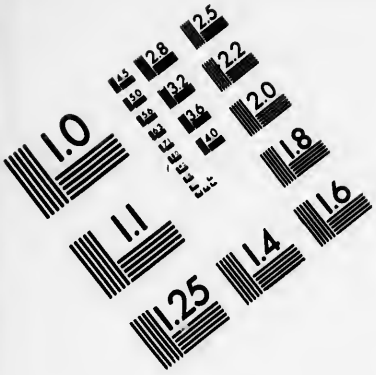

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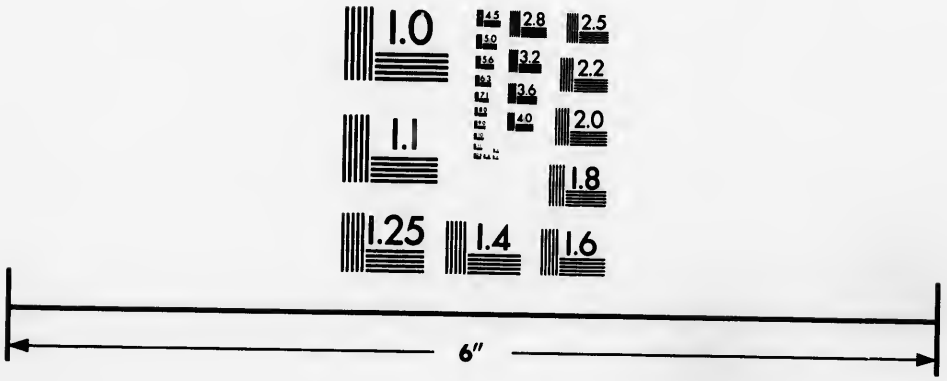

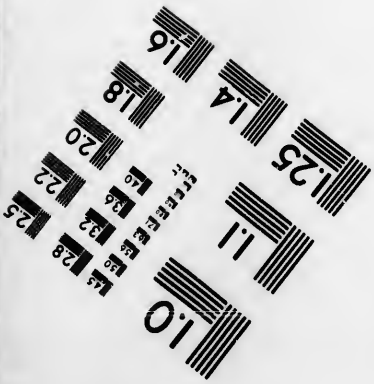

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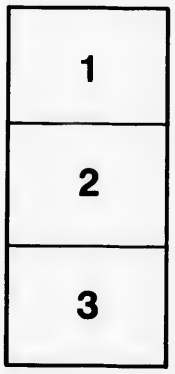

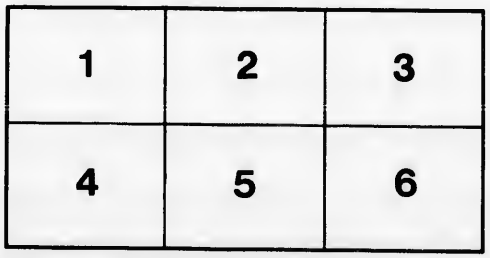

CHATTEL MORTGAGES

AND

BILLS OF SALE.

A COMPLETE ANNOTATION OF THE STATUTES OF ONTARIO, NOVA SCOTIA, NEW BRUNSWICK, PRINCE EDWARD ISLAND, MANITOBA, BRITISH COLUMBIA, AND THE NORTH-WEST TERRITORIES,

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 COMPLETE COLLECTION OF FORMS.

A New Edition of Barron on Bills of Sale.

BY

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TORONTO:

CANADA LAW JOURNAL COMPANY.

1897.

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32 AND 34 LOMBARD STREET,
TORONTO

PREFACE.

It is now nearly ten years since the second edition appeared of "Barron on Bills of Sale," and up to the present time that work has remained the only Canadian text book upon a subject so important as the law respecting mortgages and sales of personal property.

It was originally the intention of the authors of the present work to publish merely a third edition of the previous one, but in the decade that has passed since the second edition the law has in many respects been completely changed, and such of it as remains the same is so modified by judicial decision and statutory enactment, that an entirely new work was found to be necessary.

All that appeared in the former work, and which yet remains good law, will still be found, while a great deal of obsolete matter, including insolvency legislation, has been eliminated, and its place taken by modern law. Even such as is retained of the previous work has been put in more careful sequence, and duplication avoided. The space saved in this way, and the increased size of the pages, produces a book, which, while it omits nothing of any value, gives more matter in a more convenient form.

Until the 30th of May, 1849, there was no statute in force in Upper Canada, requiring registration of mortgages of personal property. On that day, the statute, 12 Vict., c. 74, became law. This statute is the foundation of the subsequent Acts relating to mortgages of goods and chattels.

The present time seems opportune for a new work on this subject. Since the previous work was issued, the Ontario law was first amended several times, then consolidated in 1894, and is now being revised for the new Revised Statutes to be issued next year. It is owing to the kindness of the Commissioners who are making the revision, that "The Bills of Sale and Chattel Mortgage Act," which has finally passed through their hands, has been placed in ours, thus enabling us to anticipate the Revised Statutes, the expectation of the early

issue of which has prevented this work from being given to the profession before this date.

The work has been brought down to date, and the many hundreds of English and Canadian cases decided in the past ten years have been carefully annotated and applied. The cases in the state courts of the United States are so frequently at variance with our law, and with those of other states, that use has only been made of modern cases, and that only where fundamental principles are involved.

Each province of the Dominion (except Quebec) is separately treated, and the law of each given in its own place, with this exception, that where the law of any particular province is applicable generally, or to the Ontario Act, the decisions of the provincial courts will be found under Ontario, which, having a greater number of decided cases than the other provinces, was thought a convenient place in which to group the cases containing general law.

In the Province of Quebec there is no law by which money can safely be loaned upon the security of personal chattels, unless possession also be obtained. There is consequently no law is that province which comes within the scope of this work.

The collection of forms includes some not usually found even in most works on conveyancing; while the special clauses for special cases have been very carefully collected. The conveyancer will, we think, find them to be complete.

The authors wish here to express their cordial acknowledgement of the work done by Mr. W. J. Tremeear, barrister-at-law, who extracted a large number of cases, and in many other ways rendered most valuable assistance, all the more valuable from his thorough knowledge of the subject, and his practical experience of chattel mortgage law.

The Canadian and English cases were verified in the final proofs, and the table of Cases Cited compiled by, Miss A. M. Read, librarian of the County of York Law Association.

November 15th, 1897.

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ABBREVIATIONS

OF CANADIAN REPORTS, STATUTES, ETC.

A. R..... ....Ontario Appeal Reports.
All..... .....Allen's New Brunswick Reports.

B. C. R.....British Columbia Reports.

Can. Ex. Rep...Exchequer Court of Canada Reports.
Cassels S. C. Dig. Cassel's Digest of Supreme Court cases.
Ch. Cham.....Chancery Chambers Reports.
C. L. J.....Canada Law Journal (Toronto).
C. L. T.....Canadian Law Times (Toronto).
C. S. M.....Consolidated Statutes of Manitoba 1880.
C. S. N. B.....Consolidated Statutes of New Brunswick (1876).
Con. Stat. U. C. Consolidated Statutes of Upper Canada (1859).

D.....Dominion of Canada.
Drap. K. B. Rep. Draper's Kings Bench, Upper Canada, Reports.

E. & App. R .....Grant's Error and Appeal Reports, Upper Canada.

Gr.....Grant's Chancery Reports, Upper Canada and Ontario.

Han. (N. B.)....Hannay's New Brunswick Reports.

Kerr..... ....Kerr's Nova Scotia Reports.

Man. R.....Manitoba Reports.

N. B. Eq. R....New Brunswick Equity Reports.
N. B. R.....New Brunswick Reports.
N. S. R.....Nova Scotia Reports.
N. W. T. R....North-West Territories Reports.

Old. . .....Oldrights' Nova Scotia Reports.
O. R.....Ontario Reports.
O. S.....Old Series Upper Canada Reports.

P. E. I.....Prince Edward Island Reports.
P. R..... ....Ontario Practice Reports.
Pugsley & Bur. Pugsley and Burbidge's New Brunswick Reports.
Pugsley & True. Pugsley & Trueman's New Brunswick Reports.

R. L. .....Revised Laws of British Columbia (1871).
R. S. C.....Revised Statutes of Canada (1886).
R. S. M.....Revised Statutes of Manitoba (1891).
R. S. O.. ....Revised Statutes of Ontario.
Russ. & Ches...Russel & Chesley's Nova Scotia Reports.
Russ. & Geld...Russell & Geldert's Nova Scotia Reports.

S. C. R.....Supreme Court of Canada Reports.

U. C. C. P.....Upper Canada Common Pleas Reports.
U. C. L. J.....Upper Canada Law Journal.
U. C. R.....Upper Canada Queen's Bench Reports.

W. L. T..... Western Law Times (Winnipeg).

REVISED STATUTES OF ONTARIO.

1887 AND 1897.

A TABLE SHOWING THE CORRESPONDING NUMBERS OF VARIOUS CHAPTERS IN EACH REVISION.

In view of this work being published two months prior to the date when the Revised Statutes of Ontario, of 1897, will be issued, it is thought well to give a table showing the corresponding numbering in the Revision of 1897 of such statutes of R. S. O. 1887 as relate to or affect the law concerning mortgages and sales of personal property.

R. S. O. 1887.	R. S. O. 1897.
CHAPTER 1	CHAPTER 1
" 64	" 77
" 96	" 115
" 97	" 116
" 100	" 119
" 102	" 121
" 122	" 145
" 123	" 146
" 124	" 147
" 125	" 148
" 128	" 150
" 126	" 153
" 127	" 156
" 143	" 170
51 Vict. c. 19	" 149

ADDENDA ET CORRIGENDA.

Page 35, note (q) read 7 U. C. R.
" 59, " (u) for 30 O. R, read 3 O. R.
" 71, " (o) for *Fair* read *Phair.*
" 227, line 5, for construction read consideration.
" 254, " 16, for mortgagor read mortgagee.
" 283, note (j) for 10 Wend. 515 read 19 Wend. (N.Y.) 514.
" 317, " (w) for 13 G, read 13 Gr.
" 329, " (c) for *Sauge* v. *Eastwood* 19 Wend. 575, read *Sanger* v. *Eastwood* 19 Wend (N.Y.) 514.
" 448, line next to last for 430 read 440.

The case of *Bacon* v. *Rice Lewis Co.* (noted on p. 243) decided subsequently to part of this work being printed, alters the law laid down on p. 22, lines 8—12, and p. 377, para. IX. The law is now as laid down in *Bacon* v. *Rice Lewis Co.*

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BILLS OF SALE AND CHATTEL MORTGAGES.

CHAPTER I.

BILLS OF SALE AND MORTGAGES.

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, and is properly a bill to denote a sale (*a*).

Sales of personal property may be either absolute or conditional. In the case of an absolute sale, the property granted passes eo instanti to the grantee, 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 assignor shall fail to perform, by a given day, the condition named, the furniture shall continue the property of the assignor, and not vest in the assignee unless and until failure in the performance of the condition, from which time the assignee becomes the true owner.

The word Mortgage is derived from the two French words, "mort," meaning dead, and "gage," meaning pledge. The word imports a grant and conveyance, and implies redemption.

A mortgage of chattels is a contract between parties,

(a) *Simpson* v. *Wood*, 21 L. J. (Ex.) 153.

whereby the mortgagor sells, assigns and transfers to the mortgagee certain goods and chattels upon the terms that the sale, assignment or transfer 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 (*b*). 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 (*c*). 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 (*d*).

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 which come within the first class, and more particularly in connection therewith as affected by the statutes relating thereto.

A mortgage made without deed may be valid although no

(b) *Sands* v. *Standard Ins'ce Co.*, 26 Gr. 116.
(c) *Martin* v. *Bearman*, 45 U. C. R. 212.
(d) *Conard* v. *At. Ins. Co.*, 1 Pet. 386. *Erskine* v. *Townsend*, 2 Mass. 495.

transfer of possession of the chattel mortgaged has taken place (*e*). It may be valid if made by simple contract (*f*).

Though there may be a verbal mortgage, such an agreement will only be valid as between the parties to the transaction. For the protection of creditors and others dealing with a mortgagor, the statute law requires, as an essential element of such a transaction, that the mortgage shall be in writing, and, in order that they may have notice of the true position of his property, that the instrument shall be registered or the property mortgaged be delivered to and remain in the possession of the mortgagee, in which case the transaction 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, he retaining a lien thereon, while the title to the property never passes from the pledgor (*g*).

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 is 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, 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.

(e) *Maughan* v. *Sharpe*, 17 C. B. N. S. 443: 34 L. J. C. P. 19; 11 Jur. N. S. 989.

(f) *Florry* v. *Denny*, 7 Ex. 581.

(g) *Beeman* v. *Lawton*, 37 Me. 543. *Britt* v. *Harrell*, 105 N. C. 10; 10 S. E. Rep. 902.

It is not essential that the condition should be inserted in the bill of sale itself, in order to constitute a legal mortgage; if, however, a defeasance be subsequently executed, the two instruments will be construed together, as part of the same transaction, provided the defeasance be executed in pursuance of an agreement to execute it as part of the original transaction. The two instruments then constitute a mortgage as between the parties (*h*). A defeasance cannot be engrafted on a bill of sale by parol (*i*). The condition may be written at the end of the instrument (*j*), or indorsed upon it, or it may be contained in a separate paper, executed and delivered simultaneously with the absolute bill of sale (*k*).

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; but the fact of a condition being attached to the conveyance must be established by clear and most positive evidence. 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 their vendor by the instrument under which he claimed to own the property, their title will not be impeached (*l*).

Parol evidence will be received, not that the instrument may thereby be contradicted, but for the purpose of raising

(h) *Lund* v. *Land*, 1 N. H. 39: *Holmes* v. *Grant*, 8 Paige 243: *Swetland* v. *Swetland*, 3 Mich. 482.

(i) *Pennock* v. *McCormack*, 120 Mass. 175.

(j) *Kent* v. *Allbritain*, 4 How. (Miss.) 317.

(k) *Brown* v. *Bement*, 8 Johns (N. Y.) 96: *Barnes* v. *Hulcumb*, 12 Sm. & M. (Miss.) 306.

(l) *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.

an equity paramount to its terms (*m*). The earliest cases admitted this evidence on the ground of fraud (*n*), accident, intimidation, ignorance, undue influence, surprise or mistake, (*o*), 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 (*p*).

The law does not presume that any man has acted or desires to act fraudulently, but presumes the contrary until the fraud is shewn (*q*). But inadequacy of consideration (*r*), the simple existence of a previous debt from vendor to vendee, the continuing in possession of the grantor of property

(m) *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. 207: *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.

(n) *Stewart* v. *Horton*, 2 Gr. 45.

(o) *Cook* v. *Gudger*, 2 Jones N. C. Eq. 172: *English* v. *Lane*, 1 Porter, 328.

(p) *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 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.

(q) *Matthews* v. *Holmes*, 5 Gr. 33: *Calvard* v. *Waugh*, 3 Jones (N. C.) Eq. 335: *Blackwell* v. *Overby*, 6 Ired. (N. C.) Eq. 38.

(r) *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.

(*s*), the conditions and circumstances of the conveyance (*t*), 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, though not in itself sufficient to negative the absolute sale, yet strengthening other evidence of a doubtful nature in that direction, has been held to give an absolute conveyance the operation of a mortgage (*u*).

The intention of the parties is to be arrived at from the evidence, entirely apart from the form of the instrument, and the question is one that a jury may decide, whether from the accompanying circumstances the instrument is in substance a mortgage or not (*v*). For instance, where the consideration in the bill of sale was $200, which the vendor agreed to repay 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 mortgage (*w*).

While the question of intention of the parties, as to whether the instrument was intended to operate as a mortgage or 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, possession remaining with the vendor, is a mortgage, and, as such, is subject

(s) *Le Targe* v. *De Tuyll*, 1 Gr. 227: *Barnhart* v. *Patterson*, 1 Gr. 459.

(t) *Whitcomb* v. *Sutherland*, 18 Ill. 578.

(u) *Locke* v. *Palmer*, 26 Ala. 312.

(v) *Bank of Toronto* v. *McDougall*, 15 U. C. C. P. 475.

(w) *Goodwin* v. *Kelly*, 42 Barb. (N. Y.) 194.

to the statutory regulations as to form and registration (*x*). The mere fact that an instrument does not contain terms of defeasance, cannot be 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 read in the light of the surrounding circumstances, it appears to have been given as security, it must be considered as a mortgage, and the law will apply thereto the rules applicable to mortgages (*y*). 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 (*z*). 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 (*a*). A bill of sale, with a condition for redemption, makes the instrument a mortgage (*b*), and so does a contract in the bill of sale securing an endorser or surety against liability (*c*). So also does taking a judgment for the consideration money mentioned in the bill of sale stamp the instrument with the character of a mortgage (*d*). And a bill of sale is a mortgage, when the vendee retains the

(x) *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.

(y) *Beckett* v. *Tower* (1891) 1 Q. B. 638: *Cooper* v. *Brock*, 41 Mich. 488: 2 N. W. Rep. 660.

(z) *Atwater* v. *Mower*, 10 Vt. 75.

(a) *Ford* v. *Ransom*, 39 How. (N. Y.) Pr. 429: *Blodgett* v. *Plodgett*, 48 Vt. 32.

(b) *Kent* v. *Allbritain*, 4 How. Miss. 317: *Wilson* v. *Carver*, 4 Hey 90: *Morrow* v. *Turney*, 35 Ala. 131.

(c) *Webb* v. *Patterson*, 7 Hump. 431: *Marsh* v. *Lawrence*, 4 Cow. 461: *Jackson* v. *Green*, 4 Johns. 186.

(d) *Hamet* v. *Dundas*, 4 Penn. 178.

right to demand repayment of the money, notwithstanding the purchase, and should the property be lost (*e*).

In those cases where the property is not delivered from the vendor to the vendee, the reason for holding the bill of sale to be a mortgage seems to be that in no other way can effect be given to the instrument; it could not be a pledge, because of the essential requisite in a pledge, namely delivery, being absent.

A provision for redemption in a contract of sale makes the transaction a mortgage (*f*). 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 (*g*).

A writing absolutely transferring the title to property from a debtor to his surety, securing the latter from all liability as such surety, the possession of the property being retained by the debtor, is a mortgage (*h*). 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 (*i*).

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 (*j*). 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 (*k*). So also is that class of instruments purporting to convey the property absolutely, and containing stipulations pointing out that if the debt is not

(e) *Robinson* v. *Farrelly*, 16 Ala. 472.

(f) *Wilson* v. *Weston*, 4 Jones (N. C.) Eq. 349.

(g) *Woodman* v. *Chesley*, 39 Me. 45.

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

(i) *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.

(j) *Weed* v. *Stanley*, 12 Fla. 166.

(k) *Beecher* v. *Austin*, 21 U. C. C. P. 334: *Stephenson* v. *Rice*, 24 U. C. C. P. 250.

paid within a stipulated time the vendee may then sell, and with the proceeds liquidate the debt (*l*).

But where, from the instrument, it appears that the same was not to become void on the payment of a sum in money, or the fulfilment of some other duty or obligation, where the right of redemption was clearly and unmistakably not reserved by the debtor—where, for instance, the interest provided for by the debtor was not in the property mortgaged, but in any surplus proceeds from the sale of the property after payment of the debt owing to the creditor, then there is absent from the transaction an essential condition of a mortgage.

For instance, where a lumberman executes a bill of sale to a bank of certain lumber, and the bank enters into an undertaking that they will sell and dispose of the lumber and apply the proceeds first in liquidation of the indebtedness to them of the lumberman, and then pay over to him the remainder of the proceeds, if any, the transaction loses the character of a mortgage, because the rights reserved 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 (*m*).

If the debt between the vendor and 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 (*n*). It has been held that where a bill of sale provides for the right to redeem, but that upon default in redemption, the vendor must pay a sum certain for the use of the property in the meantime, that the transaction is not a mortgage, but a sale (*o*).

(l) *Frost* v. *Allen*, 57 Ga. 326.

(m) *Prentice* v. *Consolidated Bank*, 13 A. R. 69: *Camp* v. *Thompson*, 25 Minn. 175, 181: *Butler* v. *White*, 25 Minn. 432; see, however, *Gage* v. *Chesebro*, 49 Wis. 486; 5 N. W. Rep. 881.

(n) *Weatherby* v. *Bradford*, 7 Ala. 724: *Goinez* v. *Kamping*, 4 Daley (N. Y.) 77: *Sewal* v. *Henry*, 9 Ala. 24.

(o) *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, then the transaction is a conditional sale, and not a mortgage. There can be no mortgage without a transfer of property, and, if the right to, or title in the property does not pass out of the vendor, then 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 (*p*). Even, though the agreement contain a clause, whereby, upon default in payment of the instalments, which are described as purchase money, the vendor might sell and apply the proceeds in payment of the debt remaining unpaid, and the surplus, if any, pay over to the vendee, the sale is none the less a conditional sale (*q*).

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 (*r*). A written promise to pay for a horse, and to secure the vendor, "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 (*s*). 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 (*t*). So also when similar words in effect are

(p) *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 A. R. 345: *Nordheimer* v. *Robinson*, 2 A. R. 305: *Stevenson* v. *Rice*, 24 U. C. C. P. 245: *Ex parte Crawcour*, 9 Ch. D. 419.

(q) *Brewster* v. *Baker*, 20 Barb. (N. Y.) 364: *Grant* v. *Skinner*, 21 Barb. (N. Y.) 581: *Pierce* v. *Scott*, 37 Ark. 308.

(r) *Thompson* v. *Blanchard*, 4 N. Y. 303.

(s) *Clayton* v. *Hester*, 80 N. C. 275.

(t) *Ellison* v. *Jones*, 4 Ired. (N. C.) 48.

subscribed beneath a promissory note identifying the note as part of the transaction (*u*).

Where a vendor provided in a bill of sale that he should have a lien on the property sold for the purchase money, the provision for a lien does not, in law, constitute a mortgage (*v*).

A pledge is not so comprehensive as a mortgage; a mortgage is a pledge, and more. 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 a certain sum by express stipulation; and the right to bring action against a person who wrongfully converts them; the pledgor retaining in himself the general title (*w*). At the time the obligation is contracted the goods must be delivered over to the pledgee and continue in his possession. The transaction begins with the voluntarily giving possession of the goods by pledgor to pledgee (*x*), but the delivery need not be actual; it may be constructive or symbolical (*y*). In making a pawn, or pledge, delivery of the chattels is all that is required, a deed or writing being unnecessary, and a deed improper. 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 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 (*z*).

(u) *Ballew* v. *Sudderth*, 10 Ired. (N. C.) 176.

(v) *Shaw* v. *Wiltshire*, 65 Me. 485: *Sawyer* v. *Fisher*, 32 Me. 28: *Barnett* v. *Mason*, 7 Ark. 253.

(w) *Ratcliffe* v. *Davis*, 1 Bulst. 29 Yelv. 179: *Jones* v. *Smith*, 2 Ves. Jr. 378: *Brown* v. *Bement*, 8 Johns. 96.

(x) *Ex parte Hubbard*, 17 Q. B. D. at p. 697: *Ex parte Parsons*, 16 Q. B. D. 532: *Franklin* v. *Neale*, 13 M. & W. 481.

(y) *Jewett* v. *Warren*, 12 Mass. 300.

(z) *In re Hall*, 14 Q. B. D. 392: *Ex parte Parsons*, 16 Q. B. D. 532.

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 and mortgages as collateral security, their possession gives them the character of a pledge, while their 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 property also, as, for instance, 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 is made the possession of the pledgee (*a*). If the user of the property be 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 (*b*).

If in its origin the transaction was intended to be a mortgage, and the mortgagee took possession of the property as such, he cannot afterwards claim that he holds the property as pledgee. 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 all the contracting parties.

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 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 (*c*). If property is pledged, which the pledgor

(a) *Reeves* v. *Capper*, 5 Bing. N. C. 136: *Martin* v. *Reid*, 11 C. B. N. S. 730: *Meverstein* v. *Barber*, L. R. 2 C. P. 52.
(b) *Crowfoot* v. *London Dock Co.*, 2 Cr. and M. 637.
(c) *Garth* v. *Howard*, 5 Car. & P. 346.

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 pledgee is not permitted to set up the jus tertii.

CHAPTER II.

GOODS AND CHATTELS.

THE SUBJECT-MATTER OF MORTGAGES.

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 some other thing 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 (*a*).

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.

Property can be mortgaged although the owner has not in himself the absolute and entire title thereto, or, in fact, the possession thereof (*b*); and property exempt from attachment and execution and sale at the suit of creditors may yet be made the subject of a mortgage. Such exemption is a statutory reservation in favor of the debtor, and not a restriction upon a debtor's right to do that which he chooses with his own (*c*).

(a) *Fraser* v. *Lazier*, 9 U. C. R. 679: *Booth* v. *Keekoe*, 71 N. Y. 341: *Breeze* v. *Bange*, 2 E. D. Smith (N. Y.) 474.
(b) *M Calla* v. *Bullock*, 2 Bibb. (Ken.) 288.
(c) *Love* v. *Blair*, 72 Ind. 281.

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 (*d*).

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 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 (*e*).

But a bona fide purchaser for value from a person in possession 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 he might reclaim them from his vendee at any time before their resale (*f*).

Both the vendor and vendee in a conditional sale of goods have such an interest therein as may be mortgaged. If the vendor delivers property to the purchaser, under an agreement that the title thereto shall not pass until paid for, the vendor may mortgage, and his mortgagee will acquire a title superior to that of the conditional vendee (*g*). And, so, such a vendee may mortgage his interest, such as it is, and upon payment of the price of the goods, the mortgage will attach (*h*).

An engine builder who agrees to construct an engine may mortgage it in its unfinished state, even though the purchaser

(d) *Smith* v. *Coalbach*, 21 Wis. 427.

(e) *Stanley* v. *Gaylord*, 1 Cush. (Mass.) 536: *Glaze* v. *Blake*, 56 Ala. 379: *Waters* v. *Cox*, 2 Brad. (Ill.) 129.

(f) *Malcom* v. *Loveridge*, 13 Barb. (N. Y.) 372.

(g) *Everett* v. *Hall*, 67 Me. 497.

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

has advanced money on account during the progress of construction, and such mortgage will pass the property (*i*).

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 mortgage until he pays the advances (*j*).

The word "goods" is less comprehensive in its operation than the word "chattels" (*k*), and is limited to what is movable personal property, to things which are tangible and visible, and have a local situation (*l*). 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 (*m*).

If a vendor 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

(i) *Wright* v. *Tetlow*, 99 Mass. 397.

(j) *Ponder* v. *Rhea*, 32 Ark. 435: *Leland* v. *Sprague*, 28 Vt. 746.

(k) *Humbler* v. *Mitchell*, 11 A. & E. 205: *Hesseltine* v. *Siggers*, 1 Ex. 861: *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.

(l) *Hewitt* v. *Corbett*, 15 U. C. R. 39.

(m) *Everman* v. *Robb*, 52 Miss. 653: *Petch* v. *Tutin*, 15 M. & W. 110.

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 the 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 (*n*). 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, 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 (*o*), or that is thereafter to be made (*p*), or such stock as should be purchased thereafter during the currency of the mortgage (*q*), or crops to be afterwards raised (*r*) 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 (*s*), and if not so described the legal property will not pass until the seller does some act appropriating

(n) Lord Westbury in *Holroyd* v. *Marshall*, 10 H. L. C. 191 : *Coyne* v. *Lee*, 14 A. R. 503 ; 23 C. L. J. 413 : *Tailby* v. *Official Receiver* (1888) 13 A. C. 546 : *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.

(o) *Cummings* v. *Morgan*, 12 U. C. R. 565.

(p) *Short* v. *Ruttan*, 12 U. C. R. 79.

(q) *Joseph* v. *Webb*, 1 C. & E. 262.

(r) *Clements* v. *Matthews*, 11 Q. B. D. 808.

(s) *Tailby* v. *Official Receiver* (1888) 13 A. C. 546 : *Holroyd* v. *Marshall*, 10 H. L. C. 191 : *McAllister* v. *Forsyth*, 12 S. C. R. 1.

them to the contract (*t*), or the buyer takes possession of them under an authority to seize (*u*).

If the mortgage covers future acquired stock, and there is, having regard to the terms of the mortgage, an implied license for the mortgagor to carry on his business and sell the stock, then bona fide purchasers from the mortgagor will get a good title, notwithstanding that the mortgage was duly registered, and, even when the mortgage specially provides that until default the mortgagor shall be entitled to make use of the stock without hindrance or disturbance of the mortgagee, then, if the mortgagor fraudulently sell the goods to bona 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 (*w*): 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 (*x*).

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

(t) *Langton* v. *Higgins* (1859) 28 L. J. Ex. 252.

(u) *Hope* v. *Hayley* (1856) 25 L. J. Q. B. 155.

(w) *National Mercantile Bank* v. *Hampson*, 5 Q. B. D. 177: *Walker* v. *Clay*, 49 L. J. C. L. 560: *Dedrick* v. *Ashdown*, 15 S. C. R. 227, 242.

(x) *Tadman* v. *D'Epineuil*, 20 Ch. D. 758: *Lazarus* v. *Andrade*, 5 C. P. D. 318: *Belding* v. *Read*, 3 H. & C. 955.

future crops in the farm to make the assignment a valid one in equity (*y*).

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 providing to the contrary, merges his mortgage claim, under which he could have taken 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 (*z*).

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, which are within the scope of the Act, are fruits produced by the annual labor of man in sowing and reaping, planting and gathering (*a*), for at common law a growing crop, produced by the labor and expense of the occupier of lands, was, as the representative of that labor and expense, considered a chattel independent of the land (*b*), to which the 17th section of the Statute of Frauds would apply. Fructus naturales, which are beyond the scope of the Act before severance, are the natural growth of the soil, as grass, timber, fruit on trees, etc. The latter are an interest in land, and, as such, embraced within the 4th section of the Statute of Frauds (*c*), with this exception

(y) *Clements* v. *Matthews*, 11 Q. B. D. 808.

(z) *Cameron* v. *Gibson*, 17 O. R. 233; 25 C. L. J. 250.

(a) *Jones* v. *Flint*, 10 A. & E. 753: *Carrington* v. *Roots*, 2 M. & W. 248: *Simsbury* 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. *Wild*, 5 B. & A. 105: *Evans* v. *Roberts*, 5 B. & C. 529: *Westbrook* v. *Eager*, 16 N. J. L. 81: *Dunn* v. *Fergusson*, 1 Hayes (Irish), 542: *Parker* v. *Stainland*, 11 East 362.

(b) *Evans* v. *Roberts*, 5 B. & C. 836: *Kingsley* v. *Holbrook*, 45 N. H. 313, 318, 319: *Dunn* v. *Fergusson*, 1 Hayes (Irish), 542.

(c) *Scovell* v. *Boxall*, 1 Y. & J. 396: *Crosby* v. *Wadsworth*, 6 East 602: *Carrington* v. *Roots*, 2 M. & W. 248: *Teal* v. *Auty*, 4 J. B. Moore 542; 2 B. & B. 97: *Rodwell* v. *Phillips*, 9 M. & W. 505.

that, when fruit or timber is sold 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 (*d*). 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 him to make a valid grant thereof by way of a personal mortgage; but the contention that a mortgage of grass is a mortgage of personal property does not prevail when it is owned by one who owns the lands (*e*), and, if allowed to remain in the possession and under the control of the vendor after severance, then the statutory requisites must be complied with (*f*).

Fixtures, too, may and 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 (*g*).

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.

(d) *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. *Slumnway*, 13 Gray 498: *Cook* v. *Stearns*, 11 Mass. 533.

(e) *Smith* v. *Jenks*, 1 Denio N. Y. 580.

(f) *Ex parte National Mercantile Bank*, 16 Ch. D. 104: *Steinhoff* v. *McRae*, 3 O. R. 546: *McMillan* v. *McSherry*, 15 Gr. 133.

(g) *Ex parte Dalglish*, L. R. 8 Ch. 1072: *Begbie* v. *Fenwick*, L. R. 8 Ch. 1075: *Hawtry* v. *Butlin*, L. R. 8 Q. B. 290.

(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 (*h*).

The intention of the parties in dealing with the fixtures will decide their character, and it is a fit subject of inquiry how fixtures came to be placed on the realty, and what was intended to be their use. By agreement of all parties interested in both the realty and the fixtures, things considered fixtures to the realty may become personal property (*i*). 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 (*j*).

When a stranger owns the goods, a wrong-doer 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 (*k*); and of course a person who has only the use of property belonging to another cannot, by annexing it to the soil, make

(h) *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.

(i) *Smith* v. *Waggoner*, 50 Wis. 155: *Godard* v. *Gould*, 14 Barb. (N. Y.) 662: *Gooding* v. *Riley*, 50 N. H. 400.

(j) *Ford* v. *Cobb*, 20 N. Y. 344: *Sisson* v. *Hibbard*, 75 N. Y. 542.

(k) *Stevens* v. *Barfoot*, 13 A. R. 366.

it part of the realty (*l*). But when 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, and so not to pass with the land to a purchaser or mortgagee (*m*). 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 statute will operate upon such a contract (*n*). 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 (*o*).

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 (*p*).

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 cannot claim them as subject to his mortgage, although they are subsequently annexed to the freehold; and upon failure to pay the chattel mortgage the mortgagee or vendor is entitled to their delivery (*q*). But 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 (*r*).

(l) *D'Eyncourt* v. *Gregory*, L. R. 3 Eq. 382: *Central Branch R. W. Co.* v. *Fritz*, 27 Am. Rep. 175.

(m) *Stevens* v. *Barfoot*, 13 A. R. 366.

(n) *Hallen* v. *Runder*, 1 C. M. & R. 266: *Wick* v. *Hodgson*, 12 Moo. 213.

(o) *Rose* v. *Hope*, 22 U. C. C. P. 482: *In re Eslick*, 4 Ch. D. 503: *Stevens* v. *Barfoot*, 13 A. R. 366: *Corcoran* v. *Webster*, 50 Wis. 125.

(p) *Per* Hagarty, C. J. O.; *Stevens* v. *Barfoot*, 13 A. R. at p. 369.

(q) *Tift* v. *Horton*, 53 N. Y., 377: *Goddard* v. *Gould*, 14 Barb. 662: *Mott* v. *Palmer*, 1 N. Y. 564.

(r) *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 (*s*), 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 (*t*).

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 (*u*).

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 (*v*).

Even fixtures of a nature that the vendor must have known, in order to be made use of, must necessarily be built into and become part of the building, none the less retain their character of chattel property in favor of a vendor thereof who retained in himself the right of property in the fixtures, and this they will do 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 (*w*). Machinery placed upon land for the purpose of trade and manufacture, being placed there for the better and more profitably enjoying the

(s) *Smith* v. *Benson*, 1 Hill (N.Y.) 176.

(t) *Simons* v. *Pierce*, 16 Ohio S, 215.

(u) *Sheffield* v. *Harrison*, 15 Q. B. D. 358.

(v) *Climpson* v. *Coles*, 23 Q. B. D. 465; 25 C. L. J. 591.

(w) *Hall* v. *Hazlitt*, 11 A. R. 749; see *Howell* v. *Listowel Rink and Park Co.*, 13 O. R. 476.

land, will pass with the freehold (*x*), but not so if by so doing it would violate the intention of the parties (*y*), and so tramways in a mine have been held to be fixtures, and so not distrainable (*z*). 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 all such passed as fixtures, even to removable portions 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 (*a*).

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 (*b*). A mortgage of leather cut and prepared for the manufacture of shoes, covers shoes subsequently made from it by the mortgagor (*c*). 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 (*d*). A mortgage of an unfinished locomotive covers the

(x) *Mather* v. *Fraser*, 2 K. & J. 536: *Longbottom* v. *Berry*, L. R. 5 Q. B. 123.

(y) *Waterfall* v. *Penistone*, 6 E. & B. 876.

(z) *Turner* v. *Cameron*, L. R. 5 Q. B. 306.

(a) *Ex parte Moore*, 14 Ch. D. 379; see *Ex parte Brown*, 9 Ch. D. 389: *In re Trethowan*, 5 Ch. D. 559: *Robinson* v. *Cook*, 6 O. R. 590.

(b) *White* v. *Browne*, 12 U. C. R. 477.

(c) *Putman* v. *Cushing*, 10 Gray (Mass.) 334.

(d) *Crosby* v. *Baker*, 6 Allen (Mass.) 295.

additions made to it by the mortgagor, although the additions were not included in the mortgage (*e*). And by way of accretion also, a mortgage of rolling stock of a railroad covers repairs and improvements thereof (*f*).

A mortgage of a mare will cover a foal in gremio at the time the mortgage was given (*g*). The right of possession of the foal follows the dam, for the reason that the two cannot or ought not to be separated (*h*); and generally the increase of all tame and domestic animals will be covered by a mortgage of the animal themselves (*i*).

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 (*j*), 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 (*k*).

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 (*l*). 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

(e) *Ex parte Ames*, 1 Lowell, 561.
(f) *Hamlin* v. *Jerrard*, 72 Me. 62.
(g) *Gunn* v. *Burgess*, 5 O. R. 685.
(h) *Temple* v. *Nicholson*, Cassels S. C. Dig. 114.
(i) *Dillaree* v. *Doyle*, 43 U. C. R. 442: *Forman* v. *Procter*, 9 B. Mon. (Ky.) 124: *McCarty* v. *Bleevins*, 5 Yerg. (Tenn.) 105: *Hughes* v. *Graves*, 1 Litt. (Ky.) 317: *Nicholson* v. *Temple*, 4 Pugsley & Bur. 20 N. B. R. 248.
(j) *Winter* v. *Landphere*, 42 Iowa, 471: *Kellog* v. *Lovely*, 46 Mich. 131.
(k) *Winter* v. *Landphere*, 42 Iowa, 471.
(l) *Fuller* v. *Paige*, 26 Ill. 358: *Burns* v. *Campbell*, 71 Ala. 271: *Fleming* v. *Graham*, 34 Mo. App. 160.

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 (*m*), 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 (*n*).

To transfer the right of property in a chattel, the chattel must be ascertained and identified at the time of the transfer (*o*). 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 (*p*); 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 (*q*), 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 (*r*).

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* (*s*) fully illustrates the law as to the appropriation of a chattel necessary to a valid grant. In that case, Parke, 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

(m) *Boys* v. *Smith*, 8 U. C. C. P. 248.
(n) *Call* v. *Gray*, 37 N. H. 428.
(o) *Snell* v. *Heighton*, 1 C. & E. 95.
(p) *Lunn* v. *Thornton*, 1 C. B. 379 : *Gale* v. *Burnell*, 7 Q. B. 850; 14 L, J. Q. B. 340 : *Robinson* v. *Macdonell*, 5 Mau. & Sel. 228.
(q) *Harding* v. *Colburn*, 12 Met. 333 : *Smith* v. *McLean*, 24 Iowa, 322.
(r) *Williamson* v. *Steale*, 3 Lea (Tenn.) 527.
(s) 4 M. & W. 774.

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 (*t*). 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) (*u*); 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 is paid the price (*v*). And the sale or mortgage of crops off 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 (*w*).

(t) *McDougall* v. *Elliott*, 20 U. C. R. 299.

(u) *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.

(v) *Rhodes* v. *Thwaites*, 6 B. & C. 388: *Aldridge* v. *Johnson*, 7 E. & B. 885, 3 Jur. N. S. 913: *Atkinson* v. *Bell*, 8 B. & C. 277.

(w) *Howell* v. *Coupland*, 1 Q. B. D. 258.

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 (*a*); or some other benefit to the person making a promise, however slight, or to a third person, by the act of the promisee (*b*); 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 (*c*); or the suspension or forbearance of legal proceedings, the prevention of litigation or the settlement of disputes (*d*).

A good consideration is affection for a child or relation, or the payment of debts by the debtor (*e*).

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 (*f*).

(a) *Kevan* v. *Crawford*, 6 Ch. D. 29: *Wright* v. *Redgrove*, W. N. (1879) 30-32.
(b) *Bailey* v. *Croft*, 4 Taunt. 611: *Williamson* v. *Clements*, 1 Taunt. 523: *Magruder* v. *State Bank*, 18 Ark. 9.
(c) *Shirbyn* v. *Albany*, Cro. Eliz. 67: *March* v. *Culpepper*, Cro. Car. 71.
(d) *Watson* v. *Randall*, 20 Wend. 201: *Sage* v. *Wilcox*, 6 Conn. 84.
(e) *Keenan* v. *Handley*, 2 D. J. & S. 283.
(f) *Ex parte Challinor*, 16 Ch. D. 265.

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 (*g*). 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 (*h*); and natural love and affection, not being a valuable consideration, will not suffice to support a bill of sale against creditors (*i*). 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.

The courts in construing the Statute of Elizabeth (*j*), have held it to include deeds made without consideration, as being prima facie fraudulent as against creditors.

Marriage is a good consideration, and is the highest consideration recognised by law. A marriage contract differs somewhat from other agreements; for as soon as the marriage

(g) *Holmes* v. *Penny*, 3 K. & J. 90: *Thompson* v. *Webster*, 7 Jur. N. S. 531.

(h) *Peacock* v. *Monk*, 1 Ves. 131: *Penhall* v. *Elwin*, 1 Sm. & G. 268.

(i) *Matthews* v. *Feaver*, 1 Cox, 268.

(j) 13 Eliz. c. 5.

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 (*k*).

A bill of sale upon a consideration of marriage is a valid instrument within the Act (*l*), when the settlement is ante-nuptial. In *Campion* v. *Cotton* (*m*) 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

(k) *Leys* v. *McPherson*, 17 U. C. C. P. at p. 274: *Lloyd* v. *Lloyd*, 2 M. & Cr. 192: *Ranclif* v. *Parkyns*, 6 Dow. 208: *Harvey* v. *Ashley*, 3 Atk. 610.
(l) *Leys* v. *McPherson*, 17 U. C. C. P. 266.
(m) 17 Ves. 264.

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 has expressly covenanted to do so, and the marriage was a sufficient 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" (*n*).

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." (*o*) 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 bona 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 (*p*).

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 dis-

(n) 17 Ves. 264: See *Kevan* v. *Crawford*, 6 Ch. D., 29: *Wright* v. *Redgrove*, W. N. (1879) 30-32.

(o) *Jewett* v. *Warren*, 12 Mass. 300.

(p) *Stevens* v. *Barfoot*, 13 A. R. 366: *McIntyre* v. *Union Bank*, 2 Man. R. 305.

covered, and thus the express purpose of a statute, passed for the protection of creditors, may be destroyed by an incorrect statement of the consideration, purposely made to deceive and mislead. 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 or no fraud (*q*). The omission to state the correct amount of the debt may be one of mistake.

Forbearance of legal proceedings is a good consideration for a mortgage by a third person, though such person derive no actual benefit (*r*), 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 (*s*).

An undertaking to accept payment of a debt at a future date, and give time in the meanwhile to a mortgagor (*t*), 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 (*u*).

The suspension or withdrawal of an execution against the goods of a mortgagor or a third person forms a sufficient consideration for a mortgage (*w*), and an agreement not to foreclose a mortgage is a good consideration for a second mortgage on the same property (*x*).

(q) *Walker* v. *Niles*, 18 Gr. 210: *Hamilton* v. *Harrison*, 46 U. C. R. 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.

(r) *Smith* v. *Algar*, 1 B & A. 603.

(s) *McGillivray* v. *Keefer*, 4 U. C. R. 456.

(t) *Morton* v. *Bernard*, Vaux. 7 A. & E. 19.

(u) *Longridge* v. *Dorville*, 5 B. & Ald. 117: *Llewellyn* v. *Llewellyn*, 15 L. J. Q. B. 4.

(w) *Sugars* v. *Brinkworth*, 4 Camp. 46: *Road* v. *Jones*, 1 Doug. (Mich.) 188.

(x) *Andus* v. *Nelson*, 64 Barb. 362.

A promise of the surrender of a lease at will is not a sufficient 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 (*y*).

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* (*z*), 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 (*a*). And the court, recognizing the authority of this case, in *Ex parte Payne* (*b*), 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

(y) *Bunn* v. *Guy*, 4 East 190: *Longridge* v. *Dorville*, 5 B. & Ald. 117.
(z) 10 Ch. D. 313.
(a) *Ex parte Cooper*, 10 Ch. D. 313: *Woodhouse* v. *Murray*, 4 Q. B. 27.
(b) 11 Ch. D. 539.

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 (*c*).

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 (*d*). Forbearance to sue is no consideration where clearly there was originally no cause of action (*e*).

If a party is illegally arrested, his release is no consideration for a mortgage given under arrest to secure the debt (*f*).

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 (*g*). 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 (*h*).

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* (*i*), that it will be valid as against creditors.

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 (*j*); but it will cover

(c) *Ex parte Stevens*, L. R. 20 Eq. 786.

(d) *Wade* v. *Simon*, 15 L. J. C. P. 114: *Graham* v. *Johnson*, L. R. 8 Eq. 36: *Longridge* v. *Dorville*, 5 B. & Ald. 117.

(e) *Lloyd* v. *Lee*, 1 Stra. 94: *Longridge* v. *Dorville*, 5 B. & Ald. 117.

(f) *Atkinson* v. *Settree*, Willes, 482.

(g) *McCartney* v. *Wilson*, 17 Kans. 294.

(h) *Lord Howden* v. *Simpson*, 1 Rail. Cas. 347.

(i) 18 Conn. 268.

(j) *Monnot* v. *Ibert*, 33 Barb. 24.

advances made to a firm before and after the introduction of a new member (*k*). 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 (*l*).

It has long been established that a past debt is a valuable and sufficient consideration for a mortgage given in good faith (*m*). 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 (*n*); 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 (*o*). In Ontario 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 a bona fide debt, and if the mortgagee is not aware of the debtor being in insolvent circumstances (*p*).

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 (*q*).

