apply the surplus proceeds towards liquidating another unsecured liability of the mortgagor as against the rights of others: Chesworth v. Hunt, 5 C.P.D. 266.

A creditor is not, of course, prevented from setting up the non-registry of an instrument under the Act, by reason of his knowledge at the time his debt was contracted, that his debtor had given a bill of sale of his goods and chattels: Edwards v. Edwards, 2 Ch. D. 291. There is a statutory distinction between "creditors" and "subsequent purchasers and mortgagees." The words "good faith" affect only the latter two classes of persons.

and have no reference whatsoever to creditors; hence a mortgage is void as against creditors without any qualification by reason of the words "good faith:" Farmers Loan Co. v. Hendrickson, 25 Barb. (N.Y.) 484; Stevens v. Buffalo, etc., Ry. Co., 31 Barb. (N.Y.) 590; Sayre v. Hewes, 32 N. J. Eq. 652, 656.

In the case of mortgages not required by the statute to be registered, preference is given according to priority of execution; but, in a case where there happens to be two mortgages, both within the Act, neither of which is registered, then, if the second mortgage is taken in good faith, the curious effect is produced that the second mortgage has priority over the first, though both unrecorded. The reason of this is because the statute so states, namely, that such mortgage shall be void as against . . . subsequent mortgagees. It does not say void as against a subsequent mortgagee who has registered his mortgage, but simply that as against such mortgagee it shall be void.

The clear direction of the Act is that a prior mortgage, unregistered, shall be absolutely void as against subsequent mortgagees in good faith. Does this follow where the subsequent mortgagee does not register his mortgage? The statute says it does. The statute prescribes but a single condition to give a second mortgage priority over a first unregistered mortgage, namely, *bona fides* in the party taking it; it is not, therefore, in the competence of the Court to require the performance of a second condition, namely, that such second instrument must be put first upon the record: Winn v. Snider, 26 A.R. (Ont.) 384; De Courcey v. Collins, 21 N.J. Eq. 357; Hall v. Collins Bay Co., 12 A.R. (Ont.) 65.

An auctioneer who sells mortgaged chattels, in ignorance of the incumbrance, under instructions from the mortgagor, and delivers the goods to the purchaser from him, is liable to the mortgagee for conversion of the goods, notwithstanding that the provisions of the Act have not been complied with by the mortgagee; and the auctioneer in such case is not in the position of a subsequent purchaser of the goods: Johnston v. Henderson, 28 O.R. 25, 32 C.L.J. 679; Cochrane v. Rymill, 27 W.R. 776; Consolidated v. Curtis, [1892] 1 Q.B. 495.

A purchaser of goods from the maker of a chattel mortgage in consideration of the discharge of a pre-existing debt, is a purchaser for valuable consideration within the meaning of this

section: Williams v. Leonard, 26 Can. S.C.R. 406; Taylor v. Blakelock, 32 Ch. D. 560.

Sale of Goods not attended with Delivery.

8. Every sale of goods and chattels, not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, shall be in writing, and such writing shall be a conveyance under the provisions of this Act, and such conveyance or a true copy thereof accompanied by an affidavit of an attesting witness thereto of the due execution of the conveyance, and an affidavit of the bargainee that the sale is *bonâ fide* and for good consideration, as set forth in the conveyance, and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor, shall be registered, as hereinafter provided, otherwise the sale shall be absolutely null and void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith. R.S.O. 1897, c. 148, s. 6.

Essentials of a Sale.

In all instances where, for a valuable consideration, the absolute beneficial interest passes from seller to buyer, there exists a sale within the meaning of this section: Stevenson v. Rice, 24 U.C.C.P. 245; Williamson v. Berry, 8 How. (U.S.) 544; Gardner v. Lane, 12 Allen 39. The question of property passing is generally one of intention: Ogg v. Shuter, L.R. 10 C.P. 159; Stevenson v. Rice, 24 U.C.C.P. 245. To constitute a valid sale, there must be a concurrence of the following elements, viz.:—

(i) Parties competent to contract.

(ii) Mutual assent.

(iii) A thing, the absolute or general property in which is transferred from the seller to the buyer; and

(iv) A price in money paid or promised.

(v) Legality of object.

The words "every sale" are in no way restrictive, and embrace sales upon trusts, as well as others, assignments or sales absolute or conditional, subject or not subject to any trusts

bills of sale, transfers, grants, and other assurances of goods and chattels. Conditional sales of chattels are governed by Conditional Sales Act, 1 Geo. V. ch. 30; R.S. 1914, ch. 136.

This section means and contemplates a *bonâ fide* bargain and sale of goods for a good consideration moving from the purchaser or bargainee to the seller or bargainor: Robertson v. Thomas, 8 O.R. 20. An inventory of goods with receipt for purchase money attached, the vendor remaining in possession of the goods, is a sale in writing within the Act: but the document itself is not necessarily a bill of sale, and to be within the Imperial Act, it was held that it must amount to an assurance of the chattels at law or in equity: Ex parte Cooper, 10 Ch. D. 313; Ex parte Odell, 10 Ch. D. 76; Charlesworth v. Mills, [1892] A.C. 231. Assignments for the benefit of creditors generally, without preference or priority, are by the Ontario Act respecting assignments and preferences by insolvent persons excepted from the operation of this Act: R.S.O. 1914, ch. 134; 10 Edw. VII. ch. 64.

Where the real transaction is a sale with a right to repurchase upon certain terms, the seller can only be required to observe the requirements of this section: Hope v. Parrott, 7 O.L.R. 496. Whether or not an instrument is a bill of sale or in reality a mortgage is a question of fact to be determined by the evidence: Coons v. Elvin (1911), 2 O.W.N. 1391.

If the sale of goods mortgaged is by a landlord or public officer there is nothing to prevent the mortgagee from buying just as any stranger might do, and standing upon his right as purchaser, but if he choose to buy as a mortgagee merely to protect his interest, or to treat his mortgage as still subsisting, he may do so, and the mortgagor's right to redeem will still continue: Severn v. Clarke, 30 U.C.C.P. 372.

A sale of goods which are in the hands of a warehouseman, who becomes the agent of the transferee, and agrees to hold the goods for him, is not a sale within the Act, so as to require registration of the instrument of sale (Jones v. Henderson, 3 Man. L. R. 433); nor is a sale of growing timber: Steinhoff v. McRae, 13 O.R. 546. But a sale of growing timber to be cut and immediately removed is a sale of goods and chattels, and not an interest in land: Marshall v. Green, 45 L.J.C.P. 153.

Where a conveyance of personal property was made by antenuptial settlement by the future husband to a trustee, to hold to the use of the bargainor until the marriage, and thereafter to the use of the intended wife, who was also a party to the convey-

ance, it was held that the wife, who was described as the bargainee, might properly make the affidavit of *bona fides*, and that her beneficial interest in and possession of the goods enabled her to maintain a claim thereto on interpleader with a creditor without joining the trustee: Connell v. Hickock, 15 A.R. (Ont.) 518; 25 C.L.J. 86.

The expression "goods and chattels" is used in the restricted sense of movable goods, and does not include terms for years in real estate: Frazer v. Lazier, 9 U.C.Q.B. 679; Harrison v. Blackburn, 17 C.B.N.S. 678.

A transfer of book debts is not within the Act, and does not require registration under it in order to be valid against creditors if the transaction is otherwise unimpeachable: National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 26 O.L.R. 279; Kitching v. Hicks, 6 Ont. R. 739; Thibaudeau v. Paul, 26 Ont. R. 385, followed; Tailby v. Official Receiver, 13 App. Cas. 523, applied.

A quantity of furs was left by a furrier with a trading company to be sold, under an agreement that the receipts of each sale were to be accounted for and paid over to the furrier, as per a list furnished by him. He had the right to take from the company all or part of the goods at any time, and when the season ended all unsold should be returned to him. The company made an assignment while in possession of part of such furs, and the assignee claimed them, and it was held that the relationship between the parties was not that of vendor and purchaser, inasmuch as the purchaser had not been possessed of the goods *animus domini*, but merely with an inexclusive *jus disponendi*, the property in the goods continuing in the consignor, and consequently there was not a sale: Langley v. Kahnert, 9 O.L.R. 164, affirmed 36 Can. S.C.R. 397.

The expression "actual and continued change of possession" is defined by section 2 (a) to mean such change of possession as is open and reasonably sufficient to afford public notice thereof.

The word "writing" includes words printed, painted, engraved, lithographed, or otherwise reproduced in any visible form: R.S.O. 1914, ch. 1; 7 Edw. VII. ch. 2, sec. 7(14). If the words "shall be in writing," were omitted, could a sale of chattels by parol without a change of possession be held valid, when the Act requires every sale to be registered? The requirements of the Act could not be complied with if the sale were by

parol, and it would be no answer to make, that because registration would in such case be impossible, it therefore becomes unnecessary: Cummings v. Morgan, 12 U.C.Q.B. 567.

The phrase, "Such writing shall be a conveyance under the provisions of this Act," implies that the provisions of the Act shall apply to such writing or conveyance.

"Accompanied" is also the word used in the same connection in section 5. See note to that section.

Affidavit of Execution.

The Act requires that the affidavit of execution shall be made by an attesting, i.e., a subscribing witness, but it need not be made upon the same day as the bill of sale is executed. It will be sufficient if made at any subsequent period, in time to file the instrument within the five days limited by statute for that purpose, and it is no objection to the affidavit that it does not state on what day the bill of sale was executed (McLeod v. Fortune, 19 U.C.Q.B. 100), and in this respect the affidavit differs from that required with chattel mortgages within section 5. It does not follow that anyone connected with the bargainee is disqualified from being a witness, but the bargainee cannot himself be the witness: Seal v. Claridge, 7 Q.B.D. 516.

The affidavit must not only verify the signature of the witness, but, under the Imperial Act, must state that the deponent was present and saw the execution, and that he himself signed as a witness: Ford v. Kettle, 9 Q.B.D. 139.

The date in a bill of sale is immaterial if it is registered after its actual execution within the time required by the Act. On a *bonâ fide* sale of goods, it is not necessary that the bill of sale shall be completed by execution of the instrument in any particular time after the actual sale: McDonald v. Gaunt, 30 O.R. 398, 35 C.L.J. 172.

In the case of Canada Permanent L. & S. Co. v. Todd, 22 A.R. (Ont.) 515, the Court of Appeal for Ontario, held that an affidavit of execution of a chattel mortgage, sworn before a commissioner employed in the office of the solicitor of the mortgagee, was valid. The matter seems to have been summarily dealt with in the course of the argument, by Osler, J.A., only the other members of the Court not expressing any opinion, but apparently concurring in what he said. Counsel for the appellant relied on Con. Rule 613, and Vernon v. Cooke (1879), W.N. 132, and Osler, J.A., says: "That rule applies only to proceedings in an

action," and he goes on to say that Vernon v. Cooke was reversed. (See 49 L.J.Q.B. 767, 32 C.L.J. 733, and also Baker v. Ambrose, [1896] 2 Q.B. 372.)

The restriction of the Ontario Consolidated Practice Rules to Court proceedings appears to prevent their application to the filing of documents under the Ontario Bills of Sale Act, the filing being in the "office of the clerk of the County Court" which is not necessarily a filing in the County Court.

Authority of Agent.

As power is given by section 12 to an agent of a mortgagee to make the affidavit of *bona fides*, so by this section is power given to the agent of the bargainee to make a similar affidavit.

The affidavit can be made by one of two bargainees, when the conveyance is to two jointly, and the consideration is made up of two debts due to the vendees separately: McLeod v. Fortune, 19 U.C.Q.B. 100.

Similarly under section 12 (3), the agent is now required to state that he is aware of all the circumstances connected with the taking of the conveyance, and that he has personal knowledge of the facts deposed to. Even before this requirement appeared in the statute, it is difficult to perceive how an agent could honestly make this affidavit without being aware of all the circumstances. Section 10(3) also exacts the same requirement where the affidavit is made by an agent or officer of a corporation.

Under section 13, not only must the original or copy of the agent's authority be filed with the conveyance, but it must be attached thereto.

His authority may be a general one. See section 15.

The affidavit of *bona fides* must state:—

(i) That the sale is *bonâ fide* and for good consideration, as set forth in the conveyance.

(ii) That it is not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor.

Bona Fides of Consideration.

Not only is it necessary that the sale should be *bonâ fide*, but it must be for good consideration; so when the affidavit accompanying the assignment states that it "was made *bonâ fide*," but omits the words "for good consideration," the assignment cannot

be upheld (Mason v. Thomas, 23 U.C.Q.B. 305; Holmes v. Penney, 3 K. & J. 90, 3 Jur. N.S. 80, 26 L.J. Ch. 179); and the words "that the *bill of* sale was executed in good faith, and for good consideration," when the affidavit should state that the *sale* is *bonâ fide* and for good consideration, render the instrument invalid: Boynton v. Boyd, 12 U.C.C.P. 334.

The *bona fides* to be considered is that of the person from whom the consideration moved: *per* Wood, V.-C., Holmes v. Penney, 3 K. & J. 90; Thompson v. Webster, 4 Drew. 628, 4 Dej. & J. 600, 7 Jur. N.S.H.L. 531; Cornish v. Clark, L.R. 14 Eq. 184.

The conveyance must shew the true and full consideration for which it is given. Hence it was, that an assignment, registered under the statute, for the nominal consideration of five shillings, with a separate declaration of trust referred to and forming part of the instrument, but not registered, was held invalid: Fraser v. Gladstone, 11 U.C.C.P. 125; Arnold v. Robertson, 8 U.C.C.P. 147.

Marriage, being the most valuable of all considerations, is the highest consideration recognized by law, and one which it is the policy of the law to give paramount force to, and is a good consideration for a conveyance under this statute (Leys v. McPherson, 17 U.C.C.P. 266; Ex parte Marsh, 1 Atk. 158; Brown v. Jones, 1 Atk. 188; Lanoy v. Duke of Athol, 2 Atk. 445; Campion v. Cotton, 17 Ves. 264; Colombine v. Penhall, 1 Sm. & G. 240; Fraser v. Thompson, 1 Giff. 49; Bulmer v. Hunter, L.R. 8 Eq. 6; Re Clint, L.R. 17 Eq. 115; Russel v. Hammond, 1 Atk. 15; Arundell v. Phipps, 10 Ves. 139; Ward v. Shallet, 2 Ves. Sen. 18; Ramsden v. Hylton, 2 Ves. Sen. 308; Townshend v. Windham, 2 Ves. Sen. 4; Ford v. Stuart, 15 Beav. 495, 499; Dalrymple v. Dalrymple, 2 Hagg. Con. 54, 62); and blood consideration, or a consideration of natural love and affection, is a "good" consideration, although the transfer may be voidable or objectionable under statutes relating to voluntary or preferential conveyances: Mathews v. Feaver, 1 Cox 280; Twyne's case, 3 Coke 80, 1 Sm. L.C. 1; see Assignment and Preference Act, R.S.O. 1914, ch. 134; 10 Edw. VII. ch. 64.

The words "not for the purpose of holding or enabling the bargainee to hold the goods, etc., against the creditors of the bargainor," must be read as meaning that the bargainee should swear that the object of the conveyance was not merely to enable him to protect or hold fraudulently or colourably the goods for

the benefit of the bargainor against his creditors: Arnold v. Robertson, 8 U.C.C.P. 147; Fraser v. Gladstone, 11 U.C.C.P. 125. Where an affidavit accompanying an assignment for registration stated that the deed was not made for the purpose of enabling the "assignor," instead of the "assignee" as required by statute, to hold the goods against the creditors, the assignment was held bad; for, though it might be a mere clerical error, the court, by accepting such an affidavit, might be assisting in an intentional evasion of the statute: Olmstead v. Smith, 15 U.C.Q.B. 421.

Though the statute mentions the words "goods," still an affidavit of *bona fides* will be sufficient when for "goods" the words, "the estate and effects mentioned," are substituted therein; the latter words being more comprehensive than the former: Mason v. Thomas, 23 U.C.Q.B. 305. Though there be two bargainees, and the affidavit of *bona fides* states that the conveyance was "not for the purpose of enabling the bargainee to hold the goods against the creditors," etc., the instrument will not be considered void (Tyas v. McMaster, 8 U.C.C.P. 446); but should the word "creditor" instead of "creditors" be written in the affidavit, the conveyance is void: Harding v. Knowlson, 17 U.C.Q.B. 564.

Registration of Bills of Sale.

The conveyance, with the affidavit of *bona fides* and affidavit of execution, shall be registered as provided by sections 18 and 20. The question whether a copy of a bill of sale, with the necessary affidavits, can be filed under this section, in substitution of the bill of sale itself, came up for the opinion of the Court in Harris v. Commercial Bank, 16 U.C.Q.B. 437, followed in Perrin v. Davis, 9 U.C.C.P. 147. McLean, J., there concurred with Robinson, C.J., in his remarks, that this section should be read in conjunction with section five and other sections of the statute, all of which bore upon the question. Robinson, C.J., in that case said: "We must consider that the copy will give as full information of the fact of the assignment and of the contents as the original deed would do, though the opportunity is not afforded of inspecting the signatures of the parties, which is not, however, the object of any of our registry laws. However, the present section expressly allows the filing of a true copy of the conveyance.

Section 18 requires the instrument to be registered in "

county or district where the chattels are situated at the time of execution thereof, "within five days from the execution thereof." Either the first or last day of the five is to be excluded: McLean v. Pinkerton, 7 A.R. (Ont.) 490.

If the last day of the five falls on a Sunday or other day when the clerk's office is closed, the bill of sale can, probably under the Interpretation Act, be registered on the first following day when the office is open: R.S.O. 1914, ch. 1; 7 Edw. VII. ch. 2, sec. 7, sub-secs. 16, 18.

A distinction is to be here noted between this section and section 7. The words used in section 7 are "in good faith *for valuable consideration*," while this section declares the instrument void, for non-compliance therewith, as against creditors and subsequent mortgagees and purchasers in *good faith*, without requiring a *valuable consideration*.

A bill of sale was supported where the affidavit stated that the sale was *bonâ fide*, and for good consideration, namely, $830 "advanced by the bargainee by way of a loan," it being shewn that the bill of sale was in fact taken in satisfaction of a previous loan of that amount: Ormsby v. Jarvis, 22 O.R. 11, 28 C.L.J. 182.

A purchaser of goods who neglects to comply with this section cannot invoke its provisions as against a subsequent purchaser in good faith, and the latter, even though also failing to comply with the Act, obtains priority: Winn v. Snider, 26 A.R. (Ont.) 384.

Where the creditors of an insolvent debtor attack a transfer of certain personal property as fraudulent and as hindering and delaying the creditors, and where some of the property in question could never have become exigible to answer the claims of the creditors, the attack fails as to the non-exigible property: *per* Idington, J., Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

When Mortgage to take Effect.

9. Every such mortgage or conveyance shall operate and take effect upon, from and after the day and time of the execution thereof. R.S.O. 1897, c. 148, s. 4.

Effect from Time of Execution.

This section was originally taken from 26 Vict., 1863, ch. 46, sec. 1. Until the passing of that Act there was no statutory enact-

ment causing a mortgage or bill of sale, duly registered, to relate back to the period of its execution. It was the statute 20 Viet., 1857, ch. 3, that limited to five days the period within which instruments under the Act should be filed. Before then, though a reasonable time might not have elapsed since the execution of an assignment, a writ of *fi. fa.*, coming in before the filing of the assignment was held entitled to prevail (Carscallen v. Moodie, 15 U.C.Q.B. 92); and likewise it was held after the passing of the statute, 20 Viet. ch. 3, that the registering of a chattel mortgage within the statutory limit of five days did not cause it to operate and have relation back to the day of its date, but that it took effect only from its registry, and that a *fi. fa.*, placed in the hands of the sheriff between the date of the mortgage and its registry, would therefore cut it out: Feehan v. Bank of Toronto, 10 U.C. C.P. 32; Haight v. McInnes, 11 U.C.C.P. 518; Shaw v. Gault, 10 U.C.C.P. 236; and see Cherryworth v. Dailey, 7 Ind. 284; Wilson v. Leslie, 20 Ohio 161; Feehan v. Bank of Toronto, 19 U.C.Q.B. 474.

Should there arise a question as to priority between a chattel mortgage and a writ of execution in the sheriff's hands, then the Court will ascertain at what hour of the day the mortgage was executed, in order to give the party equitably entitled the benefit of every moment of time: McMartin v. McDougall, 10 U.C. Q.B. 399.

The Courts will consider a fraction of a day when the justice of the cause requires them to do so: Beekman v. Jarvis, 3 U.C. Q.B. 280. Of course the careful practitioner never fails to examine the sheriff's office for encumbrances against the property, in addition to procuring a statutory declaration from the mortgagor as to encumbrances. It is from the execution of the instrument, not from its date, that the mortgage takes effect, in so far as creditors and subsequent hargainees are concerned.

Manner of Describing Property.

10. Every mortgage and every conveyance or agreement required to be registered under this Act shall contain such sufficient and full description of the goods and chattels that the same may be thereby readily and easily known and distinguished. R.S.O. 1897, c. 148, s. 32.

Book Debts not under the Act.

Book debts are not within the Ontario Bills of Sale and Chattel Mortgage Act, and the transfer of them does not require

registration, and therefore the mortgagee in an unregistered mortgage covering book debts as well as other personal property which would require its registration to make it valid as against creditors of the mortgagor, is entitled to recover the amount realized from the book debts by the mortgagor's assignee for the benefit of creditors or by the liquidator appointed under the Winding-up Act, R.S.C. 1906, ch. 144, even though no notice was given by the mortgagee to those owing the book debts: National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 3 O.W.N. 1093, 26 O.L.R. 279, 22 O.W.R. 933.

Floating Charges on Company's Assets.

A "floating charge" passing no property in the goods and conferring no rights of possession or interference therewith, but giving preferential rights on the winding-up of a company, may be created as to present and future property of a company without coming within the terms of the Bills of Sale and Chattel Mortgage Act: National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 22 O.W.R. 933, 3 O.W.N. 1093, 26 O.L.R. 279. [Johnston v. Wade, 17 O.L.R. 372, specially considered; Re London Pressed Hinge Co., [1905] 1 Ch. 576, specially referred to.]

Sufficiency of Description.

This provision was first introduced by 20 Viet. (1857) ch. 3; the word "sufficient" being subsequently substituted for the word "efficient" found in that statute. Instruments under sections 5, 6 and 8, as well as sections 16 and 17, would undoubtedly be included.

It is not required, as between the bargainor and bargainee or mortgagor and mortgagee, that such a full and sufficient description should be contained in the instrument as is pointed out by this section. It is mainly directed for the protection of creditors and subsequent purchasers or bargainees, and the subsequent taking possession of the chattels by the mortgagee or bargainee, under section 23, will not avail as against persons who became creditors or purchasers, or mortgagees before such taking of possession.

There are no words in the chattel mortgage Acts that have produced more numerous decisions than the words, "such full and sufficient description," etc., etc. The necessity for a full description is explained in the words of the statute that the goods

and chattels mortgaged may be "thereby readily and easily known and distinguished."

The object and policy of the law was no doubt to prevent secret and fraudulent assignments and mortgages of chattels, and to afford means by which persons having dealings with mortgagors, or otherwise interested, may readily obtain accurate information by an inspection of the instrument filed, and to enable such parties to distinguish the articles assigned. And if persons who claim under such instrument do not take the precaution, or trouble, to follow the enactments of the statute, and omit to describe in some reasonable way the chattels intended to be covered by the instrument itself, so that their identity may be ascertained, and if loss by reason of such omission is the result, they are themselves to blame: *per* Morrison, J.A., in Holt v. Carmichael, 2 A.R. (Ont.) 644.

What is such a description is a question that has arisen and still is frequently arising, and has occasioned not a little conflict of judicial opinion. Anyone who may read or examine the instrument containing a description of the property sold or mortgaged, should be in a position to identify the chattels from the description itself, and by means of enquiry which the instrument itself indicates or directs: Chapin v. Crane, 40 Me. 561; Elder v. Miller, 60 Me. 118; Showegan Bank v. Farron, 46 Me. 239; Winter v. Landphere, 42 Iowa 471; Smith v. McLean, 24 Iowa 322; Lawrence v. Evatts, 7 Ohio St. 194; Tindall v. Wasson, 74 Ind. 495. It need not, however, be such a description as that, with the deed in hand, without other enquiry, the property could be identified, but there must be such material on the face of the mortgage as would indicate how the property may be identified if proper enquiries are instituted: *per* Ritchie, C.J., McCall v. Wolff, 13 Can. S.C.R. 133. The description should be such as to furnish the ability to know and distinguish the goods mortgaged or sold not alone at the time of the execution of the instrument, but at any subsequent period during the currency of the written securities: *per* Wilson, C.J., Corneill v. Abell, 31 U.C.C. P., at p. 109. Hence, it is not necessary to the validity of the instrument that it should so describe the property as to enable a person to distinguish the articles of property mortgaged by merely casting his eye upon them: Holt v. Carmichael, 2 A.R. (Ont.) 639. Written descriptions of property are to be interpreted in the light of the facts known to, and in the minds of the parties at the time; they are not prepared for strangers, but for

those they are to affect—the parties and their privies: Wiley v. Snyder, 34 Mich. 60; yet they must be such as will enable the articles to be identified as against third parties, creditors or others, claiming an interest in the property: McCall v. Wolff, 13 Can. S.C.R. 133.

A mortgage on saw logs will bind the lumber into which they are sawn; but the mortgagee must prove that such lumber was made out of the identical logs mortgaged: White v. Brown, 12 U.C.R. 477, and a mortgage of leather covers shoes subsequently made from such leather: Putman v. Cushing, 10 Gray (Mass.) 334. A mortgage of "100,000 feet of white pine saw logs, now on North Branch so called, Thunder Bay River," without further description has been held to be void for uncertainty (Richardson v. Alpena, 40 Mich. 203, 8 Central L. J. 297), but if the description identified the property by its mark it would be sufficient, and especially so if the description provides a means of separating the mortgaged property from others of a like kind: Merchants' Nat. Bank v. McLauchlin, 1 McCrary 258.

Before the passing of 20 Vict. ch. 3, questions arose in our courts as to the sufficiency of a description of goods at common law. So at common law the schedule of personal property in these words, "all the horses, mares, cows, heifers, calves, sheep, lambs, pigs, waggons, buggy, harness, farming utensils, hay, household furniture, books, and every other article or thing on or about the south half of lot 24, in the third concession in the township of London," was held to contain a sufficient description: Balkwell v. Beddome, 16 U.C.R. 203. General words are sometimes all that can be employed in describing property intended to be covered by an instrument under the Act, unless a minute list is taken of every article mortgaged, and then it is necessary that the location of the property, at the moment of the execution of the deed, should be defined and ascertained by the instrument itself, and, to ensure accuracy and safety in the description, the statement should be added that the articles, etc., are all the goods answering such description on the premises: McCall v. Wolff, 13 Can. S.C.R. 130.

Thus, a description of the goods assigned as all the goods, etc., of the assignor, being in and about the warehouse on Y. street, and all his furniture in and about his dwelling-house on W. street, and all bonds and securities for money, loans, stock, notes, etc., etc., whatsoever and wheresoever belonging, due or owing to him, was held sufficient to satisfy the statute 20 Vict. ch. 3, sec. 4: Har-

ris v. Commercial Bank, 16 U.C.Q.B. 437. Property, such as bonds, bills and accounts, railway stocks and things of that kind, are not required to have that particular description necessary under the statute in regard to other property: Harris v. Commercial Bank, 16 U.C.R. 437; Burdett v. Hunt, 25 Me. 419; Russell v. Wimel, 37 N.Y. 591. An assignment in the form of "all the assignor's personal property and effects whatsoever and wheresoever," will be insufficient, these words being too indefinite; their use gives no force or meaning to this section whatsoever: Harris v. Commercial Bank, 16 U.C.R. at p. 444; Howell v. McFarlane, 16 U.C.R. 469. When the locality of property in a mortgage is clearly and sufficiently defined, then general words describing the goods and chattels mortgaged are usually sufficient. Thus, a mortgage of "all the dry goods, boots and shoes, millinery goods, and gentlemen's furnishing goods and stock-in-trade," now in the possession of the mortgagor, and being in the store occupied by him, being store number three, of Smith's Block, on the south side of King street, in the town of ———, is a good and sufficient description (Conklin v. Shelly, 28 N.Y. 360; Gardner v. McEwan, 19 N.Y. 123; Re Thirkell, 21 Gr. 492; Ross v. Conger, 14 U.C.R. 325; Fraser v. Bank of Toronto, 19 U.C.R. 381; Powell v. Bank of Upper Canada, 11 U.C.C.P. 303), and a general description of this kind, where locality is added, is in no way less effective from the instrument previously specifically and minutely describing other articles upon the *locus in quo*: Harding v. Coburn, 12 Met. (Mass.) 333; but though this is a sufficient description, it only is so, of course, of the goods that were in the shop at the date of the execution of the instrument, and such a description might, and most likely would, occasion a serious difficulty in identifying the property covered by the mortgage some months later, when, perhaps, in the meantime, other stock and property were brought upon the premises to replenish that in the shop at the time of the execution of the deed, but in the meantime sold and parted with in the ordinary course of business. It can easily be imagined what difficulty a bailiff would have in distinguishing between different quantities of the same kind of goods, only some of which were covered by a mortgage, but all of which answered to the description contained therein. Yet it is necessary, in the event of litigation, for the party setting up the mortgage to establish the fact that those goods in dispute were in the shop at the time of the execution of the mortgage: Ross v. Conger, 14 U.C.R. 325. To avoid the risk to a security by way of mortgage upon stock

so described, it is always desirable to provide for the deed covering stock brought into the stop in renewal, substitution or addition to that which may be mortgaged, for, unless the deed so provides, and it clearly appears from the deed itself, to be the intention to bring within its operation after-acquired property, the deed will not have such effect (Mason v. McDonald, 25 U.C.C.P. 435; McPherson v. Reynolds, 6 U.C.C.P. 491); and even though the deed contain a power to seize all goods, chattels and effects, the power will not otherwise be extended to goods not upon the premises at the execution of the deed: Tapfield v. Hillman, 6 Scott N. R. 967, 6 Man. & Gr. 245, 12 L.J.C.P. 311; Reeve v. Whitmore, 33 L.J. Ch. 63. This may be done by the mortgage including, in addition to the stock upon the premises when executed, any and all stock purchased thereafter by the mortgagor and which may be in his possession upon the said premises during the existence or continuance of the security or any renewal or renewals thereof: Re Thirkell, 21 Gr. 492; Stephens v. Pence, 56 Iowa 257. A description of property as the "live and dead stock, growing and other crops and other goods, personal chattels and effects whatsoever, which at any time thereafter should be in or about the same or any other premises of the mortgagor, whether brought there in substitution for, renewal of, or in addition to the goods, chattels and effects assigned, or any of them, or otherwise howsoever during the time that any money be owing upon the security" (Clements v. Matthews, 11 Q.B.D. 808), or as "the stock-in-trade, goods, chattels and effects which should or might at any time or times during the continuance of the security be brought into the messuage, warehouse and premises, or be appropriated to the use thereof, either in addition to or in substitution for stock-in-trade, chattels and effects now being therein or any of them" is good: Lazarus v. Andrade, 5 C.P.D. 318.

Substituted or After-acquired Property.

An attempt has been made to draw a distinction between substituted property and after-acquired property, as to the completeness of description, but it is doubtful if such a contention is tenable: Chidell v. Galsworthy, 6 C.B.N.S. 471.

An instrument describing after-acquired personalty in the words "all his present and future personalty," will only suffice to charge in favour of the vendee, as between the parties, all the personal property at the date of the instrument, but will not operate so as to charge after-acquired property; such a descrip-

tion does not confine the assignment to specific goods, but to undetermined property: Tadman v. D'Epineuil, 20 Ch. D. 758. And though after-acquired property is properly and specifically described, yet inasmuch as the assignment thereof, though absolute in form, amounts to a contract to assign, for the breach of which the assignor incurs a liability provable in bankruptcy, and from which he is released by his discharge, such description will not cover goods brought on the premises after the discharge in bankruptcy has been granted: Collyer v. Isaacs, 19 Ch. D. 342.

On the other hand a description as follows: "The party of the first part doth assign unto the party of the second part all his right and claim to the goods and stock-in-trade in the store of the said party of the first part to an amount sufficient to reimburse the said party of the second part whatever he may pay in consequence of becoming such surety as aforesaid, and should there not be stock enough for that purpose in the store at such time, the balance, after deducting the value of the said stock, shall be made up of the book debts then on the books of the party of the first part," is not sufficiently comprehensive to cover the substituted, renewed or added stock-in-trade: Kitching v. Hicks, 20 C.L.J. 112.

At common law an assignment was not good, so far as it professed to convey after-acquired property; it could only operate upon such property as was in existence, and which was the grantor's at the time of the assignment, or in which he had some interest, unless, however, the grantor ratify the sale of the "after-acquired property" by some act done by him after the property is acquired by him; and an assignee acquired no valid title by such instrument to such property when there was no *novus actus*: Lunn v. Thornton, 1 C.B. 379.

Where a chattel mortgage conveys the stock-in-trade, shop, contents, including shop and office fixtures, scales and appurtenances, which had been purchased by the mortgagor from a specified seller with a further provision purporting to cover and include "not only all and singular the present stock of goods and all other the contents of the mortgagor's shop, but also any other goods that may be put in said shop in substitution for, or in addition to those already there, as fully and to all intents and purposes as if said added or substituted stock were already in said shop and particularly mentioned;" such provision to cover other or after-acquired property is aimed at "stock-in-trade" and requires clear words in order to cover other property sought

to be held, the legal principle of construction being that general words following specific words are ordinarily construed as limited to things *ejusdem generis* with those before enumerated: Dominion Register Co. v. Hall & Fairweather, 8 D.L.R. 577, affirmed 11 D.L.R. 366.

But a chattel mortgage on *de facto* fixtures although duly filed, will not prevail as against a subsequent purchaser or mortgagee of the land under a registered mortgage or conveyance, and not having actual notice of the prior chattel mortgage: Bacon v. Rice, Lewis & Son, (Ont.) 33 C.L.J. 680.

In a chattel mortgage the goods were described as follows: "all of which said goods and chattels are now the property of the said mortgagor and are situated in and upon the premises of the London Machine Tool Co. (describing the premises) on the north side of King street, in the city of London," and in an attached schedule was this description: "And all machines in course of construction, or which shall hereafter be in course of construction, or completed, while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor, or which are now or shall be in any other premises in the city of London." It was held that the description in the schedule could not extend to goods wholly manufactured on premises other than those described in the mortgage, and, if it could, the description was not sufficient within the meaning of Bills of Sale Act (R.S.O. 1887, ch. 25) to cover machines so manufactured: Williams v. Leonard, 26 Can. S.C.R. 406.

A clause in a bill of sale which purports to include after-acquired property confers, as to the latter, a mere equitable title which must give way to a legal title obtained *bonâ fide* and without notice: Whymot v. McGinty, 7 D.L.R. 618, 12 E.L.R. 116; Holroyd v. Marshall, 10 H.L.C. 191.

Nothing at common law can be mortgaged but that which is *in esse*; and a man cannot give away that which he hath not: Lunn v. Thornton, 1 C.B. 379; Short v. Ruttan, 12 U.C.R. 79; Cummings v. Morgan, 12 U.C.R. 565; Congreve v. Evetts, 10 Ex. 297; Mogg v. Baker, 3 M. & W. 195; Gale v. Burnell, 7 Q.B. 850; Otis v. Sill, 8 Barb. 102; Yates v. Olmsted, 65 Barb. 43. When, therefore, sales are made in the ordinary course of trade, the stock is replenished and deficiencies supplied; the stock bought from the proceeds of the mortgaged property is not liable to the mortgagee's claim: Anderson v. Howard, 49 Ga. 313. We have seen, however, that an assignment of after-acquired prop-

erty is good, and where goods are of a nature to be used along with, or in substitution for goods actually in existence, and the subject of a mortgage, then such after-acquired property can be subject to a mortgage: *per* Blake, V.-C., Re Thirkell, 21 Gr., at p. 509.

And by section 11 of this Act its provisions are to extend to mortgages and sales notwithstanding that the goods and chattels may not be the property of or may not be in the possession, custody or control of the mortgagor or bargainor.

Indefiniteness in Description.

A description of "12 oil paintings in gilt frames" in a particular room of a dwelling house is good (Cooper v. Huggins, (1889), 34 Sol. J. 96), while "twenty-one milch cows" on a farm of the grantor, describing it, is not sufficient: Carpenter v. Deen, 23 Q.B.D. 566. But a description of a piano as of "Dominion" make, specifying the number as referring to the manufacture of pianos under that trade name, is sufficient: Field v. Hart, 22 A.R. 449, 31 C.L.J. 520.

A chattel mortgage purporting to include "all machines, etc., in course of construction or which shall hereafter be in course of construction or completed while any of the moneys hereby secured are unpaid, being in or upon the premises now occupied by the mortgagor, or which are now or shall be on *any other premises* in the city of London" cannot extend to goods manufactured on new premises and which were never on the property specially mentioned in the mortgage; but even if so construed the description is not sufficient under this section: Williams v. Leonard, 26 Can. S.C.R. 406.

A description, as follows, of a store stock in a rural locality is sufficient; all and singular, the goods, chattels, stock-in-trade, fixtures and store building of the mortgagors used in or pertaining to their business as general merchants now being in the store of said mortgagors on the north half of section 6, township 19, range 28, etc.: Thomson v. Quirk, 18 Can. S.C.R. 695.

It is not sufficient to state merely the street upon which the mortgaged stock-in-trade happens to be, without saying that it was in the shop or on the premises of the assignor situate upon that street: Wilson v. Kerr, 17 U.C.R. 168; or otherwise identifying the building.

The word stock is a convertible form. It is the capital or property of a merchant, tradesman, or company invested in any

business including merchandise, money and credits, and it may mean the stock of a grocer or dry goods merchant, or a boot and shoe merchant, and therefore a description such as, "the stock-in-trade of the mortgagor, situate at ——" is not sufficient without mention in the instrument of the trade or occupation of the mortgagor, and especially is it not sufficient without mention of locality at all.

When the mortgagor is described in the premises of the deed as being of the occupation of merchant, the nature or kind of the stock cannot be ascertained, for the word merchant is as convertible as the word stock: Wilson v. Kerr, 17 U.C.R. 168; Nolan v. Donnelly, 4 O.R. 440. But, when the nature of the trade or occupation of the grantor is definitely ascertained in the premises to the deed, it will then be assumed that "the stock-in-trade of the grantor, situate at ——" is of a description corresponding with the occupation of the grantor as previously described. Where, for instance, the mortgagor is described as a druggist, and the instrument describes the property simply as "the stock-in-trade of the mortgagor, situate at ——" etc., the court will assume that the property mortgaged is a stock of drugs, chemicals, and other goods, such as a druggist usually has to sell.

Where the description was "also the following goods and articles, being in the store of the party of the first part, on the corner of Queen and May streets, in the said town of Brampton, that is to say, eighty-five gallons of vinegar," giving a long list, and "also the following goods, being of the stock-in-trade of the party of the first part, taken in the month of April last, that is to say, sixteen pieces of tweed," it was held that all the goods were sufficiently described, for the last parcel of goods might be taken as described to be in the store (Mathers v. Lynch, 28 U.C.R. 354), and where a schedule was headed "household furniture and property of J. R. McD." and the several apartments containing the furniture were specified, it was held sufficient, as it might be assumed to refer to the party's residence: Fraser v. Bank of Toronto, 19 U.C.R. 381; see Blailberg v. Parke, 10 Q.B.D. 90.

But a description such as the following: "all and singular, the personal estate and effects, stock-in-trade, goods, chattels, rights and credits, fixtures, book debts, etc., and all other the personal estate and effects whatsoever and wheresoever and whether upon the premises where said defendant's business is carried on, or elsewhere, and which said debtors are possessed of or entitled to in

any way whatsoever, including, among other things, all the stock-in-trade, goods and chattels which they now have in their store and dwellings in the village of Renfrew aforesaid; also all and singular the personal estate and effects of every kind and nature," etc., is not sufficient description within the meaning of the Act (Nolan v. Donnelly, 20 C.L.J. 16), because, no doubt, there is a total absence of description by locality: The omission to identify by locality makes the following description defective within the meaning of the statute: "all and singular the personal estate and effects, stock-in-trade, goods, chattels, rights and credits, fixtures, book debts, notes, accounts, books of account, choses in action, and all other the personal estate and effects, whatsoever and wheresoever, and whether upon the premises where said debtors' business is carried on, or elsewhere, and which the said debtors are possessed of or entitled to in any way whatever." Without the words "whether upon the premises where said debtors' business is carried on, or elsewhere," the description would be fatal, and with such words it cannot be less fatal, for none of the goods are described as being on any particular premises; it is quite consistent with the language used, that every article was "elsewhere," and "elsewhere" means "anywhere": Whiting v. Hovey, 13 A.R. (Ont.) 7.

From the words "furniture and household stuff," though no locality is mentioned, yet, if all that the description lacks is the locality, the assumption will be that the description refers to the mortgagor's residence, and all articles in detail such as "blankets and counterpanes," "household linen," "silver," "glass," "electro and plated ware," "cutlery," "china," and "earthenware," may be properly treated as coming within the general terms "furniture and household stuff": Wilson v. Kerr, 17 U.C.R. 168, 18 U.C.R. 470; Kingston v. Chapman, 9 U.C.C.P. 130; Fraser v. Bank of Toronto, 19 U.C.R. 381; Powell v. Bank of Upper Canada, 11 U.C.C.P. 303. The words "also the stock of gold and silver watches, jewellery and electro-silver plate, which at the date hereof is in the possession of the mortgagor in his said store," is a sufficient description, notwithstanding that the electro-plated goods and watches were numbered, and might have been identified thereby: Segsworth v. Meriden Silver Plating Co., 3 O.R. 413; and goods described as "one kitchen table, four chairs," etc. (describing them) "contained in and about the dwelling-house and barn of the mortgagor situate at, or on lots" etc., has been held to be sufficient: Nattrass v. Phair, 37 U.C.R. 153.

Where goods intended to be included in a chattel mortgage are by mistake described as being situate upon the premises on the north-east corner of a certain street, but at the time of the execution of the mortgage are situated on the north-west corner, the erroneous part of the description may be rejected, and the statement that they were contained in the mortgagor's dwelling-house will govern in support of a valid description otherwise contained in the instrument: Accountant v. Mareon, 30 O.R. 135, 35 C.L.J. 235.

It must not be understood, as being the law, that, without a description by locality of the property mortgaged, the deed necessarily becomes invalid as against the parties attacking it. If the goods are themselves described with reasonable clearness, so that their identity is unquestionable, then the description will be good without any mention of a place where the goods are at the time of the execution of the mortgage (Mason v. McDonald, 25 U.C.C.P. 435); and even should the wrong locality be mentioned, the reference thereto will be considered surplusage, if otherwise the property is sufficiently identified by description in itself: Spaulding v. Mozier, 57 Ill. 148; Adamson v. Peterson, 34 Alb. L.J. 373.

For instance, the description of "two sets of blacksmithing and one set of waggon-maker's tools complete," in itself afford no means of identifying the goods intended to be mortgaged, but with the assistance of locality it becomes sufficient: Mason v. MacDonald, 25 U.C.C.P. 435. And, also, where the goods were specified as particularly mentioned in a schedule annexed, in which they were described as "one buggy, one cutter, one cart, one bread sleigh, two sets of harness, one horse, one chaff cutter," and the following household furniture, namely: "in the small parlor, one stove," etc., etc., enumerating the articles in the different rooms, the description was held sufficient as to the furniture, but insufficient as to the other goods: Sutherland v. Nixon, 21 U.C.R. 629. On the other hand, it is not difficult to perceive that a careful and minute description of some chattels, such, for instance, as "one brown stallion ten years old, one bay horse eight years old, one black mare nine years old": Corneill v. Abell, 31 U.C.C.P. 107, even without locality, would facilitate identification far more easily than an imperfect description of an animal itself, even with its whereabouts at the date of the execution of the instrument carefully defined. Locality of a mere loose chattel is held to complete a full and sufficient description

of it, by which it may be easily known and distinguished, when it is impossible it can be such a description as can enable such chattel to be easily known and distinguished unless by attributing to a movable the characteristic of an immovable, and letting in as a consequence extrinsic evidence: *per* Wilson, C.J., Nolan v. Donnelly, 4 O.R. at p. 446.

Under the Imperial Act, 45-46 Vict. ch. 43, a bill of sale was not void simply because it omits to state the locality whereat or whereupon the chattels are: Ex parte Hill, 17 Q.B.D. 74; Ex parte Nat. Mer. Bank, 15 Ch. D. 42; Jones v. Harris, L.R. 7 Q.B. 157, as it merely provides that the bill of sale shall be void as regards the personal chattels not specifically described; these words mean described according to their species, and do not mean description by locality. That does not require a description by locality to assist in ascertaining the identity of the goods; but as our statute is directed at identification of the chattels, any words that would lead the better to that identification are not only advisable, but are necessary, and therefore, when, without locality, identification is impossible, then description by locality becomes a *sine qua non*. The Imperial Act appears to be directed towards enabling a person who is about to deal with another person to see whether that person had given a bill of sale of his goods: *per* Manisty, J., Ex parte Hill, 17 Q.B.D. 74. Our statute has the same object, with the additional one that the goods may be readily and easily distinguished. Still it is suggested that decisions under the Imperial Act must have much bearing upon our statute, on account of the word "specifically" being used in the former to interpret the description thereby required. This word is a word of definition, intended, to some extent, at all events, to limit generality of description, and it cannot be satisfied without something in the nature of description which helps to separate the thing described from the rest of the things of the same class.

The case of Davies v. Jenkins, [1900] 1 Q.B. 133, turns partly on the sufficiency of a description of property in a bill of sale, and that is the only point for which it is necessary here to refer to the case. The property, purported to be covered by the bill of sale in question, consisted of farm stock and implements. In the schedule the farm stock was described as "stock: 2 horses, 4 cows," and this was held to be an insufficient description. The English Act, 45 & 46 Vict. ch. 43, sec. 4, requires the property intended to be affected to be "specifically described." The Ontario Act requires such sufficient and full description of

the chattels that the same may be thereby readily and easily known and distinguished, and it would seem that at least as specific a description is necessary under this Act as under the English Act. On this point Boldrick v. Ryan, 17 Ont. App. 253, and Corneill v. Abell, 31 C.P. 107, may be referred to. See 36 C.L.J. 204.

The description should in some way be specifically applicable to the particular chattels assigned; it is not satisfied by words which will answer just as well for any other things of the same kind and equal in number; therefore a description of "four hundred and fifty oil paintings in gilt frames, three hundred oil paintings unframed, fifty water-colours in gilt frames, twenty water-colours unframed, and twenty gilt frames," was held not to be specifically described within the meaning of the Imperial Act: Witt v. Banner, 20 Q.B.D. 114.

Locality must nevertheless be understood not to have the effect of preserving the validity of a general description otherwise bad; for example, a description of "all the mortgagor's cattle" on a lot, specifying the lot, would not be a good description, within the Act, of the mortgagor's horses, though it is the law that "horses" are covered by the word "cattle": Wright v. Pearson, L.R. 4 Q.B. 582; see Colam v. Pugett, 12 Q.B.D. 66.