For the purpose of upholding a mortgage, a past debt, being a good 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 (*r*).

(k) *Lawrence* v. *Tucker*, 23 How. 14.
(l) *In re Ames*, 1 Law 561.
(m) *Gooderham* v. *Hutchinson*, 5 U. C. C. P. 248.
(n) *Evans* v. *Morley*, 21 U. C. R. 547: *Kranet* v. *Simon*, 65 Ill. 344: *McLaughlin* v. *Ward*, 77 Ind. 383.
(o) *Cooley* v. *Hobart*, 8 Iowa, 358.
(p) *Gibbons* v. *McDonald*, 20 S. C. R. 587: *Molsons Bank* v. *Halter*, 18 S. C. R. 88: *Stephens* v. *McArthur*, 19 S. C. R. 446.
(q) *Dickenson* v. *Clemow*, U. C. R. 421.
(r) *Farlinger* v. *McDonald*, 45 U. C. R. 237.

CHAPTER IV.

FRAUD.

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, c. 5, passed in 1570, and made perpetual by 29 Elizabeth, c. 5. 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 bona fide." 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 (*a*) 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 bona fide. Under the chattel mortgage Acts conveyances are likewise required to be bona 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 Pierce 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.

(a) Smith's Leading Cases, 1; 3 Coke 80.

(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 bona fide; "et clausulæ inconsuet semper inducunt suspicionem."

Secondly, it was resolved, that notwithstanding here 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 bona fide, for although it is on a true and good consideration yet it is not bona fide, for no gift shall be deemed to be bona 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 (*b*). 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

(b) *Flemming* v. *McNaughton*, 16 U. C. R. 194.

defeat thereby the execution of a judgment creditor (*c*). And this was the law under the Statute of Elizabeth, c. 5 (*d*) ; 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 creditors' rights, then such mortgage is void. This was the construction put upon the statute 13 Elizabeth, c. 5, by Lord Mansfield (*e*).

Unless the instrument is protected by reason of bona fides, and of want of notice or knowledge on the part of the mortgagee or bargainee, yet the same shall be void under the statute, even though the same may be executed upon a valuable consideration, and with the intention, as between the parties to the same, of actually transferring to the mortgagee or bargainee the interest expressed to be transferred.

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 (*f*). 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 (*g*).

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, which statute is not repealed but rather interpreted by R. S. O., (1897) c. 147, and given an extended application by R. S. O., (1897) c. 115.

The exact quantum of debt which may invalidate a con-

(c) *Wood* v. *Dixie*, 7 Q. B. 896 ; 9 Jur. 798 : *Eveleigh* v. *Pursswarď*, 2 Me. & Rob. 539 : *Gottwalls* v. *Mulholland*, 15 U. C. C. P. 62 ; 3 E. & App. R. 194 : *Dalglish* v. *McCarthy*, 19 Gr. 578.

(d) *Per* Boyd, C., *Clark* v. *Hamilton Provident* 9 O. R. at p. 179

(e) *Worseley* v. *Demattos*, 1 Burr. 467.

(f) *Burns* v. *McKay*, 10 O. R. 167 : *Hepburn* v. *Park*, 6 O. R. 472 : *Brayley* v. *Ellis*, 9 A. R. 565.

(g) *Per* Boyd, C., *Burns* v. *McKay*, 10 O. R. 167.

veyance 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 (*h*). 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 (*i*).

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 bona 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 (*j*).

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 (*k*).

The doctrine of pressure, which obtained before the insolvency laws, now occupies the same position since their repeal (*l*), and the fact that a mortgage is obtained by pressure

(h) *Hersee* v. *White*, 29 U. C. R. 232: *Smith* v. *Pilgrim*, 2 Ch. D. 127.

(i) *Fleming* v. *McNaughton*, 16 U. C. R. 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. *Douglass*, L. R. 14 Eq. 106: *Ware* v. *Gardner*, L. R. 7 Eq. 317.

(j) *Alton* v. *Harrison*, L. R. 4 Ch. 622; *Ex parte Janes*, 12 Chy. D. 324.

(k) *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 S. C. R. 88.

(l) *Brayley* v. *Ellis*, 9 A. R. 565; 18 C. L. J. 96; *Gibbons* v. *McDonald*, 20 S. C. R. 587.

is evidence that it is free from fraud; but pressure will not validate a security, unless it be a bona fide pressure to secure a debt, and without a view of obtaining a preference over the other creditors (*m*).

"Pressure" need be nothing more than a request to which the debtor is supposed reluctantly to yield (*n*). 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 pressure which is exercised, or even to comply with a bona 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 (*o*), unless a preference is satisfactorily proved to be the voluntary act of the debtor, it is not held to be fraudulent (*p*), and the transaction is not voluntary where the doctrine of pressure can be applied. 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 (*q*). 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

(m) *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 S. C. R. 88.

(n) *Ex parte Topham*, L. R. 8 Ch. 619: *Whitney* v. *Tobey*, 6 O. R. 54: *Keays* v. *Brown*, 22 Gr. 10: *McFarlane* v. *McDonald*, 21 C[illegible]. 319: *Clemow* v. *Converse*, 16 Gr. 547.

(o) *Per* Patterson, J.A., *Davidson* v. *Ross*, 24 Gr. at p. 64: *Segsworth* v. *Meriden Silver Plating Co.*, 3 O. R. 413: *Slater* v. *Oliver*, 7 O. R. 158, 20 C. L. J. 175.

(p) *Ex parte Craven*, L. R. 10 Eq. 655: *Totten* v. *Bowen*, 8 A. R. 602.

(q) *McDonald* v. *McCall*, 9 O. R. 185.

so the doctrine cannot be invoked (*r*). 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 (*s*); 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 (*t*).

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-named creditor; but should the latter be insufficiently secured then as to the deficiency he may invoke the law as to fraudulent preference (*u*).

The statute positively makes 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 (*v*).

The utmost good faith must characterize the dealings 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.

(r) *Strachan* v. *Barton*, 11 Ex. 647.

(s) *Per* Boyd, C., *Meriden Silver Co.* v. *Lee*, 2 O. R. 451: See *Ex parte Hall*, 19 Ch. D. 585.

(t) *McRoberts* v. *Steinoff*, 11 O. R. 369.

(u) *Clark* v. *Hamilton Provident*, 9 O. R. 177.

(v) *Edwards* v. *Edwards*, 2 Ch. D. 291.

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 damages 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 (*w*).

The Revised Statutes of Ontario (1897), chapter 119, 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 encumbrances, or for falsifying pedigree.

The Criminal Code of Canada (ss. 368, 370 and 372), 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 the event of a civil action being brought under the former of these two statutes, the point might arise which came before the M. R. in *Wich* v. *Parker* (*x*). The defendant, in any such action, might decline to answer questions in regard to the transaction, on the ground that he might criminate himself, and expose himself to prosecution under the provisions of the latter statute. In *Michael* v. *Gay* (*y*), 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

(w) *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.

(x) 22 Beav. 59.

(y) 1 Fos. & Fin. 410.

Elizabeth, which rendered a person convicted of a fraudulent conveyance liable to imprisonment for the space of six months (*z*).

It was held under 13 Elizabeth, c. 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 (*a*).

There must have been a bona 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 (*b*). 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 (*c*).

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

(z) See, however, *Bunn* v. *Bunn*, 12 W. R. 561.
(a) *Edwards* v. *Harben*, 2 T. R. 587.
(b) *Wordall* v. *Smith*, 1 Camp. 334.
(c) *Latimer* v. *Batson*, 4 B. & C. 652; *Martindale* v. *Booth*, 3 B. & Ad. 498; *Reed* v. *Blades*, 5 Taunt. 212.

proper compliance with the Act in all its provisions (*d*). 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 (*e*). Possession is usually the 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.

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 prima facie, the transaction is collusive and fraudulent against creditors (*f*). But the fraudulent intent is not so strong when 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 (*g*).

(d) *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.
(e) *Clarkson* v. *McMaster*, 25 S. C. R. 96.
(f) *Robbins* v. *Parker*, 3 Met. (Mass.) 117; see *Bannon* v. *Bowler*, 33 Alb. L. J. 216: *McAllister* v. *Forsyth*, 12 S. C. R. 1.
(g) *Miller* v. *Jones*, 15 Nat. Bank Reg. 150.

CHAPTER V.

THE PARTIES

SHEPPARD in his "Touchstone" (*a*) says, "all chattels personal are grantable from man to man in 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 (*b*) establishes the time from when 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* (*c*), 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."

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 (*d*).

(a) Atherley's Ed., p. 241 : Perkin's "Grant," § 90.

(b) 29 Car. II., c. 3, s. 16.

(c) 17 U. C. R. 359.

(d) *Appleton* v. *Bancroft*, 10 Met. (Mass.) 231.

Conveyances by an infant are generally voidable by him, or his heirs, either before or on attaining majority (*e*).

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, when an infant's contract might either be for his benefit or to his prejudice, it was not void, but voidable (*f*). It is now established that the deed of an infant is not void ab initio, but voidable on his attaining majority (*g*).

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 mortgage (*h*). So it is that 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 (*i*). Therefore, it is

(e) *Gilchrist* v. *Ramsay*, 27 U. C. R. 500: *Featherstone* v. *McDonell*, 15 U. C. C. P. 162: *Miller* v. *Ostrander*, 12 Gr. 349: *Mills* v. *Davis*, 9 U. C. C. P. 510.

(f) *Touch* v. *Parsons*, 3 Barr. 1804: *Allen* v. *Allen*, 2 Dr. & Wor. 338: *Mills* v. *Davis*, 9 U. C. C. P. 510: *Featherstone* v. *McDonell*, 15 U. C. C. P. 162: *McCoffin* v. *McGuire*, 34 U. C. R. 157.

(g) *Foley* v. *Canada Permanent*, 4 O. R. 38.

(h) *Grace* v. *Whitehead*, 7 Gr. 591.

(i) *Heath* v. *West*, 28 N. H. 101: *Roberts* v. *Wiggins*, 1 N. H. 73.

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 endorser 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 (*j*); but it will likely be found that one of a firm, who is an infant, cannot bind his shares by chattel mortgage (*k*).

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 (*l*).

(j) *Knaggs* v. *Greene*, 48 Wis. 601.

(k) *Powell* v. *Calder*, 8 O. R. 511.

(l) *Foley* v. *Canada Permanent*, 4 O. R. 38.

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 (*m*). 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 (*n*). In Mitchell's case (*o*) a delay of 2 years was held sufficient to establish the infant's affirmation by implication of the contract made during infancy. In Ebbett's case (*p*) fourteen months was held sufficient for the same purpose; in Lumsden's case (*q*) six months; in *Bromfield* v. *Smith* (*r*) one year, and in *Holmes* v. *Blogg* (*s*) 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 (*t*).

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 (*u*).

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 (*v*).

And so an insane person is not bound by his execution of

(m) *Foley* v. *Canada Permanent*, 4 O. R. 38.
(n) *Holmes* v. *Blogg*, 8 Taunt. 38: *Slator* v. *Brady*, 14 Ir. C. L. Ex. 61: *Harris* v. *Wall*, 1 Ex. 122: *Mawson* v. *Blain*, 10 Ex. 206: *Featherstone* v. *McDonell*, 15 U. C. C. P. 162: *Miller* v. *Ostrander*, 12 Gr. 349.
(o) L. R. 9 Eq. 363.
(p) L. R. 5 Ch. 302.
(q) L. R. 4 Ch. 31.
(r) 2 T. R. 436.
(s) 8 Taunt. 35; 1 Moo. 466.
(t) Richards, C. J., *Featherstone* v. *McDonell*, 15 U. C. C. P. 166.
(u) *Owens* v. *Thomas*, 6 U. C. C. P. 383.
(v) Mauser's Case, 2 Coke's Rep. 3: Thoroughgood's Case, 2 Coke's Rep. 9: Shutter's case, 12 Coke's Rep. 90.

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 (*w*).

The unsoundness of mind must be known to the other contracting party (*x*) 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 (*y*).

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, though 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 (*z*). As a chattel mortgage need not be under seal (*a*), a mortgage by one of a firm of partners of all the stock in trade to raise money, or secure endorsements, or other assistance is perfectly valid; his authority to do the act arises from implication, and cannot be questioned for want of express authority (*b*). 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 (*c*).

The act done by a partner, however, must not be such as,

(w) *Campbell* v. *Hill*, 23 U. C. C. P. 473.
(x) *Banks* v. *Goodfellow*, L. R. 5 Q. B. 549.
(y) *Moulton* v. *Comroux*, 4 Ex. 17: *Beaven* v. *McDonell*, 10 Ex. 184.
(z) *Cameron* v. *Stephenson*, 12 U. C. C. P. 389.
(a) *Reeves* v. *Capper*, 5 Bing. N. C. 136: *Flory* v. *Denny*, 7 Ex. 581.
(b) *Paterson* v. *Maughan*, 39 U. C. R. 371: *Halpenny* v. *Pennock*, 33 U. C. R. 229: *Cooley* v. *Hobart*, 8 Iowa, 358.
(c) *Milton* v. *Mosher*, 7 Met. 244: *Paterson* v. *Maughan*, 39 U. C. R. 371.

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 (*d*); 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 (*e*). 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 (*f*); 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 (*g*). 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 (*h*).

The implied authority between partners to bind the

(d) *Cameron* v. *Stephenson*, 12 U. C. C. P. 389.

(e) *Nolan* v. *Donnelly*, 4 O. R. 440: *Lamb* v. *Durant*, 12 Mass. 54: *Tapley* v. *Butterfield*, 1 Met. (Mass.) 515.

(f) *In re Kahley*, 2 Biss. 383: *Kirby* v. *Schoomaker*, 3 Barb (N. Y.) Ch. 46.

(g) *Kennedy* v. *Nat. Union Bank*, 23 Hun. (N. Y.) 494.

(h) *Robinson* v. *Cook*, 6 O. R. 590.

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.

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 (*i*).

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. Whether the agent make it in his own name or

(i) *Smith* v. *Rice*, 56 Ala. 417: *Stuart* v. *Taylor*, 7 How. (N. Y.) Pr. 251: *Gaar* v. *Hurd*, 92 Ill. 315.

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 (*j*). And the agent, if he give 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 (*k*).

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 of the principal leading up to that conclusion (*l*). Authority to sell, however, does not confer authority to mortgage; nor does authority to mortgage, confer authority to sell (*m*). 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 favor of the purchaser as a mere security for so much of the purchase money, as was applied to the use of the principal (*n*).

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 (*o*). If the agent take the mortgage in

(j) *Calder* v. *Dobell*, L. R. 6 C. P. 486, 498.
(k) *Higgins* v. *Senior*, 8 M. & W. 833.
(l) *Partridge* v. *White*, 59 Me. 564: *Halpenny* v. *Pennock*, 33 U. C. R. 229.
(m) *Switzer* v. *Wilvers*, 24 Kans. 384.
(n) *Coppage* v. *Barnett*, 34 Miss. 621.
(o) *Varney* v. *Hawes*, 68 Me. 442: *Brodie* v. *Ruttan*, 16 U. C. R. 207.

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 (*p*), and though the agent have 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 (*q*).

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 (*r*).

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 (*s*).

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 (*t*).

The Queen 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 (*u*).

A married woman has the right to give a mortgage in her own name on personal property which she herself owns (*v*), and a husband can give a bill of sale or chattel mortgage direct to his wife, and vice versa (*w*).

(p) *Brodie* v. *Ruttan*, 16 U. C. R. 209.
(q) *Partridge* v. *White*, 59 Me. 564.
(r) *Shears* v. *Jacob*, L. R. 1 C. P. 513: *Deffell* v. *White*, L. R. 2 C. P. 144.
(s) *Bank of Toronto* v. *McDougall*, 15 U. C. C. P. 483.
(t) 53 Viet. (1890) c. 31, s. 68 (D).
(u) *McGee* v. *Smith*, 9 U. C. C. P. 89.
(v) *Halpenny* v. *Pennock*, 33 U. C. R. 229.
(w) *Totten* v. *Bowen*, 8 A. R. 602: *O'Doherty* v. *Ont. Bank*, 32 U. C. C. P. 285: *Sanders* v. *Malsburg*, 1 O. R. 178.

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 (*a*); but this he, of course, is required to do before the rights or liens of others attach upon the property mortgaged.

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 (*b*).

A new mortgage entirely can be taken which would be as effectual as taking possession (*c*), even though the new mortgage is to have effect given to it only in the event of the first mortgage being declared to be invalid and void (*d*).

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 as wrongdoer.

(a) *Parkes* v. *St. George*, 10 A. R. 496.
(b) R. S. O. (1897), c. 148, s. 40.
(c) *James* v. *Richards*, L. R. 2 Q. B. 285: *Ex parte Allan*, W. N., (1884), 211.
(d) *Cooper* v. *Zeffert*, 32 W. R. 402: *Ex parte Nelson*, 35 W. R. 844.

There yet 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.

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 any thing, then his legal 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 (*e*). 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 (*f*). 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 (*g*); nor will diligence in attempting to get possession help the mortgagee, against his defective security, unless he gets possession (*h*).

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 mortgagee had a right to acquire without reference to the mortgagor, and would effect the same result as if the posses-

(e) *Ex parte Fletcher*, 5 Ch. D. 809.

(f) *Emmanuel* v. *Bridger*, L. R. 9 Ch. 697.

(g) *Ancona* v. *Rogers*, 1 Ex. D. 285.

(h) *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.

sion had resulted from the act of the mortgagor (*i*). It becomes important then, from this view, to omit the redemise clause in a mortgage (*j*), 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 a 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 (*k*).

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 feel himself insecure, not whether he had reasonable ground for so believing, nor whether, in fact, he really was insecure (*l*).

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 (*m*), or for wrongful conversion (*n*).

If, however, a sense of insecurity honestly entertained by the mortgagee entitles him to possession of the property, then

(i) Osler, J. A., *Smith* v. *Fair*, 11 A. R. 765: *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.

(j) *Porter* v. *Flintoff*, 6 U. C. C. P. 335: *Keetch* v. *Hall*, 1 Sm. L. Cas. 523: *Bingham* v. *Bettison*, 30 U. C. C. P. 438: *Down* v. *Lee*, 4 Man. R. 177.

(k) *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.

(l) *Werner* v. *Bergman*, 28 Kans. 60, 64.

(m) *Frisbee* v. *Langworthy*, 11 Wis. 375: *Welsh* v. *Sackett*, 12 Wis. 243.

(n) *Harvey* v. *McAdams*, 32 Mich. 472: *Grove* v. *Wise*, 39 Mich. 472.

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 (*o*), 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 (*p*), 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 (*q*).

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 (*r*).

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 bona fide, cannot be impeached (*s*).

(o) *Bissett* v. *Pearce*, 28 N. Y. 252.

(p) *Hammond* v. *Danielson*, 126 Mass. 294: *Globe Works* v. *Wright*, 106 Mass. 207.

(q) *Williams* v. *Allsup*, 10 C. B. N. S. 417.

(r) *Morrow* v. *Reed*, 30 Wis. 81: *Frank* v. *Miner*, 50 Ill. 444.

(s) *Cookson* v. *Swire*, L. R. 9 App. Cas. 653.

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 mortgagee 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 (*t*).

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 (*u*).

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 (*v*).

Various provisions may give rise to an implication in favor 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 (*w*); such, also, as giving the mortgagee the privilege of taking possession when and so soon

(t) *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.

(u) *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*, 30 O. R. 1.

(v) *Dedrick* v. *Ashdown*, 15 S. C. R. 227; 24 C. L. J. 502; reversing 4 Man. R. 139.

(w) *Babcock* v. *McFarland*, 43 Ill. 381.

as he finds himself insecure (*x*); 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 (*y*) in favor of a mortgagee (*z*).

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 (*a*). 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 (*b*). 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 (*c*).

The measure of damages 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 (*d*); and in favor 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

(x) *Hall* v. *Sampson*, 35 N. Y. 274: *Chadwick* v. *Lamb*, 29 N. Y. 518.
(y) *Ferguson* v. *Thomas*, 26 Me. 499.
(z) *Smith* v. *Fair*, 11 A. R. 763.
(a) *Albert* v. *Grosvenor Investment Co.*, L. R. 3 Q. B. 123.
(b) *Bingham* v. *Bettison*, 30 U. C. C. P. 438: *Spaulding* v. *Barnes*, 4 Gray (Mass.) 330: *Halliday* v. *Holgate*, L. R. 3 Ex. 302.
(c) *Per* Osler, J. A., *Smith* v. *Fair*, 11 A. R. 763.
(d) *Brierly* v. *Kendall*, 17 Q. B. 937: *Brown* v. *Phillips*, 3 Bush, (Ky.) 656: *Brink* v. *Freoff*, 44 Mich. 69.

above the mortgage debt (*e*). And it generally is the case that a mortgagee, who sells under a power of sale in the general unlimited form, can, although selling when he has no right to sell, confer by the terms of the power, a good title on a bona fide purchaser, and thus effectually destroy all rights of redemption (*f*).

If the mortgage contains a redemise c' 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 favor 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 that his own term (*g*).

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 (*h*); 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 (*i*); and where a mortgagor is in possession and control of the property, this is prima facie evidence as against third parties of his right of possession (*j*).

The ordinary provision that a mortgagee may take

(e) *Sexton* v. *Williams*, 15 Wis. 292 : *Bingham* v. *Bettison*, 30 U. C. C. P. 451.

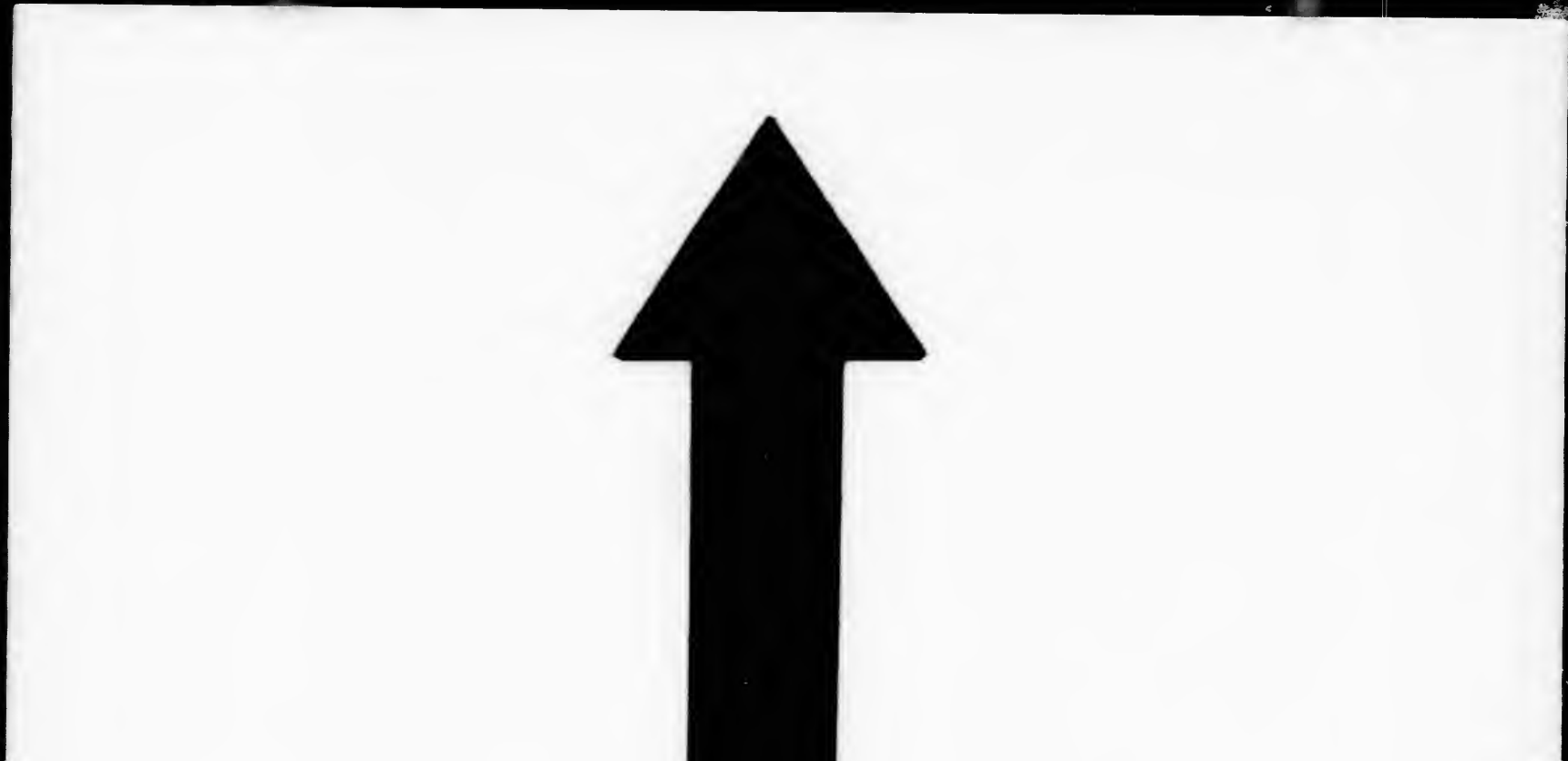
(f) *Dicker* v. *Angerstein*, 3 Ch. D. 600.

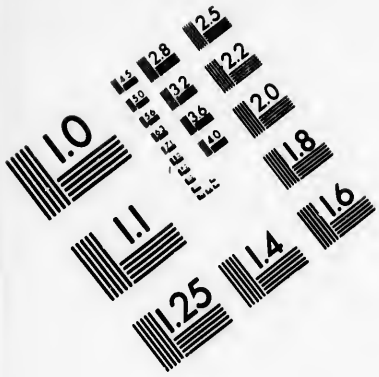
(g) *Fenn* v. *Bittleston*, 7 Ex. 152, 159, 160.

(h) *Ford* v. *Ransom*, 8 Abb. Pr. (N.Y.) N. S. 416.

(i) *Gaar* v. *Hurd*, 92 Ill. 315 : *McConnell* v. *Scott*, 67 Ill. 274.

(j) *Rogers* v. *King*, 66 Barb. N.Y. 495.





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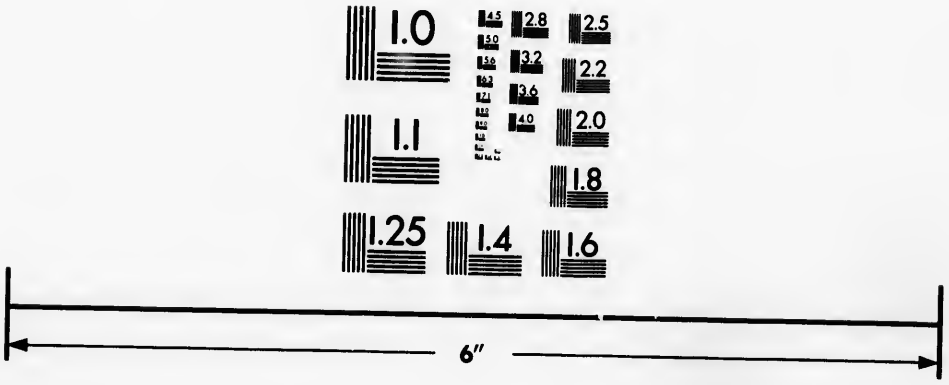

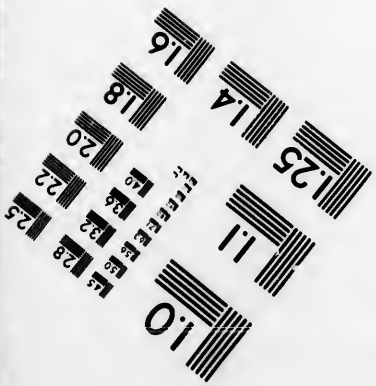

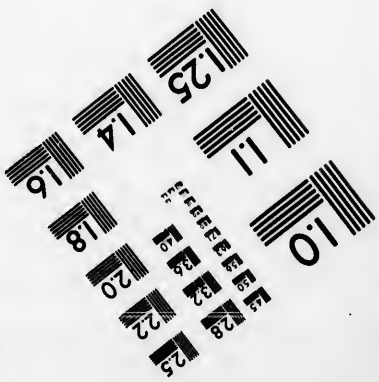

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possession in case the mortgagor shall attempt to sell or dispose of, or in any way part with the possession of the goods, or remove the same beyond a certain limit, entitles the mortgagee to exercise this right when the mortgagor disposes of the goods 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 (*k*), 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 (*l*); or upon a seizure of the mortgaged property on a distress warrant for rent due from the mortgagor (*m*); or upon a levy by way of execution upon the property and removal from the mortgagor's possession (*n*). And the mortgagee's right in this particular is none the less because the time for payment of the mortgage has not arrived (*o*). 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 (*p*). 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 (*q*).

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

(k) *Laing* v. *Perrott*, 48 Mich. 298: 12 N.W. Rep. 192.

(l) *Whimsell* v. *Giffard*, 3 O. R. 1.

(m) *Conkey* v. *Hart*, 14 N. Y. 22: *Russell* v. *Butterfield*, 21 Wend. (N. Y.) 300.

(n) *Ashley* v. *Wright*, 19 Ohio, 291.

(o) *Russell* v. *Butterfield*, 21 Wend. (N. Y.) 300.

(p) *Cutter* v. *Copeland*, 18 Me. 127: *Caldwell* v. *Tray*, 41 Mich. 307.

(q) *Fisher* v. *Friedman*, 47 Iowa, 443: *Bailey* v. *Godfrey*, 54 Ill. 507: *Ferguson* v. *Tait*, 26 Minn. 327.

proceedings being taken by the mortgagee for breach of the covenant not to remove the goods (*r*). 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 (*s*); 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 (*t*); 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 (*u*).

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

(r) *Walker* v. *Radford*, 67 Ala. 446.

(s) *Loucks* v. *McSloy*, 29 U. C. C. P. 62: *Pratt* v. *Maynard*, 116 Mass. 388: *Gage* v. *Whittier*, 17 N. H. 312.

(t) *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.

(u) *Loucks* v. *McSloy*, 29 U. C. C. P. 62.

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 (*v*). 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 (*w*).

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. (*x*). 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 (*y*).

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 (*z*), or by concealing the fact of his security induces another to buy the property (*a*). And the same result arises if the mortgage contains a covenant by the mortgagor to account for the proceeds of sales (*b*), or from the general course of dealing of the parties (*c*), or by the mortgagee being present at the sale of the property and omitting to make known the fact of his mortgage (*d*), or,

(v) *Millar* v. *Allen*, 10 R. I. 49: *Closter* v. *Headley*, 12 U. C. R. 364: *Whitney* v. *Lowell*, 33 Me. 318.

(w) *Stafford* v. *Whitcomb*, 8 Allen (Mass.) 518.

(x) *Loucks* v. *McSloy*, 29 U. C. C. P. 54: *Shearer* v. *Babson*, 1 Allen 486.

(y) *Per* Hagarty, C. J., *Bunker* v. *Emmany*, 28 U. C. C. P. 442.

(z) *Rider* v. *Powell*, 4 Abb. (N. Y.) App. Decisions 63.

(a) *Loucks* v. *McSloy*, 29 U. C. C. P. 54: *Waller* v. *Tate*, 4 B. Monroe 529.

(b) *Abbott* v. *Goodwin*, 20 Me. 408.

(c) *Pratt* v. *Maynard*, 116 Mass. 388: *Thompson* v. *Blanchard*, 4 N. Y. 303.

(d) *Brooks* v. *Record*, 47 Ill. 30.

without being present, permitting the mortgagor to assume the character of absolute owner (*e*).

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 (*f*). 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 (*g*), 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 first being applied in payment of the mortgage, the mortgagor cannot afterwards be heard to oppose the payment of the mortgage debt (*h*).

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 (*i*). 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 (*j*). 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 (*k*). And of course mere silence of the mortgagee on hearing of a sale

(e) *Thompson* v. *Blanchard*, 4 N. Y. 303.
(f) *Segsworth* v. *Meriden*, 3 O. R. 413.
(g) *Edmonson* v. *Welch*, 27 Ala. 578: *Richards* v. *Holmes*, 18 How. (N.Y.) 143: *Roberts* v. *Fleming*, 53 Ill. 196.
(h) *McConnell* v. *People*, 71 Ill. 481.
(i) *Loucks* v. *McSloy*, 29 U. C. C. P. 54.
(j) *Bunker* v. *Emmany*, 28 U. C. C. P. 438.
(k) *White* v. *Philps*, 12 N. H. 382.

by the mortgagor will not prejudice the mortgagee in his right to possession (*l*).

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 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 (*m*), as, for example, to secure a pre-existing debt (*n*), 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 (*o*).

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 (*p*).

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

(l) *Patterson* v. *Taylor*, 15 Fla. 336.

(m) *Dedrick* v. *Ashdown*, 15 S. C. R. 227 : *National Mercantile Bank* v. *Hampson*, 5 Q. B. D. 177.

(n) *Lang* v. *Perott*, 48 Mich. 298.

(o) *Taylor* v. *McKeand*, 4 C. P. D. 358: *Payne* v. *Fern*, 6 Q. B. D. 620 : *Barnard* v. *Easton*, 2 Cush (Mass.) 294.

(p) *Oswald* v. *Hayes*, 42 Iowa, 104.

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 (*q*) but makes subject to sale under execution (*r*).

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 (*s*).

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 (*t*).

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 implication, 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 (*u*), and is not controlled by an express proviso that until default the

(q) *Cadwell* v. *Pray*, 41 Mich. 307: *Davis* v. *Blume*, 1 Mont. 463: *Mechanics* v. *Conver*, 14 N. J. (Eq.) 219.
(r) R. S. O. (1887) c. 64 s. 16; R. S. O. (1897) c. 77.
(s) *Hathaway* v. *Braynean*, 42 N. Y. 322.
(t) *Jones* v. *Turch*, 33 Iowa 246.
(u) *St. Louis Drug Co.* v. *Robinson*, 10 Mo. App. 588.

mortgagor is to retain possession (*v*). 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 (*w*).

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 (*x*).

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 (*y*). The right to possession is essential to the mortgagee's right of action against third persons, who have taken the property from the mortgagor. 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 (*z*), and may recover the value of the property over and above the mortgage debt, as well as damage for the loss of user (*a*).

Replevin will lie against the mortgagor at the suit of the mortgagee before default in payment, if neither by implication nor by express stipulation the mortgagor has the right to

(v) *Ex parte Nat. Guardian Ass. Co.*, 10 Ch. D. 408.

(w) *Prior* v. *White*, 12 Ill. 261 : *Beach* v. *Derby*, 19 Ill. 617 : *Pike* v. *Calvin*, 67 Ill. 227.

(x) *McAulay* v. *Allen*, 20 U. C. C. P. 417 : *Samuel* v. *Coulter*, 28 U. C. C. P. 240

(y) *Becher* v. *Dunham*, 27 Minn. 32 : *Bailey* v. *Godfrey*, 54 Ill. 507.

(z) *Fenn* v. *Bittleston*, 21 L. J. (N. S.) Ex. 41.

(a) *Tallman* v. *Jones*, 13 Kans. 438.

possession (*b*). 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 mortgagor. 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 (*c*). 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 (*d*).

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 (*e*). This right to possession, however, will not justify a mortgagee in creating a breach of the peace or of criminal law in order to acquire the property (*f*). 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 bona 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 (*g*). But where, on default, a

(b) *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'Arcy*, 71 Ill. 648: *Ferguson* v. *Thomas*, 26 Me. 499: *Pickard* v. *Low*, 15 Me. 48.

(c) *Overton* v. *Bigelow*, 10 Yerg. 48.

(d) *Covell* v. *Dalloff*, 31 Me. 104: *Morrow* v. *Turney*, 35 Ala. 131.

(e) *Martindale* v. *Booth*, 3 B. & A. 498.

(f) *London Co.* v. *Drake*, 6 C. B. N. S. 768.

(g) *Cotton* v. *Marsh*, 3 Wis. 221.

mortgagee went through the form of taking possession without, however, any change in the 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 (*h*). The case is different, however, when the mortgagee makes a bona 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 (*i*). 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 bona fide execution (*j*).

It is not enough that a person is put in to keep possession jointly with the assignor (*k*). 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

(h) *Chamberlain* v. *Green*, 20 U. C. C. P. 304.
(i) *Carlisle* v. *Tate*, 7 A. R. 10.
(j) *Paget* v. *Perchard*, 1 Esp. 205.
(k) *Wordell* v. *Smith*, 1 Camp. 333, *per* Lord Ellenborough.

event of any of the property being taken in legal process at the instance of any creditors (*l*). This latter covenant, however, is unnecessary where the redemise clause is omitted, because, as we have seen, the mortgagee is entitled to possession, as against everybody, and may maintain trespass against a sheriff seizing goods covered by such a mortgage (*m*).

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 (*n*). 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 (*o*).

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

(l) *Jamieson* v. *Bruce*, 5 G. & J. (Md.) 72: *Wells* v. *Chapman*, (Iowa 1882) 13 N. W. Rep. 841: *Hall* v. *Sampson*, 35 N. Y. 274: *Anderson* v. *Holmes*, 14 S. C. 162: *Sidner* v. *Bible*, 43 Ind. 230.

(m) *Porter* v. *Flintoff*, 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. *Colter*, 28 U. C. C. P. 240: *Merchants Bank* v. *The Queen*, 1 Can. Ex. R. 1.

(n) *Russell* v. *Butterfield*, 21 Wendell 400.

(o) *Nattrass* v. *Fair*, 37 U. C. R. 158.

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 mortgagor, 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, for, when the authority for selling is a mortgage, then it behooves intending purchasers to take advantage of the facilities offered by the statute for searching the Clerk's office; and if they do not, and buy, their title may be defeated as against such creditors of a mortgagor whose rights have accrued when the sale was had under a mortgage, either not registered at all, or, if registered, void on some other ground fatal to its validity as against creditors. If the mortgagee sells, the sale will pass a good title to the purchaser, unless the attacking creditors could show that the whole transaction was a device to defraud creditors (*p*), and even then, if the purchaser has again sold to bona fide purchasers, the rights of the creditors would be effectually extinguished as to the goods (*q*).

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 bona fide; and, therefore, he may maintain trespass against a sheriff seizing the mortgaged goods under a fi. fa. issued at the suit of a creditor (*r*).

The presumption often arises by implication in a mortgage transaction that the intention of the parties 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

(p) *Allen* v. *Cowan*, 23 N. Y. 502: *Maughan* v. *Sharpe*, 17 C. B. N. S. 442.

(q) *Per* Boyd, C., *Davis* v. *Wickson*, 1 O. R. 373.

(r) *Stewart* v. *Cowan*, 40 U. C. R. 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.

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 (*s*).

(s) *Dedrick* v. *Ashdown*, 15 S. C. R. 227 : *National Mercantile Bank* v. *Hampson*, 5 Q. B. D. 177 : *Walker* v. *Clay*, 49 L. J. C. L. 560.

CHAPTER VII.

THE PLACE OF CONTRACT.

Unless a contract is contra bonos mores, or is one for the doing of something which is strictly forbidden by the country wherein that something is to be done, it is valid everywhere, if valid in the country wherein it is made (*a*). 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 (*b*). The law in the province wherein the mortgage is executed governs as to the nature, the validity, the construction, and effect of the mortgage (*c*), 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. At present no provincial statute has any application to a mortgage made out of the province upon property not situated within it at the time of the execution of the instrument, and the statute is not given an application by reason of the goods afterwards being brought within the limits of the province (*d*), 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 (*e*). If the mortgage is executed and recorded

(a) *Hope* v. *Hope*, 8 D. M. & G. 731, 26 L. J. Ch. 417 : *Grey* v. *Levy*, 16 C. B. N. S. 79 : *Branley* v. *S. E. Rail Co.*, 12 C. B. N. S. 72 ; 31 L. J C. P. 286.

(b) *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.

(c) *Peninsular & Oriental* v. *Shand*, 3 Moo. P. C. N. S. 272.

(d) *River Stave Co.* v. *Sill*, 12 O. R. 570 : *Bonin* v. *Robertson*, 1 N. W. T. R. pt. 4, p. 89 : *Cammell* v. *Sewell*, 5 H. & N. 728 : *Fairbanks* v. *Blomfield*, 5 Duer. (N. Y.) 434.

(e) *Beall* v. *Williamson*, 14 Ala. 55.

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 (*f*).

It is suggested that in order to protect bona fide purchasers and mortgagees, and to facilitate honest conveyances in a province into which are moved goods and chattels previously mortgaged without such province, that a reasonable time be limited within which to register such mortgage or bill of sale, or a copy thereof, in such province. Failing such registration, that any bona fide purchaser or mortgagee from the apparent owner shall be protected in taking a conveyance of the property. It is submitted that it is unreasonable to virtually require an intending purchaser or mortgagee to investigate the history and ownership of goods prior to their entry into the province. This is a present cause of delay and difficulty, and entails a hardship on intending vendors and mortgagors owning chattel property.

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 (*g*), unless the property mortgaged is in a province other than that in which the instrument is executed, and then the lex loci rei sitæ governs.

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 domicil, yet it will be invalid if it fail to conform with the laws of the province wherein the property is at the time of the execution of the documents (*h*).

The lex domicilii, in the case of mortgages of chattels, must give way to the lex sitæ when the law of the province

(f) *Ferguson* v. *Clifford*, 37 N. H. 86: *Kanaga* v. *Taylor*, 7 Ohio St. 134: *Hall* v. *Pillow*, 31 Ark. 32.

(g) *Smith* v. *Mingay*, 1 M. & S. 92.

(h) *River Stave Co.* v. *Sill*, 12 O. R. 557.

wherein the property lies prescribes a different rule of transfer from that of the province where the mortgagor lives (*i*).

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, which one of them has in a chattel, not within the jurisdiction of the place, they cannot expect that the rights of persons in the country where the chattel is, will be permitted to be affected by their contract (*j*).

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 (*k*). 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" (*l*).

(i) *Green* v. *Vanbuskirk*, 7 Wall. 139, 150.
(j) *Clark* v. *Tarbell*, 58 N. H. 88.
(k) *Edgerly* v. *Bush*, 81 N. Y. 199.
(l) *Ferguson* v. *Clifford*, 37 N. H. 86.

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.

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 whereso-ever the goods may be, and if need be to break and force open doors, locks, etc.; but the liberties extended to a mort-gagee 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 author-ity, when such is only a pretence (*a*).

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 (*b*). 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

(a) *Murray* v. *Erskine*, 109 Mass. 597: *Thornton* v. *Cochran*, 51 Ala. 415.
(b) *Rennie* v. *Block*, 26 S. C. R. 356: *Orme* v. *Wright*, 3 Jur. 19, 972: *Bird* v. *Davis*, 14 N. J. Eq. 467.

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" (*c*).

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. A mortgagee with such a power stands in a fiduciary character, and, unlike an ordinary vendor selling what is his own, 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 (*d*); his duty is "to bring the estate to the hammer under every possible advantage to his cestui que trust" (*e*).

It doubtless is the fact that though a mortgagee or his assignee selling under a power of sale, is a trustee for the mortgagor, yet he does not stand alone in the position of a dry trustee. 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 (*f*).

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 (*g*). And a mortgagee must refund to the mortgagor any balance from the sale, after paying the

(c) *Williamson* v. *Berry*, 8 How. 495: *Edwards* v. *Cottrell*, 43 Iowa 194.
(d) *Jenkins* v. *Jones*, 2 Giff. 99, 108: *Rennie* v. *Block*, 26 S. C. R. 356.
(e) *Per* Lord Eldon, *Downes* v. *Grazebrook*, 3 Mer. 205.
(f) *Falkner* v. *Equitable*, 4 Jur. N. S. 1214: *Prentice* v. *Consolidated Bank*, 13 A. R. 69.
(g) *Charter* v. *Stephens*, 3 Denio 33.

mortgage debt, interest and costs (*h*), 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 (*i*).

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 (*j*).

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 (*k*).

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 bona fide the property would have been sold for more than enough to pay the debt (*l*).

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 (*m*), 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

(h) *Pratt* v. *Styles*, 17 How. (N. Y.) Pr. 211.
(i) *Davenport* v. *McChenesy*, 86 N. Y. 242.
(j) *Corbett* v. *Sheppard*, 4 U. C. C. P. 43.
(k) *Hosmer* v. *Sargent*, 8 Allen 97.
(l) *Howard* v. *Ames*, 3 Met. (Mass.) 308.
(m) *Stoddan* v. *Denison*, 38 How. (N. Y.) Pr. 296.

were subsequently exchanged for land, the necessary enquires 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 (*n*).

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 (*o*).

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 bona 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 (*p*).

When there exists fraudulent undervalue, which simply means such gross undervalue as shews either actual and intentional fraud, or gross negligence, constituting in equity a fraud on the mortgagor (*q*), 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

(n) *Annes* v. *Dornan*, 10 U. C. C. P. 299.

(o) *Freeman* v. *Freeman*, 17 N. J. Eq. 44.

(p) *Davey* v. *Bowman*, 1 DeG. & J. 535, 577 : *Warner* v. *Jacob*, 20 Ch. D. 220.

(q) *Latch* v. *Furlong*, 12 Gr. 306 : *Crawford* v. *Meldrum*, 3 E. & App. R. 113.

the fraud could be brought home to the purchasers (*r*). 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 (*s*), 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 (*t*).

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 (*u*). 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 (*v*). 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 (*w*). And so secure are the rights of a mortgagor to have a sale properly conducted, that it is no answer to make, when he seeks his remedies, that he disentitled himself to relief, because he employed puffers at the sale (*x*); 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 (*y*).