Some property, especially such as from its nature or quality, is moved or taken about from place to place, can be best described for the purpose of identification by simply an accurate description of itself. Dispensing with such description, and relying upon its identification by describing it as of a certain locality at the time of execution of the mortgage, might prove unsatisfactory, especially after a lapse of time and a continual changing about of the property itself.

Sheriffs and others cannot be said to be protected by *locality* given one hour to an article—as a watch, chair, table, cow, and the like—which may be removed the next hour, and when an inspection of that locality the next day would be no assurance that the articles then found there were the same articles which had been there and were transferred the day before: Wilson, C.J., Corneill v. Abell, 31 U.C.C.P. at 110. Indeed, the addition of "locality" may create an additional risk to the security, for when "locality" is inserted and relied upon (and it is generally inserted) an incorrect statement of locality might, if it could not be rejected as surplusage (Spaulding v. Mozier, 57 Ill. 148;

Adamson v. Peterson, 34 Alb. L.J. 373), vitiate the mortgage; thus describing the premises by mistake as north half of lot "13" instead of "14." This error had been held to be fatal to a mortgage so far as the crops said to be in the ground, and mortgaged, were concerned: Grass v. Austin, 7 A.R. 511; Adams v. Com. Bank, 53 Iowa 491. In like manner describing goods as being "now in and upon" a certain locality, limits the goods, to which the mortgage refers, to those goods only that were, at the time of the execution of the mortgage "now in and upon" the *locus in quo,* and will disentitle the mortgagee to claim goods intended to be covered by the mortgage, but which, at the time of the execution of the mortgage were not upon the premises mentioned in the mortgage: Donnelly v. Hall, 7 O.R. 581. When goods are in a customs warehouse, a description of them by locality as being in "bond" is sufficient, though a mortgage upon such goods is not within the scope of the Act: May v. Security Loan & Savings Co., 45 U.C.R. 106.

An accidental and unintentional error in the description of a chattel may sometimes be cured by identifying it in other ways, for instance, if the description is "two bay horses which the mortgagor uses for his omnibus," and one of the horses happens to be black, not bay, but was the one intended to be mortgaged, and which was driven, and used in the omnibus, the *falsa demonstratio* as to colour might be rejected: Fitzgerald v. Johnston, 41 U.C.R. 440; Tant v. Harvey, 55 Iowa 421. So, also, where the mortgage is of "all the staves I have in M, the same which I purchased from F," and it appeared that the mortgagor had no staves in M, but close thereto, and purchased from F, it was held that the first part of the description might be rejected as false, the remainder being sufficient to pass the property, it being merely a matter of identification (Pettis v. Kellog, 7 Cush. 456); and in like manner an insufficient description in a schedule may be cured by general words in a mortgage, when the schedule is part and parcel of the mortgage.

The early case of Mills v. King, 14 U.C.C.P. 223, seems not to be supported by the later authorities. In that case, Mr. Justice Wilson was of opinion in giving judgment that "one omnibus," etc., to which no locality was given, passed under the mortgage, and he came to this conclusion because such would be a sufficient description in an action of detinue, and so "14,415 feet of prepared moulding" was held sufficient (Noell v. Pell, 7 U.C.L.J. 322), and, on the authority of Mills v. King, "one stumping

machine" was also held a sufficient description (Bertram v. Pendry, 27 U.C.C.P. 371); but the machine was described also by locality, although the evidence shewed the description to be incorrect, for when the deed was executed the machine was not in the locality described.

As the law now stands property ought to be so described that, should the grantor own more of the same kind of articles than the number set down in the deed, it would be possible from the mortgage, or from information which the mortgage indicates can be acquired, to tell which of the class is intended to be assigned: McCall v. Wolff, 13 Can. S.C.R. 130; Blakely v. Patrick, 67 N.C. 40; Harris v. Commercial Bank, 16 U.C.R. 437, 444. It would be prudent, should such be the case, to state in the instrument that the number of horses, cows, sheep or other articles mortgaged, are all of the kind that the mortgagor possesses. If a man gives all the horses in his stable and all the cows, and he gives five calves, and there are found to be ten there, the grant would not cover the five, because you could not tell which five of the ten it was meant to transfer (*per* Henry, J., McCall v. Wolff, 13 S.C.R. 138); but if there are found to be a fewer number of calves than five, then all the calves would pass by the grant: Crosswell v. Allis, 25 Conn. 301; Kelly v. Reid, 57 Miss. 89. On similar reasoning a description in a chattel mortgage of the articles mortgaged, as "60 head of two and three-year-old steers, and forty head of yearling steers," is not sufficient: Caldwell v. Trowbridge, 33 Alb. L.J. 196. And again, how is a party interested to tell from the instrument itself what buggy is mortgaged, where the mortgagor has more than one of the same kind, if the deed gives no further information than is to be acquired from the words, "one buggy." Therefore such a description is decided to be insufficient (Holt v. Carmichael, 2 A.R. (Ont.) 639), and something more than simply the generic term of a chattel or other article is required, it should be either minutely described or given a locality, or it should be shewn that the mortgagor has no more of the same kind. Hence, a mortgage of a horse, describing it as "one sorrel horse," appears to be defective for want of sufficient description (Montgomery v. Wright, 8 Mich. 143), and so is a grant of a wagon as "one four-horse-iron-axle wagon" without anything more definite (Nicholson v. Karpe, 58 Miss. 34), and so also is a mortgage of "three yoke of oxen," because there is nothing whatever to enable one to identify them

from others of a similar kind, should the mortgagor have others: McCord v. Cooper, 30 Ind. 9; Croswell v. Allis, 25 Conn. 311; Blakely v. Patriek, 67 N.C. 40.

But "one brown horse, ten years old; one bay horse, eight years old; one black mare, nine years old," has been held in our Courts to be a suffieient deseription: Corneill v. Abell, 31 U.C. C.P. 107.

It sometimes happens that property becomes intermixed with other property of a like kind. It is the law, in such eases, that when the owner of property mixes his own with that of another, and thus prevents identification, the one who so mixes loses his right to his own property to the extent required to make up the property of the other, and to that extent it becomes the property of him whose rights are invaded. If goods are mortgaged, and the mortgagor intermix them with others of a like kind belonging to him, so that the mortgaged property cannot be distinguished or separated, the mortagee is entitled to the whole, even as against a consignee of the mortgagor, and can recover the full value thereof for the property not mortgaged becomes accessorial to the mortgaged property, and subject to the lien and operation of the mortgage, provided, of course, the mortgaged property can be distingnished: Dunning v. Stearns, 9 Barb. 630; Willard v. Riee, 11 Me. 493; Adams v. Wildes, 107 Mass. 123; Frost v. Willard, 9 Barb. 440; Colwill v. Reeves, 2 Camp. 575; Martin v. Porter, 5 M. & W. 352; Brown v. Saxe, 7 Cow. 95. There seems to be a doubt whether parol evidence is admissible to identify property regarding whieh there is ambiguity from the description: Wilson, C.J., Nolan v. Donnelly, 4 O.R. p. 446; Hagarty, C.J., Mason v. McDonald, 25 U.C.C.P. p. 439. In the States of Massachusetts, Michigan and North Carolina, such evidenee is admitted, at all events to explain ambiguity in cases of general descriptions: Harding v. Coburn, 12 Met. (Mass.) 333; Winslow v. Mich. Ins. Co., 4 Met. (Mass.) 306; Willey v. Snyder, 34 Mich. 60; Goff v. Pope, 83 N.C. 123.

The following epitome of the result of the authorities may be found useful (approved by Boyd, C., in Segsworth v. Meriden Silver Plating Co., 3 O.R. at p. 415):—

(i) If the property covered by the instrument is sufficiently described so as to make identification unquestionable, without mention of locality, then it is not absolutely requisite that locality should be added: Mason v. McDonald, 25 U.C.C.P. 435.

(ii) Where general words are used, or the goods mortgaged are described as of a class, then mention of the correct locality is indispensable: Fraser v. Bank of Toronto, 19 U.C.Q.B. 381.

(iii) It is not sufficient to describe a chattel simply by its generic term. Correct locality must be added, or the chattel must be otherwise identified beyond question: Holt v. Carmichael, 2 A.R. 639.

(iv) A mortgage can be properly given upon goods not in existence, and which are to be afterwards acquired (Re Thirkell, 21 Gr. 492), but the intention of the parties must appear upon the face of the instrument, to bring the after-acquired property within the operation of the mortgage: Mason v. McDonald, 25 U.C.C.P. 435.

(v) Where the locus is omitted, the Court will sometimes assume the locality to be that intimated by other parts of the deed: Mathers v. Lynch, 28 U.C.Q.B. 354.

(vi) The words "stock-in-trade" gives no information, but the Court will look at the description of the mortgagor, in order, if possible, to ascertain the nature of the property mortgaged: Wilson v. Kerr, 17 U.C.Q.B. 168, 18 U.C.Q.B. 470.

(vii) The assumption from the words "furniture and household stuff" is, that the description refers to the mortgagor's residence: Fraser v. Bank of Toronto, 19 U.C.Q.B. 381.

(viii) Though there may be an error in one of two descriptions of property, the one that is incorrect may be rejected and the other retained, and the description yet held good: Fitzgerald v. Johnston, 41 U.C.Q.B. 440.

(ix) An owner of land, upon which he has fixtures, has the right to sever the chattels from the realty, and when severed a chattel mortgage will be preferred as against a subsequent mortgagee of the land: Rose v. Hope, 22 U.C.C.P. 482; Coombs v. Beaumont, 5 B. & Ad. 72; Boydell v. McMichael, 1 C. M. & R. 177.

(x) A mortgage on saw logs will bind the lumber into which they are sawn if the mortgagee can prove that such lumber was made out of the logs mortgaged: White v. Browne, 12 U.C.Q.B. 477.

(xi) If goods are referred to as all being contained in a schedule, general words in the mortgage itself will not embrace other goods than those mentioned in the schedule: Kingston v.

Chapman, 9 U.C.C.P. 130; Wood v. Roweliffe, 6 Ex. 407, 20 L.J. Ex. 285.

(xii) The words "all the assignor's personal property and effects whatsoever and wheresoever," are insufficient: Harris v. Commercial Bank, 16 U.C.Q.B., at 444.

(xiii) Bonds, bills, notes, accounts, stocks, etc., "*ejusdem generis*" do not require the usual particular description necessary under the statute: Harris v. Commercial Bank, 16 U.C.Q.B. 444.

(xiv) The words "any and all stock purchased by the mortgagor, and which may be in his possession upon the said premises during the existence or continuance of this security, or of any renewal or renewals thereof," is a sufficient description to pass after-acquired property: Re Thirkell, 21 Gr. 492; Lazarus v. Andrade, 5 C.P.D. 318; Clements v. Matthews, 11 Q.B.D. 808.

Future-acquired Property; Goods not in Possession.

11. This Act shall extend to a mortgage or sale of goods and chattels, which may not be the property of, or in the possession, custody or control of the mortgagor or bargainor or any person on his behalf at the time of the making of the mortgage or sale, and notwithstanding that such goods or chattels may be intended to be delivered at some future time, or that the same may not at the time of the making of the mortgage or sale be actually procured or provided, or fit or ready for delivery, or that some act may be required for the making or completing of such goods and chattels, or rendering the same fit for delivery. R.S.O. 1897 c. 148, s. 37.

Goods Not in Possession of Mortgagor.

Before this section was enacted it was held that the Act did not apply where the seller was not the owner of the goods, and that, on sale by a landlord, under distress for rent to a mortgagee of goods already under mortgage, no registration was required: Severn v. Clarke, 30 U.C.C.P. 363. This section makes the Act apply although the chattels may not be the property of the bargainor, and now on such sales the Act must be followed. Prior to the enactment of this section, a bill of sale by a sheriff, on an execution of debtor's goods to a purchaser whether he

be plaintiff in the execution or not, was held not to be within the Act: Kissock v. Jarvis, 6 U.C.C.P. 393, 9 U.C.C.P. 156; Paterson v. Maughan, 39 U.C.Q.B. 371.

Where a mortgagee sells the goods of a mortgagor under a power of sale contained in the chattel mortgage, and the purchaser permits the mortgagor to remain in possession, the Act would appear to require the registration of a bill of sale as against the mortgagee's creditors, but seemingly not as against creditors of the mortgagor, for the registration is required only as against creditors of the bargainor, subsequent purchasers from *him*, or *his* mortgagees in good faith, and the bargainor in such a case is not the mortgagor, but the mortgagee: Carlisle v. Tait, 7 A.R. (Ont.) 10; Cookson v. Swire, 9 App. Cas. 653.

Growing Crops.

Crops to be grown may be covered by a chattel mortgage; and where the expression used was "crops which may be sown during the *currency* of this mortgage" it was held that this covered crops sown after the mortgage fell due, but while it remained unpaid: Canada Permanent v. Todd, 22 A.R. (Ont.) 515. But a land mortgagor after default is, as far as crops growing upon the land mortgaged are concerned, in the position of a tenant at sufferance, and cannot, by giving a chattel mortgage upon the crops, confer a title thereto upon the chattel mortgagee to the prejudice of the land mortgagee who enters into possession before the crop is harvested: Bloomfield v. Hellyer, 22 A.R. (Ont.) 232; Laing v. Ontario Loan, 46 U.C.Q.B. 114, explained.

Future-acquired Property.

A mortgage of future-acquired goods, although in form a present charge, is, in law, nothing more than a covenant, promise or agreement to make a mortgage upon them, and takes effect as a transfer of the goods only from the acquisition of them, and then only by virtue of the equity which the mortgagee has to enforce a legal transfer, his title being preferable to that of an execution creditor: Horsfall v. Boisseau, 21 A.R. (Ont.) 663. A description in a chattel mortgage of after-acquired goods in the following terms was held sufficient and binding upon such goods upon premises to which the mortgagor removed after making the mortgage: Holroyd v. Marshall, 10 H.L.C. 191: Canada Permanent v. Todd, 22 A.R. 515. "All other ready made

clothing, tweeds, trimmings, gents' furnishings, furniture and fixtures and personal property which shall at any time during the currency of this mortgage be brought in or upon the said premises, or in or upon any other premises in which the said mortgagor may be carrying on business."

Where there is any probability of a stock of goods mortgaged being removed to other premises, and it is desired to cover after-acquired goods, care must be taken that the words used are sufficient to cover goods which may afterwards be brought upon any other premises which may thereafter be occupied by the mortgagors, for such will not be included in a description such as "any and all stock of goods and chattels and effects which should at any time during the currency of this mortgage, be brought into or upon said premises or store, either in addition to or in substitution for the stock-in-trade now being therein or any of them": Milligan v. Sutherland, 27 O.R. 235, 32 C.L.J. 231.

And where a chattel mortgage included "all and singular the stock-in-trade and fixtures now contained in the store premises known as number 380 Queen street west, Toronto, and all additions thereto or substitutions thereof hereafter at any time made by the said mortgagor or any one on her behalf," it was held that the description covered only the future goods which might thereafter be brought on the premises, 380 Queen street west, and not goods brought and added to the stock after the execution debtor had moved to other premises where the business was continued: Ryan v. Shields, (Q.B.D. Ont.) April 8th, 1897, not reported.

This section, however, does not appear to cover the sale of a *share* in a chattel and such was not formerly required to be registered, yet it will be the safer course to register under the Act in a case where the vendor retains possession: Gunn v. Burgess, 5 O.R. 685. But it does apply to an equitable interest in the whole of the goods.

A husband who had purchased a piano under a conditional sale contract whereby he would become the owner on completing all payments thereon, entered into an agreement before he had paid the whole amount that his wife should purchase his interest in the piano and pay the balance due thereon. No bill of sale was registered and there was no change of possession as is required by the Act, and it was held that the transaction was void as to his execution creditors, under this section: Eby v. McTavish, 32 O.R. 187.

Affidavits of Bona Fides and on Renewal of Mortgage.

12. (1) Every affidavit of *bona fides* required by this Act and every affidavit required upon the renewal of a chattel mortgage may be made by one of two or more bargainees or mortgagees, or by his or their agent if aware of all the circumstances and properly authorized in writing to take the conveyance or to take or renew the mortgage, or, in the case provided for by section 6, to make the agreement and to take the mortgage.

(2) If the mortgage or conveyance is made to a corporation the affidavit may be made by the president, vice-president, manager, assistant manager, secretary, or treasurer, or by any other officer or agent thereof authorized to do so by resolution of the directors.

(3) Where the affidavit is made by the agent of the mortgagee or bargainee or by an officer or agent of a corporation it shall state that the deponent is aware of all the circumstances connected with the mortgage or conveyance, and has personal knowledge of the facts deposed to. 3 Edw. VII. c. 7, s. 30; R.S.O. 1897, c. 148, ss. 2, 3, 7 and 8.

Affidavit for Several Mortgagees.

The affidavit is only required for the purpose of affording information as to grounds upon which the claim to the goods is made, and one affidavit embracing the requisites of the statute affords that information, as well as affidavits of twenty bargainees, if there were so many, would do: Heward v. Mitchell, 11 U.C.Q.B. 625; McLeod v. Fortune, 19 U.C.Q.B. 100. In one case it was contended that although the statute permitted one of several mortgagees to make the affidavit, the spirit of the statute required that it should be so construed as to limit it to the case of joint mortgagees who were connected in business, either of whom would be aware of all the circumstances connected with the mortgage. But it was held that this contention was untenable, and that there was no reason why the Court should assume that one of two joint mortgagees, even when not connected in business, should not be capable of making the affidavit with a full knowledge of all the circumstances: Severn v. Clark, 30 U.C.C.P. 363; McLeod v. Fortune, 19 U.C.Q.B. 100.

See also notes to sec. 5 and sec. 6 of this Act.

Officers Authorized to Administer Oaths.

The Interpretation Act, R.S.O. 1914, ch. 1, 7 Edw. VII. ch. 2, s. 7 (20), in reference to the administration of oaths, declares as follows:—

Where by an Act of the Legislature or by a rule of the Legislative Assembly, or by an order, regulation or commission, made or issued by the Lieutenant-Governor in Council, under a law authorizing him to require the taking of evidence under oath, an oath is authorized or directed to be made, taken or administered, the oath may be administered, and a certificate of its having been made, taken or administered, may be given by any one named in the Act, rule, order, regulation or commission or by a Judge of any Court, a Notary Public, Justice of the Peace or Commissioner for taking affidavits, having authority or jurisdiction in the place where the oath is administered.

This clause in the statute 7 Edw. VII. was later amended in 9 Edw. VII. 1909, ch. 26, s. 4 [R.S.O. 1914, ch. 1] by adding thereto: "Any officer authorized to administer an oath or take an affidavit may take any declaration authorized or required by an Act of the Legislature. By 3-4 Geo. V. 1913, ch. 18, s. 1, it was further amended by adding the following: "Every Justice of the Peace having authority in Ontario shall have the same powers to take and receive affidavits and affirmations as a Commissioner appointed under the Commissioners for Taking Affidavits Act [R.S.O. 1914, ch. 1].

The Evidence Act (Ont.), 9 Edw. VII. 1909, ch. 43, sec. 38, R.S.O. 1914, ch. 76, provides for oaths, affidavits, affirmations, or declarations, sworn, affirmed or made out of Ontario.

Under this enactment is included any commissioner authorized to administer oaths in the Supreme Court of Judicature in England or Ireland, a Judge of the Supreme Court of Judicature in England or Ireland; or a Judge of the Court of Session, or of the Justiciary Court of Scotland; or a Judge of any of the County Courts of Great Britain or Ireland, within his county, or any notary public certified under his hand and official seal, or the mayor or chief magistrate of any city, borough or town corporate in Great Britain or Ireland, or in any colony of His Majesty, or in any foreign country, and certified under the common seal of such city, borough or town corporate, or a Judge of any Court of Record or of supreme jurisdiction in any colony belonging to the crown of Great Britain, or any dependency

thereof, or in any foreign country; or, if made in the British possessions in India before any magistrate or collector certified to have been such under the hand of the governor of such possession; or, if made in Quebec, before a Judge or prothonotary of the Superior Court or clerk of the Circuit Court, or before any consul, vice-consul or consular agent of His Majesty exexercising his functions in any foreign place; or before a commissioner authorized by the laws of Ontario to take affidavits in and for any of the Courts of Record of the province, for the purposes of, and in or concerning any cause, matter, or thing which is, or may be depending, or in anywise concerning any proceedings to be had in the said Courts: Ontario Statutes, 9 Edw. VII. 1909, ch. 44, sec. 9; R.S.O. 1914, ch. 77. Every solicitor of the Supreme Court of Ontario is *ex officio* a commissioner for taking affidavits for every county in Ontario: 9 Edw. VII. 1909 (Ont.) ch. 44, sec. 3(2); R.S.O. 1914, ch. 77.

An affidavit could not be administered by a justice of the peace, under this section, at a place beyond which his jurisdiction as a magistrate extends. Hence, a justice of the peace in one county cannot properly administer his affidavit in a different county: 7 Edw. VII. 1907, ch. 2, sec. 7 (23); R.S.O. 1914, ch. 1.

An affirmation can be administered instead of an oath, and the above persons have full power and authority to take the same and certify to its having been made: 7 Edw. VII. 1907, ch. 2, sec. 7 (19); R.S.O. 1914, ch. 1.

It will be observed that the Ontario Evidence Act (9 Edw. VII. 1909, ch. 43, sec. 38; R.S.O. 1914, ch. 76) specially states before whom affidavits can be taken, when made in the Province of Quebec, for use in Ontario; but a notary public is not among those designated. Hence, it was held that an affidavit of *bona fides* under this Act, sworn to before a notary public in the Province of Quebec, was insufficient, as a notary public in Quebec had no power, under the provision of the Ontario Evidence Act, to administer it: Reynolds v. Williamson, 25 U.C. C.P. 49.

A person who prepares an assignment of mortgage may administer an affidavit under this Act as commissioner (Noell v. Pell, 7 U.C.L.J. 322), but not so if he be the mortgagee: Beaman v. Whitney, 20 Me. 413; Honmers v. Dole, 61 Ill. 307; Wilson v. Traer, 20 Iowa 231. It is important that the person who administers the affidavit should not neglect to subscribe his name to the jurat.

Errors and Omissions in the Jura'.

In the case of Nisbet v. Cock, 4 A.R. (Ont.) 200, it was decided that a chattel mortgage was invalid as against a subsequent execution creditor, on account of the signature of the commissioner to the affidavit of *bona fides* being omitted, even though it was so omitted through inadvertence, and although it was satisfactorily proved that the oath was in fact administered. In delivering judgment the Chief Justice said:—

"The real question is, not whether perjury could be assigned, but whether the paper filed with the chattel mortgage is such an affidavit as the statute requires. In that enquiry, due regard must be paid to the objects which the statute was designed to effect, and the mischief it was intended to remedy. These have been rendered familiar to all engaged in the study and practice of the law by the explanations of the Courts in many cases. It is sufficient here to say that the legislature has not been content that a chattel mortgage should be merely stamped with good faith, but has required the mortgagee to pledge this oath to its character. Still further, it has required this oath to be recorded in the form of an affidavit, which must be sworn before one of certain named officers, and must then be filed along with the mortgage. This was obviously for the purpose of enabling creditors to satisfy themselves, not merely of the existence of claims against the goods of their debtor, but of the existence of a statement made under the sanction of an oath and in compliance with the terms of the statute. To the attainment of this end, it seems indispensable that it should appear that the affidavit was sworn before some officer having authority to administer the oath. It never could have been intended that the creditor should be left at his peril to assure himself by extrinsic evidence of the presence or absence of this requisite. A paper purporting to be an affidavit, but not authenticated as sworn, is quite consistent with the supposition that at the last moment the mortgagee had shrunk from swearing to the necessary statement. We have not overlooked the class of cases in which defects in affidavits have been held immaterial, because the object of giving notice had been secured by the actual placing of the instrument on record, although in strictness it should not have been received by the officer. But these decisions depend upon a different principle, which is not applicable here. There, the policy of the Act was simply to give to all persons interested notice of the

existence of a certain instrument affecting property. Here, as we have already indicated, the creditor is entitled to more. The information to him that there is a chattel mortgage executed by his debtor falls far short of that to which he is entitled by the Act. We cannot hold that such information is given when he finds with the mortgage a paper which does not appear to have been sworn before any recognized authority, or sworn at all.

It is quite true that the Courts have uniformly manifested a great reluctance to destroy an honest security on account of a slip or omission. We may regret that our decision defeats the appellant's just claim, but we feel that to support it would be to open wide the door to a palpable and dangerous mode of evading the salutary provision of the statute. What has in this case been the result of innocent mistake might, in another, be the offspring of readiness to aid in the commission of a deliberate fraud. It is not sufficient answer to urge that the absence of the commissioner's name would invite suspicion and provoke attack. The mortgagee would be under no obligation to furnish any information, and it would be highly unreasonable and unjust to force the creditor either to undertake the difficult and often impossible task of satisfying himself that it was not really secure, or to enter upon a suit which would be liable to be defeated by the testimony of a commissioner of whom the creditor had never heard: Nisbet v. Cock, 4 A.R. (Ont.) 200; see, also, Hill v. Gilman, 39 N.H. 88; Becker v. Anderson, 11 Neb. 493. Therefore a mortgage not regularly on file, as having been improperly completed, in so far as the signature of the commissioner or that of the person taking the affidavit of *bona fides* or execution is concerned, is not notice to creditors or purchasers: Frank v. Miner, 50 Ill. 444. And so a paper purporting to be an affidavit, and not authenticated as sworn, is consistent with the theory that it was not sworn to. It is part of the authentication that the word "sworn" be inserted in the jurat, and, therefore, it is that the omission of this word is fatal to the sufficiency of the affidavit of *bona fides*: Pollard v. Huntingdon, (Mo.) 16 C.L.J. 168. If, however, in point of fact the affidavit of *bona fides* or execution is sworn to before a commissioner or other officer authorized to administer the affidavit, then, if such officer's signature is added to the jurat, the omission to add words shewing in what capacity the affidavit was taken by such officer is not a fatal objection to the affidavit (Cheney v. Courtois, 13 C.B.N.S. 634, followed in Re Chapman,

Ex p. Johnson, 26 Ch. D. 338; see also, Howard v. Brown, 4 Bing. 393; Hamilton v. Harrison, 46 U.C.Q.B. 127); such an objection is merely a technical one, and it would seem that, if the party be named at all, the Court may examine to see whether he is one of the commissioners: *per* Lord Abinger, Burdekin v. Potter, 9 M. & W. 13. The fact that the deponent could be convicted of perjury demonstrates that the omission to add the character of the officer is not fatal, and, on perjury being assigned, proof could be adduced shewing that the officer was competent to administer the oath: Ex parte Johnson, 26 Ch. D. 338.

The Ontario Evidence Act contains the following provision with reference to affidavits defective for informalities: —

No informality in the heading, or other formal requisites to any affidavit, declaration or affirmation, made or taken before a commission or other person authorized to take affidavits under the Commissioners for Taking Affidavits Act, or under this Act, shall be any objection to its reception in evidence, if the Court or Judge before whom it is tendered thinks proper to receive it: 9 Edw. VII. ch. 43, sec. 40; R.S.O. 1914, ch. 76.

Affidavits by Agents of Corporations.

In a case arising under the statute 3 Edw. VII. ch. 7, sec. 20, from which sec. 12, sub-sec. 3, was taken, it was the opinion of the majority of the Divisional Court that the affidavit of *bona fides* and the affidavit required upon the renewal of a chattel mortgage, where the mortgagees are an incorporated company, if made by the president, vice-president, manager, assistant manager, secretary, or treasurer of the company, need not state that the deponent is authorized by resolution of the directors in that behalf, nor that he is aware of the circumstances connected with the mortgage and has personal knowledge of the facts deposed to; the words "officer or agent" in the section according to the construction placed upon them by the Court being confined in their application to an officer or agent who is not one of the principal officers above enumerated: Bank of Toronto v. McDougall (1865), 15 U.C.C.P. 475, and Freehold Loan and Savings Co. v. Bank of Commerce (1879), 44 U.C.Q.B. 284, applied and followed, notwithstanding the amendments to the statute. Mabee and Riddell, JJ., also held, that the statute does not make it imperative that the position of the deponent should be sworn to: Universal Skirt Co. v. Gormley, 13 O.L.R. 114; see also Carlisle v. Tait, 7 A.R. (Ont.) 10.

To avoid any question as to the precise status of the officer, and as to the limitation of the above decision to exactly parallel facts, it is recommended that the affidavit should state what office the deponent holds in the company and that he is aware of the circumstances connected with the mortgage and has personal knowledge of the facts deposed to. Furthermore, it must be borne in mind that the decision in Universal Skirt Mfg. Co. v. Gormley, 17 O.L.R. 114, is not binding upon the newly constituted Appellate Divisions of the Ontario Supreme Court, which take the place of the former Court of Appeal; and, of course, no decision has no binding effect on the higher forums, [illegible] Imperial, before which the same question has still to be discussed in some future appeal. In this connection it would [illegible] part of the holding of the Court is *obiter dicta* [illegible] upon a test of the action of the president of an [illegible] company and upon the theory approved in Bank [illegible] McDougall, 15 U.C.C.P. 475, the action of the president in making the affidavit is not as an agent, but in chief; is [illegible] of the executive officer not an act by delegation as would be the act of a manager or of a subordinate officer.

Agent's Authority.

13. The authority in writing referred to in the next preceding section, or a copy of such authority shall be attached to and filed with the mortgage or conveyance. R.S.O. 1897, c. 148, s. 9.

Agent's Authority.

See notes to sections 5 and 6 of this Act.

Affidavit of Executor, Administrator, Next of Kin, or Assignee.

14. Any affidavit by this Act required to be made by the mortgagee or by the bargainee may in the case of his death be made by any of his next of kin or by his executor or administrator, or, if the mortgage has been assigned, by his assignee. *New.*

General Authority to Take or Renew Mortgages.

15. An authority to take a conveyance or to take or renew a mortgage may be a general one to take all or any conveyances to the bargainee, or to take and renew all or any mortgages to the mortgagee. R.S.O. 1897, c. 148, s. 31.

General Power of Attorney.

It appears from this section that an authority to an agent to take a mortgage without more said, would not be a sufficient authority to the agent to renew. To enable the agent to renew a mortgage on the same authority as that upon which he took the mortgage, the authority requires to be "to take and renew," etc. But a general authority to take and renew mortgages or conveyances under the Act, will be sufficient without the authority identifying any particular mortgage or conveyance. Of course, the "authorities" are required to be in writing. The "conveyances" referred to are evidently the conveyances intended under sections 5, 6 and 8.

Contracts to Give Mortgages.

16. Every covenant, promise or agreement to make, execute or give a mortgage of goods and chattels shall be in writing, and shall be deemed to be a mortgage within the meaning of this Act. R.S.O. 1897, c. 148, s. 11.

Agreements to give Mortgage.

The covenant, promise or agreement must be in writing in order that it may be filed pursuant to this section.

Although the words "covenant, promise or agreement" are here used, it is probable that equal effect would be deducible from the word "agreement" alone, for unless the covenant or promise be assented to, so as to form an agreement, it would have no validity to affect the title to property.

Where an agreement fixes no limit of time within which the mortgage is to be given, and provides for no extension or other consideration moving from the mortgagee, the presumption of fraud declared by the Assignments and Preferences Act, when an assignment is made within 60 days after the mortgage, will still arise, although the *agreement* was more than 60 days prior to the assignment: Breese v. Knox (1897), 24 A.R. (Ont.) 203, 33 C.L.J. 201.

Where an agreement to give a chattel mortgage is duly made and registered under this section, and subsequently a mortgage is made and registered, the giving of such mortgage whereby the legal title becomes vested in the mortgagee does not revest in the mortgagor the equitable title which the mortgagee had by virtue of the agreement, but it continues to exist as before, and

the mortgagee is enabled to rely on it where the mortgage is ineffectual for any reason: Fisher v. Bradshaw, 4 O.L.R. 162, affirming 2 O.L.R. 128.

An unregistered agreement by a debtor to give his creditor upon default in payment, or upon demand, a chattel mortgage upon his "present and future goods and chattels" confers no title upon the creditor as against the debtor's assignee for the benefit of creditors, who takes possession before a chattel mortgage is, in fact, given: Hope v. May, 24 A.R. (Ont.) 16.

Contract to Make a Sale.

17. Every covenant, promise or agreement to make a sale of goods and chattels shall be in writing and shall be deemed to be a sale of goods and chattels within the meaning of this Act. R.S.O. 1897, c. 148, s. 12.

Agreements for Sales of Goods.

This section evidently embodies the well-known rule of Courts of equity "that equity considers done that which ought to be done." This is exemplified in the case of Clarkson v. Sterling, 15 A.R. (Ont.) 234, where the Court held that a manager who had advanced money to his company to be repaid on notice from and within a certain period, in default of which payment the company would assign to defendant certain securities, was entitled to the securities as against the assignee for creditors of the company, and the Court, by Hagarty, C.J.O., adopted the language of James, L.J., in Ex parte Burton, 13 Ch. D. 102, at p. 108, where he says: "A Court of equity regards that which has been agreed to be as done, and, therefore, it has said that if it was really part of the understanding when the money was advanced that a bill of sale should be given, then that agreement would be the same thing as if the bill of sale had been actually given at the time. The bill of sale would be sustained by the previous agreement." See, also, Ex parte Kilner, 13 Ch. D. 245.

The equitable doctrine discussed in Clarkson v. Stirling, 15 A.R. (Ont.) 234, 14 O.R. 460, namely, that a pre-existing binding agreement for valuable consideration to give a chattel mortgage will be treated as if the chattel mortgage had been actually given, has no application, first, where the agreement to give is not absolute but merely in the alternative, either for the

giving of a hire receipt or a mortgage; and, secondly, where the mortgage given was not the security contracted for but included additional goods: Brown v. Lamontagne (1889), 1 Can. S.C. Cas. 30.

See note to the preceding section, in which the same words "covenant, promise or agreement" are used.

Nothing is said specifically as to contracts of exchange of goods, and although rules of law relating to sales apply to contracts of sale, it is still a matter of doubt whether statutory requirements in respect of sales will apply to exchanges: Fairmaner v. Budd, 7 Bing. 574; Emanuel v. Dane, 3 Camp. 299. Harrison v. Luke, 14 M. & W. 139.

Section 11, providing that the Act shall extend to "mortgages and sales" of future goods or goods not completed and ready for delivery, would appear not to extend in terms to "agreements for sale," but apart from that section agreements, etc., of sale are held to include not only existing goods owned or possessed by the seller, but also goods to be manufactured or acquired by the seller after the making of the contract: Hibblewhite v. McMorine, 5 M. & W. 462. If the contract is intended to result in transferring for a price from B. to A. a chattel in which A. had no previous property, it is a contract for the sale of a chattel. If work and labour be bestowed in such a manner that the result is not anything which can properly be said to be the subject of sale, the action would be for work and labour; but if the contract be such that when carried out it would result in the sale of a chattel, the party cannot sue for work and labour: Lee v. Griffin, 1 B. & S. 272; Wolfenden v. Wilson, 33 U.C.Q.B. 442. It cannot be said that the paper and ink used by a solicitor in drawing a deed are goods sold and delivered. And the disproportion in value of the work and of the material does not form any test, and if a sculptor be employed to execute a work of art the contract is, nevertheless a contract for the sale of a chattel: Lee v. Griffin, 1 B. & S. 272. And an order given for a tombstone to be erected in a cemetery, is a contract for the sale of a chattel, and not a contract for work and labour: Wolfenden v. Wilson, 33 U.C.Q.B. 442. And where by the contract the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods: Lee v. Thornton, 1 C.B. 379, 14 L.J.C.P. 161.

A man can contract to assign property which is to come into existence in the future, and when it has come into ex-

equity treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment if the goods be sufficiently described to be identified on acquisition by the seller: Collyer v. Isaacs, 19 Ch. D. 342; Holroyd v. Marshall, 10 H.L.C. 191; Tailby v. Official Receiver, 13 App. Cas. 523. Where the contract is for the sale of specific goods, and without the seller's knowledge they had been destroyed at the time when the contract was made, then the contract is void: Couturier v. Hastie, 5 H.L.C. 673.

The property may pass by the contract itself, and at such time as the parties intend it to be transferred, and for the purpose of ascertaining the intention regard is had to the terms of the contract, the conduct of the parties, and the circumstances of the case: Seath v. Moore, 11 App. Cas. 350, Ogg v. Shuter, L.R. 10 C.P. 159.

Unless a different intention appears, where the seller is bound to do something to the specific goods sold for the purpose of putting them into a deliverable state, the property does not pass until such thing has been done, and the buyer has had notice thereof: Seath v. Moore, 11 App. Cas. 350.

So also where the specific goods are in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods, for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice, unless a different intention is shewn: Furley v. Bates, 33 L.J. Ex. 43; Simmons v. Swift, 5 B. & C. 857.

Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract by either actual or constructive delivery to the buyer, the property thereupon passes to the buyer: Heilbut v. Hickson, L.R. 7 C.P. 438; Wait v. Baker, 2 Exch. 1.

Registration.

18. (1) Except in the case of the Provisional County of Haliburton the instruments mentioned in the preceding sections shall be registered in the office of the clerk of the County or District Court of the county or district in which the property mortgaged or sold is at the time of the execution thereof

(2) Where the property is situate in the Provisional County

of Haliburton the instrument shall be registered in the office of the clerk of the first division court of the provisional county.

(3) In the case of a county the instrument shall be registered within five days from the execution thereof.

(4) In the case of the Provisional County of Haliburton and of a district the instrument shall be registered within ten days from the execution thereof.

(5) The clerk shall file the instrument and endorse thereon the time of receiving it. R.S.O. 1897, c. 148, s. 15; 62 V., session 2, c. 14, s. 13.

Object of Registration.

The object in view in requiring registration is that all persons interested in, or desiring to acquire any interest in the mortgaged or sold property can procure information regarding that property. Possession of the mortgaged property by the bargainor or mortgagor after the sale or mortgage being considered evidence of fraud, it became necessary, in order to protect creditors, purchasers, and mortgagees in good faith, and all persons interested in, or desiring to acquire any interest in the mortgaged or sold property, that some rule should be adopted by which the mortgagor or bargainor might overcome this presumption, and be permitted to retain the property and carry on his business; and by which creditors and others having business with him might be notified of his financial position, and of the incumbrances upon his property; it being in many cases, a great hardship upon a debtor to be compelled to deliver possession of the very property by which he not only obtains his livelihood, but which is the very means for satisfying the debt for which the property is security. Registration and the consequent publicity given the transaction prevents the inference of fraud above mentioned: Belanger v. Menard, 27 O.R. 209; Cookson v. Swire, 9 App. Cas. 653.

The object of the Act, accomplished by a fulfilment of the requirements of this section, therefore, is that the public should have notice of an existing incumbrance or transfer of a person's property, thereby protecting creditors and others interested in the property against secret conveyances and transfers when possession of the property was not changed.

Fraudulent Conveyances.

Any one claiming under an instrument filed in pursuance of the Act will, none the less, be required to shew, when called upon so to do, that the transaction was made and entered into in good faith, and with no intention of defrauding the creditors of the person with whom he is dealing, or subsequent purchasers, or mortgagees in good faith; and should it be made under circumstances constituting an invalid and fraudulent gift or preference under the provisions of the Act respecting assignments and preferences by insolvent persons, the registration will not validate it whether or not the affidavit of *bona fides* be true.

A conveyance to defeat creditors is good as between the parties themselves and their representatives, the principle of law being that "no man shall set up his own fraud as the basis of a right or claim for his own benefit": Phillpotts v. Phillpotts, 10 C.B. 85, 20 L.J.C.P. 11.

Besides, however, as between the immediate parties to the instrument and their personal representatives it is likewise good without registration as against a wrongdoer or trespasser. Should any one, without title or otherwise than in the character of a creditor, purchaser or mortgagee, in good faith, take possession of the property mortgaged or sold, the mortgagee or bargainee would be entitled to an action of replevin or trespass against any such person: Pratt v. Harlow, 16 Gray 379; Moses v. Walker, 2 Hilt. 536; Huckett v. Manlove, 14 Cal. 85; Johnson v. Jeffries, 30 Mo. 423; Morrow v. Turney, 35 Ala. 131.

The retaining of possession of chattels by the bargainor under a bill of sale cannot be said to be fraudulent, where the instrument has been duly registered: Belanger v. Menard, 27 O.R. 209; Cookson v. Swire, 9 A.C. 653.

Place of Registration.

The instruments mentioned above are to be filed in the office of the clerk of the County Court of the county or union of counties, as the case may be, where the property is at the time of the execution of the instrument. By the Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, sub-sec. 12, R.S.O. 1914, ch. 1, the word "county" in a statute includes two or more counties united for purposes to which the enactment relates.

Registration, in compliance with the Act, is equivalent to change of possession. A mortgage, or conveyance, properly registered within the period of five days, relates back, operates and takes effect upon, from and after the day of its execution: section 4.

It has been held under a somewhat similar statute, that during a vacancy in the office of the clerk, the filing is valid when performed by any person in charge of the office for the time being: Bishop v. Cook, 13 Barb. (N.Y.) 326.

Filing of Instruments.

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 (Gorham v. Summers, 25 Minn. 81); 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 the same" (Whart. Law Lex.), 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 (Low v. Pettengill, 12 N.H. 337; see Ross v. Hamilton, E.T. 3 Vic.; Foster v. Smith, 13 U.C.Q.B. 243; In re Ross, 3 P.R. 394; Bank of Montreal v. Munro, 23 U.C.Q.B. 414; Kerr v. Kinsey, 15 U.C.C.P. 531; Trust & Loan v. Cuthbert, 13 Gr. 412); and, the fact of the clerk acting contrary to his instructions, and endorsing therein the time of filing, of its receipt by him, will not create a filing within the statute Town v. Griffith, 17 N.H. 165; Parker v. Palmer, 13 R.I. 3 Nor will the receipt, out of his office, by the clerk after office hours, constitute a filing, though he endorse the hour of the instrument being handed to him (Hathaway v. Howell, 54 N.Y. 97); but should the clerk be told to file the instrument when he gets his fee for so doing, and without getting it he files the document, the filing is good by reason of the presumption that when he did file the instrument he had been paid his fee: Conrard v. Colgan, 55 Iowa 538.

It is not the clerk's duty to inquire into the truth of the

statements contained in the affidavits any more than it is the county registrar's duty to make such enquiry when he receives for registration a deed properly proved.

The original indorsement by the clerk, made in pursuance of the Act, upon any instrument or copy filed under this Act, is evidence only of the time of receiving the same in the proper office. The clerk shall note the day and hour of the instrument being received by him, by indorsement, and from such time the law considers the instrument filed. Any omission, error, or mistake on the part of the clerk, in making his indorsement, cannot be used to the prejudice of the mortgagee or bargainee: Durfee v. Grinnell, 69 Ill. 371; McLarren v. Thompson, 40 Me. 284; Mems v. Mems, 35 Ala. 28; Partridge v. Swazey, 46 Me. 414.

Any person is entitled, upon tender to the clerk of the proper fee under sections 30 (*c*) and 31, to an inspection of any of the instruments filed in his office in pursuance of this Act.

Sundays and Holidays.

When by a statute a certain number of days is given for doing an act, the last of which happens to fall on a Sunday, that day is in such case included in the time given, and the party has no further time to do the act unless the statute expressly provides that it may be done on the day following: McLean v. Pinkerton (1882) 7 A.R. (Ont.) 490. In that case the rules of Court passed under the Ontario Judicature Act were relied upon as given the Monday for filing when the fifth day after execution of the mortgage fell on a Sunday, but the Court held that the Judicature Rules had no such effect. Since then the statute law of Ontario has been changed by the introduction of the provision embodied in the Interpretation Act the effect of which is to validate the filing on Monday where the fifth day falls on a Sunday, and so the decision in McLean v. Pinkerton, 7 A.R. (Ont.) 490, is no longer applicable as to that ground of objection.

The Interpretation Act, section 7 (16, 17, 18) enacts that where the time limited by any Act for any proceeding or the doing of anything under its provisions expires or falls upon a holiday (which term includes Sunday) the time so limited shall extend to and the thing may be done on the day next follow-

ing which is not a holiday: R.S.O. 1914, ch. 1, 7 Edw. VII. 1907, ch. 2, sec. 7, sub-secs. 16, 17, 18.

The connecting of the words "registering" and "filing" in the manner this section uses them, indicates that the two words are synonymous, or, at any rate, that, so far as the statute is concerned, they are intended to be used in the same sense and to mean the same thing. The literal meaning of the word "registration" is "the act of inserting in the register," and though the old common law meaning of the word file, viz.: "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 to the same" (Whart. Law Lex.) indicates the like, yet the later definition as to when a paper is filed, namely "when it is delivered to the proper officer, and by him received to be kept on file" (Bouvier's Law Dictionary) seems to declare the existence of a difference in meaning; indeed, it has been held that the latter definition is the meaning to be given to it under statute, unless a contrary meaning is made to appear: Gorham v. Summers, 25 Minn. 81, 87.

Should the officer be absent from his office during office hours, and from this cause, a mortgagee be unable to file his mortgage, the day none the less would count against him, and he would be left to his remedy against the clerk. A person in charge of the office on the occasion of a vacancy, may receive and file a mortgage or other instrument under the statute, and it is supposed that a person in the office doing the clerk's work, with the clerk's authority, would be capable of receiving and filing instruments under the Act: Bishop v. Cook, 13 Barb. (N.Y.) 326; Dodge v. Potter, 18 Barb. (N.Y.) 193.

Procedure when Mortgaged Goods are Removed.

19. In the event of the permanent removal of the goods and chattels from the county, provisional county or district in which the goods and chattels were at the time of the execution of the mortgage, to another county, provisional county or district, before the payment and discharge of the mortgage, a copy of the mortgage, and of the affidavits, documents, instruments and statements relating thereto, certified under the hand of the Clerk in whose office it was registered, and under the seal of the Court

shall be filed with the proper officer as mentioned in section 18, of the county, provisional county or district to which the goods and chattels are removed within two months from such removal, otherwise the mortgage shall be null and void as against creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith for valuable consideration. R.S.O. 1897, c. 148, s. 17.

Removal of Mortgaged Chattels.

This section does not contemplate a removal of the goods and chattels beyond the province. It has only reference to the case of a removal from one county to another within Ontario.

The rule is that the validity and effect of contracts relating to personal property are to be determined by the laws of the state or country where they are made, and as a matter of comity they will, if valid there, be enforced in another state or country, although not executed or recorded according to the law of the latter. This rule has been applied to a great number of cases of chattel mortgages where the mortgagor removes with the property into another state, continuing in possession of it, permissible by the law of the former under circumstances that had the mortgage been executed in the latter state by a resident therein, would have made it invalid as against creditors or purchasers: Keenan v. Stimson, 31 Alb. L.J. 118.

The intention of this section doubtless is to protect purchasers in the county to which the goods might be removed, and for that purpose it directs a registration there, allowing two months from the time of removal: Clarke v. Bates, 21 U.C.C.P. 348.