The fact that the mortgage contains a power of sale does not compel the mortgagee to pursue that method of realizing

(r) *Gordon* v. *Clapp*, 113 Mass. 335.
(s) *Wylder* v. *Crane*, 53 Ill. 490.
(t) *McConnell* v. *People*, 71 Ill. 481.
(u) *Marriott* v. *Anchor*, 7 Jur. N. S. 155.
(v) *Whitaker* v. *Sigler*, 44 Iowa. 419.
(w) Spragge, V. C., *Richmond* v. *Evans*, 8 Gr. 518.
(x) *Matthie* v. *Edwards*, 16 L. J. Ch. 405; *Richmond* v. *Evans*, 8 Gr. 518.
(y) *Hall* v. *Ditson*, 55 How. (N. Y.) Pr. 19; 5 Abb. N. C. 198.

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 (*z*).

A provision for sale after forfeiture does not extend the time for payment in favor of the mortgagor, nor does it in any way add to, or give to, the interest of the mortgagor greater strength (*a*). 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 (*b*).

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 shown 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. 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 (*c*); 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 (*d*).

Unless there is fraud to which the purchaser is a party, a sale at private sale will pass to him a good title, even where

(z) *Nicholls* v. *Webster*, 1 Chand. (Wis.) 203: *Durfee* v. *Grinnell*, 69 Ill. 371: *McConnell* v. *Scott*, 67 Ill. 274.

(a) *Durfee* v. *Grinnell*, 69 Ill. 371.

(b) *Bradley* v. *Redmond*, 42 Iowa 452.

(c) *Ballon* v. *Cunningham*, 60 Barb. (N. Y.) 425: *Chamberlin* v. *Martin*, 43 Barb. (N. Y.) 607.

(d) *Dane* v. *Mallory*, 16 Barb. (N. Y.) 46.

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 (*e*). 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 show wherein they have produced harm (*f*).

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 effect the interests of the mortgagor or lienholders 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 (*g*); 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 (*h*).

Not infrequently is the property of others put up and sold at the auction held by a mortgagee. In fact, in Ontario, it has to a great extent become a custom to grant permission for the sale of articles belonging to others than those who control the sale. It does not follow as a matter of course

(e) *Wylder* v. *Crane*, 53 Ill. 493.
(f) *Wilson* v. *Brannan*, 27 Cal. 258.
(g) *Waite* v. *Denison*, 51 Ill. 319: *Finch* v. *Sink*, 46 Ill. 169: *McConnell* v. *Scott*, 67 Ill. 274.
(h) *Ramsey* v. *Merriam*, 6 Minn. 168.

that joining in this custom, when the sale is by a mortgagee of mortgaged property, will avoid a sale: 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 (*i*).

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 (*j*).

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; and where a clerk of the mortgagee's solicitor purchased, but paid nothing, and immediately reconveyed to the mortgagee, the sale was held invalid (*k*).

Such a purchase is none the less illegal because made by a third party for and on behalf of the mortgagee (*l*), and if the mortgagee resell at a profit, the mortgagor may claim such profit (*m*).

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 (*n*).

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 (*o*).

(i) *Waite* v. *Denison*, 51 Ill. 319.
(j) *Hungate* v. *Reynolds*, 72 Ill. 425.
(k) *Ellis* v. *Dellabough*, 15 Gr. 583.
(l) *Pettibone* v. *Perkins*, 6 Wis. 616: *Phares* v. *Barbour*, 49 Ill. 370: *Alger* v. *Farley*, 19 Iowa 518.
(m) *Cunningham* v. *Rogers*, 14 Ala. 147.
(n) *Godell* v. *Dewey*, 100 Ill. 308: *Emmons* v. *Hawn*, 75 Ind. 356.
(o) *Chamberlin* v. *Martin*, 43 Barb. (N. Y.) 607.

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 (*p*).

There is generally in every mortgage an express provision entitling the mortgagee to enter the premises of the mortgagor to get possession of, and remove the mortgaged goods; but, apart from such an express proviso, this right arises by implication; that is, of course, when and so soon as he is entitled to possession. Having the right of property, all that remains to entitle him to possession is the right thereto, and when he can combine both rights in himself he is privileged 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 (*q*); but the mortgagee, in exercising such right ought not to do so otherwise than in a peaceable and reasonable manner (*r*); 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 (*s*).

(p) *Shepherd* v. *Earles*, 13 Hun. (N. Y.) 651: *Harris* v. *Lynn*, 25 Kans. 281.

(q) *McGregor* v. *McNeil*, 32 U. C. C. P. 538: *Walfe* v. *Horne*, 2 Q. B. D. 355: *Saint* v. *Pelley*, L. R. 10 Ex. 137.

(r) *McNeal* v. *Emerson*, 15 Gray (Mass.) 384.

(s) *Richardson* v. *Anthony*, 12 Vt. 273.

CHAPTER IX.

LANDLORD'S RIGHTS.

A "distress" is defined as the taking, without legal process, of cattle, or goods, as a pledge to compel the satisfaction of a demand, the performance of a duty, or the redress of an injury (*a*). 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 (*b*). In Ontario 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 favor of a person claiming title under or by virtue of an execution against the tenant, or in favor of any person whose title is derived by purchase, gift, transfer, or assignment from the tenant, whether absolute or in trust, or by way of mortgage or otherwise, nor to the interest of the tenant in any goods on the premises in the possession of the tenant under a contract for purchase or by which he may or is to become the owner thereof upon performance of any condition, nor where goods have been exchanged between two tenants or persons, by the one borrowing or 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

(a) Woodfall on Landlord and Tenant, 14th ed., p. 672.

(b) Foa on Landlord and Tenant, 2nd ed., 383.

(c) 1894, Ont. (57 Vict.), c. 43, s. 1; 1897, Ont. (60 Vict.), c. 15, schedule A, item 60.

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" (*c*). 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 (*d*). 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 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 (*e*).

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 (*f*).

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 (*g*). When a mortgagee has taken possession of the mortgaged goods, and allows them to remain on the mort-

(d) Woodfall L. and T., 14th ed., 672.
(e) *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.
(f) *Whimsell* v. *Giffard*, 3 O. R. 1; see *Wood* v. *Nunn*, 5 Bing. 10: *Cramer* v. *Mott*, L. R. 5 Q. B. 357: *Swann* v. *Lord Falmouth*, 8 B. & C. 456: *Roe* v. *Roper*, 23 U. C. C. P. 76.
(g) *England* v. *Marsden*, L. R. 1 C. P. 529.

gagor'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 (*h*).

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 (*i*); and 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 (*j*).

By 2 Geo. II. (Imp.) c. 19, s. 1, it is enacted that: "In case any tenant or tenants, lessee or lessees for life or lives,

(h) *England* v. *Marsden*, L. R. 1 C. P., 531.

(i) *Exall* v. *Partridge*, 8 T. R. 308.

(j) *Herring* v. *Wilson*, 4 O. R. 607.

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 (*k*), therefore goods, to the possession of which a mortgagee has the right, when once removed from off the demised premises, are no longer liable to distress. 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 elude a distress (*l*), and the rent must have been in arrear at the time of the fraudulent removal (*m*). 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 purchase the property at once ceases.

(k) *Foulger* v. *Taylor*, 5 H. & N. 202.
(l) *Parry* v. *Duncan*, 7 Bing. 243.
(m) *Watson* v. *Main*, 3 Esp. 15: *Rand* v. *Vaughan*, 1 Bing. N. C. 767: *Dibble* v. *Bowater*, 2 El. & Bl. 564.

The statute enabling a landlord to sell (*n*), 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 (*o*). 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 (*p*). 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 (*q*); 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 bill of sale be registered, or there be an immediate delivery and an actual and continued change of possession (*r*).

The relation of landlord and tenant may be created by proper words between the land mortgagee and his mortgagor for the bona fide purpose of further securing the debt without being either a fraud upon creditors or an evasion of the chattel mortgage Acts (*s*).

If a landlord obtain the surrender of a lease from his tenant, then the whole of the property becomes legally vested

(n) 2 W. & M. sess. 1, c. 5.
(o) *King* v. *England*, 4 B. & S. 782.
(p) *Williams* v. *Grey*, 23 U. C. C. P. 561.
(q) *Woods* v. *Rankin*, 18 U. C. C. P. 44.
(r) *Burnham* v. *Waddell*, 28 U. C. C. P. 263; 3 A. R. 288.
(s) *Trust & Loan* v. *Lawrason*, 10 S. C. R. 679.

in the landlord without the existence or 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 (*t*). 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 (*u*). 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 the instrument from some defect arising under the statute, may be found to be immaterial when his rights as landlord can be enforced (*v*).

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 (*w*).

(t) *Clements* v. *Matthews*, 11 Q. B. D. 808.
(u) *Griffin* v. *McKenzie*, 46 U. C. R. 93.
(v) *Pitkin* v. *Fletcher*, 47 Iowa 53.
(w) *Langtry* v. *Clark*, (1896), 27 O. R. 280: 32 C. L. J. 199.

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 (*x*). 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 no 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 (*y*).

(x) R. S. O. (1887), c. 102, s. 16; R. S. O. (1897), c. 121.
(y) *Edmonds* v. *Hamilton Prov.* (1891), 18 A. R. 347.

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 (*a*). 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 (*b*), and a subsequent voluntary conveyance will not be preferred to it (*c*). But when the conveyance is obtained from the settlor by fraud, then the property will pass under a subsequent voluntary conveyance (*d*).

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 (*e*). But there is no doubt that that statute makes no distinction between creditors; and a fraudulent assignment is void against both subsequent and existing creditors (*f*), yet a creditor desiring to attack an instrument

(a) See 13 Eliz., c. 5; R. S. O. 1897, c. 115; R. S. O. 1897, c. 147.

(b) *Robinson* v. *McDonnell*, 2 B. & A. 134.

(c) *Boughton* v. *Boughton*, 1 Atk. 625: *Allen* v. *Arme*, 1 Vern. 365: *Clavering* v. *Clavering*, 2 Vern. 473.

(d) *Young* v. *Cottle*, 1 P. Wms. 192.

(e) *Kidney* v. *Coussmaker*, 12 Ves. 136.

(f) *Graham* v. *Furbur*, 14 C. B. 410; 33 L. J. C. P. 51: *Mackay* v. *Douglas*, L. R. 14 Eq. 106.

as being void must put himself in a situation to complain by getting judgment and execution (*g*).

And it has been questioned whether the liquidator of a company under the Winding Up Act of Canada, R.S.C., c. 129, can object to the want of registration or other formal defects in a chattel mortgage as a creditor or subsequent mortgagee or purchaser (*h*).

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 (*i*).

Whatever interest the mortgagor has in goods can be sold, and R.S.O., 1887, c. 64, s. 16, authorizes its sale (*j*); 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 (*k*). 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 (*l*).

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 (*m*).

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

(g) *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: *Martyn* v. *Padger*, 5 Burr. 2631: *White* v. *Morris*, 11 C. B. 1015.

(h) *Re Rainy River Lumber Co.*, 15 A. R. 749.

(i) *Evans* v. *Warren*, 122 Mass. 303: *Whitney* v. *Farrar*, 51 Me. 418: *Libby* v. *Cushman*, 29 Me. 429.

(j) *Ross* v. *Simpson*, 23 Gr. 552: R. S. O. (1897), c. 77.

(k) *Manning* v. *Monaghan*, 1 Bosw. (N. Y.) 459.

(l) *McConegny* v. *McGaw*, 31 Ala. 442.

(m) *Smith* v. *Cobourg*, 3 P. R. 113.

in consequence the mortgage may be void as against the purchaser, when it would be valid as against the debtor (*n*). The interest of a *mortgagee* in goods mortgaged may also be sold under a fi. fa. by virtue of R. S. O., 1887, c. 64, s. 17, whereby it is provided that a sheriff, acting upon a writ issued out of the High Court or County Court, shall seize any mortgages or other securities for money belonging to the persons against whose effects the writ of execution has issued (*nn*).

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 (*o*); 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 (*p*). But 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 (*q*), 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.

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

(n) *Porter* v. *Parmley*, 52 N. Y. 185.

(nn) R.S.O. (1897), c. 77.

(o) *McLeod* v. *Mercer*, 6 U. C. C. P. 197: *Goggins* v. *Gilmore*, 47 Me. 9.

(p) *Watson* v. *Henderson*, 25 U. C. C. P. 562.

(q) *Hull* v. *Carnley*, 11 N. Y. 501: *Cotton* v. *Marsh*, 3 Wis. 221: *Tannahill* v. *Tuttle*, 3 Mich. 104.

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 (*r*).

A purchaser at a sale under execution has all the rights of an 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 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 free 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 (*s*). 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.

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 mort-

(r) *Porter* v. *Parmley*, 52 N. Y. 185: *Hamill* v. *Gillespie*, 48 N. Y. 556.
(s) *McLeod* v. *Fortune*, 19 U. C. R. 98.

gages, 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 (*t*). 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 (*u*), then the mortgagor, and not the creditors garnishing, is entitled to the surplus (*v*).

(t) *Pike* v. *Colvin*, 67 Ill. 227.

(u) For list of exemptions, see R. S. O., 1887, c. 64, s. 2; R. S. O. (1897), c. 77.

(v) *Michie* v. *Reynolds*, 24 U. C. R. 303.

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 (*a*).

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 (*b*). 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

(a) *Con. Credit Corpn.* v. *Gosney*, 16 Q. B. D. 24.

(b) *Gillet* v. *Balcom*, 6 Barb. 370.

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.

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 bona 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 (*c*).

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. An instrument, absolute upon its face, may yet be shewn to be a conditional conveyance, and parol evidence will be received to shew what

(c) *Severn* v. *Clarke*, 30 U. C. C. P. 372: *Kelly* v. *Macklem*, 14 Gr. 29.

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 (*d*).

The courts will generally treat a doubtful instrument as a mortgage (*e*). "Once a mortgage, always a mortgage" is a well recognized maxim (*f*).

The right must be exercised within a reasonable time, because, 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 (*g*). 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

(d) *Le Targe* v. *Le 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. *Peachey*, 2 Atk. 207: *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.

(e) *Perry* v. *Medocraft*, 4 Beav. 197: *Williams* v. *Owens*, 10 Sims. 368.

(f) *Flanders* v. *Chamberlin*, 24 Mich. 305: *Severn* v. *Clarke*, 20 U. C. C. P. 372.

(g) *Byrd* v. *McDaniel*, 33 Ala. 18: *Perry* v. *Craig*, 3 Mo. 516.

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 (*h*). 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 (*i*). 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 (*j*), the value being fixed as of the time when the mortgagee took possession (*k*), 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 has received sufficient to pay the mortgage debt, then the mortgagor becomes entitled to the unsold property (*l*); 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 (*m*).

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. 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

(h) *Brierly* v. *Kendall*, 17 Q. B. 937.
(i) *Bingham* v. *Bettinson*, 30 U. C. C. P. 438: *Stoddard* v. *Denison*, 38 How. (N. Y.) Pr. 296, 306.
(j) *Blodgett* v. *Blodgett*, 48 Vt. 32: *Boyd* v. *Beaudin*, 54 Wis. 193: *Bingham* v. *Bettinson*, 30 U. C. C. P. 451.
(k) *Mowry* v. *First Nat. Bank*, 54 Wis. 38.
(l) *Bragelman* v. *Dane*, 69 N. Y. 69.
(m) *Faulds* v. *Harper*, 2 O. R. 405.

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 (*n*).

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 (*o*).

But, though the courts favor 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(*p*). Foreclosure is in default of redemption; where the right to foreclose exists, the right to redeem exists also (*q*).

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,

(n) *Bartlett* v. *Thynes*, 2 Hill (S. C.) Eq. 171: *Winchester* v. *Ball*, 54 Me. 558.

(o) *Chamberlin* 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. *Sheddon*, 3 Gr. 655: *Crown* v. *Chamberlain*, 27 Gr. 551.

(p) *Cook* v. *Flood*, 5 Gr. 463: *Slade* v. *Rigg*, 3 Hare 35: *Wayne* v. *Hanham*, 9 Hare 62: *Lonquet* v. *Scawen*, 1 Ves. 453.

(q) *Parker* v. *Vine Growers*, 23 Gr. 179.

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 an agreement by the mortgagor in the mortgage to give up all claim to the property upon his failure to pay the debt secured at maturity (*r*). 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 (*s*). 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 (*t*).

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.

(r) *Bunacleugh* v. *Poolman*, 3 Daly (N. Y.) 236: *Lavigne* v. *Naramore*, 52 Vt. 267.

(s) *Jones* v. *Dunbar*, 32 U. C. C. P. 136: *Wylder* v. *Crane*, 53 Ill. 490.

(t) *Per* Jessel, M. R., *Carter* v. *Wake*, 4 Ch. D. 606.

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" (*a*).

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 (*b*).

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" (*c*).

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

(a) Leith's Blackstone, 258.
(b) *Smith* v. *Butcher*, 10 Ch. D. 113.
(c) Leith's Blackstone, 259.

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. *Rowcliffe* (*d*), 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* (*e*) and of *Morrell* v. *Fisher* (*f*), that the bill of sale only operated as an assignment of the "goods and furniture specified in the inventory." In *Kingston* v. *Chapman* (*g*) 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 (*h*).

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 show verbatim such intention (*i*). 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 (*j*).

(d) 6 Ex. 407; 20 L. J. Ex. 285.
(e) 19 L. J. C. P. 302.
(f) 19 L. J. Ex. 273.
(g) 9 U. C. C. P. 130.
(h) *Gunn* v. *Ruttan*, 7 U. C. C. P. 516.
(i) *Tapfield* v. *Hillman*, 12 L. J. C. P. 311.
(j) *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 (*k*), 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 (*l*).

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 (*m*).

A valid grant may be made of after-acquired property, and a power to seize such is not revocable (*n*), not even by the death of the grantor (*o*), 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 mortgagor 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 (*p*).

(k) *Sutton* v. *Bath*, 1 Fos. & Fin. 152.

(l) *Reeve* v. *Whitmore*, 33 L. J. Ch. 63: *Topfeld* v. *Hillman*, 6 Scott N. R. 967: 6 Man. & Gr. 245: 12 L. J. C. P. 311.

(m) *Belding* v. *Read*, 3 H. & C. 955: 34 L. J. Ex. 212: *Reeve* v. *Whitmore*, 33 L. J. Ch. 63.

(n) *Lepard* v. *Vernon*, 2 Ves. & B. 51: *Broomly* v. *Holland*, 7 Ves. 28.

(o) *Spooner* v. *Sandilands*, 1 Y. & C. 390.

(p) *Coyne* v. *Lee*, 14 A. R. 503.

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 (*a*), 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, show the true time of delivery (*b*).

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 now provided that the affidavit of execution of mortgages shall contain the date of the execution of the mortgage (*c*). 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 (*d*), nor in the case of an

(a) *Hayward* v. *Thacker*, 31 Q. B. 427.
(b) *Burdett* v. *Hunt*, 25 Me. 419: *Partridge* v. *Swazey*, 46 Me. 414: *McLean & Pinkerton*, 7 A. R. 490: *Burdett* v. *Hunt*, 25 Me. 419.
(c) R. S. O. (1897), c. 148, s. 2.
(d) R. S. O. (1897), c. 148, s. 6.

agreement to make a sale (*e*); 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" (*f*).

In consequence of the statute requiring bills of sale to be registered within a limited time from their execution, and the date being prima facie evidence of the time when execution took place (*g*), 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 (*h*).

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 (*i*).

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 (*j*).

(e) R. S. O. (1897), c. 148, s. 12.
(f) R. S. O. (1897), c. 148, s. 11.
(g) *Foster* v. *Perkins*, 42 Me. 168.
(h) *Stone-breaker* v. *Kerr*, 40 Ind. 186.
(i) *Beekman* v. *Jarvis*, 3 U. C. R. 280.
(j) *Holman* v. *Doran*, 56 Ind. 358: *Hoadley* v. *Hoadley*, 48 Ind. 452.

CHAPTER XIV.

INSURANCE.

THE mortgagor and mortgagee have each an insurable interest in the property mortgaged (*a*), and each may insure for his own benefit independently of the other (*b*). 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 (*c*), 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 (*d*).

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 (*e*); 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

(a) *Richards* v. *Liverpool and London Ins. Co.*, 25 U. C. R. 401.
(b) *French* v. *Rogers*, 16 N. H. 177: *Fullon* v. *Brooks*, 4 Cush. 203: *Connover* v. *Ins. Co.*, 23 Pick. 413: *Ayers* v. *Home*, 21 Iowa 185.
(c) *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 Matt. 224: *Powles* v. *Innes*, 11 M. & W. 10.
(d) *Ogden* v. *Montreal Ins. Co.*, 3 U. C. C. P. 497.
(e) *Ogden* v. *Montreal Ins. Co.*, 3 U. C. C. P. 497.

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 (*f*).

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 (*g*); but when the loss (if any) is merely made payable to the mortgagee, such may not be the case (*h*). 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

(f) *Richardson* v. *Home*, 21 U. C. C. P. 291: *Ogden* v. *Montreal Ins. Co.*, 3 U. C. C. P. 497.

(g) *Burton* v. *Gore District Ins. Co.*, 12 Gr. 156.

(h) See *Livingston* v. *Western Ins. Co.*, 16 Gr. 9.

mortgage is not within the statutory condition against assignment, and notice of such an assignment seems unnecessary (*i*). 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 (*j*). In all cases, however, it is advisable that the company's assent 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 (*k*).

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 (*l*); 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 (*m*), 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

(i) *Burton* v. *Gore District Ins. Co.*, 14 Q. B. 342: *Sands* v. *Standard Ins. Co.*, 27 Gr. 167: *Sovereign Ins. Co.* v. *Peters*, 12 S. C. R. 33.

(j) *Pritchard* v. *Merchants*, 26 N. B. R. 232.

(k) *Western Bank* v. *Courtemanche*, 27 O. R. 213: *Greet* v. *Citizens Ins. Co.*; *Greet* v. *Royal Ins. Co.*, 5 A. R. 596.

(l) *Leland* v. *Colliver*, 34 Mich. 418.

(m) *Austin* v. *Storey*, 10 Gr. 306: *Green* v. *Hewer*, 21 U. C. C. P. 531: *Trust and Loan Co.* v. *Dennin*, 16 U. C. C. P. 321.

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 (*n*). In case of loss the insurer is entitled to be subrogated to the mortgagee's claim (*o*).

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 (*p*).

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

(n) *Carpenter* v. *Ins. Co.*, 16 Pet. 495 : *Ins. Co.* v. *Woodruff*, 2 Dutch 541 : *Smith* v. *Ins. Co.*, 17 Penn. St. 253.

(o) *Sussex* v. *Woodruff*, 26 N. J. Eq. 541 : *Honore* v. *Lamar Ins. Co.*, 51 Ill. 409 : *Norwich* v. *Boomer*, 52 Ill. 442 : *Blaaupot* 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.

(p) *Mason* v. *Sainsbury*, 3 Doug. 61 : *Yates* v. *White*, 4 Bing. N. C. 272.

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 (*q*).

(q) *Power v. Hoffman*, 31 Mich. 215.

CANADA.

STATUTES OF 1892 (55-6 VICT.)

CHAPTER 29. (CRIMINAL CODE).

3. (*v.*) The expression "property" includes :

(i) 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 ;

(ii) 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.

368. Everyone 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 ;

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

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

370. Everyone 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.

372. Everyone is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding two thousand dollars, who, knowing the existence of any unregistered prior sale, grant, mortgage, hypothec, privilege or encumbrance of or upon any real property, fraudulently makes any subsequent sale of the same, or of any part thereof.

STATUTES OF 1897 (60 VICT.)

CHAPTER 8.

[Assented to 29th June, 1897].

An Act respecting Interest.

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. This Act may be cited as *The Interest Act*, 1897.

2. 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 six 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 (1).

(1) This new Act renders it necessary that chattel mortgages heretofore drawn at a rate per month shall shew also the yearly rate to which the monthly or other rate is "equivalent," and is particularly aimed at a class of brokers whose interest charges are at a rate per day, per week or per month the enormity of which is perhaps not realized by the borrower 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.

3. 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.

4. This Act shall not apply to mortgages on real estate (2).

(2) 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.

Act in force
B.C. 1905 - C. & S. 8.
Amended 1908. Cap. 2.

BRITISH COLUMBIA.

CONSOLIDATED STATUTES, 1888.

CHAPTER 8.

An Act to amend the law relating to Bills of Sale.

Her 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 "Bills of Sale Act." R. L. No. 142, s. 16.

Interpretation.

2. In construing this Act the following words and expressions shall have the meaning hereby assigned to them, unless there be something in the subject or context repugnant to such construction; that is to say:

(*a*) The expression "Bill of Sale" shall include bills of sale, assignments, transfers, declarations of trust without transfers, and other assurances of personal chattels (1) and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, 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 section 74 of the "Banking Act," 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 document to transfer or receive goods thereby represented. [As amended by 1892, c. 3, s. 1].

(1) It will be observed that verbal sales are not included because there is nothing in such a case that can be registered, and there is nothing in the Act to require that verbal sales shall be evidenced by some written document (*a*).

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 (*b*).

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 (*c*).

(*b*) Any goods, or furniture, or fixtures, or any interest of any kind therein, or any articles capable of complete transfer by delivery, shall be deemed to be and to have been included within the meaning of the term "personal chattels," but any chattel interest in real estate, or shares or interests in the stock,

(a) *Esnouf* v. *Gurney* (1895) 4 B. C. R. 144.
(b) *Charlesworth* v. *Mills* (1892) A. C. 231.
(c) *Esnouf* v. *Gurney*, 4 B. C. R. 144; *Ramsay* v. *Margrett* (1894) 2 Q. B. 18: *North Central* v. *Manchester*, 35 Ch. D. 205; 13 App. Cas. 554: *Re Watson*, 25 Q. B. D. 33.

funds, or securities of any Government, or in the capital or property of any incorporated or joint stock company, or any stock or produce upon any farm or lands which, by virtue of any covenant or agreement, ought not to be removed from any farm where the same shall be at the time of the making or giving of such bill of sale, shall not be deemed to be or to have been included within the meaning of such term; but this amendment shall not be deemed to in anywise affect any actions pending in any of the Courts of this Province. [Amendment of 1894, c. 2, s. 2.]

(*c*) 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, or other premises occupied by him (1), or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession (2) thereof may have been taken by or given to any other person.

(1) 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 (*d*).

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 (*e*).

(2) "Formal possession" means nothing more than nominal possession (*f*). As where the grantor went in and out of

(d) *Brackman* v. *McLaughlin* (1894) 3 B. C. R. 265.
(e) *Per* Drake J. ib. at p. 267.
(f) *Brackman* v. *McLaughlin* (1894) 3 B. C. R. 265.

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 (*g*): 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 (*h*).

(*d*) The term "Vancouver Island," shall be held to include that part of the Province formerly being the Colony of Vancouver Island; and the term "Mainland of British Columbia," shall be held to include the remaining portion of the Province. R. L. No. 142, s. 15.

Registration.

3. Every Bill of Sale (1) of personal chattels made 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, either with or without notice, and either immediately after the making of such Bill of Sale, or at any future time, to seize or take possession of any property and effects comprised in or made subject to such Bill of Sale, and every schedule and inventory which shall be thereto annexed or therein referred to, or a true copy thereof, and of every attestation of the execution thereof, shall, together with an affidavit of the time of such Bill of Sale being made or given, and a description of the residence and occupation of the person making and giving the same, or in case the same shall be made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process shall have issued,

(g) *Seal* v. *Claridge*, 7 Q. B. D. 516.
(h) *Ex parte Hooman*, L. R. 6 Ch. App. 63: *Ex parte Lewis*, L. R. 6 Ch. App. 626.

and of every attesting witness to such Bill of Sale, be registered as follows :—If affecting property on Vancouver Island, by filing the same in the office of the Registrar-General of Titles at Victoria; if affecting property on the Mainland of British Columbia, within the limits of any Land Registry District for the time being established, by filing the same in the office of the Registrar of the District in which the property affected is situate; if affecting property elsewhere on the Mainland of British Columbia by filing the same in the office of the stipendiary magistrate of the District in which the property intended to be affected is situate, or in the office of some other person appointed in that behalf; and the said Bill of Sale, or copy thereof with affidavit as aforesaid, shall in all cases hereinbefore mentioned be so filed within twenty-one days after the making or giving of such Bill of Sale, otherwise such Bill of Sale shall as against all assignees of the estate and effects of the person whose goods, or any of them, are comprised in such Bill of Sale, under the laws relating to bankruptcy or insolvency (2), or under any assignment for the benefit of the creditors of such person, and 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 as against every person on whose behalf such process shall have been issued and as against subsequent purchasers or mortgagees in good faith 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 personal chattels comprised in such Bill of Sale,

which at or after the time of such bankruptcy or of filing the insolvent's petition in such insolvency, or of the execution by the debtor of such assignment for the benefit of his creditors, or of executing such process, or of such purchase or mortgage (as the case may be), and after the expiration of the said period of twenty-one days, shall be in the possession or apparent possession (3) of the person making 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 (4). The affidavit aforesaid may be in the form (5) in the Schedule hereto annexed marked A. R. L. No. 142, s. 2. [As amended by 1892, c. 3, s. 2; and 1893, c. 3, s. 2.]

(1). The expression "Bill of Sale" is partly interpreted by section 2 of the Act.

The Act, however, does not affect parol contracts of purchase and sale (*i*). 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 (*j*).

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., c. 15, under which it has recently been held that a bona fide demand

(i) *Esnouf* v. *Gurney* (1895) 4 B. C. R. at p. 146.

(j) *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.

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 (*k*).

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 bona fide debt, if the mortgagee is not aware of the debtor being in insolvent circumstances (*l*).

(2). See Consolidated Acts 1888, c. 51, s. 2, and R. S. O. 1897, c. 147; R. S. O. 1887, ss. 2 and 3.

(3). 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 (*m*).

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 (*n*).

See also definition of "apparent possession," subsection (*c*) of section 2, and notes thereto. The question is, if anyone went there would he conclude that the debtor was in sole possession (*o*).

(4). This section and that following are taken from sec-

(k) *Brown* v. *Jowett* (1895) 4 B. C. R. 44; and see *Stephens* v. *McArthur*, 19 S. C. R. 446.

(l) *Stewart* v. *Wilson* (1894) 3 B. C. R. 369, *per* Drake J.: *Molsons Bank* v. *Halter*, 18 S. C. R. 95: *Stephens* v. *McArthur*, 19 S. C. R. 446: *Gibbons* v. *McDonald*, 20 S. C. R. 577; *Doll* v. *Hart*, 2 B. C. R. 32.

(m) *Brackman* v. *McLaughlin* (1894) 3 B. C. R. 265.

(n) Ib.

(o) *Per* Drake, J., in *Brackman* v. *McLaughlin*, 3 B. C. R. at p. 268.

tions 1 and 2 of the Imperial Act of 1854 (17-18 Vict., c. 36). The policy of section 3 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 (*p*).

(5). The form is as follows: "Subscribed to and sworn before me this day of A.D., 18 ."

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 (*q*).

4. If such Bill of Sale shall be made or given, subject to any defeasance, or condition, or declaration of trust not contained in the body thereof, such defeasance, condition (1), or declaration of trust, shall, for the purpose of this Act, be taken as part of such Bill of Sale, and shall be written on the same paper or parchment on which such Bill of Sale shall be written, before the time when the same, or a copy thereof respectively, shall be filed, otherwise such Bill of Sale shall be null and void to all intents and purposes as against the same persons and as regards the same property and effects as if such Bill of Sale, or a copy thereof, had not been filed according to the provisions of this Act. R.L. No. 142, s. 4.

(1) So 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

(p) *Matheson* v. *Pollock* (1893) 3 B. C. R. 74; Fisher on Mortgages, 1st ed. 20.

(q) *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.

mortgage with all the incidents of one, and the condition of defeasance not being embodied in it, it becomes void under this section (*r*).

As 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 (*s*).

5. Where such Bill of Sale, or copy thereof, with affidavit aforesaid, is filed elsewhere than in a Land Registry Office, a duplicate thereof (duly certified as in form B in the Schedule to this Act) shall be forwarded by the first opportunity, free of charge, by the person in whose office it is filed, to the Registrar-General, or, in case the office of such person is within the limits of any Land Registry District for the time being established, such duplicate shall be forwarded to the District Registrar of such District, to be deposited in his office. R.L. No. 142, s. 3. [As amended by 1895, c. 2, s. 3].

6. Where a duplicate of a Bill of Sale, or copy thereof, is required to be forwarded by the officer filing the same to the Registrar-General, or a District-Registrar, the person requiring registration shall furnish such duplicate at the time of his application for registration. [Amendment of 1895, c. 2, s. 4].

7. Notwithstanding anything in this Act contained, it shall be a sufficient compliance with this Act, if such Bill of Sale of personal chattels, when executed on the Mainland of British Columbia, and east of the Cascade Range of mountains, be registered

(r) *Matheson* v. *Pollock* (1893) 3 B. C. R. 74.

(s) *Doll* v. *Hart*, 2 B. C. R. 32.

within thirty days from the time of the making or giving such Bill of Sale: Provided that the said Bill of Sale is in all other respects registered in accordance with the provisions of this Act. 1873, No. 30, s. 5.

District Registries.

8. It shall be lawful for the Lieutenant-Governor-in-Council, from time to time, to appoint as many justices of the peace, or other fit and proper persons, to perform the duties allotted to stipendiary magistrates in this Act; and such Lieutenant-Governor-in-Council may prescribe the limits of the Districts of the Province within which such persons shall respectively perform such duties. 1873, No. 30, s. 7.

9. Notwithstanding anything hereinbefore contained, the Lieutenant-Governor-in-Council may from time to time, by proclamation in the British Columbia Gazette, define and from time to time vary districts, and appoint proper persons in such districts, by whom and in whose offices Bills of Sale may be filed and registered. From and after such proclamation, all Bills of Sale affecting property in any such districts which should theretofore have been elsewhere filed shall be filed and registered in such district office. [Amendment of 1895, c. 2, s. 5.]

10. Every person so appointed shall file and register such Bills of Sale and forward duplicates thereof to the Registrar-General of Titles, or the Land Registrar of the District in which such office is situate, in like manner as is provided in sections 5 and 6 hereof. [Amendment of 1895, c 2, s. 6.]

11. As to every Bill of Sale within the meaning of this Act, executed within the New Westminster

Land Registry District, and affecting property therein, it shall not be necessary to file the same, or a copy thereof, with any other officer than the Deputy-Registrar of that District; but such Bill of Sale, or true copy thereof, with the affidavit, shall be filed in his office, and it shall not be necessary to file in his office more than the original Bill of Sale, or a true copy thereof with affidavit, but otherwise the conditions of this Act shall be complied with and govern such Bills of Sale. 1885, c. 17, s. 3.

12. Every Bill of Sale of personal chattels, being a Bill of Sale of personal chattels within the meaning of this Act, 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. 1873, No. 30, s. 1.

13. Where two or more such Bills of Sale of the same personal chattels shall be registered in accordance with the provisions of this Act, the said Bills of Sale shall, as between themselves, have priority according to the times when such Bills of Sale respectively were made. 1873, No. 30, s. 2.

14. The registration, in accordance with the provisions of this Act, of any such Bill of Sale of personal chattels, shall, from the time of such registration, have the same effect as if the goods and chattels assigned by such Bill of Sale had been bona fide delivered to and retained by the grantee or assignee under such Bill of Sale. 1873, No. 30, s. 3.

15. Nothing in the three last preceding sections contained shall affect or apply to any Bill of Sale, transfer, or sale of personal chattels, when the

grantee, assignee, transferee, or vendee shall have such chattels bona fide delivered to him at the time of making such Bill of Sale, transfer, or sale. 1873, No. 30, s. 4.

Quinquennial Renewal.

16. The registration of a Bill of Sale shall, during the subsistence of such security, be renewed in manner hereinafter mentioned once in every period of five years, commencing from the day of registration, and if not so renewed such registration shall cease to be of any effect at the expiration of any period of five years during which a renewal has not been made as hereby required. R. L., No. 142, s. 6.

17. The registration of a Bill of Sale shall be renewed by some person filing in the office of the said Registrar-General of Titles, or stipendiary magistrate, or other person as aforesaid, an affidavit, stating the date of such Bill of Sale, and the names, residences, and occupations, of the respective parties thereto, as stated therein, and also the date of the registration of such Bill of Sale, and that such Bill of Sale is still a subsisting security, and the Registrar-General of Titles, or stipendiary magistrate, or other person as aforesaid, shall thereupon number such affidavit, and re-number the original Bill of Sale or copy filed in the said office with a similar number. R. L. No. 142, s. 7.

18. Every affidavit renewing the registration of a Bill of Sale may be in the form C. given in the Schedule to this Act, and where such affidavit is filed in the office of the stipendiary magistrate or other person as aforesaid, a duplicate thereof, certified as such by the magistrate or other person as aforesaid, shall be transmitted by the first oppor-

tunity by the said magistrate or other person as aforesaid, to the office of the Registrar-General, to be there deposited. R. L. No. 142, s. 8.

Satisfaction.

19. The Registrar-General, and every stipendiary magistrate and other person so appointed as aforesaid, is hereby empowered to enter satisfaction upon any Bill of Sale, or copy thereof, upon being satisfied that the debt (if any) for which such Bill of Sale is given as security has been discharged, upon payment of one dollar; but in all cases where the consent of the grantee, assignee, or mortgagee, 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. R. L. No. 142, s. 12; 1879, c. 1, s. 3.

20. Whenever any stipendiary magistrate, or other person thereto duly authorized, shall enter satisfaction upon any Bill of Sale, or copy thereof, registered in his office, he shall forward a notice of such satisfaction, by the first opportunity, free of charge, to the Registrar-General; and such notice shall be in the form E in the Schedule hereto, and the Registrar-General is hereby authorized, on receiving such notice, to write the word "satisfied" on the duplicate (of such satisfied Bill of Sale) deposited in his office. 1873, No. 30, s. 6, part.

Affidavits.

21. All affidavits required by this Act to be taken and made, may be taken by and made before the Registrar-General, or stipendiary magistrate, or other person as aforesaid, 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, and if such affidavits are made without the Province, then such affidavits may be taken by and made before any notary public practising as such in the place where such affidavits are taken or made. R. L. No. 142, s. 11; 1888, c. 1, s. 2.

Office Regulations.

22. The Registrar-General, and stipendiary magistrate, and other person as aforesaid, shall cause every Bill of Sale, and every such schedule and inventory as aforesaid, and every such copy, and every affidavit of renewal, 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 affidavit of renewal, 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 affidavit of renewal as aforesaid; and the date of the said Bill of Sale, or copy, and of the registration thereof, and the date of the filing of the said affidavit of renewal and all such particulars shall be entered according to the form D 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. R. L. No. 142, s. 9; 1888, c. 1, s. 1.

23. The Registrar-General, and stipendiary magistrate, and other person appointed as aforesaid, shall keep an index book showing 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 section of this Act provided; and the Registrar-General 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. R.L. No. 142, s. 14.

24. The said Registrar-General, and every stipendiary magistrate, and other person as aforesaid, shall be entitled to receive for filing every Bill of Sale, or a copy thereof, or affidavit of renewal 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, or of an affidavit of renewal as aforesaid, upon paying for the same at the rate of twenty-five cents per folio of one hundred words. R.L. No. 142, s. 10.

25. All moneys, other than charges made for taking and furnishing copies of Bills of Sale, affidavits, and other documents (which shall be retained by the person taking and furnishing the same for his own use) received by the Registrar-General and stipendiary magistrate, and other person appointed as aforesaid, under this Act shall be paid into the Treasury for the use of Her Majesty, her heirs and successors. R.L. No. 142, s. 13.

THE SCHEDULE.

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 eight 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 the making and giving the said Bill of Sale, resided and still resides at , and then was and still is

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 , and am

Subscribed to, and sworn before me this day of A.D. 18 . R.L. No. 142, Sch.

FORM B.

I hereby certify that the document hereunto annexed is a duplicate 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 , 18 .

A. B.
Stipendiary Magistrate

To the Registrar-General,

R.L. No. 142, 1 Sch.

FORM C.

I, A.B., of , do swear that a Bill of Sale, bearing date the day of , 18 , and made between , and which said Bill of Sale (*or*, "and a copy of which said Bill of Sale," *as the case may be*) was filed in the office of the Registrar-General of Titles (*or*, in the office of the stipendiary magistrate, *or*), on the day of , 18 , and is still a subsisting security.

Subscribed to, and sworn before me, this day of , 18 .

A.B.

R.L. No. 142, Sch.

FORM D.

No.	By whom given.			To whom given.	Nature of Instrument.	Date of Instrument.	Date of Registration.	Date of filing of affidavit of renewal.	Amount of purchase or mortgage money.	Short particulars of property sold or mortgaged.	Date of satisfaction entered.
	Name.	Address.	Occupation.								

1888, c. 1, s. 3.

FORM E.

To the Registrar-General :

Take notice that a Bill of Sale bearing date the day of , A.D. 18 , made between of and of , in consideration of the sum of $, has been satisfied, and satisfaction thereof was duly entered by me, on the day of , A.D. 18 .

A. B.,
Stipendiary Magistrate, etc., at

1873, No. 30, S n.

STATUTES OF 1892.

CHAPTER 3.

An Act to amend the "Bills of Sale Act."

[*23rd April, 1892.*]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. Section 2 of the "Bills of Sale Act" is hereby amended by inserting between the words "lading" and "warehouse," in sub-section (*a*) of the said section, the words "any securities that may be taken under section 74 of the 'Banking Act.'"

2. Section 3 of the "Bills of Sale Act" is hereby amended by striking out all the words after "follows," in the 16th line of said section, to and inclusive of "therein," in the 19th line thereof, and by inserting in lieu thereof the words "if affecting property on Vancouver Island, by filing the same in the office of the Registrar-General of Titles at Victoria; if affecting property on the Mainland of British Columbia, and within any District for the time being established under this Act, by filing the same in the office of the Registrar of the District in which the property affected is situate; if affecting property elsewhere on the Mainland of British Columbia;" and by inserting after the word "issued," in the 34th line of said section, the words "and as against subsequent purchasers or mortgagees in good faith for valuable consideration;" and by inserting after the word "process," in the 40th line of said section, the words "or of such purchase or mortgage." [As amended by 1893, c. 3, s. 2.]

STATUTES OF 1893.

CHAPTER 3.

An Act to amend the "Bills of Sale Act."

[*12th April, 1893.*]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. This Act may be cited as the "Bills of Sale Act Amendment Act, 1893."

2. Section 2 of 55 Victoria, chapter 3, intituled "An Act to amend the 'Bills of Sale Act,'" is hereby amended by striking out the words "and within any district for the time being established under this Act," in lines 6 and 7 of said section, and inserting in lieu thereof the words "within the limits of any Land Registry District for the time being established."

STATUTES OF 1894.

CHAPTER 2.

An Act to amend the "Bills of Sale Act."

[*11th April, 1894.*]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. This Act may be cited as the "Bills of Sale Act Amendment Act, 1894."

2. The "Bills of Sale Act" is hereby amended by striking out subsection (*b*) of section 2 thereof, and inserting in lieu thereof the follov ng:—

"(*b.*) Any goods, or furniture, or fixtures, or any interest of any kind therein, or any articles capable of complete transfer by delivery, shall be deemed to be and to have been included within the meaning of the term 'personal chattels,' but any chattel interest in real estate, or shares or interests in the stock, funds, or securities of any Government, or in the capital or property of any incorporated or joint stock company, or any stock or produce upon any farm or lands which, by virtue of any covenant or agreement, ought not to be removed from any farm where the same shall be at the time of the making or giving of such bill of sale, shall not be deemed to be or to have been included within the meaning of such term; but this amendment shall not be deemed to in anywise affect any actions pending in any of the Courts of this Province."

STATUTES OF 1895.

CHAPTER 2.

An Act to amend the law relating to Bills of Sale.

[*21st February, 1895.*]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. This Act may be cited as the "Bills of Sale Amendment Act, 1895."

2. The expression "Bill of Sale" has, in this Act. the meaning assigned to it by the "Bills of Sale Act."

3. Section 5 of the "Bills of Sale Act" is hereby

repealed, and the following section is substituted therefor:—

"5. Where such Bill of Sale, or copy thereof, with affidavit as aforesaid, is filed elsewhere than in a Land Registry Office, a duplicate thereof (duly certified as in form B in the Schedule to this Act) shall be forwarded by the first opportunity, free of charge, by the person in whose office it is filed, to the Registrar-General, or, in case the office of such person is within the limits of any Land Registry District for the time being established, such duplicate shall be forwarded to the District Registrar of such District, to be deposited in his office."

4. Section 6 of the "Bills of Sale Act" is hereby repealed, and the following section is substituted therefor:

"6. Where a duplicate of a Bill of Sale, or copy thereof is required to be forwarded by the officer filing the same to the Registrar-General, or a District Registrar, the person requiring such registration shall furnish such duplicate at the time of his application for registration."

5. Section 9 of the "Bills of Sale Act" is hereby repealed, and the following section is substituted therefor:

"9. Notwithstanding anything hereinbefore contained, the Lieutenant-Governor-in-Council may from time to time, by proclamation in the British Columbia Gazette, define and from time to time vary districts, and appoint proper persons in such districts, by whom and in whose offices Bills of Sale may be filed and registered. From and after such proclamation all Bills of Sale affecting property in any such district which should theretofore have been

elsewhere filed shall be filed and registered in such District Office."

6. Section 10 of said Act is hereby repealed, and the following section is substituted therefor :

"10. Every person so appointed shall file and register such Bills of Sale and forward duplicates thereof to the Registrar-General of Titles, or the Land Registrar of the district in which such office is situate, in like manner as is provided in sections 5 and 6 hereof."