The removal must be a "permanent" removal. It must be a removal by the mortgagor in the ordinary way. Where from any cause, a mortgagor or bargainor decides to, and does, definitely leave one county to which he has not *animus revertendi*, to reside in another, and takes with him his goods and chattels, with the present intention of permanently keeping them within the county to which he removes, then this section applies: Boyd v. Beck, 29 Ala. 703. If the goods are stolen and wrongfully taken out of the possession of the mortgagor, and then removed by anyone other than the mortgagor or mortgagee or through their agency, the statute does not apply:

Cochrane v. Boucher, 3 O.R. 462. It does not follow that the section will not apply so long as the mortgagee is ignorant of the removal: Clarke v. Bates, 21 U.C.C.P. 348. And when a purchaser of the mortgaged goods from the mortgagor during the currency of a valid mortgage removes them out of the county where the mortgage is filed, the purchaser cannot object that the mortgagee should have refiled his security in the county to which they were removed, and in which they could not be found. The moment the goods were wrongfully taken by the purchaser, the mortgagee's cause of action at once accrued to him, of which he could not be divested by non-compliance with the requisites of this section: Hodgins v. Johnston, 5 A.R. (Ont.) 449.

The Act does not cover the case of a permanent removal of the residence of the mortgagor. The goods mortgaged may be in one county, the mortgagor's residence in another; in the former county the instrument must be registered; but no provision exists requiring registration of the mortgage in any county a mortgagor may move to, unless, of course, he takes the goods with him to such county.

Recording on Removal of Goods.

A copy of the mortgage and affidavits and documents relating thereto with the clerk's certificate under the seal of the Court, must be filed in the office of the county to which the goods are removed.

Should the goods not be permanently removed until after the mortgage has been renewed, then certified copies of all renewals, as well as of the original mortgage itself, with all affidavits, must be filed in the proper office of the county to which the goods are removed; if the mortgage has been assigned and assignment registered, a copy of the latter is also necessary.

Clerk's Certificate.

The following is a form of certificate that may be used:

I——, clerk of the County Court of the county of —— do hereby certify that the annexed paper writing marked "A" is a true and correct copy of the original chattel mortgage from——— to——— (with all endorsements thereon) bearing date the —— day of ——, 19—, which was filed in the office of the said Court at —— o'clock in the —— noon on the ——

day of ———, 19—. [*If the mortgage has been renewed or assigned, add* and that the paper writings marked "B" hereto attached are true and correct copies of the renewal (*or* assignment *as the case may be*) of the said mortgage filed as aforesaid with all endorsements thereon, and of all affidavits, statements, documents, and instruments relating thereto, which said paper writings marked "B" were respectively filed in the office of the said Court as follows (*here set out the dates of filing and the numbers and other specifications of each document*)], and that there are no other affidavits, documents, instruments or other papers relating to the said mortgage filed in the office of the said Court.

Witness my hand and the seal of said Court this——day of—— 19—.

[*Court Seal*]

————C.C.C.

This certificate must be signed by the clerk, and have the seal of the Court attached to it.

Computation of Time.

By the Interpretation Act the word "month" means a calendar month: 7 Edw. VII. (Ont.) ch. 2, sec. 7(15); R.S.O. 1914, ch. 1. "Within" two months excludes in computation either the first or last day. If the removal is made on the tenth of January, the certified copies of the mortgage with the affidavits, etc., will be properly filed on the tenth day of March following.

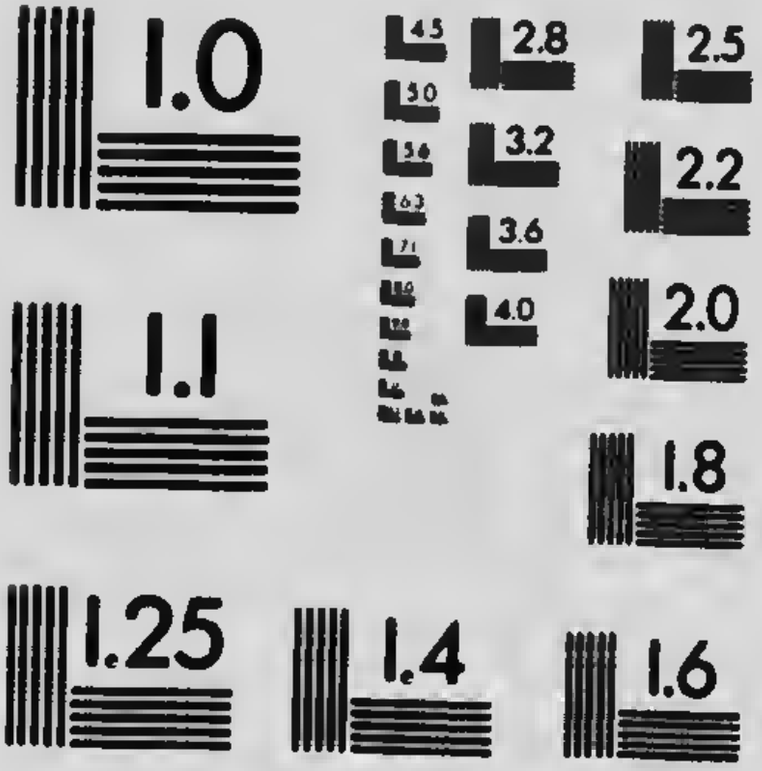
The time is to be computed from the day upon which the removal is made from the county, and presumably the date when the chattels pass the boundary line is the date of the removal thereof, and not necessarily the date when the removal took place from their location within the county.

Bills of Sale not Included.

The section does not apply to bills of sale under section 8 of the Act, but would apply to a bill of sale (*i.e.*, conveyance) which although absolute in form was intended to operate as a mortgage, and which by sec. 2 of the Act is a mortgage for the purposes of the Act.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



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Subsequent Purchaser.

The "subsequent purchaser" in such case must be one who purchased after the expiration of the period allowed for re-registration, and will be valid as against a purchase made within such period: Hulbert v. Peterson, 36 Can. S.C.R. 324; Roper v. Scott, 16 Man. L.R. 594.

Renewals.

As for renewals of mortgages in case of a permanent removal of goods under this section, see sub-secs. 2 and 3 of sec. 21 of this Act.

Manner of Registration.

20. The Clerk shall number every instrument or copy filed in his office, and shall enter in alphabetical order in a book to be provided by him the names of all the parties thereto, with the number indorsed thereon opposite to each name, and such entry shall be repeated alphabetically under the name of every party thereto. R.S.O. 1897, c. 148, s. 16.

Duties of Registering Officer.

It is very important that the clerk should carefully follow out the instructions as to the manner of registration, pointed out by this section: Handley v. Howe, 22 Me. 560; Holmes v. Sprowl, 31 Me. 73. Negligence, or dereliction of duty on the clerk's part in indexing a duly filed instrument, will not, however, prejudice a person setting up an instrument, if he has done all that the Act requires him to do in relation to such instrument. See Jost v. McCuish, 25 N.S.R. 519. But since a compliance with this section furnishes the means by which those desiring information are affected with notice, it would be a disadvantageous position for a mortgagee or bargainee to be claiming as valid an instrument apparently wanting in registration through some neglect of the clerk, as against others interested in the property without notice.

Sections 18 and 32 which also contain instructions for the clerk's guidance should be read together with this section. His first duty, when an instrument is presented to him for registration, is to endorse thereon the time of receiving the same, and then to number it. The instruments should be numbered

consecutively, and the clerk then should enter the names of all the parties to the instrument in alphabetical order, repeating all the names to the instrument in each entry, and opposite to each name in the book he should enter the number he previously has endorsed upon the instrument itself. The clerk's omission to follow out these requisites will not invalidate the mortgage or bill of sale, for the statute in regard thereto is merely directory, and does not make them an essential part of the registration of the instrument: Lawrie v. Rathbun, 38 U.C. Q.B. 255; Smith v. Waggoner, 50 Wis. 155.

The instrument must not be delayed in its registry beyond the statutory period. If filed after that time it is void, and if filed before the expiration of the period of five days it will, under section 9, relate back, operate and take effect from the moment of its execution.

Renewal of Mortgages.

21. (1) Except as provided in sub-section 2 and subject to the provisions of section 24, every mortgage registered in pursuance of this Act shall cease to be valid, as against the creditors of the person making the same and as against subsequent purchasers and mortgagees in good faith for valuable consideration, after the expiration of one year from the day of the registration thereof, unless, within thirty days next preceding the expiration of the said term of one year, a statement, Form 1, exhibiting the interest of the mortgagee, his executors, administrators or assigns in the mortgaged property, and shewing the amount still due for principal and interest thereon, and all payments made on account thereof, is registered in the proper office, as mentioned in section 18, of the county, provisional county or district in which the mortgage was registered, with an affidavit of the mortgagee, that the statement is true, and that the mortgage has not been kept on foot for any fraudulent purpose. R.S.O. 1897, c. 148, s. 18.

(2) Where there has been a permanent removal of the goods and chattels as mentioned in section 19, and a certified copy of the mortgage has been registered as required by that section, the

statement and affidavit shall be registered in the office in which such certified copy is registered, and the period of one year shall be reckoned from the date of the registration of such certified copy.

(3) Where the two months mentioned in section 19 have not expired when the period of one year mentioned in sub-section 1 expires and a certified copy of the mortgage has not been registered as provided by section 19, the statement and affidavit may be registered in the office in which the mortgage was registered.

(4) If any *bonâ fide* error or mistake is made in the statement, either by the omission to give any credit or by any miscalculation in the computation of interest or otherwise, the statement and the mortgage therein referred to shall not be invalidated if the mortgagee, his executors, administrators or assigns within two weeks after the discovery of the error or mistake registers an amended statement and affidavit referring to the former statement and clearly pointing out the error or mistake therein and correcting the same.

(5) If before the registration of such amended statement and affidavit any creditor or purchaser or mortgagee in good faith for valuable consideration has made any *bonâ fide* advance of money or given any valuable consideration to the mortgagor, or has incurred any costs in proceedings taken on the faith of the amount due on the mortgage being as stated in the renewal statement and affidavit as first registered, the mortgage as to the amount so advanced or the valuable consideration given or costs incurred by such creditor, purchaser or mortgagee, shall, as against such creditor, purchaser or mortgagee, stand good only for the amount mentioned in the renewal statement and affidavit first registered. R.S.O. 1897, c. 148, s. 19.

(6) The statement and affidavit shall be deemed one instrument, and shall be registered and entered as provided by section 20. R.S.O. 1897, c. 148, s. 20.

(7) Another statement in accordance with the provisions of sub-section 1, verified as required by that sub-section, shall be

registered in the proper office, according to section 18 or sub-section 2 of this section, as the case may be, within thirty days next preceding the expiration of one year from the day of the registration of the statement required by sub-section 1, otherwise such mortgage shall cease to be valid as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith for valuable consideration, and so on from year to year, that is to say, another verified statement shall be registered within thirty days next preceding the expiration of one year from the day of the registration of the former statement, otherwise such mortgage shall cease to be valid as aforesaid. R.S.O. 1897, c. 148, s. 21.

(8) If the affidavit is made by an assignee, or by any of his next of kin, or by his executor or administrator, the assignment or the several assignments through which he claims shall be registered with the statement and affidavit, unless the same have been already registered.

(9) Sub-section 8 shall not apply to an assignment for the benefit of creditors under the *Assignments and Preferences Act*, or any other Act of Ontario or of Canada relating to assignments for the benefit of creditors if such assignment be referred to in the statement, and notice thereof has been given in manner required by law. R.S.O. 1897, c. 148, s. 22.

Object of Renewal Provisions.

The object of this section is clear to all. Without it parties might, by simply remaining passive, allow their securities to continue upon record long after they were totally or partially satisfied, to the great injury of the business community, who, without inquiring from the parties themselves, would have no means of ascertaining the true position of a mortgagor with whom they were desirous of doing business. Its object is obviously to prevent the mortgage being used to shield the chattels from the claims of creditors after the debt for which the mortgage was given is satisfied, and also to give creditors information at the end of the year as to the state of the debt secured, and whether it is in progress of liquidation (Kissock v.

Jarvis, 9 U.C.C.P. 156); and furthermore to make void as against subsequent purchasers, etc., a mortgage not renewed at the end of the year; the intention, in both cases, being to prevent intending purchasers being misled at the time of their purchase: Burton, J.A., Hodgins v. Johnston, 5 A.R. (Ont.) 457. The intention of the Act is to give reasonable information to those who deal with persons who have executed bills of sale, but not to operate as a mere trap for those who advance money on such securities: Ex parte Popplewell, 21 Ch. D. 73, 80.

Should the result of a search be to find a mortgage, but that such mortgage had not been renewed in accordance with the requirements of this section, then the party so searching would be at liberty to deal with the mortgagor without any risk of his interests being subject to those of the mortgagee.

Renewal of Mortgages.

By "every mortgage, registered in pursuance of the Act," is meant only such mortgages as, in the first instance, were valid and subsisting securities under the Act. Renewing under this section will not have the effect of making an invalid mortgage valid, any more than a compliance with the Act, in the beginning, will make a bad mortgage good. Refiling a mortgage made under section 6, to secure the mortgagee against liability on his endorsements, will be inoperative, when the notes or their renewals, have not matured within a year from the date of the mortgage.

Although there is an express prohibition against mortgages under section 6 given for future advances or to secure endorsers or sureties when the time for repayment is more than one year from the date of the mortgage, there is no such limit express or implied as regards a chattel mortgage given to secure a debt under section 5, and the fact that this section requires a "renewal" at the end of the year is no indication that the debt should have then matured: Kerry v. James, 21 A.R. (Ont.) 338; O'Neill v. Small, 15 C.L.J. 114, overruled.

Where it is intended that a mortgage to secure a debt should not require renewal, but should be paid off at about the time the original registration would expire, it is a convenient practice to make the time for repayment eleven months from the date of the mortgage, in order that there may be ample time to obtain renewal in case of default in payment; as other-

wise—as in the case of an absent mortgagee—it might become necessary to prepare and have sworn the renewal statement and affidavit before the due date of the mortgage in order to place it on record before the time expires, and the costs of preparing such renewal statement and affidavit would in such a case have to be borne by the mortgagee, if the mortgage were paid off before the mortgage expired.

Renewal will not have the effect of continuing a mortgage security for renewals of promissory notes under section 6, which have not matured within the year: Turner v. Mills, 11 U.C.C.P. 366; In re Stevens, L.R. 20 Eq. 786. Though forfeiture may have occurred by default in payment according to the condition in the mortgage, and the mortgage become absolute in its terms, none the less is renewal necessary under this section.

Effect of Assignment or Taking Possession.

The fact of an assignment of a mortgage under the Act before the time approaches after which the mortgage must be renewed, makes it none the less imperative that the instrument should be renewed; and an assignee who neglects to do so will be deferred to creditors and to purchasers or mortgagees in good faith subsequent to the time for renewal of the mortgage: Hodgins v. Johnston, 5 A.R. (Ont.) 449; Karet v. Kosher, 2 Q.B.D. 361. This section does not apply to absolute bills of sale: Boynton v. Boyd, 12 U.C.C.P. 334. Before the enactment of 57 Vict. (1894), ch. 37, sec. 40 (the present section 23) it was not necessary if possession were taken of the property mortgaged by the mortgagee within the year and still retained, that the mortgagee should refile his mortgage (Ross v. Elliott, 11 U.C.C.P. 221; Porter v. Parmley, 52 N.Y. 185; Bates v. Wilbur, 10 Wis. 359); but it is now doubtful if such is the law. Section 23 would seem to be wide enough in its terms to prevent any taking possession subsequent to the making of the mortgage from being effective to retain its validity.

A bill of sale in form intended as security for a debt, and defeasible upon its payment, will cease to be valid without renewal after the time for renewing has expired: McMartin v. McDougall, 10 U.C.Q.B. 399.

Under this Act it is not necessary, as against purchasers or mortgagees, to refile a mortgage between the original filing

and the time prescribed for refiling: Hodgins v. Johnston, 5 A.R. (Ont.) 449; Latimer v. Wheeler, 30 Barb. (N.Y.) 485; Dillingham v. Ladue, 35 Barb. (N.Y.) 38.

It is against "creditors and subsequent purchasers and mortgagees in good faith for valuable consideration," that the refiling is necessary, and the word "subsequent" has been held to apply only to purchasers, etc., becoming such after the time when the mortgage should be refiled in order to preserve its validity: Hodgins v. Johnston, *supra;* see Thompson v. Van-Vechten, 27 (N.Y.) 568; Latimer v. Wheeler, 30 Barb. (N.Y.) 485; Meech v. Patchin, 14 N.Y. 71.

It is not necessary to comply with the statute as to refiling in order to continue a mortgagee's right of action against a creditor, who, before the expiration of the year from the original filing, and while the mortgage was still in force, seizes the property in such a manner as to make him a trespasser; the rights of the parties are fixed by the taking, and are to be determined as they are at the beginning of the suit: Case v. Jewett, 13 Wis. 557; Newman v. Tymeson, 12 Wis. 498; Otis v. Sill, 8 Barb. (N.Y.) 102. If a mortgagee has a cause of action, nothing but a release will deprive him of it, and if his mortgage expires as to creditors and purchasers one day after his right of action vests in him, he need not renew the mortgage by refiling, in order to maintain such right.

Creditors and Subsequent Purchasers.

The statute does not enact that the mortgage becomes null and void from its inception, but simply that it expires, and then, when it expires, the statute opens the door to the different persons protected by the statute. Though a mortgagee fail to renew his mortgage, it does not, on that account, become absolutely void as against creditors. He might still take possession and sell the property, if at the moment when the sale takes place the mortgagor has no creditors, and if he sells to another person taking from the other a mortgage for the full amount of the purchase money, the taking possession and selling is none the less valid on that account: Cookson v. Swire, 9 App. Cas. 653. The words "creditors," "purchasers," etc., mean creditors, purchasers, etc., of the person making the mortgage, hence, where a mortgage is satisfied quoad the goods, the mortgage cannot be properly refiled, though the mortgagor re-

main in possession as before such satisfaction. When, upon default, the mortgagee sells the goods mentioned in the mortgage, the purchaser, though he allow them to remain in possession of the mortgagor, is not required to refile the mortgage, because he is not a purchaser of the mortgagee's interest in them, but a purchaser of the goods themselves, nor is it necessary in such a case that, as against the mortgagor, there should be a bill of sale of the goods, nor in the event of there being a bill of sale, is it necessary that the same should, as against the mortgagor, be registered: Carlisle v. Tait, 7 A.R. (Ont.) 10.

If, however, instead of the mortgagee selling the goods themselves absolutely, he sells merely his interest as a mortgagee, then the purchaser, or as the latter then would be, his assignee, would require to refile the mortgage: Karet v. Kosher, 2 Q.B.D. 361.

We have seen that it is only as against the persons mentioned in the statute that the mortgage must be renewed; hence it is that a landlord against whom an action of trespass is brought by a mortgagee for distraining upon the goods mortgaged, for his rent, cannot object to the mortgage on the ground of not being properly renewed under this section: Griffin v. McKenzie, 46 U.C.Q.B. 93.

A creditor can take advantage of a neglect to refile, no matter when his right accrued, whether prior or subsequent to the default made by the mortgagee in refiling (Moss, C.J.O., Hodgins v. Johnston, 5 A.R. (Ont.) 449; Thompson v. Vechten, 27 N.Y. 568), and his having notice of the mortgage does not prevent him availing himself of the objection that the mortgage has not been refiled: Edwards v. Edwards, 2 Ch.D 291.

A subsequent purchaser or mortgagee cannot, in the words of the statute, be such a purchaser or mortgagee in good faith for value as to entitle him to have the mortgage, "cease to be valid" if he purchased, or became mortgagee, with full notice during the existence of a prior valid mortgage, and subject thereto, or before any default on the part of the prior mortgagee to refile: Rose v. Hope, 22 U.C.C.P. 482; Meech v. Patchin, 14 N.Y. 71; Sanger v. Eastwood, 19 Wend. (N.Y.) 514; Wetherell v. Spencer, 3 Mich. 123; Gregory v. Thomas, 20 Wend. 17; Hill v. Beebe, 13 N.Y. 556. A purchaser or mortgagee may be such in good faith when becoming such subsequent to a

mortgage or bill of sale void *ab initio* from some defect, but of which mortgage notice by registration is duly given: Moffatt v. Conlson, 19 U.C.Q.B. 341. In the case of a subsequent purchaser or mortgagee becoming such during the existence of a prior valid mortgage, the mortgage was perfectly good when the subsequent transactions were had, whilst in the former case, the prior mortgage would have been invalid from the beginning. In the latter case the subsequent purchaser or mortgagee would be such in bad faith, and hence could not be heard to advance the absence of renewal of the mortgage to his own benefit: Hodgins v. Johnston, 5 A.R. (Ont.) 449. The construction to be placed upon the word "subsequent" is that it applies only to purchasers or mortgagees becoming such after the time when the mortgage should, in order to preserve its validity, be renewed: Burton, J.A., Hodgins v. Johnston, 5 A.R. (Ont.), at p. 455.

But a purchaser after the expiration of the year procures a title paramount to the mortgagee, if the mortgage be not refiled, and this is so as well in the case of a purchase from the mortgagor as from his vendee, his executor, and in some cases his widow: Meech v. Patchin, 14 N.Y. 71; Fox v. Burns, 12 Barb. 677; Jones v. Howell, 3 Rob. N.Y. 438. It sometimes happens that by taking a second mortgage in lieu of a former one which he neglects to renew, a mortgagee waives his right, as was the case in Courtis v. Webb, 25 U.C.Q.B. 576, where E. mortgaged a horse with other property to the defendant in April, 1864, and the mortgage contained a proviso that, if he should attempt to dispose of the property, the defendant might take possession and sell. E. disposed of the horse to the plaintiff within a few weeks. This mortgage was not refiled, but the defendant took another in which the horse was included, in February, 1865, for t. e same money with other advances. In July, having first discovered the sale, he seized under the proviso, and it was held, that having neglected to refile the mortgage and taken another, he had lost his right to seize.

Time for Renewal.

The mortgage shall cease to be valid after one year from the filing thereof, not from the date thereof, and, if a mortgagee wants to maintain his prior security he must refile a statement exhibiting the interest of the mortgagee, and an affidavit substantiating such statement from year to year, having with-

in proper time refiled it, according to the statute, at the expiration of the first year.

The renewal may be filed on the anniversary day of the original filing if the hour of filing the renewal is earlier than that of the original filing (Thompson v. Quirk, 18 Can. S.C.R. 695, affirming 1 N.W.T.R., part 1, p. 88), and although not necessary for the decision of that case, the opinion was expressed by Patterson, J., that the day of the original filing should be altogether excluded in the computation, and that the mortgagee would be entitled to the whole of the anniversary day for filing the renewal.

But there will be no necessity for renewing a mortgage after the time when the debt for which it was given is barred by the Statute of Limitations. At least, a compliance with the statute, in periodically renewing the mortgage, will not extend the mortgage lien beyond the time when an action might be maintained to recover the debt.

Time of Filing.

In computing the year within which the renewal of a chattel mortgage must be filed under this section, the day on which the mortgage was filed is to be excluded (McCann v. Martin, 15 O.L.R. 193, following Goldsmith's Co. v. West Metropolitan R. Co., [1904] 1 K.B. 1), where Mathew, L.J., says: "The rule is now well established that, where a particular time is given from a certain date within which an act is to be done, the day of the date is to be excluded."

The provision in the present Act, sub-sec. 1 of sec. 21, is literally the same as sec. 18, R.S.O. 1897, ch. 148, which was under discussion in the above case of McCann v. Martin, 15 O.L.R. 193, except that where the word "filing" is used in the latter Act the word "registration" is substituted in the present Act.

In Armstrong v. Ansman, 11 U.C.Q.B. 498 a chattel mortgage was filed May 15, 1852, and the refiling on May 14, 1853, was held to be clearly in time, the Court suggesting that the year commenced either at midnight, the beginning of the day when filed, or at the hour of the particular day when it is received for filing. The decision in McCann v. Martin, 15 O.L.R. 193, must, however, now be viewed as authoritative.

A chattel mortgage does not cease to be valid as against

creditors, etc., if otherwise regularly renewed, because a renewal statement, made and verified by the mortgagee before an assignment by him of the mortgage, is not filed until after such assignment: Daniel v. Daniel, 29 O.R. 493.

The statute requires that the refiling shall take place "within thirty days" next preceding the expiration of the year; where, therefore, a mortgage of personal property was refiled with the county clerk, forty-seven days before the expiration of a year from the first filing, it was held insufficient: Beaty v. Fowler, 10 U.C.Q.B. 382; Newell v. Warner, 44 Barb. (N.Y.) 258; Biteler v. Baldwin, 31 Alb. L.J. 478; National Bank v. Sprague, 20 N.J. Eq. 13. The thirty days is to be reckoned back from a year from the filing of the mortgage, not from the date of the instrument, and the thirty days is to be next preceding the expiration, not next preceding the day of the expiration of the year. It has not yet been decided what the effect is of refiling a mortgage within the proper time on an affidavit, verifying the statement, sworn to more than thirty days before the expiration of the year; but it is strongly advisable to have the affidavit made as nearly as possible to the day when it is filed, in order more clearly to meet the wording of the statute, in shewing the amount still due: Griffin v. McKenzie, 46 U.C.Q.B. 93.

The statute requires the clerk to endorse upon the mortgage the time of its filing; hence, in computing time running from the act of filing, a fraction of a day will be considered: McMartin v. McDougall, 10 U.C.Q.B. 399; Pugh v. Duke of Leeds, 2 Cowp. 720; Re Sheriff of Newcastle, Drap K.B. Rep. 503: Beekman v. Jarvis, 3 U.C.Q.B. 280; Seamen v. Eager, 16 Ohio 209; Campbell v. Strangeways, 3 C.P.D. 105; Commercial Steamship Co. v. Boulton, L.R. 10 Q.B. 346.

The refiling is nugatory if done either before the thirty days begin to run, or after their expiration: Newell v. Warner, 44 Barb. (N.Y.) 258.

Renewal Statement and Affidavit.

This statute requires two things.

(i) A statement exhibiting the interest of the mortgagee in the property claimed by virtue thereof, and a full statement of the amount still due for principal and interest thereon, and of all payments made on account thereof.

(ii) An affidavit, stating that such statement is true, and that the said mortgage has not been kept on foot for any fraudulent purpose: O'Halloran v. Sills, 12 U.C.C.P. 465. The expressions "kept on foot" and "kept alive" have been held to mean the same thing: Roper v. Scott, 16 Man. L.R. 594, 43 C.L.J. 373.

The statement exhibiting the interest of the mortgagee in the property, required on renewal of a mortgage, must be positive and distinct as to that interest. It should give such precise information of the amount still due as to enable other creditors, or persons, to judge how far it would be safe or prudent to give credit to the mortgagor: Theviot v. Prince, 1 Edm. Sel. Cas. 219. The statement is intended to supply the place of a new mortgage. It might be difficult to obtain a new mortgage at the end of a year. There would be no obligation on the part of the mortgagor to execute it, and no necessary inducement to him to do so. A convenient substitute, and one within the control of the creditor, is given by the section we are considering, and the statutory terms should be strictly complied with.

The information made necessary is as to the following particulars:—

(i) The interest of the mortgagee in the property claimed;

(ii) The amount still due for principal and interest;

(iii) All payments made on account thereof, or if none, it must be so stated: Barber v. Maughan, 42 U.C.Q.B. 134.

This statement cannot be made by the mortgagor without authority, however accurate and *bonâ fide* it may be (Newell v. Warren, 44 Barb. (N.Y.) 258), but there is nothing to prevent the mortgagor acting as agent for the mortgagee for the purpose of refiling the mortgage, though if he is in possession his so doing is regarded with grave suspicion. The statement must shew the interest of the mortgagee in the property claimed, and it must contain a full statement of the amount due for principal and interest: Reynolds v. Williamson, 25 U.C.C.P. 49.

If made in good faith, with reasonable care, and if it be substantially correct and accurate, the statute will have been complied with (Beers v. Waterbury, 8 Bosw. (N.Y.) 396), and a failure to give credit for $2,00 upon a debt of several hundred, will not vitiate the refiling: Patterson v. Gillis, 64 Barb.

(N.Y.) 563. What is necessary is that the statement should notify creditors of the amount of the mortgagee's claim: Miller v. Jones, 15 N. Bank R. 150. The statute appears to require something more than a mere account. The statement should refer to the time of filing: Fraser v. Bank of Toronto, 19 U.C. Q.B. 381. A statement filed on a renewal of a mortgage, whilst not affecting the mortgage as to the amount claimed between the original parties to the instrument, is yet binding upon the mortgagee in favour of all those whom it is the design of the Act to protect, and who have dealt upon the faith of such statement, and against them the mortgagee cannot afterwards claim any greater sum than is contained in the statement: Beers v. Waterbury, 8 Bosw. (N.Y.) 96. It often happens that the statement, standing alone, does not satisfy the statute; but, when assisted by the affidavit, and read in conjunction with it, the two together contain all that the statute calls for. It formerly was the law that however fully the affidavit supplied deficiencies in the statement, the statute was not complied with if the statement itself did not contain the necessary information. It was said in O'Halloran v. Sills, 12 U.C.C.P. 465, "that the mortgagee has no more right to transfer a part of what should be in the statement to the affidavit than he would have to transfer to the statement the portion of the affidavit that the mortgage has not been kept on foot for any fraudulent purpose, and then make affidavit simply that the statements are true." This was followed in Saulter v. Carruthers, 9 U.C.L.J. 158, and Hagarty, C.J., in Reynolds v. Williamson, 25 U.C.C.P. 49, recognized O'Halloran v. Sills, *supra*, as an authority that assistance could not be had from the affidavit to supply defects in the statement. In Walker v. Niles, 18 Gr. 210, Mowat, V.-C., expressed a different opinion, and the later decisions have established a rule directly opposed to that laid down in O'Halloran v. Sills. The rule is now established that the statement and affidavit, when they refer to each other and are meant to be read together, can be so read, and that, if together, they contain the particulars required by the statute, the renewal is sufficient: Barber v. Maughan, 42 U.C.Q.B. 134; Sloan v. Maughan, 3 A.R. (Ont.) 222; Beers v. Waterbury, 8 Bosw. (N.Y.) 96. If the affidavit follows the terms of the statute, and if it and the statement, when read together in the sense in which they would be understood by ordinary English-speaking business men, con-

vey with reasonable fulness and fairness, the information that the deponent is still the mortgagee of the goods described in the mortgage, and that a certain sum remains due for principal and interest, and that certain payments have been made on account, then the intent and spirit of the statute are satisfied (*per* Moss, C.J.A., in Sloan v. Maughan, 3 A.R. (Ont.), at p. 227: see Brodrick v. Seale, L.R. 6 C.P. 98; Jones v. Harris, L.R. 7 Q.B. 157; Murray v. Mackenzie, L.R. 10 C.P. 625; Pickkard v. Bretz, 5 H. & N. 9; Banbury v. White, 2 H. & C. 300; Hatton v. English, 7 E. & B. 94), and now, by sub-sec. 6 of this section, the statement and affidavit shall be deemed one instrument, which would seem to confirm the latter decisions.

Christin v. Christin, 1 O.L.R. 634, 37 C.L.J. 309, holds that a renewal statement, filed by a chattel mortgagee and not signed by him, but on the back of which an affidavit appeared, which was signed and sworn to by him, and which referred to the statement of renewal, was a sufficient compliance with sec. 18, ch. 148, R.S.O. 1897, the case following in that respect, Barber v. Maughan, 42 U.C.Q.B. 134, which holds that, on the renewal of a chattel mortgage, the statement and affidavit may be read together when they refer to each other and the intention to include them as one paper is evident. Street, J., in Christin v. Christin, *supra*, said: "There has been an attempt to follow too slavishly the form of the statute, but I think the requirements of the statute have been sufficiently complied with and that the amount remaining due could be calculated by any person with the material supplied by the statement."

Mortgagee's Affidavit.

The affidavit can be made by any of the following:—

(i) By the mortgagee (sec. 21 (1)).

(ii) By one of several mortgagees (sec. 12 (1)).

(iii) By the assignee of the mortgagee (sec. 14).

(iv) By the agent of the mortgagee (sec. 12 (1)).

(v) By the agent of several mortgagees (*ibid.*).

(vi) By any next of kin, executor or administrator of a deceased mortgagee (sec. 14).

(vii) By any next of kin, executor, or administrator of any assignee of a mortgagee (secs. 14 and 21 (8)).

(viii) By the officer or agent of a corporation (sec. 12 (2)).

Under the above sections, an agent has power to take a mortgage, as well as the power to renew one. His authority should be purposely to renew, and the authority must be in writing, and be filed with the renewal statement. An authority to take a mortgage may not be an authority to renew it. It would appear reasonable, however, that power to take included power to renew, especially when renewal became necessary to preserve the rights of the principal; but section 15 refers to an authority to take and renew in a manner seeming to imply that the latter is not included in the former. Section 12 expressly provides that the affidavit of the agent shall state that the deponent is aware of all the circumstances connected with the mortgage, and has personal knowledge of the facts deposed to.

Assignees' Renewals.

In addition to all other papers, there must be filed the assignment, or the several assignments, as the case may be, through which the assignee claims (sub-sec. 8, of sec. 21).

The time when such assignment, or several assignments, must be filed, is at the time of refiling of the mortgage, or at any time prior thereto.

The original assignment, or assignments, must be filed, and the assignee has no option, when renewing a mortgage, of filing copies thereof. The proof necessary to register the assignment is an affidavit of execution by a subscribing witness, as provided by sub-sec. 4 of sec. 29, *infra*. When the affidavit for renewal is made by a next of kin, executor or administrator, then the capacity in which the deponent refiles the mortgage ought to appear in the affidavit, in order that the public may be informed thereupon.

Sub-section 9 as to renewal by an assignee for creditors, confirms the prior decision of the Court of Appeal in Fleming v. Ryan, 21 A.R. (Ont.) 39, 30 C.L.J. 32.

Validity of Affidavits.

It is no objection that the affidavit made on one day states the amount due for interest at what it would be on a future day, the day of refiling. The Act is complied with, where no fraud is intended, though the amount due is, by inadvertence stated at a few shillings too much, or the statement includes a trifling sum which the mortgagee had no right to charge;

through a mistake of this kind the Court will not hold the object of refiling defeated, and the security lost; Fraser v. Bank of Toronto, 19 U.C.Q.B. 381; Patterson v. Gillis, 64 Barb. (N.Y.) 563. The affidavit must aver that the statements are "true." The substitution of the words "correct," "accounts," "exact," for the word "true," is a fatal objection: Reynolds v. Williamson, 25 U.C.C.P. 49. There is safety in keeping to the words of the statute, for though it may be difficult to point out what difference in substance there may be between the meaning of the words, yet the omission, or change of a word, may lack a strict compliance with the statute. The mere omission of the word "really" in an affidavit made under Revised Statutes of Ontario, 1887, ch. 134, sec. 3, is a well-founded objection: Jackson v. Kassel, 26 U.C.Q.B. 341. The addition of the word "correctly" to that of "truly," will not, however, nullify the affidavit: Barber v. Maughan, 42 U.C.Q.B. 134: see also De Forrest v. Bunnell, 15 U.C.Q.B. 370; Harding v. Knowlson, 17 U.C.Q.B. 564; Brodie v. Ruttan, 16 U.C.Q.B. 207; Moyer v. Davidson, 7 U.C.C.P. 521; Maxwell v. Ferrie, 8 U.C.C.P. 11; Hatton v. English, 7 E. & Bl. 94.

On a renewal by the original mortgagee the omission of the words, as provided in "Form 1," "that the said mortgagee is still the mortgagee of the said property and has not assigned the said mortgage" will invalidate the renewal: McNicholl v. Ellis, 28 C.L.J. 95, *per* Dartnell, Co.J.

Successive Renewals.

By sub-section 7 of this section the legislature makes statutory law that which was held to be necessary by the Courts in Kissock v. Jarvis, 9 U.C.C.P. 156, and Beaumont v. Cramp, 45 U.C.Q.B. 356.

It will be observed that sub-section 7 only refers to a second and subsequent renewals, not to the first renewal, which is still governed by sub-section 1.

The second renewal must be filed within thirty days next preceding the expiration of the term of one year from the day of filing of the first renewal. The day of filing is to be excluded, and the whole of the anniversary day is given within which to file the second or subsequent renewals: *per* Patterson, J., Thomson v. Quirk, 18 Can. S.C.R. 695.

The words here used are "shall cease to be valid." Atten-

tion is directed to the difference in language in this section and section 7 where the words are "shall be absolutely null and void."

The time when the second renewal must be filed is within thirty days next preceding the expiration of one year from the day of filing the first renewal; the third renewal within the same time from the day of filing the second, and so on.

Stating the Payments in the Renewal Statement.

In the case of Kerr v. Roberts, 33 C.L.J. 695, Ketchum, Co.J., held that every statement made in the renewal of a chattel mortgage must shew all payments made on account of the mortgage since the date of the mortgage. It is not sufficient to state only the payments in the year to which the statement refers. A different rule, however, had been laid down in Christin v. Christin, 1 O.L.R. 634, to the effect that the statement of payments made need not set forth in detail the date and amount of each payment, but only the total sum paid. Hence, where the statement set forth "that no payments have been made upon the said mortgage;" but it clearly shewed that payment of a certain sum had been made on account of interest, and no other payments, it was held, that the statute had been sufficiently complied with. The case of Rogers v. Marshall, 7 O.L.R. 291, specially referring to Christin v. Christin, *supra*, and overruling Kerr v. Roberts, *supra*, held that successive renewal statements of a chattel mortgage need not shew all the credits on account of the mortgage; it is sufficient if each statement contains the payments made since the last renewal.

Alteration of County or District Boundaries.

22. Where a new county or district is formed, or territory is added to a county or district, every mortgage which under the provisions of this Act would otherwise require to be renewed in the county or district of which the territory forming or added to the new county or district was part, shall be renewed in the office of the proper officer of the county or district so formed or to which such territory is added, and upon such renewal a copy of the mortgage, certified under the hand of the officer in whose office it was registered and the seal of the court,

shall be registered with the renewal statement and affidavit. R.S.O. 1897, c. 148, s. 35.

Subsequent Taking of Possession.

23. A mortgage or sale declared by this Act to be void or which under the provisions of section 21 has ceased to be valid as against creditors and subsequent purchasers or mortgagees shall not by the subsequent taking of possession of the goods and chattels mortgaged or sold by the mortgagee or bargainee be thereby made valid as against persons who became creditors, purchasers, or mortgagees before such taking of possession. R.S.O. 1897, c. 148, s. 40.

Subsequent Possession.

This section, of course, refers to the subsequent taking of possession of the mortgaged chattels in the event the mortgage ceases to be valid for want of renewal. In Marthinson v. Patterson, 19 A.R. (Ont.) 188, the Court of Appeal held that taking possession does not make good a defective chattel mortgage as against a subsequent validly registered *bonâ fide* chattel mortgage which existed at the time possession was taken, but under which no default had occurred.

Where the mortgagee took possession of goods rightfully as against the mortgagor and before the creditors had obtained judgment or execution, but after they became simple contract creditors, the taking of possession does not make the mortgage valid as against them: Wood v. Brunt, 32 C.L.J. 775 (*per* Ketchum, Co.J.), following Clarkson v. McMaster, 25 Can. S.C.R. 96; see note to sec. 2, of this Act, *supra*.

The seizure of mortgaged chattels by the mortgagee's bailiff after the time within which to file a renewal had expired, but leaving them in the possession of the mortgagor's son who resided on the same premises, does not constitute such a taking of possession as is required by the statute: Heaton v. Flood, 29 O.R. 87, 34 C.L.J. 30. In any event, the act of taking possession after the time for renewal has expired, must amount to a new delivery or new transfer by the mortgagor: *per* Meredith, C.J., *ibid*.

Mortgages to Secure Bonds, etc., of Corporations.

24. (1) In the case of a mortgage of goods and chattels made by any incorporated company to a bondholder, or to a trustee, for the purpose of securing the bonds or debentures of such company, it shall be sufficient if the affidavit of *bona fides* is to the effect that the mortgage was executed in good faith and for the express purpose of securing the payment of the bonds or debentures referred to therein, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagors, or of preventing the creditors of such mortgagors from obtaining payment of any claim against them. R.S.O. 1897, c. 148, s. 23(1); 4 Edw. VII. c. 10, s. 36.

(2) Where the head office of the company is not within Ontario, the mortgage may be registered within thirty days instead of five days, as provided by section 18.

(3) Any such mortgage may be renewed in the manner and with the effect provided by section 21 by the filing of a statement by the mortgagee or one of the mortgagees exhibiting the interest of the mortgagee or mortgagees in the property claimed by virtue of the mortgage, and shewing the amount of the bond or debenture debt which the same was made to secure, and shewing all payments on account thereof which to the best of the information and belief of the person making such statement, have been made, or of which he is aware or has been informed, together with an affidavit of the person making such statement, that the statement is true to the best of his knowledge, information and belief, and that the mortgage has not been kept on foot for any fraudulent purpose, and such statement shall be filed instead of the statement required by section 21.

(4) Where the mortgage is made as a security for debentures and the by-law authorizing the issue of the debentures, as a security for which the mortgage was made, or a copy thereof, certified under the hand of the president or vice-president and secretary of the company and verified by an affidavit thereto attached or endorsed thereon, and having the corporate seal at

tached thereto, is registered with the mortgage, it shall not be necessary to renew the mortgage, but the same shall in such case continue to be as valid as if it had been duly renewed as in this Act provided.

(5) The next preceding sub-section shall apply to every such mortgage made and registered after the 5th day of May, 1894, but nothing herein shall affect any accrued rights or any litigation pending on the 13th day of April, 1897. R.S.O. 1897, c. 148, s. 23 (2-6).

Chattel Mortgage to Trustee for Bondholders.

Where the mortgage is to a trustee for the debenture holders, the trustee could not swear that the company was justly and truly indebted to him in the sum total of the debentures; for the nature of a security by bond or debenture is that the indebtedness is to the respective holders individually for the amount respectively allotted to each.

A debenture commonly means an acknowledgment of indebtedness by a company, importing a covenant or obligation to pay, and usually secured by some charge: Edmonds v. Blaina, 36 Ch.D. 215.

Usually it is one of a serial issue, ranking *pari passu*, but a single debenture may be issued, and any document which either creates a debt or acknowledges it, is a "debenture:" Levy v. Abercorris, 37 Ch.D. 260.

The commonest form of debenture with trading companies is the "mortgage debenture" whereby a charge is created upon the property of the company, and if it appears that the intention was to create a charge, and that the parties who intended to create it had the power to do so, it will be given effect so far as the immediate parties are concerned, notwithstanding the occurrence of a mistake in the attempt: Re Strand Music Hall Co., 3 DeG. J. & S. 147.

But an agreement with share underwriters merely providing that a trust shall be created in favour of debenture holders, but not in fact creating it and to which such holders are not parties, does not constitute the underwriters trustees for the debenture holders nor prevent a subsequent alteration of the agreement: Re Hansard Publishing Union, 8 Times L.R. 280.

A body corporate is entitled to hold property and to dispose of it with the same freedom as an individual, unless there is an express prohibition from so doing: Re Patent File Co., 40 L.J. Ch. 190.

A trust deed securing debentures is in its nature a mortgage, and usually takes the form of a conveyance to trustees to hold upon trust for securing to the holders of the debentures without preference or priority the principal moneys and interest, but permitting the company to retain possession until it makes default or is wound up; the intention being that the mortgage or conveyance is to be a floating security only, and not to hinder the company's dealing with the property comprised in it, in the ordinary course of its business, but not to create any charge ranking before it.

It is frequently of importance to provide that the trustee shall have power, instead of selling, to appoint a receiver or to carry on the business; also, that the trustee shall, on requisition by a fixed proportion of debenture holders, call a meeting of the debenture holders to discuss and determine any matters affecting their interest, and the manner of advertising or giving notice of the meeting, and the regulations to be observed thereat. The trust deed should also provide that a resolution passed at the meeting shall bind the remaining debenture holders, when a majority in number and value of the debenture holders present have voted in its favour. The debenture holders are *cestuis que trustent* without any right, independently of their trustee, to sue the company, except on the trustee's refusal or neglect to do so: Re Empress Engineering Co., 16 Ch.D. 125; Gandy v. Gandy, 30 Ch.D. 67; Re Uruguay Railway, 11 Ch.D. 372.

A document by which the title and right to possession of chattel property of a company is transferred to a trustee for bondholders is within the purview of sec. 24 of the Act, but a "floating charge" passing no property in the goods and conferring no rights of possession or interference therewith, but giving preferential rights on the winding-up of a company, may be created as to present and future property of a company without coming within the terms of the Bills of Sale and Chattel Mortgage Act: National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459; Johnston v. Wade, 17 O.L.R. 372, specially considered: Re London Pressed Hinge Co., [1905] 1 Ch. 576, specially referred to.

Mortgage of Railway Rolling Stock.

25. (1) In the case of a mortgage securing bonds made by an incorporated company on rolling stock owned by it, it shall be sufficient for the purposes of this Act if the mortgage or a copy thereof and the affidavit in sub-section 1 of the next preceding section referred to be filed in the office of the Provincial Secretary within the time limited by this Act for registering a mortgage to secure bonds or debentures of an incorporated company.

(2) The office of the Provincial Secretary shall be the place for filing the renewal statements of any such mortgage of rolling stock where renewal thereof is necessary under this Act.

(3) Sub-sections 1 and 2 shall apply to any such mortgage on rolling stock heretofore made, if the same has been filed as therein provided. 3 Edw. VII. c. 7, s. 60.

Railway Equipment Mortgages.

See note to sec. 26.

Mortgage to Secure Bonds, etc., on Leased Rolling Stock.

26. (1) In the case of a mortgage, hypothec or other instrument made by an incorporated company securing bonds, debentures, notes or other securities on any rolling stock which is subject to any lease, conditional sale or bailment to a railway company, the same or a copy thereof may be filed in the office of the Provincial Secretary within 21 days from the execution thereof, and if so filed shall be as valid as against creditors of such company and subsequent purchasers as if the same had been registered pursuant to the provisions of this Act.

(2) Notice of the filing shall forthwith thereafter be given in the *Ontario Gazette*. (*See* 6 Edw. VII. c. 38, s. 7 (Dom.); 8 Edw. VII. c. 33, ss. 41 and 42.)

(3) In case any such mortgage, hypothec or other instrument made before the 14th day of April, 1908, or a copy thereof had been filed in the office of the Provincial Secretary within ninety days from that date, the same shall be as valid as against

creditors of such company and purchasers or mortgagees, becoming such creditors, purchasers or mortgagees subsequent to that date as if it had been registered pursuant to the provisions of this Act.

Leased Rolling Stock Mortgages.

By the Interpretation Act the word "may" is to be construed as permissive: Ontario Statutes, 7 Edw. VII. ch. 2, sec. 7, sub-sec. 2, R.S.O. 1914, ch. 1. The advantage of filing under this section is that it avoids the many filings which would be necessary if separate registration were necessary in every county through which the line of railway ran.

Proof of Registration.

27. A copy of any instrument or document registered under this Act and of any endorsement thereon certified under the hand of the officer with whom the same is registered and under the seal of the court or where the same is filed in the office of the Provincial Secretary under the hand of the Provincial Secretary or Assistant Provincial Secretary, shall be received as evidence by all courts that the instrument or document was received and registered or filed according to the endorsement thereon R.S.O. 1897, c. 148, s. 24.

Proof of Registration.

There appear to be two methods, by either of which registration can be proved:—

First: By a copy of the original instrument, or of a copy thereof, including any statements filed, certified by the clerk under his seal.

Second: By the production of the original indorsement made by the clerk upon the original instrument or upon the copy.

Either of these methods affords evidence only of the fact that the instrument, or copy, and statements were received and filed according to the indorsement of the clerk thereon. The execution of the instrument would still have to be proved by the production of the original, and by proof of the signature in the ordinary way. Should the original be lost, and for this reason the party setting it up be unable to produce it, secondary evidence would be admissible to prove its contents.

Unless instruments under the Act are properly filed—filed as required by the statute—then it would appear that the means afforded of giving evidence, pointed out by this section, become of no avail. Everything hangs upon the provisions of the statute being faithfully complied with, in their directions as to filing.

Certificate of Registration.

The following is a form that may be used, of a clerk's certificate, under this section:—

I ———— Clerk of the County Court of the County of ———— do hereby certify that the annexed paper writing marked "A." is a true and correct copy of the original chattel mortgage from A. B. to C. D., and of all endorsements on said original mortgage, bearing date the ——— day of ——— 19—, and filed in the office of the said Court at ——— o'clock in the —— noon, on ——— the —— day of —— 19—.

Dated this —— day of —— 19—.

[Seal] (Signed) ————C.C.C.

It appears that the entries in the book kept by the clerk would not be received in evidence to contradict the clerk's certificate under this section (Adams v. Pratt, 109 Mass. 59), for the certificate is conclusive as to the filing and indorsements (Thayer v. Stark, 6 Cush. (Mass.) 11; Jordan v. Farnsworth, 15 Gray (Mass.) 517; Head v. Goodwin, 37 Me. 181), but as to nothing more. It is no proof that the paper purporting to be a copy is a copy of the original mortgage when a copy thereof is filed in the first instance: Bissell v. Pearce, 28 N.Y. 252.

Discharge of Mortgages.

28. A mortgage registered under this Act may be discharged by registering in the office in which the mortgage is registered a certificate, Form 2, signed by the mortgagee, his executors, administrators or assigns. R.S.O. 1897, c. 148, s. 25.

Discharge of Chattel Mortgage.

The earlier chattel mortgage Acts made no provision for the discharging of mortgages and filing of the release, as is herein contained. This privilege or power was first given by

40 Viet. (1877) ch. 21, sec. 1. It is optional, however, with the parties interested to take advantage of this provision. By virtue of this section the clerk is compelled to receive and file any certificate of discharge of a mortgage, registered under the provisions of this Act, but the certificate must be duly proved for registration by the affidavit of a subscribing witness, pursuant to section 29.

Payment of Debt.

The debt being the "principal," and the mortgage security the "adjunct," when the debt is paid the mortgage security forthwith ceases to exist: Jackson v. Stackhouse, 1 Cow. 122; Crosby v. Chase, 17 Me. 369. A parol release of a mortgage is good when supported by sufficient consideration. And a simple receipt in full of the debt secured by the mortgage is a sufficient release in equity.

When a bill of sale is given as security, it becomes, as between the immediate parties, null and void by payment of the debt, as if the instrument had contained a defeasance: Wallard v. Worthman, 84 Ill. 446.

Payment of the debt discharges the mortgage for all purposes, hence a mortgage given to a surety for a debt, is discharged when the debt is paid, and cannot be continued in behalf of a new mortgagee for a new debt: Brooks v. Ruff, 37 Ala. 371.

Releasing a surety to whom a mortgage is given as security against payment of a debt, discharges the mortgage (Sumner v. Bucheldor, 30 Me. 35); but payment by the surety of the debt does not discharge the mortgage: Bryan v. Pollard, 10 Allen (Mass.) 81; Puckhard v. Kingman, 11 Iowa 219. It does not render the mortgage invalid because no time is stated in the defeasance clause when the mortgage is to be paid, except where the statute expressly provides otherwise. An accidental omission of this kind can be supplied by verbal testimony, and an intentional omission is met with the rule of law, that the mortgage must be paid within a reasonable time: Byram v. Gordon, 11 Mich. 531. Where the time for payment is stated to be, "when the borrower is able to pay," then the debt is payable at such time when it can be shewn, that, to public observation, the mortgagor's affairs are in a flourishing condition, without shewing further that the mortgagor can discharge the debt with

out inconvenience: Re Ross, 29 Gr. 385. Should the mortgage name a day for payment earlier than the date of the mortgage, then inasmuch as such is an impossible date for payment, oral testimony would probably be admitted to shew the true time for payment: Fuller v. Acker, 1 Hill (N.Y.) 473.

After default has been made in payment of the mortgage, or after breach of any of the conditions in the mortgage entitling the mortgagee to possession, and the mortgagee takes possession, then upon a tender of the money and its acceptance, the legal title revests in the mortgagor without a re-delivery or re-sale, and without cancellation of the mortgage: Patchin v. Pierce, 12 Wend. (N.Y.) 61.

If the mortgagee has not obtained possession, or taken any steps to secure possession, and the mortgagor make a good tender of the mortgage money, then the mortgagee can be restrained from taking possession: Mersgat v. Pumpelly, 46 Wis. 660; Archer v. Cole, 22 [illegible] (N.Y.) Pr. 411.

Modes of Satisfaction.

A mortgage may be discharged otherwise than by payment: thus, conversion by the mortgagee of the property mortgaged to his own use may be treated by the mortgagor as payment of the mortgage debt: Davis v. Rider, 5 Mich. 423. Possession of the mortgaged property by the mortgagee after maturity of the mortgage may or may not be satisfaction of the mortgage: Carpenter v. Bridges, 32 Miss. 265. The debt itself, though it be the principal, and the mortgage be the incident, may be uncollectable, and the mortgage lien remain undischarged, as when the benefit of a bankruptcy law is taken by the mortgagor, or the Statute of Limitations interferes to prevent a personal action for the amount of the debt: Crane v. Paine, 4 Cush. (Mass.) 483. On the other hand, the mortgagee, by consent, may waive his lien on the goods mortgaged, and preserve his personal remedy against the mortgagor: Conkling v. Sherry, 28 N.Y. 360; Brant v. Daniels, 45 Ill. 453.

Limitations Against Mortgage Debt.

In the case of London and Midland Bank v. Mitchell, [1899] 2 Ch. 161, the effect of the Statute of Limitations (21 Jac. I., ch. 16) is considered. In this case the action was brought to foreclose the equity of redemption in an equitable mortgage

by deposit of certain shares in a limited company, made to secure a simple contract debt. The defence was that the remedy for the debt was barred by the Statute of Limitations (21 Jac. I., ch. 16), and that as no action could now be maintained for the debt, the right to the equitable relief claimed by the plaintiffs was also barred by analogy to the statute. A passage in Robbins on Mortgages, p. 1059, was relied on in support of this defence; but Stirling, J., was of opinion that though the remedy for the debt was barred, the debt itself was not barred, and that an action of foreclosure is not an action for the recovery of the debt, but an action to recover the mortgaged property, and that no Statute of Limitations applied to bar the plaintiff's right to foreclosure or sale of the mortgaged property, and he therefore granted the relief prayed by the plaintiff: see. 35 C.L.J. 709.

Necessity for Registering Discharge.

If not renewed, a mortgage will, though it continues valid between the original parties, become null and void as against creditors, subsequent purchasers, and mortgagees in good faith for valuable consideration under section 21 *ante*. The lapse of time, therefore, as to them, serves to invalidate the mortgage, and usually mortgagors are content with this, retaining in their own possession the evidence, as against the mortgagee, of the mortgage having been released. As the object of registration of mortgages is to apprise the public of a man's financial position, so is this section intended to inform the public of a removal of the incumbrance as well as to benefit the mortgagor's financial position by affording him an opportunity of giving official notice of his circumstances having been altered. In view of the financial position and dealings of business men now so well known through the medium of commercial agencies, merchants and others relieved from incumbrances will gladly avail themselves of privileges afforded by this section, in order to strengthen their credit and improve their business standing.

Certificate of Discharge.

The certificate of discharge of mortgage can be signed as well by the assignee of a mortgagee himself, his executors or administrators: see section 29.

The form provided by the statute had better be adhered to.

but there is nothing to prevent the conveyancer adopting any other form, provided it produces the precise legal effect, neither more nor less, of the statutory form, and that the variance is not calculated reasonably to deceive those for whose benefit the statutory form is prescribed: Ex p. Stanford, Re Barber, 17 Q.B.D. 259; Davis v. Burton, 10 Q.B.D. 414, affirmed, 11 Q.B. D. 537; Re Williams, Ex p. Pearce, 25 Ch. D. 656; Melville v. Stringer, 13 Q.B.D. 392; Saunders v. White, [1902] 1 K.B. 70; Roberts v. Roberts, 13 Q.B.D. 794.

Entering Certificates of Discharge, etc; Assignments.

29. (1) The officer with whom the mortgage is registered upon receiving such certificate, proved by the affidavit of a subscribing witness, shall, at each place where the number of the mortgage has been entered, with the name of any of the parties thereto, in the book kept by him under section 20, or wherever otherwise in such book the mortgage has been entered, write the words "Discharged by Certificate Number (*stating the number of the certificate*)," and to such entry the officer shall subscribe his name, and he shall also endorse the fact of the discharge upon the instrument discharged, and shall subscribe his name to the endorsement. R.S.O. 1897, c. 148, s. 26.

(2) Where a mortgage has been renewed under section 21, the endorsement or entries required by the next preceding subsection need only be made upon the statement and affidavit filed in the last renewal, and at the entries of the statement and affidavit in such book. R.S.O. 1897, c. 148, s. 27.

(3) A certificate of discharge by an assignee shall not be registered unless and until the assignment is registered.

(4) The assignment shall, upon proof by the affidavit of a subscribing witness, be registered, numbered and entered in such book, in the same manner as a mortgage. R.S.O. 1897, c. 148, s. 28.

Registration of Discharges.

By this section is pointed out the method of registering the discharge. It is the clerk's duty to see that the statute has been complied with: DeForrest v. Bunnell, 15 U.C.Q.B. 370.

As to who can administer the affidavit of the witness, see notes to section 12, *supra*.

Sub-section 6 of section 21 provides that the statement and affidavit shall be deemed one instrument, so that the indorsements need not be made both upon the statement and on the affidavit; if made on one, it will be sufficient.

Registration of Assignments.

The legal effect of the assignment is to transfer the entire interest of the mortgagee in the property to the assignee, who, thereupon, in place of the mortgagee, becomes the legal owner. If the mortgagee was entitled to the possession of the property, the legal effect of his assignment is the same as if he had been in possession of the property and sold and delivered it to the assignee. The latter may recover possession in the same manner that the mortgagee himself might have done.

An assignment of the mortgage and of all interest therein contained in an assignment of the debt (Jones v. Huggeford, 3 Met. (Mass.) 515), and an assignment of the debt secured passes the equitable interest in the property mortgaged: Langdon v. Buel, 9 Wend. (N.Y.) 80. If the debt be in the shape of a negotiable promissory note, then, by transfer of the note, the indorsee takes the benefit of the mortgage. The mortgage is the incident, and the debt the principal; hence, if the debt be transferred, the mortgage passes as incident thereto: Earl v. Stamp, 13 N.W. Rep. 701; Lucas v. Harris, 20 Ill. 165; Hill v. Beebe, 13 N.Y. 556.

An assignment of part of the debt carries with it an equitable interest in the mortgage *pro tanto*: Emmons v. Dowe, 2 Wis. 322. The right to assign in the mortgagee continues so long as the mortgage is a subsisting one (Moody v. Ellebe, 4 S.C. 21), and, until the right of redemption is barred, or the liability discharged, the assignee will step into the position of the mortgagee, taking over all the latter's rights at the moment when the assignment is completed (Beach v. Derby, 19 Ill. 617) including right of action, in some cases accruing prior to the assignment (Langdon v. Buel, 9 Wend. (N.Y.) 80), though apparently not in all: Bowers v. Bradley, 4 Bradw. (Ill.) 279.

When the debt is assigned without the mortgage, though the mortgage passes too, yet, without assignment, the legal interest does not pass in the mortgage, and the assignee could n

maintain replevin or trespass in his own name: Ramsdell v. Tewkesbury, 73 Me. 197; Crane v. Paine, 4 Cush. (Mass.) 483. Unless there is an express warranty of title, a mortgagee assigning is not in any way liable for the title of the mortgagor being good: Jones v. Huggeford, 3 Met. (Mass.) 515.

Any one wishing to register an assignment of a chattel mortgage can now do so, and the clerk is obliged to receive it from him, when the statute is otherwise complied with, for the purpose of registration. But it would appear to be still optional with an assignee of a mortgage whether he register his assignment or not. If, however, he requires to renew the mortgage under section 21 of this Act, he must then, either before or at the time of filing the renewal statement, file the assignment also. It has also been held in New York that the result of registration is to supply the mortgagor with notice (Reed v. Markle, 10 Paige 409; Walcott v. Sullivan, 1 Edw. Ch. 399; New York Life Ins. Co. v. Smith, 2 Barb. Ch. 82), though it may be considered questionable whether registration is notice to any but creditors, subsequent purchasers and subsequent mortgagees, for which classes alone the statute is providing a protection. A mortgagor on redeeming can hardly be placed in the category of a subsequent purchaser; the original divesting of title made by the mortgage is simply made void, and the mortgagor regains his original title by virtue of the defeasance in the mortgage without a formal discharge, and should have actual notice of the transfer or assignment of the debt. The assignee should not only register his assignment but at once give notice to the mortgagor of the fact of his having become the assignee of the mortgage, and thus prevent any further dealings between the mortgagor and the mortgagee by which he might be prejudiced. (For form of notice see Appendix of Forms.) The mortgagor, having received the notice, can then no longer deal with the mortgagee concerning the mortgage; should he do so, however, any payments that he might make would be fraudulently received by the mortgagee, and void, and of no avail on the part of the mortgagor: Johnson v. Holdsworth, 4 Dowl. P.C. 63; Hickey v. Burt, 7 Taunt. 48; Mountstephen v. Brooke, 1 Chit. 390; Phillips v. Claggett, 11 M. & W. 84; Payne v. Rogers, Doug. 407; Manning v. Cox, 7 Moore 617; Barker v. Richardson, 1 Y. & J. 362; Legh v. Legh, 1 Bos. & P. 447; Wild v. Williams, 6 M. & W. 490; Buckley v. Landon, 3 Conn. 76; Webb v. Steele,

13 N. H. 230; Blake v. Buchanan, 22 Vt. 548; Jones v. Herbert, 7 Taunt. 421; Crook v. Stephens, 5 Bing. N.C. 688. But should the assignee be the purchaser of a note, the payment of which the mortgage purports to secure, then, even without the precaution being taken of giving notice, the assignee cannot be prejudiced by a release given by the assignor to the mortgagor after the transfer of the note: Dick v. Mowry, 17 Miss. 448; McCormick v. Digby, 8 Black. 99. Should the note be overdue before the mortgage is assigned, then the same equities can be set up by the mortgagor against the assignee's claim, as he had against the assignor: Howard v. Gresham, 27 Geo. 347; Nichols v. Lee, 10 Mich. 526. The assignee of a chattel mortgage takes it from the assignor, subject to the same equities that exist against it in the hands of the mortgagee. The law regulating assignments of choses in action applies to assignments of chattel mortgages, and the general principle is that the assignee of a chose in action takes it subject to the equities existing between the original parties, and now by statute a chose in action is assignable at law, but subject to the equities existing before notice of the assignment: see R.S.O. 1914, ch. 133.

An assignee of a mortgage can always discover from the mortgagor the true position in which the mortgagor stands towards the mortgagee in regard to the mortgage, and therefore an assignee takes subject to any equities of the mortgagor existing against the assignor at the date of the assignment, or up to the time when the mortgagor has acquired notice of the assignment of the mortgage: Egleson v. Howe, 3 A.R. (Ont.) 574; Martin v. Bearman, 45 U.C.Q.B. 205; Matthews v. Wallwyn, 4 Ves. 118; Williams v. Sorrell, 4 Ves. 389; Mangles v. Dixon, 18 L. & E. 82; James v. Murray, 2 Cow. 246; Hartley v. Tatham, 10 Bosw. 273; Fitch v. Cotheal, 2 Sand. Ch. 29; Henry v. Carroll, 3 Sand. Ch. 301; Clute v. Robinson, 2 John. 595; Ord v. White, 3 Beav. 357; Cole v. Muddle, 10 Hare 186; Davies v. Austen, 1 Ves. 247; Murray v. Governor, 2 Johns. Cases, 438; Niagara Bank v. Rosenfelt, 9 Cow. 409; Woods v. Perry, 1 Barb. 114; Evertson v. Evertson, 5 Paige 202.

Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule that must yield where it appears from the nature or terms of the con-

tract that it must have been intended to be assignable free from and unaffected by such equities: Lord Cairns in Re Agra v. Masterman's Bank, L.R. 2 Ch. App. 397. It makes no difference that the assignee has no notice of the equities; thus, where the plaintiff gave a chattel mortgage to H. to secure certain money, with a proviso enabling the mortgagee to take possession and sell in case the goods should be taken in execution by any creditor of the mortgagor, and the goods were so taken, and the defendant to whom the mortgage had been assigned by H. took possession and sold under it, and the plaintiff sued, alleging that H. verbally agreed to pay these executions, which were made part of the money secured; it was held that the defendant as assignee took, subject to such agreement (which did not vary the terms of the mortgage) though without notice of it, and that the seizure and sale were illegal: Martin v. Bearman, 45 L.C. Q.B. 205.

An assignee of a mortgage, which has been partly paid off, cannot look to the goods, as against the class of persons protected by the Act, to realize not only the balance due on the mortgage, but an additional sum which at the time of the transfer he was induced to advance the mortgagor: Horne v. Hughes, 6 Q.B.D. 676.

Book debts are not within the Ontario Bills of Sale and Chattel Mortgage Act, and the transfer of them does not require registration, and, therefore, the mortgagee claiming under an unregistered mortgage covering book debts is entitled to recover the amount realized from the book debts by the mortgagor's assignee for the benefit of creditors, or by the liquidator appointed under the Winding-up Act, R.S.C. 1906, ch. 144, even though no notice of their assignment was given by the mortgagee to those owing the book debts: National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459.

An assignment of book debts by a mortgagor to a bank, without notice of the assignment of the same to the company under the chattel mortgage, followed by notices to and collections from the debtors, vests the debts and the proceeds thereof in the bank against the claim of the company, who had given no notice to the debtors under the Judicature Act, sec. 58 (5): Thomas v. Standard Bank of Canada, 1 O.W.N. 379, 548 (D.C.).

Affidavit of Assignment.

There is no objection to the solicitor of the assignor being the witness (Penwarden v. Roberts, 9 Q.B.D. 137), but it has been held, in effect, that the assignee himself cannot be the attesting witness: Seal v. Claridge, 7 Q.B.D. 516.

As it is not compulsory that an assignee should file his assignment of mortgage except in the event of the mortgage being renewed, it would seem that an assignee when seeking to enforce his mortgage prior to the period when it should be renewed, could not be prejudiced by the registration of an imperfect assignment; if an assignee's security be good without registration, imperfect registration could not make it bad; but this would probably be otherwise in the event of a conflict taking place between the assignee and other parties after the period has elapsed within which the mortgage was required to be re-filed; because then the statute requires also that the assignment shall be registered, and this section requires certain formalities to be observed in its registration. The statute seems to make registration compulsory; but it has been held that the assignee of a mortgage for valuable consideration will be preferred as against a subsequent *bonâ fide* purchaser of the same for value without notice, even though the assignment be not registered: Wilson v. Kimball, 27 N.Y. 300.

In addition to the mortgagee or the executors or administrators of the mortgagee mentioned in section 28, the assignee of a mortgage has, under this section, the power given him to execute the certificate of discharge of mortgage, upon the registration of his assignment.

Fees of Officers.

30. For services under this Act the officers shall be entitled to the following fees:—

(*a*) For registering each instrument or copy or renewal statement, fifty cents;

(*b*) For registering an assignment, twenty-five cents;

(*c*) For registering a certificate of discharge, twenty-five cents;

(*d*) For a general search, twenty-five cents;

(*e*) For production and inspection of any instrument or document, ten cents;

(*f*) For copies of any instrument or document and certifying the same, ten cents for every hundred words;

(*g*) For extracts, whether made by the person making the search or by the officer, ten cents for every hundred words. R.S.O. 1897, c. 148, s. 29.

Inspection of Books and Instruments.

31. (1) Every person shall on payment of the proper fees have access to and be entitled to inspect the books containing records or entries of mortgages, conveyances or assignments registered.

(2) A person desiring such access or inspection shall not be required, as a condition to his right thereto, to furnish the names of the persons in respect of whom such access or inspection is sought.

(3) The Clerk shall upon demand produce for inspection any such mortgage, conveyance, assignment or copy thereof registered in his office. R.S.O. 1897, c. 148, s. 36.

Statistical Returns.

32. (1) Every officer with whom instruments are required to be registered under the provisions of this Act shall, on or before the 15th day of January in each year, transmit to the Minister of Agriculture a return which shall set out:—

(*a*) The number of undischarged mortgages on record in his office on the 1st day of January in the year next preceding that in which the return is made;

(*b*) The number of mortgages and renewals, the number of discharges, and the number of assignments for the benefit of creditors registered during the year following the said 1st day of January; and

(*c*) The number of undischarged mortgages on record in his office on the 31st day of December in said year.

(2) The return shall not include instruments which have lapsed by reason of non-renewal.

(3) The occupations or callings of the mortgagors or assignors as stated in the instruments shall be classified and the return shall shew the aggregate sums purporting to be secured by the mortgages in each class.

(4) The return shall, where practicable, distinguish mortgages to secure endorsations or future advances from mortgages to secure existing debts or present advances. R.S.O. 1897, c. 148, s. 42.

[*Ontario Statute*, 10 *Edw. VII. ch.* 65.]

Repeal.

33. (*Of* 1910 *Act.*) Chapter 148 of the Revised Statutes, 1897, except section 41, and all amendments thereto, are repealed.

Conditional Sales to Traders for Re-sale.

Sec. 41 of the Bills of Sale Act, R.S.O. 1897, ch. 148, here referred to more properly belonged to the subject of "Conditional Sales" and its exclusion here was for the purpose of dealing with it under that heading. It was consequently transferred in an amended form to the Conditional Sales of Goods Act, 1 Geo. V. ch. 30 (see sec. 10) and consolidated with the latter Act. R.S.O. 1914, ch. 136.

Commencement of Act.

34. (*Of* 1910 *Act.*) This Act shall come into force and take effect on, from and after the 1st day of September, 1910.

FORM 1.

RENEWAL STATEMENT.

Statement exhibiting the interest of in the property mentioned in the mortgage dated the day of 19 , made between of , of the one part, and , of , of the other part, and registered in the office of the Clerk of the Court of the of .

on the day of , 19 , and of the amount due for principal and interest thereon, and of all payments made on account thereof.

The said , is still the mortgagee of the said property, and has not assigned the said mortgage (*or* the said is the assignee of the said mortgage by virtue of an assignment thereof from the said to him, dated the day of , 19 ,), (*or as the case may be*).

No payments have been made on account of the said mortgage (*or* the following payments, and no other, have been made on account of the said mortgage:—

, 19 , January 1, Cash received .....$100.00).

The amount still due for principal and interest on the said mortgage is the sum of $ made up as follows: (*here give the items*).

A. B.,

(*Signature of Mortgagee or Assignee.*)

(*Affidavit.*)

County (*or* District) of
To wit.

I, of the of , in the of , the mortgagee named in the mortgage mentioned in the foregoing (*or* annexed) statement (*or* assignee of the mortgagee named in the mortgage mentioned in the foregoing [*or* annexed] statement) (*as the case may be*), make oath and say:—

1. That the foregoing (*or* annexed) statement is true.

2. That the mortgage mentioned in the said statement has not been kept on foot for any fraudulent purpose.

A. B.

Sworn before me at the
of , in the of
, this day of
, 19 .

E. F.,
A Commissioner, etc.

R.S.O. 1897, c. 148, Sched. B.

FORM 2.

Discharge of Mortgage.

To the Clerk of the Court of the of .

I, , of , do certify that has satisfied all money due, or to grow due on a certain mortgage made by to , which mortgage bears date the day of , 19 , and was registered (*or in case the mortgage has been renewed* was last renewed), in the office of the Clerk of the Court of the of , on the day of , 19 , as No. (*here mention the date of registration of each assignment thereof, and the names of the parties, or mention that such mortgage has not been assigned, as the fact may be*); and that I am the person entitled by law to receive the money, and that such mortgage is therefore discharged.

Witness my hand, this day of , 19 .

Witness, A. B.,

C. D. (*Signature of Mortgagee or Assignee.*)

R.S.O. 1897, c. 148, Sched. A.

ACT RESPECTING THE COSTS OF DISTRESS OR SEIZURE OF CHATTELS.

(9 Edw. VII. (Ont.) ch. 45; R.S.O. 1914, ch. 78.)

Seizure under Chattel Mortgage.

4. No person making a seizure or sale of goods for default in payment of the principal money or interest secured by a chattel mortgage shall levy, take or receive any greater or other fees or costs with respect to such seizure or sale than those set forth in Schedule 3. (9 Edw. VII. ch. 45.)

5. No person shall make any charge for anything mentioned in such schedules unless it has been actually done. (9 Edw. VII. ch. 45.)

SCHEDULE 3.

(Section 4.)

COSTS ON SEIZURE UNDER CHATTEL MORTGAGES.

1. Making seizure where amount does not exceed $80....$1.00
2. Making seizure where amount exceeds $80..... 1.50
3. One man keeping possession, per diem 1.00
4. Where the amount exceeds $80, advertisement when reasonably published in a newspaper, the actual outlay not exceeding 5.00
5. If any printed advertisement otherwise than in a newspaper (where the amount does not exceed $80) the actual outlay not exceeding 1.00
   And where the amount exceeds $80 and the actual outlay not exceeding 3.00
6. Catalogues, sale and commission and delivery of goods, *five cents in the dollar on the net proceeds of the sale,* up to $100, and where the proceeds of sale exceed $100 in addition thereto *two and one-half per cent. on the excess over* $100.
7. Where amount is paid before sale, *a commission of two cents in the dollar,* and the amount actually disbursed in cartage not to exceed 2.00

PRINCE EDWARD ISLAND.

AN ACT FOR PREVENTING FRAUDS BY SECRET BILLS OF SALE OF PERSONAL CHATTELS.

(STATUTES OF 1860, CHAPTER 9 AND AMENDMENTS.)

Preamble.

Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being possessed of property, and the grantees or holders of such bills of sale nevertheless have the power of taking possession of the property of such persons, to the exclusion of the rest of their creditors; for remedy thereof: Be it therefore enacted, by the Lieutenant-Governor, Council and Assembly, as follows:—

Bills of Sale.

1. Every bill of sale of personal chattels, made either before or after the passing of this Act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, with or without notice, and either immediately after the making of such bill of sale, or at some future time, to seize or take possession of any property and effects comprised in and made subject to such bill of sale, and every schedule and inventory which shall be thereto annexed, or therein referred to, may be filed with the prothonotary of Her Majesty's Supreme Court of Judicature at Charlottetown, or with the deputy prothonotary of Prince or King's counties, according to the county in which the grantor of the bill of sale may usually reside; and in case such grantor shall be a non-resident in this Island, or shall have no fixed permanent place of residence, then with the prothonotary of the Supreme Court in Charlottetown.

Amendments.

Statutes amending this Act in general terms without varying the precise wording of any section, will be found *post* at the end of this Act.

Execution.

2. The execution of all such bills of sale as aforesaid which already have been or hereafter shall be made, shall before filing thereof, be proved on oath before the prothonotary or deputy prothonotary, with whom the same shall be filed, by one or more of the subscribing witnesses thereto, or by the personal acknowledgment before him of the grantor or grantors in such bill of sale; which oath the said prothonotary, or deputy prothonotary, is hereby empowered to administer, and which acknowledgment or proof of due execution shall be endorsed on the back of each and every such bill of sale or writing so produced and proved, and also signed by the prothonotary or deputy prothonotary.

Proof of Execution.

3. The commissioners appointed to take affidavits in the Supreme Court in the several counties of this Island shall be, and they are hereby empowered to administer an oath to any witness or witnesses who may come before them to prove the due execution of any such bill of sale as aforesaid, or take the personal acknowledgment of the grantor or grantors therein as aforesaid; and they shall thereupon, and upon the back of each bill of sale, certify the proof or acknowledgment so made before them respectively, in manner as set forth in schedules (A) and (B) to this Act; for which service the commissioner shall receive the sum of two shillings and sixpence, and no more; and the prothonotary or deputy prothonotary, after such proof or acknowledgment before himself, or on receipt of any bill of sale so certified by the commissioner as aforesaid, and on receipt of the fees due to him therefor, shall receive, file and enter the same in his office in manner as hereinafter mentioned.

Mode of Proof.

4. In ease the witnesses to any such bill of sale shall die before the proof or aeknowledgment and filing thereof as aforesaid, or eannot be found, or shall be absent from the Island, then execution of the bill of sale may be proved by affidavit before a judge of the Supreme Court, to be attached to the bill of sale by any person or persons, to the effect, that the person making the affidavit has seen the grantor or the witness or witnesses, or one of them, write, and is well aequainted with his or their handwriting, and believes the handwriting set to the bill of sale, or subscribed as witness thereto, is of the proper handwriting of the grantor or witness as the case may be, and such affidavit shall be signed by the judge in the usual manner; and he shall be entitled to receive the fee of one shilling, and no more, for administering the oath and signing the affidavit; and any bill of sale with the affidavit in this clause mentioned annexed shall be filed with the prothonotary of the Supreme Court in Charlottetown.

Witness to Execution.

5. No person shall be compelled to attend before the prothonotary, deputy prothonotary, judge or commissioner, as a witness to prove the due execution of any such bill of sale as aforesaid, unless there shall have been previously tendered to him, or her, a reasonable compensation for his, or her trouble and time, at and after the rate of four pence per mile for travelling expenses, for every mile to be travelled in coming to and returning from the place, where proof shall be made of the bill of sale, and in ease the witness shall refuse to attend before the proper officer, within six days after such tender as aforesaid, the person or persons requiring the attendance of such witness may make oath before any one of Her Majesty's justices of the peace and therein set forth the necessity of such witness's attendance before the judge, prothonotary, deputy prothonotary or commissioner, the making of such tender, and the amount thereof and the

refusal to attend; and thereupon the witness so refusing to attend as aforesaid shall be forthwith committed by warrant, under the hand and seal of such justice, to prison, there to remain without bail or imprise, until he, or she, shall comply with the requisitions of this Act, and shall also pay the reasonable costs and all damages which may have accrued to the grantee or holder of the bill of sale, in consequence of such his or her neglect or refusal to attend and give evidence before the judge, prothonotary, deputy prothonotary or commissioner as aforesaid.

Register and Record.

6. The prothonotary and each of the deputy prothonotaries of the said Supreme Court respectively shall cause every bill of sale, and every such schedule and inventory as aforesaid filed in his office under the provisions of this Act, to be numbered, and shall keep a book or books in his said office, in which he shall cause to be fairly entered an alphabetical list of every such bill of sale, containing therein the name, description and addition of the person making or giving the same, and also the person to whom or in whose favour the same shall be given, together with the number and dates of the execution and filing of the same, and the sum for which the same has been given, and the time or times (if any) when the same is thereby made payable, according to the form contained in schedule (C) to this Act; which said book or books, and every bill of sale filed in the said office, may be searched and viewed by all persons at all reasonable times, paying the officer for every search the sum of one shilling, and no more.

Fees.

7. Each of the said officers shall be entitled to receive, for his trouble in filing and entering every such bill of sale, the sum of one shilling and no more; and for taking proof or acknowledgment, and certifying the same in manner as aforesaid, the sum of two shillings and sixpence, and no more.

Office Copies.

8. Any person shall be entitled to have an office copy, or an extract of every bill of sale which shall be filed as aforesaid, upon paying for the same at the like rate, as for office copies of judgments or other documents in the Supreme Court of Judicature.

Satisfaction.

9. It shall be lawful for any judge of the said Supreme Court of Judicature to order a memorandum of satisfaction to be written upon any bill of sale as aforesaid, if it shall appear to him that the debt (if any) for which such bill of sale is given as security shall have been satisfied or discharged; and the judge's fee for such order shall be one shilling, and no more.

Priorities.

10. From and after the passing of this Act, every such bill of sale of personal chattels as hereinbefore mentioned, which shall have been duly filed in the office of the prothonotary or deputy prothonotary as aforesaid, shall take precedence and have priority over all other bills of sale of the same chattels, whether prior in point of date or otherwise, which shall not have been previously filed; and every such last mentioned bill of sale, not being filed as aforesaid, shall, as against all other bills of sale given by the same party of the same property, or a part thereof, and duly filed, and also as against all sheriff's officers and other persons seizing any property or effects comprised in such bill of sale, in the execution of any process of any court of law or equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of the execution by the grantor of the bill of sale, so duly filed under this Act, or of executing such process as

the case may be) shall be in the possession or apparent possession of the person making such bill of sale; provided always, nevertheless, that all bills of sale heretofore or hereafter to be duly made and executed, shall in all cases as between the immediate parties thereto, and as against the grantor therein named, and his heirs, executors and administrators, be deemed to be valid and binding, notwithstanding the same shall not have been filed according to the provisions of this Act, unless there shall be therein contained a condition or covenant to the contrary.

Jus Tertii.

A sheriff sued for selling under execution goods claimed by the plaintiff, may set up the title of a third party as a bar to the plaintiff's action, the plaintiff not being in possession at the time of the seizure: Stewart v. Gates (1881), 2 P.E.I. 432.

Copies.

11. Any person filing a bill of sale under this Act may make a copy thereof for his or her own use or otherwise, and require the prothonotary or deputy prothonotary with whom the original may be filed, to compare the same with the copy, and after comparison to certify on the said copy that the same is a true copy of such original, and also to certify to the filing of such original bill of sale.

Bills of Sale before the Act.

12. Bills of sale executed before the passing of this Act, if duly filed as aforesaid, under the provisions hereinbefore contained, within six months after the passing of this Act, shall not be affected or postponed by the filing within that period of any bill of sale of a later date, anything herein contained to the contrary thereof notwithstanding.

Certified Copies.

13. A certified copy of any bill of sale filed under this Act, certified under the seal of the Supreme Court, and the hand of the officer with whom the original bill of sale shall be deposited,

together with a certificate of the filing given by the same officer, shall be received as evidence of the contents of such bill of sale, and of the filing thereof, in all courts in this Island, wherein it shall become necessary to give the same in evidence.

Cost of Copies.

14. The officer's fees for making a copy shall be six pence per folio of one hundred words; for comparing a copy produced and required to be certified, the sum of two shillings; and two shillings and three pence for the certificate and seal, and no more.

Interpretation of Terms.

15. In construing this Act, the following words and expressions shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction.

The expression "bill of sale" shall include bills of sale, assignments, transfers, declarations of trust without transfer, and other assurances of personal chattels, and also powers of attorney, authorities and licenses to take possession of personal chattels as security for any debt, but shall not include the following documents, that is to say: transfers or assignments of any registered ship or vessel, or any share thereof, transfers of goods in the ordinary course of business of any trade.

Personal Chattels.

16. The expression "personal chattels," shall mean horses, cattle, animals, goods, furniture, fixtures and other articles capable of complete transfer by delivery; and shall not include chattel-interest in real estate, nor shares or interest in government securities, or in the capital or property of any incorporation or joint stock company or other choses in action.

Apparent Possession.

17. Personal chattels shall be deemed to be in the apparent possession of the person making or giving the bill of sale, so long

as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, farm or other premises occupied by him, or so long as they shall be used or enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person.

SCHEDULES TO WHICH THIS ACT REFERS.

SCHEDULE (A).

OATH OF SUBSCRIBING WITNESS.

On the day of personally appeared before me, A. B., of , and being sworn, testified that he is a subscribing witness to the within deed or writing, and that he was present and did see the same duly executed by the grantor (*or* assignor, *as the case may be*) therein named.

E. F.
Prothonotary, Deputy Prothonotary, or Commissioner, in County for taking affidavits in the Supreme Court.

SCHEDULE (B).

FORM OF CERTIFICATE OF ACKNOWLEDGMENT.

On the day of personally appeared before me, A. B., of , and acknowledged that he did freely and voluntarily execute the within written deed or writing, to and for the uses and purposes therein mentioned.

E. F.
Prothonotary, Deputy Prothonotary or Commissioner, in County for taking affidavits in the Supreme Court.

SCHEDULE (C).

Name, etc., of the person making or giving the Bill of Sale, or of the person divested of property.	Whether Bill of Sale, assignment, or what other assurance, and whether absolute or conditional and number.	Date of Execution.	Date of Filing.	Sum for which made or given.	When and how payable.

AN ACT TO AMEND THE ACT FOR PREVENTING FRAUDS BY SECRET BILLS OF SALE OF PERSONAL CHATTELS.

(P.E.I. STATUTES, 1869, CHAPTER 7.)

Whereas the present mode of marking bills of sale satisfied is attended with inconvenience and expense. Be it therefore enacted by the Administrator of the Government, Council and Assembly as follows, that is to say—

Authority for Satisfaction of Bill of Sale.

1. It shall be the duty of the prothonotary, or any deputy prothonotary for any county in this Island, with whom any bill of sale shall have been registered, to mark the same satisfied on receiving authority to do so from the grantee or grantees of such bill of sale. Provided that such authority, from the grantee or grantees of such bill of sale, be given under the hand of such grantee or grantees in the form (A) in the schedule to this Act annexed, signed and acknowledged before a commissioner for taking affidavits in the Supreme Court for the county where such bill of sale is registered and certified by such commissioner. For entering such satisfaction, the prothonotary or deputy pro-

thonotary shall be entitled to receive a fee of one shilling and sixpence, and the commissioner taking the acknowledgment of satisfaction, the sum of two shillings and sixpence.

SCHEDULE (A).

In this Act referred to.

FORM OF AUTHORITY TO BE SIGNED BY GRANTEE.

On this day of , A.D. 18 , personally appeared before me, A. B., the grantee named in a certain bill of sale, dated the day of , A.D. 18 , and made between him and C. D., of , to secure the sum of £ , and acknowledged the same to be fully paid and satisfied.

Taken and acknowledged before me the day and year above mentioned.

A. B.,
Grantee's name or mark.

E. F.,
Commissioner in County for taking affidavits in the Supreme Court.

AN ACT TO AMEND THE ACT TWENTY-THIRD VICTORIA, CHAPTER NINE, INTITULED "AN ACT FOR PREVENTING FRAUDS BY SECRET BILLS OF SALE OF PERSONAL CHATTELS."

(P.E.I. STATUTES, 1878, CHAPTER 7.)

Be it enacted by the Lieutenant-Governor, Council and Assembly as follows—

Possession by Grantee.

1. All absolute bills of sale and deeds or writings, purporting to transfer the property in chattels from the grantor to the grantee absolutely and unconditionally, shall be fraudulent and void (except as between the grantor and grantee), unless the

grantee shall forthwith, upon the execution thereof, take actual possession of such chattels, and the grantor shall cease to have the possession thereof.

Delay in Taking Possession.

A delay by the mortgagee in taking possession of mortgaged chattels or the secret postponement of registration of a bill of sale thereof until the grantor's insolvency for the purpose of protecting the insolvent's credit constitutes a fraud against creditors and makes the transaction void against them: Brow v. Crabbe, (P.E.I.) 9 E.L.R. 342, applying Clarkson v. McMaster, 25 Can. S.C.R. 96.

Validity of Mortgage or Bill of Sale.

2. A chattel mortgage or bill of sale with conditions or stipulations for redemption to be therein set forth, shall be presumed to be valid, notwithstanding the grantee may not take the actual possession of the chattels therein described, if such chattel mortgage be registered pursuant to the Act, twenty-third Victoria, chapter nine, and if the grantee, or his agent, or one of several grantees, or the agent of all or any of such grantees, make affidavit before the filing of such chattel mortgage in the form set forth in Form A of the schedule (which affidavit shall be endorsed upon or annexed to such chattel mortgage), that the grantor is really and truly indebted to the grantee in the amount expressed in said mortgage, or that a consideration of the nature and amount therein expressed for the making thereof really and truly exists.

Levy on Mortgaged Chattels.

3. Sheriffs and sheriffs' bailiffs, constables and all persons authorized to levy under any execution issued from any court in this province, may levy upon and sell any chattels mentioned, described in, or conveyed by a chattel mortgage. Provided that the amounts secured by all chattel mortgages duly registered prior to the levy, together with interest as expressed in such mortgages up to the day of payment, be duly paid, and shall hold the surplus toward satisfaction of the levy.

Wrongful Levy.

A claim under a valid bill of sale prevails as against a seizure under an execution by a creditor of the grantor: Stewart v. Gates (1881), 2 P.E.I.R. 432.

Affidavits, Commissioners, etc.

4. Affidavits required to be made by grantees of chattel mortgages under this Act, may be sworn before any commissioner for taking affidavits in the Supreme Court, or County Court, or before the prothonotary of the Supreme Court, or deputy prothonotary of the county in which such mortgage is required to be filed, or before any clerk or assistant clerk of the County Court.

Registration of Chattel Mortgage.

5. When any chattel mortgage is produced for filing, purporting to have endorsed on or annexed thereto the affidavit required by the second section of this Act, the prothonotary or deputy prothonotary to whom the same is offered in order that it may be filed, shall file such mortgage without proof of the genuineness of such affidavit upon the execution of such chattel mortgage (in other respects) being proved in manner required by the Act twenty-third Victoria, chapter nine.

This Act shall be construed as part of the Act hereby amended.

SCHEDULE FORM A.

AFFIDAVIT OF GRANTEE OF CHATTEL MORTGAGE.

Dominion of Canada,

Province of Prince Edward Island,

County.

I, of in County (*Farmer, as the case may be*), the grantee or one of the grantees mentioned in the within chattel mortgage, or I, of in

County, agent for the grantee or one of the said grantees, make oath and say:—

That the grantor named in said chattel mortgage, is really and truly indebted to me (*or* to the grantee or grantees therein named) in the sum of $ for (*here state consideration*).

And I further say that the said chattel mortgage was really and truly given and accepted for the consideration therein expressed, and that to the best of my knowledge and belief the said mortgage was not executed for the purpose or with the intent of protecting the property therein described, from the creditors of the said grantor, or of defrauding the creditors of the said grantor, or any of them.

Sworn at , in County, this day of before me. A. B.

AN ACT RESPECTING WITNESSES AND EVIDENCE.

(P.E.I. STATUTES OF 1889, CHAPTER 9.)

Certified Copies of Bills of Sale.

49. A certified copy of any bill of sale or chattel mortgage duly filed, certified under the seal of the Supreme Court and the hand of the officer with whom the original bill of sale or chattel mortgage is deposited, together with a certificate of the filing given by the said officer shall be received as evidence of the contents of such bill of sale or chattel mortgage, and of the filing thereof, in all courts in this province, and before all persons having by law or by consent of parties authority to hear, receive and examine evidence.

SASKATCHEWAN.

AN ACT RESPECTING MORTGAGES AND SALES OF PERSONAL PROPERTY.

(R.S.S. 1909, CHAPTER 144 AND AMENDMENTS.)

Short Title.

1. This Act may be cited and known as "*The Chattel Mortgage Act.*" C.O. 1898, ch. 43, sec. 1.

The Chattel Mortgage Act.

See note to Alta. Chattel Mortgage Act, sec. 1.

Registration Districts.

2. For the purpose of the registration of mortgages and other transfers of personal property in Saskatchewan the registration districts shall be as established by the order of the Lieutenant-Governor-in-council of September 17, 1907, printed in the schedule to this Act.

(2) The Lieutenant-Governor-in-council may, from time to time, appoint a deputy registration clerk for each registration district who may in the event of vacancy in the office of the registration clerk or of the illness or absence from his office of the registration clerk perform all the duties required by this or any other Act to be performed by the registration clerk: 1909, ch. 35, sec. 28.

District Boundaries.

The following is the order-in-council referred to in section 2:

ORDER-IN-COUNCIL.

(*Section* 2.)

Regina, Tuesday, September 17, 1907.

Under the provisions of *The Bills of Sales Ordinance* His Honour the Lieutenant-Governor by and with the advice of

the Executive Council has been pleased to order the alteration as hereinafter set forth on, from and after the fifteenth day of October, 1907, of the boundaries of the Registration Districts of Moosomin, Yorkton, Regina, Moose Jaw, Prince Albert, Battleford and Souris for the registration of mortgages and the transfers of personal property, and the establishment on, from and after the said fifteenth day of October, 1907, of two new registration districts to be known as the registration districts of Cannington and Saskatoon, that is to say: that on, from and after the said fifteenth day of October, 1907, the registration districts of Moosomin, Yorkton, Regina, Moose Jaw, Prince Albert, Battleford and Saskatoon shall comprise the areas comprising the judicial districts of Moosomin, York ton, Regina, Moose Jaw, Prince Albert, Battleford and Sask atoon as set out in Schedule A to *The District Courts Act* be ing chapter 9 of the Statutes of 1907; that the Registration District of Cannington shall comprise the area bounded as fol lows: Commencing at the intersection of the eastern boundary of the Province of Saskatchewan by the north boundary of the fifth township, thence northerly along the east boundary of the said province to the north boundary of the eleventh township, thence westerly along the said north boundary of the eleventh township to the meridian between the tenth and eleventh ranges west of the second principal meridian, thence southerly along the said meridian between the tenth and eleventh ranges to the north boundary of the fifth township, thence easterly along the said north boundary of the fifth township to the point of commencement; and that the Registration District o Souris shall comprise the area bounded as follows: Commencing at the south-east corner of the Province of Saskatchewan, then northerly along the east boundary of the said province to the north boundary of the fifth township, thence westerly along the said north boundary of the fifth township to the meridian tween the tenth and eleventh ranges west of the second princip meridian, thence southerly along the said meridian between the tenth and eleventh ranges to the southern boundary of the said province, thence easterly along the said southern boundary of the province to the place of commencement.

The Executive Council also advises that the clerks of District Courts of the Judicial Districts of Canningto Moosomin, Yorkton, Regina, Moose Jaw, Saskatoon, Prin

Albert and Battleford shall respectively be registration clerks for the said Registration Districts of Cannington, Moosomin, Yorkton, Regina, Moose Jaw, Saskatoon, Prince Albert and Battleford, and that such person as may from time to time be appointed to that office be registration clerk for the Registration District of Souris, and that such registration clerks shall keep their offices at the places set opposite the names of the registration districts in the following list, that is to say:—

Registration District of Cannington, Areola;
Registration District of Moosomin, Moosomin;
Registration District of Yorkton, Yorkton;
Registration District of Regina, Regina;
Registration District of Moose Jaw, Moose Jaw;
Registration District of Saskatoon, Saskatoon;
Registration District of Prince Albert, Prince Albert;
Registration District of Battleford, Battleford;
Registration District of Souris, Oxbow.