7. Notwithstanding any law to the contrary, it shall only be necessary, in the case of Bills of Sale made or given by companies or corporations aggregate which have a registered head office or chief place of business in British Columbia, that the Bill of Sale, or a copy thereof, be registered in the Land Registry Office in which such head office or chief place of business is situate at the time of the making or giving of such Bill of Sale, notwithstanding the fact that the property included in such Bill of Sale or a portion thereof may be without the limits of such Land Registry district; but in such case a duplicate thereof, duly certified as in form B in the Schedule to said Act, shall be forwarded by the first opportunity, free of charge, by the person in whose office it is filed to the proper officer in whose district the chattels, or any portion of the chattels, mentioned in such Bill of Sale are or is situate, to be deposited in his office.

8. The affidavit required to be made and registered by section 3 of the "Bills of Sale Act" shall, in the case of all companies and corporations aggregate, be made by the person or one of the persons who has or have executed the Bill of Sale on behalf

of the company or corporation, and may be in the following form, or as nearly thereto as the circumstances of the case shall permit :—

"BILLS OF SALE ACT."

For a Company or Corporation.

I, of , (President, Secretary *or* 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 *or* 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 A.D. 18 .

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.

STATUTES OF 1896.

CHAPTER 3.

An Act to further amend the "Bills of Sale Act."

[*17th April, 1896.*]

Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:—

1. This Act may be cited as the "Bills of Sale Amendment Act, 1896."

2. Bills of Sale affecting property situate in the electoral district of Cassiar, may, in lieu of being filed in the first instance with the proper officer in the District, be filed in the office of the Registrar-General at Victoria, and a duplicate shall be furnished by the party applying for registration, which shall be forwarded to the proper officer in the District.

3. Any Bill of Sale affecting property in Cassiar electoral district which has heretofore been executed, but the registration of which within the time and in the manner provided by law has been prevented by distance, may be registered as herein provided, and, upon such registration, shall have priority as from the date of such registration.

MANITOBA.

REVISED STATUTES, 1891.

CHAPTER 10.

An Act respecting Bills of Sale and Mortgages of Chattels.

[*In force 20th April, 1892.*]

SHORT TITLE ..... s. 1.

SALES ..... s. 2.

In certain cases to be in writing and filed, s. 2.

MORTGAGES ..... ss. 3-8.

Mortgage of chattels to be filed with certain affidavits, s. 3.

Growing and future crops may be mortgaged, s. 4.

Mortgages to secure future advances, endorsements, &c., s. 5.

Assignment of chattel mortgage may be filed, s. 6.

Mortgage filed to cease to be valid unless renewed within 30 days before expiration of two years, s. 7.

Next of kin or certain others can make affidavit, s. 8.

DISCHARGE OF MORTGAGE ..... ss. 9-11.

Discharge, Form of, s. 9.

Execution of discharge to be proven by affidavit, s. 10.

Discharge to have no force until filed, s. 11.

DESCRIPTION OF GOODS ..... s. 12.

The instrument to contain full description of goods, &c., s. 12.

OFFICERS TO TAKE AFFIDAVITS ..... s. 13.

FILING ..... ss. 14-16.

Where to be filed, s. 14.

Duties of Clerk, s. 15.

Clerk to certify discharge—Form of certificate, s. 16.

EVIDENCE ..... s. 17.

Certified copies with endorsements to be received as evidence of filing, s. 17.

FEES OF CLERK ..... s. 18.

Her Majesty, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows :—

SHORT TITLE.

1. This Act may be cited as "The Bills of Sale Act" (1).

(1) This statute is apparently framed after that of Ontario.

In many particulars there is not a verbatim similarity between the statutes, yet the legislation so far agrees that we venture to refer the Manitoban practitioner to the annotation of the Ontario Act.

Sales.

2. Every sale of goods and chattels hereafter made in the Province of Manitoba, not accompanied by an immediate delivery, and not followed by an actual and continued change of possession (1) 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 (2) of the bargainee or his agent that the sale is bona fide and for valuable consideration as set forth in the said conveyance (3), and not for the purpose of holding or enabling the bargainee to hold the goods mentioned therein against the creditors of the bargainor; and such conveyance and affidavits shall be filed as hereinafter provided, otherwise the sale shall be absolutely void as against the creditors of the bargainor, and as against subsequent purchasers and mortgagees in good faith for valuable consideration (4) without actual notice (5) and such conveyance shall only affect such creditors and subsequent pur-

chasers and mortgagees from and after the time of filing thereof. C. S. M. c. 49, s. 3; 48 V. c. 35, s. 3; 54 V. c. 8, s. 1.

(1) 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 (*a*).

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 (*b*).

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 (*c*).

The case of *Jackson* v. *Bank of Nova Scotia* (1893) 9 Man. 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 (*d*).

(a) *Per* Bain J. *Robertson* v. *Wrenn* (1895) 10 Man. R. 378.
(b) *Robertson* v. *Wrenn* (1895) 10 Man. R. 378; and see *Danford* v. *Danford*, 8 A. R. 518.
(c) *Hovey* v. *Whiting*, 14 S. C. R. 515: *Trust & Loan* v. *Wright* (1895) 11 Man. R. 314.
(d) *Trust & Loan* v. *Wright* (1895) 11 Man. R. 314.

Brown v. *Peace* (1897), 11 Man. R. 409, is authority for the rule that notwithstanding an ante-nuptial settlement made by the husband, including the household furniture in question, in favor 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* (*e*), 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* (*e*).

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 present transfer, but states that the bargainor "hath bargained, sold and assigned," etc., and "by these presents doth bargain, sell, assign," etc.

(2) 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 (*f*).

(3) Mr. Justice Bain, in delivering the judgment of the Court in *Bathgate* v. *Merchants Bank* (*g*), 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* (*h*).

(4) While under the Ontario Act a *good* consideration will be sufficient to sustain a bill of sale, it must, under this section, be a *valuable* one. 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.

(5) "Without actual notice." It will be observed that these words do not appear in the corresponding section three, relating to mortgages.

(e) (1894) 2 Q. B. 18; see also *Bank of B. N. A.* v. *McIntosh*, 11 Man. R. 503.

(f) *Inman* v. *Rae* (1895) 10 Man. R. 411; and see *Farmers and Traders* v. *Conklin*, 1 Man. R. 181; *Ford* v. *Kettle*, 9 Q. B. D. 143.

(g) 5 Man R. 210.

(h) (1897) 11 Man. R. 555; 33 C. L. J. 407; see also *Darlow* v. *Bland* (1897) 1 Q. B. 125; *Parkes* v. *St. George*, 10 A. R. 496.

Mortgages.

3. Every mortgage (1) or conveyance intended to operate as a mortgage of goods and chattels (2) hereafter made in the Province of Manitoba, which is not accompanied by an immediate delivery, and not followed by an actual and continued change of possession (3), of the things mortgaged, or a true copy thereof, may be filed as hereinafter provided, together with an affidavit of a subscribing 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 one of several mortgagees, or his or their 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 (4); and every such mortgage (5) or conveyance shall operate and take effect (6) upon, from and after the day and time of filing thereof and not before as against execution creditors of the mortgagor and as against purchasers or mortgagees in good faith (7) for valuable consideration (8). C. S. M., c. 49, s. 1; 48 V., c. 35, s. 1 [As amended by 1894, c. 1, s. 1].

(1) If the transaction is in fact a transfer simply as security, the provisions of this section should be followed, and not those of section 2, and a bill of sale absolute in form and registered with an affidavit of bona fides, pursuant to section 2, 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 2 (*a*).

(2) 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 (*b*).

(3) It will be observed that the words "which is not accompanied by an immediate delivery, and not followed by an actual and continual change of possession of the things mortgaged," differ slightly from the corresponding words in the Ontario Act, the words "not followed by" being omitted from the latter statute. It is presumed their insertion does not alter the legal meaning or effect of the sentence from that given to the corresponding words in the Ontario Act. The "immediate delivery" and "the actual change of possession" are intended to be simultaneous. The change of possession is the consequence of the immediate delivery, but both are one and the same manual Act.

(4) 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 bona fides (*c*); but the Ontario authorities are the other way (*d*).

(5) "Such mortgage" means one that has been filed together with the affidavits of execution and bona fides.

The former provision in the Consolidated Statutes 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

(a) *Boddy* v. *Ashdown* (1897) 11 Man R. 555; *Bathgate* v. *Merchants Bank*, 5 Man. R. 210: *Matheson* v. *Pollock*, 3 B. C. R. 74.
(b) *Waterous* v. *Henry*, 1 Man. R. 36.
(c) *Ontario Bank* v. *Miner*, Armour's Man. R., Temp. Wood, p. 162.
(d) *Re Andrews*, 2 A. R. 24.

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 2 (*e*).

(6) 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 (*f*).

(7) 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 (*g*).

(8) 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 (*h*).

But an assignee under R.S.M., c. 7, is given powers analogous to those of a trustee in bankruptcy and is therefore not barred from setting up the want of registration (*i*).

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 to sue as representing creditors (*j*).

(2) In case a grantee or mortgagee under section 2 or 3 of this Act be a corporation, then the affidavit of bona fides, required under such section, may be made by the president or other head officer, or by the vice-president, manager, treasurer or secretary of the corporation, whether the same be a

(e) *Inman* v. *Rae* (1895) 10 Man. R. 411.

(f) *Massey* v. *Clement* (1893) 9 Man. R. 359.

(g) *Roff* v. *Krecker* (1892) 8 Man. R. 230, overruling *King* v. *Kuhn*, 4 Man. R. 413; see also *Moffatt* v. *Coulson*, 19 U. C. R. 341: *Tidey* v. *Craib*, 4 O. R. 696: *Marthinson* v. *Patterson*, 20 O. R. 720.

(h) *Roff* v. *Krecker* (1892) 8 Man. R. 230.

(i) *Bertrand* v. *Parkes* (1892), 8 Man. R. 175.

(j) *Burland* v. *Moffatt*, 11 S. C. R. 76.

foreign or domestic corporation, and whether such president or other officer be, or be not, resident in this province; and in case of a foreign corporation such affidavit may be made by any general or local manager, secretary or agent of the corporation in the province (9). [Amendment of 1894, c. 1, s. 1.]

(9) 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 (*k*).

4. Every 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 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 (1); or be made, executed or created as a further or substituted security for a debt, which, on the first day of March A.D., 1894, is already secured by a mortgage upon the crop of the mortgagor to be grown during the year 1894 and interest on such debt. Provided, however, that no such further or substituted security shall be valid after the thirty-first day of December A.D., 1897. [1894, c. 1, s. 2, as added to by 1896, c. 1, s. 1.]

(1) This 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 (*l*).

(k) *Massey* v. *Clement*, 9 Man. R. 359.
(l) *Kirchhoffer* v. *Clement* (1897), 11 Man. R. 460.

(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 Act, and the affidavit of the mortgagee or his agent, shall contain a statement that the same is taken to secure the purchase price of seed grain (2). [Added 1894, c. 1, s. 2.]

(2) This sub-section is not complied with if the affidavit of bona fides, instead of following the words of the statute, contains a statement that the mortgage is taken "for seed grain" (*l*); and the Interpretation Act, R. S. M., c. 78, s. 8, s-s. (uu), does not cure the defect (*l*). A divergence from a statutory form is not necessarily immaterial because it does not alter the effect of the instrument (*m*). This sub-section is partly due to the decision in *Clifford* v. *Logan* (*n*) in 1894, in which it was held that under the Act, as it then stood, a chattel mortgage covering crops to be grown did not require filing, and was not within the Act, it being considered there that the wording of the Act shews that they apply only to goods and chattels of which there *can* be an immediate delivery followed by an actual and continued change of possession. Chattel mortgages on crops are no longer to be effectual unless given to secure the price of seed grain (s. 4), and by this sub-section must be proved and registered. Other personalty not capable of complete transfer by delivery remains unaffected by the Act (*n*).

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

(m) *Thomas* v. *Kelly*, 13 A. C. 506.

(n) *Clifford* v. *Logan*, 9 Man. R. 423: *Hamilton* v. *Harrison*, 46 U. C. R. 127.

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 a 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 (57 Vict. c. 1.), come under the Bills of Sale Act (*o*).

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 (*o*).

(3) Every County Court clerk shall keep a separate register of such seed grain mortgages, and shall deliver a copy of such register to any person applying therefor, on payment of a fee of fifty cents. [Added 1894, c. 1, s. 2.]

(4) Every mortgage or encumbrance 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 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 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. [Added 1895, c. 3.]

5. In case of an agreement for future advances

(o) *Bank of British North America* v. *McIntosh* (1897), 11 Man. R. 503 *per* Taylor, C. J., Killam, J., and Bain, J.

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 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 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 liability intended to be created, and in case such mortgage is accompanied by the 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 filed as hereinafter provided, the same shall be as valid and binding as mortgages mentioned in the third section of this Act, but, except as between the parties thereto, only from and after the time of

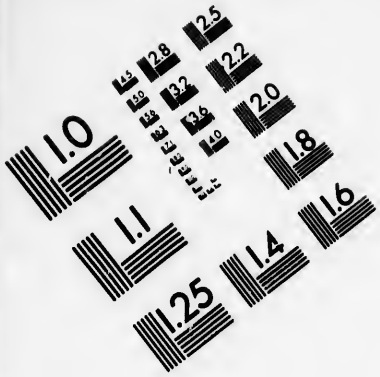
filing thereof. C. S. M., c. 49, s. 4; 44 V. 3rd sess., c. 11, s. 63; 48 V., c. 35, s. 4; 54 V., c. 8, s. 2.

6. Any assignment of a chattel mortgage (1) may be filed in the office in which the mortgage is filed, upon an affidavit of the due execution of such assignment and payment of the same fee as is required on filing a chattel mortgage. 46-47 V., c. 34, s. 7.

(1) This means a mortgage to which the Act applies, and which has already been registered.

7. Every mortgage, the original or a copy whereof is filed in pursuance of this Act or of "The Chattel Mortgage Act," shall cease to be valid as against the creditors of the persons making the same, and as 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 (1), a statement exhibiting the interest of the mortgagee or his executor, administrator, assignee or assignees in the property claimed by said mortgagee, and a full statement of the amount still due for principal and interest thereon and of all payments made on account thereof, be again filed in the office of the Clerk of the County Court of the judicial division wherein the original mortgage was filed, with an affidavit of the mortgagee or of one of several mortgagees, or of the assignee, or one of several assignees, or his or their agent, stating that such statement is true and that the said mortgage has not been kept on foot for any fraudulent purpose. C. S. M., c. 49, s. 8; 53 V., c. 2, s. 47, part [As amended by 1894, c. 1, s. 3].

(1) The words "a true copy of such mortgage, together with" which preceded "a statement, etc.," in the original Act, were struck out by the amendment of 1894, c. 1, s. 3.



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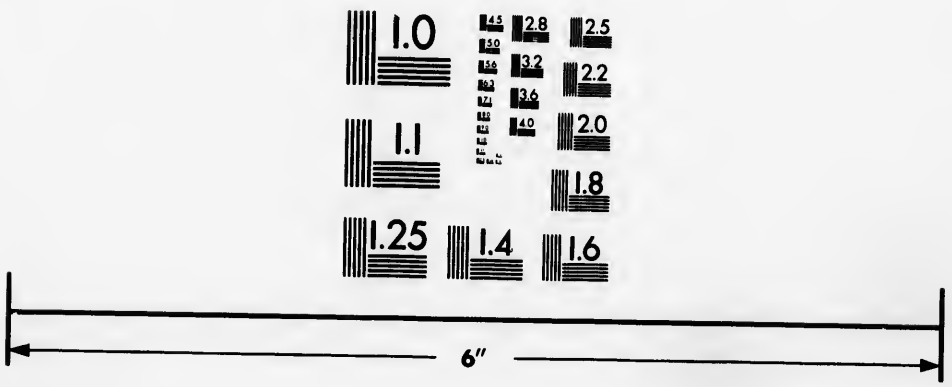

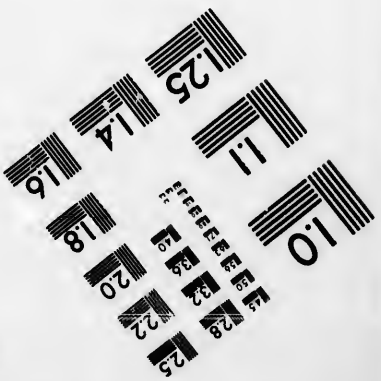

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(2) Another statement in accordance with the provisions of sub-section 1 of this section, duly verified as required by said sub-section shall be filed within thirty days next preceding the expiration of the term of two years from the day of the filing of the statement required by the said sub-section, or such mortgage or copy thereof shall cease to be valid as against the creditors of the persons making the same, and as against purchasers and mortgagees in good faith for valuable consideration, and so on every two years, that is to say, another statement as aforesaid, duly verified, shall be filed within thirty days next preceding the expiration of two years from the day of the filing of the former statement, or such mortgage, or copy thereof, shall cease to be valid as aforesaid. [Added by 1893, c. 2, s. 1.]

8. The affidavit required by the last preceding section 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 filed in the office in which the mortgage is filed, at or before the time of such re-filing, by such assignee, next of kin, executor or administrator of such assignee. 53 V., c. 2, s. 47, part [As amended by 1894, c. 1, s. 4].

Discharge of Mortgage.

9. Any mortgage of goods and chattels registered or filed under the provisions of this Act, or of "The Chattel Mortgage Act" or its amendments, may be

discharged or partially discharged by filing in the office in which the said mortgage is registered or filed, a certificate signed by the said mortgagee, his executor or administrator, or by his or their assignee under an assignment or assignments filed as hereinafter provided, or by the executor or administrator of any such assignee, which certificate may be in the form following or to the like effect (1).

(1) 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 bona fide transaction it would be a release of the debt as well as of the security (*p*).

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 18 , and was filed (*or in case the mortgage has been renewed under the seventh section of this Act or the corresponding provision of "The Chattel Mortgage Act"* was re-filed) in the office of the clerk of the County Court of the County of on the day of as No. (*here mention the date of filing each assignment, again naming the parties of 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

(p) *Manitoba* v. *Bolton* (1893), 4 W. L. T. 114.

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). 46-47 V., c. 34, s. 1.

10. The due execution of said discharge or partial discharge shall be proved by the affidavit of a subscribing witness thereto, endorsed upon or attached to such certificate, and the date on which the same was actually executed shall be stated in such affidavit. 46-47 V., c. 34, s. 2.

11. Any such certificate of discharge or partial discharge shall have no force or effect, except as between the parties to such mortgage, until the same has been filed. 46-47 V., c. 34, s. 3.

Description of Goods.

12. All instruments mentioned in this Act, whether for the sale or mortgage of goods and chattels, excepting discharges and partial discharges of mortgages in the form or to the effect of the form provided by this Act shall contain such sufficient and full description (1) of such goods and chattels that the same may be thereby readily and easily known and distinguished. C. S. M., c. 49, s. 5.

(1) A description 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 shown 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 (*q*).

(q) *Fisher* v. *Brock* (1892), 3 W. L. T. 74, *per* Taylor, C. J., and Dubuc, J.; and see *Hovey* v. *Whiting*, 14 S. C. R. 515.

Officers to take Affidavits.

13. 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 Oaths Act" to take affidavits for use in Manitoba. C. S. M., c. 49, s. 9; 46-47 V., c. 34, s. 8; 49 V., c. 23, s. 2.

Filing.

14. The instruments (1) and copies mentioned in the preceding sections of this Act shall be filed with the clerk of the County Court in the judicial division (2) where the said goods and chattels are situated; and such clerk of the County Court shall file (3) all such instruments presented to him for that purpose, and shall endorse thereon the time of receiving the same in his office, and the same shall be kept there for inspection by all persons interested therein, or intending or desiring to acquire any interest in all or any portion of the property covered thereby. C. S. M., c. 49, s. 6; 44 V., 3rd sess., c. 11, s. 64.

(1) "instruments." This word is intended to include affidavits, where it is required by the statute that they are to be filed (*r*).

(2) The Province of Manitoba is divided into three Judicial Districts, viz., the Eastern, with headquarters at Winnipeg; the Central at Portage la Prairie; and the Western at Brandon.

(3) The section indicates that by "filing" is meant that such instruments are to be kept by the clerk in his office for inspection by all persons interested.

15. The said clerk of the County Court shall number every such instrument or copy filed in his

(r) *Inman* v. *Rae* (1895), 10 Man. R. 411.

office, and shall enter in alphabetical order, in books to be provided by him, 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. C. S. M., c. 49, s. 7.

Certificate of Discharge of Mortgage.

16. 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:

Province of Manitoba,
County 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 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 County Court of said County 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 chattel or property.*)

Given under my hand and the seal of said Court,

{Seal.}

E. M.,
Clerk.

46-47 V., c. 34, s. 5.

Evidence.

17. Any original instrument or a copy of any original instrument, or a copy thereof, filed under the provisions of this Act, or of "The Chattel Mortgage Act" or amendments thereof, including any statement made in pursuance of such Act certified by the clerk of the County Court under the seal of the Court, shall be received in evidence in all courts, but only of the fact that such instrument or copy and statement were received and filed according to the endorsement of the clerk of the County Court thereon, and of no other fact; and in all cases the original endorsement by the said clerk, made in pursuance of this Act upon any such instrument or copy, shall be received in evidence only of the facts stated in such endorsement. C. S. M., c. 49, s. 11. [As amended by 1894, c. 1, s. 5].

Fees of Clerk.

18. For services under this Act, the clerk aforesaid shall be entitled to receive the following fees:—

(*a.*) For filing each instrument and affidavit, and for entering the same in a book as aforesaid, fifty cents;

(*b.*) For searching each paper, twenty-five cents;

(*c.*) For copies of any document, with certificate thereof filed under this Act, fifteen cents for every hundred words.

(*d.*) For filing each certificate of discharge or partial discharge and affidavit of execution, and for entering the same in the reference book, fifty cents; and for any certificate of the filing of such discharge or partial discharge endorsed upon any true copy or duplicate thereof, a further sum of twenty-five cents; and

(*e.*) For giving a certificate under the sixteenth

section of this Act, twenty-five cents. C.S.M., c. 49, s. 12; 46-47 V., c. 34, ss. 4, 6.

19. The clerk of the County Court shall, upon payment of a fee of fifty cents, give a certificate setting forth the chattel mortgages or bills of sale registered in his office against any person or corporation, and such clerk shall be responsible for the correctness of the statements in such certificates. [Added 1894, c. 1, s. 6].

REVISED STATUTES OF 1891.

CHAPTER 46.

An Act respecting Distress and Extra-Judicial Seizure.

[*In force 20th April, 1892.*]

11. 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. 47 V., c. 28, s. 2.

12. If any person making any distress or seizure referred to in the tenth and eleventh 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. 47 V., c. 28, s. 3.

13. 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.

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. 47 V., c. 28, ss. 1, 2, sch. A; 52 V., c. 35, s. 24.

New Brunswick.

STATUTES OF 1893.

Chapter 5.

An Act relating to the Registry of Bills of Sale.

Sec.

1 How and when mortgages or conveyances shall be filed; affidavit of witnesses.
2 What affidavit shall state.
3 When mortgage or conveyance shall take effect.
4 Mortgages, etc., when not filed to be null and void against subsequent purchasers, etc.
5 Sales of goods, etc., to be in writing, accompanied by affidavits, and filed within thirty days, otherwise void against subsequent purchaser, etc.
6 Agreements in writing for future advances, when valid and binding; affidavit, etc.
7 Affidavit required by sections 5 and 6 may be made by one of two or more bargainees or mortgagees.
8 Instruments mentioned in preceding sections, where to be filed.
9 Duty of registrar on receipt.
10 When mortgage shall be renewed, filing of statement and affidavit.
11 Statement to be as in form in Schedule B.
12 Statement and affidavit deemed one instrument and filed, as required by section 8; fees.

13 When another statement in accordance with section 10 of this Act shall be filed, or mortgage cease to be valid.

14 By whom affidavit may be made under section 10, assignments to be filed.

15 In case of mortgage of personal property of incorporated companies, what affidavit sufficient. Renewal of mortgage. Statement and affidavit when mortgage to incorporated company. Head office to be deemed place of residence of company.

16 Copies certified by registrar to be received in evidence in all courts—of what fact.

17 Discharge of mortgage of goods.

18 Duties of registrar when discharged by certificate or by mortgagee in person.

19 Renewal of mortgage; endorsements, how to be made.

20 Assignm ent of chattel mortgage.

21 Defeasance to be considered part of bill of sale.

22 Fees of registrar.

23 When time for registering or filing any bill of sale, affidavit, etc., expires on Sunday or holiday, it may be done next day.

24 Authority for taking or renewing mortgage may be a general one.

25 Sufficient description of goods and chattels to be given.

26 Affidavits, etc., by whom administered; fee.

27 To what bills of sale, etc., this Act does not apply; meaning of term "goods and chattels."

28 Mortgages, etc., filed before passing of this Act to be renewed—and when—proviso; when conveyance shall be null and void.

29 Acts repealed.

30 Citation of Act.
31 When Act shall come into force. Schedules.

[In force July 1st, 1894.]

Be it enacted by the Lieutenant-Governor and Legislative Assembly as follows (1):

(1.) Every mortgage or conveyance intended to operate as a mortgage of goods and chattels(2), 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.

(1) The point was raised, on one occasion, whether the original statute respecting bills of sale (*a*) 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," but the majority of the court held against such a contention (*b*).

(2) The words "goods and chattels" are defined by section 27 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

(a) C. S. N. B., c. 75.
(b) *Re De Veber*, 21 N. B. R. 397.

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 applying to a bill of sale made in a foreign country of chattels then there (*c*).

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 plaintiff 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 (*d*), 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* (*e*), and *Hope* v. *Hayley* (*f*). 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 (*g*)—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 de-

(c) *Gosline* v. *Dunbar* (1894), 32 N. B. R. 325: *Singer Machine Co.* v. *McLeod*, 20 N. S. R. 341.
(d) *Vassie* v. *Vassie*, 22 N. B. R. 76.
(e) 10 Ex. 298.
(f) 5 E. & B. 830.
(g) *Lloyd* v. *European, etc., Ry. Co.*, 18 N. B. R. 194.

livery (*h*) 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. 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 sequitor ventrem" (*i*).

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 (*j*). 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 (*k*). Manure lying in heaps in the barn yard is a chattel, and it is none the less a chattel because it is not produced upon the land (*l*), 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 (*m*). So with timber: when such is sold with the right to cut, it becomes, so soon as severed, a personal chattel (*n*).

A sale of 50,000 bricks out of a kiln containing 100,000, to

(h) As to symbolical delivery, see *McNab* v. *Sawyer*, 9 N. S. S. 38.

(i) *Nicholson* v. *Temple*, 20 N. B. R. 248.

(j) *Alexander* v. *Cowie*, 19 N. B. R. 599.

(k) *Doran* v. *Willard*, 14 N. B. R. 358.

(l) *Foshay* v. *Barnes*, 1 Han. (N. B.) 452: *Thomson* v. *Walsh*, 2 All. 369.

(m) *Yearworth* v. *Pierce*, Aleyn, 32 S. C. 31.

(n) *Murray* v. *Gilbert*, 1 Han. (N. B.) 545.

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 (*o*). 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 (*p*). 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 (*q*); 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 transference of a registered vessel by the owner, which must be in writing, and the conveyance of a wrecked vessel by the master (*r*). 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* (*s*), does not seem to be supported by the current of later authorities (*t*).

A conditional sale agreement when the property in the

(o) *Close* v. *Temple*, 20 N. B. R. 234.
(p) *Gibson* v. *Gill*, 19 N. B. R. 565.
(q) *Lloyd* v. *European, etc., Ry. Co.*, 18 N. B. R. 194.
(r) *Orange* v. *McKay*, 1 Oldright, 5 N. S. R. 444.
(s) 2 T. R. 587.
(t) *Sheriff* v. *McKeen*, 23 N. B. R. 184.

goods sold is to remain in the vendor until full payment is made, is not within the provisions of the Act (*u*).

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 (*v*).

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 (*w*).

2. 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 (1), or of preventing the creditors of such mortgagor from obtaining payment of any claims against him.

(1) Whether the alleged indebtedness for which a chattel mortgage is given exists or not, it is still a question for the

(u) *Trueman* v. *Bain* (1885), 25 N. B. R. 298: *Wheeler & Wilson* v. *Charters*, 21 N. B. R. 480.

(v) *Stewart* v. *Muirhead* (1890), 29 N. B. R. 273, *per* Wetmore, King and Tuck, JJ., (Allen, C. J., and Palmer, J., dissenting.)

(w) Ib., at page 282. See also *Polak* v. *Everett*, 1 Q. B. D. 669: *Freeman* v. *Cooke*, 2 Ex. 654.

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 (*x*).

3. Every such mortgage or conveyance shall only operate and take effect upon, from and after the day and time of filing thereof.

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 enters and takes possession of the personal property described in the bill of sale (*y*). And the mere fact of some of the debtor's family being on the premises would not defeat the possession of the grantee (*z*).

4. 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 (1) 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 (2) of the mortgagor, or any sheriff, constable or other person levying on (3) or seizing the property comprised in such mortgage under process of law (4).

(1). When one represents that 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

(x) *Flanagan* v. *Whelan*, *per* Palmer, J. (1892), 31 N. B. R. 607.
(y) *McLean* v. *Bell*, 5 Rus. & Geld. 17 N. S. R. 128: see *ante* p. 55.
(z) *Davies* v. *Jones*, 7 L. T. N. S. 130: *Graham* v. *Wilcockson*, 46 L. J. Ex. 55.

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 (*a*).

(2) 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 (*b*), but such judgment was not subsequently sustain by authority (*c*).

(3) The legal meaning of the word "levy" is simply the act of raising money (*d*), 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 (*e*).

(4) The levy or seizure must be "under process of law." Strictly speaking by process of law is meant the summons or first proceeding 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 (*f*). But is a landlord's warrant within the meaning of the term "process of law?"

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 (*g*).

(a) *Carr* v. *Carey*, 3 N. S., S. C. Cases 70.

(b) *Barker* v. *Leeson*, 1 O. R. 114.

(c) *Parkes* v. *St. George*, 10 A. R. 498.

(d) Whart. Law Lex.

(e) *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., Ry. Co.*, v. *Gore Bank*, 10 C. L. J. 45: see *Brockville & Ottawa Ry. Co.* v. *Central Canada Ry. Co.*, 7 P. R. 372: *Corbett* v. *McKenzie*, 6 U. C. R. 605: *Thomas* v. *Cotton*, 12 U. C. R. 148: *Buchanan* v. *Frank*, 15 U. C. C. P. 197.

(f) Whart. Law Lex.

(g) *Le Vasseur* v. *Beaulieu* (1896), 33 N. B. R. 569.

5. 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 (1), and shall be accompanied by an affidavit of a witness thereto of the due execution thereof, and an affidavit of the bargainee or his agent duly authorized in writing to take the conveyance, a copy of which authority shall be attached to the conveyance, that the sale is bona 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 (2).

(1) See notes to preceding sections.

(2) Where A being indebted to B, an account was made out by B showing the indebtedness and crediting a wagon upon same, which account was signed by A, who retained possession of the wagon 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 wagon was liable to seizure under an execution against A (*h*).

(h) *Shirreff* v. *Vye* (1885), 24 N. B. R. 572.

6. In case of an agreement in writing for future advances for the purpose of enabling the borrower to enter into or carry on business with such advances, the time of repayment thereof, not being longer than one year from the making of the agreement, 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 one year 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 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 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 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 the mortgagor; and in case the mortgage is filed, as hereinafter provided, the same shall be as valid and binding as mortgages mentioned in the preceding sections of this Act (1).

(1) 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(*i*).

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.

7. The affidavit of bona fides required by the preceding two sections, may be made by one of two or more bargainees or mortgagees.

8. The instruments mentioned in the preceding sections shall be filed with the registrar of deeds and wills of the county (1) 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 and hour 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.

(1) 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

(i) *Le Vasseur* v. *Beaulieu* (1896), 33 N. B. R. 569.

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 (*j*).

9. 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 (*1*).

(*1*) This section follows closely the wording of the Ontario Act, section 16, which see.

10. Every mortgage or copy thereof filed in pursuance of this Act 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 showing the amount still due for principal and interest thereon, and showing all payments made on account thereof, 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

(j) *Fisher* v. *Bishop*, 5 Rus. & Geld., 17 N. S. R. 451.

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.

11. The statement and affidavit mentioned in the next preceding section may be in the form given in Schedule B to this Act, or to the like effect.

12. The statement and affidavit shall be deemed one instrument, and be filed and entered in like manner as the instruments in this Act mentioned are by section 8 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.

13. Another statement in accordance with the provisions of section 10 of this Act, 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 10, 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.

14. The affidavit required by section 10 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; 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.

15. (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 the first and second sections of this Act, 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;

(2) Any such mortgage may be renewed in the manner and with the effect provided by the tenth and following 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 showing the amount of the bond or debenture debt that the same was made to secure, and showing 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 Act;

(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;

(4) For the purpose of the filing or registering of any conveyance under this Act, the head office within the province of any incorporated company

shall be deemed the domicile or place of residence of the company.

16. A copy of such original instrument or a copy thereof so filed as aforesaid, including any statement made in pursuance of this Act, 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 endorsement of the registrar thereon, and of no other fact, and in all cases the original endorsement by the registrar made in pursuance of this Act upon any such instrument or copy shall be received in evidence only of the fact stated in the endorsement.

17. 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 of the registrar in which the same is filed, of a certificate signed by the mortgagee, his executors or administrators in the form given in the Schedule A hereto, or to the like effect.

18. (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 9 of this Act, 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.

19. Where a mortgage has been renewed under section 10 of this Act, 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.

20. 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 Act may and shall be had upon a certificate of the assignee proved in manner aforesaid.

21. In case any bill of sale is subject to any defeasance, the same shall be considered as part thereof, and such defeasance (1), 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 (2), 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 Act.

(1) 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 Acts respecting bills of sale, then the bill of sale will be inoperative, and not vest any title in the grantee thereof as against the assignee of the grantor under the Insolvent Act (*i*). 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 (*j*).

(2) The persons meant are those stated in sections 4 and 5. It is only as against such persons that the instrument is void and for no other purpose (*k*).

Fees for Services under this Act.

22. The registrar aforesaid shall be entitled to receive the following fees:

(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 for every one hundred words.

23. Where under any of the provisions of this

(i) *Re De Veber*, 21 N. B. R. 397.
(j) *Per* Allen, C. J., *Sheraton* v. *Whelpley*, 20 N. B. R. at p. 77.
(k) See pp. 172, 174, *ante*.

Act 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.

24. An authority for the purpose of taking or renewing a mortgage or conveyance under the provisions of this Act may be a general one, to take or renew all or any mortgages or conveyances to the mortgagee or bargainee.

25. All the instruments mentioned in this Act, 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 (1).

(1) The Ontario Act (section 32) 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 (*l*).

(l) *Re De Veber*, 21 N. B. R. 392.

26. All affidavits and affirmations required by this Act 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.

27. This Act 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 the 74th section 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 interest 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 (1).

(1) By 58 Vict. (1895) N. B., c. 6, s. 12, a further exception is made of assignments for the general benefit of creditors made under the provisions of that Act.

28. (1) Every chattel mortgage and every conveyance intended to operate as a mortgage of goods and chattels, filed before the passing of this Act, 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 10 and 11, within twelve months from the passing of this Act; and so on from year to year thereafter as provided by section 13, otherwise the same may cease to be valid in the manner specified in sections 10 and 13 respectively, as against a creditor of the mortgagor serving the notices provided for by the said sections;

(2) Every mortgage or conveyance intended to operate as a mortgage of goods and chattels, and every bill of sale of goods and chattels made before the passing of this Act, and which has not been accompanied by delivery and an actual and continued change of possession of the things mortgaged or conveyed (and which or a copy thereof was not filed under chapter 75 of the Consolidated Statutes, and as required by that chapter before the passing of this Act), or a true copy thereof, shall be filed with the registrar of deeds of the county where the maker resided at the time of the execution thereof, if resident within the province, or if not so resident, then with the registrar or registrars of the several counties in which the goods may be, within three months from the passing of this Act, together with an affidavit 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 bona fides required by sections 2 and 6 respectively; provided, however, that if the mortgagee or mortgagees, bargainee or bargainees respectively, make an affi-

davit and file the same with the registrar at the time of filing such mortgage, conveyance or bill of sale, or a copy thereof, that he or they were not aware within the said three months of the provisions of this section, and that he or they filed the said mortgage, conveyance, or bill of sale, or a copy thereof, as soon as he or they became aware of such provisions, then such mortgage, conveyance, or bill of sale, or a copy thereof, if accompanied by the affidavits above-mentioned of the due execution thereof, and of bona fides, may be filed within six months from the passage hereof.

(3) If such mortgage or conveyance intended to operate as such, or such bill of sale, is not filed as required by the next preceding sub-section, the same shall then become absolutely null and void as against the persons mentioned in sections 4 and 5 of this Act.

(4) Every such mortgage or conveyance intended to operate as a mortgage filed under the provisions of this section, shall be renewed in the manner provided by sections 10, 11 and 13, otherwise the same may cease to be valid in the manner specified in sections 10 and 13 respectively, as against a creditor of the mortgagor serving the notices provided for in the said sections.

29. Chapter 75 of the Consolidated Statutes, "Registry of Bills of Sale," and any Act or Acts in amendment thereof, are hereby repealed, but such repeal shall not affect the rights of any parties in respect to bills of sale or chattel mortgages heretofore filed, except as provided in the next preceding section.

30. This Act shall be cited as "The Bills of Sale Act, 1893."

31. This Act shall go into effect on the first day of July next (1), and not sooner.

(1) July 1st, 1894.

SCHEDULE A.

(SECTION 17).

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. 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. 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.

A. B.

One witness
stating occupation and residence.

SCHEDULE B.

(SECTION 11).

Statement.

Statement exhibiting interest of C. D. in the property mentioned in a chattel mortgage dated the day of A. D. 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. 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 A.D.) (*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).

1893, January 1. Cash received $100.00.

The amount still due for principal and interest on the said mortgage is the sum of $ computed as follows (*here give the computation*).

County of)
to wit,)

C.D.

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*) 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 the of in the County of this day of A. D. 18 }

STATUTES OF 1895.

CHAPTER 6.

An Act respecting Assignments and Preferences by Insolvent Persons.

12. (1)—No assignment for the general benefit of the creditors under this Act shall be within the operation of "The Bills of Sale Act, 1893," 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 (1).

(1) This section sets at rest the doubt raised in *Douglas* v. *Sanson* (*a*) as to whether an assignment of goods for the benefit of creditors is within "The Bills of Sale Act."

(2) A counterpart or copy of every such assignment shall also within 5 days from the execution

(a) 1 N. B. Eq. 122.

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 the Act respecting Mortgages and Sales of Personal Property.

STATUTES OF 1897.

CHAPTER 11.

An Act in addition to, and in amendment of, "The Bills of Sale Act, 1893."

[Passed 13th March, 1897.]

Be it enacted by the Lieutenant-Governor and Legislative Assembly as follows:

When a party may be desirous of giving evidence in any court of an instrument filed under "The

Bills of Sale Act, 1893," 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 prima 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.

NORTH-WEST TERRITORIES.

ORDINANCES OF 1895

No. 8.

An Ordinance to amend and consolidate as amended the law relating to Mortgages and Sales of personal property.

[*In force 1st December, 1895.*]

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

1. This Ordinance may be cited and known as "The Bills of Sale Ordinance."

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

(*a*) The registration district of "Moosomin" (1), comprising that part of the provisional district of Assiniboia, as is defined by the order of the Privy Council of Canada passed on the 8th 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 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.

(1) Section 9 of Ordinance No. 24 of 1896 provides that renewals of instruments now filed in the office of the clerk of the Moosomin district shall, where the property described is at the time of such removal within the Yorkton district, be filed in the office of the clerk of the latter district, after January 1st, 1897.

(*b*) The registration district of "Yorkton" (1), comprising that part of the provisional district of Assiniboia as is defined by the order of the Privy Council of Canada passed on the 8th day of May, A.D. 1882, eastward of the eleventh range of townships west of the second meridian and north of the north boundary of the registration district of Moosomin.

(1) See note (1) above.

(*c*) 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.

(*d*) 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.

(*e*) 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."

(*f*) 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.

(*g*) The registration district of "Calgary," comprising all that part of the said provisional district of Alberta lying between townships sixteen and forty-three.

(*h*) The registration district of "Edmonton," comprising all that portion of the said provisional district of Alberta lying north of township forty-two.

(*i*) 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.

(*j*) The registration district of "Prince Albert," comprising all that portion of the said provisional district of Saskatchewan lying east of the Battleford registration district.

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

(1) 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.

4. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels (1), 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 (2), 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 is hereinafter provided under section 26; 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 (3). [As amended by 1896, No. 24, s. 1].

(1) The former section, No. 3 of the 1889 Ordinance, had the words "made in the Territories" following the words

"goods and chattels" in the second line of the section, but they were struck out on the last revision, and at the same time the former 15 days' limit for filing was extended to 30 days.

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 (*a*).

Under the former section 3, 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 bona 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 (*b*).

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 (*c*).

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 the removal takes place.

(a) *Stimson* v. *Smith*, 1 N. W. T. R. part 1, p. 109.
(b) *Bonin* v. *Robertson* (1893), 1 N. W. T. R. part 4, p. 89.
(c) *Cammell* v. *Sewell*, 5 H. & N. 728: *Bonin* v. *Robertson*, 1 N. W. T. R. part 4, p. 89: *River Stave Co.* v. *Sill*, 12 O. R. 570: *Marthinson* v. *Patterson*, 19 A. R. 188.

(2) By the amending Ordinance No. 24 of 1896, it is declared that the expressions "mortgagee," "bargainee" or "assignee" in sections 4, 5, 6 and 15 shall include the agent or manager of an "incorporated company," a rather unfortunate phraseology, as it may well be doubted whether a chartered bank is an "incorporated company" so as to obtain the benefit of the amendment.

(3) Before the present consolidation, the mortgage or conveyance took effect from the "execution thereof."

5. 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 (1) 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 is 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 third (2) section of this Ordinance.

(1) See ante, s. 4, note (2).

(2) The word "third" is evidently a clerical error for "fourth." The section of the Ordinance of 1889, from which the present section is taken, is numbered "4," and the section preceding the latter is the one relating to mortgages. The reference, therefore, must be taken to apply to section 4 of the present Ordinance of 1895.

6. 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 (1), 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 is bona 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 any creditors (2) 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.

(1) See ante, s. 4, note (2).

(2) "The creditors" is the phrase used in s. 4. An affidavit of bona fides in which the word "the" was inserted—where a strict following of this section would have inserted the word "any,"—is not thereby invalidated, the two expressions being substantially the same (*a*).

The fact that in one section the expression "any creditors" is used, and that in the two cognate sections (now ss. 4 and 5) we find the expression "the creditors," is evidence furnished by the statute itself that the legislature regarded the two forms of expression as practically synonymous (*b*).

7. Such registration shall only have effect in the registration district, wherein such registration has been made.

(*a*) Provided however that the division of the registration district of Moosomin, as it existed prior to the coming into force of this Ordinance, shall not effect mortgages or other instruments filed before such division but such mortgages and other instru-

(a) *Emerson* v. *Bannerman* (1891), 19 S. C. R. 1: *Archibald* v. *Hubley*, 18 S. C. R. 116, distinguished.

(b) *Emerson* v. *Bannerman*, 19 S. C. R. 1, *per* Patterson, J.

ments and any renewal or renewals thereof shall have the same force and effect as if filed in the office of the registration clerk of the registration district of Yorkton.

8. 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 duly 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.

9. 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 (1) 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.

(1) 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 (*a*).

The original of this section was also incorporated with

(a) *Thomson* v. *Quirk* (1889), 18 S. C. R. 695, affirming *Quirk* v. *Thomson*, 1 N. W. T. R., part 1, p. 88: *Hovey* v. *Whiting*, 14 S. C. R. 515 followed: *McCall* v. *Wolff*, 13 S. C. R. 130 distinguished.

section 2 of Ordinance No. 8 of 1889, and conditional sale contracts 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" (*b*).

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" (*c*).

10. 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 clerks shall file all such instruments pre-

(b) *Western Milling Co.* v. *Darke* (1894), 2 N. W. T. R., part 1, p. 34.
(c) *Per* Strong, J., in *McCall* v. *Wolff*, 13 S. C. R. 130.

sented 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.

11. 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.

12. 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 (1) 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 (2), 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 again 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 as (3)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.

(1) In computing the time mentioned in this section, the day of the original filing should be excluded (*a*).

(2) See ante, s. 4, note (2).

(3) "As" is evidently a clerical error for the word "or," which appears in Ordinance No. 18 of 1889, s. 11, from which this section is taken.

13. Such statement and affidavit shall be in the following form or to the like effect:—

STATEMENT exhibiting the interest of C. D. in the property mentioned in the chattel mortgage dated the day of A. D., 18 , 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 district (*as the case may be*), on the day of 18 , 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 18), *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:

18 ,—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.

(a) *Thomson* v. *Quirk*, 18 S. C. R. 695; affirming *Quirk* v. *Thomson*, 1 N. W. T. R., part 1, p. 88.

NORTH-WEST TERRITORIES. } I,
TO WIT. } 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 18 }

14. Another statement in accordance with the provisions of section 12 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 12, 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.

15. The affidavit required by the twelfth section of this Ordinance 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 re-filing by such assignee, next of kin, executor or administrator of such assignee.

16. A copy of such original instrument, or of a copy thereof, so filed as aforesaid, including any statement made in pursuance of this Ordinance, certified by the registration clerk in whose office the same has been filed, shall be received in evidence in all courts, but only of the fact that such instrument or copy and statement were received and filed according to the endorsement of the clerk thereon, and of no other fact; and in all cases the original endorsement by the said clerk, made in pursuance of this Ordinance upon any such instrument or copy, shall be received in evidence only of the fact stated in such endorsement.

17. 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 the form given in the schedule hereto, or to the like effect.

18. The officer 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 such mortgage has been entered with the name of any of the parties thereto, in the book kept under section 10 (1) 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 the certificate) (2), and he shall also endorse the fact of such discharge upon the instrument discharged, and shall affix his name to such endorsement.

(1) Section 11 is evidently meant, which was section 10 of the Ordinance of 1889.

(2) 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.

19. 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:

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 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 Registra-

tion District 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 chattel or property*).

E. M., Clerk.

20. 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 alphabetical chattel mortgage book in the same manner as a chattel mortgage, and the proceedings authorized by the two next preceding sections of this ordinance may and shall be had upon a certificate of the assignee, proved in manner aforesaid.

21. In the event of the permanent removal (1) 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.

(1) Section 7 of Ordinance No. 24, of 1896, provides that "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.

22. 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.

23. Subject to the rights of third persons accrued by reason of such omissions as are hereinafter defined, any judge of the Supreme Court of the Territories, on being satisfied that the omission to register

a mortgage, or any authority to take or renew the same, or other transfer of personal property, or any statement and affidavit of renewal thereof within the time prescribed by this Ordinance, 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.

24. Except as to cases provided in section 5 of this Ordinance, a mortgage or conveyance intended to operate as a mortgage of goods and chattels may be made in accordance with the form in the schedule of this Ordinance.

25. Where, under any of the provisions of this Ordinance, 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.

26. 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 aforesaid it shall not be necessary to attach a copy thereof to each mortgage filed. [As amended by 1896 No. 24, s. 2.]

27. 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, fifty cents;

(2) For filing assignment of each instrument, and for making all proper endorsements in connection therewith, fifty cents;

(3) For filing certificate of discharge of each instrument and for making all proper entries and endorsements connected therewith, fifty cents;

(4) For searching for each paper, twenty-five cents;

(5) For copies of any document filed under this Ordinance, ten cents for every hundred words;

(6) For every certificate, under section 19 of this Ordinance, fifty cents.

28. All affidavits and affirmations required by this Ordinance shall be taken and administered by any commissioner for taking affidavits, justice of the peace or notary public in or out of the Territories, or registration clerk and the sum of twenty-five cents shall be paid for every oath thus administered.

29. 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, shall be valid except the same be made, executed or created as a security for the purchase price and interest thereon of seed grown.

(1) Provided that the provisions of this section shall not apply to any such security already made, executed or created or which may be made, executed or created as a further or substituted security for a debt which on the passing hereof is already secured by a mortgage upon the crop of the mortgagor grown during the year 1895 and interest on such debt, such further or substituted security to become absolutely null and void on and after the 31st day of December, 1897 (1). [As amended by 1896, No. 24, s. 5.]

(1) The only change from the original section of 1895 is that of "1896" to "1897," so as to extend the term for another year.

(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 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 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 27 of the said Ordinance (1). [Substituted by 1896, No. 24, s. 3.]

(1) This formerly read "the same fees for services as provided for under section 25 of Ordinance No. 18 of 1889," although the 1889 Ordinance was repealed by the same Act (1895). The correction is here made, so that the reference is now to the corresponding section of the present 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 and price per bushel, must be stated in the mortgage as well as in the affidavit of bona fides. [Added by 18[illegible] No. 24, s. 4.]

30. 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 between the fifteenth day of July and the fifteenth day of September, inclusive of both days, when the same shall be closed at one o'clock in the afternoon, and during office hours only shall registrations be made. [As amended by 1896, No. 24, s. 6.]

31. Every registration clerk shall on or before the fifteenth day of January in each year make up and return to the Lieutenant-Governor-in-Council, a statement, verified under oath, setting forth the total amount of fees which have been received by such clerk during the preceding year.

32. This Ordinance shall not come into force until the first day of December, 1895.

33. Ordinance No. 18, of 1889, entitled "An Ordinance to amend and consolidate as amended chapter 47 of the Revised Ordinances of the North-West Territories," intituled "An Ordinance respecting Mortgages and Sales of Personal Property," Ordinance No. 13 of 1893, entitled "An Ordinance to amend the Ordinance respecting Mortgages and Sales of Personal Property," and Ordinance No. 36 of 1894, entitled "An Ordinance to further amend Ordinance No. 18 of 1889, relating to Mortgages and Sales of Personal Property" are hereby repealed.

SCHEDULE.

(*Vide Section 24.*)

FORM OF MORTGAGE.

This Indenture made the day of A.D. 18 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 [*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 22 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.*]

SCHEDULE.

(*Vide Section 17.*)

FORM OF DISCHARGE OF MORTGAGE.

To the Registration Clerk of District.

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. 18 and was registered (*or in case the mortgage has been renewed under sections eleven and twelve (1) was renewed*) in the office of the Registration Clerk of the District of on the A.D. 18 , 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. 18

Witness (*stating residence and occupation*).

(1) Sections 12 and 13 are the proper numbers in the present consolidated Act.

ORDINANCES OF 1896.

No. 24.

An Ordinance to amend Ordinance No. 8. of 1895, intituled "The Bills of Sale Ordinance."

[*Assented to October 30th, 1896.*]

1. Section 4 of Ordinance No. 8 of 1895 is hereby amended by inserting after the word "thereto," where it appears in the fourteenth line thereof, the words: "save as hereinafter provided under section 26."

2. Section 26 of the said Ordinance is hereby amended by adding thereto the following: "And provided such general authority is duly filed with the clerk aforesaid it shall not be necessary to attach a copy thereof to each mortgage filed."

3. Sub-section 4 of section 29 of the said Ordinance is hereby repealed and the following substituted therefor:

(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 27 of the said Ordinance.

4. Section 29 of the said Ordinance is hereby amended by adding thereto the following sub-section:

(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 prefer-

ential 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 the bona fides.

5. Sub-section 1 of section 29 of the said Ordinance is hereby amended by striking out the figures 1896 at the end thereof and substituting therefor the figures 1897.

6. Section 30 of said Ordinance is hereby amended by inserting after the word "Saturdays" therein, the words "and during the period between the fifteenth day of July and the fifteenth day of September, inclusive of both days."

7. No goods or chattels under mortgage shall be removed into another registration district without a notice of the intention to remove be mailed, post-paid and registered, to the mortgagee at his last-known place of address, not less than twenty days prior to such removal.

8. For the purpose of making the affidavit of bona fides required by sections 4, 5 and 6 of this Ordinance (1) and the affidavit required by section 12 of this Ordinance (1), the expressions "mortgage," "bargainee" or "assignee" shall in addition to their primary meaning mean and include the agent or manager or (2) any mortgagee, bargainee, or assignee being an incorporated company.

(1) "This Ordinance." It is plain that the Ordinance of 1895 is referred to. The words "the said Ordinance" used in the preceding sections might better have been repeated here.

(2) The word here printed "or" is evidently a misprint for the word "of."

9. From and after the first day of January, A.D. 1897, any renewal of any instrument filed in the office of the clerk of the registration district of Moosomin, in which the property described is, at the time of such renewal, within the registration district of Yorkton, shall be filed in the office of the clerk of the registration district of Yorkton, and such renewal shall have the same force and effect as if the original document had been filed in the said office.

ORDINANCES OF 1893.

No. 6.

An Ordinance to amend and consolidate as amended the Judicature Ordinance and amendments thereto.

[*Assented to 16th September, 1893.*]

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

339. 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.

340. In cases where registered mortgages upon lands or chattels are seized by the sheriff, such seizure shall have no effect until a notice thereof in writing, signed by the officer charged with the execution of such writ, has been deposited in the

office where the same is registered, and an entry of every such notice, when delivered, shall be made in the proper books; for which service in each instance a fee of fifty cents shall be paid to the registering officer.

ORDINANCES OF 1895.

No. 7.

An Ordinance to further amend the Judicature Ordinance.

[*Assented to 30th September, 1895.*]

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

2. Section 337 of the said Ordinance is hereby repealed and the following substituted therefor :—

337. 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 bona 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.

Nova Scotia.

Revised Statutes (Fifth Series) 1884.

Chapter 92.

Of the prevention of Frauds on Creditors by Secret Bills of Sale.

1. Every bill of sale of personal chattels (1) made either absolutely or conditionally, or subject or not subject to any trust, and whereby the assignee shall have 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, and every schedule annexed thereto or therein referred to, or a true copy of such bill of sale and schedule, shall be filed with the registrar of deeds of the county or district where the maker resides; and in case a copy be filed the same shall be accompanied by an affidavit of the execution of the original bill of sale; otherwise such bill of sale, as against the assignee of the grantor under the provisions of chapter 118 (2) or for the general benefit of his creditors or against bona fide purchasers, or as against the execution creditors, or sheriffs and constables, and other persons levying on or seizing the property comprised therein, under process of law, shall only take effect and have priority from the time of the filing thereof (3). [As amended by 1886, c. 32, s. 2.]

(1) A bill of sale purporting to convey "one red cow four years old, valued at $21.00," 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 (*a*).

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 (*b*).

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 (*c*).

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 bona 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 (*d*).

(2) In substitution for the words "the law relating to

(a) *Hughan* v. *McCollum*, 20 N. S. R. 202: *McAskill* v. *Power* (1897), 33 C. L. J. 571.

(b) *Kennedy* v. *Whittie*, 27 N. S. R. 460: *Ramsay* v. *Margrett* (1894), 2 Q. B. 18, followed.

(c) *Boston Marine* v. *Longard*, 26 N. S. R. 387: *England* v. *Marsden*, L. R. 1 C. P. 529: *McNeal* v. *Emmerson*, 15 Gray 384.

(d) *Cunningham* v. *Morse*, 20 N. S. R. 110: *Hobson* v. *Thelusson*, L.R. 2 Q. B. 642, distinguished.

insolvency," in the original Revised Statute the words "the provisions of chapter 118" now appear. This amendment was made by 49 Vict. (1886), c. 32, s. 2.

(3) Unlike the Ontario Act, 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 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 (*e*).

2. In case such 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 (1) as against the same persons (2) 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.

(1) These are the words used in the Ontario Act, which see.

(2) The persons meant are those stated in section 1. It is only as against such persons that the instrument is void, and for no other purpose.

(e) *McAllister* v. *Forsyth*, 5 Rus. & Geld., 17 N. S. R. 151: *Creighton* v. *Jenkins*, *ib*, 353.

3. Every hiring, lease, or agreement for the sale of goods and chattels (1) accompanied by an immediate delivery, and followed by an actual and continued change of possession, whereby it is agreed that the property in the goods and chattels, or in case of an agreement for sale, a lien thereon for the price or value thereof, or any portion thereof, shall remain in (2) the hirer, lessor, or bargainor, until the payment in full of such price or value by future payments or otherwise (3), shall be in writing, signed by the parties thereto, or their duly authorized agents, in writing, a copy of which authority shall be attached to such agreement, and shall set forth fully, by recital or otherwise, the terms, nature and effect of such hiring, lease, or bargain for sale, and the amount to be paid thereunder, whether expressed as rent, payment, or otherwise; and shall be accompanied by the affidavit of either of the parties; or in case such agreement has been signed by an agent or agents of the parties, duly authorized as aforesaid, then by the affidavit of the agent of either of the parties thereto, stating that the writing truly sets forth the agreement between the parties thereto, and truly sets forth the claims, lien, or balance due to the hirer, lessor, or bargainor therein, and that such writing is executed in good faith, and for the express purpose of securing to the hirer, lessor, or bargainor, the payment of the claim, lien, or charge thereon, at the times and under the terms set out in the writing, and for no other purpose; and such agreement and affidavit shall be registered at the time and place, and in every respect according to the provisions of this chapter; otherwise the claim, lien, charge, or property intended to be secured to the hirer, lessor, or bargainor, shall be null, void, and of no effect (4) as

against the creditors (5) and subsequent purchasers and mortgagees of the person to whom such goods and chattels are hired, leased, or agreed to be sold. [As amended by 1886, c. 32, s. 1; 1893, c. 40, s. 1.]

(1) This section does not 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 (*f*).

(2) In the Act the word "or" appears by a clerical error for "in", which we here insert.

(3) 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 (*g*).

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" (*h*).

(4) 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 (*i*).

(5) 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

(f) *McGregor* v. *Kerr* (1896), 29 N. S. R. 45; 32 C. L. J. 593.
(g) *Lewis* v. *Denton*, 19 N. S. R. 235.
(h) *Guest* v. *Diack* (1897), 33 C. L. J. 497.
(i) *Singer* v. *McLeod*, 20 N. S. R. 341.

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 (*j*).

4. Every bill of sale or chattel mortgage (1) of personal property other than mortgages to secure future advances or mortgages for securing the mortgagee against the endorsement of any bills or promissory notes or other liability incurred for the mortgagor, shall hereafter be accompanied by an affidavit of the party giving the same (2), or his agent or attorney duly authorized in that behalf, that the amount set forth therein as being the consideration thereof is justly and honestly due and owing by the grantor to the grantee (3), and that the bill of sale or chattel mortgage was executed in good faith (4) and not for the purpose of protecting the property mentioned therein against the creditors of the grantor or mortgagor (5), or of preventing the creditors or such grantor or mortgagor from obtaining payment of any claims against him; otherwise such bill of sale or chattel mortgage shall, as against the persons mentioned in section 1 of this chapter, take effect and have priority from the time of the filing thereof, accompanied by such affidavit. [As amended by 1886, c. 32, s. 3.]

(1) This section has been qualified by excepting from its operation trust mortgages and deeds made by incorporated companies to secure their bonds or debentures. The amending Act, 56 Vict. (1893), c. 39, passed February 1st, 1893, is as follows:

(j) *Miller* v. *Curry*, 25 N. S. R. 537.

"Sections 4 and 5 of chapter 92, of the Revised Statutes, (fifth series), shall not apply to mortgages or deeds of trust made to secure the bonds or debentures of any incorporated company."

The wording of the latter Act is not in as definite a form as could be wished, for it might be contended that it applied to the mortgage or deed of trust given by a private individual to secure debentures of a company, and to a mortgage by one company to secure the bonds of another company, a not unusual occurrence where two companies are under practically the same management. It is, however, probable that what the legislature intended was to except from the Act such instruments as are executed by an incorporated company to secure their own bonds or debentures only.

(2) By this section it is required that the person *giving*, not taking, the affidavit shall make the affidavit. Under the Ontario Act it is the grantee or mortgagee who is required to make this affidavit.

(3) 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 grantees 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 (*k*), 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 (*l*).

Where the mortgage is given to secure a debt, and also to secure against liability on accommodation endorsements, two separate affidavits should be made (*m*).

(k) *Archibald* v. *Hubley*, 18 S. C. R. 116.
(l) *Levy* v. *Logan*, 24 N. S. R. 412.
(m) *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 a bill of sale within the Act (*n*), this section will not be complied with unless the preferred debts are verified (*o*).

(4) Where there is a valid construction and no fraud, the question of apparent possession or merely formal possession does not arise, the Nova Scotia Act in that particular differing from the Ontario and English Acts (*p*).

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 (*q*).

(5) 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 (*r*).

5. In case of a mortgage of goods and chattels (1) securing the mortgagee repayment of any future 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, and in case it is executed in good faith, and sets forth fully by recital or otherwise the terms, nature and effect of the agreement for such advances or endorsements or other liability to be incurred, and the amount of the liability intended to be created, and in case such mortgage is accompanied by the affidavit of the mortgagor, as in the schedule hereto annexed, or in case the mortgage has been given or entered

(n) *Archibald* v. *Hubley*, 18 S. C. R. 116.
(o) *Kirk* v. *Chisholm*, 28 N. S. R. 111.
(p) *Eastern Canada* v. *Curry*, 28 N. S. R. 323.
(q) *Pineo* v. *Gavaza*, 20 N. S. R. 249.
(r) *Mulcahy* v. *Archibald* (1897), 33 C. L. J. 545.

into by an agent or attorney duly authorized in writing to give or enter into such mortgage, and if the agent or attorney is aware of the circumstances connected therewith, then, if accompanied by the affidavit of such agent or attorney, such affidavit, whether of the mortgagor or his agent or attorney, 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 and covered by said mortgage, and that such mortgage was 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, with such affidavit, is filed with the registrar of deeds of the county wherein the maker resides, the same shall be valid and binding to the same extent and as against the same persons as the bills of sale or chattel mortgages mentioned in this chapter; otherwise such mortgage shall, as against the persons mentioned in section 1 of this chapter, only take effect from the time of filing thereof accompanied by such affidavit. [As amended by 1886, c. 32, s. 4.]

(1) This section does not, however, apply to mortgages and deeds of trust made by an incorporated company to secure their bonds or debentures, they having been excepted from the operation of this and the preceding section (which see) by Nova Scotia Act of 1893, 56 Vict., c. 39.

6. The affidavits mentioned in the first section and (1) the three next preceding sections shall be

made before a judge of any court, any commissioner for taking affidavits, or any justice of the peace or notary public, and if the same is made by the agent or attorney of the party required to make the same, it shall be set out in said affidavit that the said agent or attorney making the same is personally cognizant of the facts therein set out. [As amended by 1886, c. 32, s. 5.]

The words "the first section and" were added by 49 Vict., c. 32, s. 5.

7. The registrar of deeds shall cause the bills of sale or copies thereof deposited with him (1), to be numbered and indexed, and an alphabetical list thereof to be made in a book to be kept by him for that purpose, containing the names and descriptions of the grantors and grantees, the date of execution and filing, and the sums for which the same have been given; and every bill of sale or copy may be inspected by any person paying a fee of twenty cents therefor.

(1) 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, though it might be restored by the assignee as promptly as possible, 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 (*s*). 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

(*s*) *Fisher* v. *Bishop*, 5 Rus. & Geld., 17 N. S. R. 451.

fulfilled the statutory requirements devolving upon them, cannot be prejudiced by failure in the registrar to do his duty.

8. When a bill of sale or chattel mortgage shall have been discharged or released, an entry of such discharge 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 oath of a subscribing witness, made before the registrar of deeds or any justice of the peace, or otherwise, as required for the registry of deeds of real estate, and such certificate shall be indexed and entered on the list, and on the files kept by the registrar. [As amended by 1886, c. 32, s. 6.]

9. The registrar shall be entitled to twenty cents for his trouble in filing, indexing and entering every bill of sale or copy, and to twenty cents for administering every oath, under this chapter, and to twenty cents for entering and indexing every certificate of discharge of a bill of sale.

10. In construing this chapter 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, that is to say :

The expression "bills 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 or licenses to take possession of personal chattels as security for any debt, but shall 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, 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 keeper's 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 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 (1).

The expression "personal chattels" shall mean goods, furniture, fixtures (2) and other articles capable of complete transfer by delivery, and shall not include chattel interests in real estate, nor shares or interests in the stock, funds, or securities of any government, or in the capital or property of any incorporated or joint stock company, nor choses in action.

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 building, land, or other premises occupied by him, or as they shall be 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 (3). [As amended by 1886, c. 32, s. 7.]

(1) An assignment of personal property in trust to sell the same and apply the proceeds to the payment of debts due certain named creditors of the assignor, is a bill of sale within section 4, it not being an assignment for the "general benefit of creditors" excepted by this section (*t*).

(t) *Archibald* v. *Hubley*, 18 S. C. R. 116; 27 C. L. J. 188; *Durkee* v. *Flint*, 19 N. S. R. 487, overruled.

And where an assignment of real and personal property in trust to pay first, certain preferred creditors; second, claims upon which certain persons named might respectively become liable as endorsers; third, debts due creditors who consented to the assignment, and lastly for all creditors pro rata, the document was held to be a bill of sale within the Act (*u*).

(2) 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 (*v*).

(3) Where there is no fraud, and a valid consideration is shewn, the question of apparent possession or of merely formal possession does not arise (*w*).

11. The affidavits mentioned in sections four and five of this chapter shall be as nearly as may be in the form in schedules A and B, respectively (1).

(1) 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 (*x*).

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 (*y*).

But where a mortgage is given to secure both a present

(u) *Kirk* v. *Chisholm*, 28 N. S. R. 111.
(v) *Warner* v. *Don*, 26 S. C. R. 388.
(w) *Eastern Canada* v. *Curry*, 28 N. S. R. 323.
(x) *Kilcup* v. *Belcher*, 23 N. S. R. 462.
(y) *Smith* v. *McLean*, 21 S. C. R. 355; 28 C. L. J. 620: *Cunningham* v. *Morse*, 20 N. S. R. 110.

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 (*z*).

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 (*a*).

12. This chapter shall not apply to deeds of trust or mortgages made or given or that hereafter may be made or given by any railway company for the purpose of securing its bonds. Such trust deed or mortgage shall hold and bind any personal property therein named of the railway company making or giving the same against the judgment creditors of said company and others as fully and completely as though this chapter had never become law (1).

(1) This section was added by 51 Vict. (1888), c. 23. The Act does not give a number to the section, but we have numbered it 12 for convenience of citation.

(z) *Reid* v. *Creighton*, 24 S. C. R. 69; 31 C. L. J. 274; *Thomas* v. *Kelly*, 13 App. Cas. 506.

(a) *Morse* v. *Phinney*, 22 S. C. R. 563; 30 C. L. J. 359; *Smith* v. *McLean*, 21 S. C. R. 355, distinguished.

SCHEDULES.

A.

Canada,
Province of Nova Scotia,
County of

I, A. B., of , in the County of (*occupation*) make oath and say as follows:

I am the grantor (*or* agent *or* attorney of the grantor duly authorized in that behalf, and have a personal knowledge of the matters hereinafter deposed to) mentioned in the accompanying bill of sale (*or*, chattel mortgage).

The amount set forth therein as being the consideration thereof is justly and honestly due and owing by the grantor to the grantee, and the bill of sale (*or*, chattel mortgage, *as the case may be*,) was executed in good faith, and not for the purpose of protecting the property mentioned therein against the creditors of the grantor (*or*, mortgagor,) or of preventing the creditors of such grantor (*or*, mortgagor,) from obtaining payment of any claims against him.

Sworn to at in the
County of , this day (Sgd) A. B.
of , A. D. 18 ,
Before me.

B.

Canada,
Province of Nova Scotia,
County of

I, A. B., of , in the County of (*occupation*), make oath and say

I am the mortgagor (*or*, agent *or*, attorney of the mortgagor duly authorized in that behalf, and have a personal knowledge of the matters hereinafter deposed to) mentioned in the accompanying chattel mortgage.

The mortgage hereto annexed truly sets forth the agreement entered into between the parties, and truly states the extent of the liability intended to be created and covered by said mortgagor (1), and that such mortgage was executed in good faith and for the express purpose of securing the mortgagee repayment of his advances (*or, and*, against the payment of the amount of the liability of the mortgagee 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 they may have against such mortgagor.

Sworn to at , in the County of , this day of , A.D. 18 , Before me,

(Sgd.) A. B.

(1) Presumably the word "mortgagor" is a clerical error, for "mortgage."

ONTARIO.

REVISED STATUTES, 1897.

CHAPTER 148.

An Act respecting Mortgages and Sales of Personal Property.

SHORT TITLE, S. 1.

CHATTEL MORTGAGES WHERE POSSESSION OF GOODS UNCHANGED:
Affidavits as to indebtedness, ss. 2, 3.
To be registered or void as against creditors, ss. 2, 5.
To operate from execution, s. 4.

SALES OF GOODS WHERE POSSESSION UNCHANGED:
To be registered or void as against creditors, s. 6.

MORTGAGES OF GOODS TO SECURE ADVANCES OR SURETIES, ss. 7, 8.

AUTHORITY TO BE FILED, S. 9.

AFFIDAVIT OF BONA FIDES MAY BE MADE BY ONE OF TWO OR MORE MORTGAGEES, ETC., S. 10.

CONTRACTS TO GIVE MORTGAGES OR MAKE SALES, ss. 11-14.

PLACE OF REGISTRATION, ss. 15, 16.

WHEN MORTGAGED GOODS REMOVED TO ANOTHER COUNTY OR DISTRICT, S. 17.

RENEWAL OF MORTGAGES, ss. 18-23.

CERTIFICATE OF CLERK TO BE EVIDENCE OF REGISTRATION, S. 24.

DISCHARGE OF MORTGAGES, ss. 25-28.

FEES, S. 29.

MISCELLANEOUS :
Registration where time expires on a day on which offices are closed, s. 30.
Authority to take or renew mortgages may be general, s. 31.
Description in instrument, s. 32.
Affidavits, s. 33.
Act not to apply to vessels, s. 34.
Where new county formed, s. 35.
Inspection of books, s. 36.
Act to extend to goods not ready for delivery, s. 37.
"Creditor," meaning of, s. 38.
"Actual and continued change of possession," meaning of, s. 39.
Taking possession not to validate, s. 40.
AGREEMENTS WHERE POSSESSION PASSES WITHOUT OWNERSHIP, s. 41.
STATISTICAL RETURNS, s. 42.

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

1. This Act may be cited (1) as "The Bills of Sale and Chattel Mortgage Act" (2). 57 V., c. 37, s. 1.

(1) Until the passing of chapter 37 of the statutes of Ontario of 1894 (which came into force January 1st, 1895), this Act had no short title for convenience of citation, although commonly known by the name now given to it.

(2) By the use of this compound title the legislature appears to have disregarded the fact that chattel mortgages are bills of sale by way of security, and intends to treat them as a distinct class of legal conveyances. This may perhaps be for the purpose of more pointedly calling attention to the different requirements to be observed in respect of bills of sale by way of mortgage, and absolute bills of sale.

Effect of registering or omitting to register.

2. Every mortgage, or conveyance intended to operate as a mortgage (1) of goods and chattels (2),

in Ontario (3), which is not accompanied by an immediate delivery and an actual and continued change of possession of the things mortgaged (4) or a true copy thereof (5), shall, within five days from the execution thereof (6), except as hereinafter otherwise provided (7), be registered (8) as hereinafter provided, together with the affidavit of an attesting witness (9) 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 (10), which affidavit shall also contain the date of the execution of the mortgage (11), and also with the affidavit of the mortgagee or of one of several mortgagees (12), or of the agent of the mortgagee or mortgagees, if such agent is aware of all the circumstances connected therewith and is properly authorized in writing to take such mortgage, in which case the affidavit of the agent shall state that he is aware of all the circumstances connected therewith (13), and a copy of such authority or the authority itself (14) shall be registered therewith (15). 57 V., c. 37, s. 2.

(1) The words "Every mortgage or conveyance intended to operate as a mortgage" have been held 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 (*a*); 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 (*b*). A mortgagor, after default, is, as to crops growing upon the mortgaged land, a tenant at

(a) *North Central Wagon Co.* v. *Manchester Ry. Co.*, 13 App. Cas. 554: *Jackson* v. *Green*, 4 Johns. 186: *Palemus* v. *Trainor*, 30 Cal. 685: *Johnson* v. *Crofoot*, 53 Barb. 574.

(b) *Beecher* v. *Austin*, 21 U. C. C. P. 334: *Ex parte Parsons*, 16 Q. B. D. 532.

sufferance, and cannot, by giving a chattel mortgage upon the crops, confer a title to the p ejudice of the land mortgagee (*c*). 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 (*d*). 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 (*e*).

A mortgage of a vessel, registered under the provisions of any Act in that behalf (section 34), is not within the Act, nor is a mortgage of a vessel with all her apparel, furniture, etc., as part of the vessel (*f*); and a dump barge may be held to be a vessel, so that a mortgage thereof shall be excepted from the statute (*g*); but, inasmuch as the property in an unregistered ship may be transferred by parol like any other personal chattel (*h*), so it may be found that unregistered boats, being chattels, may be within the Act, so as to require a sale or mortgage thereof to be registered. Neither is an instrument evidencing a conditional sale; but such is subject to the Act respecting conditional sales of personal property (*i*); nor an instrument which conveys an interest in land, and also conveys machinery fixed to the land (*j*); an agreement to give a bill of sale or chattel mort-

(c) *Bloomfield* v. *Hellyer*, 22 A. R. 232.
(d) *Patterson* v. *Kingsley*, 25 Gr. 425.
(e) *Ex parte Hubbard*, 17 Q. B. D. 690.
(f) *Patton* v. *Fay*, 9 U. C. C. P. 512.
(g) *Gapp* v. *Bond*, Times L. R. (1887), 621.
(h) *McLean* v. *Grant*, 1 Kerr 50.
(i) *Rogers' Locomotive Works* v. *Lewis*, 4 Dill. 158; *Nash* v. *Weaver*, 23 Hun. (N. Y.) 513; R. S. O. (1897), c. 149.
(j) *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. 5 Q. B. 123.

gage is, by section 11, brought under the Act, and must be in writing and registered in manner similar to bills of sale and chattel mortgages, unless accompanied by an immediate delivery and followed by an actual and continued change of possession, and in like manner every covenant, promise or agreement to make a sale of chattels is deemed a sale under the Act (s. 12). A mortgage of growing timber (*k*), or the ordinary rent receipt of a piano or furniture, with right of purchase (*l*), is not within the Act; because, at no time does the property ever pass to, or vest in the lessees, or pass from the lessors (*m*). 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 (*n*), but now such agreements in respect of goods intended for re-sale are governed by section 41. But a general assignment of property, by deed, will pass timber in the possession of a poundkeeper, so as to entitle the assignee to bring trover for the timber after demand therefor and refusal (*o*); 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 (*p*). Nor again is an equitable

(k) *Steinhoff* v. *McRae*, 13 O. R. 546.

(l) *Crawcour* v. *Salter*, 18 Ch. D. 30: *Stevenson* v. *Rice*, 24 U. C. C. P. 245: *Banks* v. *Robinson*, 15 O. R. at p. 620: *McDonald* v. *Forrestal*, 19 C.L. J. 241: *Forristal* v. *McDonald*, 9 S. C. R. 12: *Lincoln Waggon Co.* v. *Mumford*, 41 L. T. 655: *Polson* v. *Degver*, 12 O. R. 275: *Ex parte Crawcour*, 9 Ch. D. 419.

(m) *Tomlinson* v. *Morris*, 12 O. R. 311: *Frye* v. *Milligan*, 10 O. R. 509.

(n) *Banks* v. *Robinson*, 15 O. R. 618.

(o) *Jack* v. *Eagles*, 2 All., 7 N. B. R. 95.

(p) *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.

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 assignment in favor of another (*q*). So far as the debtor's interest in same is concerned the statute will 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 (s. 37), in this respect abrogating the former rule (*r*).

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 (*s*); 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

(q) *McMaster* v. *Garland*, 8 A. R. 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: *Engelback* v. *Nixon*, 10 C. P. 645: *Pollock* v. *Fisher*, 1 All., 6 N. B. R. 515: *Jack* v. *Eagles*, 2 All., 7 N. B. R. 95.

(r) *Dominion Bank* v. *Davidson*, 12 A. R. 90.

(s) *Kelsey* v. *Rogers*, 32 U. C. C. P. 624: *Burnett* v. *McBean*, 16 U. C. R. 466.

part," appears to be an instrument within the Act requiring registration (*t*).

A simple receipt for purchase money of chattels, not at the time separated or appropriated from a greater number of the same kind, is probably subject to the provisions of the statute under section 37 (*u*).

A mortgage of what passes by a grant of the land need not be registered (*v*); 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 the Act (section 11). 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 12 and 37 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 (*w*).

To be within the second and third sections 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 bona fide existing debt (*x*), 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 (*y*).

It has been held (*z*) that the owner of land upon which

(t) *Howitt* v. *Gzowski*, 5 Gr. 555.

(u) And see *Snell* v. *Heighton*, 1 C. & E. 95.

(v) *Ex parte Belcher*, 4 D. & Ch. 703: *Ex parte Reynal*, 2 M. D. & D. 443; *Hutchinson* v. *Kay*, 23 Beav. 413.

(w) *Re Hall*, 14 Q. B. D. 386: *per* Bacon, C. J., *Ex parte North Western Bank*, L. R. 15 Eq. 69: *Marsden* v. *Meadows*, 7 Q. B. D. 80.

(x) *Beecher* v. *Austin*, 21 U. C. C. P. 334: *Middlebrook* v. *Thompson*, 19 U. C. R. 311.

(y) *Ex parte Bolland*, 21 Ch. D. 543.

(z) *Rose* v. *Hope*, 22 U. C. C. P. 482.

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; but in the recent case of *Bacon* v. *Rice Lewis* (*a*), it was held (following a decision of the English Court of Appeal) (*b*), 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 (*c*). And indeed, since manure lying in heaps in a barn yard is a chattel which may be taken away by an outgoing tenant (unless the contrary be stipulated), it may be mortgaged (*d*).

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 (*e*), and evidence can be gone into to show what the intention was, but the proof should be clear and convincing (*f*).

A bill of sale of goods, 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

(a) *Bacon* v. *Rice Lewis* (1897), 33 C. L. J. Nov. 1st.

(b) *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.

(c) *Thomson* v. *Walsh*, 2 All., 7 N. B. R. 369.

(d) *Foshay* v. *Barnes*, 1 Han., 12 N. B. R. 452.

(e) *McMartin* v. *McDougall*, 10 U. C. R. 399: *Kulm* 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.

(f) *Dabney* v. *Green*, 4 H. & N. 101: *Ex parte Odell*, 10 Ch. D. 76: *Ex parte Cooper*, 10 Ch. D. 313.

due thereunder and expenses, the surplus should go to the original bargainor, has been held to be a mortgage, but there the documents alone constituted the transaction, and apart from them there was no transaction at all (*g*).

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 impossibilia," 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 (*h*): 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 (*i*).

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 set forth a schedule to be followed "as nearly as may be" (*j*).

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 (*k*).

(g) *North Central Wagon Co.* v. *Manchester, etc. Ry. Co.*, 35 Ch. D. 191; affirmed 13 App. Cas. 554.

(h) *Kitching* v. *Hicks*, 6 O. R. 739: *Mowat* v. *Clement*, 3 Man. R. 585; *Hughes* v. *Little*, 18 Q. B. D. 32.

(i) *Pickering* v. *Ilfracombe Ry. Co.*, L. R. 3 C. P. p. 250: *Ex parte Browning*, L. R. 9 Ch. 583.

(j) *Reid* v. *Creighton*, 24 S. C. R. 69.

(k) *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 himself does not prevent the mortgage from being registered under the statute (*l*).

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 (*m*). Such treasurer, as mortgagee, may maintain an action against a wrongdoer for taking the goods mortgaged, although, as a 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 has 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 (*n*). 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 constituted 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" (*o*).

The Queen may take a mortgage from any of her subjects to secure a debt (under our Act) through, and in the name of, the head of the department to which the debt is due (*p*), and

(l) *White* v. *Brown*, 12 U. C. R. 477.
(m) *Brodie* v. *Ruttan*, 16 U. C. R. 207.
(n) *Re Cunningham*, 28 Ch. D., 682: *Shears* v *Jacob*, L. R. 1 C. P. 513: *Deffell* v. *White*, L. R. 2 C. P. 144.
(o) *Brown* v. *Sweet*, 7 A. R. 725.
(p) *McGee* v. *Smith*, 9 U. C. C. P. 89.

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. 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 (*q*).

There is no necessity for a chattel mortgage to be under seal (*r*).

(2) 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 (*s*).

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 (*t*). 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 (*u*).

(q) *Jones* v. *Henderson*, 3 Man. R. 433.
(r) *Hall* v. *Collins Bay Co.*, 12 A. R. 65.
(s) *Hobson* v. *Gorringe*, (1897) 1 Ch. 182; 33 C. L. J. 311.
(t) *Tucker* v. *Muirhead*, 6 All., 11 N. B. R. 420.
(u) *Macpherson* v. *Fredericton Boom Co.*, 1 Han., 12 N. B. R. 337: see also *Pollock* v. *Fisher*, 1 All., 6 N. B. R. 515.

(3) In R. S. O. 1887, c. 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., c. 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 requisites (*v*).

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 (*w*).

(4) 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 (*x*).

Our statute has adopted the doctrine in Twyne's case (*y*), namely, that it is a sign of fraud for the donor to continue

(v) *River Stave Co.* v. *Sill*, 12 O. R. 557: *Marthinson* v. *Patterson*, 19 A. R. 188.

(w) *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*, 1 N. W. T. R., part 4, p. 89: *Ferguson* v. *Clifford*, 37 N. H. 86.

(x) *Belanger* v. *Menard*, 27 O. R. 209: *Cookson* v. *Swire*, 9 App. Cas. 664; *Purshall* v. *Eggart*, 52 Barb. 367.

(y) 1 Sm. L. C. 3.

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 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 (*z*).

Whether or not there has been an actual and continued 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 (*a*). 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 37, but book debts are not within the Act (*b*). 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, etc., are capable (*c*). 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 impos-

(z) Osler, J. A., *Dominion Bank* v. *Davidson*, 12 A. R. at p. 92.

(a) *Fry* v. *Miller*, 45 Penn. 441: *Morse* v. *Powers*, 17 N. H. 286.

(b) *Thibaudeau* v. *Paul*, 26 O. R. 385.

(c) *Per* Spragge, C. J. O., *McMaster* v. *Garland*, 8 A. R. at p. 5; *Ex parte Morrison*, 42 L. T. 158.

sible (*d*), 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 (*e*).

Precautions are wisely necessary, when it is remembered that the statute makes the title by possession a per[illegible]itle in favor of creditors, and in favor of subsequent mort[illegible]gees and purchasers who do register, as against the secret title of the actual owner or prior mortgagee who does not register (*f*).

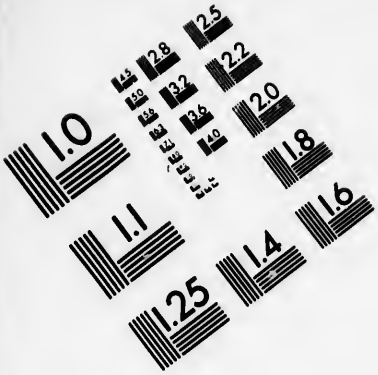
In many cases it is not possible to make an immediate and complete delivery, and then the only safe course is to effect registration under the Act.

"Actual and continued change of possession" is now defined by section 39 (which see), 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 wrongdoer who illegally takes possession (e.g., a landlord distraining for rent when nothing is due him), and the latter cannot set up jus tertii of the mortgagee as a defence, but 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 (*g*).

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 (*h*).

(d) *McMartin* v. *Moore*, 27 U. C. C. P. 397: *Maulson* v. *Commercial Bank*, 17 U. C. R. 30.
(e) *Hamilton* v. *Harrison*, 46 U. C. R. 127.
(f) *Per* Wilson, C. J., *McMaster* v. *Garland*, 31 U. C. C. P. 328.
(g) *Williams* v. *Thomas*, 25 O. R. 536.
(h) *Taylor* v. *Whittemore*, 10 U. C. R. 440.



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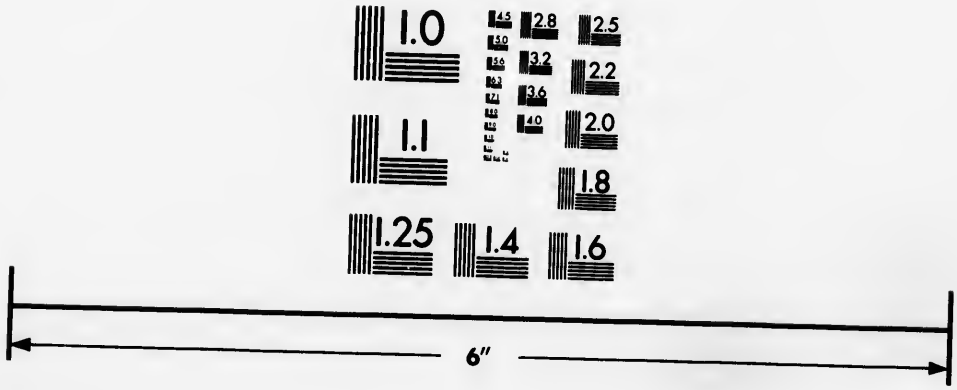

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Where the transaction is of such a nature that it was probably not contemplated that the document would be affected by the statute, the tendency is to endeavor to uphold it, if it be possible (*i*), for if any class of Acts ought to be construed strictly it should be those which, having for their object the prevention of fraud, have in certain cases a tendency to invalidate bona fide transactions. Where fraud does not exist, this Act should at all events receive no more than its true construction (*j*).

(5) As the alternative of filing the mortgage itself, this section gives the power of filing a true copy thereof. Section 5, 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 24 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

(i) Cameron, J., *Scribner* v. *McLaren*, 2 O. R. 279.

(j) *Gough* v. *Everard*, 2 H. & C., Pollock, C. B. at p. 8.

where, for instance, in the copy, Gardnor's name was spelt with an "e" instead of an "o" (*k*). 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 nobody reading it can by any possibility misunderstand it (*l*).

(6) 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 (*m*).

Sunday, it has been decided, counts as a day; but by section 30, 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, and a similar provision is contained in the Interpretation Act as governing periods of time limited by statute.

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 (*n*).

A mortgage or bill of sale that has been ineffectually registered may, during the five days, be taken off the file and re-registered (*o*); but not after the time for registering has elapsed (*p*). In the latter case a new mortgage or bill of sale must be made and filed with a fresh affidavit (*q*), and if a mortgagee take possession under his mortgage before the expiration of the five days, which he may do, his possession

(k) *Gardnor* v. *Shaw*, 24 L. T. N. S. 319.

(l) *In re Hewer*, 21 Ch. D. 871: *Sharp* v. *McHenry*, W. N. (1887), 179: *Emerson* v. *Bannerman*, 19 S. C. R. 1: *Smith* v. *McLean*, 21 S. C. R. 355.

(m) *McLean* v. *Pinkerton*, 7 A. R. 490.

(n) *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. R. 399: *Thomas* v. *Desanges*, 2 B. & Ald. 586.

(o) *In re Wright*, 27 L. T. 192.

(p) *McTaggart* v. *Rose*, 14 Ind. 230.

(q) *In re O'Brien*, 10 Ir. C. L. R. app. xxxiii.

before others have acquired rights in respect to the property will make his mortgage effectual (*r*), and he need not register the mortgage at all (*s*).

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 (*t*).

Parol evidence is admissible to shew that a mistake was made in the insertion of the date (*u*), 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. When asserting any rights under the mortgage, it is incumbent on the mortgagee to prove its validity as to filing; and though section 24 makes the clerk's certificate evidence of registration, it is only prima facie so, and therefore evidence can be gone into to shew when the mortgage was in fact filed.

A mortgage under this Act executed on a Sunday is not void, the giving or taking in security not being [illegible]ying or selling within the Act to prevent the profan[illegible] of the Lord's Day (*v*).

(7) The words "except as hereinafter otherwise provided," now added, refer to the exceptions in section 15, whereby additional time is allowed for registration in the various districts and provisional counties.

(r) *McTaggart* v. *Rose*, 14 Ind. 230, *per* Lush, L. J.; *Ex parte Saffery*, 16 Ch. D. at p. 671.

(s) *Per* Sir A. Cockburn, C. J., in *Marples* v. *Hartley*, 30 L. J. Q. B. 92.

(t) *Beekman* v. *Jarvis*, 3 U. C. R. 280.

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

(v) *Lai* v. *Stall*, 6 U. C. R. 506: *Wilt* v. *Lai*, 7 U. C. R. 535.

The omission from the affidavit of "the date of execution" is a fatal defect (*w*).

(8) The meaning of the word registration is the doing of that which section sixteen, infra, requires to be done.

(9) The attesting witness cannot be the mortgagee (*x*).

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" (*y*). 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 yet will be sufficient if it gives the above particulars.

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 (*z*), and when, and also that the deponent himself signed as a witness.

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 (*a*), and he ought not to receive and file an instrument under the Act without an affidavit of execution (*b*).

(w) *Wood* v. *Brunt*, 32 C. L. J. 775, Ketchum, Co. J.
(x) *Seal* v. *Claridge*, 7 Q. B. D. 516.
(y) *Grindell* v. *Brendon*, 6 C. B. N. S. 698; 5 Jur. N. S. 142; 28 L. J. C. P. 333.
(z) *Ford* v. *Kettle*, 9 Q. B. D. 139; *Sharpe* v. *Birch*, 8 Q. B. D. 111.
(a) *DeForrest* v. *Bunnell*, 15 U. C. R. 370.
(b) *Grindell* v. *Brendon*, 6 C. B. N. S. 698; 28 L. J. C. P. 3.

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 (*c*).

The witness is required to be an "attesting," i.e., "subscribing" witness. This corresponds to the Imperial Act, where the affidavit must be of the "due execution and attestation" (*d*).

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 mortgagor 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 (*e*). 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. 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 accept-

(c) *Bogley* v. *McMickle*, 9 Cal. 430.

(d) Imp. 41-42 Vict., c. 31, s. 10, s-s. 2.

(e) *Miller* v. *Blineburv*, 21 Wis. 676: *Welch* v. *Sackett*, 12 Wis. 243.

ance (*f*): 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 (*g*). Mere knowledge is not acceptance. The mortgagee must do some act, directly or indirectly, ratifying the mortgage (*h*). A mortgage executed and filed in pusurance 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 (*i*).

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 (*j*), and the omission of the deponent's addition is no objection to the affidavit (*k*).

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, the witness to which makes affidavit that he saw both mortgagors execute, when, in fact, he only saw one (*l*).

The affidavit may be sworn before any judge, notary public, commissioner or other person in or out of the province authorized to take affidavits in and for the High Court of Justice or by a justice of the peace (*m*).

Should the party administering the affidavit omit to sign the jurat, the mortgage will be void (*n*). On the same reasoning, a mortgage will be void if the jurat omit the word

(f) *Thayer* v. *Stark*, 6 Cresh. (Mass.) 11.
(g) *Jordan* v. *Farnsworth*, 15 Gray (Mass.) 517.
(h) *Cobb* v. *Chase*, 54 Iowa 253.
(i) *Day* v. *Griffith*, 15 Iowa, 104.
(j) *Rex* v. *Newman*, 1 Ld. Raym. 562.
(k) *Brodie* v. *Ruttan*, 16 U. C. R. 207.
(l) *DeForrest* v. *Bunnell*, 15 U. C. R. 370.
(m) See section 33.
(n) *Ex parte Heymann*, L. R. 7 Ch. 488: *Nisbet* v. *Cock*, 4 A. R. 200.