The Executive Council further advises that all mortgages and other transfers of personal property within the existing Registration Districts of Moosomin, Yorkton, Regina, Moose Jaw, Prince Albert, Battleford and Souris respectively, and all hire receipts and other instruments registered under the provisions of chapter 44 of *The Consolidated Ordinances of the North-West Territories*, 1898, or any other Ordinance or Act in force in the province, shall, until the renewal of such chattel mortgages becomes necessary to maintain their force against creditors, subsequent purchasers or mortgagees in good faith continue to be as valid and effectual in all respects as they would have been if the boundaries of the said registration districts had not been altered or the Registration Districts of Cannington and Saskatoon established, but in the event of a renewal of any such chattel mortgage after the fourteenth day of October 1907, the renewal statement shall be filed in the office of the registration clerk of the registration district in which the property described in the mortgage or transfer is at the time of the filing of such renewal statement and there shall be filed therewith a certified copy of the chattel mortgage to which such renewal statement relates and of any renewals thereof under the hand of the registration clerk of the registration district in whose office such chattel mortgage and renewals are filed, and no such chattel mortgage shall lose its

priority by reason of not being prior to renewal filed in the office of the registration clerk in which renewal statements are after the said fourteenth day of October, 1907, required to be filed.

JOHN A. REID,
Clerk Executive Council.

Change in Boundaries.

See note under sec. 3 of this Act.

Power to Alter Boundaries.

3. The Lieutenant-Governor-in-council shall have power to alter the boundaries of any registration district now or hereafter established by adding thereto or taking therefrom; and to establish new districts and to appoint registration clerks therefor who shall hold office during pleasure; and designate at what places the offices of such clerk shall be kept.

(2) All chattel mortgages relating to property within any newly established district shall (until their renewal becomes necessary to maintain their force against creditors, subsequent purchasers or mortgagees in good faith) continue to be as valid and effectual in all respects as they would have been if the new district had not been established, but in the event of a renewal of any such chattel mortgage after the establishing of such new district the renewal statement shall be filed in the office of the registration clerk of such new district together with a certified copy of the chattel mortgage to which such renewal statement relates and of any renewals thereof under the hand of the registration clerk in whose office the same were filed; and no chattel mortgage in force and filed at the date of the establishing of such new district shall lose its priority by reason of it not being filed in the office of the registration clerk of such new district prior to its renewal: 1900, ch. 12, secs. 1, 3; 1909, ch. 35, sec. 28 (2).

Change of Boundaries.

In Reinholz v. Cornell, 2 S.L.R. 342, plaintiff delivered a

team of horses to his son, under an agreement for conditional sale whereby the property in the horses was reserved to the plaintiff until the purchase price was paid. Subsequently the son mortgaged the horses, and the mortgage came into the hands of the defendant company. Default being made, the company authorized its bailiff, the defendant Cornell, to seize the horses. On the seizure being made the plaintiff notified the bailiff of his lien and the registration thereof, but, by reason of a change in the boundaries of the registration district, mentioned the wrong office as the place where the note was registered. Search on two occasions at the office named failed to shew the lien registered, and the defendants thereupon sold the horses. The note had, in fact, been properly registered before the changes in the boundaries. In an action for conversion, it was held that although the defendants acted innocently and in good faith in selling the property in question, there was nevertheless a wrongful conversion.

Registration Clerks.

4. The registration clerks for the existing registration districts are hereby continued in office and shall severally hold office during pleasure and their offices shall be kept at places to be designated by the Lieutenant-Governor-in-council.

(2) In the event of any vacancy occurring in the office of the registration clerk by reason of death, resignation or otherwise, the vacancy shall be filled by the Lieutenant-Governor-in-council: C.O. 1898, ch. 43, sec. 3.

Office Hours.

5. The registration clerks under this Act shall keep their respective offices open between the hours of ten in the forenoon and four in the afternoon on all days excepting Sundays and holidays and except on Saturdays and during the period of vacation prescribed by the *Judicature Act* when the same shall be closed at one o'clock in the afternoon and during office hours only shall registrations be made: C.O. 1898, ch. 43, sec. 4.

No Clerk to Draw Documents.

6. No registration clerk shall draw or prepare any document or conveyance which may be filed or registered in his office under the provisions of this or any other Act: C.O. 1898, ch. 43, sec. 5.

Mortgages; Form and Registration.

7. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged shall within thirty days from the execution thereof be registered as hereinafter provided together with the affidavit of a witness thereto of the due execution of such mortgage or conveyance and also with the affidavit of the mortgagee or one of several mortgagees or the agent of the mortgagee or mortgagees if such agent is aware of all the circumstances connected therewith and is properly authorized by power in writing to take such mortgage in which case a copy of such authority shall be attached thereto (save as hereinafter provided under section 23 hereof) such last-mentioned affidavit stating that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage, that it was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagor or of preventing the creditors of such mortgagor from obtaining payment of any claim against him; and every such mortgage or conveyance shall operate or take effect upon, from and after the day and time of the filing thereof: C.O. 1898, ch. 43, sec. 6.

Bill of Sale Intended as Mortgage.

In Patterson v. Palmer, 4 S.L.R. 487, the Court was evenly divided on the question whether or not the particular bill of

sale in that case was in fact intended to operate as a mortgage. Newlands, and Lamont, JJ., who favoured affirming the judgment below, thought it was not, and expressed no view as to what would have resulted had it been otherwise. Wetmore, C.J., and Johnstone, J., were of opinion that notwithstanding a clause in one part of the document for a re-sale of the goods to the bargainor it must be held to be a mortgage in effect as it was elsewhere expressed to be made to "secure the repayment" of moneys with interest. Their view was that if a document be intended as a mortgage though in the form of an absolute bill of sale, the affidavit provided by the Act for bills of sale will not be sufficient; the affidavit of *bona fides* to be attached in such cases is to be that applicable to chattel mortgages and conveyances intended to operate as a mortgage.

See also note to sec. 13 (*post*); text, ch. XIII; Ontario Act, sec. 5; Alberta Act, sec. 6.

Time of Filing.

As to the distinction between "registering" and "filing," see note to sec. 8, British Columbia Act.

Actual and Continued Change of Possession.

See note to sec. 11, *post*.

Mortgage by Company to Secure Bonds or Debentures; Renewal Statement.

8. In the case of a mortgage or conveyance of goods and chattels of any incorporated company made to a bondholder or bondholders or to a trustee or trustees for the purpose of securing the bonds or debentures of such company instead of the affidavit of *bona fides* required by section 7 of this Act it shall be sufficient for the purposes of this Act if an affidavit is filed as thereby required made by the mortgagee or one of the mortgagees to the effect that the said mortgage or conveyance was executed in good faith and for the express purpose of securing the payment of the bonds or debentures referred to therein and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the mortgagors or of preventing the creditors of such mortgagors from obtaining payment of any claim against them.

(2) Any such mortgage may be renewed in the manner and with the effect provided by section 19 and subsequent sections of this Act upon the filing of a statement by the mortgagee or one of the mortgagees exhibiting the interest of the mortgagee or mortgagees in the property claimed by virtue of the said mortgagee and shewing the amount of the bond or debenture debt which the same was made to secure and shewing all payments on account thereof which to the best of the information and belief of the person making such statement have been made or of which he is aware, or has been informed, together with an affidavit of the person making such statement, that the statement is true to the best of his knowledge, information and belief, and that the mortgage has not been kept on foot for any fraudulent purpose; and such statement shall be filed instead of the statement required by the said section 19 of this Act.

(3) If any mortgage as aforesaid is made to an incorporated company, the several affidavits and statements herein mentioned may be made by the president, vice-president, manager or assistant manager of such mortgage company or any other officer of the company authorized for such purpose, in which latter case such authority or a copy thereof shall be filed as required by this Act.

(4) Where such mortgage or conveyance is made as a security for debentures and the by-law authorizing the issue of the debentures as a security for which the mortgage or conveyance was made or a copy thereof certified under the hand of the president or vice-president and the secretary of the company and verified by an affidavit of the secretary thereto attached or indorsed thereon, and having the corporate seal attached thereto, is registered with the mortgage or conveyance it shall not be necessary to renew the said mortgage or conveyance, but the same shall in such case continue to be as valid as if the same had been duly renewed as in this Act provided: 1909, ch. 35, sec. 28.

See text, ch. 5, on Parties; and see sec. 27 of the Ontario Act.

Form of Mortgage.

9. Except as to cases provided in the next following section of this Act a mortgage or conveyance intended to operate as a mortgage of goods and chattels may be made in accordance with form A in the schedule hereto: C.O. 1898, ch. 43, sec. 7.

Statutory Chattel Mortgage.

The following is Form A of the schedule to the Act referred to in the above section:—

FORM A.

(*Section* 9.)

MORTGAGE OF CHATTELS.

This Indenture made the day of 19 between *A. B.*, of of the one part and *C. D.*, of of the other part.

Witnesseth that in consideration of the sum of $ now paid to *A. B.* by *C. D.* the receipt of which the said *A. B.* hereby acknowledges (*or whatever else the consideration may be*) he the said *A. B.* doth hereby assign to the said *C. D.* his executors, administrators and assigns all and singular the several chattels and things specifically described as follows (*or* in the schedule hereto annexed) by way of security for the payment of the sum of $ and interest thereon at the rate of per cent. per annum (*or whatever else may be the rate*) and the said *A. B.* doth further agree and declare that he will duly pay to the said *C. D.* the principal sum aforesaid together with the interest then due on the day of 19 (*or whatever else may be the stipulated time or times for payment*). And the said *A. B.* doth agree with the said *C. D.* that he will (*here insert terms as to insurance, payment of rent, collateral securities or otherwise which the parties may agree to for the maintenance or defeasance of the security*).

Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said *C. D.* for any cause other than those specified in section 18 of *The Chattel Mortgage Act* except as is otherwise specially provided herein.

In witness whereof the said *A. B.* has hereunto set his hand and seal.

Signed and sealed by the said *A. B.* in the presence of me *E. F.*

A. B.

(*Add name, address and occupation of witness.*)

Statutory Forms.

See note to sec. 7, Alberta Act.

Mortgage to Secure Future Advances or Indorsers, etc.

10. In case of an agreement in writing for future advances for the purpose of enabling the borrower to enter into and carry on business with such advances and in case of a mortgage of goods and chattels for securing the mortgagee repayment of such advances or in case of a mortgage of goods and chattels for securing the mortgagee against the indorsement of any bills or promissory notes or any other liability by him incurred for the mortgagor not extending for a longer period than two years from the date of the mortgage and in case the mortgage is executed in good faith and sets forth fully by recital or otherwise the terms, nature and effect of the agreement and the amount of liability intended to be created, and in case such mortgage is accompanied by the affidavit of a witness thereto of the due execution thereof and by the affidavit of the mortgagee or one of several mortgagees or in case the agreement has been entered into and the mortgage taken by an agent duly authorized by writing to make such agreement and take such mortgage, in which case a copy of such authority shall be attached thereto, and if the agent is aware of the circumstances connected therewith, then, if accompanied by the affidavit of such agent, such affidavit whether of the mortgagee or his agent, stating that the mortgage truly sets forth the agreement entered into between the parties thereto and truly states the extent of the liability intended to be created by such agreement, and covered

by such mortgage and that such mortgage is executed in good faith and for the express purpose of securing the mortgagee repayment of his advances or against the payment of the amount of his liability for the mortgagor, as the case may be, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the mortgagor nor to prevent such creditors from recovering any claims which they may have against such mortgagor, and in case such mortgage is registered as hereinafter provided within thirty days from the execution thereof the same shall be as valid and binding as mortgages mentioned in section 7 of this Act: C.O. 1898, ch. 43, sec. 8.

Mortgages to Secure Future Advances or Endorsements.

See note to sec. 8, Alberta Act, and section 6 of the Ontario Act.

Bills of Sale; Delivery and Change of Possession.

11. (*As amended* 1912-13). Every sale, assignment and transfer of goods and chattels not accompanied by an immediate delivery and followed by an actual and continued change of possession of the goods and chattels sold, and every assignment by any retail merchant or trader of book debts, accounts or debts to be incurred, shall be in writing and such writing shall be a conveyance under the provisions of this Act and shall be accompanied by an affidavit of a witness thereto of the due execution thereof and an affidavit of the bargainee or one of several bargainees or of the agent of the bargainee or bargainees duly authorized in writing to take such conveyance (a copy of which authority shall be attached to the conveyance) that the sale or the assignment by any retail merchant or trader of book debts, accounts or debts to be incurred, is *bonâ fide* and for good consideration as set forth in the said conveyance and not for the purpose of holding or enabling the bargainee to hold the goods, book debts, accounts, or debts to be incurred, mentioned therein against the creditors of the bargainor; and such conveyance and affidavits shall be registered as hereinafter

provided within thirty days from the execution thereof otherwise the sale shall be absolutely void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith: C.O. 1898, ch. 43, sec. 9; 2-3 Geo. V. 1912-13, ch. 46, sec. 35.

Registration of Bills of Sale.

See sec. 8 of the Ontario Act.

Attesting Witness.

The statute requires the affidavit to be made by a witness to the execution of the bill of sale, but as attestation is not essential to the validity of the instrument, its execution can be proved by any competent witness: Emerson v. Bannerman, 19 Can. S.C.R. 1.

Affidavit of Bona Fides.

The expressions "against *the*" or "against *any* creditors of the bargainor" are substantially synonymous, and the employment of either in the affidavit of *bona fides* is no variation from the statutory form: Emerson v. Bannerman, 19 Can. S.C.R. 1, affirming 1 Terr. L.R. 224. However, it is always safer to follow the precise wording of the statute.

Change of Possession.

The construction placed by the English decisions upon the words "possession or apparent possession" in the Imperial Bills of Sale Act, 1878, 41 & 42 Vict. ch. 31, is inapplicable to the expression "actual and continued change of possession" found in the Provincial Acts: Mueller v. Cameron, 2 W.L.R. 524, distinguishing Ramsay v. Margrett, [1894] 2 Q.B. 18, 63 L.J.Q.B. 513, where it was held that where property is sold by a person to an inmate of the same house there is a presumption of actual possession in the grantee. The decision in the latter case turned on the construction of the phrase "apparent possession."

In order to create a change of possession under the statute, there must be such a change as would be visible and apparent to the public: Danford v. Danford, 8 A.R. (Ont.) 518. See also Svaigher v. Rotaru, 3 W.L.R. 486.

Where the possession of the chattels is left with the bargainor after a sale, a subsequent sale by the bargainor to a *bonâ fide* purchaser for value will give the latter a superior title as against the original purchaser, unless there be a compliance with the provisions of the Act: Palmer v. May, 5 Sask. L.R. 20, 18 W.L.R. 676; Patterson v. Palmer, (Sask.) 19 W.L.R. 422; Taeger v. Rowe, 2 S.L.R. 159.

In construing a bill of sale under a foreign law of similar effect the same rule was applied in favour of creditors: Hennenfest v. Malehose, 3 W.L.R. 171.

A sale of growing crops is void where it is not followed by an actual and continued change of possession: Mihm v. Baleolvski, 1 Sask. L.R. 415; see sec. 17 (*post*); unless the provisions of the statute have been complied with under the circumstances in which registration is permitted.

Bill of Sale by Partnership.

While each partner has authority to do such things as are necessary for carrying on the partnership, a bill of sale of a business as a running concern will not bind the absent partner where signed to evidence a sale made in fraud of his rights by the other partner left in possession of a moving picture business, particularly where the buyer knew of the partnership and was satisfied with the assurance of the resident partner that the latter had a power of attorney authorizing him to sell, but made no further enquiries: Kay v. Chapman, (Sask.) 11 D.L.R. 726, 24 W.L.R. 80; Kirk v. Blurton, 9 M. & W. 284; McClary v. Howland, 9 B.C.R. 479.

Persons may give credit to the acts of a partner in dealing with the partnership property in the scope of his implied authority in furtherance of the partnership business, but if they get notice, or have reason to believe, that what is being done is really done for the private purposes or on the separate account of the person doing it, then authority by virtue of the partnership contract ceases and the person dealing with the individual partner is bound to enquire and ascertain the extent of the authority: Ex parte Darlington, 4 DeG. J. & S. 581. If he does not so act, he must depend upon the actual right of the partner or on circumstances sufficient to repel the presumption of fraud: *Ibid;* Ex parte Peele, 6 Ves. 601.

Assignments for Creditors.

The Assignments Act, ch. 142, secs. 12 and 13, R.S.S. 1909, excepts assignments for the general benefit of creditors from the operation of the Chattel Mortgage Act, and provides a different mode of filing for instruments of that character. The sections are as follows:—

12. No assignment made for the general benefit of creditors under this Act shall be within the operation of the Chattel Mortgage Act, but a notice of the assignment shall, as soon as conveniently possible, be published at least once in the *Saskatchewan Gazette*, and not less than twice in at least one newspaper having a general circulation in each judicial district in which any of the property assigned is situate: 1906, ch. 25, sec. 11; 1908, ch. 26, sec. 2.

13. A duplicate original or copy of every such assignment shall also within ten days from the execution thereof be registered (together with an affidavit of a witness thereto of the due execution of such duplicate original or of the assignment of which the copy filed purports to be a copy) in the office of the clerk of the registration district for mortgages and other transfers of personal property where the assignor, if a resident in Saskatchewan, resides at the time of the execution thereof, or if he is not a resident, then, in the office of the clerk of the said registration district where the personal property so assigned is, or where the principal part thereof (in case the assignment includes property in more registration districts than one) is at the time of the execution of such assignment; and such clerks shall file all such instruments presented to them respectively for that purpose, and shall indorse thereon the time of receiving the same in their respective offices and the same shall be kept there for the inspection of all persons interested therein. The said clerks respectively shall number and enter such assignments and be entitled to the same fees for services in the same manner as if such assignments had been registered under the Chattel Mortgage Act.

(2) A duplicate original or copy certified by the said registration clerk shall within fifteen days also be filed in the land titles office for the land registration district in which any land vested by this Act in the assignee is situated: 1906, ch. 25, sec. 12; 1908, ch. 38, sec. 20.

Effect of Registration.

12. Such registration shall only have effect in the registration district wherein such registration has been made: C.O. 1898, ch. 43, sec. 10.

Effect of Non-compliance with Statute.

13. In case such mortgage or conveyance and affidavits are not registered as hereinbefore provided or in case the consideration for which the same is made is not truly expressed therein, the mortgage or conveyance shall be absolutely null and void as against creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith for valuable consideration: C.O. 1898, ch. 43, sec. 11.

Omission to Register.

See note to sec. 11, Alberta Act.

Bill of Sale Intended as Mortgage.

On a bill of sale absolute in form but intended to operate as a chattel mortgage as, for instance, where there is an unregistered equity of redemption, the affidavit of *bona fides* is to be in the form required under this section: Patterson v. Palmer, 4 S.L.R. 487.

Stating the Consideration.

The consideration must be truly expressed both in the bill of sale and affidavit of *bona fides*, either actually or according to the legal or mercantile effect: Palmer v. May, 5 Sask. L.R. 20, 18 W.L.R. 676.

A small inaccuracy or a trivial inconsistency in the statement of the consideration is not sufficient to avoid a chattel mortgage, where it is in the commercial and mercantile sense correctly expressed: Walley v. Harris (1892), 3 Terr. L.R. 161, distinguishing Richardson v. Harris, 22 Q.B.D. 268, and referring to Ex parte Rolph, 19 Ch. D. 98; Ex parte Firth, 19 Ch. D. 419; Ex parte Challinor, 16 Ch.D. 260; Ex parte Bolland, 21 Ch.D. 543; Ex parte Winter, 29 W.R. 575, 44 L.T. 323.

In Mueller v. Cameron (1905), 2 W.L.R. 524, at 527, Wetmore, J., said:—

The consideration for the bill of sale, as expressed therein,

is "the sum of $1,907.45 of lawful money of Canada paid by the bargainee to the bargainor at or before the sealing and delivery of these presents." As already stated the consideration was an alleged past indebtedness due . . . to the claimant. I am inclined to think, although I do not express a decided opinion on the subject, that the bill of sale is void . . . because the consideration is not truly expressed; the express consideration is for a present payment, the true consideration was a past indebtedness."

In Hennenfest v. Malehose (1906), 3 W.L.R. 171, the same Court held that where the express consideration is a present payment, and the real consideration was a part cash payment and a past indebtedness, that the same was not truly expressed within the meaning of the Act. Relying on this case and the above dictum, it was held that a bill of sale reciting the consideration of $1,000, where it is in point of fact based on a marriage settlement is void against creditors under this section as not being a true expression of the consideration: Saskatchewan Lumber Co. v. Michaud, 1 Sask. L.R. 412.

In Patterson v. Palmer (1911), 4 S.L.R. 487, at 491, Judge Wetmore makes the following observation: "I wish, while dealing with this question, to draw attention to two decisions made by myself on the question of stating the true consideration in a bill of sale. The first one is Walley v. Harris, 3 Terr. L.R. 161, where I held, practically as laid down in Credit Co. v. Pott, 6 Q.B.D. 295, . . . and seems to have been supported by the authorities which I cited. In Hennenfest v. Malehose, 3 W.L.R. 171, I arrived at a different conclusion. Evidently my attention was not drawn to Walley v. Harris, and the other cases, and I attempted to come to the conclusion which I would have reached if left to my own unaided judgment, on the principle that the legislature, in making the provision, meant and intended what they said. I regret this because I am afraid that I caused one of my learned brothers to go astray from the authorities on the subject." He further held that where the real consideration is totally made up of a present cash payment and a past indebtedness then due, which is not thus expressed in the affidavit of *bona fides*, it is void against creditors under this section.

The inclusion after a statement of the amount of the money consideration of general words such as "and other valuable con-

siderations" is mere surplusage, and does not avoid the bill of sale as not truly expressing the consideration: Toronto Type Foundry Co. v. Riddett, (Sask.) 10 D.L.R. 633.

See also text, ch. XIII.

Description of Property and Parties.

14. (*As amended* 1912-13). All the instruments mentioned in this Act whether for the mortgage, sale, assignment or transfer of goods and chattels, book debts, accounts or debts to be incurred, shall set forth the names, surnames, additions and post office addresses of all the parties thereto and shall contain such sufficient and full description of such goods and chattels that the same may be readily and easily known and distinguished except in the case of assignments for the general benefit of creditors in which case the description shall be sufficient if it conforms to the provisions of the *Assignments Act* in that behalf: C.O. 1898, ch. 43, sec. 12; 1908-9, ch. 15, sec. 17; 2-3 Geo. V. (1912-13) ch. 46, sec. 35, am.

Describing the Chattels in a Bill of Sale or Chattel Mortgage.

A description of cattle by brand is sufficient without any locality being given, so as to include range cattle roaming over a large extent of unenclosed country: Graveley v. Springer, 3 Terr. L.R. 120, affirming 2 N.W.T. 306, 34 C.L.J. 135; see Mason v. Macdonald, 25 U.C.C.P. 439; Field v. Hart, 22 A.R. (Ont.) 449.

As to what constitutes a sufficient description of goods, see ch. XII. of the text, and notes to sec. 12 of Alberta Act, and to sec. 10 of the Ontario Act.

Where to Register.

15. (*As amended* 1912-13). The proper registration officer for instruments being mortgages and transfers of personal property shall be the clerk of the registration district in which the property described in the mortgage or transfer is at the time of the execution of the instrument, or in case of a sale, assignment or transfer of book debts or accounts, the clerk of the registration district in which the vendor, assignor or transferor

carries on business; such registration clerks shall file all such instruments presented to them respectively for that purpose and shall indorse thereon the time of receiving the same in their respective offices and the same shall be kept there for the inspection of the public, subject to the payment of the proper fees: C.O. 1898, ch. 43, sec. 13; 2-3 Geo. V. (1912-13) ch. 46, sec. 35, am.

Entry of Instruments.

16. Every such clerk shall number each instrument or copy filed in his office and shall enter in alphabetical order in a book to be provided by him the name of the mortgagor in each such instrument with the number indorsed thereon opposite to each name: C.O. 1898, ch. 43, sec. 14; 1908-9, ch. 15, sec. 17 (2).

Recording the Bill of Sale or Chattel Mortgage.

See sec. 20 of the Ontario Act.

Growing or Future Crops; Seed Grain Indebtedness.

17. No mortgage, bill of sale, lien, charge, incumbrance, conveyance, transfer or assignment hereafter made, executed or created and which is intended to operate and have effect as a security shall in so far as the same assumes to bind, comprise, apply to or affect any growing crop or crop to be grown in future in whole or in part be invalid except the same be made, executed or created as a security for the purchase price and interest thereon of seed grain.

(2) Every mortgage or incumbrance upon growing crops or crops to be grown, made or created to secure the purchase price of seed grain shall be held to be within the provisions of this Act and the affidavit of *bonâ fides* among the other necessary allegations shall contain a statement that the same is taken to secure the purchase price of seed grain.

(3) No mortgage or incumbrance to secure the price of seed grain shall be given upon any crop which is not sown within

one year of the date of the execution of the said mortgage or incumbrance.

(4) Every registration clerk shall be entitled to receive the same fees for his services as provided for under section 35 of this Act.

(5) Every such seed grain mortgage so taken and filed shall not be affected by or subject to any chattel mortgage or bill of sale previously given by the mortgagor or by any writ of execution against the mortgagor in the hands of the sheriff at the time of the registration of such seed grain mortgage, but such seed grain mortgage shall be a first and preferential security for the sum therein mentioned; the date of the purchase of seed grain, the number of bushels purchased and the price thereof per bushel must be stated in the mortgage as well as in the affidavit of *bona fides*: C.O. 1898, ch. 43, sec. 15; 1908-9, ch. 15, sec. 2 (3).

Growing or Uncut Crops.

This section applies only to an instrument intended to affect growing crops, but not to crops severed from the land capable of immediate delivery or change of possession under sec. 11. Hence, an assignment of a lease intended to cover the crops, must, in so far as it is intended to cover the growing or uncut crops, be executed in conformity with this section, and as to the portion of the cut crops the instrument must be registered under sec. 11 where there is no actual or continued change of possession: Robinson v. Lott, 2 S.L.R. 150; see Mihm v. Balcolvski, 1 S.L.R. 415.

Procedure Under Chattel Mortgage on Default.

18. Unless it is otherwise specially provided therein, goods and chattels assigned under a mortgage or conveyance intended to operate as a mortgage of goods and chattels shall be liable to be seized or taken possession of by the grantee for any of the following causes:—

1. If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided

for payment or in the performance of any covenant or agreement contained in the mortgage or conveyance intended to operate as a mortgage and necessary for maintaining the security;

2. If the grantor shall, without the written permission of the grantee, either remove or suffer the goods or any of them to be removed from the registration district within which they are situate;

3. If the grantor shall suffer the said goods or any of them to be distrained for rent, rates or taxes or shall suffer the said goods or any of them to be liable to seizure for rent by reason of default of the grantor in paying the same when due;

4. If execution shall have been levied against the goods of the grantor under any judgment at law;

5. If the grantor shall attempt to sell or dispose of or in any way part with the possession of the said goods: C.O. 1898, ch. 43, sec. 16.

Waiver by Mortgagor.

Although a mortgagee may have no right to take possession of the mortgaged chattels, still, if he does so, and the mortgagor assents thereto, the possession is lawful *quoad* the mortgagor, and such assent may be implied from conduct: Adams v. Hutchings, 3 Terr. L.R. 206, distinguishing Dedrick v. Ashdown, 15 Can. S.C.R. 227.

Blank in Interest Clause.

The "sum secured" in a chattel mortgage, may, if the context implies that interest shall be paid, include the legal rate of interest, although the rate of interest has been left blank: Copland v. Paris Plow Co., (Sask.) 14 W.L.R. 689, varying 13 W.L.R. 682, and following Cross v. Douglas, 3 S.L.R. 97, at 105.

Rights and Duties of Mortgagee.

It is the duty of the mortgagee, when he seizes chattels under a chattel mortgage, for the purpose of selling them, to realize the best price that can be obtained; and, if he fails to make use of such means as may be necessary to secure such price, he must account to the mortgagor for the full value of the pro-

perty: Grimes v. Gauthier, 1 S.L.R. 54; National Bank of Australia v. United Hand, etc. (1879), 4 A.C. 391; see McHugh v. Union Bank, (P.C.) 10 D.L.R. 562, 44 Can. S.C.R. 473.

The right of seizure under the power in a chattel mortgage given to secure payment of a promissory note cannot be exercised until the complete expiration of the last day of grace of the note for which it is given as security; and any seizure before that time, where no other ground exists, is premature and unlawful, and will entitle the mortgagor to damages for the full value of the goods less the amount due to the mortgagee: Westaway v. Stewart, 1 S.L.R. 200; Kennedy v. Thomas, [1894] 2 Q.B. 759; Sinclair v. Robson, 16 U.C.Q.B. 211; Trumbull v. Hill (1879), 5 A.C. 342; McAulay v. Allen, 20 U.C.C.P. 417; Williams v. Stern, 5 Q.B.D. 409.

On appeal (Westaway v. Stewart, 2 S.L.R. 178), it was held, affirming the trial judgment, but varying it as to amount of damages, that in order to justify entry and seizure before default, under a chattel mortgage containing a clause providing for entry and seizure, provided the mortgagee deems the mortgage to be insecure before the sum payable thereunder is due, it must appear, that the mortgagee did actually deem the mortgage insecure at the time he made the entry, and that such entry was made on that ground. Furthermore that it is a matter entirely in the discretion of the trial Judge whether he assess the damages claimed in an action or refer it to the local registrar to do so. See also McHugh v. Union Bank, (P.C.) 10 D.L.R. 562, 568; Coupland v. Paris Plow Co., (Sask.) 14 W.L.R. 689, varying 13 W.L.R. 682.

Where the seizure is legal and the mortgaged chattels are sold by private sale instead of at public auction, the mortgagee will be charged with the highest price obtainable had he used reasonable and proper care, as a prudent person, to obtain the best price. The fact that the illegal seizure caused the landlord to descend upon the claimant for rent is probably too remote an element in the assessment of damages, particularly where it is not specifically alleged as a ground of special damage in the statement of claim: Coupland v. Paris, etc. (supra).

Similarly the loss resulting from refusal of credit by reason of a wrongful seizure where the party is able to pay cash for goods required, or the loss occasioned by trade going elsewhere, cannot be properly included: Baron v. Drewery, 4 S.L.R. 26,

16 W.L.R. 717. Failure of the claimant to claim before seizure, certain goods not covered by the mortgage, when aware seizure is to be made, may create an estoppel from impeaching the seizure or the proceedings thereunder: *Ibid.*, following Imperial Brewer v. Gelin, 18 Man. L.R. 283.

On a realization of mortgaged property under a power of sale contained in a chattel mortgage, the mortgagee should be allowed to deduct from the amount realized the reasonable expenses of such realization, such as the necessary costs of removal and care of the chattels in keeping them in good condition: McHugh v. Union Bank, (P.C.) 10 D.L.R. 562.

For a case of an injunction at the suit of a second mortgagee against a sale, under chattel mortgage, see McDonald v. Scearce, (Y.T.) 5 W.L.R. 324.

In Baron v. Drewery, 4 Sask. L.R. 26, the question arose as to damages for seizing under a chattel mortgage certain hotel furnishings not included in the mortgage. It was shewn that certain of the travelling public who otherwise would have patronized the plaintiff's hotel, having seen the advertisement of his goods for sale, went to the rival hotel. Lamont, J., said: "This is evidence of damage, but it is not evidence of damage resulting from the wrongful seizure and advertisement for sale of the goods not covered by the mortgage as distinguished from the rightful seizure, and advertisement for sale of the goods included in the mortgage. The defendants had a clear right to seize all the goods covered by their mortgage and to offer the same for sale. For any loss of business to the plaintiff arising from such seizure and offer for sale, the defendants are not liable. In order to hold the defendants liable the plaintiff must shew that the loss he sustained resulted from the wrongful acts of the defendant, that is, from the seizure and advertisement for sale of the goods not included in the mortgage, and not from the seizure and advertisement of the goods which the defendants were rightfully entitled to take. No loss resulting solely from the wrongful seizure of the goods not covered by the mortgage was shewn. The damage which was shewn, might, so far as the evidence goes, have resulted just the same if no goods but the mortgaged property had been seized."

Costs of Seizure and Sale.

Secs. 2 and 3, ch. 51, R.S.S. 1909, respecting extra judicial seizure regulate the costs of seizures under chattel mortgages

and provide statutory penalties for exacting any charges not in accordance with the statutory schedule. It reads as follows:—

2. No person making any seizure under the authority of any chattel mortgage, bill of sale, or any other judicial process whatsoever nor any person employed in any manner in making such seizure or doing any act whatsoever in the course of such seizure, or for carrying the same into effect shall have, take or receive out of the proceeds of the goods and chattels seized and sold from the person against whom the seizure may be directed or from any other person whomsoever any other or more costs or charges for and in respect of such seizure or any matter or thing done therein or thereunder than such as are fixed in the schedule hereto, and applicable to each act which shall have been done in course of such seizure, and no person or persons shall make any charge whatsoever for any act or matter or thing mentioned in the said schedule unless such act, matter or thing shall have been really performed and done: C.O. 1898, ch. 34, sec. 2.

3. If any person making any distress or seizure referred to in sees. 1 and 2 of this Act shall take or receive any other or greater costs or charges than are set down in the said schedule or make any charge whatsoever for any act, matter or thing mentioned in the said schedule and not really performed or done, he shall be liable at the suit of the party aggrieved to treble the amount of moneys taken contrary to the provisions of this Act and costs of action: C.O. 1898, ch. 34, sec. 3.

SCHEDULE.

1. Levying distress $1.00
2. Man in possession, per day 1.50
3. Appraisement, whether by one appraiser or more, two cents on the dollar on the value of goods up to $500, and one per cent. on the dollar for each additional $500 or fraction thereof up to $2,000, and one-half per cent. on all sums over that amount.
4. All reasonable and necessary disbursements for advertising.
5. Catalogue, sale, commission and delivery of goods, three per cent. on the net proceeds of the goods up to $1,000, and one and one-half per cent. thereafter.

Statutory Penalty; Return of Treble the Excess.

The infliction of the penalty provided in sec. 3 of ch. 34, of the North-West Territories Consolidated Ordinances, 1898, to the effect that, if greater or other than statutory costs be taken by the person making a distress, the Court "may" order such person to pay the party aggrieved treble the amount of moneys taken in excess, is permissive only: McHugh v. Union Bank, 10 D.L.R. 563, [1913] A.C. 299.

The statutory penalty under these sections may be waived by the parties: Collins v. Eaton, (Alta.) 19 W.L.R. 608.

See note to sec. 16, Alberta Act.

Renewal of Chattel Mortgages.

19. Every mortgage or conveyance intended to operate as a mortgage filed in pursuance of this Act shall cease to be valid as against the creditors of the persons making the same and against subsequent purchasers or mortgagees in good faith for valuable consideration after the expiration of two years from the filing thereof unless within thirty days next preceding the expiration of the said term of two years a statement exhibiting the interest of the mortgagee, his executors, administrators or assigns in the property claimed by virtue thereof and a full statement of the amount still due for principal and interest thereon and of all payments made on account thereof is filed in the office of the registration clerk of the district where the property is then situate with an affidavit of the mortgagee or of one of several mortgagees or of the assignee or one of several assignees or of the agent of the mortgagee or assignee or mortgagees or assignees duly authorized for that purpose, as the case may be, stating that such statements are true and that the said mortgage or conveyance has not been kept on foot for any fraudulent purpose which statement and affidavit shall be deemed one instrument: C.O. 1898, ch. 43, sec. 17; 1900, ch. 12, sec. 2; 1908, ch. 25, sec. 1.

Renewal Statement to be Filed.

The fact that the time of payment extends beyond the time within which the renewal should be filed does not render the

mortgage void: Springer v. Graveley, 34 C.L.J. 135, 2 N.W.T. 306, affirmed in Graveley v. Springer, 3 Terr. L.R. 120.

See note to Alberta Act, sec. 17.

Successive renewal statements of a chattel mortgage need not shew all the credits on account of the mortgage; it is sufficient if each statement contains the payments made since the last renewal: Rogers v. Marshall, 7 O.L.R. 291, overruling Kerr v. Roberts (1897), 33 C.L.J. 695, and specially referring to Christin v. Christin, 1 O.L.R. 634.

See sec. 21 (1) of the Ontario Act.

Form of Renewal Statement.

20. Such statement and affidavit shall be in the following form or to the like effect:—

(Renewal Statement.)

Statement exhibiting the interest of *C. D.* in the property mentioned in the chattel mortgage dated the day of 19 , made between *A. B.* of of the one part and *C. D.* of of the other part and filed in the office of the registration clerk of the registration district of (*as the case may be*) on the day of 19 , and of the amount due for principal and interest thereon and of all payments made on account thereof.

The said *C. D.* is still the mortgagee of the said property and has not assigned the said mortgage (*or* the said *E. F.* is the assignee of the said mortgage by virtue of an assignment thereof from the said *C. D.* to him dated the day of 19 , *or as the case may be*).

No payments have been made on account of the said mortgage (*or* the following payments and no other have been made on account of the said mortgage:

19 .—Jan. 1—Cash received $)

The amount still due for principal and interest on the said mortgage is the sum of dollars computed as follows:

(*Here give the computation.*)

C. D.

(*Affidavit.*)

Province of Saskatchewan,

To wit:

I, of , the mortgagee named in the chattel mortgage mentioned in the foregoing (*or* annexed) statement (*or* assignee of the mortgagee named in the chattel mortgage mentioned in the foregoing *or* annexed statement, *as the case may be*) make oath and say:

1. That the foregoing (*or* annexed statement) is true.

2. That the chattel mortgage mentioned in the said statement has not been kept on foot for any fraudulent purpose.

Sworn before me at
in the Province of Saskatchewan
this day of , 19 .

C. O. 1898, ch. 43, sec. 18.

Renewal Yearly after First Renewal.

21. Another statement in accordance with the provisions of section 20 hereof duly verified as required by that section shall be filed in the office of the registration clerk of the district where the property is then situate within thirty days next preceding the expiration of the term of one year from the day of the filing of the statement required by the said section 20 and in default thereof such mortgage shall cease to be valid as against the creditors of the person making the same and as against purchasers and mortgagees in good faith for valuable consideration and so on from year to year; that is to say another statement as aforesaid duly verified shall be filed within thirty days next preceding the expiration of one year from the day of the filing of the former statement and in default thereof such mortgage shall cease to be valid as aforesaid. C. O. 1898, ch. 43, sec. 19.

Further Renewal Statements.

See sec. 21(7) of the Ontario Act.

Personal Representative or Assignee.

22. The affidavit required by section 20 of this Act may be made by any next of kin, executor or administrator of any deceased mortgagee or by an assignee claiming by or through any mortgagee or any next of kin, executor or administrator of any such assignee; but if the affidavit is made by any assignee, next of kin, executor or administrator of any such assignee the assignment or the several assignments through which such assignee claims shall be filed in the office in which the mortgage is originally filed at or before the time of such refiling by such assignee, next of kin, executor or administrator of such assignee. C.O. 1898, ch. 43, sec. 20.

Affidavits by Assignee or Personal Representative.

See secs. 14 and 21(8) of the Ontario Act.

Agent's Authority to Take Conveyances.

23. (*As amended* 1912-13.) An authority for the purpose of taking or renewing a mortgage or conveyance intended to operate as a mortgage or sale, assignment or transfer of goods and chattels, book debts, accounts or debts to be incurred under the provisions of this Act may be a general one to take and renew all or any mortgages or conveyances to the mortgagee or bargainee; and provided such general authority is duly filed with the clerk it shall not be necessary to attach a copy thereof to any mortgage filed. C.O. 1898, ch. 43, sec. 21; 2-3 Geo. V. (1912-13) ch. 46, sec. 35, am.

Written "Authority" to Mortgagee's Agent.

See secs. 12 and 13 of the Ontario Act, and note to sec. 21, Alberta Act.

Agent or Manager of Incorporated Company.

24. (*As amended* 1912-13.) In the case of a mortgage or sale of goods, or in case of a sale, assignment or transfer of book

debts, accounts or debts to be incurred, to an incorporated company the affidavit of *bona fides* required by this Act and the affidavit required upon the renewal of a chattel mortgage may be made by the president or vice-president, manager, assistant manager, secretary or treasurer of such company or by any other officer or agent of such company duly authorized by resolution of the directors in that behalf; any such affidavit made by an officer or agent shall state that the deponent is aware of the circumstances connected with the sale or mortgage, as the case may be, and has personal knowledge of the facts deposed to. 1909, ch. 35, sec. 28(4); 2-3 Geo. V. (1912-13) ch. 46, sec. 35, am.

Affidavit of bona fides for Incorporated Company.

See sec. 12(2) of the Ontario Act, and note to sec. 22, Alberta Act.

Rectification of Omissions and Errors.

25. Subject to the rights of third persons accrued by reason of such omissions as are hereinafter defined any judge of the supreme court or of the district court of the judicial district within which such goods and chattels are situate on being satisfied that the omission to register a mortgage or other transfer of personal property or any authority to take or renew the same or any statement and affidavit of renewal thereof within the time prescribed by this Act or the omission or misstatement of the name, residence or occupation of any person was accidental or due to inadvertence or impossibility in fact, may in his discretion order such omission or misstatement to be rectified by the insertion in the register of the true name, residence or occupation or by extending the time for such registration on such terms and conditions, if any, as to security, notice by advertisement or otherwise or as to any other matter as he thinks fit to direct. C.O. 1898, ch. 43, sec. 23; 1908-9, ch. 15, sec. 17(4).

Rectification Orders.

See note to British Columbia Sales Act, sec. 21.

Assignment of Chattel Mortgages.

26. In case any registered chattel mortgage has been assigned such assignment may upon proof by the affidavit of a subscribing witness be numbered and entered in the book mentioned in section 16 hereof in the same manner as a chattel mortgage and the proceedings authorized by sections 29 and 30 of this Act may and shall be had upon a certificate of the assignee proved in manner aforesaid. C.O. 1898, ch. 43, sec. 24.

Filing Assignments of Mortgage.

See sec. 27(4) of the Ontario Act.

Discharge of Chattel Mortgage.

27. Where any mortgage of goods and chattels is registered under the provisions of this Act such mortgage may be discharged by the filing in the office in which the same is registered of a certificate signed by the mortgagee, his executors or administrators in form B in the schedule hereto or to the like effect. C.O. 1898, ch. 43, sec. 25.

Form of Discharge.

Form B referred to in this section and set forth in the schedule of the Act is as follows:—

FORM B.

(*Section* 27.)

DISCHARGE OF CHATTEL MORTGAGE.

To the registration clerk of the registration district of .

I, *A. B.*, of , do certify that has satisfied all money due on or to grow due on a certain chattel mortgage made by to which mortgage bears date the day of , 19 , and was registered (*or in case the mortgag has been renewed* was renewed) in the office of the registration clerk of the registration district of on the , 19 , as number (*here mention the day and date of registration of each assignment thereof and the names of the parties or mention that such mortgage has not been assigned as the fact may*

be) and that I am the person entitled by law to receive the money; and that such mortgage is therefore discharged.

Witness my hand this day of , 19 .

Witness (*stating residence and occupation*). } *A. B.*

E. F.

Discharge of Chattel Mortgage.

See sec. 28 of the Ontario Act.

Recording the Discharge.

28. The officer with whom such chattel mortgage is filed upon receiving such certificate duly proved by the affidavit of a subscribing witness shall at each place where the number of such mortgage has been entered with the name of any of the parties thereto in the book kept under section 16 of this Act or wherever otherwise in the said book the said mortgage has been entered, write the words "Discharged by certificate number (stating the number of certificate)"; and he shall also indorse the fact of such discharge upon the instrument discharged and shall affix his name to such indorsement. C.O. 1898, ch. 43, sec. 26.

Entry of Discharge by Offic .

See sec. 29(1) of the Ontario Act, and note sec. 26, Alberta Act.

Certificate of Discharge.

29. Any person filing a discharge of mortgage or a partial discharge of mortgage as aforesaid shall be entitled to ask for and receive from such clerk a certificate (other than the certificate which might be endorsed on a copy or duplicate of the mortgage as aforesaid) of such discharge or partial discharge in the form following or to the like effect:—

(*Form of Certificate of Discharge.*)

Province of Saskatchewan,
Registration District of }

This is to certify that an instrument purporting to be a discharge in full (*or* a partial discharge) of a certain chatt

mortgage bearing date the day of and filed the day of following made between *A. B.* of as mortgagor and *C. D.* of as mortgagee has been filed in the office of the clerk of the registration district of on the day of (*and in case of a partial discharge* that the goods or property mentioned in such partial discharge consist of *describing the chattels or property*).

M.,
Clerk.

C.O. 1898, ch. 43, sec. 27.

Removal of Chattels Mortgaged, Notice.

30. No goods or chattels mortgaged as aforesaid shall be removed into another registration district without a notice of the intention to remove be mailed by post, duly registered to the mortgagee at his last known place of residence not less than twenty days prior to such removal. C.O. 1898, ch. 43, sec. 28.

Re-filing Mortgage on Removal of Goods to Another District or from Another Jurisdiction.

31. In the event of the permanent removal of goods and chattels mortgaged as aforesaid from the registration district in which they were at the time of the execution of the mortgage to another registration district before the payment and discharge of the mortgage a certified copy of such mortgage under the hand of the registration clerk in whose office it was first registered and of the affidavit and documents and instruments relating thereto filed in such office shall be filed with the registration clerk of the district to which such goods and chattels are removed within three weeks from such removal otherwise the said goods and chattels shall be liable to seizure and sale under execution and in such case the mortgage shall be null and void as against subsequent purchasers and mortgagees in good faith for valuable consideration as if never executed.

(2) In the event of the permanent removal into Saskatchewan of goods and chattels subject to a mortgage or bill of

sale made, executed or created without Saskatchewan from a place in which they were at the time of the execution of said mortgage or bill of sale a copy thereof and of the affidavit and documents and instruments relating thereto proved to be a true copy by the affidavit of some person who has compared the same with the originals shall be filed with the registration clerk of the district to which such goods and chattels are removed within three weeks from such removal otherwise the mortgagee or bargainee shall not be permitted to set up any right of property or right of possession to said goods and chattels against the creditors of the mortgagor or bargainor or against subsequent purchasers or mortgagees in good faith for valuable consideration. C.O. 1898, ch. 43, sec. 29; 1908, ch. 25, sec. 3.

Removal of Goods.

See sec. 19 of the Ontario Act, and note to sec. 29, Alberta Act.