"sworn," or the word "affirmed" (*o*). 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 (*p*).

(10) Should a copy be filed as permitted by the Act, in place of the original, then it should also be shown by affidavit that the copy is a true copy of such original.

(11) 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 our Act.

(12) 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 (*m*).

The question was raised in *McLeod* v. *Fortune* (*n*), 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

(o) *Pollard* v. *Huntingdon*, 16 C. L. J. 168.
(p) *Moyer* v. *Davidson*, 7 U. C. C. P. 521.
(m) *Hobbs* v. *Kitchen*, 17 O. R. 363; 25 C. L. J. 251.
(n) 19 U. C. R. 98.

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 (*o*).

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 (*p*).

(13) The section 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 therewith," i.e., with the mortgage.

(14) R. S. O. (1887), c. 125, s. 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 the Act of 1894 to allow the registration of the original, by adding after the words "a copy of such authority," the words, "or the authority itself."

(15) It was not until the passing of the statute 20 Vict., c. 3, that an agent could make the affidavit of bona fides, the Act 13-14 Vict., c. 62, imperatively requiring that, in case of a mortgage, the mortgagee himself (and, in case of a sale, the bargainee himself) should make the affidavit. Hence a mortgage filed under that Act on the affidavit of an agent, was held bad (*q*). The Act 40 Vict., c. 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.

(o) *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.

(p) *Jones* v. *Harris*, L. R. 7 Q. B. 157.

(q) *Holmes* v. *Vancamp*, 10 U. C. R. 510.

Third, by an agent of the mortgagee.

Fourth, by an agent of the several mortgagees.

It does not expressly appear, however, that an agent of one only of several joint mortgagees can make it, and an agent with power to make an affidavit cannot invest another with his power delegated to him from his principal.

If the agent make the affidavit, it must state, besides the requirements necessary under section 3, infra, 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. The authority of the agent is not required to be under seal (*r*), and it will be revoked by the death of the principal (*s*), unless it provide otherwise (*t*). 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 (*u*). 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 authority for that purpose (*v*). When the mortgage is taken to a trading company, then, if the affidavit of bona fides be 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, the mortgage will be held

(r) *Beecher* v. *Austin*, 21 U. C. C. P. 342.
(s) *Jacques* v. *Worthington*, 7 Gr. 192; *Wallace* v. *Cook*, 5 Esp. 118.
(t) R. S. O. (1887) c. 97, s. 1; (1897) c. 116.
(u) R. S. O. (1887) c. 97, s. 2; (1897) c. 116.
(v) See s. 31.

void (*w*), and an affidavit made by the manager of a loan company on a chattel mortgage to the company was likewise held insufficient (*x*). 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 (*y*). 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 (*z*).

SECTION 3.

3. Such last mentioned affidavit (1), whether of the mortgagee or his agent (2), or one of several mortgagees or the agent of the mortgagee or mortgagees (3) shall state (4) in addition to what is required by section 2 of this Act (5) that the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage (6), that the mortgage was executed in good faith and for the express purpose of securing the payment of money justly due or accruing due (7) and not for the purpose of protecting the goods and chattels (8) mentioned therein against the creditors

(w) *Freehold L. & S. Co.* v. *Bank of Commerce*, 44 U. C. R. 284.
(x) *Greene* v. *Castleman*, 25 O. R. 113.
(y) *Bank of Toronto* v. *McDougall*, 15 U. C. C. P. 475.
(z) *Per* Hagarty, C. J., *Freehold L. & S. Co.* v. *Bank of Commerce*, 44 U. C. R. 284.

of the mortgagor (9), or of preventing the creditors of such mortgagor from obtaining payment of any claim against him (10). 57 V., c. 37, s. 3.

(1) It is not necessary that the affidavit of the truth of the debt and bona fides required by this and section 2 supra, should be made on the same day that the mortgage is executed (*b*); the decision in *Perry* v. *Ruttan* was under 13-14 Vict., c. 62, the provision 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., c. 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 technicalties required by a rule of court (*c*). 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 (*d*); so also where the commissioner

(b) *Perry* v. *Ruttan*, 10 U. C. R. 637.

(c) *Moyer* v. *Davidson*, 7 U. C. C. P. 521: *De Forrest* v. *Bunnell*, 15 U. C. R. 370: *Cobbett* v. *Oldfield*, 16 M. & W. 469.

(d) *Moyer* v. *Davidson*, 7 U. C. C. P. 521.

signed a jurat over the words "A Com'r, etc." (*e*). And an affidavit may be sworn before a solicitor employed in the office of the mortgagee's solicitors (*f*), 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 (*g*), or that the deponent's addition is wanting (*h*). It is sufficient if the affidavit identifies the deponent as being the mortgagee, or the mortgagee as being the deponent (*i*). 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 (*j*). 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

(e) *Canada Permanent* v. *Todd*, 22 A. R. 515.
(f) *Canada Permanent* v. *Todd*, 22 A. R. 515.
(g) *DeForrest* v. *Bunnell*, 15 U. C. R. 370.
(h) *Brodie* v. *Ruttan*, 16 U. C. R. 207; *Allen* v. *Thomson*, 1 H. & N. 15; 2 Jur. (N. S.) 451; 25 L. J. Ex. 249.
(i) *Sladden* v. *Sergeant*, 1 F. & F. 322, Willis, J.; *Nicholson* v. *Cooper*, 3 H. & N. 384; 27 L. J. Ex. 392; *Brodie* v. *Ruttan*, 16 U. C. R. 207.
(j) *Archibald* v. *Hubley*, 18 S. C. R. 116.

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 (*k*); 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 (*l*). 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 (*m*); 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 (*n*).

The affidavit of bona fides must not be sworn before the execution of the mortgage, or the mortgage will be invalid (*o*).

The test as to the sufficiency of the affidavit is not, as has been supposed, whether or not perjury could be assigned,

(k) *Nisbet* v. *Cock*, 4 A. R. 200.

(l) *Hamilton* v. *Harrison*, 46 U. C. R. 127: *Blaiberg* v. *Parke*, 10 Q. B. D. 90: *Canada Permanent* v. *Todd*, 22 A. R. 515.

(m) *Mowat* v. *Clement*, 3 Man. R. 585.

(n) *Pollard* v. *Huntingdon*, 16 C. L. J. 168: *Archibald* v. *Hubley*, 18 S. C. R. 116.

(o) *Reid* v. *Gowans*, Ont. Ct. of Appeal, 1885, not reported: *Building & Loan* v. *Betzner*, 26 C. L. J. 189.

but whether the paper filed with the chattel mortgage is such an affidavit as the statute requires (*p*).

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 to be made, in order to registration of mortgages, cannot be properly made or legally received for the purpose of registering it. 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 (*q*).

(2) 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 (*r*). 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 to the corporation itself wherever possible, in which event he would make the

(p) *Nisbet* v. *Cock*, 4 A. R. 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.

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

(r) *White* v. *Brown*, 12 U. C. R. 477: *Heward* v. *Mitchell*, 11 U. C. R. 625.

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 (*s*).

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 (*t*). One of a firm of co-partners may take this affidavit on behalf of the firm (*u*). 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 (*v*), 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 (*w*).

(3) The words "or of one of several mortgagees, or the agent of the mortgagee or mortgagees" added by the Act of 1894, were suggested in the first edition of this work, on the ground that their absence might encourage a contention that the requirements 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 (*x*), the cases of *McLeod* v. *Fortune* (*y*), and *Severn* v. *Clarke* (*z*), having already decided the point in the affirmative.

(4) Three things are required by the affidavit:

(s) See section 31 *post*.

(t) *Taylor* v. *Ainslie*, 19 U. C. C. P. 78: *Brodie* v. *Ruttan*, 16 U. C. R. 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. R. 52.

(u) *Randall* v. *Baker*, 20 N. H 335.

(v) *McGee* v. *Smith*, 9 U. C. C. P. 89.

(w) *Sumner* v. *Dalton*, 58 N. H. 295.

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

(y) 19 U. C. R. 100.

(z) 30 U. C. C. P. 363.

(i) That the mortgagor therein named is justly and truly indebted to the mortgagee in the sum mentioned in the mortgage (s. 3);

(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 (s. 3);

(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 (s. 3);

If the affidavit is made by an agent, it must, in addition, state:—

(iv) That the agent is aware of all the circumstances connected with the mortgage (s. 2.)

Should the affidavit be made by an agent, it need not state that he is properly authorized in writing to take the mortgage (*a*). It is, however, always open to a creditor, subsequent purchaser or mortgagee in good faith, to show 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 (*b*).

(5) The words "in addition to what is required by section 2 of this Act" are here inserted apparently to call attention to the requirement of the affidavit of bona fides when made by an agent (see s. 2), viz.: that he is aware of all the circumstances connected with the mortgage.

(6) 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

(a) *Carlisle* v. *Tait*, 1 A. R. 10.

(b) Cameron, J., *Carlisle* v. *Tait*, 1 A. R. at p. 35: *Ex parte Bolland*, 21 Ch. D. 543.

another may take a chattel mortgage in security from that other, for his own indemnity, under section 8, 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 (*c*): 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. 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 (*d*). 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 (*e*). 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

(c) *McIntyre* v. *Union Bank of Lower Canada*, 2 Man. R. 305.

(d) *Oliver* v. *Robinson*, not reported.

(e) *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.

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 (*f*). 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 shown that there were more goods than would satisfy that amount (*g*); 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 (*h*). 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 (*i*). 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 (*j*).

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

(f) *Knox* v. *Meldrum*, Dean, Co. J., not reported.

(g) *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.

(h) *Hamilton* v. *Harrison*, 46 U. C. R. 127: *Biddulph* v. *Goold*, 11 W. R. 882: *Parkes* v. *St. George*, 10 A. R. 496: *Marthinson* v. *Patterson*, 19 A. R. 188.

(i) *Per* James, L. J., *Ex parte Challinor*, 16 Ch. D. 265.

(j) *Re Johnstone*, 50 L. T. 184.

sufficient, as a matter of law, to avoid the mortgage (*k*); and where the affidavit of bona fides on a bill of sale stated that the "sale was bona 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 (*l*). 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 describe it as "in consideration of £500 now paid," the consideration is truly stated, and the affidavit is properly made under this and the previous section (*m*). 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 (*n*). 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 (*o*).

In the case of a debt, the debt must be a bona fide subsisting one; such a debt is a valuable and sufficient consideration for a mortgage (*p*). 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 (*q*). 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

(k) *Marthinson* v. *Patterson*, 19 A. R. 188: *Parkes* v. *St. George*, 10 A. R. 496: *Hamilton* v. *Harrison*, 46 U. C. R. 133: *Hughes* v. *Shull*, 32 Alb. L. J., 337: *Jaffray* v. *Robinson*, not reported, but referred to in *Marthinson* v. *Patterson*, *ante*.

(l) *Ormsby* v. *Jarvis*, 22 O. R. 11.

(m) *Ex parte Allam*, 14 Q. B. D. 43: *Ramsden* v. *Lupton*, L. R. 9 Q. B. 17.

(n) *Ramsden* v. *Lupton*, L. R. 9 Q. B. 17.

(o) *Cooper* v. *Zeffert*, 32 W. R. 402: *Ex parte Nelson*, 35 W. R. 264.

(p) *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.

(q) *Robinson* v. *Paterson*, 18 U. C. R. 55.

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 (*r*).

(7) 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 four days after the filing, the mortgage was upheld (*s*). It is sufficient if the consideration is owing at the date of the mortgage (*t*). This word "consideration" has a legal sense, 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 (*u*); 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 (*v*). 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 the 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

(r) *Fleming* v. *McNaughton*, 16 U. C. R. 194: *Twyne's Case*, 3 Coke 81 (b): *Benton* v. *Thornhill*, 7 Taunt. 149; 2 Marsh. 427.
(s) *Martin* v. *Sampson*, 24 A. R. 1.
(t) *Beecher* v. *Austin*, 21 U. C. C. P. 339.
(u) *Ex parte Challinor*, 16 Ch. D. 260: *Credit Co.* v. *Pott*, 6 Q. B. D. 295.
(v) *Murillo* v. *Swift*, 18 Conn. 268.

the mortgage can be upheld against the objection that the affidavit and mortgage do not correctly shew the real transaction between the parties (*w*).

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 (*x*). 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 (*y*); and it appears that the affidavit of bona fides has still to be taken under sections 2 and 3 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 (*z*). 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 (*a*).

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 (*b*).

(w) *Beecher* v. *Austin*, 21 U. C. C. P. 339: *Clark* v. *Bates*, 21 U. C. C. P. 348: *Baldwin* v. *Benjamin*, 16 U. C. R. 52.
(x) *Walker* v. *Niles*, 18 Gr. 210.
(y) *Tidey* v. *Craib*, 4 O. R. 696.
(z) *Fish* v. *Higgins*, 2 Man. R. 65: *Hepburn* v. *Park*, 6 O. R. 472.
(a) *Hepburn* v. *Park*, 6 O. R. 472: *Hyman* v. *Cuthbertson*, 10 O. R. 443.
(b) *Ross* v. *Dunn*, 16 A. R. 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 (*c*).

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 (*d*).

When a banker discounts a bill or note for a customer, he buys it or purchases it out and out from him, and acquires all his customer's rights in it, that is, of bringing an action against all the parties to it, and also of re-selling it again if he pleases, or re-discounting it, and this is one of the great advantages of discounting bills, that if there be an unusual pressure for cash on the banker, he can re-sell the bills he has bought.

But in connection with the bill, or note forming the consideration of a mortgage, must be considered the position of the acceptor; if the latter gives his paper to the mortgagee as cash, and the mortgagee at once place its value as cash to the acceptor's credit, so as to extinguish all liability for the goods, and substitute only his liability on the draft; or should the holder of the bill transfer it to his banker, so that thereafter the acceptor should be the banker's debtor, and not the debtor of the holder of the bill, then under such circumstances, it might be found that a draft or bill given by the mortgagor, discounted by the mortgagee, does not form a good consideration for a mortgage under this section.

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 (*e*);

(c) *Bank of Hamilton* v. *Tamblyn*, 16 O. R. 247; 24 C. L. J. 343.

(d) *Campbell* v. *Patterson*, 21 S. C. R. 645; 29 C. L. J. 196: *Commercial Bank* v. *Wilson*, 3 A. R. 257, superseded.

(e) Grant's Law of Banking, 4th ed., 145.

and according as the dealing is or is not one between the parties whereby the bank takes the mortgagee as its debtor, and the mortgagor as his surety, or the mortgagor as its debtor, and the mortgagee as his surety, will the indebtedness be said to be truly or untruly stated (*f*). If the bill were held by the bank merely as collateral, the paper discounted being the mortgagee's note, and the bills of the latter's customers, including that of the mortgagor, were delivered as collateral, there would be strong evidence that the mortgagee was the debtor and the mortgagor the surety so far as the bank was concerned. 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 (*g*), so long as the note and mortgage can be reasonably connected one with another as embracing one and the same transaction (*h*). Parol evidence is of course admitted to identify a note with the one secured by the mortgage (*i*); and, if it can be shown 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 (*j*), 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 (*k*); but a totally false description of the note in the mortgage will not be allowed to prevail (*l*); 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 (*m*), though, if such notes be renewals of the

(f) *Hepburn* v. *Park*, 6 O. R. 472.
(g) *Webb* v. *Stone*, 24 N. H. 282.
(h) *Colby* v. *Everett*, 10 N. H. 429: *Robertson* v. *Stark*, 15 N. H. 109.
(i) *Holmes* v. *Hinkle*, 63 Ind. 518.
(j) *Robertson* v. *Stark*, 15 N. H. 109.
(k) *Windrell* v. *Coney*, 34 Alb. L. J. 210.
(l) *Fallet* v. *Heath*, 15 Wis. 601.
(m) *Jewett* v. *Preston*, 27 Me. 400.

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 (*n*).

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 (*o*). But where the mortgagee under a mortgage for an existing indebtedness made the affidavit of bona fides under section 7 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 (*p*).

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 (*q*). 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 second and third sections of the Act describing the debt as an absolute debt, and so swearing to it in the affidavit of bona fides.

(8) The words "estate and effects" are more compre-

(n) *Barrows* v. *Turner*, 50 Me. 127.
(o) *Squair* v. *Fortune*, 18 U. C. R. 547.
(p) *Midland* v. *Cowieson*, 20 O. R. 583.
(q) *Farlinger* v. *McDonald*, 45 U. C. R. 233.

hensive 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 (*r*).

(9) 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 sufficiency of the affidavit (*s*). 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 (*t*). But when there is more than one mortgagor the affidavit will not be 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 (*u*).

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,"

(r) *Mason* v. *Thomas*, 23 U. C. R. 305.

(s) *Boulton* v. *Smith*, 17 U. C. R. 404.

(t) *Harding* v. *Knowlson*, 17 U. C. R. 564: *Nisbet* v. *Cock*, 4 A. R. 200.

(u) *Bertram* v. *Pendry*, 27 U. C. C. P. 371.

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" (*v*).

(10) 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. 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 (*w*).

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 (*x*), or as against a subsequent purchaser or mortgagee.

4. (1) Every such mortgage or conveyance shall operate and take effect upon, from and after the day and time (2) of the execution thereof. 57 V., c. 37, s. 4.

(1) This section was originally taken from 26 Vict., 1863, c. 46, s. 1. Until the passing of that Act there was no statutory enactment causing a mortgage or bill of sale, duly registered, to relate back to the period of its execution. It was the statute, 20 Vict., 1857, c. 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 (*y*), and likewise it was held after the passing of the

(v) *Farlinger* v. *McDonald*, 45 U. C. R. 233: *Tyas* v. *MacMaster*, 8 U. C. C. P. 449.

(w) *Re Andrews*, 2 A. R. 24: *Morrow* v. *Rorke*, 39 U. C. R. 500: *Nesbit* v. *Cock*, 4 A. R. 200.

(x) *Davis* v. *Wickson*, 1 O. R. 369.

(y) *Carscallen* v. *Moodie*, 15 U. C. R. 92.

statute, 20 Vict., c. 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 (*z*).

(2) 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 (*a*).

The courts will consider a fraction of a day when the justice of the cause requires them to do so (*b*). Of course the careful practitioner never fails to examine the sheriff's office for encumbrances against the property mortgaged or to be mortgaged, 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 prior bargainees are concerned.

5. In case such mortgage or conveyance (1) and affidavits (2) are not registered as by this Act provided (3), the mortgage or conveyance shall be absolutely null and void (4) as against (5) creditors of the mortgagor (6), and against subsequent purchasers or mortgagees in good faith (7) for valuable consideration (8). 57 V., c. 37, s. 5.

(1) It will be observed that the mortgage, or conveyance, referred to in this section is "the mortgage or conveyance intended to operate as a mortgage," mentioned in section 2,

(z) *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. R. 474.

(a) *McMartin* v. *McDougall*, 10 U. C. R. 399.

(b) *Beekman* v. *Jarvis*, 3 U. C. R. 280.

yet, while the latter section permits a true copy to be registered, this section makes no reference to such. It therefore will be safer to register the mortgage itself. [See also note (5) to s. 2.]

(2) The affidavits are—(i.) The affidavit of execution (see s. 2), and (ii.) The affidavit of bona fides (see s. 3).

(3) This clause refers to what is said in section 2 regarding registration. That section, however, merely provides that the registration shall be within five days, and there is nothing prior to section 15 giving instructions as to how the mortgage is really to be registered.

A mortgage void under this section is void as against all creditors, including those who become such after the mortgagee has taken possession of the goods (*c*).

The mortgagee cannot now 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 (*d*).

(4) As the mortgage becomes absolutely null and void at the expiration of five days, the void security cannot be revived by the creditor simply taking possession (*e*).

(5) 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 (*f*), 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 (*g*).

(c) *Clarkson* v. *McMaster*, 25 S. C. R. 96.
(d) *Clarkson* v. *McMaster*, 25 S. C. R. 96.
(e) *Clarkson* v. *McMaster*, *supra*; *Barker* v. *Leeson*, 1 O. R. 114, *per* Boyd, C.
(f) *Ex parte Blaiberg*, 23 Ch. D., *per* Jessel, M. R., p. 258.
(g) *In re Artistic Color Printing Co.*, 21 Ch. D. 510; *Ex parte Blaiberg*, 23 Ch. D. 254.

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.

(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 their 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 (*h*).

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 (*i*); and it will be valid and

(h) See *Hall* v. *Collins Bay Co.*, 12 A. R. 65.

(i) *Robinson* v. *McDonnell*, 2 B. & Ald. 134: *Boughton* v. *Boughton*, 1 Atk. 625.

effectual as against any person consenting to it (*j*). 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 (*k*).

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 nevertheless 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 (*l*).

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 a mortgage to the purchaser will not affect his right (*m*).

(6) If there be a distinct agreement between mortgagor

(j) *Steele* v. *Brown*, 1 Taunt. 381 : see *Olliver* v. *King*, 1 Jur. N. S. 1066.

(k) *Scoble* v. *Henson*, 12 U. 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.

(l) *Mercer* v. *Peterson*, L. R. 2 Ex. 304 : *Darvill* v. *Terry*, 6 H. & N. 807 : *Oriental Banking Co.* v. *Coleman*, 3 Giff. 11.

(m) *Moffatt* v. *Coulson*, 19 U. C. R. 341 : *Edwards* v. *English*, 7 E. & B. 564 : *Otley* v. *Manning*, 9 East 59.

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 (*n*).

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 (*o*), and the creditor must be an opposing creditor (*p*). 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 (*q*). 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 (*r*). But the chattel mortgage Act does not make void the instrument as against "strangers," they not coming within any of the three classes of persons mentioned. And a sheriff, seizing under a fi. fa., will be a stranger, and not entitled to the benefit of the statute, unless he shows that he represents a creditor, and he can only do this by showing a judgment (*s*).

And it has been held that there is no reason for any distinction between this Act and that of Elizabeth in this respect, and as was said by a most eminent Judge (Boyd, C.),

(n) *Clarkson* v. *McMaster*, 25 S. C. R. 96, *per* Strong, C. J.

(o) *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.

(p) *Bank of Montreal* v. *McWhirter*, 17 U. C. C. P. 506.

(q) *Kidney* v. *Coussmaker*, 12 Ves. 136.

(r) *Graham* v. *Furbur*, 14 C. B. 410; 23 L. J. C. P. 51: *Mackay* v. *Douglas*, L. R. 14 Eq. 106.

(s) *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 "potential invalidity of a mortgage exists as to all creditors in existence," while the mortgage is defective for want of proper compliance with the Act (*t*). The creditor, it has been said, 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 (*u*).

"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" (*v*). 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 (*w*). Such person however has an interest which he could enforce against the person receiving the advances, or against his assignee in insolvency, or for the benefit of creditors, and could even restrain the debtor from disposing of the property without first satisfying the lien (*x*).

An assignee in insolvency may object to the absence of a bill of sale on an alleged sale by the insolvent, just as an

(t) *Barker* v. *Leeson*, 1 O. R. 114.

(u) *Barker* v. *Leeson*, 1 O. R. 114: *Clarkson* v. *McMaster*, 25 S. C. R. 96.

(v) *Per* Boyd, C., *Campbell* v. *Campbell*, 29 Gr. 254.

(w) *Hall* v *Collins Bay Co.*, 12 A. R. 65.

(x) *Rusden* v. *Pope*, L. R. 3 Ex., 269: *Engelback* v. *Nixon*, L. R. 10 C. P. 645.

execution creditor or a subsequent purchaser for value may do (*y*), and by section 38 it is specially provided that an assignee, under a deed of assignment in favor 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 (*z*).

(7) 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 (*a*), but where collusion exists with the mortgagor to cheat the mortgagee, a purchaser is one in bad faith, and 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 (*b*), even though the statutory formalities have been neglected by the mortgagee (*c*). 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 (*d*).

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

(y) *Snarr* v. *Smith*, 45 U. C. R. 156.
(z) *Kitching* v. *Hicks*, 6 O. R. 739.
(a) *Sage* v. *Browning*, 51 Ill. 217: *McDowall* v. *Stewart*, 83 Ill. 538.
(b) *Fuller* v. *Paige*, 26 Ill. 358.
(c) *Gooding* v. *Riley*, 50 N. H. 1400: *Pattern* v. *Moore*, 32 N. H. 382.
(d) *Edwards* v. *English*, 7 E. & B. 564: *Morrow* v. *Rorke*, 39 U. C. R. 500: *Moffatt* v *Coulson*, 19 U. C. R. 341: *Kaplin* v *Anderson*, 88 Ill. 120: *Porter* v. *Dement*, 35 Ill. 478.

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 (*e*). 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 (*f*). 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 (*g*). 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 (*h*).

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 neglect to renew such prior mortgage, are not subsequent mortgagees in good faith (*i*). But one who buys the 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 (*j*). The

(e) *Sayre* v. *Hewes*, 32 N. J. Eq. 652, 656.

(f) *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.

(g) *Farmers Loan Co.* v. *Hendrickson*, 25 Barb. (N. Y.) 484.

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

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

(j) *Patten* v. *Moore*, 32 N. H. 382: *Sanger* v. *Eastwood*, 10 Wend. 515: *Lewis* v. *Palmer*, 28 N. Y. 271.

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 (*k*).

A landlord may become a purchaser in good faith from his tenant, within the meaning of this section, either by taking the goods of his tenant as so much payment of his rent, or by purchase in pursuance of arrangement. In either case, as between them, the property would pass. It seems, too, that the landlord would still be a purchaser within the Act should he, with the tenant's consent, purchase the tenant's goods at a bailiff's sale, instituted by himself by way of distress in order to secure his rent (*l*); but, to be such in good faith, he must become a purchaser after the mortgage has expired by reason of not being renewed, or subsequent to a mortgage 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 (*m*).

A purchaser who assumes payment or a mortgage is not a purchaser within the Act for the purpose of taking advantage of alleged defects in the mortgage (*n*), and of course when the amount of the mortgage forms part of the consideration of the purchase, a purchaser cannot deny the validity of the mortgage (*o*), 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

(k) *Hodgins* v. *Johnston*, 5 A. R. 449: *Latimer* v. *Wheeler*, 30 Barb. 480: *Dillingham* v. *Laduc*, 35 Barb. 38: *Meech* v. *Patchin*, 14 N. Y. 71: *Gardner* v *Smith*, 29 Barb. 68: *Hill* v. *Beebe*, 3 Kernan 556.

(l) *Farlinger* v. *McDonald*. 45 U. C. R. 233.

(m) *Griffin* v. *McKenzie*, 46 U. C. R. 93.

(n) *Greither* v. *Alexander*, 15 Iowa 470.

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

mortgage (*p*). 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 (*q*).

A creditor, of course, is not prevented from taking advantage of the non-registry of an instrument under the Act, for the reason that, at the time his debt was contracted, he knew that his debtor had given a bill of sale of his goods and chattels (*r*). 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" (*s*).

In the case of mortgages not required by the statute to be registered, preference is given according to priority of execution; but, if the statute does apply to two mortgages, 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 a 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

(p) *Barry* v. *Bennett*, 7 Met. (Mass.) 354: *Housatonic* v. *Martin*, 1 Met. (Mass.) 294.

(q) *Chesworth* v. *Hunt*, 5 C. P. D. 266.

(r) *Edwards* v. *Edwards*, 2 Ch. D. 291.

(s) *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.

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 (*t*).

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 (*u*)

(8) A purchase of goods from the maker of a chattel mortgage in consideration of the discharge of a pre-existing debt, is a purchase for valuable consideration within the meaning of this section (*v*).

6. Every sale (1) of goods and chattels (2), not accompanied by an immediate delivery and followed by an actual and continued change of possession (3) of the goods and chattels sold, shall be in writing (4), and such writing shall be a conveyance under the provisions of this Act (5), and shall be accompanied (6) by an affidavit of an attesting witness thereto of the due execution thereof (7), and an affidavit of the bargainee (8), or his agent (if such agent is aware of all the circumstances connected therewith) (9) duly authorized in writing to take the conveyance (a copy of which authority or the authority itself (10) shall be attached to and filed with (11) the conveyance) (12) that the sale is bona fide and for good consideration

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

(u) *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.

(v) *Williams* v. *Leonard*, 26 S. C. R. 406; *Taylor* v. *Blakelock*, 32 Ch. D. 560.

(13), 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 (14), and the conveyance and affidavits shall be registered, as by this Act provided (15), within five days from the executing thereof (16) otherwise the sale shall be absolutely void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith (17). 57 V., c. 37, s. 6.

(1) 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 (*w*). The question of property passing is generally one of intention (*x*). 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.

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.

This section means and contemplates a bona fide bargain and sale of goods for a good consideration moving from the purchaser or bargainee to the seller or bargainor (*y*). An inventory of goods with receipt for purchase money attached, the vendor remaining in possession of the goods, is a sale in

(w) *Stevenson* v. *Rice*, 24 U. C. C. P. 245 : *Williamson* v. *Berry*, 8 How. (U. S.) 544 : *Gardner* v. *Lane*, 12 Allen, 39.

(x) *Ogg* v. *Shuter*, L. R. 10 C. P. 159 : *Stevenson* v. *Rice*, 24 U. C. C. P. 245.

(y) *Robertson* v. *Thomas*, 8 O. R. 20.

writing within the Act; but it must amount to an assurance of the chattels at law or in equity (*z*). 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 (*a*).

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 (*b*).

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 (*c*); nor is a sale of growing timber (*d*).

Where a conveyance of personal property was made by ante-nuptial 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 conveyance, 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 (*e*).

(2) The expression "goods and chattels" is used in the restricted sense of movable goods, and does not include terms for years in real estate (*f*).

(z) *Ex parte Cooper*, 10 Ch. D. 313: *Ex parte Odell*, 10 Ch. D. 76.
(a) R. S. O. (1897), c. 147.
(b) *Severn* v. *Clarke*, 30 U. C. C. P. 372.
(c) *Jones* v. *Henderson*, 3 Man. R. 433.
(d) *Steinhoff* v. *McRae*, 13 O. R. 546.
(e) *Connell* v. *Hickock*, 15 A. R. 518; 25 C. L. J. 86.
(f) *Frazer* v. *Lazier*, 9 U. C. R. 679: *Harrison* v. *Blackburn*, 17 C. B. N. S. 678.

(3) The expression "actual and continued change of possession" is defined by section 39 to mean such change of possession as is open and reasonably sufficient to afford public notice thereof.

(4) The word "writing" includes words printed, painted, engraved, lithographed, and otherwise traced or copied (*g*). 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 (*h*).

(5) In other words the provisions of the Act shall apply to such writing or conveyance.

(6) "Accompanied" is also the word used in the same connection in section 2, which see.

(7) The Act of 1894 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 (*i*), and in this respect the affidavit differs from that required with chattel mortgages (section 2). It does not follow that anyone connected with the bargainee is disqualified from being a witness, but the bargainee cannot himself be the witness (*j*).

The affidavit must not only verify the signature of the witness, but must state that the deponent was present and saw the execution (*k*), and that he himself signed as a witness.

(g) R. S. O. 1887, c. 1, s. 8, s-s. 14.
(h) *Cummings* v. *Morgan*, 12 U. C. R. 567.
(i) *McLeod* v. *Fortune*, 19 U. C. R. 100.
(j) *Seal* v. *Claridge*, 7 Q. B. D. 516.
(k) *Ford* v. *Kettle*, 9 Q. B. D. 139.

(8) As power is given by section 2 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 (*l*).

(9) Similarly to section 2, the agent is now required to be aware of all the circumstances connected with the taking of the mortgage. 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 also provides that the affidavit of the agent shall state that he is aware of all the circumstances connected with the sale.

(10) The words "or the authority itself" were added by the Act of 1894, in order to permit the filing of the original, where previously a copy only could be filed. The singular anomaly which existed up to January 1st, 1895, is now rectified.

(11) The words "and filed with" would seem to be a repetition, as filing was necessary under a reasonable construction of the section as it read prior to the Act of 1894, where these words first appear.

(12) Under this section, not only must the original or copy of the agent's authority be filed with the conveyance, but it must be attached thereto. The latter is not required in the case of an agent of a mortgagee taking the affidavit under section 2, which merely requires that it shall be registered therewith. As to a general authority to an agent, see section 31.

(13) The affidavit of bona fides must state:

(i) That the sale is bona 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.

(l) *McLeod* v. *Fortune*, 19 U. C. R. 100.

Not only is it necessary that the sale should be bona fide, but it must be for good consideration; so when the affidavit accompanying the assignment states that it "was made bona fide," but omits the words "for good consideration," the assignment cannot be upheld (*m*); 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 bona fide and for good consideration, render the instrument invalid (*n*).

The bona fides to be considered is that of the person from whom the consideration moved (*o*).

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 (*p*).

Marriage, being the most valuable of all considerations, is the highest consideration recognized by law (*q*), 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 (*r*) and blood consideration, or a consideration of

(m) *Mason* v. *Thomas*, 23 U. C. R. 305: *Holmes* v. *Penney*, 3 K. & J. 90; 3 Jur. N. S. 80; 26 L. J. Ch. 179.

(n) *Boynton* v. *Boyd*, 12 U. C. C. P. 337.

(o) *Per* Wood, V. C., *Holmes* v. *Penney*, 3 K. & J. 90: *Thompson* v. *Webster*, 4 Drew. 628; 4 DeG. & J. 600; 7 Jur. N. S. H. L. 531: *Cornish* v. *Clark*, L. R. 14 Eq. 184.

(p) *Fraser* v. *Gladstone*, 11 U. C. C. P. 125: *Arnold* v. *Robertson*, 8 U. C. C. P. 147.

(q) *Townshend* v. *Windham*, 2 Ves. Sen. 4; *Ford* v. *Stuart*, 15 Beav. 495, 499: *Dalrymple* v. *Dalrymple*, 2 Hagg. Con. 54, 62.

(r) *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. 46: *Re Clint*, L. R. 17 Eq. 115: *Russel* v. *Hammond*, 1 Atk. 15: *Arundell* v. *Phipps*, 10 Ves. 139: *Ward* v. *Shallett*, 2 Ves. Sen. 18: *Ramsden* v. *Hylton*, 2 Ves. Sen. 308.

natural love and affection, is a "good" consideration, although the transfer may be voidable or objectionable under statutes relating to voluntary or preferential conveyances (*s*).

(14) 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 (*t*). 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.

Though the statute mentions the word "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 (*u*). 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 made void (*v*); but should the word "creditor" instead of "creditors" be written in the affidavit, the conveyance is void (*w*).

(15) The conveyance, with the affidavit of bona fides and affidavit of execution, shall be registered as provided by sections 15 and 16. The question whether a copy of a bill of sale, with the necessary affidavits, can be filed under this section,

(s) *Mathews* v. *Feaver*, 1 Cox, 280: *Twyne's case*, 3 Coke 80: 1 Sm. L. C. 1.

(t) *Arnold* v. *Robertson*, 8 U. C. C. P. 147.

(u) *Mason* v. *Thomas*, 23 U. C. R. 305.

(v) *Tyas* v. *McMaster*, 8 U. C. C. P. 446.

(w) *Harding* v. *Knowlson*, 17 U. C. R. 564.

in substitution of the bill of sale itself, came up for the opinion of the court in *Harris* v. *Commercial Bank* (*x*). McLean, J., there concurred with Robinson, C.J., in his remarks, that this section should be read in conjunction with section two 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."

(16) "Within five days from the executing thereof," is presumably identical in meaning with the words of section two "within five days from the execution thereof." Either the first or last day of the five is to be excluded (*y*).

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 be registered on the first following day when the office is open. (*z*).

(17) A distinction is to be here noted between this section and section 5. The words used in section 5 are "in good faith *for valuable consideration*"; so also in section 11 as to contracts to give chattel mortgages. Section 12 as to contracts to make a sale of goods follows this section in omitting the words "for valuable consideration."

A bill of sale was supported where the affidavit stated that the sale was bona 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 (*a*).

7. (1) In case of an agreement in writing for future advances (2) for the purpose of enabling the borrower to enter into and carry on business with

(x) 16 U. C. R. 437; followed in *Perrin* v. *Davis*, 9 U. C. C. P. 147.
(y) *McLean* v. *Pinkerton*, 7 A. R. 492.
(z) Section 30.
(a) *Ormsby* v. *Jarvis*, 22 O. R. 11; 28 C. L. J. 182.

such advances (3), the time of repayment thereof not being longer than one year from the making of the agreement, and in case of a mortgage of goods and chattels for securing the mortgagee repayment of such advances, the time of repayment thereof not being longer than one year from the making of the agreement (4), 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 (5), and in case the mortgage is accompanied by the affidavit of an attesting 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 (6), 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 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 his advances, 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 (7), and in case the mortgage is registered as by this Act provided (8), the same shall be as valid and binding as mortgages mentioned in the preceding sections of this Act. 57 V., c. 37, s. 7.

(1) A mortgage that is given to secure an existing debt only, will come under the operation of the second 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 (*b*).

(2) 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 bona fide asked for, and made with the view to carrying on the debtor's business (*c*).

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 (*d*).

(3) 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" (*e*).

The purpose of the future advances must be to enable the borrower to carry on business (*f*), 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. 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

(b) Patterson, J. A., *Barber* v. *MacPherson*, 13 A. R., p. 358.

(c) *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.

(d) *Per* Osler, J. A., *Parkes* v. *St. George*, 1[illegible] A. R., p. 538.

(e) *McLean* v. *Pinkerton*, 7 A. R. 490; *Goulding* v. *Deeming*, 15 O. R. at p. 207.

(f) *Risk* v. *Sleeman*, 21 Gr. 251.

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 dealing, and the statute therefore makes it requisite that the mortgage should state the true consideration (*g*), and should set forth "fully, by recital or otherwise, the terms, nature and effect of the agreement," besides requiring affidavits of good faith to be made by parties interested. 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 (*h*), but there is no necessity for its being made under seal (*i*).

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 two, 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 (*j*).

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

(g) *Arnold* v. *Robertson*, 8 U. C. C. P. 155.

(h) *Flory* v. *Denny*, 7 Ex. 581, 21 L. J. Ex. 223.

(i) *Patterson* v. *Maughan*, 39 U. C. R. 379: *Reeves* v. *Capper*, 5 Bing. N. C. 136: *Halpenny* v. *Pennock*, 33 U. C. R. 229: *Gerry* v. *White*, 47 Me. 504.

(j) *Hughes* v. *Little*, 17 Q. B. D. 207.

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 (*k*); so that 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 (*l*), 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 (*m*).

It will be observed that the words of the section are, — "In case of an agreement in writing for future advances," therefore a mortgage will be invalid, as against creditors, which 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 when the mortgage is executed (*n*). 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 (*o*). If the fresh advance were made by the lender, with the intention of enabling the borrower to continue his business, and if he had reasonable grounds for believing that the advance would enable the borrower to do so, then the transaction would be upheld under insolvency laws (*p*). And advances may be agreed to be made to a person already in business, and a

(k) *Sutherland* v. *Nixon*, 21 U. C. R. 631.
(l) *Brooks* v. *Lester*, 35 Md. 65: *Carpenter* v. *Blote*, 1 E. D. Smith 491.
(m) *Goulding* v. *Deeming*, 15 O. R. at pp. 207, 213.
(n) *Robinson* v. *Paterson*, 18 U. C. R. 55.
(o) *Risk* v. *Sleeman*, 21 Gr. 251.
(p) *Ex parte Johnson*, 26 Ch. D. 338.

mortgage given to secure the same will still be within the Act (*q*).

(4) The time for the repayment of the advances made must not be for a longer period than 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 (*r*). 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 (*s*). 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 (*t*).

(5) 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 (*u*).

(6) It is provided by section 10 that if the affidavit is made by an agent it shall state that he is aware of all the circumstances connected with the mortgage.

(7) The affidavit must state:—

(i) That the mortgage truly sets forth the agreement entered into between the parties thereto.

(ii) That it (the mortgage) truly states the extent of the

(q) *McLean* v. *Pinkerton*, 7 A. R. 490.

(r) *O'Donohoe* v. *Wilson*, 42 U. C. R. 333: *Kough* v. *Price*, 27 U. C. C. P. 309: *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460: *May* v. *Security L. & S. Co.*, 45 U. C. R. 106: *Barber* v. *MacPherson*, 13 A. R. 356.

(s) *Hetherington* v. *Groome*, 13 Q. B. D. 789: *Sibley* v. *Higgs*, 15 Q. B. D. 619: *Melville* v. *Stringer*, 13 Q. B D. 392.

(t) *Strange* v. *Dillon*, 22 U. C. R. 223.

(u) *Lee* v. *Barnes*, 17 Q. B. D. 77.

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.

(8) "As by this Act provided" evidently refers to the time limit of five days specified in section 2 as well as to section 15 relating to the place of registration.

8. 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 (1) by him incurred for the mortgagor, not extending for a longer period than one year from the date of such mortgage (2), and in case the mortgage is executed in good faith (3), 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 (4), and in case such mortgage is accompanied by the affidavit of an attesting witness thereto of the due execution thereof, and by the affidavit of the mortgagee, or in case the mortgage has been taken by an agent duly authorized in writing to take such mortgage and if the agent is aware of the circumstances connected therewith (5), then, if accompanied (6) by the affidavit of such agent, such affidavit, whether of the mortgagee or his agent, stating that the mortgage truly states the extent of the liability intended to be created, and covered by such

mortgage, and that such mortgage is executed in good faith and for the express purpose of securing the mortgagee against the payment of the amount of his liability (7) 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, the same shall be as valid and binding as mortgages mentioned in the preceding sections of this Act (8). 57 V., c. 37, s. 8.

(1.) 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 show 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 (*v*).

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,

(v) *Wadsworth* v. *Townley*, 10 U. C. R. 579: *Rutledge* v. *McLean*, 12 U. C. R. 205: *Roe* v. *McNeil*, 14 U. C. C. P. 424: *Thompson* v. *Bennett*, 22 U. C. C. P. 393.

and if, to an adequate description, the recital contains that which is inapt and erroneous, the latter will not thereby invalidate the former (*w*). 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 (*x*).

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 (*y*). 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 (*z*).

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 (*a*). "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 (*b*). It is, however, probable that sections 11 and 37 shew such an intention to make the Act cover all transactions by which a transfer of title

(w) *Throssell* v. *Marsh*, 53 L. T. 321.

(x) *Belknap* v. *Wendell*, 31 N. H. 92.

(y) *Mathers* v. *Lynch*, 28 U.C.R. at p. 363: *Turner* v. *Mills*, 11 U.C C.P. 366: *Paterson* v. *Maughan*, 39 U. C. R. 380: *O'Donohoe* v. *Wilson*, 42 U. C. R. 333.

(z) *Per* Patterson, J. A., *Barber* v. *MacPherson*, 13 A. R, at pp. 358-9.

(a) *Baldwin* v. *Benjamin*, 16 U. C. R. 52: *Valentine* v. *Smith*, 9 U. C. C. P. 59: *Mathers* v. *Lynch*, 28 U. C. R. 354: *Walker* v. *Niles*, 18 Gr. 210: *Clarke* v. *Bates*, 21 U. C. C. P. 348.

(b) *Per* Harrison, C.J., *Paterson* v. *Maughan*, 39 U. C. R. 379.

is effected that registration would now have to be made with affidavits of execution and bona fides" under section 11.

(2) 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 (*c*); 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 mortgage is bad (*d*). 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 showing that the liability of the mortgagor was limited in duration to one year (*e*).

But where the agreement, as recited in the mortgage, is that the endorsement was made upon the agreement that the

(c) *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460: *Kough* v. *Price*, 27 U. C. C. P. 309: *May* v. *Security L. & S. Co.*, 45 U. C. R. 106: *Barber* v. *MacPherson*, 13 A. R. 356.

(d) *Elliott* v. *Gladstone*, 4 C. L. T. 405.

(e) *Kough* v. *Price*, 27 U. C. C. P. 325: *Ontario Bank* v. *Wilcox*, 43 U. C. R. 460: *May* v. *Security L. & S. Co.*, 45 U. C. R. 106: *Barber* v. *MacPherson*, 13 A. R. 356.

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 (*f*). 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 (*g*).

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 (*h*).

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 coven-

(f) *Driscoll* v. *Green*, 8 A. R. 366.
(g) Re *Hewer*, 21 Ch. D. 871.
(h) *Embury* v. *West*, 15 A. R. 357; 24 C. L. J. 616.

ant 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" (*i*).

It has not been so decided, but it is possible the law may yet be found to be, 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 (*j*).

If it be the intention to renew notes, the indorsement of which is secured by mortgage under this section, then it must so appear by the instrument itself (*k*). And a mortgage cannot be renewed under section 18 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 (*l*).

(3) The good faith to be considered is that of the person from whom the consideration moves (*m*).

(4) 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 (*n*).

Because section two says nothing about the consideration for the instrument being set forth therein, it has been held that an erroneous statement of the consideration will not, per se,

(i) Spragge, C.J. O., *Driscoll* v. *Green*, 8 A. R. 366.

(j) Burton, J. A., *Driscoll* v. *Green*, 8 A. R. at p. 374: see *Kitching* v. *Hicks*, 6 O. R. 739: *Mowat* v. *Clement*, 3 Man. R. 585.

(k) *Turner* v. *Mills*, 11 U. C. C. P. 366.

(l) *Turner* v. *Mills*, 11 U. C. C. P. 369.

(m) *Per* Wood, V.C., *Holmes* v. *Penney*, 3 K. & J. 90: *Thompson* v. *Webster*, 4 Drew 628.

(n) *Barber* v. *MacPherson*, 13 A. R. at p. 362: *Parker* v. *Morrison*, 46 N. H. 280: *Ex parte Webster*, 22 Ch. D. 136.

invalidate the mortgage under that section (*o*), but the meaning of the reference to the consideration in cases under this section is that it must be the true amount of the liability as in the Imperial statute (*p*).

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 (*q*); 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 (*r*), though a collateral agreement between mortgagor and mortgagee as to the application of the consideration money need not be set forth (*s*).

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

(o) *Tidey* v. *Craib*, 4 O. R. 696: *Parkes* v. *St. George*, 10 A. R. 496: *Wood* v. *Scott*, 55 Iowa 114.

(p) *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. 101.

(q) *Ex parte Popplewell*, 21 Ch. D. 73.

(r) *Lee* v. *Barnes*, 17 Q. B. D. 77.

(s) *Ex parte National Bank*, 15 Ch. D. 42.

of correct and full information, without danger that the language used will deceive or mislead parties (*t*).

It should be noticed that the words "*amount* of the liability" are here used, while in the latter part of the section the expression is "*extent* of the liability." Although there is probably no real difference in meaning, it will be well to follow the statutory words, "extent of the liability" in the affidavit of bona fides, to which the latter are applied.

(5) The agent must be aware of 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 (*u*). It is also necessary, under section 10, that the agent's affidavit shall state that he is aware of *all* the circumstances connected with the mortgage.

(6) 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 section two, meaning "simultaneously," or "along with" (*v*).

(7) 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 (*w*). An affidavit is insuffi-

(t) *Sheppard* v. *Sheppard*, 6 Conn. 37: *Pittibone* v. *Griswold*, 4 Conn. 158: *Frink* v. *Branch*, 10 Conn. 260: *Kramer* v. *Bunk*, 15 Ohio, 253: *Michigan Ins. Co.* v. *Brown*, 11 Mich. 266: *Hurd* v. *Robinson*, 11 Ohio S. 222: *Hough* v. *Bailey*, 32 Conn. 288: *Paine* v. *Benton*, 32 Wis. 591: *Tousley* v. *Tousley*, 5 Ohio S. 78: *Porter* v. *Smith*, 10 Vt. 492: *Gill* v. *Pinney*, 12 Ohio S. 78: *Ritcheson* v. *Richardson*, 19 Cal. 33: *North* v. *Powell*, 11 N. H. 251: *Allan* v. *Lathrop*, 43 Ga. 133: *Tulley* v. *Smith*, 24 Conn. 314.

(u) Cameron, J., *Carlisle* v. *Tate*, 7 A. R. at p. 35.

(v) *Grindell* v. *Brendon*, 6 C. B. N. S. 698.

cient 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 (*x*). 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., etc., instead of the phrase "for the purpose of 'securing' the goods and chattels against the creditor," etc. (*y*). 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 (*z*). 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 (*a*).

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

(w) *Mathers* v. *Lynch*, 28 U. C. R. 354.
(x) *Boulton* v. *Smith*, 18 U. C. R. 458.
(y) *Per* Harrison, C. J., *O'Donohoe* v. *Wilson*, 42 U. C. R. 336.
(z) *Fraser* v. *Bank of Toronto*, 19 U. C. R. 381: *Bertram* v. *Pendry*, 27 U. C. C. P. 377: *Taylor* v. *Ainslie*, 19 U. C. C. P. 78.
(a) *Boldrick* v. *Ryan*, 17 A. R. 253: 26 C. L. J. 313.

to be incurred. It being impossible in such a case to state it precisely, an approximation must either be made to satisfy the provisions of this section, or such transaction be considered as not within the Act (*b*).

(8) The sections of the Act here referred to are numbers two and seven.

9. The authority in writing referred to in the two next preceding sections, or a copy of such authority shall be attached to and filed with the mortgage. 57 V., c. 37, s. 9.

10. The affidavit of bona fides required by sections 6, 7 and 8 may be made by one of two or more bargainees or mortgagees (1) and if made by an agent as herein provided the same shall state that he is aware of all the circumstances connected with the sale or mortgage, as the case may be. 57 V., c. 37, s. 10.

(1) 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 (*c*). 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

(b) *Morris* v. *Martin*, 19 O. R. 564.

(c) *Heward* v. *Mitchell*, 11 U. C. R. 625; *McLeod* v. *Fortune*, 19 U. C. R. 100.

capable of making the affidavit with a full knowledge of all the circumstances (*d*).

Contracts to Give Mortgages, Etc.

11. Every covenant, promise or agreement (1) entered into on or after the 7th day of April, 1896, 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, the same or a true copy thereof together with affidavits of execution and bona fides shall be registered within the time and in the manner hereby prescribed in respect of bills of sale and mortgages (2), 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 valuable consideration (3). 59 V., c. 34, s. 1.

(1) The covenant promise or agreement must be in writing in order that it may be filed pursuant to this section. If the promise or agreement be verbal it comes within section 14, and is thereby made void as against creditors, subsequent purchasers or subsequent mortgagees.

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.

(2) This section does not in any way render valid an agreement void as a preference; and where an agreement

(d) *Severn* v. *Clarke*, 30 U. C. C. P. 363; *McLeod* v. *Fortune*, 19 U. C. R. 100.

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 (*b*).

(3) The words "shall be absolutely null and void, etc.," to the end of this section, are identical with the language of section 5; see notes to that section.

12. Every covenant, promise or agreement (1) to make a sale (2) of goods and chattels (3), in whatever words the same may be expressed, 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 bona fides shall be registered within the time and in the manner prescribed as respects bills of sale by this Act, otherwise the said covenant, promise or agreement shall be absolutely void as against the creditors of the bargainor and as against subsequent purchasers or mortgagees in good faith (4). 59 V., c. 34, s. 2.

(1) See note to the preceding section, in which the same words "covenant promise or agreement" are used.

(2) 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 (*c*).

(3) Section 37, providing that the Act shall extend to "mortgages and sales" of future goods or goods not com-

(b) *Breese* v. *Knox* (1897), 24 A. R. 203; 33 C. L. J. 201.

(c) *Fairmaner* v. *Budd*, 7 Bing. 574; *Emanuel* v. *Dane*, 3 Camp. 299; *Harrison* v. *Luke*, 14 M. & W. 139.

pleted 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 (*d*).

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 labor 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 labor; 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 labor (*e*).

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 materials 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 (*f*).

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 labor (*g*).

And where by a contract the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods (*h*).

A man can contract to assign property which is to come into existence in the future, and when it has come into existence equity treating as done that which ought to be done, fastens upon that property, and the contract to assign thus

(d) *Hibblewhite* v. *McMorine*, 5 M. & W. 462.
(e) *Lee* v. *Griffin*, 1 B. & S. 272: *Wolfenden* v. *Wilson*, 33 U. C. R. 442.
(f) *Lee* v. *Griffin*, 1 B. & S. 272.
(g) *Wolfenden* v. *Wilson*, 33 U. C. R. 442.
(h) *Lunn* v. *Thornton*, 1 C. B. 379: 14 L. J. C. P. 161.

becomes a complete assignment if the goods be sufficiently described to be identified on acquisition by the seller (*i*).

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 (*j*).

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 (*k*).

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 (*l*).

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 (*m*).

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 (*n*).

(4) The latter part of this section from the words "shall be absolutely void" follows the wording of section 6.

The word "bargainor" is wide enough in its meaning to

(i) *Collyer* v. *Isaacs*, 19 Ch. D. 342: *Holroyd* v. *Marshall*, 10 H. L. C. 191: *Tailby* v. *Official Receiver*, 13 App. Cas. 523.
(j) *Couturier* v. *Hastie*, 5 H. L. C. 673.
(k) *Seath* v. *Moore*, 11 App. Cas. 350: *Ogg* v. *Shuter*, L. R. 10 C. P. 162.
(l) *Seath* v. *Moore*, 11 App. Cas. 350.
(m) *Furley* v. *Bates*, 33 L. J. Ex. 43: *Simmons* v. *Swift*, 5 B. & C. 857.
(n) *Heilbut* v. *Hickson*, L. R. 7 C. P. 438: *Wait* v. *Baker*, 2 Exch. 1.

include a party covenanting, promising or agreeing to make a sale, but it would seem that protection is not given to persons who subsequently contract for the acquisition of the goods in future, or for a future mortgage of the same, as distinguished from those who actually purchase or take a mortgage upon them.

13. In the case of covenants, promises or agreements made before the 7th day of April, 1896, the provisions of this Act with regard to registration may be deemed to be complied with if such registration was effected within three calendar months after the said date and subject thereto this Act shall extend and apply to every such covenant, promise and agreement made before as well as after the said date (1). 59 V., c. 34, s. 3.

(1) This section does not, however, apply to a case tried and adjudicated upon before the date specified, although an appeal is taken and is pending at that date. Agreements which have then "passed into litigation" are not included, as the rule is that the rights of parties are to be decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights (*o*).

14. Every verbal agreement (1) to the effect mentioned in the three next preceding sections and not reduced to writing shall be absolutely null and void to all intents and purposes whatever, as against creditors or subsequent purchasers or mortgagees mentioned in such sections (2). 59 V., c. 34, s. 4.

(1) Although the word "agreement" is used here without the word "promise" used in the preceding sections, it can hardly be contended that a promise not acquiesced in by the promisee, and therefore not amounting to an agreement, would support a mortgage or sale of chattels.

(2) That is, as against subsequent purchasers or mort-

(*o*) *Hope* v. *May*, 24 A. R. 16; Maxwell on Statutes, 3rd ed. 298.

gagees in good faith "for valuable consideration" in the case of an agreement for a mortgage; and as against subsequent purchasers or mortgagees in good faith, in the case of an agreement under section 12 to "make a sale."

15.—(*1*) The instruments mentioned in the preceding sections shall in counties be registered (1) in the office of the clerk of the County Court of the county or union of counties where the property so mortgaged or sold is at the time of the execution of such instrument; and every such clerk (2) shall file all such instruments presented to him for that purpose, and shall endorse thereon the time of receiving the same in his office (3). 57 V., c. 37, s. 11.

(*2*) Where the goods and chattels mortgaged or sold are situate within the Districts of Algoma, Thunder Bay or Nipissing, the said instruments shall be filed within ten days from the execution thereof in the office of the district court clerk in the district in which the goods are situate.

(*3*) Where the goods or chattels mortgaged or sold are situate within the Districts of Parry Sound, Muskoka or Rainy River, the said instruments shall be filed within ten days from the execution thereof in the office of the clerk of the First Division Court of the district in which the goods are situate.

(*4*) Where the goods and chattels mortgaged or sold are situate within the Provisional County of Haliburton, the said instruments shall be filed within seven days from the execution thereof in the office of the clerk of the First Division Court of the said provisional county. 59 V., c. 32, s. 1.

(*5*) Where the goods and chattels mortgaged or sold are situate within the District of Manitoulin the said instruments shall be filed within ten days from

the execution thereof in the office of the deputy clerk for Manitoulin.

(6) Any bill of sale or chattel mortgage filed with the said deputy clerk for Manitoulin prior to the 4th of May, 1891, shall be as valid as if the same had been filed with the clerk of the County Court.

(7) Nothing in the two next preceding subsections contained shall be construed to affect any action or other proceeding pending on the 4th day of May, 1891, in which the validity of any instrument required to be filed under chapter 125 of the Revised Statutes of Ontario, 1887, and amending Acts is called in question by reason of the place of filing such instrument. 57 V., c. 37, s. 28.

(8) "Clerk of the County Court" when used in this Act shall include the officers mentioned in this section.

(1) 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 (*p*).

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.

Any one claiming under an instrument filed in pursuance of the Act will, none the less, be required to show, 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" (*q*).

Besides, however, as between the immediate parties to the instrument and their personal representatives it is yet 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 (*r*).

(p) *Belanger* v. *Menard*, 27 O. R. 209: *Cookson* v. *Swire*, 9 App. Cas. 664.

(q) *Phillpotts* v. *Phillpotts*, 10 C. B. 85; 20 L. J. C. P. 11.

(r) *Pratt* v. *Harlon*, 16 Gray, 379: *Moses* v. *Walker*, 2 Hilt. 536: *Hackett* v. *Maulvere*, 4 Cal. 85: *Johnson* v. *Jeffries*, 30 Mo. 423: *Morrow* v. *Turney*, 35 Ala. 131.

(2) 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.

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 (*s*).

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 (*t*).

(3) 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 (*u*); 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" (*v*), 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 (*w*); and, the fact of the clerk acting contrary to his instructions, and endorsing therein the time of filing, or of its receipt by him, will not create a filing within the

(s) Section 4.
(t) *Bishop* v. *Cook*, 13 Barb. (N. Y.) 326.
(u) *Graham* v. *Summers*, 25 Minn. 81.
(v) Whart Law Lex.
(w) *Low* v. *Pettergill*, 12 N. H. 337: see *Ross* v. *Hamilton*, E. T. 3 Vic.: *Foster* v. *Smith*, 13 U. C. R. 243: *In re Ross*, 3 P. R. 394: *Bank of Montreal* v. *Munro*, 23 U. C. R. 414: *Kerr* v. *Kinsey*, 15 U. C. C. P. 531 *Trust & Loan* v. *Cuthbert*, 13 G. 412.

statute (*x*). 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 (*y*); 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 (*z*).

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 (*a*).

Any person is entitled, upon tender to the clerk of the proper fee under section 29 (ten cents), to an inspection of any of the instruments filed in his office in pursuance of this Act.

16. The said Clerks respectively shall number every such instrument or copy filed in their offices, and shall enter in alphabetical order in books to be provided by them, the names of all the 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 (1). 57 V., c. 37, s. 12.

(x) *Town* v. *Griffith*, 17 N. H. 165: *Parker* v. *Palmer*, 13 R. I. 359.
(y) *Hathaway* v. *Howell*, 54 N. Y. 97.
(z) *Connard* v. *Colgan*, 55 Iowa, 538.
(a) *Durfee* v. *Grinnell*, 69 Ill. 371: *McLaren* v. *Thompson*, 40 Me. 561; *Mems* v. *Mems*, 35 Ala. 28: *Partridge* v. *Swozzey*, 46 Me. 414.

(1) It is very important that the clerk should carefully follow out the instructions as to the manner of registration, pointed out by this section (*b*). 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. 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.

Section 15, sub-section (1) which also contains instructions for the clerk's guidance should be read 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 (*c*).

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 4, relate back, operate and take effect from the moment of its execution.

17. In the event of the permanent removal (1) of goods and chattels mortgaged as aforesaid from the

(b) *Hawley* v. *Howe*, 22 Me. 560: *Holmes* v. *Sproule*, 31 Me. 73.
(c) *Lawrie* v. *Rathbun*, 38 U. C. R. 261: *Smith* v. *Waggoner*, 50 Wis. 155.

county or union of counties or territorial district in which the goods and chattels were at the time of the execution of the mortgage, to another county or union of counties or territorial district, or to the said provisional county, 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 filed in such office (2), shall be filed with the clerk of the County Court of the county or union of counties or territorial district to which the goods and chattels are removed, or in the proper office as mentioned in section 15 in case such goods and chattels are removed to a territorial district or to the said provisional county, within two months (3) from such removal (4), otherwise the said goods and chattels shall be liable to seizure and sale under execution (5), and in such case the mortgage (6) shall be null and void as against creditors of the mortgagor and against subsequent purchasers and mortgagees in good faith for valuable consideration, as if never executed. 57 V., c. 37, s. 13; 60 V., c. 3, s. 3.

(1) 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 (*d*).

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 (*e*).

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 the 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 (*f*). 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 (*g*). It does not follow that the section will not apply so long as the mortgagee is ignorant of the removal (*h*). 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 (*i*).

The Act does not cover the case of a permanent removal

(d) *Keenan* v. *Simson*, 31 Alb. L. J. 118.
(e) *Clarke* v. *Bates*, 21 U. C. C. P. 352.
(f) *Boyd* v. *Beck*, 29 Ala. 703.
(g) *Cochrane* v. *Boucher*, 3 O. R. 462.
(h) *Clarke* v. *Bates*, 21 U. C. C. P. 352.
(i) *Hodgins* v. *Johnston*, 5 A. R. 449.

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.

(2) 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.

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 ——, 18—, which was filed in the office of the said court at —— o'clock in the —— noon on the —— day of ———, 18—. [*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 ——— 18 .

[*Seal*]

———C.C.C.

This certificate must be signed by the clerk, and have the seal of the court attached to it.

(3) By the Interpretation Act the word "month" means a calendar month. "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.

(4) 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.

(5) The execution under which the goods and chattels shall be liable for seizure, means an execution against the mortgagor, and the purchasers or mortgagees mean purchasers or mortgagees from the mortgagor (*j*).

(6) The section does not apply to bills of sale under section 6 of the Act.

18. Subject to the provisions hereinafter contained as to mortgages to companies, every mortgage (1), or copy thereof, filed in pursuance of this Act (2), shall cease to be valid (3), as against the creditors of the persons making the same and against subsequent purchasers and mortgagees in good faith for valuable consideration (4), after the expiration of one year from the day of the filing thereof (5), unless, within thirty days (6) next preceding the expiration of the said term of one year, a statement exhibiting the interest of the mortgagee, his executors, administrators or other assigns in the property claimed by virtue thereof, and shewing the amount still due for principal and interest thereon, and shewing all payments made

(*j*) *Clarke* v. *Bates*, 21 U. C. C. P. 352.

on account thereof (7), is filed in the office of the clerk of the County Court of the county or union of counties wherein the goods and chattels are then situate, with an affidavit (8) of the mortgagee, or one of several mortgagees, or of the assignee or one of several assignees, or of the agent (9) of the mortgagee or assignee, or mortgagees or assignees (as the case may be), duly authorized in writing, for that purpose (a copy of which authority or the authority itself shall be filed therewith), that the statement is true, and that the mortgage has not been kept on foot for any fraudulent purpose (10). 57 V., c. 37, s. 14.

(1) 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 (*k*); 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 (*l*). 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 (*m*).

(k) *Kissock* v. *Jarvis*, 9 U. C. C. P. 156.
(l) Burton, J. A., *Hodgins* v. *Johnston*, 5 A. R. 457.
(m) *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.

(2) By "every mortgage, or copy thereof, filed 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 8, 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 sections 7 and 8 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 2 (*n*), 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.

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 otherwise—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

(n) *Kerry* v. *James*, 21 A. R. 338: *O'Neill* v. *Smell*, 15 C. L. J. 114, overruled.

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 8, which have not matured within the year (*o*). 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.

(3) 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 (*p*). This section does not apply to absolute bills of sale (*q*). Before the enactment of 57 Vict. (1894), c. 37, s. 40 (the present section 40) 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 (*r*); but it is now doubtful if such is the law. Section 40 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 of use without renewal after the time for renewing has expired (*s*).

Under this Act it is not necessary, as against purchasers

(o) *Turner* v. *Mills*, 11 U. C. C. P. 366: *In re Stevens*, L. R. 20 Eq. 786.

(p) *Hodgins* v. *Johnston*, 5 A. R. 449: *Karet* v. *Kosher*, 2 Q. B. D. 361.

(q) *Boynton* v. *Boyd*, 12 U. C. C. P. 334.

(r) *Ross* v. *Elliott*, 11 U. C. C. P. 221: *Porter* v. *Parmley*, 52 N. Y. 185: *Bates* v. *Wilbur*, 10 Wis. 415.

(s) *McMartin* v. *McDougall*, 10 U. C. R. 399.

or mortgagees, to refile a mortgage between the original filing and the time prescribed for refiling (*t*).

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 (*u*).

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 (*v*). 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.

(4) 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

(t) *Hodgins* v. *Johnston*, 5 A. R. 449: *Latimer* v. *Wheeler*, 30 Barb. (N. Y.) 480: *Dillingham* v *Laduc*, 35 Barb (N. Y.) 38.

(u) *Hodgins* v. *Johnston*, *supra*: see *Thompson* v. *Vanvechten*, 27 (N. Y.) 568: *Latimer* v. *Wheeler*, 30 Barb. (N. Y.) 485: *Meech* v. *Tutin*, 14 N. Y. 71.

(v) *Case* v. *Jewett*, 13 Wis. 498: *Newman* v. *Tymeson*, 12 Wis. 448: *Otes* v. *Sill*, 8 Barb. (N. Y.) 102.

and selling is void the less valid on that account (*w*). 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 remain 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 (*x*).

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 (*y*).

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 (*z*).

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 (*a*), and his having notice of the mortgage does not prevent him availing

(w) *Cookson* v. *Swire*, 9 App. Cas. 653.

(x) *Carlisle* v. *Tait*, 7 A. R. 10.

(y) *Karet* v. *Kosher*, 2 Q. B. D. 361.

(z) *Griffin* v. *McKenzie*, 46 U. C. R. 93.

(a) Moss, C. J. O., *Hopkins* v. *Johnston*, 5 A. R. 452: *Thompson* v. *Vanvechten*, 27 N. Y. 508

himself of the objection that the mortgage has not been refiled (*b*).

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 (*c*). 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 (*d*). 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 (*e*). 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 (*f*).

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 (*g*). It sometimes happens that by taking a

(b) *Edwards* v. *Edwards*, 2 Ch. D. 291.

(c) *Rose* v. *Hope*, 22 U. C. C. P. 482: *Meech* v. *Patchin*, 14 N. Y. 71: *Sauge* v. *Eastwood*, 19 Wend. 575: *Wetherell* v. *Spencer*, 3 Mich. 123: *Gregory* v. *Thomas*, 20 Wend. 17: *Hill* v. *Beebe*, 13 N. Y. 556.

(d) *Moffatt* v. *Coulson*, 19 U. C. R. 341.

(e) *Hodgins* v. *Johnston*, 5 A. R. 449.

(f) Burton, J. A., *Hodgins* v. *Johnston*, 5 A. R. at p. 455.

(g) *Meech* v. *Patchin*, 14 N. Y. 71: *Fox* v. *Burns*, 12 Barb. 677: *Jones* v. *Howell*, 3 Rob. N. Y. 438.

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* (*h*), 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 the 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.

(5.) 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 within 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 (*i*), 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.

(h) 25 U. C. R. 576.

(i) *Thompson* v. *Quirk*, 18 S. C. R. 695; affirming 1 N. W. T. R. part 1, p. 88.

(6) 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 (*j*). 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 (*k*).

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 (*l*).

The refiling is nugatory if done either before the thirty days begin to run, or after their expiration (*m*).

(7) 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

(j) *Beaty* v. *Fowler*, 10 U. C. R. 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.

(k) *Griffin* v. *McKenzie*, 46 U. C. R. 97.

(l) *McMartin* v. *McDougall*, 10 U. C. R. 399: *Pugh* v. *Duke of Leeds*, 2 Cowp. 720: *Re Sheriff of Newcastle*, Drap K. B. Rep 503: *Beekman* v. *Jarvis*, 3 U. C. R. 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.

(m) *Newell* v. *Warner*, 44 Barb. (N. Y.) 258.

that the said mortgage has not been kept on foot for any fraudulent purpose (*n*).

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 (*o*). 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 (*p*), or if none, it must be so stated.

This statement cannot be made by the mortgagor without authority, however accurate and bona fide it may be (*q*), 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 show the interest of the mortgagee in the property claimed, and it must contain a full statement of the amount due for principal and interest (*r*).

If made in good faith, with reasonable care, and if it be substantially correct and accurate, the statute will have been

(n) *O'Halloran* v. *Sills*, 12 U. C. C. P. 465.
(o) *Theviot* v. *Prince*, 1 Edm. Sel. Cas. 219.
(p) *Barber* v. *Maughan*, 42 U. C. R. 134.
(q) *Newell* v. *Warren*, 44 Barb. (N. Y.) 258.
(r) *Reynolds* v. *Williamson*, 25 U. C. C. P. 49.

complied with (*s*), and a failure to give credit for $2.00 upon a debt of several hundred, will not vitiate the refiling (*t*). What is necessary is that the statement should notify creditors of the amount of the mortgagee's claim (*u*). The statute appears to require something more than a mere account. The statement should refer to the time of filing (*v*). 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 favor 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 (*w*). 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* "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" (*x*). This was followed in *Saulters* v. *Carruthers* (*y*), and Hagarty, C. J., in *Reynolds* v. *Williamson* (*z*) recognized *O'Halloran* v. *Sills* as an authority that assistance could not be had from the affidavit to supply defects in the

(s) *Beers* v. *Waterbury*, 8 Bosw. (N. Y.) 396.
(t) *Patterson* v. *Gillis*, 64 Barb. (N. Y.) 563.
(u) *Miller* v. *Jones*, 15 N. Bank R. 150.
(v) *Fraser* v. *Bank of Toronto*, 19 U. C. R. 381.
(w) *Beers* v. *Waterbury*, 8 Bosw. (N. Y.) 96.
(x) *O'Halloran* v. *Sills*, 12 U. C. C. P. 465.
(y) 9 U. C. L. J. 158.
(z) 25 U. C. C. P. 49.

statement. In *Walker* v. *Niles* (*a*), 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 (*b*). 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, convey 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 (*c*), and now by section 20 the statement and affidavit shall be deemed one instrument, which would seem to confirm the latter decisions.

(8.) The affidavit can be made by any of the following :

(i) By the mortgagee.

(ii) By one of several mortgagees.

(iii) By the assignee of the mortgagee.

(iv) By any assignee claiming by or through any mortgagee.

(v) By one of several assignees of the mortgagee.

(vi) By the agent of the mortgagee or assignee.

(vii) By the agent of the mortgagees or assignees.

(viii) By any next of kin, executor or administrator of a deceased mortgagee (section 22).

(a) 18 Gr. 210.

(b) *Barber* v. *Maughan*, 42 U. C. R. 134 : *Sloan* v. *Maughan*, 3 A. R. 222 : *Beers* v. *Waterbury*, 8 Bosw. (N. Y.) 96.

(c) *Per* Moss, C. J. A., in *Sloan* v. *Maughan*, 3 A. R. at p. 227 : see *Broderick* v. *Scale*, 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.

(ix) By any next of kin, executor, or administrator of any assignee of a mortgagee (section 22).

(x) By any next of kin, executor or administrator of any assignee claiming by or through any mortgagee (section 22).

As under sections 2, 7 and 8, an agent has power to take a mortgage, so under this section he has 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 31 refers to an authority to take *and* renew in a manner seeming to imply that the latter is not included in the former. Sections 2, 7 and 8 expressly condition for the agent taking the mortgage and making the affidavit of bona fides, as being aware of all the circumstances connected therewith. There is no such express condition in this section, yet it follows that to make the affidavit truthfully, he must be aware of all the circumstances in connection with the renewal of the instrument.

(10.) 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 (*d*). 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 (*e*). There is safety in keeping to the words of the statute, for though it may be

(d) *Fraser* v. *Bank of Toronto*, 19 U. C. R. 381: *Patterson* v. *Gillis*, 64 Barb. (N. Y.) 563.

(e) *Reynolds* v. *Williamson*, 25 U. C. C. P. 49.

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, c. 134, s. 3, is a well-founded objection (*f*). The addition of the word "correctly" to that of "truly," will not, however, nullify the affidavit (*g*).

19. The statement and affidavit mentioned in the next preceding section may (1) be in the form given in the Schedule B to this Act, or to the like effect; provided, that if any bona fide error or mistake shall be made in the said statement, either by the omission to give any credit or credits or by any miscalculation in the computation of interest or otherwise, the said statement and the mortgage therein referred to shall not be invalidated, provided that the mortgagee, his executors, administrators or other assigns shall, within two weeks after the discovery of any such error or mistake, file an amended statement and affidavit in the form given in Schedule B or to the like effect, and referring to the former statement and clearly pointing out the error or mistake therein and correcting the same; but if, prior to the filing of such amended statement and affidavit, any creditor or purchaser or mortgagee in good faith for valuable consideration shall have made any bona fide advance of money or given any valuable consideration to the mortgagor, or shall have incurred any costs in proceedings taken on the faith of the amount due on any mortgage being as stated in

(f) *Jackson* v. *Kassell*, 26 U. C. R. 341.

(g) *Barber* v. *Maughan*, 42 U. C. R. 134: see also *De Forrest* v. *Bunnell*, 15 U. C. R. 370: *Harding* v. *Knowlson*, 17 U. C. R. 564: *Brodie* v. *Ruttan*, 16 U. C. R. 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.

the renewal statement and affidavit filed, then the said mortgage as to the amount so advanced or the valuable consideration given or costs incurred as aforesaid 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 filed. 57 V., c. 37, s. 15.

(1) By the Interpretation Act the word *may* is to be construed as permissive, hence it is not compulsory to use the statutory form.

On a renewal by the original mortgagee the omission of the words "that the said mortgagee is still the mortgagee of the said property and has not assigned the said mortgage" will invalidate the renewal (*h*).

20. The statement and affidavit shall be deemed one instrument, and be filed and entered in like manner as the instruments in this Act mentioned are, by section 16, required to be filed and entered, and the like fees shall be payable for filing and entering the same as are now payable for filing and entering such instruments. 57 V., c. 37, s. 16.

21. Another statement (1) in accordance with the provisions of section 18 of this Act, duly verified as required by that section, shall be filed in the office of the clerk of the County Court of the county wherein the goods and chattels described in the mortgage are then situate, within thirty days next preceding the expiration of the term of one year from the day of the filing of the statement (2) required by the said section 18, or such mortgage, or copy thereof (3), shall cease to be valid (4) as against the creditors of the persons making the same, and as

(h) *McNicholl* v. *Ellis*, 28 C. L. J. 95, per Dartnell Co. J.

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 (5), or such mortgage or copy thereof shall cease to be valid (6) as aforesaid. 57 V., c. 37, s. 17.

(1) By this section the legislature makes statutory law that which was held to be necessary by the courts in *Kissock* v. *Jarvis* (*i*), and *Beaumont* v. *Cramp* (*j*).

It will be observed that this section only refers to a second and subsequent renewals, not to the first renewal, which is still governed by section 18.

Every statement on renewal must shew all payments made on account of the mortgage from the date of the mortgage, not simply from the last renewal, and the earlier renewal statements cannot be read with, or in aid of, the later statements (*k*).

(2) 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 (*l*).

(3) The words "or copy thereof" must refer to the case of a copy of the mortgage itself being filed in the first instance in place of the mortgage; it cannot refer to "the copy" filed on renewal, because filing a copy on renewal was done away with long prior to the enactment of this section. The use of the words, indeed, seem to be quite unnecessary, for the copy could not be valid, and the mortgage invalid. An

(i) 9 U. C. C. P. 156.

(j) 45 U. C. R. 356.

(k) *Kerr* v. *Roberts*, 33 C. L. J. Nov. 1st., 1897, per Ketchum Co. J.

(l) *Per* Patterson, J., *Thompson* v. *Quirk*, 18 S. C. R. 695.

enactment that the mortgage shall cease to be valid appears to be all that was necessary.

(4) The words here used are "shall cease to be valid." Attention is directed to the difference in language in this section and section 5 where the words are "shall be absolutely null and void."

(5) 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.

(6) These words refer to the third and subsequent renewals.

22. The affidavit required by section 18 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 (1); 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 proper office of the county in which the goods are (2), at or before the time of such refiling by the assignee, next of kin, executor or administrator of the assignee (3); provided that an assignment for the benefit of creditors under chapter 147 of the Revised Statutes of Ontario, 1897, or any other Act of the Province of Ontario or the Dominion of Canada relating to assignments for the benefit of creditors or to insolvency or bankruptcy, need not be filed as aforesaid, provided such assignment be referred to in such statement, and notice thereof (when required), shall have been given in manner required by law (4). 57 V., c. 37, s. 18.

(1) The following persons are empowered by statute to make the affidavit :

(i) The mortgagee (section 18).

(ii) One of several mortgagees (section 18).

(iii) The assignee of the mortgagee (section 18).

(iv) Any assignee claiming by or through any mortgagee (section 22).

(v) One of several assignees of the mortgagee (section 18).

(vi) The agent of the mortgagee or assignee (section 18).

(vii) The agent of the mortgagees or assignees (section 18).

(viii) Any next of kin, executor or administrator of any deceased mortgagee (section 22).

(ix) Any next of kin, executor or administrator of any assignee of a mortgagee (section 22).

(x) Any next of kin, executor or administrator of any assignee, claiming by or through any mortgagee (section 22).

(2) This section formerly required that the assignment shall be filed in the office in which the mortgage is filed, regardless of the statutory provisions for the case of a permanent removal of the goods and of the spirit of legislation requiring registration in the county in which the goods are.

It was therefore suggested in the last edition of this work that to comply with the spirit, and carry out the letter of the Act, the assignment be registered in both counties should a case arise such as suggested. The present section is in an amended form, making it clear that registration shall now be made in the county where the goods are.

(3) Should the affidavit be made by—

(i) The assignee of the mortgagee ;

(ii) Or by any assignee claiming by or through any mortgagee ;

(iii) Or by one of several assignees of the mortgagee ;

(iv) Or by the agent of the assignee or assignees ;

(v) Or by any next of kin, etc., of any assignee of the mortgagee ;

(vi) Or by any next of kin, etc., etc., of any assignee claiming by or through the mortgagee :

Then, 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.

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, section 28, *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 by the affidavit, in order that the public may be informed thereupon.

(4) The latter part of this section, as to renewal by an assignee for creditors, confirms the prior decision of the Court of Appeal in *Fleming* v. *Ryan* (*m*).

Mortgages to Secure Bonds, etc., of Corporations.

23. (*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 by or under any Act or charter of the Province of Ontario, 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 the sections 2 and 3 of this Act (1), 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

(m) 21 A. R. 39; 30 C. L. J. 32.

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).

(1) 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.

(2.) A debenture commonly means an acknowledgment of indebtedness by a company, importing a covenant or obligation to pay, and usually secured by some charge (*n*).

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" (*o*).

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 (*p*).

But an agreement with share underwriters merely providing that a trust shall be created in favor 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 (*q*).

(n) *Edmonds* v. *Blaina*, 36 Ch. D. 215.
(o) *Levy* v. *Abercorris*, 37 Ch. D. 260.
(p) *Re Strand Music Hall Co.*, 3 D. J. & S. 147.
(q) *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 (*r*).

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 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 favor. 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 (*s*).

(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 Ontario, such mortgage or conveyance may be filed within thirty days instead of five days, as provided in section 2 of this Act, and the same shall be of the like

(r) *Re Patent File Co.*, 40 L. J. Ch 190.

(s) *Re Empress Engineering Co.*, 16 Ch. D. 125: *Gandy* v. *Gandy*, 30 Ch. D. 57: *Re Uraguay Railway*, 11 Ch. D. 372.

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force, effect and priority as if the same had been filed within such five days.

(3) Any such mortgage may be renewed in the manner and with the effect provided by section 18 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 showing the amount of the bond or debenture debt which the same was made to secure, and showing 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 18 of this Act.

(4) 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 authorized for such purpose. 57 V., c. 37, s. 19.

(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 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.

(6) The preceding sub-section shall apply to every such mortgage or conveyance made and registered after the 5th day of May, 1894, but nothing herein contained shall affect any accrued rights or any litigation pending on the 13th day of April, 1897. 60 V., c. 14, s. 86.

24. A copy of any original instrument or of a copy thereof (1), so filed as aforesaid (2), including any statement made in pursuance of this Act, certified by the clerk in whose office the same has been filed under the seal of the court (3), shall be received in evidence in all courts, but only of the fact that the instruments or copy and statement were received and filed 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 or copy, shall be received in evidence only of the fact stated in the indorsement (4). 57 V., c. 37, s. 20.

(1) 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.

(2) 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.

(3) 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 ——— 18—, and filed in the office of the said court at ——— o'clock in the —— noon, on ——— the —— day of ——.

Dated this —— day of —— 18—.

[Seal] (Signed) ——— C.C.C.

(4) 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 (*t*), for the certificate is conclusive as to the filing and indorsements (*u*), 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 (*v*).

(t) *Adams* v. *Pratt*, 109 Mass. 59.

(u) *Thayer* v. *Stark*, 6 Cush., (Mass.) 11: *Jordan* v. *Farnsworth*, 15 Gray, (Mass.) 517: *Head* v. *Goodwin*, 37 Me. 181.

(v) *Bissell* v. *Pearce*, 28 N. Y. 252.

Discharge of Mortgages.

25. Where any mortgage of goods and chattels is registered under the provisions of this Act (1), such mortgage may be discharged (2) by the filing, in the office in which the same is registered, of a certificate signed by the mortgagee, his executors or administrators (3), in the form given in the Schedule A. hereto, or to the like effect (4). 57 V., c. 37, s. 21.

(1) 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 Vict. (1877), c. 21, s. 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 26.

(2) The debt being the "principal," and the mortgage security the "adjunct," when the debt is paid the mortgage security forthwith ceases to exist (*w*). 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 (*x*).

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 (*y*).

Releasing a surety to whom a mortgage is given as security

(w) *Jackson* v. *Stackhouse*, 1 Cow. 122: *Crosby* v. *Chase*, 17 Me. 369.
(x) *Wallard* v. *Worthman*, 84 Ill. 446.
(y) *Brooks* v. *Ruff*, 37 Ala. 371.

against payment of a debt, discharges the mortgage (*z*); but payment by the surety of the debt does not discharge the mortgage (*a*). 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 (*b*). 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 shown, that, to public observation, the mortgagor's affairs are in a flourishing condition, without showing further that the mortgagor can discharge the debt without inconvenience (*c*). 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 (*d*).

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 (*e*).

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 (*f*).

(z) *Sumner* v. *Bacheldor*, 30 Me. 35.

(a) *Bryan* v. *Pollard*, 10 Allen (Mass.) 81: *Packhard* v. *Kingman*, 11 Iowa, 219.

(b) *Byram* v. *Gordon*, 11 Mich. 531.

(c) *Re Ross*, 29 Gr. 385.

(d) *Fuller* v. *Acker*, 1 Hill (N. Y.) 473.

(e) *Patchin* v. *Pierce*, 12 Wend. (N. Y.) 61.

(f) *Mersgat* v. *Pumpelly*, 46 Wis. 660: *Archer* v. *Cole*, 22 How. (N. Y.) Pr. 411.

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 (*g*). Possession of the mortgaged property by the mortgagee after maturity of the mortgage may or may not be satisfaction of the mortgage (*h*). 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 (*i*). On the other hand, the mortgagee, by consent, may waive his lien on the goods mortgaged, and preserve his personal remedy against the mortgagor (*j*).

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 (section 18, 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.

(g) *Davis* v. *Rider*, 5 Mich. 423.
(h) *Carpenter* v. *Bridges*, 32 Miss. 265.
(i) *Crane* v. *Paine*, 4 Cush. (Mass.) 483.
(j) *Conkling* v. *Sherry*, 28 N. Y. 360; *Brandt* v. *Daniels*, 45 Ill. 453.

(3) The certificate of discharge of mortgage can be signed as well by the assignee of a mortgagee as by the mortgagee himself, his executors or administrators (section 28).

(4) The form provided by the statute had better be adhered to (*k*), 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 (*l*).

26. The officer with whom the chattel mortgage is filed, upon receiving such certificate, duly proved(1) by the affidavit (2) 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 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 the certificate*)," and to the said entry the officer shall affix his name, and he shall also indorse the fact of the discharge upon the instrument discharged, and shall affix his name to the indorsement (3). 57 V., c. 37, s. 22.

(1) 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 (*m*).

(2) As to who can administer this affidavit, see section 33, post.

(3) The clerk's duties under this section are :—

(i) To satisfy himself that the execution of the discharge has been perfectly proved for registration.

(ii) To number the certificate.

(k) *Davis* v. *Burton*, 10 Q. B. D. 414.
(l) *Ex parte Stanford*, 17 Q. B. D. 259.
(m) *DeForrest* v. *Bunnell*, 15 U. C. R. 370.

(iii) To write at each place where the number of the mortgage has been entered, or wherever otherwise the mortgage has been entered, the words, "Discharged by certificate number —," subject, however, to the provisions of section 27 when the mortgage has been renewed.

(iv) To each such entry to affix his signature.

(v) To indorse the fact of such discharge upon the instrument itself or upon the last renewal statement filed in respect thereof (section 27).

(vi) To such indorsement to affix his signature.

27. Where a mortgage has been renewed under section 18 of this Act, the indorsement 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 (1). 57 V., c. 37, s. 23.

(1) Section 20 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.

28. In case a registered (1) chattel mortgage has been assigned (2), the assignment shall (3), upon proof by the affidavit of a subscribing witness (4), be numbered and entered in the alphabetical chattel mortgage book, in the same manner as a chattel mortgage (5), and the proceedings authorized by the next preceding three sections of this Act, may and shall be had, upon a certificate of the assignee (6), proved in manner aforesaid. 57 V., c. 37, s. 24.

(1) This provision only applies to chattel mortgages which have been registered.

(2) 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 is an assignment of the debt (*n*), and an assignment of the debt secured passes the equitable interest in the property mortgaged (*o*). 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 (*p*).

An assignment of part of the debt carries with it an equitable interest in the mortgage pro tanto (*q*). The right to assign in the mortgagee continues so long as the mortgage is a subsisting one (*r*), 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 (*s*), including right of action, in some cases accruing prior to the assignment (*t*), though apparently not in all (*u*).

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 not maintain replevin or trespass in his own name (*v*). Un-

(n) *Jones* v. *Huggeford*, 3 Met. (Mass.) 515.

(o) *Langdon* v. *Buel*, 9 Wend. (N. Y.) 80.

(p) *Earl* v. *Stamp*, 13 N. W. Rep. 701: *Lucas* v. *Harris*, 20 Ill. 165: *Hill* v. *Beebe*, 13 N. Y. 556.

(q) *Emmons* v. *Dowe*, 2 Wis. 322.

(r) *Moody* v. *Ellebe*, 4 S. C. 21.

(s) *Beach* v. *Derby*, 19 Ill. 617.

(t) *Langdon* v. *Buel*, 9 Wend. (N. Y.) 80.

(u) *Bowers* v. *Bradley*, 4 Bradw. (Ill.) 279.

(v) *Ramsdell* v. *Tewksbury*, 73 Me. 197: *Crane* v. *Paine*, 4 Cush. (Mass.) 483.

less there is an express warranty of title, a mortgagee assigning is not in any way liable for the title of the mortgagor being good (*w*).

(3) The word "shall" has been substituted here for the word "may," which was formerly used. Any one wishing to register an assignment of 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 the eighteenth section 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 (*x*), 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 (*y*). 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

(w) *Jones* v. *Huggeford*, 3 Met. (Mass.) 515.

(x) *Reed* v. *Markle*, 10 Paige, 409: *Walcott* v. *Sullivan*, 1 Edw. Ch. 399: *New York Life Ins. Co.* v. *Smith*, 2 Barb. Ch. 82.

(y) For form of notice see Appendix.

fraudulently received by the mortgagee, and void, and of no avail on the part of the mortgagor (*z*). 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 (*a*). 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 (*b*). 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 (*c*) a chose in action is assignable at law, but subject to the equities existing before notice of the assignment.

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 take subject to any equities of the mortgagor existing against the assignor at the date of the

(z) *Johnson* v. *Holdsworth*, 4 Dowl. P. C. 63: *Hickey* v. *Burt*, 7 Taunt. 48: *Mountstephen* v. *Brooke*, 1 Chit. 390: *Phillips* v. *Clagett*, 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. *Stephen*, 5 Bing. N. C. 688.

(a) *Dick* v. *Mowry*, 17 Miss. 448: *McCormick* v. *Digby*, 8 Black. 99.

(b) *Howard* v. *Gresham*, 27 Geo. 347: *Nichols* v. *Lee*, 10 Mich. 526.

(c) R. S. O. 1887, c. 122, ss. 6-13; R. S. O. (1897) c. 145.

assignment, or up to the time when the mortgagor has acquired notice of the assignment of the mortgage (*d*).

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 contract that it must have been intended to be assignable free from and unaffected by such equities (*e*). 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 (*f*).

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 him 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 (*g*).

(d) *Eglesone* v. *How*, 3 A. R. 574: *Martin* v. *Bearman*, 45 U. C. R. 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.

(e) Lord Cairns in *Re Agra* v. *Masterman's Bank*, L. R. 2 Ch. App. 397.

(f) *Martin* v. *Bearman*, 45 U. C. R. 205.

(g) *Horne* v. *Hughes*, 6 Q. B. D. 676.

(4) There is no objection to the solicitor of the assignor being the witness (*h*), but it has been held, in effect, that the assignee himself cannot be the attesting witness (*i*).

(5) 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. As the statute does not make registration compulsory, the assignee of a mortgage for valuable consideration will be preferred as against a subsequent bona fide purchaser of the same for value without notice, even though the assignment be not registered (*j*).

(6) In addition to the mortgagee or the executors or administrators of the mortgagee mentioned in section 25, the assignee of a mortgage has, under this section, the power given him to execute the certificate of discharge of mortgage.

Fees.

29. For services under this Act the clerks aforesaid shall be entitled to receive the following fees:

1. For filing each instrument and affidavit, and entering the same in a book as aforesaid, fifty cents.

2. For filing an assignment of any instrument,

(h) *Penwarden* v. *Roberts*, 9 Q. B. D. 137.
(i) *Seal* v. *Claridge*, 7 Q. B. D. 516.
(j) *Wilson* v. *Kimball*, 27 N. Y. 300.

and making all proper indorsements in connection therewith, twenty-five cents.

3. For filing a certificate of discharge of any instrument, and making all proper entries and indorsements connected therewith, twenty-five cents.

4. For a general search, twenty-five cents.

5. For production and inspection of any instrument filed under this Act, ten cents.

6. For copies of any document with certificate prepared, filed under this Act, ten cents for every hundred words.

7. For extracts, whether made by the person who made the search, or by the officer ten cents for every hundred words. 57 V., c. 37, s. 29.