On the principle of comity each sovereignty accords to the other a recognition of rights created within its respective boundaries on subject matters thereon situated, provided they are not in conflict with the positive law or public policy of the place wherein they are sought to be enforced. Hence, apart from statute such as this a chattel mortgage valid according to the laws wherein the chattels are situated will be enforced in and protected by the country whereto the mortgaged chattels are subsequently removed even as against *bonâ fide* purchasers for value without notice of the foreign incumbrances. Bonin v. Robertson, 2 Terr. L.R. 21; Jones v. Twohey, 1 A.L.R. 267. The sub-section is intended to protect innocent purchasers by requiring the registration of a copy of the original instrument within three weeks from the permanent removal of the goods into Saskatchewan. See also chapter VII. of the text, *ante*.

Subsequent Purchasers.

The "subsequent purchaser" must be one who purchased after the expiration of the three weeks from the time of removal; though a copy of the mortgage has not been filed as provided, it is valid as against a sale made within such period. Hulbert v. Peterson, 36 Can. S.C.R. 324, reversing 6 Terr. L.R. 114.

Evidence; Certified Copies.

32. Copies of any instrument filed under this Act certified by the registration clerk or the registrar of joint stock companies shall be received as *primâ facie* evidence for all purposes as if the original instrument was produced and also as *primâ facie* evidence of the execution of the original instrument according to the purport of such copy and the clerk's or registrar's certificate shall also be *primâ facie* evidence of the date and hour of registration and filing. C.O. 1898, ch. 43, sec. 30; 1909, ch. 35, sec. 28.

Certified Copy as Evidence.

See sec. 27 of the Ontario Act.

In Hennenfest v. Malchose, 3 W.L.R. 171, a certified copy of a bill of sale executed in a foreign country as to goods therein situate when the bill of sale was made, but subsequently removed into Canada, was held not admissible in evidence in Saskatchewan, where it had been certified by the recording official in the foreign state. Presumably the words "registration clerk" in the statute are limited in their application to officials within the jurisdiction.

Affidavits; Commissioners.

33. All affidavits and affirmations required by this Act may be taken and administered by the registration clerk or any person whether in or out of Saskatchewan authorized to administer oaths or take affidavits for use in Saskatchewan and the sum of twenty-five cents shall be payable for every oath thus administered. C.O. 1898, ch. 43, sec. 31.

Expiry on Holiday of Time for Filing.

34. Where under any provisions of this Act the time for registering or filing any mortgage, bill of sale, instrument, document, affidavit or other paper expires on a Sunday or other day on which the office in which the registering or filing is to be made or done is closed and by reason thereof the filing or registering cannot be made or done on that day the registering or filing shall so far as regards the time of doing or making

the same be held to be duly done or made if done or made on the day on which the office shall next be open. C.O. 1898, ch. 43, sec. 32.

Clerks' Fees.

35. For services under this Act each registration clerk shall be entitled to receive the following fees:—

1. For each filing including stamping duplicate original, if any, with registration stamp, 50 cents;

2. For filing each assignment, renewal statement or certificate of discharge and for making all proper indorsements in connection therewith, 50 cents;

3. For searching each name, 50 cents;

4. For each certificate or abstract of search, 25 cents;

5. For each certificate under section 27 of this Act, 50 cents.

6. For copies of any document filed under this Act, with certificate thereof, every 100 words, 10 cents. 1908-9, ch. 15, sec. 17(5); 1909, ch. 35, sec. 28 (3).

Railway Equipment Bond Mortgages or Trust Deeds.

36. In the case of a bill of sale or of a mortgage or conveyance for the purpose of securing bonds or debentures made by an incorporated company of cars, equipment, rolling stock and other chattel property owned by it it shall be sufficient for the purpose of this Act if the bill of sale, mortgage or conveyance or a notarial copy thereof be filed in the office of the registrar of joint stock companies within the time limited by this Act for filing chattel mortgages; such bill of sale, mortgage or conveyance shall have priority from the date of filing and such mortgage or conveyance shall remain in force without the necessity of renewal or of any affidavits of execution or *bona fides* until the same has been discharged and satisfied; and a discharge of such mortgage or conveyance may be registered in such office.

(2) Any such bill of sale, mortgage or conveyance heretofore given which has been duly registered and renewed in

accordance with the Statutes relating thereto from time to time in force or a sworn copy thereof may be deposited in the office of the registrar of joint stock companies within ninety days after the passing of this Act; and notice of such deposit shall forthwith thereafter be given in *The Saskatchewan Gazette*.

(3) No objection shall be taken on the part of any creditor of such company or any purchaser or mortgagee becoming such creditor or purchaser or mortgagee subsequent to the giving of such notice to any such mortgage or other instrument in respect of which such deposit has been made and such notice given on the ground that the same has not been otherwise deposited, registered or filed under the provisions of any law respecting the deposit, registration or filing of instruments affecting real or personal property. 1909, ch. 35, sec. 28(6).

SCHEDULE.

[The schedule of the Act consists of Form A, already printed under sec. 9; Form B, already printed under sec. 27; and the order-in-council of September 17, 1907, already printed under sec. 2.]

CHATTEL MORTGAGE FORMS.

CHATTEL MORTGAGE.

(General form, with special clauses.)

(R.S.O. 1914, c. 135.)

THIS INDENTURE made the —— day of —— 19—, between —— of the —— of —— in the county of ——, ——, hereinafter called the mortgagor, of the first part, and —— of the —— of —— in the county of ——, ——, hereinafter called the mortgagee of the second part.

WITNESSETH that the mortgagor in consideration of dollars to him paid by the mortgagee at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged) doth hereby grant, bargain, sell and assign unto the mortgagee, his executors, administrators and assigns, all and singular.

Description and locality of chattels.

The goods and chattels following, that is to say: [*Here insert a full and accurate description of each article intended to be mortgaged, so that it may be readily and easily known and distinguished.*] [*or*, the goods and chattels particularly described in the schedule hereto annexed marked "A"].

All of which said goods and chattels are the property of the mortgagor, and are now [ordinarily] situate, lying and being in and upon [the property of the mortgagor] situate [*here describe accurately the lands upon which the goods, etc., are at the date of the execution of the mortgage, and the exact locality of each article as nearly as possible*].

Subsequently acquired or substituted goods.

[If it is desired to secure goods subsequently brought upon the lands add,] and also all the goods and chattels which may be added to or substituted for the said goods and chattels, or any of them, as hereinafter mentioned, or which shall hereafter be brought by the mortgagor upon the said lands or upon any other lands to which the mortgagor, his executors or administrators, may remove the said goods and chattels or any of them during the continuance of this security, or any renewal thereof.

Hotel property.

Also all wines, liquors, cigars, furniture, household stuff and all other goods and chattels of every nature and kind the property of the mortgagor, without restriction to the description in the schedule hereto annexed marked "A," which are now in and upon the said hotel and lands hereinbefore mentioned; and also all other wines, liquors and cigars, furniture, household stuff and all other goods and chattels of every nature and kind which, being the property of the mortgagor, shall be brought in or upon the said hotel and lands during the continuance of this security or any renewal thereof.

Farm stock, implements, etc.

Also all the farm stock of the mortgagor, without restriction to the above description, including implements, vehicles, harness, horses, cattle, sheep, hogs and fodder now upon the lands hereinbefore mentioned or which may hereafter be brought upon the said lands while in possession of the mortgagor or during the continuance of this security or any renewal thereof, and after as well as before the last day hereinafter provided for payment, until the mortgage is fully paid.

Crops.

The crops growing or to be grown during the year 19—, on the [*describe the particular lands*].

Grain, crops and produce (*a*).

And also all seed, grain and other seed or vegetables for seeding purposes now upon or which may hereafter be upon the said lands, and also the crops and produce of every description whether grain, hay, clover, vegetables or fruit now in process of growth, or which may hereafter be in process of growth, upon the said lands during the continuance of this security and any renewal thereof, and whilst the said lands are in possession of the mortgagor and after as well as before the last day hereinafter provided for payment, until the mortgage is fully paid, the intention being that this mortgage shall attach on such crops in every stage until their maturity and after their maturity whether severed or not from the realty.

Book debts.

And by way of additional security for the moneys hereby secured, the mortgagor doth hereby grant, bargain, sell and assign unto the mortgagee all book debts, claims, money, demand, mortgages, bills, notes, cheques, judgments, choses in action, both present and future, and all books and papers, both present and future, containing any entries of or in any wise relating thereto, and particularly all such book debts, claims, money, demands, mortgages, bills, notes, cheques, judgments, choses in action, books and papers which arise in connection with or or are related to or shall hereafter arise in connection with or relate to the business now carried on or which shall hereafter be carried on by the mortgagor.

Payment of mortgage money.

Provided that if the mortgagor, his executors or administrators, pay or cause to be paid unto the mortgagee, his executors, administrators or assigns, the sum of —— dollars, with interest

(*a*) Seed Grain Mortgages may be subject to special statutory restrictions, as to which see the statutes set forth in this work and the general index under the title "Seed grain."

thereon at the rate of —— per cent. (*b*) per annum as follows: [*Here set out the time and mode of payment*], then these presents shall be void.

Note given as collateral security.

When a promissory note is given as collateral security, add the following after setting out the time and mode of payment; or shall pay or cause to be paid a certain promissory note bearing even date herewith made by the mortgagor to the mortgagee, payable —— months [*or as the case may be*] after the date thereof for the sum of —— dollars with interest thereon at the rate of —— per cent. per annum, or shall pay or cause to be paid all renewals of the said note maturing within the period of one year (*c*) from the date hereof, whether for the whole sum or any part thereof with interest thereon at the rate aforesaid, which said note was given and received as collateral security for the payment of the debt hereby secured, then these presents, etc.

Interest on money in arrear.

And it is agreed that if default be made in the payment of any sum due hereunder, whether for principal, interest or otherwise, then interest shall be paid on any sum so in arrear, at the said rate, until the whole sum due is fully paid.

(*b*) R.S.C. 1906, c. 120, s. 1, requires that if the interest is made payable at a rate or percentage for any period less than a year—e.g., per day, week or month—not more than 5% per annum shall be chargeable or recoverable unless the contract also shows the yearly rate to which the other rate is equivalent. In such a case add, "and it is hereby expressly stated that the interest aforesaid is equivalent to the yearly rate of per centage of——per cent."

Under the Ontario statute (2 Geo. V. c. 34, R.S.O. 1914, c. 181) a refund may be ordered in favour of the borrower in respect of a loan, not exceeding $200, if there is a concealment or omission by the lender of any material fact or term of the contract or of the rate per cent per annum, if such concealment or omission induces the contract and the cost of the loan exceeds 10% per annum. This applies specially to chattel mortgages in which no interest is reserved but a cash discount is taken in advance.

(*c*) In Manitoba, Alberta, Saskatchewan and the Yukon Territory this period is two years (R.S.M., c. 11, s. 6; Ord. (Alta. 1911) c. 43, s. 8; R.S.S. 1909, c. 144, sec. 10; Con. Ord. Yukon, c. 30, s. 8).

Warranty of goods.

And the mortgagor for himself, his executors and administrators, shall and will warrant and forever defend by these presents all and singular the said goods and chattels unto the mortgagee, his executors, administrators and assigns, against him, the mortgagor, his executors and administrators, and against every other person whomsoever.

Covenant for payment.

And the mortgagor, for himself, his executors and administrators, hereby covenants with the mortgagee, his executors, administrators and assigns, that he will pay or cause to be paid to the mortgagee, the said sum of money in the above proviso mentioned, with interest thereon as aforesaid on the days and times and in the manner above limited for the payment thereof

Powers on default.

And also, in case default shall be made in the payment of the said money in the said proviso mentioned, or of the interest thereon, or any part thereof, or if the mortgagor shall (without having first obtained the consent in writing of the mortgagee, his executors, administrators or assigns to such sale, removal or disposal) sell or attempt to sell or dispose of or in any way part with the possession of the said goods and chattels, or any of them, or shall remove or attempt to remove them, or any part thereof, out of the county or ——, [*or*, from the lands where they are now or to which they may have been removed with the consent of the mortgagee], or if the mortgagee, his executors, administrators or assigns should at any time feel unsafe or insecure, or deem the said goods and chattels in danger of being sold or removed, or if there shall be issued against the mortgagor, his executors or administrators, any writ or process for a money demand or any writ of execution or any warrant of distress for any rent or taxes in respect of the lands in or

upon which the said goods and chattels, or any part thereof, may at any time during the currency of this mortgage, or any renewal thereof be situate, or if the mortgagor shall suffer, allow or permit a judgment to be obtained against him for any debt, or shall suffer the said goods and chattels, or any of them, to be seized or taken in execution, or shall suffer, allow or permit any rent, taxes, rates or assessments whatsoever for which he now is, or may hereafter, while this mortgage, or any renewal thereof, shall be in force, be liable or assessed in respect of any lands whereon the said goods and chattels or any of them may then be situate, to remain unpaid and unsatisfied for a period of —— days after the same have become due; or if the mortgagor, his executors or administrators, shall fail to pay the rent arising out of the lands and premises upon which are situate and lying the said goods and chattels, at any time during the continuance of this security, or any renewal thereof, promptly when [*or*, —— days at least before] such rent becomes due, or if the mortgagor, his executors or administrators, shall fail to insure and keep insured the said goods and chattels within the meaning of the provisions of this indenture, or shall abandon the said goods and chattels, or any part thereof, or make an assignment for the benefit of his creditors, or be arrested on any criminal charge, or if a writ of capias or of attachment or order of arrest shall issue against the mortgagor, or if default shall be made in the performance of any of the covenants by the mortgagor in this indenture contained, then and in every such case all the money secured by this indenture shall, at the option of the mortgagee, his executors, administrators or assigns, immediately become due and be payable, and the mortgagee, his executors, administrators or assigns may, with his or their servants, and with such other assistance as he or they may require at any time during the day or night, enter into and upon any lands, tenements, houses and places wheresoever and whatsoever where the said goods and chattels, or any part thereof, may be, and such persons may

break and force open any doors, locks, bars, bolts, fastenings, hinges, gates, fences, houses, buildings, enclosures and places for the purpose of taking possession of and removing the said goods and chattels; [*In the case of a mortgage of growing crops, add,* and if the said crops have not matured at the time of taking possession as aforesaid, then the mortgagee, his executors, administrators or assigns shall be at liberty to remain in possession of the said premises until the crops aforesaid have matured and been converted into marketable form and sold,] and upon and from and after the taking possession of such goods and chattels as aforesaid the mortgagee, his executors, administrators or assigns, and each or any of them, may and he and they are hereby authorized and empowered to sell the said goods and chattels, or any of them, or any part thereof, at public auction or private sale, as to him, them, or any of them may seem meet; and from and out of the proceeds of such sale in the first place to pay all such sums of money and interest as may then be secured by virtue of these presents, and all costs and expenses which have been incurred by the mortgagee, his executors, administrators or assigns, in the protection of this security, or in consequence of the default, neglect or failure of the mortgagor, his executors, administrators or assigns, in payment as above mentioned or in respect of the non-performance of any covenant herein contained or in consequence of such sale or removal or otherwise as above mentioned; and in the next place to pay unto the mortgagor, his executors, administrators or assigns such surplus as may remain after such sale, and after payment of all such sums of money and interest thereon as may be secured by these presents and of the costs, charges and expenses incurred by such seizure and sale as aforesaid.

Payment of deficiency.

And the mortgagor doth hereby for himself, his executors and administrators further covenant and agree with the mortgagee, his executors, administrators and assigns, that in case

the sum of money realized under any such sale as above mentioned shall not be sufficient to pay the whole amount payable under the provisions of this indenture at the time of such sale, he, the mortgagor, his executors or administrators, shall forthwith pay or cause to be paid unto the mortgagee, his executors, administrators or assigns the amount of such deficiency, as well as and including all costs and expenses which may have been incurred by the mortgagee, his executors, administrators and assigns, in and about such seizure and sale and otherwise as aforesaid.

Power to sell chattels separate from land.

[*When the mortgage is given as collateral security to a mortgage on land, and it is desired to have power to sell the chattels separately, add,*] The mortgagee shall be at liberty, in exercising the power of sale hereinbefore given, to sell the said goods or chattels either in one block or separately, or in several parcels (and either with or without the realty mortgaged to the mortgagee as the primary security for the mortgage debt) or in any other way in the mortgagee's discretion best adapted to realize the mortgage debt.

Keeping possession instead of selling.

Provided that it shall not be incumbent on the mortgagee, his executors, administrators or assigns, to sell and dispose of the said goods and chattels, but that in case of any default as aforesaid the mortgagee, his executors, administrators or assigns may peaceably and quietly have, hold, use, occupy, possess and enjoy the said goods and chattels without the let, molestation, eviction, hindrance or interruption of the mortgagor, his executors, administrators or assigns, or any of them, or any other person whomsoever.

Power of distress.

Provided that the mortgagee, his executors, administrators or assigns, may, in default of payment of any interest or instal-

ments hereinbefore mentioned, or any part thereof, distrain for the whole principal sum then unpaid, with the accrued interest thereon.

Mortgagee put in possession.

And the mortgagor doth put the mortgagee in full possession of the said goods and chattels by delivering to him this indenture, at the sealing and delivery hereof, in the name of all the said goods and chattels.

Stock in trade to be kept up.

The mortgagor, for himself, his executors and administrators, covenants with the mortgagee, his executors, administrators and assigns, that he and they will, during the continuance of this security and any renewals thereof, keep up the amount of the stock in trade on the said premises so that at no time will it be less than the actual cash value of —— dollars if sold by public auction, and that if, during the said period the said stock in trade should not be of such value (as to which the mortgagee, his executors, administrators and assigns shall be sole judge) all the moneys secured by this indenture shall, at the option of the mortgagee, his executors, administrators and assigns, immediately become due and be payable, and the mortgagee, his executors, administrators and assigns, may forthwith take any and all proceedings for the better securing himself or themselves, and for enforcing and obtaining payment of the money secured hereby as though default had actually been made in the payment of the moneys secured hereby or any part thereof.

Sale by retail to continue.

It is hereby agreed that the mortgagor shall be at liberty to make sales by retail of the goods and chattels hereby mortgaged in the ordinary course of business until the mortgagee shall notify him in writing to the contrary.

Insurance.

And the mortgagor for himself, his executors and administrators, further covenants with the mortgagee, his executors, administrators and assigns, that he and they will, during the continuance of this security and of any and every renewal thereof, insure and keep insured the goods and chattels hereinbefore mentioned against loss and damage by fire in some insurance company authorized to transact business in Canada, and approved of by the mortgagee, his executors, administrators or assigns, in the sum of not less than —— dollars [*or*, their full insurable value] as security for all moneys secured by this indenture, for the benefit of the mortgagee, his executors, administrators and assigns, and will pay all premiums and moneys necessary for that purpose as [*or*, three days at least before] such premiums and moneys become due and payable, the loss, if any, to be payable to the mortgagee, his executors, administrators or assigns, and the production of this indenture shall be sufficient authority for and such insurance company is hereby directed thereupon to pay such loss, if any, to the mortgagee, his executors, administrators or assigns; and the mortgagor for himself, his executors and administrators, hereby agrees that he will, on demand, assign and deliver over to the mortgagee, his executors, administrators or assigns, every such policy of insurance and the receipts thereto appertaining. Provided that if the said insurance is not effected, or not kept duly renewed, and default be made by the mortgagor, his executors or administrators, in payment of the said premiums or of any sum of money hereby secured, or of the rent for the premises whereon the said goods and chattels may at any time be situated, the mortgagee, his executors, administrators or assigns, may pay the same, and such sums of money shall be added to the debt hereby secured, and shall be forthwith repayable and shall bear interest at the same rate from the day of such payment.

Possession until default.

Provided that until default shall be made in any of the covenants or provisos herein contained the mortgagor shall have peaceable and quiet possession and use of the said goods and chattels.

Collateral and other security.

Provided always that the mortgagee, his executors, administrators or assigns, may accept from time to time the bills, notes, or other negotiable instruments of the mortgagor, his executors, or administrators, or of any other person or persons, for the said moneys, or any of them, or as further or collateral security therefor or for any part thereof, and may accept renewals thereof in whole or in part from time to time, and may compound the same or any of them or relinquish them or any of them with or without security, without affecting or prejudicing the rights and remedies of the mortgagee under these presents, [which said bills, notes or negotiable instruments shall be a security collateral to all other claims and rights of the mortgagee in the premises,] and provided that such bills, notes or negotiable instruments shall all mature and become due and payable within one year [*or* two years *as the case made be under the provincial law*] (*d*) from the date hereof, and if such have been or may hereafter be given the payment thereof shall be deemed payment *pro tanto* of this mortgage, *or*,

When the mortgage is collateral to a debt.

It is hereby understood and agreed that these presents, and any notes, acceptances or other negotiable paper or renewals thereof now or hereafter taken in respect of the said indebtedness or any part thereof, are a collateral security only.

Subsequently acquired or substituted goods.

It is hereby declared and agreed that in case any goods or chattels of a class or kind similar to those herein mentioned

(*d*) For Manitoba, Alberta, Saskatchewan and Yukon Territory the period may be two years, but is limited to one year in Ontario.

shall at any time during the continuance of this security be added to the said goods and chattels either as an augmentation thereof or in substitution for any part or article thereof which may happen to be lost or cease to exist or be sold or disposed of, then such additional or substituted goods and chattels shall be deemed to be covered and assigned and mortgaged by these presents and to be subject to all the terms, covenants, conditions and powers herein contained.

Costs of mortgage and renewals.

The mortgagor covenants with the mortgagee that he will pay the costs, charges and expenses of and incidental to the taking, preparation, execution and registration of these presents and of every renewal thereof.

Solicitor's costs on default.

And it is expressly agreed that if default is made in the payment of the moneys hereby secured, and this mortgage is put in a solicitor's hands for collection, a solicitor's fee of [ten] dollars shall forthwith be chargeable and such fee shall be added to the principal money hereby secured.

IN WITNESS, etc.

SIGNED, SEALED, etc.

AFFIDAVIT OF EXECUTION

OF CHATTEL MORTGAGE.

(R.S.O. 1914, c. 135, s. 6.)

ONTARIO;
County of ——.
To Wit:

I, ——, of the —— of —— in the county of ——, ——, make oath and say:

1. I was personally present and did see the foregoing [*or*, annexed] mortgage [*or*, bill of sale by way of mortgage (*e*)]

(*e*) When the mortgage is made to an incorporated company, see form *post*.

duly signed, sealed and executed by ——, one of the parties thereto.

2. The name "——" set and subscribed as a witness to the execution of the said mortgage is of the proper handwriting of me this deponent.

3. The said mortgage was executed at the —— of ——, in the said county of ——, on the —— day of —— 19—.

SWORN, etc.

AFFIDAVIT OF BONA FIDES

BY SOLE MORTGAGEE.

(R.S.O. 1914, c. 135, s. 6.)

ONTARIO; County of ——, To Wit: } I, ——, of the —— of —— in the county of ——, ——, the mortgagee in the foregoing [*or*, annexed] mortgage(*f*) named, make oath and say:

1. ——. the mortgagor in the foregoing [*or*, annexed] mortgage named is justly and truly indebted to me, this deponent. the mortgagee therein named, in the sum of —— dollars mentioned therein.

2. The said mortgage was executed in good faith and for the express purpose of securing the payment of the money so justly due or accruing due as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in the said mortgage against the creditors of the said ——, the mortgagor therein named, or of preventing the creditors of such mortgagor from obtaining payment of any claim against the said mortgagor.

SWORN, etc.

(*f*) There is no authority for using the words "bill of sale by way of mortgage" if the instrument is really a mortgage; and now, by statute, an instrument which is a "conveyance intended to operate as a mortgage" (*ex. gr.* where it is absolute in form, but intended as a security only) is declared to be a "mortgage" for the purposes of the Ontario Act (R.S.O. 1914, c. 135).

AFFIDAVIT OF BONA FIDES

BY ONE OF SEVERAL MORTGAGEES.

(R.S.O. 1914, c. 135, ss. 5, 12.)

ONTARIO;
County of ——,
To Wit:

I, ——, of the —— of —— in the county of ——, ——, make oath and say:

1. I am one of the mortgagees in the foregoing [*or*, annexed] mortgage named, and I am aware of all the circumstances connected therewith (*g*).

2. That ——, the mortgagor in the foregoing [*or*, annexed] mortgage named, is justly and truly indebted jointly to me, this deponent, and to ——, the other mortgagee therein named, in the sum of —— dollars mentioned therein.

3. The said mortgage was executed in good faith and for the express purpose of securing the payment of the money so justly due or accruing due as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in the said mortgage against the creditors of the said ——, the mortgagor therein named, or of preventing the creditors of such mortgagor from obtaining payment of any claim against the said mortgagor.

SWORN, etc.

AFFIDAVIT OF BONA FIDES

BY AGENT OF MORTGAGEE.

(R.S.O. 1914, c. 135, ss. 5, 12.)

ONTARIO;
County of ——,
To Wit:

I, E.F., of the —— of —— in the county of ——, ——, make oath and say:

1. I am the duly authorized agent of C.D., the mortgagee in the foregoing [*or*, annexed] mortgage (*h*) named for the pur-

(*g*) The latter part of this clause may not be strictly necessary, but is inserted for greater caution in view of R.S.O. 1914, c. 135, s. 12.

(*h*) See R.S.O. 1914, c. 135, s. 2, sub-sec. (*c*).

poses of the said mortgage and I am aware of all the circumstances connected with the said mortgage, and I have a personal knowledge of the facts deposed to (*j*).

2. I am duly authorized in writing to take such said mortgage and the paper writing marked "B" attached to the said mortgage is [a true copy of] my authority to take such mortgage.

3. That A.B., the mortgagor in the foregoing [*or*, annexed] mortgage named, is justly and truly indebted to C.D., the mortgagee therein named, in the sum of ——— dollars mentioned therein.

4. The said mortgage was executed in good faith and for the express purpose of securing the payment of the money so justly due or accruing due, as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in the said mortgage against the creditors of the said A.B., the mortgagor therein named, or of preventing the creditors of such mortgagor from obtaining payment of any claim against the said mortgagor.

SWORN, etc.

AFFIDAVIT OF BONA FIDES

BY OFFICER OF A COMPANY (*k*).

(R.S.O. 1914, c. 135, s. 5.)

ONTARIO;
County of ——,
To Wit:

I, ——, of the —— of —— in the county of ——, ——, make oath and say:

1. I am the [manager, *or as the case may be*] of the —— Company, the mortgagee in the foregoing [*or*, annexed] mortgage

(*j*) The affidavit of *bona fides* when made by an agent shall state "that the deponent is aware of the circumstances connected with the mortgage, and has personal knowledge of the facts deposed to." R.S.O. 1914, c. 135, s. 12 (3).

(*k*) This affidavit may be made by the president, vice-president, manager, assistant-manager, secretary, or treasurer, or other officer or agent of the company duly authorized by resolution of the directors in that behalf. R.S.O. 1914, c. 135, s. 12 (2).

(*h*) named, and I am aware of all the circumstances connected with the said mortgage, and I have a personal knowledge of the facts herein deposed to.

2. I am the agent of the said mortgagee duly authorized by resolution of the directors to take such mortgage, and the paper writing marked "B," attached to the said mortgage, is a true copy of such authority.

3. A.B., the mortgagor in the foregoing [*or*, annexed] mortgage named, is justly and truly indebted to the said company, the mortgagee therein named, in the sum of ——— dollars mentioned in the said mortgage.

4. The said mortgage was executed in good faith and for the express purpose of securing the payment of the money so justly due or accruing due, and not for the purpose of protecting the goods and chattels mentioned in the said mortgage against the creditors of the said A.B., the mortgagor therein named, or of preventing the creditors of such mortgagor from obtaining payment of any claim against the said mortgagor.

DECLARATION OF MORTGAGOR

ON GIVING A CHATTEL MORTGAGE (*l*).

PROVINCE of —— To Wit: } I, —— of the —— of —— in the province of ——, ——, the within named mortgagor, do solemnly declare:

1. That my name and surname are both correctly spelled in the within mortgage, and I am correctly described therein, and that the said mortgage was read over and explained to me and I verily believe that I understand the same.

2. I am now absolutely, and in my sole and exclusive right,

(*h*) See R.S.O. 1914, c. 135, s. 2, sub-sec. (*c*).

(*l*) This declaration is not required by the Act but is merely for additional protection to the mortgagee.

the owner and possessor of the goods and chattels mentioned and described in the said mortgage, and they are fully paid for.

3. The said goods and chattels are correctly described in the said mortgage and are now all in good condition and repair and are worth to-day at least —— dollars in cash.

4. My liabilities in all do not exceed —— dollars.

5. There is no mortgage, hypothec, lien, note or claim of any kind or nature, adverse to my rights, of, upon, or against such goods and chattels, or any portion of them, save the within mortgage, and no taxes or rent due on the lands and premises on which the said goods and chattels or any of them are situated.

6. There is no judgment or execution of any kind now in force or extant against me. I claim the said chattels, or such portion thereof as may properly be so claimed as exempt from seizure for rent or under any execution or other process of any court, and I will so claim them until the said mortgage is fully paid and satisfied. I undertake to pay the said mortgage according to the tenor thereof, and not to sell, exchange, or otherwise dispose of any of the chattels therein described, without the consent in writing of the mortgagee therein mentioned, until the said mortgage and interest are fully paid.

7. I am over twenty-one years of age.

8. I am the [tenant] of the premises whereon the said goods are situate at a [monthly] rental of ——, payable to —— as landlord, and the rent is paid up to the —— day of —— 19--.

9. I make the above statements (among others) with the intent and for the express purpose of inducing the within named mortgagee to advance me money on the security of the said mortgage.

And I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of The Canada Evidence Act.

DECLARED, etc.

CHATTEL MORTGAGE

TO SECURE MORTGAGEE AGAINST LIABILITY AS INDORSER FOR MORTGAGOR.

(R.S.O. 1914, c. 135, s. 6.)

THIS INDENTURE made the —— day of —— 19—, between —— of the —— of —— in the county of ——, ——, hereinafter called the mortgagor, of the first part, and —— of the —— of —— in the county of ——, ——, hereinafter called the mortgagee of the second part.

WHEREAS the mortgagee, at the request of the mortgagor and for his accommodation, has indorsed a certain promissory note of the mortgagor for the sum of —— dollars, which said note is in the words and figures following, that is to say: [*here give an exact copy of the note or notes and of the indorsements thereon*].

AND WHEREAS in consideration thereof the mortgagor has agreed to enter into these presents for the purpose of indemnifying and saving harmless the mortgagee of and from the payment of the said recited note or any part thereof, or any note or notes hereafter to be indorsed by the mortgagee for the accommodation of the mortgagor by way of renewal of the said recited note (so that, however, any such renewal shall not extend the time of payment of the said note or the liability of the mortgagee beyond the period of one year (*m*) from the date hereof, nor increase the amount of the said liability beyond the amount of the interest accruing thereon), and against any loss that may be sustained by the mortgagee by reason of such indorsement of the said recited note or any renewal thereof.

NOW THIS INDENTURE WITNESSETH that the mortgagor, in consideration of the premises and of the sum of one dollar to him paid by the mortgagee at or before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged), doth hereby grant, bargain, sell and assign unto the mortgagee,

(*m*) In Manitoba, Alberta, Saskatchewan and the Yukon Territory this period is two years. (R.S.M. c. 11, s. 6; Ord. Alta. 1911, c. 43, s. 8; R.S.S. 1909, c. 144, s. 10; Con. Ord. Yukon, c. 39, s. 8.)

his executors, administrators and assigns, all and singular the goods and chattels following, that is to say: [*here insert a full and accurate description of each article intended to be mortgaged, so that it may be readily and easily known and distinguished*], [*or*, the goods and chattels particularly described in the schedule hereto annexed marked "A"] all of which said goods and chattels are the property of the mortgagor, and are now situate, lying and being in and upon [the property of the mortgagor] situate [*here describe accurately the lands upon which the goods, etc., are at the date of the execution of the mortgage, and the exact locality of each article as nearly as possible*]. [*If it is desired to secure goods subsequently brought upon the lands add*, and also all goods and chattels which may be added to or substituted for the said goods and chattels, or any of them, as hereinafter mentioned or which shall hereafter be brought by the mortgagor upon the said lands or upon any other lands to which the mortgagor, his executors or administrators, may remove the said goods and chattels or any of them during the continuance of this security or any renewal thereof.]

[*Here insert such special clauses as may be required from the general form, ante.*]

Provided that if the mortgagor, his executors or administrators, pay or cause to be paid at maturity the said note so indorsed by the mortgagee as aforesaid, a copy of which said note is set out in the recital to this indenture, and pay or cause to be paid every other note which may hereafter be indorsed by the mortgagee for the accommodation of the mortgagor by way of renewal of the said note, which shall not extend the liability of the mortgagee beyond one (*n*) year from the date hereof, and all interest in respect thereof, and indemnify and save harmless the mortgagee, his heirs, executors and administrators, from all loss, costs, charges, damages or expenses in

(*n*) For Manitoba, Alberta, Saskatchewan and Yukon Territory see note (*m*) ante.

respect of the said recited note or renewals thereof as hereinbefore set forth, then these presents shall be void.

And the mortgagor for himself, his executors and administrators, shall and will warrant and forever defend by these presents all and singular the said goods and chattels unto the mortgagee, his executors, administrators, and assigns, against him the mortgagor, his executors and administrators and against all and every other person or persons whomsoever.

And the mortgagor, for himself, his executors and administrators, hereby covenants with the mortgagee, his executors, administrators and assigns, that the mortgagor, his executors or administrators, or some or one of them, shall pay or cause to be paid the said note and any renewal thereof which the mortgagee shall hereafter indorse for the accommodation of the mortgagor as aforesaid, and all interest and incidental expenses to accrue thereon, and will indemnify and save harmless the mortgagee, his heirs, executors and administrators, from all loss, costs, charges, damages or expenses in respect thereof.

And also, in case default shall be made in the payment of the said recited note, or any renewal thereof, as in the said proviso mentioned, or of the interest thereon, or any part thereof; or if the mortgagor shall (without having first obtained the consent in writing of the mortgagee, his executors, administrators or assigns, to such sale, removal or disposal,) sell or attempt to sell or dispose of or in any way part with the possession of the said goods and chattels, or any of them, or shall remove or attempt to remove them, or any part thereof, out of the county of —— [*or*, from the lands where they now are, or to which they may have been removed with the consent of the mortgagee]; or if the mortgagee, his executors, administrators or assigns, should at any time feel unsafe or insecure, or deem the said goods and chattels in danger of being sold or removed; or if there shall be issued against the mortgagor, his executors or administrators, any writ or process for a money demand or any writ of execution or any warrant of distress for

any rent or taxes in respect of the lands in or upon which the said goods and chattels, or any part thereof, may at any time during the continuance of this security or any renewal thereof be situate; or if the mortgagor shall suffer, allow or permit a judgment to be obtained against him for any debt, or shall suffer the said goods and chattels or any of them to be seized or taken in execution, or shall suffer, allow or permit any rent, taxes, rates or assessments whatsoever for which he now is, or may hereafter, while this security or any renewal thereof shall be in force, be liable or assessed, in respect of any lands whereon the said goods and chattels or any of them may then be situate to remain unpaid and unsatisfied for a period of —— days after the same has become due; or if the mortgagor, his executors or administrators, shall fail to pay the rent arising out of the lands and premises upon which are situate and lying the said goods and chattels, at any time during the continuance of this security, or any renewal thereof, promptly when [*or*, —— days at least before] such rent becomes due; or if the mortgagor, his executors or administrators, shall fail to insure and keep insured the said goods and chattels within the meaning of the provisions of this indenture, or shall abandon the said goods and chattels or any part thereof, or make an assignment for the benefit of his creditors, or be arrested on any criminal charge, or if a writ of capias or of attachment or order for arrest shall issue against the mortgagor; or if default shall be made in the performance of any of the covenants by the mortgagor in this indenture contained; then and in every such case all the money secured by this indenture shall, at the option of the mortgagee, his executors, administrators or assigns, immediately become due and be payable, and the mortgagee, his executors, administrators or assigns may, with his or their servants, and with such other assistance as he or they may require at any time during the day or night enter into and upon any lands, tenements, houses and places wheresoever and whatsoever where the said goods and chattels, or any part thereof, may be, and such persons may

break and force open any doors, locks, bars, bolts, fastenings, hinges, gates, fences, houses, buildings, enclosures and places for the purpose of taking possession of and removing the said goods and chattels; [*In the case of a mortgage of growing crops, add,* and if the said crops have not matured at the time of taking possession as aforesaid, then the mortgagee, his executors, administrators or assigns, shall be at liberty to remain in possession of the said premises until the crops aforesaid have matured and been converted into marketable form and sold] and upon and from and after the taking possession of such goods and chattels as aforesaid the mortgagee, his executors, administrators or assigns, and each or any of them may, and he and they are hereby authorized and empowered to, sell the said goods and chattels or any of them, or any part thereof, at public auction or private sale as to him, them or any of them may seem meet. And from and out of the proceeds of such sale in the first place to pay all such sums of money and interest as may then be secured by virtue of these presents on the said recited note, or any renewals thereof as aforesaid, and all costs and expenses which have been incurred by the mortgagee, his executors, administrators or assigns, in the protection of this security, or in consequence of the default, neglect or failure of the mortgagor, his executors, administrators or assigns, in payment of the said recited note or any renewals thereof as above mentioned, or in respect of the non-performance of any covenant herein contained, or in consequence of such sale or removal, or otherwise, as above mentioned; and in the next place to pay unto the mortgagor, his executors, administrators or assigns, such surplus as may remain after such sale, and after payment of all such sums of money and interest thereon as the mortgagee shall be called upon to pay by reason of indorsing the said recited note in the said recital and proviso mentioned or any renewal thereof to be indorsed by the mortgagee for the mortgagor as aforesaid, at the time of such seizure, and after payment of the costs, charges and expenses incurred by such seizure and sale as aforesaid.

Provided that it shall not be incumbent on the mortgagee, his executors, administrators or assigns, to sell and dispose of the said goods and chattels, but that in case of default of payment of the said recited note, or any renewal thereof, as aforesaid, the mortgagee, his executors, administrators and assigns, may peaceably an . quietly have, hold, use, occupy, possess and enjoy the said goods and chattels without the let, molestation, eviction, hindrance or interruption of him, the mortgagor, his executors, administrators or assigns, or any of them, or any other person whomsoever.

And the mortgagor for himself, his executors and administrators, further covenants with the mortgagee, his executors, administrators and assigns, that in case the sum of money realized under any such sale as above mentioned shall not be sufficient to pay the whole amount due under the provisions of this indenture at the time of such sale he, the mortgagor, his executors or administrators, shall forthwith pay or cause to be paid unto the mortgagee, his executors, administrators or assigns, such sums of money, together with the interest thereon, as may then be remaining due upon or under the said note or any renewal thereof as aforesaid, as well as and including all costs and expenses which may have been incurred by the mortgagee, his executors, administrators and assigns, in and about such seizure and sale and otherwise as aforesaid.

And the mortgagor doth put the mortgagee in full possession of the said goods and chattels by delivering to him this indenture, at the sealing and delivery hereof, in the name of all the said goods and chattels.

[*Here add such clauses from the general form, ante, as may be desired.*]

IN WITNESS, etc.

SIGNED, SEALED, etc.

[*For Affidavit of Execution, see affidavit following the general form, ante.*]

AFFIDAVIT OF BONA FIDES

BY SOLE MORTGAGEE.

MORTGAGE TO SECURE INDORSER.

(R.S.O. 1914, c. 135, s. 6.)

ONTARIO; County of ——, To Wit: } I, —— of the —— of —— in the county of ——, ——, the mortgagee in the foregoing [*or*, annexed] mortgage named, make oath and say:

1. The foregoing [*or*, annexed] mortgage fully sets forth the agreement entered into between me, ——, and the said mortgagor therein named, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage.

2. The said mortgage was and is executed in good faith and for the express purpose of securing me, the mortgagee therein named, against my indorsement for the mortgagor therein named of the promissory note for —— dollars, mentioned in the said mortgage, or any renewals of the said note, as set out in the said mortgage, and against the payment of the amount of such my liability for the said mortgagor as set out in the said mortgage, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of ——, the mortgagor therein named, nor to prevent such creditors from recovering any claims which they may have against such mortgagor.

SWORN, etc.

AFFIDAVIT OF BONA FIDES

BY ONE OF SEVERAL MORTGAGEES.

MORTGAGE TO SECURE INDORSER.

(R.S.O. 1914, c. 135, s. 6.

ONTARIO; County of ——, To Wit: } I, ——, of the —— of —— in the county of ——, ——, make oath and say:

1. I am one of the mortgagees in the foregoing [*or*, annexed]

mortgage named and I am aware of all the circumstances connected therewith.

2. The foregoing [*or*, annexed] mortgage fully sets forth the agreement entered into between the mortgagees in the said mortgage named and the said mortgagor therein named and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage.

3. The said mortgage was and is executed in good faith and for the express purpose of securing us, the mortgagees therein named, against our indorsement for the mortgagor therein named of the promissory note for —— dollars mentioned in the said mortgage or any renewals of the said note as set out in the said mortgage and against the payment of the amount of such our liability for the said mortgagor as set out in the said mortgage, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of ——, the mortgagor therein named, nor to prevent such creditors from recovering any claims which they may have against such mortgagor.

SWORN, etc.

AFFIDAVIT OF BONA FIDES

BY AGENT OF MORTGAGEE.

MORTGAGE TO SECURE INDORSER.

(R.S.O. 1914, c. 135, s. 6.)

ONTARIO;
County of ——,
To Wit:

I, E.F., of the —— of ——, in the county of ——, ——, make oath and say:

1. The foregoing [*or*, annexed] mortgage was taken by me for and on behalf of C.D., the mortgagee therein named, and I am the agent duly authorized in writing of the said C.D. to take the said mortgage, and I am aware of the circumstances connected with the said mortgage, and I have a personal knowledge of the facts deposed to.

2. The paper writing attached to the said mortgage and

marked "B" is [a true copy of] my authority to take the said mortgage.

3. The said mortgage fully sets forth the agreement entered into between ——, the mortgagor, and the said C.D. the mortgagee, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage.

4. The said mortgage was and is executed in good faith and for the express purpose of securing the mortgagee therein named against his indorsement for the said mortgagor of the promissory note for —— dollars mentioned in the said mortgage, or any renewals of the said note, as set out in the said mortgage, and against the payment of the amount of the mortgagee's liability for the said mortgagor as therein set out, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of ——, the mortgagor therein named, nor to prevent such creditors from recovering any claims which they may have against such mortgagor.

SWORN, etc.

AFFIDAVIT OF BONA FIDES

MORTGAGE BY A COMPANY TO SECURE BONDS OR DEBENTURES.

(R.S.O. 1914, c. 135, s. 6.)

ONTARIO: County of ——, To Wit: } I, ——, of the —— of —— in the county of ——, (*o*) the mortgagee [*or*, one of the mortgagees] named in the foregoing [*or*, annexed] mortgage make oath and say:

1. I am a [trustee for the bondholders] of the —— Company named in the foregoing [*or*, annexed] mortgage [*or as the case may be*].

2. The said mortgage was executed in good faith and for the express purpose of securing the payment of bonds [*or*,

(*o*) If the mortgage is made to an incorporated company, the several affidavits and renewal statement may be made by the president, vice-president, manager, assistant manager, or any other officer of the company authorized for such purpose (R.S.O. 1914, c. 136, s. 12).

debentures] referred to therein, and not for the purpose of protecting the goods and chattels mentioned therein against the creditors of the said —— Company, the mortgagors therein named, or of preventing the creditors of such mortgagors from obtaining payment of any claim against them the said mortgagors.

SWORN, etc.

CHATTEL MORTGAGE

TO SECURE FUTURE ADVANCES IN GOODS.

(R.S.O. 1914, c. 135, s. 6.)

THIS INDENTURE made the —— day of —— 19—, between —— of the —— of —— in the county of ——, ——, hereinafter called the mortgagor, of the first part, and —— of the —— of —— in the county of ——, ——, hereinafter called the mortgagee of the second part.

WHEREAS the mortgagor is carrying on business at —— as a ——, and has applied to the mortgagee for advances in goods to be supplied to him upon the usual terms of credit, from time to time, for the term of —— months from the date hereof, to enable him to enter into and carry on his business with such advances, the term of credit for any such goods not to extend in any case beyond the —— day of —— 19—. [*Such date not to be more than one* (*p*) year from the date of the mortgage.]

AND WHEREAS the mortgagee, on the faith of the security given or to be given by these presents, has agreed to make such advances in goods on the usual terms of credit from time to time as the same may be required by the mortgagor in the usual and proper course of his said business for the term of —— months from the date hereof, provided he shall not be bound to advance, in all, goods to the amount of more than —— dollars

(*p*) In Manitoba, Alberta, Saskatchewan and Yukon Territory, this period is two years (R.S.M. c. 11, s. 6; Ord. Alta. 1911, c. 43, s. 8; R.S.S. 1909, c. 144, s. 10; Con. Ord. Yukon, c. 39, s. 8).

in value, and provided the term of credit for any of such goods shall not in any case extend beyond the —— day of —— 19—. [*Such date not to be more than one (p) year from the date of the mortgage.*]

NOW THEREFORE the mortgagor, for the consideration hereinbefore recited, and in pursuance of the said agreement, doth hereby grant, bargain, sell and assign unto the mortgagee, his executors, administrators and assigns, all and singular the goods and chattels following, that is to say: [*Here insert a full and accurate description of each article intended to be mortgaged, so that it may be readily and easily known and distinguished.*] [*or*, the goods and chattels particularly described in the schedule hereto annexed marked "A"].

Provided that if the mortgagor, his executors or administrators, pay or cause to be paid to the mortgagee his executors, administrators or assigns, all sums of money which shall become payable by the mortgagor to the mortgagee for or in respect of all goods which shall be supplied by the mortgagee to the mortgagor during the period of —— from the date hereof, punctually when the said sums of money shall become payable according to the terms of credit, which shall not extend in any case beyond the —— day of —— 19—, then these presents shall be void.

And the mortgagor, for himself, his executors and administrators, shall and will warrant and forever defend, by these presents, all and singular the said goods and chattels unto the mortgagee, his executors, administrators and assigns, against him, the mortgagor, his executors and administrators, and against every other person whomsoever.

And the mortgagor, for himself, his executors and administrators, hereby covenants with the mortgagee, his executors, administrators and assigns, that he will pay or cause to be paid to the mortgagee all sums of money which shall become payable by him, the mortgagor, to the mortgagee for and in respect of all goods which shall be supplied by the mortgagee to the mortgagor during the said period of —— months from the date hereof, in accordance with the said agreement, punctually when

the said sums of money become payable according to the said terms of credit, which shall not extend in any case beyond the —— day of —— 19—.

Provided that should default occur in payment of the price of any of the goods so to be advanced, or if the mortgagor shall, without having first obtained the consent in writing of the mortgagee, etc. [*continue as in the powers on default in the general form*, ante, *using such clauses as are desired.*]

IN WITNESS, etc.

SIGNED, SEALED, etc.

[*For Affidavit of Execution and Affidavit of Bona Fides, see forms of same following the general form of chattel mortgage.*]

CHATTEL MORTGAGE

TO SECURE FUTURE ADVANCES OF MONEY.

(R.S.O. 1914, c. 135, s. 6.)

THIS INDENTURE made the —— day of —— 19—, between ——of the —— of —— in the county of ——, ——, hereinafter called the mortgagor, of the first part, and —— of the —— of —— in the county of ——, ——, hereinafter called the mortgagee, of the second part.

WHEREAS the mortgagor has applied to the mortgagee for future advances in money, and for the purpose of enabling the mortgagor to enter into and carry on business with such advances the mortgagee has this day consented and agreed, upon the agreement of the mortgagor to execute and deliver these presents as security to the mortgagee for the repayment thereof, to advance to the mortgagor the sum of —— dollars in [three] sums of —— dollars each, the first whereof is to be advanced to the mortgagor in [one] month from the date of these presents; the second whereof in [two] months from the date of these presents; and the third whereof in [three] months from the date of these presents; and in consideration thereof the mortgagor has this day agreed to execute these presents in order to secure the

repayment of the said advances, it being understood and agreed between the parties hereto, however, that the time of repayment thereof shall not be for a longer period than one (*q*) year from the making of the agreement for such advances, which is the day of the date of these presents.

NOW THEREFORE the mortgagor, for the consideration hereinbefore recited and in pursuance of the said agreement, doth hereby grant, bargain, sell and assign unto the mortgagee, his executors, administrators and assigns, all and singular the goods and chattels particularly described in the schedule hereto annexed marked "A."

Provided that if the mortgagor, his executors or administrators, pay or cause to be paid unto the mortgagee, his executors, administrators or assigns, the sum of —— dollars at the end or expiration of [ten] months from the day of the date of these presents, with interest at the rate of —— per cent. per annum from the date of the several advances so to be made as aforesaid on such advances, and do save harmless the mortgagee, his executors, administrators and assigns, of and from all loss and damage by reason of these presents, then these presents shall be void [*continue with any appropriate provisoes and covenants from the general form, ante.*]

And in consideration of the execution of these presents the mortgagee covenants for himself, his executors, administrators and assigns, with the mortgagor, his executors, administrators and assigns, that he, the mortgagee, his executors, administrators and assigns, will faithfully advance the said sum of —— dollars to the mortgagor in the manner and at the times hereinbefore specified.

IN WITNESS, etc.

SIGNED, SEALED, etc.

For Affidavit of Execution and Affidavit of Bona Fides, see forms of same following the general form of chattel mortgage.]

(*q*) See note (*p*) to the preceding form.

AFFIDAVIT OF BONA FIDES

BY SOLE MORTGAGEE.

MORTGAGE TO SECURE FUTURE ADVANCES.

(R.S.O. 1914, c. 135, s. 6.)

ONTARIO;
County of ——,
To Wit:

I, C.D., of the —— of —— in the county of ——, ——, the mortgagee in the foregoing [*or*, annexed] mortgage named, make oath and say:

1. The foregoing [*or*, annexed] mortgage truly sets forth the agreement entered into between myself and A.B., the mortgagor therein named, the parties thereto, and truly states the extent of the liability intended to be created by the said agreement and covered by such mortgage.

2. The said mortgage was and is executed in good faith and for the express purpose of securing to me, the said mortgagee, repayment of the said advances which I have agreed to make to A.B., the said mortgagor, as set out in the said mortgage.

3. The said mortgage was not and is not executed for the purpose of securing the goods and chattels mentioned therein against the creditors of the said A.B., the mortgagor, nor to prevent such creditors from recovering any claims which they may have against the said mortgagor.

SWORN, etc.

AFFIDAVIT OF BONA FIDES

BY ONE OF SEVERAL MORTGAGEES.

MORTGAGE TO SECURE FUTURE ADVANCES.

(R.S.O. 1914, c. 135, s. 6.)

ONTARIO;
County of ——,
To Wit:

I, ——, of the —— of —— in the county of ——, ——, make oath and say:

1. I am one of the mortgagees in the foregoing [*or*, annexed] mortgage named, and I am aware of all the circumstances connected therewith.

2. The foregoing [*or*, annexed] mortgage truly sets forth the

agreement entered into between the mortgagees in the said mortgage named and ——, the said mortgagor therein named, and truly states the extent of the liability intended to be created by the said agreement and covered by such mortgage.

3. The said mortgage was and is executed in good faith and for the express purpose of securing to us, the mortgagees therein named, repayment of the said advances which we have agreed to make to ——, the said mortgagor, as set out in the said mortgage.

4. The said mortgage was not and is not executed for the purpose of securing the goods and chattels mentioned therein against the creditors of the said ——, the mortgagor, nor to prevent such creditors from recovering any claims which they may have against the said mortgagor.

SWORN, etc.

AFFIDAVIT OF BONA FIDES

BY AGENT OF MORTGAGEE.

MORTGAGE TO SECURE FUTURE ADVANCES.

(R.S.O. 1914, c. 135, s. 6.)

ONTARIO;
County of ——,
To Wit:

I, E.F., of the —— of ——, in the county of ——, ——, make oath and say:

1. The agreement set forth in the foregoing [*or*, annexed] mortgage was entered into and the said mortgage was taken by me for, and on behalf of C.D., the mortgagee therein named and I am the agent duly authorized in writing of the said C.D. to make such agreement and to take such mortgage, and I am aware of the circumstances connected with the said mortgage, and I have a personal knowledge of the facts deposed to (*r*).

2. The paper writing attached to the said mortgage, marked B. is [a true copy of] my authority to make such agreement and to take the said mortgage.

3. The said mortgage truly sets forth the agreement entered

(*r*) See sec. 12 of the Ontario Act.

into between C.D., the mortgagee therein named, and A.B., the mortgagor therein named, and truly states the extent of the liability intended to be created by the said agreement and covered by such mortgage.

4. The said mortgage was executed in good faith and for the express purpose of securing to the said mortgagee repayment of his advances, which he has agreed to make as in the said mortgage set out, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the said A.B., the mortgagor, nor to prevent such creditors from recovering any claims which they may have against the said mortgagor.

SWORN, etc.

AFFIDAVIT OF BONA FIDES

BY OFFICER OF COMPANY.

MORTGAGE TO SECURE FUTURE ADVANCES.

(R.S.O. 1914, c. 135, s. 6.)

ONTARIO; County of ——, To Wit: } I, ——, of the —— of —— in the county of ——, ——, make oath and say:

1. The agreement set forth in the foregoing [*or*, annexed] mortgage was entered into and the said mortgage was taken by me for and on behalf of the said —— Company, the mortgagee therein named, and I am the [manager] of the said mortgagee company and its agent duly authorized in writing to make such agreement and to take the said mortgage, and I am aware of the circumstances connected with the said mortgage, and I have a personal knowledge of the facts deposed to (*s*).

2. The paper writing marked "B", attached to the said mortgage, is a true copy of my authority to make such agreement and to take the said mortgage.

3. The said mortgage truly sets forth the agreement entered

(*s*) See sec. 12 of the Ontario Act.

into between the said —— Company, the mortgagee, and ——, the mortgagor therein named, and truly states the extent of the liability intended to be created by the said agreement and covered by such mortgage.

4. The said mortgage was executed in good faith, and for the express purpose of securing to the said mortgagee company repayment of its advances which it has agreed to make as in the said mortgage set out, and not for the purpose of securing the goods and chattels mentioned therein against the creditors of the said —— , the mortgagor, nor to prevent such creditors from recovering any claims which they may have against the said mortgagor.

SWORN, etc.

ASSIGNMENT OF CHATTEL MORTGAGE

THIS INDENTURE made the —— day of —— 19—, between —— of the —— of —— in the county of ——, ——, hereinafter called the assignor, of the first part, and —— of the —— of —— in the county of ——, ——, hereinafter called the assignee, of the second part.

WHEREAS by a certain chattel mortgage dated the —— day of —— 19—, and duly filed in the office of the clerk of the [county] court of the [county] of ——, one —— [*name of the mortgagor in full*] mortgaged the goods and chattels therein mentioned unto the assignor, his executors, administrators and assigns, for securing the payment of —— dollars and interest thereon at the rate of —— per cent. per annum in manner following, that is to say: [*Here set out the mode of payment as provided in the mortgage.*]

AND WHEREAS there is now owing upon the said mortgage the sum of —— dollars and interest thereon at the rate aforesaid from the —— day of —— 19—.

AND WHEREAS the assignor has agreed to assign the said mortgage to the assignee.

NOW THIS INDENTURE WITNESSETH that in consideration of —— dollars now paid by the assignee to the assignor, the receipt whereof is hereby acknowledged, the assignor doth hereby assign and set over unto the assignee, his executors, administrators and assigns, all that the said hereinbefore in part recited mortgage, and also the said sum of —— dollars and interest thereon now owing as aforesaid, together with all moneys that may hereafter become due or owing in respect of the said mortgage, and the full benefit of all powers and of all covenants and provisos contained in the said mortgage. And the assignor doth hereby grant, bargain, sell and assign unto the assignee, his executors, administrators and assigns, all and singular the said goods and chattels therein mentioned, and hereinafter particularly mentioned and described [*or*, described in the schedule endorsed hereon, (*or*, hereto annexed), marked "A."] that is to say [*here set out the list of the chattels as contained in the mortgage*]. And all the right, title, interest, property, claim and demand whatsoever of the assignor of, in, to and out of the same, and every part thereof, subject to the proviso for redemption contained in the said mortgage.

And the assignor for himself, his executors and administrators, hereby covenants with the assignee, his executors, administrators and assigns, that the said sum of —— dollars and interest thereon at the rate aforesaid from the —— day of —— 19—, is now justly due, owing and unpaid under and by virtue of the said mortgage, and that he has not done or permitted any act, matter or thing whereby the said mortgage has been released or discharged, or the said goods and chattels in any wise encumbered, or whereby the said goods and chattels, or any of them, have been or may be removed from the premises mentioned in the said mortgage.

[*If so agreed, add,* And that he, the assignor, his executors or administrators, will, upon the request and at the cost of the assignee, his executors, administrators or assigns, do, perform and execute every act necessary for further assuring the said

mortgage and money, goods and chattels, and for enforcing the performance of the covenants and other matters contained in the said mortgage.]

IN WITNESS, etc.

SIGNED, SEALED, etc.(*t*).

AFFIDAVIT OF EXECUTION

OF ASSIGNMENT OF CHATTEL MORTGAGE.

(R.S.O. 1914, c. 135, s. 6.)

ONTARIO; County of ——, To Wit: } I, ——, of the —— of —— in the county of ——, ——, make oath and say:

1. I was personally present and did see the foregoing [*or*, annexed] assignment of chattel mortgage duly signed, sealed and executed by ——, [one of] the parties thereto.

2. I, this deponent, am a subscribing witness to the said assignment.

3. The name "——" [*name of witness*] set and subscribed as a witness to the execution thereof, is of the proper handwriting of me, this deponent.

4. The said assignment was executed at the —— of ——, in the county of —— on the —— day of —— 19—.

SWORN, etc.

[*In Ontario no affidavit of bona fides by the assignee of a chattel mortgage is required.*]

NOTICE OF ASSIGNMENT

OF CHATTEL MORTGAGE.

NOTICE TO MORTGAGOR BY ASSIGNEE OF MORTGAGE.

To MR. A.B.

TAKE NOTICE that I have this day become the purchaser and

(*t*) In *Seal* v. *Claridge*, 7 Q.B.D. 516, it was held, in effect, that the assignee himself cannot be the attesting witness.

assignee for value of that certain chattel mortgage made and executed by you to C.D. of the —— of ——, in the county of ——, ——, whereby you secured to the said C.D. on the goods and chattels therein mentioned the sum of —— dollars, payable as therein set out, and which said mortgage was duly registered in pursuance of the statute in that behalf on the —— day of —— 19—, as no. ——, in the office of the clerk of the county court of the county of ——.

And further take notice that all sums of money now unpaid, due or accruing due on account of the said mortgage are hereafter to be paid by you to me as such purchaser and assignee, and to no one else. And I am the person with whom all further dealings of any nature whatsoever are to be had of and concerning the said mortgage.

Dated at ——, the —— day of —— 19—.

WITNESS: [*Signed*] E.F.

AUTHORITY TO AGENT

TO TAKE A CERTAIN CHATTEL MORTGAGE (*u*).

(R.S.O. 1914, c. 135, s. 12.)

KNOW ALL MEN by these presents that I, C.D., of the —— of —— in the county of ——, ——, do hereby constitute, authorize and appoint E.F., of the —— of —— in the county of ——, ——, as my true and lawful agent and attorney for me and in my name and on my behalf to take and receive from one A.B. of the —— of —— in the county of ——, ——, a mortgage, securing to me upon the goods, chattels and effects of the said A.B. the sum of —— dollars payable [*here set out the terms of the payment of the mortgage*].

And for all and every of the purposes aforesaid, I hereby give and grant unto my said agent and attorney full power and authority to do, perform and execute all acts, deeds and matters

(*u*) A copy of this authority, or the authority itself, must be registered with the mortgage (R.S.O. 1914, c. 135, s. 13).

necessary to be done and performed, and to take all proceedings necessary to be taken in and about the premises, I hereby ratifying, confirming and allowing, and agreeing to ratify, confirm and allow all and whatsoever my said agent and attorney shall lawfully do or cause to be done by virtue hereof.

IN WITNESS, etc.

SIGNED, SEALED, etc.

AUTHORITY TO AGENT

TO RENEW A CERTAIN CHATTEL MORTGAGE (*uc*).

(R.S.O. 1914, c. 135, ss. 12, 21.)

KNOW ALL MEN by these presents that I, C.D., of the — — of —— in the county of ——, ——, do hereby constitute, authorize and appoint E.F., of the —— of —— in the county of ——, ——, as my true and lawful agent and attorney for me and in my name and on my behalf to renew a certain chattel mortgage to me from one A.B. of the —— of —— in the county of ——, ——, securing to me on certain goods and chattels the sum of —— dollars, which said mortgage bears date the —— day of ——19—, and was filed in the office of the clerk of the [county] court of the [county] of —— on the —— day of —— 19—, at the hour of —— o'clock in the [fore]noon.

And for all and every of the purposes aforesaid I hereby give and grant unto my said agent and attorney full power and authority to do, perform and execute all acts, deeds, matters and things necessary to be done and performed, and all proceedings to take necessary to be taken in and about the premises, I hereby ratifying, confirming and allowing and agreeing to ratify, confirm and allow all and whatsoever my said agent and attorney shall lawfully do or cause to be done by virtue hereof.

IN WITNESS, etc.

SIGNED, SEALED, etc.

(*uc*) A copy of this authority, or the authority itself, must be filed with the renewal statement (R.S.O. 1914, c. 135, s. 13).

AUTHORITY TO AGENT

TO TAKE AND RENEW CHATTEL MORTGAGES GENERALLY (x).

(R.S.O. 1914, c. 135, s. 15.)

KNOW ALL MEN by these presents that I, C.D., of the —— of —— in the county of ——, ——, do hereby constitute, authorize and appoint E.F., of the —— of —— in the county of ——, ——, as my true and lawful agent and attorney for me and in my name and on my behalf to take and renew all and any chattel mortgages and bills of sale by way of mortgage necessary or expedient to be taken or renewed for me and on my behalf from any person or persons whomsoever as I myself could do.

And for all and every of the purposes aforesaid I hereby give and grant unto my said agent and attorney full power and authority to do, perform and execute all acts, deeds, matters and things necessary to be done and performed, and all proceedings to take necessary to be taken in and about the premises, I hereby ratifying, confirming and allowing and agreeing to ratify, confirm and allow all and whatsoever my said agent and attorney shall lawfully do or cause to be done by virtue thereof.

IN WITNESS, etc.

SIGNED, SEALED, etc.

AUTHORITY TO AGENT BY A COMPANY

TO TAKE AND RENEW, ETC., A CERTAIN CHATTEL MORTGAGE.

(R.S.O. 1914, c. 135, ss. 5, 12.)

KNOW ALL MEN by these presents that we, The —— Company, do hereby constitute, authorize and appoint —— of the —— of —— in the county of ——, ——, our true and lawful attorney and agent, for us and on our behalf, to take and receive from —— of the township of —— in the county of ——, —— a certain chattel mortgage dated the —— day of —— 19—, for —— dollars and interest thereon, payable as therein provided and to renew the said mortgage when and as often as it may be

(x) A copy of this authority must be registered with the mortgage (R.S.O. 1914, c. 135, s. 13).

necessary to do so, and to make such affidavits as may be required for the registration thereof and of any renewal or renewals thereof, and for all and every of the purposes aforesaid do hereby give and grant unto our said attorney and agent full and absolute power and authority to do, perform and execute all acts, deeds, matters and things necessary to be done in the premises [and also to commence, institute and prosecute all actions, suits and other proceedings which may be necessary or expedient in and about the premises] as fully and effectually to all intents and purposes as we, the said company, could do; we hereby ratifying and agreeing to ratify and confirm all and whatsoever our said attorney shall lawfully do or cause to be done by virtue hereof.

As WITNESS our corporate seal this —— day of —— 19—.

STATEMENT OF RENEWAL

OF CHATTEL MORTGAGE (*y*).

(R.S.O. 1914, c. 135, s. 21.)

STATEMENT exhibiting the interest of C.D. [*mortgagee, or* E.F., *assignee of mortgagee,*] of the —— of —— in the county of ——, ——, in the property mentioned in a chattel mortgage dated the —— day of —— 19—, made between A.B., of the —— of ——, ——, of the one part, and C.D. of ——, ——, of the other part, and filed in the office of the clerk of the [county] court of the [county] of —— on the —— day of —— 19—, [*if renewed add,* and renewed by statements filed on the —— day of —— 19—, and on the —— day of —— 19—, *as the case may be*] and of the amount due for principal and interest thereon, and of all payments made on account thereof.

The said C.D. is still the mortgagee of the said property,

(*y*) This statement, with the affidavit of the mortgagee or assignee must be filed within one year from the day of the filing of the mortgage (R.S.O. 1914, c. 135, s. 21). In the case of a mortgage to secure debentures of an incorporated company, if a copy of the by-law authorizing the issue (duly certified and sealed) is registered with the mortgage it will not be necessary to renew the mortgage (ib. s. 24).

and has not assigned the said mortgage [*or,* the said E.F. is the assignee of the said mortgage by virtue of an assignment thereof from the said C.D. to him dated the —— day of —— 19—, and filed in the said office on the —— day of —— 19—, *or as the case may be*].

No payments have been made on account of the said mortgage, [*or,* the following payments, and no other, have been made on account of the said mortgage:

19—, January 1, cash received, $——].

The amount still due for principal and interest on the said mortgage is the sum of —— dollars, computed as follows: [*here give the computation*].

Dated at —— this —— day of —— 19—.

[*Signed by* C.D. *or* E.F. *or*, C.D. by his attorney G.H., *as the case may be.*]

AFFIDAVIT ON RENEWAL

OF CHATTEL MORTGAGE.

BY MORTGAGEE, OR ASSIGNEE OF MORTGAGE (*z*).

(R.S.O. 1914, c. 135, s. 21.)

COUNTY OF ——, To Wit: } I, ——, of the —— of —— in the county of ——, ——, the mortgagee [*or,* the assignee, *or,* one of the mortgagees, *or,* assignees] of the mortgagee named in the chattel mortgage mentioned in the foregoing [*or,* annexed] statement, make oath and say:

1. The foregoing [*or,* annexed] statement is true.

2. The chattel mortgage mentioned in the said statement has not been kept on foot for any fraudulent purpose.

SWORN, etc.

(*z*) This affidavit may also be made by one of several mortgagees or assignees, and by any next of kin, executor or administrator of any deceased mortgagee, or by any assignee claiming by or through any mortgagee, or any next of kin, executor or administrator of any such assignee (R.S.O. 1914, c. 135, ss. 14, 21(8)).

AFFIDAVIT ON RENEWAL
OF CHATTEL MORTGAGE.
BY AGENT OF MORTGAGEE.
(R.S.O. 1914, c. 135, s. 21.)

COUNTY of ——, To Wit: } I,——, of the —— of —— in the county of ——, ——, the agent of the mortgagee named in the chattel mortgage mentioned in the foregoing [*or*, annexed] statement, make oath and say:

1. The foregoing [*or*, annexed] statement is true.

2. The chattel mortgage mentioned in the said statement has not been kept on foot for any fraudulent purpose.

3. I am aware of all the circumstances connected with this renewal of the said mortgage, and I have a personal knowledge of the facts deposed to.

4. I am the agent of the said mortgagee duly authorized in writing for the purpose of renewing the said chattel mortgage a copy of my authority being hereto annexed.

SWORN, etc.

CLERK'S CERTIFICATE
OF COPY OF CHATTEL MORTGAGE, WHEN GOODS REMOVED TO ANOTHER COUNTY.
(R.S.O. 1914, c. 135, s. 19.)

I, L.M., clerk of the county court of the county of ——, do hereby certify that the annexed paper writing marked "A" is a true and correct copy of the original chattel mortgage from A.B. to C.D., with all endorsements thereon, bearing date the —— day of —— 19—, which was filed in the office of the said court at —— o'clock in the [fore] noon on the —— day of —— 19—. [*If the mortgage has been renewed or assigned add,* and that the paper writings marked "B" hereto attached are true and correct copies of the renewal (or, assignment, *as the case may be*) of the said mortgage filed as aforesaid with all endorsements thereon and of all affidavits, statements, documents and instruments relating thereto, which said paper writings marked "B"

were respectively filed in the office of the said court as follows: (*Here set out the dates of filing and the numbers and other specifications of each document*)] and that there are no other affidavits, documents, instruments or other papers relating to the said mortgage filed in the office of the said court.

Dated this —— day of —— 19—.

[*Seal of court.*] [*Signed*] L.M.
C.C.C.

CLERK'S CERTIFICATE

OF INSTRUMENTS BEING RECEIVED AND FILED, WHEN SUCH ARE REQUIRED FOR EVIDENCE IN COURT.

(R.S.O. 1914, c. 135, s. 27.)

I, L.M., clerk of the county court of the county of ——, do hereby certify that the annexed paper writing marked "A" is a true and correct copy [of a copy] of the original chattel mortgage from A.B. to C.D. [and of the statement thereto belonging] and of all endorsements on the said original mortgage which bears date the —— day of —— 19—, and was filed in the office of the said court at —— o'clock in the [fore] noon on —— the —— day of —— 19—.

Dated this —— day of —— 19—.

[*Seal of court.*] [*Signed.*] L.M.
C.C.C.

DISTRESS WARRANT

TO SEIZE UNDER A CHATTEL MORTGAGE.

To ——, my bailiff in this behalf.

SEIZE and take possession of the goods and chattels described in a certain chattel mortgage made between A.B. and C.D. dated the —— day of —— 19—, [a copy of] which is hereunto annexed [and which was assigned to me by the said C.D. by assignment dated the —— day of —— 19—.]

You may give up possession of the said goods and chattels on payment of the sum of —— dollars and your own proper fees

and charges, and for so doing this shall be your sufficient warrant and authority.

WITNESS my hand and seal (*a*) this —— day of —— 19—.

WITNESS:

DISTRESS WARRANT

TO SEIZE AND SELL UNDER A CHATTEL MORTGAGE.

To ——, my bailiff in this behalf.

You are hereby authorized and required to seize and take possession of all the goods and chattels mentioned in the mortgage [a copy whereof is] hereunto annexed, wherever the said goods and chattels may be found, and to sell and dispose thereof as provided by the said mortgage so as to realize the sum of —— dollars now due and owing to me by virtue of the provisions therein contained, and the said sum, or so much thereof as may be realized, to pay over to me, my executors, administrators or assigns, and proceed thereupon to obtain possession of such goods and chattels and for the recovery of the said sum as the law directs and the said indenture permits, and for your so doing this shall be your sufficient warrant and authority.

WITNESS my hand and seal (*a*) this —— day of —— 19—.

WITNESS:

DISCHARGE OF CHATTEL MORTGAGE.

BY ORIGINAL MORTGAGEE.

(R.S.O. 1914, c. 135, s. 28.)

To the clerk of the [county] court of the [county] of ——.

I, C.D., of the —— of —— in the county of —— ——, do certify that A.B., [*or*, G.H.] of the —— of —— in the county of ——, ——, has satisfied all money due on, or to grow due on, a certain chattel mortgage made by A.B. to me, which mortgage bears date the —— day of —— 19—, and was registered [*or*,

(*a*) A seal is not necessary, but is commonly used.

if mortgage has been renewed, was re-registered] in the office of the clerk of the [county] court of the [county] of —— on —— the day of —— 19—, as no. ——.

That such mortgage has not been assigned by me and that I am the person entitled by law to receive the money, and that such mortgage is therefore discharged.

WITNESS my hand this —— day of —— 19—.

[*Signature of witness, stating residence and occupation.*] [*Signature of mortgagee.*]

AFFIDAVIT OF EXECUTION
OF DISCHARGE OF CHATTEL MORTGAGE.
(R.S.O. 1914, c. 135, ss. 28, 29.)

COUNTY OF ——, TO WIT: I, ——, of the —— of —— in the county of ——, ——, make oath and say:—

1. I was personally present and did see the within [*or,* annexed] certificate of discharge of chattel mortgage duly signed and executed by ——, one of the parties thereto.

2. The said certificate was so executed at the —— of —— in the county of ——.

3. I know the said party.

4. I am a subscribing witness to the said certificate.

SWORN, etc.

DISCHARGE OF CHATTEL MORTGAGE.
BY ASSIGNEE OF THE MORTGAGEE.
(R.S.O. 1914, c. 135, ss. 28, 29.)

To the clerk of the county court of the county of ——.

I, E.F., of the —— of —— in the county of ——, ——, do hereby certify that [A.B.] of the —— of —— in the county of ——, ——, has satisfied all money due on, or to grow due on a certain chattel mortgage made by him, the said A.B. [*or,* made by one A.B.] to one C.D., of ——, which mortgage bears date the —— day of —— 19—, and was registered [*or in case the mortgage has been renewed,* was re-registered] in the office

of the clerk of the county court of the county of —— on the —— day of —— 19—, as no. ——, and which mortgage was, by assignment thereof bearing date the—— day of —— 19—, duly assigned by the said C.D. to me, which said assignment was duly registered in the office of the clerk of the said court on the —— day of —— 19—, as no. ——.

That such said mortgage has not been assigned by me and that I am the person entitled by law to receive the money, and that such mortgage is therefore discharged.

WITNESS my hand this —— day of —— 19—.

[*Signature of witness, stating residence and occupation.*] [*Signature of assignee.*]

[*For Affidavit of Execution, see the preceding form.*]

CHATTEL MORTGAGE

(*Alberta Statutory form (b).*)

(Con. Ord. Alta. 1911, c. 43, s. 7; Sch. Form A.)

THIS INDENTURE made the —— day of ——, A.D. 19—, between A.B. of ——, of the one part, and C.D. of ——, of the other part.

WITNESSETH that in consideration of the sum of $——(*c*) now paid to A.B. by C.D., the receipt of which the said A.B. hereby acknowledges [*or whatever else the consideration may be*], he the said A.B. doth hereby assign to the said C.D., his executors, administrators and assigns, all and singular the several chattels and things specifically described as follows [*or*, in the schedule hereto annexed] by way of security for the payment of the sum of $——, and interest thereon at the rate of —— per

(*b*) This form is very seldom used. A good general form with special clauses is given on the next page.

(*c*) If the consideration for which the mortgage or conveyance is made is not truly expressed therein the mortgage or conveyance is absolutely void as against creditors of the mortgagor and subsequent purchasers or mortgagees in good faith for valuable consideration (Con. Ord. N.W.T. 1898, c. 42, s. 11).

cent. per annum [*or whatever else may be the rate*], and the said A.B. doth further agree and declare that he will duly pay to the said C.D. the principal sum aforesaid together with the interest then due on the —— day of ——, A.D. 19—, [*or whatever else may be the stipulated time or times for payment*].

And the said A.B. doth agree with the said C.D. that he will [*here insert terms as to insurance, payment of rev' collateral securities or otherwise which the parties may agre o for the maintenance or defeasance of the security* (*d*)].

Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C.D. for any cause other than those specified in section 16 (*e*) of "The Bills of Sale Ordinance," except as is otherwise specially provided herein.

In WITNESS whereof the said A.B. has hereunto set his hand and seal.

SIGNED AND SEALED by the said A.B.
in the presence of me, E.F.

[*Add name, address and occupation of witness.*] } [*Signed*] A.B.

AFFIDAVIT OF BONA FIDES
OF CHATTEL MORTGAGE.

(Con. Ord. Alta. 1911, c. 43, s. 6.)

[*The affidavits by a sole mortgagee or by one of several mortgagees may follow the Ontario forms.*]

[*For the affidavit by an agent* (*f*) *of the mortgagee the Mani-*

(*d*) For special clauses which may be added here, see the general form.

(*e*) In drawing a chattel mortgage for the Yukon Territory (Con. Ord. Yukon 1902, c. 39, ss. 6,7; Sch. Form A) substitute "section 15" for "section 16." Notes (*c*) and (*d*) above apply also to a Yukon mortgage.

(*f*) The expressions "mortgagee," "bargainee" and "assignee" include also the agent or manager of any mortgagee, bargainee or assignee being an incorporated company (Con. Ord. Alta. 1911, c. 43, s. 22).

toba form may be applied with the addition of the following clause:

I am properly authorized by power in writing to take such said mortgage (*or*, bill of sale by way of mortgage) and the paper writing marked "B" attached (*g*) to the said mortgage (*or*, bill of sale by way of mortgage) is a true copy of my authority to take such mortgage."]

CHATTEL MORTGAGE
TO SECURE MORTGAGEE AGAINST LIABILITY AS INDORSER FOR MORTGAGOR.
(Con. Ord. Alta. 1911, c. 43, s. 8.)

[*The Ontario form may be used, but the time of payment of the note must not be more than two years from the date of the mortgage, instead of one year as in the Ontario Act.*]

[*The Affidavit of Execution is the same as the Manitoba form.*]

AFFIDAVIT OF BONA FIDES.
MORTGAGE TO SECURE INDORSER.
(Con. Ord. Alta. 1911, c. 43, s. 8.)

[*The affidavits by a sole mortgagee and by one of several mortgagees are the same as the Ontario forms. The affidavit by an agent of the mortgagee follows the Ontario form.*]

CHATTEL MORTGAGE
TO SECURE FUTURE ADVANCES.
(Con. Ord. Alta. 1911, c. 43, s. 8.)

[*The Ontario forms may be used, but the date of repayment of the advances must not be more than two years from the date of the mortgage, instead of one year as in the Ontario Act.*]

[*The Affidavit of Execution is the same as the Manitoba form.*]

(*g*) If the authority is a general one to take and renew all or any mortgages or conveyances it is not necessary to attach a copy to each mortgage filed, provided such general authority is filed with the clerk (Con. Ord. Alta. 1911, c. 43, s. 21).

AFFIDAVIT OF BONA FIDES.

MORTGAGE TO SECURE FUTURE ADVANCES.

(Con. Ord. Alta. 1911, c. 43, s. 8.)

[*The affidavit of bona fides may be adapted from the Ontario forms.*]

STATEMENT ON RENEWAL

OF CHATTEL MORTGAGE.

(Con. Ord. Alta. 1911 c. 43, ss. 17, 18.)

STATEMENT exhibiting the interest of C.D. in the property mentioned in the chattel mortgage dated the —— day of —— A.D. 19—, made between A.B. of ——, of the one part, and C.D. of ——, of the other part, and filed in the office of the registration clerk of the registration district of —— [*as the case may be*] on the —— day of —— 19—, and of the amount due for principal and interest thereon and of all payments made on account thereof.

The said C.D. is still the mortgagee of the said property and has not assigned the said mortgage [*or*, the said E.F. is the assignee of the said mortgage by virtue of an assignment thereof from the said C.D. to him dated the —— day of —— 19—, *or as the case may be*].

No payments have been made on account of the said mortgage [*or*, the following payments and no other have been made on account of the said mortgage: 19—, Jan. 1. Cash received $—].

The amount still due for principal and interest on the said mortgage is the sum of —— dollars computed as follows: [*here give the computation*].

C.D.

AFFIDAVIT ON RENEWAL OF CHATTEL MORTGAGE.

(Con. Ord. Alta. 1911, c. [illegible], s. 18.)

PROVINCE of Alberta, To Wit: } I, ——, of ——, the mortgagee named in the chattel mortgage mentioned in the foregoing [*or*, annexed] statement [*or*, assignee of ——, the mortgagee named in the chattel mortgage mentioned in the foregoing, [*or*, annexed, statement, *as the case may be*] make oath and say:

1. That the foregoing [*or*, annexed] statement is true.

2. That the chattel mortgage mentioned in the said statement has not been kept on foot for any fraudulent purpose.

SWORN, etc.

DISCHARGE OF CHATTEL MORTGAGE.

(Con. Ord. Alta. 1911, c. 43, s. 25; Sch. Form B.)

To the registration clerk of the registration district of ——.

I, ——, of ——, do certify that —— has satisfied all money due on or to grow due on a certain chattel mortgage made by —— to ——, which mortgage bears date the —— day of ——, A.D. 19—, and was registered [*or in case the mortgage has been renewed*, was renewed] in the office of the registration clerk of the registration district of ——, on the —— day of ——, A.D. 19—, as number ——, [*here mention the day and date of registration of each assignment thereof and the names of the parties, or mention that such mortgage has not been assigned, as the fact may be,*] and that I am the person entitled by law to receive the money; and that such mortgage is therefore discharged.

WITNESS my hand this —— day of ——, A.D. 19—.

WITNESS [*stating residence and occupation*].

AFFIDAVIT OF EXECUTION

OF DISCHARGE OF CHATTEL MORTGAGE.

(Con. Ord. Alta. 1911, c. 43, s. 26.)

PROVINCE of Alberta, } I, ——, of the ——of —— in the
To Wit: } —— of ——, ——, make oath and say:

1. I was personally present and did see the within certificate of discharge of chattel mortgage duly signed and executed by ——, one of the parties thereto.

2. The said certificate was so executed at the —— of —— in the county of ——.

3. I know the said party.

4. I am a subscribing witness to the said certificate.

SWORN, etc.

CHATTEL MORTGAGE.

(R.S.M. c. 11, s. 5.)

[*Same as Ontario form. But when the mortgage is for the purchase price of seed grain, see the conditions imposed by the Manitoba statute.*]

AFFIDAVIT OF EXECUTION

OF CHATTEL MORTGAGE.

(R.S.M. c. 11, s. 5.)

MANITOBA; } I. ——, of the —— of —— in the —— of
To Wit: } ——, make oath and say:

1. I was personally present and did see the foregoing [*or*, annexed] mortgage duly signed, sealed and executed by — , one of the parties thereto.

2. The name "——" [*signature of witness*] set out and subscribed as a witness to the execution thereof is of the proper handwriting of me, this deponent.

3. The said mortgage [*or*, bill of sale by way of mortgage] was executed at the —— of —— in the —— of ——.

SWORN, etc.

AFFIDAVIT OF BONA FIDES
BY MORTGAGEE.

(R.S.M. c. 11, s. 5.)

[Same as Ontario form.]

AFFIDAVIT OF BONA FIDES
BY AGENT OF MORTGAGEE.

(R.S.M., c. 11, ss. 5, 12.)

MANITOBA; To Wit: I, ——, of the —— of —— in the —— of ——, ——, make oath and say:

1. I am the duly authorized agent of ——, the mortgagee in the foregoing [*or*, annexed] mortgage [*or*, bill of sale by way of mortgage] named for the purposes of the said mortgage, and I am aware of all the circumstances connected therewith (*g*).

2. That ——, the mortgagor in the foregoing [*or*, annexed] mortgage named, is justly and truly indebted to ——, the mortgagee therein named, in the sum of —— dollars mentioned therein.

3. The said mortgage was executed in good faith and for the express purpose of securing the payment of the money so justly due or accruing due as aforesaid and not for the purpose of protecting the goods and chattels mentioned in the said mortgage against the creditors of the said ——, the mortgagor therein named, or of preventing the creditors of such mortgagor from obtaining payment of any claim against the said mortgagor.

SWORN, etc.

(*g*) When the mortgage is given for the purchase price of seed grain, insert here the clause from the "Affidavit of Bona Fides on Seed Grain Mortgage, *post*.

AFFIDAVIT OF BONA FIDES
OF CHATTEL MORTGAGE.
BY OFFICER OF A COMPANY.

(R.S.M., c. 11, ss. 5, 12; Man. 1910, c. 6.)

MANITOBA; } I, ——, of the —— of —— in the —— of
To Wit: } ——, ——, make oath and say:

1. I am the [manager, *or as the case may be*] of The —— Company, Limited, the mortgagee in the foregoing [*or*, annexed mortgage [*or*, bill of sale by way of mortgage] named, and I am aware of all the circumstances connected with the said mortgage and have a personal knowledge of the facts deposed to.

2. That ——, the mortgagor in the foregoing [*or*, annexed] mortgage named is justly and truly indebted to The —— Company, Limited, the mortgagee therein named, in the sum of —— dollars mentioned therein.

3. The said mortgage was executed in good faith and for the express purpose of securing the payment of the money so justly due or accruing due as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in the said mortgage against the creditors of the said ——, the mortgagor therein named, or of preventing the creditors of such mortgagor from obtaining payment of any claim against the said mortgagor.

SWORN, etc.

SEED GRAIN MORTGAGE.

(R.S.M., c. 11, ss. 39, 40; Man. 1908, c. 2, s. 2.)

[*When a mortgage is given as security for the purchase price of seed grain* (*h*) *the following recital should be inserted:*

(*h*) A mortgage upon growing crops or crops to be grown, made or created to secure the purchase price of seed grain, with or without interest, is a first and preferential security for the sum mentioned in the mortgage, and takes priority over all other chattel mortgages previously given and over every writ of execution in the hands of a sheriff or county court bailiff (R.S.M., c. 11, s. 40), and every mortgage, bill of sale, lien charge, incumbrance, conveyance, transfer or assignment intended to bind any growing crops or crops to be grown in the future is absolutely void unless given as security for the purchase price, and interest thereon, of seed grain (ib. s. 39).

"Where as the mortgagee has sold and delivered to the mortgagor —— bushels of [*describe grain*] for the purpose of seeding [*describe land*], and has requested the mortgagor to execute this indenture for the purpose of securing the said purchase price and interest thereon as hereinafter mentioned."

In other respects the Ontario form may be used, taking such clauses as are appropriate and substituting the word "crops" *for the words* "goods and chattels."]

AFFIDAVIT OF BONA FIDES

ON SEED GRAIN MORTGAGE.

(R.S.M., c. H, s. 41.)

[*Use the Ontario forms, but add the following clause:*

"The said mortgage (*or*, bill of sale by way of mortgage) is taken to secure the purchase price of seed grain, as therein set forth."]

CHATTEL MORTGAGE

TO SECURE FUTURE ADVANCES.

(R.S.M., c. H, s. 6.)

[*The Ontario forms may be used, but the date of repayment of the advances must not be more than two years from the date of the mortgage, instead of one year as in the Ontario Act.*]

AFFIDAVIT OF BONA FIDES

BY SOLE MORTGAGEE, OR BY ONE OF SEVERAL MORTGAGEES. MORTGAGE TO SECURE FUTURE ADVANCES.

(R.S.M., c. H, s. 6.)

[*Same as Ontario forms.*]

AFFIDAVIT OF BONA FIDES

BY AGENT OF MORTGAGEE (*j*).

MORTGAGE TO SECURE FUTURE ADVANCES.

(R.S.M., c. 11, s. 6.)

MANITOBA; } I, ——, of the —— of —— in the —— of
To Wit: } ——, ——, make oath and say:

1. The agreement set forth in the foregoing [*or*, annexed] mortgage was entered into, and the said mortgage was taken by me for and on behalf of ——, the mortgagee therein named, and I am the agent of the said mortgagee duly authorized to make such agreement and take such mortgage, and I am aware of all the circumstances connected therewith.

2. The said mortgage truly sets forth [*continue as in Ontario forms*].

CHATTEL MORTGAGE

TO SECURE MORTGAGEE AGAINST LIABILITY AS INDORSER FOR MORTGAGOR.

(R.S.M., c. 11, s. 6.)

[*The Ontario form may be used, but the time of payment of the note must not be more than two years from the date of the mortgage, instead of one year as in the Ontario Act.*]

AFFIDAVIT OF BONA FIDES

BY MORTGAGEE, OR BY ONE OF SEVERAL MORTGAGEES.

MORTGAGE TO SECURE INDORSER.

(R.S.M., c. 11, s. 6.)

[*Same as Ontario forms.*]

(*j*) In the case of an affidavit made by an officer or agent of a company (see note (*l*) on p. 650), the affidavit must also state that the deponent has a personal knowledge of the facts deposed to. (Man. 1910, c. 6, s. 1).

AFFIDAVIT OF BONA FIDES

BY AGENT OF MORTGAGEE.

MORTGAGE TO SECURE INDORSER.

(R.S.M., c. 11, s. 6.)

MANITOBA; } I, ——, of the —— of —— in the —— of
To Wit: } ——, ——, make oath and say:

1. The foregoing [*or*, annexed] mortgage was taken by me for and on behalf of ——, the mortgagee therein named, and I am the agent of the said mortgagee duly authorized to take the said mortgage, and I am aware of all the circumstances connected therewith.

2. The said mortgage truly sets forth the agreement entered into between ——, the mortgagor, and the said ——, the mortgagee, and truly states the extent of the liability intended to be created by such agreement and covered by such mortgage.

3. The said mortgage was and is executed [*continue as in Ontario form*].

AFFIDAVIT OF BONA FIDES

MORTGAGE BY A COMPANY TO SECURE BONDS OR DEBENTURES.

(Man. 1904, c. 2, s. 1.)

[*Same as Ontario form.*]

ASSIGNMENT OF CHATTEL MORTGAGE (*k*).

(Man. 1908, c. 1, s. 2.)

[*Same as Ontario form.*]

(*k*) The section (R.S.M., c. 11, s. 13), which required an affidavit of *bona fides* by the assignee of a chattel mortgage, and registration within 20 days, was repealed by s. 2 of c. 1 of the statutes of 1908, which reads "any assignment of a chattel mortgage may be filed in the office in which the mortgage is filed, accompanied by an affidavit of the due execution of such assignment and payment of the same fee as is required on filing the chattel mortgage."

AFFIDAVIT OF EXECUTION
OF ASSIGNMENT OF CHATTEL MORTGAGE.
(Man. 1908, c. 1, s. 2.)

[*Same as Ontario form.*]

STATEMENT ON RENEWAL
OF CHATTEL MORTGAGE.
(R.S.M., c. 11, s. 20.)

[*Same as Ontario form, but the statement and affidavits may be filed within two years (instead of one year, as in Ontario, from the date of the registration of the mortgage.*]

AFFIDAVIT ON RENEWAL
OF CHATTEL MORTGAGE (*l*).
(R.S.M., c. 11, ss. 20-22.)

MANITOBA; } I, ——, of the —— of —— in the —— o
To Wit: } —, ——, the mortgagee [*or*, the agent, *or* the assignee of the mortgagee, *or*, one of the mortgagees, *or*, assignees] named in the chattel mortgage mentioned in the foregoing [*or*, annexed] statement, make oath and say:

1. The foregoing [*or*, annexed] statement is true.

2. The chattel mortgage mentioned in the said statement has not been kept alive (*m*) for any fraudulent purpose.

SWORN, etc.

(*l*) This affidavit may be made by one of several mortgagees or assignees, or by the agent of any mortgagee or assignee, or by any next of kin, executor or administrator of any deceased mortgagee, or by any assignee claiming by or through any mortgagee or any next of kin, executor or administrator of any such assignee, or by the agent of such next of kin, executor, administrator or assignee (R.S.M., c. 11, ss. 20, 22).

In the case of a corporation this affidavit may be made by the president, vice-president, manager, assistant manager, secretary or treasurer, or by any other officer or agent duly authorized by resolution of the directors. If the head office of the corporation be outside the province, the affidavit may be made by any general or local manager, secretary or agent of the corporation in the province (Man. 1910, c. 6, s. 1).

(*m*) In the Ontario Act, the expression used is "kept on foot."

DISCHARGE OF CHATTEL MORTGAGE.

[See Ontario form of discharge, but for the Affidavit of Execution, see below. In the case of a corporation the discharge may be signed by the persons named in the second paragraph of note (l) on previous page.]

AFFIDAVIT OF EXECUTION
OF DISCHARGE OF CHATTEL MORTGAGE.
(R.S.M., c. 11, s. 26.)

MANITOBA; To Wit: } I, ——, of the —— of —— in the province of ——, ——, make oath and say:

1. I was personally present and did see the within [*or*, annexed] certificate of discharge of chattel mortgage duly signed and executed by ——, one of the parties thereto.

2. The said certificate was executed at the —— of —— on the —— day of —— 19—.

3. I know the said party.

4. I am a subscribing witness to the said certificate.

SWORN, etc.

CHATTEL MORTGAGE
(Nova Scotia general form.)

THIS INDENTURE made the —— day of —— 19—, (*a*) between A.B. of ——, ——, of the one part, and C.D. of ——, ——, of the other part.

WITNESSETH that the said A.B., in consideration of the sum of —— dollars of lawful money of Canada to him paid by the said C.D. at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, doth hereby grant, bargain, sell, assign, transfer and set over unto the said C.D., his executors, administrators and assigns, [*here describe articles*].

(*a*) The mortgage takes effect and has priority as against *bonâ fide* purchasers and creditors only from the time of the filing thereof accompanied by the proper affidavit of *bona fides* (R.S.N.S., c. 142, s. 5, ss. 3).

To have and to hold the same unto and to the use of the said C.D., his executors, administrators and assigns, on breach of the covenants, provisos and agreements hereinafter mentioned and expressed or any or either of them, in trust to sell the same either at public auction or by private contract, and out of the proceeds arising from such sale to pay all expenses connected with these presents and the said sale and then to retain to and reimburse the said C.D. the said sum of —— dollars with interest thereon at the rate of —— per cent. per annum or any balance that may then be due to him the said C.D., rendering the surplus, if any there be, to the said A.B., his executors, administrators or assigns.

Provided always and these presents are upon the express condition that if the said A.B., his executors, administrators or assigns, shall pay or cause to be paid to the said C.D., his executors, administrators or assigns, the said sum of —— dollars with interest thereon at the rate of —— per cent. per annum in —— months from the date hereof then these presents shall be void, otherwise to be and remain in full force, virtue and effect.

And it is agreed that until default of payment or other default herein it shall be lawful for the said C.D. to retain the possession and use of the said——.

And provided always and it is hereby agreed by and between the parties hereto that if any proceedings shall be taken at law or in equity to remove any of the property hereby conveyed without the consent of the said C.D., or to assign or attempt to assign the same, or if any legal proceedings shall be taken or any judgment entered against the said A.B. by any person or persons, or executions issued against him or attempted to be levied on the said property, or in case of any other default herein, then in either of the said cases it shall be lawful for the said C.D., his executors, administrators or assigns, to take immediate possession of and sell the said property, as hereinbefore provided, before the expiration of the said period of——, and in so taking

possession, either by himself or any person or persons on his behalf, to enter into or upon any lands, houses and premises whatsoever and wheresoever where the said property or any part thereof may be, and to break and force open any doors, locks, bolts, bars, fastenings, gates, houses, buildings, inclosures or places whatsoever for the purpose of taking possession of the said property.

And the said A.B., for himself, his heirs, executors and administrators, covenants with the said C.D., his heirs, executors, administrators and assigns, that he, the said A.B., is lawfully possessed of the said hereinbefore enumerated articles of personal property, as of his own property; that they are free from all encumbrances, and that he will, and his heirs, executors and administrators shall, warrant and defend them to the said C.D., his heirs, executors, administrators and assigns, against the lawful claims and demands of all persons.

And that he, the said A.B., his executors or administrators, will pay or cause to be paid to the said C.D., his executors, administrators or assigns, the said sum of —— dollars and interest at the times and in the manner hereinbefore specified and provided.

And also will insure and keep insured against fire in such good and sufficient fire insurance office or offices as shall be approved of by the said C.D., his executors, administrators or assigns, on the property hereby mortgaged and conveyed the sum of —— dollars in the name and for the benefit of the said C.D., his executors, administrators and assigns, and will deposit with the said C.D. all policies and receipts for renewal premiums of such insurance, and in default thereof that the said C.D., his executors, administrators and assigns, shall and may, as required, effect, renew and continue such insurance and charge all payments made for or in respect thereof with interest at the rate aforesaid upon the mortgaged property.

[*Insert here any special covenants which may be required.*]

And that he, the said A B., shall and will obey, abide by, and perform all and every the terms and stipulations hereinbefore mentioned according to the true intent and meaning of these presents and every the covenants and agreements herein contained.

IN WITNESS whereof the parties to these presents have hereunto their hands and seals subscribed and set the day and year first above written.

SIGNED, SEALED, etc.

AFFIDAVIT OF BONA FIDES.

MORTGAGE TO SECURE ADVANCES, INDORSEMENTS AND LIABILITY.

(R.S.N.S., c. 142, Sch. A.)

PROVINCE of Nova Scotia, County of ——. } I, A.B., of ——, in the county of ——, [*occupation*], make oath and say as follows:

1. I am the grantor mentioned in the bill of sale [a copy of which is] hereto annexed, [*or*, I am the agent or attorney of the grantor mentioned in the bill of sale [a copy of which is] hereto annexed, duly authorized in that behalf in writing, and have a personal knowledge of the matters hereinafter deposed to.]

2. Such bill of sale truly sets forth:

The terms, nature and effect of the agreement entered into between the parties in respect to the advances therein mentioned [*or*,

The terms, nature and effect of the indorsement made or given by the grantee for the grantor, *or*,

The terms, nature and effect of the liability incurred by the grantee for the grantor, *or*,

The terms, nature and effect of the agreement in respect to the liability to be incurred by the grantee for the grantor

And truly states the amount of the liability created [*or*, by such agreement intended to be created] and to be covered by the bill of sale.

3. Such bill of sale was executed in good faith, and for the purpose of securing the grantee repayment of his advances, [*or*, against loss or damage by reason of his indorsements, *or*, against loss or damage by reason of the liability incurred by the grantee for the grantor, *or*, against loss or damage by reason of such agreement in respect to the liability to be incurred,] and not for the mere purpose of protecting the personal chattels therein mentioned against the creditors of the grantor, or of preventing such creditors from recovering any claims which they have against such grantor.

SWORN, etc. [*Signed*] A.B.

RENEWAL STATEMENT
FOR CHATTEL MORTGAGE (*a*).
(R.S.N.S., c. 142, Sch. C.)

STATEMENT exhibiting the interest of C.D., in the property mentioned in a bill of sale dated the —— day of —— 19—, made between A.B., of ——, of the one part, and C.D., of ——, of the other part, and filed in the registry of deeds for the registration district of —— on the —— day of —— 19—, and of the amount due for principal and interest thereon, and of all payments made on account thereof.

The said C.D. is still the grantee of the said property and has not assigned the bill of sale [*or*, the said E.F. is the assignee of the said bill of sale by virtue of an assignment thereof from the said C.D., to him, dated the —— day of —— 19—, *or as the case may be*.].

No payments have been made on account of the said bill of sale [*or*, the following payments and no others have been made on account of the said bill of sale:

19—. January 1. Cash received $——.]

(*a*) The renewal statement and affidavit must be filed within 30 days next preceding the expiration of 3 years from the filing of the bill of sale mortgage or copy, or from the filing of the last renewal statement and affidavit (R.S.N.S., c. 142, s. 7, s-s. 6).

The amount due for principal and interest on the said bill of sale is the sum of $——, computed as follows [*here give the computation*].

Dated at —— the —— day of —— 19—.

WITNESS: [*Signature of C.D. or E.F. as the case may be.*]

AFFIDAVIT ON RENEWAL

OF CHATTEL MORTGAGE (*p*).

(R.S.N.S., c. 142, Sch. C.)

COUNTY of ——, } I, ——, of —— in the county of ——, the
To Wit: } grantee named in the bill of sale mentioned in the foregoing [*or,* annexed] statement [*or,* assignee of the grantee named in the bill of sale mentioned in the foregoing statement], make oath and say:

That the foregoing [*or,* annexed] statement is true.

That the bill of sale mentioned in the said statement has not been kept on foot for any fraudulent purpose.

SWORN, etc.

BILL OF SALE

OF GOODS AND CHATTELS.

The common form (with special clauses to be added where desired).

THIS INDENTURE made the —— day of —— 19—, between —— of the —— of —— in the county of ——, ——, hereinafter called the bargainor, of the first part, and —— of the —— of —— in the county of ——, ——, hereinafter called the bargainee, of the second part.

(*p*) This affidavit may be made by the grantor or grantee or one of several grantors or grantees, or the assignee, or one of several assignees, or any next of kin, executor or administrator of a deceased grantee or assignee or the agent of a grantee, or of any next of kin, executor, administrator or assignee duly authorized (R.S.N.S., c. 142, s. 7, s-s. 3). If the affidavit is made by the agent or attorney required to make it, then the agent or attorney shall state that he has a personal knowledge of the matters deposed to (ib. s. 12, s-s. 2).

WHEREAS the bargainor is possessed of the goods and chattels hereinafter described, and has agreed with the bargainee for the absolute sale thereof to him for the sum of —— dollars.

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the sum of —— dollars paid by the bargainee to the bargainor at or before the sealing and delivery of these presents (the receipt whereof is hereby acknowledged) the bargainor doth bargain, sell and assign unto the bargainee, his executors, administrators and assigns,

Description and locality of chattels.

The goods and chattels following, that is to say:—[*Give a full and accurate description of the goods, so that they may be easily known and distinguished*] [*or,* the goods and chattels particularly described in the schedule hereto annexed marked "A"], all of which said goods and chattels are now in the possession of the bargainor, and are situate in or upon [*describe accurately where the goods are*]; and all the right, title, interest, property, claim and demand whatsoever of the bargainor of, in and to the same.

[*Special descriptions may be adapted from the descriptions given in the chattel mortgage forms, ante.*]

Habendum.

tels, and all the right, title and interest of the bargainor thereto and therein, unto and to the use of the bargainee.

Covenant for title and peaceable possession.

To hold (*q*) the said hereinbefore assigned goods and chat-

And the bargainor both hereby for himself, his executors and administrators, covenant with the bargainee, his executors,

(*q*) When the transfer is absolute and to take effect immediately the habendum clause would appear to be unnecessary. But if there is a present grant of goods, the vendor, however, keeping possession until a future date fixed, the habendum clause should be inserted, adding at the end thereof the words "from and after the ——day of——".

administrators and assigns, that the bargainor is now rightfully and absolutely possessed of and entitled to the said hereby assigned goods and chattels and every of them and every part thereof. And that the bargainor now has in himself good right to assign the same unto the bargainee, his executors, administrators and assigns, in manner aforesaid, and according to the true intent and meaning of these presents; and that the bargainee, his executors, administrators and assigns, shall and may from time to time and at all times hereafter peaceably and quietly have, hold, possess and enjoy the said hereby assigned goods and chattels and every of them and every part thereof, to and for his and their own use and benefit without any manner of hindrance, interruption, molestation, claim or demand whatsoever of, from or by the bargainor or any other person or persons whomsoever; and that free and clear and freely and absolutely released and discharged or otherwise (at the cost of the bargainor), effectually indemnified from and against all former and other bargains, sales, gifts, grants, titles, charges and incumbrances whatsoever.

Covenant for further assurance.

And, moreover, that the bargainor and all persons rightfully claiming or to claim any estate, right, title or interest of in or to the said hereby assigned goods and chattels, and every of them, and every part thereof, shall and will, from time to time, and at all times hereafter upon every reasonable request of the bargainee, his executors, administrators or assigns, but at the cost and charges of the bargainee, his executors, administrators or assigns, make, do and execute, or cause or procure to be made, done and executed, all such further acts, deeds and assurances for the more effectually assigning and assuring the said goods and chattels unto the bargainee, his executors, administrators or assigns, in manner aforesaid, and according to the true intent and meaning of these presents as by the bar-

gainee, his executors, administrators or assigns or his or their counsel in the law shall be reasonably advised or required.

IN WITNESS whereof the parties hereto have hereunto set their hands and seals.

SIGNED, SEALED AND DELIVERED (*r*) in the presence of

AFFIDAVIT OF EXECUTION

OF BILL OF SALE.

(R.S.O. 1914, c. 135, s. 8.)

ONTARIO; County of ——, To Wit:

I, ——, of the —— of —— in the county of ——, ——, make oath and say:

1. I was personally present and did see the wit in [*or*, annexed] bill of sale duly signed, sealed and executed by —— [one of] the parties thereto.

2. The name "——" [*signature of witness*] set and subscribed as a witness to the execution thereof is of the proper handwriting of me this deponent.

3. The said bill of sale was executed at the —— of —— in the county of —— on the —— day of —— 19—.

SWORN, etc.

AFFIDAVIT OF BONA FIDES

BY SOLE BARGAINEE.

(R.S.O. 1914, c. 135, s. 8.)

ONTARIO; County of ——, To Wit:

I, ——, of the —— of ——, in the county of ——, ——, the bargainee (*s*) in the foregoing [*or*, annexed] conveyance or bill of sale named, make oath and say:

That the sale therein made is bona fide and for good con-

(*r*) In Ontario, a bill of sale must be registered "within five days from the executing thereof" (R.S.O. 1914, c. 135, s. 18). There is no provision, in Ontario, for registering a "copy" of a bill of sale.

(*s*) When the bill of sale is made to an incorporated company, see the special form, *post*.

sideration, namely the sum of —— dollars, as set forth in the said conveyance, and is not for the purpose of holding or enabling me this deponent to hold the goods mentioned therein against the creditors of ——, the bargainor therein named.

SWORN, etc.

AFFIDAVIT OF BONA FIDES
BY ONE OF SEVERAL BARGAINEES.
(R.S.O. 1914, c. 135, s. 8.)

ONTARIO; County of ——, To Wit: } I, ——, of the —— of —— in the county of ——, ——, one of the bargainees in the foregoing [*or*, annexed] conveyance or bill of sale named, make oath and say:

That the sale therein made is bona fide, and for good consideration, namely the sum of —— dollars, as set forth in the said conveyance, and is not for the purpose of holding or enabling the bargainees therein named or either of us [*if more than two*, or any one or more of us] to hold the goods mentioned therein against the creditors of ——, the bargainor therein named.

SWORN, etc.

AFFIDAVIT OF BONA FIDES
BY AGENT OF BARGAINEE.
(R.S.O. 1914, c. 135, s. 8.)

ONTARIO; County of ——, To Wit: } I, ——, of the —— of —— in the county of ——, ——, make oath and say:

1. I am the duly authorized agent of ——, the bargainee in the foregoing [*or*, annexed] bill of sale named for the purposes of the said bill of sale, and I am aware of all the circumstances connected with the sale, and I have a personal knowledge of the facts deposed to.

2. I am duly authorized in writing to take the said conve-

ance or bill of sale, and the paper writing thereunto annexed marked "B" is a true copy of such authority.

3. The sale therein made is bona fide and for good consideration, namely the sum of —— dollars as set forth in the said conveyance, and is not for the purpose of holding or enabling the said bargainee to hold the goods mentioned therein against the creditors of ——, the bargainor therein named.

SWORN, etc.

AFFIDAVIT OF BONA FIDES

BY OFFICER OF A COMPANY (*t*).

(R.S.O. 1914, c. 135, ss. 8, 12.)

ONTARIO;
County of ——,
To Wit:

I, ——, of the —— of ——, in the county of ——, ——, make oath and say:

1. I am the [manager, *or as the case may be,*] of the —— company, the bargainee in the foregoing [*or,* annexed] conveyance or bill of sale named, and I am aware of all the circumstances connected with the sale and I have personal knowledge of the facts deposed to.

2. I am the agent of the said bargainee duly authorized in writing to take the said conveyance or bill of sale, and the paper writing marked "B," attached to the said conveyance is a true copy of the said authority.

3. The sale therein made is bona fide and for good consideration, namely, the sum of —— dollars as set forth in the said conveyance, and is not for the purpose of holding or enabling the said bargainee to hold the goods mentioned therein against the creditors of ——, the bargainor therein named.

SWORN, etc.

(*t*) This affidavit may be made by the president, vice-president, manager, assistant manager, secretary, or treasurer, or other officer of the company duly authorized by resolution of the directors in that behalf (R.S.O. 1914, c. 135, s. 12).

BILL OF SALE

OF GOING CONCERN.

THIS INDENTURE made the —— day of —— 19—, between —— of ——, of the first part, and —— of ——, of the second part.

WHEREAS the party of the first part has for some years prior to the date hereof carried on business as a coal [and wood] merchant at No. ———, —— street, in the town of ——.

AND WHEREAS it has been agreed that the party of the first part shall sell and that the party of the second part shall buy from the party of the first part his said business and his stock in trade, horses, carts, wagons, sleighs, harness, book debts, lease of premises, business fixtures and furniture and everything used in and about the said business and the good will of the business, all for the price or sum of —— dollars.

NOW THIS INDENTURE WITNESSETH that in pursuance of the said agreement and in consideration of the said sum of —— dollars paid by the party of the second part to the party of the first part at or before the sealing and delivery of these presents (the receipt whereof is hereby by him acknowledged) the party of the first part doth bargain, sell and assign unto the party of the second part, his executors, administrators and assigns all the interest and good will of him the party of the first part of, in or concerning the said [coal and wood] business carried on at the premises aforesaid. And also all and singular the book debts due or owing to the party of the first part in respect of the said business, and all securities for or evidence of indebtedness relating thereto, and the benefit of all contracts and engagements entered into with, and orders given to the party of the first part in connection with the said business; and also all and singular the stock in trade of [coal and wood] and the trade fixtures, furniture, sheds, offices, stables, horses, carts, wagons, sleighs, harness, cutting machines, articles, effects, matters and things belonging to the party of the first part in respect

of the said business or in any wise used in or belonging to the said business, and whether on the premises where the said business is carried on or elsewhere, and which are more particularly described in the schedule hereto annexed. And also the residue of the term or lease yet unexpired of the premises aforesaid where the said business is now carried on. And all the right, title, interest, property, claim and demand whatsoever of the party of the first part of it, in, to and out of the same, and every part thereof.

To hold the said hereinbefore assigned business, good will, book debts, goods and chattels, buildings, and residue of the said terms with the appurtenances, and all the right, title and interest of the party of the first part thereto and therein, as aforesaid, unto and to the use of the party of the second part, his executors, administrators and assigns.

And the party of the first part doth hereby, for himself, his heirs, executors and administrators, covenant, promise and agree with the party of the second part, his executors, administrators and assigns in manner following, that is to say: That he, the party of the first part, is now rightfully and absolutely possessed of and entitled to the said hereby assigned business, good will, book debts, goods and chattels and the residue of the said term.

And that the party of the first part now has in him good right to assign the same unto the party of the second part, his executors, administrators and assigns, in manner aforesaid, and according to the true intent and meaning of these presents.

And that the party hereto of the second part, his executors, administrators, and assigns, shall immediately on the execution and delivery of these presents have possession of, and may from time to time, and at all times hereafter, peaceably and quietly have, hold, possess and enjoy the said hereby assigned business, good will, goods and chattels, buildings and the residue of the said term to and for his own use and benefit, without any manner of hindrance, interruption, molestation, claim or demand what-

soever, of, from or by him the party of the first part, or any per son whomsoever, and free and clear, and absolutely released an discharged, from and against all former and other bargain sales, gifts, grants, titles, charges and encumbrances whatsoeve

And moreover, that he, the party of the first part will fro time to time, and at all times hereafter, upon every reasonab request of the party of the second part, his executors, admi istrators or assigns, make, do and execute or cause or procure be made, done and executed, all such further acts, deeds an assurances as may be necessary for the more effectually assigni and assuring the said hereby assigned business, good will, goo and chattels, buildings and the residue of the said term, un the party of the second part, his executors, administrators assigns, in manner aforesaid, and according to the true inte and meaning of these presents.

And for the better and more effectually getting in the sa several debts, effects and premises and enforcing the said co tracts and engagements, the party of the first part here appoints the party of the second part, and his substitute substitutes, the attorney and attorneys of him the party the first part in his name but for the benefit of the party of t second part, to demand, call in and receive the said debts, effe and premises, and in case of the non-payment, non-delivery non-performance thereof to commence and prosecute all actio and proceedings for obtaining the payment, delivery or p formance thereof respectively.

IN WITNESS, etc.

SIGNED, SEALED, etc.

SCHEDULE referred to in the within indenture made betwe —— and ——, and dated the —— day of —— 19—.

1. Property on the premises known as number ——, — street, in the town of ——.

—— tons of coal or thereabouts, consisting of nut, eg stove, grate and soft, also coal screenings.

—— cords of wood or thereabouts, consisting of hard pine and slabs.

The building known as the office, situate on the said premises, with the office furniture, consisting of desks, books, chairs, safe, carpets, pictures, stoves, etc.

The sheds, steam engine and splitter, platform scales, screens and yard fittings, and wood cutting machine.

The stables, and stable fittings, feed chopper and feed in the stable.

—— horses, —— carts, —— single wagons, —— double wagons, —— sleighs, —— racks, —— sets cart harness, —— sets double harness, and horse covers.

All other articles, effects, matters and things belonging to the said party of the first part in connection with his coal and wood business, and in or upon the said premises.

2. Also all coal and wood purchased by the said party of the first part and which has not yet been delivered at the said several yards in ——.

[*For Affidavit of Execution and Affidavit of Bona Fides, see affidavit forms following Bill of Sale form, ante.*]

AUTHORITY TO AGENT
TO TAKE BILLS OF SALE (*u*).

(R.S.O. 1914, c. 135, ss. 12, 13.)

KNOW ALL MEN by these presents that I, C.D., of the —— of ——, in the county of ——, ——, do hereby constitute, authorize and appoint E.F., of the——of—— in the county of ——, ——, my true and lawful agent and attorney for me and on my behalf to take and receive [*if it is intended to give authority to take a certain bill of sale only, add,* from one A.B. of the —— of —— in the county of ——, ——, a bill of sale of certain chattels, the property of the said A.B., for and in consideration of the sum

(*u*) A copy of this authority or the authority itself must be attached to and filed with the conveyance (R.S.O. 1914, c. 135, s. 13).

of —— dollars to be paid by me for the purchase thereof, *but if it is intended to give authority to take bills of sale generally, say*, all and any bills of sale necessary or expedient to be taken for me and on my behalf from any person or persons whomsoever as I myself could do].

And for all and every of the purposes aforesaid I do hereby give and grant unto my said agent and attorney full power and authority to do, perform and execute all acts, deeds and matters necessary to be done and performed, and to take all proceedings necessary to be taken under and by virtue of any statute in that behalf or otherwise howsoever in and about the premises; I hereby ratifying, confirming and allowing and agreeing to ratify, confirm and allow all and whatsoever my said agent and attorney shall lawfully do or cause to be done by virtue hereof.

IN WITNESS, etc.

SIGNED, SEALED, etc.

BY-LAW OF COMPANY

GIVING AUTHORITY TO AGENT TO TAKE AND RENEW BILLS OF SALE AND CHATTEL MORTGAGES.

BY-LAW number ——, passed —— 19—.

WHEREAS it is sometimes expedient for The —— Company, Limited, to accept bills of sale, chattel mortgages or conveyances intended to operate as mortgages of personal property, as security for debts or obligations owing to the said company.

BE IT THEREFORE ENACTED that the [manager] of the said company and the [assistant manager] of the said company be, and they, or either of them, are or is hereby authorized to take or accept for or on behalf of the said company from any person, firm or corporation, any mortgage, bill of sale or assignment to, or in favour of, the said company, of any personal property or of any mortgages thereon, either as security for, or in satisfaction of all or any part of any debts, moneys, claims or demands which is or are now, or shall hereafter be payable, due

or owing from or against any person, firm or corporation in favour of the said company, and to file or register the same or cause the same to be filed or registered, and to sign and make all proper affidavits, declarations or statements, and to do all things necessary, or which they or either of them shall deem necessary or expedient, to effect such filing or registration, and from time to time to renew such filing or registration, and to do or cause to be done anything necessary, or which they or either of them shall deem necessary or expedient to keep on foot or in force any mortgage or assignment of any personal property heretofore or hereafter made or executed in favour of or assigned to the said company, and for such purposes to sign and make all affidavits, declarations and statements which are or shall be required by law, or by them or either of them shall be deemed necessary or expedient as to the interests of the said company in any property, or as to the amount due or the payments made on such mortgage or security, or the good faith and absence from fraud in relation to the same, or any further or other particulars or matters relating thereto.

AUTHORITY TO AGENT BY A COMPANY

TO TAKE AND RENEW, ETC., BILLS OF SALE AND CHATTEL MORTGAGES.

(R.S.O. 1914, c. 135, s. 12.)

KNOW ALL MEN by these presents that we, The —— Company, Limited, do hereby constitute, appoint and authorize —— of the —— of ——, in the county of ——, [manager] of the said company, our true and lawful attorney and agent for us and on our behalf to take and renew all bills of sale and chattel mortgages necessary or expedient to be taken and renewed from time to time and to make such affidavits as may be required for the registration thereof, and for the purposes aforesaid we do hereby give our said attorney and agent full power and authority to do, perform and execute all acts, deeds, matters and

things necessary to be done in the premises [and also to com
mence, institute and prosecute all actions, suits and other pro
ceedings which may be necessary or expedient in and about th
premises] as fully and effectually as we the said company, coul
do; we hereby ratifying and agreeing to ratify and confirm al
and whatsoever our said attorney shall lawfully do or cause t
be done by virtue hereof.

As WITNESS our corporate seal this —— day of —— 19—

Alberta.

BILL OF SALE
OF GOODS AND CHATTELS.

(Con. Ord. Alta. 1911, c. 43.)

[*The same as the general form ante. The bill of sale mus
"contain sufficient and full description thereof that the sam
may be readily and easily known and distinguished."*]

AFFIDAVIT OF EXECUTION
OF BILL OF SALE.

(Con. Ord. Alta. 1911, c. 43.)

ALBERTA, } I, ——, of the —— of —— in the —— of ——
To Wit: } ——, make oath and say:

1. I was personally present and did see the foregoing [*o*
annexed] bill of sale duly signed, sealed and executed by ——
one of the parties thereto.

2. The name "——" [*signature of witness*] set and sub
scribed as a witness to the execution thereof is of the prop
handwriting of me this deponent.

3. The said bill of sale was executed at the —— of —— i
the —— of ——.

SWORN.

AFFIDAVIT OF BONA FIDES
BY BARGAINEE.
(Con. Ord. Alta. 1911, c. 43.)

[*The same as the Ontario forms.*]

AFFIDAVIT OF BONA FIDES
BY AGENT OF BARGAINEE.
(Con. Ord. Alta. 1911, c. 43.)

ALBERTA, To Wit: } I, ——, of the —— of —— in the —— of ——, ——, make oath and say:

1. I am the duly authorized agent of ——, the bargainee in the foregoing [*or*, annexed] conveyance or bill of sale named for the purposes of the said conveyance, and I am aware of all the circumstances connected with the sale.

2. I am duly authorized in writing to take the said conveyance or bill of sale, and the paper writing thereunto attached (*r*) marked "B" is a true copy of such authority.

3. The sale therein made is *bonâ fide* and for good consideration, namely the sum of —— dollars, as set forth in the said conveyance, and is not for the purpose of holding or enabling the said bargainee to hold the goods mentioned therein against the creditors of ——, the bargainor therein named.

SWORN, etc.

Manitoba.

BILL OF SALE
OF GOODS AND CHATTELS.
(R.S.M., c. 11, s. 3.)

[*Same as Ontario form.*]

(*r*) If the authority is a general one to take all or any bills of sale it is not necessary to attach a copy to each bill of sale filed, provided such general authority is filed with the clerk (Con. Ord. Alta. 1911, c. 43).

AFFIDAVIT OF EXECUTION
OF BILL OF SALE.
(R.S.M., c. 11, s. 3.)

MANITOBA; } I, ——, of the —— of —— in the —— of
To Wit: } ——, ——, make oath and say:

1. I was personally present and did see the foregoing [*or*, annexed] bill of sale duly signed, sealed and executed by ——, one of the parties thereto.

2. The name "——" [*signature of witness*] set and subscribed as a witness to the execution thereof is of the proper handwriting of me, this deponent.

3. The said bill of sale was executed at the —— of —— in the —— of ——.

SWORN, etc.

AFFIDAVIT OF BONA FIDES
BY BARGAINEE (*w*).
(R.S.M., c. 11, s. 3.)

MANITOBA; } I, ——, of the —— of —— in the —— of ——,
To Wit: } ——, the bargainee [*or*, one of the bargainees] in the foregoing [*or*, annexed] conveyance or bill of sale named, make oath and say:

That the sale therein made is *bonâ fide* and for good or valuable (*x*) consideration, namely, the sum of —— dollars, as set forth in the said conveyance, and is not for the purpose of holding or enabling me this deponent [*or*, the bargainees therein named or either of us (*y*)] to hold the goods mentioned therein against the creditors of ——, the bargainor therein named.

SWORN, etc.

(*w*) When there are two or more bargainees, one of them may make the affidavit (R.S.M., c. 11, s. 12). When the sale is to an incorporated company, see the special form, *post*.

(*x*) The words "or valuable" are not in the Ontario Act.

(*y*) If there are more than two bargainees, say "enabling the bargainees therein named or any of us."

AFFIDAVIT OF BONA FIDES
BY AGENT OF BARGAINEE.
(R.S.M., c. 11, ss. 3, 12.)

MANITOBA: } I, ——, of the —— of —— in the —— of
To Wit: } ——, ——, make oath and say:

1. I am the duly authorized (*z*) agent of ——, the bargainee in the foregoing [*or*, annexed] conveyance or bill of sale named for the purposes of the said conveyance, and I am aware of all the circumstances connected with the sale.

2. The sale therein made is *bonâ fide* and for good or valuable consideration, namely the sum of —— dollars, as set forth in the said conveyance, and is not for the purpose of holding or enabling the said bargainee to hold the goods mentioned therein against the creditors of ——, the bargainor therein named.

SWORN, etc.

AFFIDAVIT OF BONA FIDES
OF BILL OF SALE BY OFFICER OF A COMPANY (*a*)
(R.S.M., c. 11, ss. 3, 12; Man. 1910, c. 6.)

MANITOBA; } I, ——, of the —— of —— in the —— of
To Wit: } ——, ——, make oath and say:

1. I am the [manager, (*y*) *or as the case may be*] of The—— Company, the bargainee in the foregoing [*or*, annexed] conveyance or bill of sale named, and I am aware of all the circumstances connected with the sale, and have a personal knowledge of the facts deposed to.

2. The sale therein made is *bonâ fide* and for good or valuable consideration, namely the sum of —— dollars, as set forth in the said conveyance, and is not for the purpose of

(*z*) The statute does not require that the agent's authority shall be in writing, but as a matter of evidence it is desirable that it should be.

(*a*) This affidavit may be made by the president, vice-president, manager, assistant manager, secretary or treasurer of the corporation, or by any other officer or agent duly authorized by resolution of the directors. If the head office of the corporation be outside the province, the affidavit may be made by any general or local manager, secretary or agent of the corporation in the province (Man. 1910, c. 6, s. 1).

holding or enabling the said bargainee to hold the goods mentioned therein against the creditors of ——, the bargainor therein named.

SWORN, etc.

BILL OF SALE.

ABSOLUTE SALE OF CHATTELS (*b*).

(*Nova Scotia form.*)

KNOW ALL MEN (*c*) by these presents that —— of ——, in the county of ——, ——, hereinafter called the grantor, in consideration of ——, has granted, bargained and sold, and by these presents doth grant, bargain and sell unto ——, hereinafter called the grantee, the following personal property, viz.:——.

To have and to hold all and singular the said personal property unto the grantee, his executors, administrators and assigns, to his and their sole use for ever.

And he, the grantor, for himself, his heirs, executors and administrators, doth covenant to and with the grantee, his heirs, executors, administrators and assigns, that he is lawfully possessed of the said hereinbefore enumerated articles or personal property, as of his own property, that they are free from all encumbrances, and that he will, and his heirs, executors and administrators shall, warrant and defend the same to the grantee, his heirs, executors, administrators and assigns, against the lawful claims and demands of all persons.

IN TESTIMONY whereof he, the said ——, has hereunto set his hand and seal this —— day of —— 19—.

SIGNED, SEALED, etc.

[*As to Affidavit of Execution and Affidavit of Bona Fides, see R.S.N.S. c.* 142.]

(*b*) The bill of sale takes effect and has priority as against *bonâ fide* purchasers and creditors only from the time of the filing thereof accompanied by the proper affidavit of *bona fides* (R.S.N.S., c. 142, s. 5, s-s. 3).

(*c*) It will be noticed that the commencement of this form of bill of sale differs from that of Chattel Mortgage in Nova Scotia. There is no special reason why either style of commencement may not be used for either form, but the ones given are those generally used.

AFFIDAVIT OF BONA FIDES
OF "BILL OF SALE AND CHATTEL MORTGAGE."
(General form.)

(R.S.N.S., c. 148, Sch. B.)

PROVINCE of Nova Scotia, County of ——. } I, A.B., of ——, in the county of ——, [*occupation*], make oath and say as follows:

1. I am the grantor mentioned in the bill of sale [a copy of which is] hereto annexed [*or*, I am the agent, *or*, attorney, of the grantor mentioned in the bill of sale [a copy of which is] hereto annexed, duly authorized in that behalf in writing, and have a personal knowledge of the matters hereinafter deposed to].

2. The amount set forth therein as being the consideration thereof was at the time of making such bill of sale justly and honestly due [*or*, accruing due, *as the case may be*] from the grantor to the grantee.

3. The bill of sale was executed in good faith and for the purpose of securing to the grantee the payment of such amount [*or*, payment to the grantee of such amount].

4. Such bill of sale was not made for the mere purpose of protecting the personal chattels therein mentioned against the creditors of the grantor, or of preventing such creditors from recovering any claims which they have against such grantor.

SWORN to at —— in the county of —— this —— day of —— A.D. 19—.
Before me, ——.

ASSIGNMENT OF DEBT
WITH COVENANTS.

THIS INDENTURE made the —— day of ——, between —— of ——, hereinafter called the assignor, of the one part, and —— of ——, hereinafter called the assignee, of the other part.

WHEREAS —— of —— is indebted to the assignor in the

sum of —— dollars for and on account of, etc., and the assignor has agreed with the assignee for the absolute sale to him of the said debt for the sum of —— dollars.

NOW THIS INDENTURE WITNESSETH that in consideration of the sum of —— dollars now paid by the assignee to the assignor (the receipt whereof is hereby acknowledged), the assignor hereby assigns, transfers and sets over to the assignee the said debt, and all his right, title and interest therein; to hold the said debt of —— dollars unto the assignee absolutely.

And the assignor covenants with the assignee that the said debt or sum of —— dollars is still due and owing to him from the said debtor; that he has good right to assign the said debt unto the assignee in the manner aforesaid; and that he, the assignor, will not at any time hereafter receive the said debt or sum of —— dollars, or any part thereof, nor do any act whereby the assignee may be prevented or hindered from enforcing the payment of the said debt; and also that the assignor and all persons rightfully claiming any interest in the said debt or sum of —— dollars shall and will from time to time, and at any time hereafter, execute such further assurances for effectually assigning the said debt or sum of —— dollars to the assignee as he or his counsel in the law shall require.

It is hereby declared and agreed that these presents and everything herein contained shall respectively enure to the benefit of and be binding upon the parties hereto, their executors, administrators and assigns, respectively.

IN WITNESS, etc.

SIGNED, SEALED, etc.

ASSIGNMENT OF DEBT

WITH WARRANTY OF INDEBTEDNESS.

(Short form.)

KNOW ALL MEN by these presents that I, ——, of ——, in consideration of —— dollars to me paid by —— of —— (the

receipt whereof I hereby acknowledge), do hereby assign to the said —— absolutely a certain debt owing to me from —— of —— for [goods supplied, etc.] and all and every sum or sums of money now due or to become due thereon. And I hereby warrant that the said debt is still due and owing to me from the said ——, and that I have not previously assigned or encumbered the said debt or any part thereof.

IN WITNESS, etc.

SIGNED, SEALED, etc.

ASSIGNMENTS OF DEBTS GENERALLY

WITHOUT COVENANTS.

(Short form.)

KNOW ALL MEN by these presents, that we A.B., and C.D., all of the —— of ——, doing business under the firm name of A.C. & Company, in consideration of the sum of [one dollar] to us paid by E.F. of ——, do hereby assign to the said E.F., his executors, administrators and assigns, absolutely, all debts and sums of money now due to the said firm of A.C. & Company from any person or corporation whatsoever, together with all bonds, mortgages, leases, assignments, judgments, insurance policies, cheques, bills (*d*), notes, choses in action and other securities for money now held by or in the name or for the benefit of the said firm, as also all contracts or agreements entered into by or on behalf of the said firm and all benefits to which the said firm now is or may be entitled thereunder.

IN WITNESS, etc.

SIGNED, SEALED, etc.

ASSIGNMENT OF BOOK DEBTS

FOR EXISTING DEBT AND PRESENT ADVANCE.

THIS INDENTURE made the —— day of ——, between —— of —— and —— of ——, [merchants,] trading in co-partner-

(*d*) If the benefit of such cheques and bills is intended to pass, they should be expressly mentioned; see *Felix* v. *Hadley*, [1898] 2 Ch. 680.

ship under the name, style and firm of —— and Company, hereinafter called the assignors, of the first part, and —— of ——, hereinafter called the assignee, of the second part.

WHEREAS the assignors are now carrying on and intend to carry on business in partnership at number ——, —— street, in the [town] of —— as [merchants].

AND WHEREAS the assignee has heretofore at different times made cash advances as loans to assignors, amounting in the aggregate to the sum of —— dollars, and the assignors are at present indebted to the assignee in the [said] sum of —— dollars.

AND WHEREAS the assignors have applied to the assignee for a further advance in cash, and the assignee has agreed to advance to them the further sum of —— dollars in cash upon the execution of these presents as collateral security for the said past and present advances (hereinafter called the said indebtedness), in order to assist the assignors in their said business.

NOW THIS INDENTURE WITNESSETH that in consideration of the said indebtedness (the amount whereof is hereby acknowledged) the assignors do hereby assign, transfer and set over unto the assignee, his executors, administrators and assigns, firstly, all the debts, claims and demands now due or owing or accruing due and owing to the assignors trading as aforesaid out of their said business as ——, the accounts whereof are now mentioned in the ledgers or other account books of the said business. Secondly, all the debts, claims or demands which may at any time hereafter become due and owing to the assignors trading as aforesaid arising out of their said business as ——, the accounts whereof may hereafter be mentioned in the ledgers or other account books in connection with the said business.

And the assignors, for themselves, their and each of their executors and administrators, covenant and agree with the assignee, his executors, administrators and assigns, that they will at any time upon demand or request of the assignee furnish

true and correct list and schedule of the said debts, claims and demands, and also, that they will upon every reasonable request of the assignee make, do and execute all such further and other assurances by acts, deeds and instruments which may be requisite for more perfectly and absolutely assigning, transferring and assuring the said debts, claims and demands hereby assigned and transferred, or intended so to be, and every part thereof unto the assignee, his executors, administrators and assigns.

And the assignors do hereby assign, transfer and set over unto the assignee, his executors, administrators and assigns all deeds, books of account, vouchers, promissory notes, cheques, bills of exchange and all other documents or evidences of the said debts, or any of them, or any part thereof, together with all books of account in which there are or hereafter may be any entries of the particulars of the said debts.

And the assignors hereby irrevocably nominate, constitute and appoint the assignee, his executors, administrators and assigns, their true and lawful attorney or attorneys to ask, demand, sue for and recover the said debts, claims and demands and every of them, and to give effectual receipts and discharges therefor, together with full power to compromise the said debts or any of them which may seem bad or doubtful, and to give time for payment thereof with or without security.

And it is hereby understood and agreed that these presents are given as collateral security only for the due payment of the said indebtedness, and that the execution hereof shall not in any way suspend or affect the present or future rights and remedies of the assignee in respect of the said indebtedness, or any part thereof, nor shall it affect any securities which he now holds or hereafter may hold in respect of the said indebtedness, or any part thereof.

IN WITNESS, etc.

SIGNED, SEALED, etc.

ASSIGNMENT OF BOOK DEBTS

FOR EXISTING DEBTS AND FUTURE ADVANCES.

WE, —— and Company of ——, [merchants], hereby assign, transfer and set over to —— of ——, his executors, administrators and assigns, all book debts, accounts and choses in action now due or accruing due to us in connection with our business as [general merchants]; and also all book debts, accounts and choses in action which may at any time hereafter become due and owing to us in connection with our business; and also all deeds, books, vouchers, promissory notes, cheques, bills of exchange and other documents or evidences of the said debts, accounts and choses in action, or any of them or any part thereof or in any manner relating to or containing entries of the said book debts, accounts, choses in action or any of them, to be held by the said —— as a collateral security to the present and all future indebtedness of us to the said ——.

We hereby covenant and agree on demand at any time to prepare and deliver to the said ——, his heirs, executors, administrators or assigns, a full list of all accounts due or accruing due to us, and to execute such further assurances or assignments as may be necessary to complete their title, and to prepare and deliver to them all deeds, books, vouchers, promissory notes, bills of exchange and other documents or evidences of the said debts, accounts and choses in action, or any of them or any part thereof, and to furnish all information necessary to enable them to collect the said debts, accounts and choses in action, and we hereby authorize them whenever necessary to sue for and collect the said debts, accounts and choses in action.

This assignment is executed as a continuing security collateral to our indebtedness to the said ——, whether the said indebtedness has been already contracted or may be hereafter contracted, and the execution hereof shall not in any way suspend or affect the present or future rights and remedies of the said —— in respect of the said indebtedness or any part thereof.

nor shall it affect any securities which they now or hereafter may hold in respect of the said indebtedness or any part thereof.

[*If it is intended to limit the security to a fixed amount, add:* Provided, however, that this assignment shall be limited to the extent of —— dollars, but shall be considered as a continuing security to that extent.]

The understanding on which this security is given is that the said —— shall accept payment of our present overdue indebtedness as follows: —— dollars in —— days from this date and the balance in [weekly] payments of —— dollars thereafter until paid.

IN WITNESS, etc.

SIGNED, SEALED, etc.

ASSIGNMENT OF BOOK DEBTS.

EXISTING DEBTS AND FUTURE ADVANCES.

(*Short form.*)

To —— of ——.

WE, ——, of ——, carrying on business under the name of —— and Company, do hereby, for valuable consideration and the sum of one dollar (the receipt whereof we hereby acknowledge) assign, transfer and set over to you all our book debts, accounts and choses in action both present and future and also all our books and papers both present and future containing entries of or relating to the same, as collateral security for our present and future indebtedness to you. And in case it becomes necessary for you to collect the above at any time then the costs and expenses thereof shall be a first charge on the proceeds thereof.

IN WITNESS, etc.

SIGNED, SEALED, etc.

ASSIGNMENTS OF PERSONAL PROPERTY.

SPECIAL DESCRIPTIONS.

The special descriptions following may either be inserted, when required, in various instruments, (for example, in a bill of sale, or other instruments of a general nature,) or may be used for the descriptive parts of special conveyances of the subject matter to which the description relates.

Agreement.

All that the said recited agreement, and all the estate, right, title, benefit, advantage, property, claim and demand whatsoever of the said [*assignor*] of, in, or to the same, and the property comprised therein.

Annuity.

All that annuity or yearly sum of —— dollars payable during the life of —— by [equal half-yearly] payments on the —— day of —— and the —— day of —— in every year [*or as the case may be*], and the arrears and future payments thereof and all remedies and powers whatsoever for the recovery thereof [and also the said bond or obligation and the full benefit thereof and all sums of money recoverable thereunder].

Farm stock, implements, etc.

All the farm stock of [the bargainor], [without restriction to the above description], including all horses, cattle, sheep, hogs, carts, wagons, sleighs, harness, agricultural, farming and dairy implements, machinery, utensils, crops cut, or fodder, whether now upon the said lands or elsewhere [and which are more particularly described in the schedule hereto].

Furniture.

All the household furniture and effects specified in the schedule hereto and lying or being in the messuage or tenement known as number ——, —— street, in the [town] of ——.

Good will and assets of business.

All that the interest and good will of the said [*vendor*] in the said business of —— carried on by him at ——, and also all the book and other debts due and owing to the said [*vendor*] in respect of the said business and all securities for the same [including any cheques or bills given to the said [*vendor*] in payment or part payment or satisfaction of the said debts or any of them], and also the benefit of all contracts entered into and orders given to the said [*vendor*] in respect of the said business, [and also all goods, stock in trade, machinery and implements of manufacture, furniture, effects and other assets, if any, except cash in hand or at the bank belonging to the said [*vendor*] in respect of the said business or used for the purpose of carrying on the same].

Grain, crops and produce.

All seed grain and other seed or vegetables for seeding purposes, and all crops and produce of every description, including grain and other seeds, hay, clover and other grass, vegetables and fruits, upon the said lands.

Growing crops.

All crops of grain, grass or other seed, vegetables and fruit in process of growth, now in or upon the said lands, and consisting of the following parcels, viz., —— acres of wheat, —— acres of timothy, —— acres of turnips, etc., with full liberty for the said [*assignee*], his servants, workmen and agents, either with or without horses, or wagons, at all reasonable times hereafter, so long as the said crops shall be growing, standing or lying on the said farm, to enter thereon to see the state of such crops and for the purpose of cutting, reaping and carrying away the same, and for all other necessary purposes.

Hotel property.

Also all wines, liquors, tobacco, furniture, household stuff and all other goods and chattels of every nature and kind, the

property of [the bargainor] [without restriction to the description in the schedule hereto annexed marked "B"] which are now in and upon the said hotel and lands hereinbefore mentioned.

Jewelry.

All jewels, jewelry, watches and trinkets, of or to which the said —— is now possessed or entitled.

Personal effects.

All the goods, chattels, furniture and household effects, gold and silver plate, plated articles, china, glass, articles of domestic use or ornament, jewelry, trinkets, books, pictures and personal chattels and movable effects of the said ——.

Life interest in personal property.

All that the life interest of the said —— under the said will [*or*, settlement] in the several stocks, funds and securities the particulars whereof are specified in the schedule hereto, and in the investments for the time being representing the property for the time being subject to the trusts of the said will [*or*, settlement] and in the dividends, interest and income thereof respectively.

Reversionary interest in personal property.

All that the remainder [*or*, reversionary interest] of the said —— under the said will [*or*, settlement] expectant upon and to take effect in possession immediately upon and after the decease of the said —— [*or as the case may be*] of and in the stocks, funds and securities mentioned in the schedule hereto or the investments for the time being representing the property for the time being subject to the trusts of the said will [*or*, settlement].

Policy of life insurance.

All that policy of insurance dated the —— day of ——, and numbered ——, granted by The —— Insurance Company insuring the life of [*insured*] in the sum of —— dollars at the

annual premium of —— dollars, and all bonuses and additional sums of money to become payable or to be received under or by virtue of the said policy, and all benefits and advantages thereof.

Partnership debts and securities.

All and every the outstanding debts and sums of money due and owing to the said partnership of [*firm name*] from any person or persons whomsoever for or [illegible] of the said partnership and all securities for the same [illegible] cheques or bills given to the said partn[illegible] payment [illegible] payment or satisfaction of the said [illegible] d the benefit of all rights and rem[illegible]

Share[illegible]

All that —— part or [illegible] in trust [illegible] the said —— of and in the good[illegible]ship of [*firm name*] and the gains and profits now due to the said —— and henceforth to arise from the said par[illegible], and of and in the goods, stock in trade, furniture, accou[illegible], books and all other property and effects of the said partnership.

Shares in a company or bank.

All these —— shares of [common] stock of the par value of —— dollars each [numbered —— to —— inclusive] in the capital of the —— company [*or*, bank] [credited in the books of the company with the sum of —— dollars paid up on each of such shares]; and the assignor hereby covenants and agrees for himself, his executors and administrators, with the assignee, his executors, administrators and assigns, to cause the said shares to be transferred upon the books of the company and to do such other acts and give such other assurances as may be necessary for the effectual transferring of the said shares and [illegible] the costs of the assignor.

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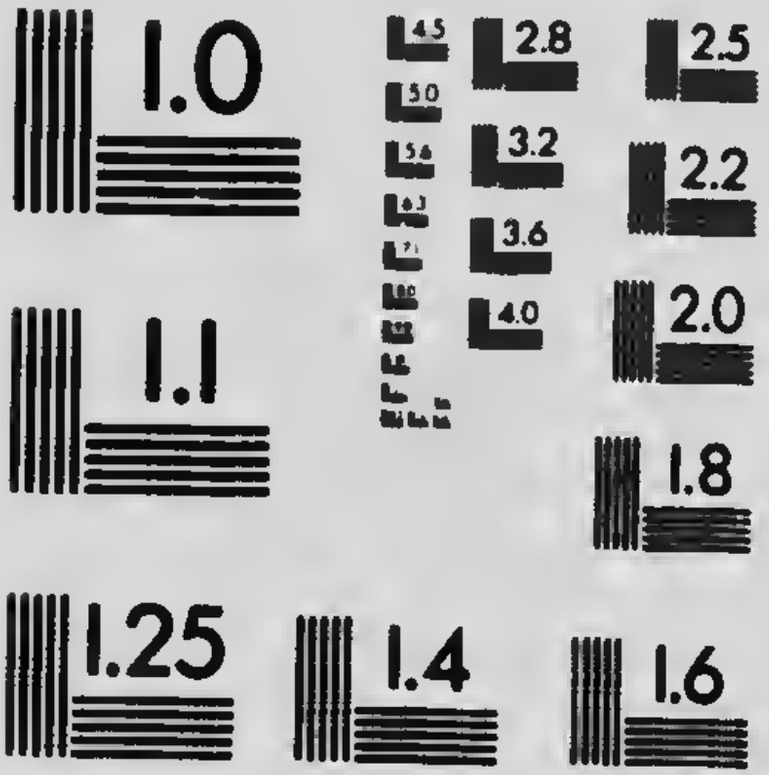

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