Miscellaneous Provisions.

30. Where under any of the 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 (1) 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 registering or filing cannot be made or done on that day, the registering or filing (2) shall, so far as 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 (3). 57 V., c. 37, s. 30.

(1) This corresponds in its terms with the Interpretation Act, section 7 (27) which 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 the time so limited shall extend to and the thing may be done on the day next following which is not a holiday (*k*).

(k) R. S. O. (1887) c. 1, s. 8 (17); R. S. O. (1897) c. 1.

(2) 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" (*l*) 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" (*m*) 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 (*n*).

(3) Except on Sundays and legal holidays the office shall be open, hence the meaning of the word "closed" in the section means closed by reason of the day being a Sunday or legal holiday. 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 (*o*).

31. An authority for the purpose of taking or renewing a mortgage or conveyance under the provisions of this Act may be a general one to take and renew

(l) Whart. Law Lex.

(m) Bouvier's Law Dictionary.

(n) *Gorham* v. *Summers*, 25 Minn. 81, 87.

(o) *Bishop* v. *Cook*, 13 Barb. (N. Y.) 326: *Dodge* v. *Potter*, 18 Barb. (N. Y.) 193.

all or any mortgages or conveyances to the mortgagee or bargainee (1). 57 V., c. 37, s. 31.

(1) 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 conveyances intended to operate as mortgages under section 2.

32. All the instruments mentioned in this Act, whether for the sale or mortgage of goods and chattels, shall contain such sufficient and full description (2) thereof that the same may be thereby readily and easily known and distinguished. 57 V., c. 37, s. 32.

(1) This provision was first introduced by 20 Vict., (1857), c. 3; the word "sufficient" being subsequently substituted for the word "efficient" found in that statute. Instruments under sections 2, 6, 7 and 8 would undoubtedly be included, but strangely enough the same form of words is here followed as appeared in the statute before the enactments as to contracts to give mortgages or to make sales now incorporated as sections 11 to 14 inclusive. It may therefore be doubted whether a "sufficient and full description" is necessary in cases under the latter sections. In practice it will be better with such or with an assignment of mortgage required to be registered, to comply with this section.

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. As to creditors the subsequent

taking possession of the chattels by the mortgagee or bargainee will not avail as against persons who became creditors or purchasers, or mortgagees before such taking of possession (section 40).

(2) 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 instruments do not take the precaution, or the trouble, to follow the enactments of the statute, and omit to describe in some reasonable way the chattels intended to be mortgaged in 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 (*p*).

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 (*q*). 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

(p) *Per* Morrison, J. A., in *Holt* v. *Carmichael*, 2 A. R. 644.

(q) *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.

would indicate how the property may be identified if proper enquiries are instituted (*r*). 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 (*s*). 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 (*t*). 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 (*u*); 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 (*v*).

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 (*w*), and a mortgage of leather, covers shoes subsequently made from such leather (*x*). 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 (*y*); 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 (*z*).

Before the passing of 20 Vict., c. 3, questions arose in

(r) *Per* Ritchie, C. J., *McCall* v. *Wolff*, 13 S. C. R. at p. 133.
(s) *Per* Wilson, C. J., *Corneill* v. *Abell*, 31 U. C. C. P., at p. 109.
(t) *Holt* v. *Carmichael*, 2 A. R. 639.
(u) *Willey* v. *Snyder*, 34 Mich. 60.
(v) *McCall* v. *Wolff*, 13 S. C. R. 133.
(w) *White* v. *Brown*, 12 U. C. R. 477.
(x) *Putman* v. *Cushing*, 10 Gray (Mass.) 334.
(y) *Richardson* v. *Alpena*, 40 Mich. 203: 8 Central L. J. 297.
(z) *Merchants Nat. Bank* v. *McLauchlin*, 1 McCrary, 258.

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 (*a*). 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 (*b*).

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., c. 3, s. 4. (*c*). 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 (*d*). 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 (*e*). When the locality of

(a) *Balkwell* v. *Beddome*, 16 U. C. R. 203.
(b) *McCall* v. *Wolff*, 13 S. C. R. 130.
(c) *Harris* v. *Commercial Bank*, 16 U. C. R. 437.
(d) *Harris* v. *Commercial Bank*, 16 U. C. R. 437: *Burdett* v. *Hunt*, 25 Me. 419: *Russell* v. *Wimel*, 37 N. Y. 591.
(e) *Harris* v. *Commercial Bank*, 16 U. C. R. at p. 444: *Howell* v. *McFarlane*, 16 U. C. R. 469.

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 (*f*), 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 (*g*); 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 (*h*). 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 shop in renewal,

(f) *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. 525: *Fraser* v. *Bank of Toronto*, 19 U. C. R. 381: *Powell* v. *Bank of Upper Canada*, 11 U. C. C. P. 303.

(g) *Harding* v. *Coburn*, 12 Met. (Mass.) 333.

(h) *Ross* v. *Conger*, 14 U. C. R. 525.

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 (*i*); 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 (*j*). 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 (*k*). 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" (*l*), 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" (*m*), is good. 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 (*n*).

(i) *Mason* v. *McDonald*, 25 U. C. C. P. 435: *McPherson* v. *Reynolds*, 6 U. C. C. P. 491.

(j) *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.

(k) *Re Thirkell*, 21 Gr. 492: *Stephens* v. *Pence*, 56 Iowa 257.

(l) *Clements* v. *Matthews*, 11 Q. B. D. 808.

(m) *Lazarus* v. *Andrade*, 5 C. P. D 318.

(n) *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 favor 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 description does not confine the assignment to specific goods, but to undetermined property (*o*). 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 (*p*).

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 (*q*).

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 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

(o) *Tadman* v. *D'Epineuil*, 20 Ch. D. 758.
(p) *Collyer* v. *Isaacs*, 19 Ch. D. 342.
(q) *Kitching* v. *Hicks*, 20 C. L. J. 112.

when there was no novus actus (*r*). Nothing at common law can be mortgaged but that which is in esse; and a man cannot give away that which he hath not (*s*). 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 (*t*). We have seen, however, that an assignment of after-acquired property 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 (*u*).

And by section 37 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.

A description of "12 oil paintings in gilt frames" in a particular room of a dwelling house is good (*v*), while "twenty-one milch cows" on a farm of the grantor, describing it, is not sufficient (*w*). But a description of a piano as of "Dominion" make, specifying the number is sufficient (*ww*).

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

(r) *Lunn* v. *Thornton*, 1 C. B. 379.

(s) *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.

(t) *Anderson* v. *Howard*, 49 Ga. 313.

(u) *Per* Blake, V.C., *Re Thirkell*, 21 Gr. at p. 509.

(v) *Cooper* v. *Huggins*, (1889) 34 Sol. J. 96.

(w) *Carpenter* v. *Deen*, 23 Q. B. D. 566.

(ww) *Field* v. *Hart*, 22 A. R. 449; 31 C. L. J. 520.

on the property specially mentioned in the mortgage; but even if so construed the description is not sufficient under this section (*x*).

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. (*xx*).

It is not sufficient to state merely the street upon which the stock-in-trade mortgaged happens to be, without saying that it was in the shop or on the premises of the assignor situate upon that street (*y*).

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 (*z*). 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

(x) *Williams* v. *Leonard*, 26 S. C. R. 406.

(xx) *Thomson* v. *Quirk*, 18 S. C. R. 695.

(y) *Wilson* v. *Kerr*, 17 U. C. R. 168.

(z) *Wilson* v. *Kerr*, 17 U. C. R. 168: *Nolan* v. *Donnelly*, 4 O. R. 440.

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 (*a*), 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 (*b*).

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 the 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 a sufficient description within the meaning of the Act (*c*), because, no doubt, there is a total absence of description by locality: The omission to identify by locality makes the following

(a) *Mathers* v. *Lynch*, 28 U. C. R. 354.

(b) *Fraser* v. *Bank of Toronto*, 19 U. C. R. 381: see *Blaiberg* v. *Parke*, 10 Q. B. D. 90.

(c) *Nolan* v. *Donnelly*, 20 C. L. J. 16.

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" (*d*).

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" (*e*). 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 (*f*); and goods described as "one kitchen table, four chairs," etc., (describing them) "all contained in and about the dwelling-house and barn of the mortgagor situate at, or on lots," etc., has been held to be sufficient (*g*).

(d) *Whiting* v. *Hovey*, 13 A. R. 7.
(e) *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.
(f) *Segsworth* v. *Meriden Silver Plating Co.*, 3 O. R. 413.
(g) *Nattrass* v. *Phair*, 37 U. C. R. 153.

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 (*h*); 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 (*i*).

For instance, the description of "two sets of blacksmithing and one set of waggon-maker's tools complete," in itself affords no means of identifying the goods intended to be mortgaged, but with the assistance of locality it becomes sufficient (*j*). 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 (*k*). 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" (*l*), 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

(h) *Mason* v. *McDonald*, 25 U. C. C. P. 435.

(i) *Spaulding* v. *Mozier*, 57 Ill. 148: *Adamson* v. *Peterson*, 34 Alb. L. J. 373.

(j) *Mason* v. *McDonald*, 25 U. C. C. P. 435.

(k) *Sutherland* v. *Nixon*, 21 U. C. R. 629.

(l) *Corneill* v. *Abell*, 31 U. C. C. P. 107.

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 (*m*).

Under the Imperial Act (*n*) a bill of sale is not void simply because it omits to state the locality whereat or whereupon the chattels are (*o*), 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. The Imperial Act does not require 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 has given a bill of sale of his goods (*p*). 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 description

(m) *Per* Wilson, C. J., *Nolan* v. *Donnelly*, 4 O. R. at p. 446.
(n) 45-46 Vict., c. 43.
(o) *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.
(p) *Per* Manisty, J., *Ex parte Hill*, 17 Q. B. D. 74.

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 (*q*).

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" (*r*).

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 easily 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 (*s*). Indeed, the addition of "locality" may

(q) *Witt* v. *Banner*, 20 Q. B. D. 114.

(r) *Wright* v. *Pearson*, L. R. 4 Q. B. 582: see *Colam* v. *Pagett*, 12 Q. B. D. 66.

(s) Wilson, C. J., *Corneill* v. *Abell*, 31 U. C. C. P. at p. 110.

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 (*t*), vitiate the mortgage; thus, describing the premises by mistake as north half of lot "13" instead of "14." This error has been held to be fatal to a mortgage so far as the crops said to be in the ground, and mortgaged, were concerned (*u*). 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 desentitle 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 (*v*). 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 (*w*).

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 color might be rejected (*x*). 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

(t) *Spaulding* v. *Mozier*, 57 Ill. 148; *Adamson* v. *Peterson*, 34 Alb. L. J. 373.

(u) *Grass* v. *Austin*, 7 A. R. 511: *Adams* v. *Com. Bank*, 53 Iowa 491.

(v) *Donnelly* v. *Hall*, 7 O. R. 581.

(w) *May* v. *Security Loan & Savings Co.*, 45 U. C. R. 106.

(x) *Fitzgerald* v. *Johnston*, 41 U. C. R. 440: *Taut* v. *Harvey*, 55 Iowa 421.

sufficient to pass the property, it being merely a matter of identification (*y*); 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* (*z*) 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 (*a*), and, on the authority of *Mills* v. *King*, "one stumping machine" was also held a sufficient description (*b*); but the machine was described also by locality, although the evidence showed 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 (*c*). 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 (*d*); but if there are found to be a fewer number of calves than five, then all

(y) *Pettis* v. *Kellog*, 7 Cush. 456.
(z) 14 U. C. C. P. 223.
(a) *Noell* v. *Pell*, 7 U. C. L. J. 322
(b) *Bertram* v. *Pendry*, 27 U. C. C. P. 371.
(c) *McCall* v. *Wolff*, 13 S. C. R. 130: *Blakely* v. *Patrick*, 67 N. C. 40: *Harris* v. *Commercial Bank*, 16 U. C. R. 437, 444.
(d) *Per* Henry, J., *McCall* v. *Wolff*, 13 S. C. R. 138.

the calves would pass by the grant (*e*). 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 (*f*). 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 (*g*), 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 (*h*), and so is a grant of a wagon as "one four-horse-iron-axle wagon" without anything more definite (*i*), 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 (*j*).

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 sufficient description (*k*).

It sometimes happens that property becomes intermixed with other property of a like kind. It is the law, in such cases, 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

(e) *Crosswell* v. *Allis*, 25 Conn. 301: *Kelly* v. *Reid*, 57 Miss. 89.
(f) *Caldwell* v. *Trowbridge*, 33 Alb. L. J. 196.
(g) *Holt* v. *Carmichael*, 2 A. R. 630.
(h) *Montgomery* v. *Wright*, 8 Mich. 143.
(i) *Nicholson* v. *Karpe*, 58 Miss. 34.
(j) *McCord* v. *Cooper*, 30 Ind. 9: *Croswell* v. *Allis*, 25 Conn. 311: *Blakely* v. *Patrick*, 67 N. C. 40.
(k) *Corneill* v. *Abell*, 31 U. C. C. P. 107.

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 mortgagee 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 cannot be distinguished (*l*). There seems to be a doubt whether parol evidence is admissible to identify property regarding which there is ambiguity from the description (*m*). In the States of Massachusetts, Michigan and North Carolina, such evidence is admitted, at all events to explain ambiguity in cases of general descriptions (*n*).

From a perusal of the authorities the author, in the first edition, ventured upon the following epitome (*o*) :—

(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 (*p*).

(ii) Where general words are used, or the goods mortgaged are described as of a class, then mention of the correct locality is indispensable (*q*).

(iii) It is not sufficient to describe a chattel simply by its

(l) *Dunning* v. *Stearns*, 9 Barb. 630 : *Willard* v. *Rice*, 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.

(m) Wilson, C.J., *Nolan* v. *Donnelly*, 4 O. R. p. 446 : Hagarty, C.J., *Mason* v. *McDonald*, 25 U. C. C. P. p. 439.

(n) *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.

(o) Approved by Boyd, C., in *Segsworth* v. *Meriden Silver Plating Co.*, 3 O. R. at p. 415.

(p) *Mason* v. *McDonald*, 25 U. C. C. P. 435.

(q) *Fraser* v. *Bank of Toronto*, 19 U. C. R. 381.

generic term. Correct locality must be added, or the chattel must be otherwise identified beyond question (*r*).

(iv) A mortgage can be properly given upon goods not in existence, and which are to be afterwards acquired (*s*), 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 (*t*).

(v) Where the locus is omitted, the court will sometimes assume the locality to be that intimated by other parts of the deed (*u*).

(vi) The words "stock-in-trade" give 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 (*v*).

(vii) The assumption from the words "furniture and household stuff" is, that the description refers to the mortgagor's residence (*w*).

(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 (*x*).

(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 (*y*).

(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 (*z*).

(r) *Holt* v. *Carmichael*, 2 A. R. 639.
(s) *Re Thirkell*, 21 Gr. 492.
(t) *Mason* v. *McDonald*, 25 U. C. C. P. 435.
(u) *Mathers* v. *Lynch*, 28 U. C. R. 354.
(v) *Wilson* v. *Kerr*, 17 U. C. R. 168.
(w) *Fraser* v. *Bank of Toronto*, 19 U. C. R. 381.
(x) *Fitzgerald* v. *Johnston*, 41 U. C. R. 440.
(y) *Rose* v. *Hope*, 22 U. C. C. P. 482: *Coombs* v. *Beaumont*, 5 B. & Ad. 72: *Boydell* v. *McMichael*, 1 C. M. & R. 177.
(z) *White* v. *Browne*, 12 U. C. R. 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 (*a*).

(xii) The words "all the assignor's personal property and effects whatsoever and wheresoever," are insufficient (*b*).

(xiii) Bonds, bills, notes, accounts, stocks, etc., "ejusdem generis" do not require the usual particular description necessary under the statute (*c*).

(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 (*d*).

33. All affidavits and affirmations required by this Act may be taken and administered by any judge, notary public, or a commissioner or other person in or out of the province authorized to take affidavits in and for the High Court (1) or by a justice of the peace (2); and the sum of twenty cents shall be payable for every oath thus administered. 57 V., c. 37, s. 33.

(1) 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 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

(a) *Kingston* v. *Chapman*, 9 U. C. C. P. 130: *Wood* v. *Rowcliffe*, 6 Ex. 407, 20 L. J. Ex. 285.

(b) *Harris* v. *Commercial Bank*, 16 U. C. R. at p. 444.

(c) *Harris* v. *Commercial Bank*, 16 U. C. R. at p. 444.

(d) *Re Thirkell*, 21 Gr. 492: *Lazarus* v. *Andrade*, 5 C. P. D. 318: *Clements* v. *Matthews*, 11 Q. B. D. 808.

any colony of Her 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 Her Majesty exercising 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 depending or in anywise concerning any proceedings to be had in the said courts (*e*).

(2) 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 this affidavit in a different county (*f*).

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 (*g*).

It will be observed that the Ontario Evidence Act (*h*) 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 was insufficient, as a notary public in Quebec had no power to administer it (*i*).

A person who prepares an assignment of mortgage may

(e) R. S. O. (1887) c. 61, s. 34
(f) R. S. O. (1887) c. 1, s. 8, sub.-sec. 19; R. S. O. (1897) c. 1.
(g) R. S. O. (1887), c. 1, s. 8 (18); R. S. O. (1897) c. 1.
(h) R. S. O. (1887), c. 61, s. 34.
(i) *Reynolds* v. *Williamson*, 25 U. C. C. P. 49.

administer an affidavit under this Act as commissioner (*j*), but not so if he be the mortgagee (*k*). It is important that the person who administers the affidavit should not neglect to subscribe his name to the jurat. In the case of *Nisbet* v. *Cock* (*l*), 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 mischiefs 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

(j) *Noell* v. *Pell*, 7 U. C. L. J. 322.

(k) *Beaman* v. *Whitney*, 20 Me. 413; *Honmers* v. *Dole*, 61 Ill. 307: *Wilson* v. *Traer*, 20 Iowa 231.

(l) 4 A. R. 200.

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 decision 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 (*m*). 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 purchasérs (*n*). 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 (*o*). 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 showing in what capacity the affidavit was taken by such officer is not a fatal objection to the affidavit (*p*); 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 (*q*). 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 (*r*).

34. This Act shall not apply to mortgages of vessels registered under the provisions of any Act in that behalf (1). 57 V., c. 37, s. 34.

(1) This section has a much wider application than is implied by the mere words it contains. Whatever is on board

(m) *Nisbet* v. *Cock*, 4 A. R. 200; see also *Hill* v. *Gillman*, 39 N. H. 88: *Becker* v. *Anderson*, 11 Neb. 493.

(n) *Frank* v. *Miner*, 50 Ill. 444.

(o) *Pollord* v. *Huntingdon*, 16 C. L. J. 168.

(p) *Cheney* v. *Courtois*, 13 C. B. N.S. 634: *Hamilton* v. *Harrison*, 46 U. C. R. 127.

(q) *Per* Lord Abinger, *Burdekin* v. *Potter*, 9 M. & W. 13.

(r) *Ex parte Johnson*, 26 Ch. D. 338.

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 (*s*), 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 (*t*).

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 (*u*). And it is very doubtful if those vessels only which require registration under the Acts relating to registration of vessels are meant by the above section (*v*).

(s) *Patton* v. *Foy*, 9 U. C. C. P. 512: see *Gale* v. *Laurie*, 5 B. & C. 156.

(t) *St. John* v. *Bullivant*, 45 U. C. R. 614.

(u) *Gapp* v. *Bond*, 19 Q. B. D. 200.

(v) *Union Bank of London* v. *Lenanton*, 3 C. P. D. 243.

35. All chattel mortgages relating to property within any township, city, town, or incorporated village forming part of a new county, at the date the proclamation forming the new county takes effect, 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 county had not been formed, but in the event of a renewal of any such chattel mortgage after the date the proclamation takes effect, the renewal shall be filed in the proper office in that behalf in the new county as if the mortgage had originally been filed therein, together with a certified copy under the hand of the clerk and seal of the county court, and no chattel mortgage in force at the said date shall lose its priority by reason of its not being filed in the new county prior to its renewal. 57 V., c. 37, s. 35.

36. Every person shall have access to and be entitled to inspect the several books of the county courts, containing records or entries of the chattel mortgages and bills of sale filed; 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 chattel mortgage, or bill of sale, filed in their respective offices, or of which records or entries are, by law, required to be kept in such several books of the county courts (1). 57 V., c. 37, s. 36.

(1) This section enables the mercantile agencies to make a search daily of all instruments filed on the previous day, and thus to obtain a complete record of the registrations from time to time.

37. 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 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 (1). 57 V., c. 37, s. 37.

(1) 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 a sale by a landlord under distress for rent to a mortgagee of goods already under mortgage no registration was required (*w*). 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. But a bill of sale by a sheriff, on an execution debtor's goods to a purchaser, whether he be plaintiff in the execution or not, was formerly not within the Act (*x*), and it is submitted that this section has not the effect of including it so that it would be open to attack by subsequent execution creditors of the debtor, although the purchaser leaves the goods in the latter's possession.

Where a mortgagee sells the goods of a mortgagor under a power of sale contained in the 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 credi-

(w) *Severn* v. *Clarke*, 30 U. C. C. P. 363.

tors 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 (*y*).

Although formerly the chattel mortgagee of after-acquired goods might be postponed to a legal title acquired from his mortgagor by a bona fide purchaser or mortgagee contracting as to the goods themselves (*z*), it would now appear that priority is given to a contract or agreement in respect of such goods when duly registered, as against a subsequent bill of sale by the acquiring party by virtue of section 37.

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 (*a*). 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 (*b*).

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 (*c*). A description in

(x) *Kissock* v. *Jarvis*, 6 U. C. C. P. 393: *Paterson* v. *Maughan*, 39 U. C. R. 371.

(y) *Carlisle* v. *Tait*, 1 A. R. 10: *Cookson* v. *Swire*, 9 App. Cas. 653.

(z) *Canada Permanent* v. *Todd*, 22 A. R. 515.

(a) *Canada Permanent* v. *Todd*, 22 A. R. 515.

(b) *Bloomfield* v. *Hellyer*, 22 A. R. 232: *Laing* v. *Ontario Loan*, 46 U. C. R. 114 explained.

(c) *Horsfall* v. *Boisseau*, 21 A. R. 663.

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 (*d*). "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." (*e*).

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 (*f*).

This section however does not appear to cover the sale of a *share* in a chattel and such was not formerly required to be

(d) *Holroyd* v. *Marshall*, 10 H. L. C. 191 : *Canada Permanent* v. *Todd*, 22 A. R. 515.

(e) *Milligan* v. *Sutherland*, 27 O. R. 235 ; 32 C. L. J. 231.

(f) *Ryan* v. *Shields*, (Q. B D. Ont.) April 8th, 1897, not reported.

registered (*g*), yet it will be the safer course to register under the Act in a case where the vendor retains possession.

38. In the application of this Act the word "creditors" where it occurs, shall extend to creditors of the mortgagor or bargainor suing on behalf of themselves and other creditors, and to any assignee in insolvency of the mortgagor, and to an assignee for the general benefit of creditors, within the meaning of "The Act respecting Assignments and Preferences by Insolvent Persons," as well as to creditors having executions against the goods and chattels of the mortgagor or bargainor in the hands of the sheriff or other officer. 57 V., c. 37, s. 38; 60 V., c. 3, s. 3.

39. The "actual and continued change of possession" mentioned in this Act shall be taken to be such change of possession as is open, and reasonably sufficient to afford public notice thereof. 57 V., c. 37, s. 39.

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 (*h*), 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

(g) *Gunn* v. *Burgess*, 5 O. R. 685.

(h) *McMartin* v. *Moore*, 27 U. C. C. P. 397: *Kerr* v. *Canadian Bank of Commerce*, 4 O. R. 652.

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 neighborhood (*i*). 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 (*j*), such would probably not be sufficient, 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 (*k*), 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.

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 (*l*); 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 (*m*).

And so, in our courts, 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

(i) *Scribner* v. *McLaren*, 2 O. R. 265: *McPartland* v. *Read*, 11 Allen (Mass.) 231: *Doyle* v. *Stevens*, 4 Mich. 87.

(j) *Robinson* v. *Briggs*, L. R. 6 Ex. 1: 40 L. J. Ex. 17.

(k) *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.

(l) *Ex parte Lewis*, L. R. 6 Ch. 626: *Ex parte Hooman*, L. R. 10 Eq. 63.

(m) *Seal* v. *Claridge*, 7 Q. B. D. 516.

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 for the defendant should not be interfered with (*n*). 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* (*o*) a step further was made than in *Armstrong* v. *Moodie* 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 (*p*); 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 which was capable of actual delivery (*q*).

(n) *Armstrong* v. *Moodie*, 6 O. S. 538.

(o) *Heward* v. *Mitchell*, 10 U. C. R. 535.

(p) *McMartin* v. *McDougall*, 10 U. C. R. 399: *Steele* v. *Benham*, 84 N. Y. 634: *Otis* v. *Sill*, 8 Barb. (N. Y.) 102: *Hanford* v. *Archer*, 4 Hill. (N. Y.) 271.

(q) *Per* Pollock, C. B., *Tanner* v. *Scovell*, 14 M. & W. 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 (*r*).

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" (*s*). 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 (*t*). Though timber may be delivered by marking it with the initials of the assignee (*u*), our statute requires, in addition to delivery, an actual and continued change of possession of the things mortgaged. Hence, in *Short* v. *Ruttan* (*v*), 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 express words of 12 Vict., c. 74. Both *Cummings* v. *Morgan* (*w*), and *Middlebrook* v. *Thompson* (*x*), are distinguishable from *Short* v. *Ruttan*, supra. In the former case, though the timber re-

(r) *Haight* v. *Munro*, 9 U. C. C. P. 464.

(s) *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.

(t) *Longman* v. *Tripp*, 2 B. & P. N. R. 67: *Ex parte Foss*, 2 DeG. & J. 230: *West* v. *Skipp*, 1 Ves. Sen. 231.

(u) *Stoveld* v. *Hughes*, 14 East, 308.

(v) 12 U. C. R. 79

(w) 12 U. C. R. 565.

(x) 19 U. C. R. 207.

mained in the possession of the assignor as it had done previously, and the plaintiffs were not otherwise in possession than by the marking it with their mark, the defendants, on the trial, admitted the plaintiffs' 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 plaintiffs, his possession being their possession (*y*); and there had been a further delivery of some, in the name of those previously marked with the plaintiffs' 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 (*z*). 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 (*a*).

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 (*b*).

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 independent of the assignment by which the property was conveyed to them all (*c*).

Immediate delivery must be "accompanied by" an actual

(y) *MacPherson* v. *Fredericton Boom Co.*, 1 Han., 12 N. B. R. 337.

(z) *McMillan* v. *McSherry*, 15 Gr. 133.

(a) *Segee* v. *Perley*, 1 Kerr, 439.

(b) Wilson, C. J., *McMaster* v. *Garland*, 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.

(c) *Haight* v. *Munro*, 9 U. C. C. P. 462.

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 (*d*). 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 goods delivered to the sheriff (*e*). 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 remains in possession, there is yet not such a sufficient, actual, and continued change of possession as to satisfy the statute (*f*).

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 (*g*); 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

(d) Osler, J., *Scribner* v. *McLaren*, 2 O. R. at p. 265.
(e) *Carruthers* v. *Reynolds*, 12 U. C. C. P. 596.
(f) *Doyle* v. *Lasher*, 16 U. C. C. P. 263.
(g) *Pettigrew* v. *Thomas*, 12 A. R. 577.

used as before the sale of it, there is not such a change of possession as will satisfy the statute (*h*).

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 (*i*). 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 (*j*).

And where the sheriff's bailiff is in possession of household goods under an execution, and the debtor obtains a third party to pay off the sheriff's claim to retain the bailiff in possession as security for the advance, the debtor still continuing to reside where the goods and bailiff were, such will not constitute an actual change of possession (*k*).

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 (*l*).

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 contined from that time forward to be of any avail, although the mortgage must be "accompanied by an immediate delivery" of the things mortgaged (*m*).

(h) *Snarr* v. *Smith*, 45 U. C. R. 156.
(i) *Haight* v. *Munro*, 9 U. C. C. P 464.
(j) *Frazer* v. *Lazier*, 9 U. C. R. 679.
(k) *Mills* v. *Charlesworth*, 25 Q. B. D. 421.
(l) *Gillard* v. *Bollert*, 24 O. R. 147.
(m) Wilson, J., *Ontario Bank* v. *Wilcox*, 43 U. C. R. at p. 489.

We have seen, however, that though an interval of time elapses, perhaps even of 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 (*n*).

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 (*o*). And although it has been said that visible possession cannot be put higher than actual possession (*p*), 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 (*q*). 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 (*r*). 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 (*s*).

And where material is sold and delivered, to be worked

(n) *Haight* v. *Munro*, 9 U. C. C. P. 462.

(o) *Wilson* v. *Kerr*, 17 U. C. R. 170; *Reid* v. *McDonald*, 26 U. C. C. P. 147.

(p) Jessel, M. R., *Ex parte Saffery*, 16 Ch. D. at p. 670.

(q) *Robinson* v. *Tucker*, 1 C. & E. 173.

(r) *Danford* v. *Danford*, 8 A. R., 518; *Flagg* v. *Pierce*, 58 N. H. 348.

(s) *Danford* v. *Danford*, *supra*; *Gibbons* v. *Hickson*, 55 L. J. Q. B. 119; 53 L. T 910; 34 W. R. 140.

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 (*t*) a different rule obtained.

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 (section 37,) (*u*).

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 (*v*). 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 (*w*). 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 (*x*).

Strict compliance with the Act is necessary, notwithstand-

(t) *Gildersleeve* v. *Ault*, 16 U. C. R. 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.

(u) *Gurney* v. *James*, 19 U. C. R. 157, no longer applicable.

(v) R. S. C. 1886, c. 32, s. 81; and see *Harris* v. *Commercial Bank*, 16 U. C. R. 437: *May* v. *Security L. & S. Co.* 45 U. C. R. 106.

(w) *Jones* v. *Henderson*, 3 Man. R. 433: *Re Cunningham*, 28 Ch. D. 682, *Com. Nat. Bank of Chicago* v. *Corcoran*, 20 C. L. J. 272.

(x) *Re Hall*, 14 Q. B. D. 386.

ing that there may have been as much a change of possession as the position of the parties admits of (*y*).

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 (*z*). 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 (*a*). 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 (*b*).

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 (*c*).

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. But, though when possession is taken rightfully the possession will be extended by construction of law beyond the actual physical possession, this will not be done in the case of a wrong-doer. His possession will not be extended beyond his actual physical possession (*d*). When taken rightfully, before any other rights have accrued, the mortgage becomes good

(y) *Snarr* v. *Smith*, 45 U. C. R. at p. 159.

(z) *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.

(a) *Scribner* v. *McLaren*, 2 O. R. 275.

(b) Burton, J.A., *Pettigrew* v. *Thomas*, 12 A. R. at p. 578: see *Scribner* v. *Kinlock*, 12 A. R. 367.

(c) *Scribner* v. *Kinlock*, 12 A. R. 367.

(d) *Ex parte Fletcher*, 5 Ch. D. 809.

as against everybody, 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 (*e*); 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 an attaching creditor, subject however to the mortgagor's right of action, if any, for taking possession before default (*f*).

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 (*g*). If a bargainee, or mortgagee, does not actually get possession, diligence in attempting to get it will not help him (*h*). 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 (*i*), 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 (*j*), yet such is only constructive possession, and as the change is not an open one affording public notice it will not suffice.

A landlord who, by arrangement with his tenant, pur-

(e) *Morrow* v. *Reid*, 30 Wis. 81, 84.
(f) *Robins* v. *Clark*, 45 U. C. R. 362.
(g) *Ancona* v. *Rogers*, 1 Ex. D. 285.
(h) *Per* Mellish, L.J., *Ex parte Jay*, L. R 9 Ch. at p. 705.
(i) *McKellar* v. *McKibbon*, 12 A. R. 221; 21 C. L. J. 414.
(j) *Hyman* v. *Bourne*, 5 O. R. 430.

chases 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 (*k*).

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 (*l*).

40. A mortgage or sale declared by this Act to be void, or which under the provisions of section 18 has ceased to be valid as against creditors and subsequent purchasers or mortgagees shall not by the subsequent taking of possession of the things mortgaged or sold by or on behalf of the mortgagee or bargainee be thereby made valid as against persons who become creditors, or purchasers, or mortgagees before such taking of possession (1). 57 V., c. 37, s. 40.

(1) This section sets at rest a much litigated question, and establishes the decision in *Marthinson* v. *Patterson* (*m*), where the Court of Appeal held that taking possession does not make good a defective chattel mortgage as against a subsequent validly registered bona fide chattel mortgage which existed at the time possession was taken, but under which no default had occurred.

(k) *Farlinger* v. *McDonald*, 45 U. C. R. 233.
(l) *Hogaboom* v. *Graydon*, 26 O. R. 298; 31 C. L. J. 100.
(m) 19 A. R. 188.

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 (*n*).

Agreements where possession passes without ownership.

41. (*1*) In case of an agreement for the sale or transfer (1) of merchandise (2) of any kind to a trader or other person for the purpose of resale by him in the course of business (3), the possession to pass to such trader or other person, but not the absolute ownership until certain payments are made or other considerations satisfied, any such provision as to ownership shall as against creditors, mortgagees or purchasers (4) be void, and the sale or transfer shall be deemed to have been absolute, unless

(*a*) The agreement is in writing, signed by the parties to the agreement or their agents, and

(*b*) Unless such writing or a duplicate or copy verified by oath is filed in the office of the county court clerk of the county or union of counties or in the proper office in a district in which the goods are situate at the time of making the agreement, and also in the office of the county court clerk of the county or union of counties or in the proper office in a district in which such trader or other person resides at the time of making the agreement, such filing to be within five days of the delivery of possession of any of the goods under the agreement. 57 V., c. 37, s. 41 (1); 58 V., c. 24, s. 2.

(*2*) In the territorial districts of Muskoka, Nipis-

(n) *Wood* v. *Brunt*, 32 C. L. J. 775 (*per* Ketchum Co. J.) following *Clarkson* v. *McMaster*, 25 S. C. R. 96.

sing, Algoma, Thunder Bay and Rainy River the agreement shall be filed in the office of the Clerk of the Peace in the district; and in the districts of Parry Sound and Manitoulin in the office of the registrar of deeds for the district; provided that if a Clerk of the Peace should be appointed for the district of Parry Sound or the district of Manitoulin, then any agreement requiring thereafter to be filed in such district shall be filed in the office of such Clerk of the Peace.

(3) Such an agreement, though signed and filed, shall not affect purchases from the trader or person aforesaid in the usual course of his business.

(4) The provisions of this and the four next preceding sections of this Act shall not affect the case of manufactured goods and chattels which at the time possession is given have the name and address of the manufacturer, bailor or vendor of the same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto, nor any goods or chattels where the receipt-note, hire receipt, order or other instrument is filed, and for which cases respectively provision is made by the Act respecting conditional sales of chattels. 57 V., c. 37, s. 41 (2-4).

(1) A sale is a transfer of the absolute or general property in a thing for a price in money; and a transfer is the act by which the owner delivers anything to another with intent of passing some right he has in it to the latter (*o*).

(2) "Merchandise" is a term having no fixed technical meaning (*p*); but does not apply to mere evidences of value such as bills of lading or insurance policies, but only to ar-

(o) *Ex parte Thomson*, 16 Neb. 238: *Robertson* v. *Wilcox*, 36 Conn. 426.

(p) *Kent* v. *Liverpool Co.*, 26 Ind. 294.

ticles having an intrinsic value in bulk, weight or measure, and which are bought and sold (*q*).

The term may include horses and trucks when transported or otherwise dealt with as merchandise in a mercantile sense, but when they are driven aboard a ferry boat in charge of their drivers, who are passengers, and remain in their charge upon the trip, they are not shipped, taken in, or put on board, as merchandise (*r*).

And fruit has been held to be included within a statute declaring an implied warranty on sales of merchandise (*s*).

(3) The "purpose" here mentioned must, it is submitted, be the purpose of both parties to the agreement; but may be inferred from the nature, quantity and condition of the goods agreed to be sold and the surrounding circumstances. Where a stock of goods in a store is included in a sale of the business as a going concern and of the good-will thereof there could be little doubt that the "purpose" of both parties was that the goods should be resold.

(4) "Creditors, mortgagees or purchasers." What is evidently intended is creditors of, and purchasers or mortgagees from, the trader or other person who is the conditional purchaser or transferee and who obtains possession, though it might better have been so stated explicitly. Sub-section 3 may be looked at to indicate the meaning of this sub-section, and there it is purchasers *from the trader or person aforesaid* who are protected.

If a purchaser buys only the right and interest of the conditional bailee, and undertakes to pay the purchase money still owing by the latter, such purchaser cannot take advantage of the want of registration or of the absence of the name of the bailor from the article (*t*).

But the purchaser may show that the claim of the bailor

(q) *Citizens Bank* v. *Nantucket*, 2 Story (U. S.) 16.

(r) *The Garden City*, 26 Fed. Rep. 766.

(s) *Blackwood* v. *Cutting Co.*, 76 Cal. 212; 9 Am. St. Rep. 199.

(t) *Greither* v. *Alexander*, 15 Iowa, 470: *Kellog* v. *Secord*, 42 Mich. 318.

has been paid or that the chattel was never in fact subject to a lien or reservation of title (*u*).

42.—(*1*) Every clerk 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 returns which shall set out:

(*a*) The number of chattel mortgages and renewals, the number of discharges, and the number of assignments for the benefit of creditors on record and undischarged in the office of such clerk on the 1st day of January in the year preceding that in which the return is made.

(*b*) The number of chattel mortgages and renewals, the number of discharges, and the number of assignments for the benefit of creditors registered in such office during the year following the said 1st day of January, and

(*c*) The number of chattel mortgages and renewals, the number of discharges, and the number of assignments for the benefit of creditors on record and undischarged in the said office on the 31st day of December in said year.

(*2*) The returns shall not include instruments which have lapsed by reason of non-renewal.

(*3*) The chattel mortgages and renewal and discharges, and assignments for the benefit of creditors in the said returns shall be classified according to the several occupations or callings of the vendors or mortgagors or assignors as stated in the instruments,

(u) *Barry* v. *Bennett*, 7 Met. (Mass.) 354: *Housatonic* v. *Martin*, 1 Met. (Mass.) 294.

and shall show the aggregate sums purporting to be secured thereby respectively.

(*4*) The return shall, where practicable, distinguish mortgages to secure future indorsations or future advances from mortgages to secure an existing debt or a present advance. 53 V., c. 12, s. 7.

SCHEDULE A.

SECTION 25.

Form of Discharge of Mortgage.

To the Clerk of the Court of the 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 day of A.D. , and was registered *(or in case the mortgage has been renewed* was re-registered), in the office of the Clerk of the Court of the of , on the day of A.D. , 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.

Signature of witness and state residence and occupation. A.B.

57 V., c. 37, Sched. A.

SCHEDULE B.

SECTION 19.

Statement exhibiting the interest of C.D. in the property mentioned in a chattel mortgage dated the day of 18 , made between A.B., of of the one part, and C.D., of , of the other part, and filed in the office of the Clerk of the Court of the of , on the day of , 18 , 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 , 18 ,) *(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 :

1896, January 1, Cash received.... $100 00)

The amount still due for principal and interest on the said mortgage is the sum of $ computed as follows : *(here give the computation).*

C.D.

County of } I, of the
To wit, } 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)*, 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 the)
of in the)
County of , this)
day of 18 ,)

57 V., c. 37, Sched. B.

REVISED STATUTES, 1897.

CHAPTER 75.

An Act respecting the Costs of Distress or Seizure of Chattels.

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

4. No person making a seizure or sale of goods for default in payment of the principal money or interest secured by any chattel mortgage or bill of sale shall charge any greater or other fees or costs with respect to such seizure or sale than those set forth in Schedule B hereto annexed. 59 V., c. 33, s. 1 (1) part; 60 V., c. 15, Sched. A (75).

5. No person shall make any charge for anything mentioned in the said schedules unless such thing has been actually done. R.S.O. 1887, c. 63, s. 1 part; 59 V., c. 33, s. 1 (2).

SCHEDULE B.

(SECTION 4).

Costs of Seizure under Chattel Mortgages or Bills of Sale.

1. For making seizure where amount of debt does not exceed $100 ..... $1.00.

2. For making seizure where amount of debt exceeds $100 ..... $1.50.

3. One man keeping possession, per diem .. $1.00.

4. If any printed advertisement, the same not to exceed in all ..... $1.50.

5. For 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 the sale exceed $100, two and one-half per cent. on the excess over $100.

6. Where debt 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.

Revised Statutes of 1860.

Chapter 9.

An Act for preventing Frauds by Secret Bills of Sale of personal chattels.

[*Passed May 2, 1860*].

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: (1)

1. Every bill of sale of personal chattels, made either before or after the passing of this Act, either absolutely (2) 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 Char-

lottetown, 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.

(1) To avoid useless repetition of law applicable to all the provinces, we omit all reference to cases already discussed, and interpretations of expressions already given in previous parts of the book. Such can be found by reference.

(2) This Act has been amended (*a*) so as to provide that all absolute bills of sale shall be fraudulent and void unless the grantee shall, upon execution of the instrument, take actual possession of the chattels, and the grantor cease to have the possession thereof.

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.

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

(a) 41 Vict. P. E. I. (1878), c 7, s. 1.

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.

4. In case the witnesses to any such bill of sale shall die before the proof or acknowledgment and filing thereof as aforesaid, or cannot 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 acquainted 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.

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 case 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' attendance before the judge, prothonotary, deputy prothonotary or commissioner, the making of such tender, and the amount thereof and 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 mainprise, 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.

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 num-

bered, 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.

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.

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.

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.

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 (1) 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.

(1) 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 seizure (*a*).

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.

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.

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.

(a) *Stewart* v. *Gates*, (1881), 2 P. E. I. 432.

14. The officer's fees for making a copy shall be sixpence 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 threepence for the certificate and seal, and no more.

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.

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.

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.

STATUTES OF 1869.

CHAPTER 7.

An Act to amend the Act for preventing Frauds by Secret Bills of Sale of personal chattels.

[*Passed April 19th, 1869.*

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—

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 wherein such bill of sale is registered and certified by such commissioner. For entering such satisfaction, the prothonotary or deputy prothonotary 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.

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.

STATUTES OF 1878.

CHAPTER 7.

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."

[*Passed April 18th, 1878.*

Be it enacted by the Lieutenant-Governor, Council and Assembly as follows—

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.

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.

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.

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.

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,

I, of in County. *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.

STATUTES OF 1889.

CHAPTER 9.

An Act respecting Witnesses and Evidence.

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.

FORMS.

CHATTEL MORTGAGE.

General form.

R. S. O. 1897, c. 148.

This Indenture, made (in duplicate) the ——— day of ———, one thousand eight hundred and ——— between A. B., of the [town] of ———, in the County of ———, ———, [*occupation*] hereinafter called the mortgagor, of the first part; and C. D., of the ——— of ———, in the county of ———, ———, hereinafter called the mortgagee, of the second part;

Witnesseth, that the mortgagor for and in consideration of ——— dollars of lawful money of Canada to him in hand 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 the goods, chattels, personal property and effects hereinafter particularly mentioned and described that is to say, [*or* particularly mentioned and described in the schedule hereunto annexed marked "A".] [*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,*] all of which said goods and chattels are the property of and now in the possession of the mortgagor, and are now situate, lying and being on, around and about the premises of the mortgagor, situate [*here describe accurately the premises upon which the goods, etc., are at the date of the execution of the instrument, and the locality of each article as nearly as possible.*] [*If it is desired to secure goods subsequently brought upon the premises add* also all goods and chattels which shall hereafter be brought upon the said premises, or upon any other premises to which the mortgagor

may remove during the existence of these presents or any renewal thereof, and the mortgagor doth hereby agree that all such goods upon being so brought into possession shall at once become mortgaged by virtue of these presents.]

To have and to hold all and singular the said goods and chattels, unto the mortgagee, his executors, administrators and assigns to the only proper use and behoof of the mortgagee, his executors, administrators and assigns forever:

Provided always, and these presents are upon this express condition, that if the mortgagor, his executors or administrators, do and shall well and truly pay, or cause to be paid, unto the mortgagee, his executors, administrators or assigns, the full sum of ——— dollars, with interest for the same at the rate of ——— per cent. (*a*) per annum at the times and in the manner following, that is to say: [*Here insert the time and mode of payment.*] Then these presents and every matter and thing herein contained shall cease, determine and be utterly void to all intents and purposes, anything herein contained to the contrary thereof in anywise notwithstanding; but provided that if default shall 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 shall be fully paid.

And the mortgagor for himself, his executors and administrators, shall and will warrant, and for ever defend by these presents, all and singular the said goods, chattels and property 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 doth hereby for himself, his executors and administrators, covenant, promise and agree to, and with the mortgagee, his executors, administrators and assigns, that the mortgagor, his executors or administrators, or some or one of them, shall and will well and truly pay or cause to be paid unto the mortgagee, his executors, administrators or assigns, the said sum of money in the above proviso men-

(*a*) See ante, p. 116, note (1).

tioned, with interest for the same as aforesaid, on the days and times and in the manner above limited for the payment thereof.

And also, in case default shall be made in the payment of the said sum of money in the said proviso mentioned, or of the interest thereon, or any part thereof, or in case the mortgagor shall 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 attempt to remove the same or any part thereof out of the County of ———, [*or* out of the premises where they now are] without the consent of the mortgagee, his executors, administrators or assigns, to such sale, removal or disposal thereof, first had and obtained in writing, [or if there shall be issued against the mortgagor, his executors or administrators, any writ of summons for a money demand, or any writ of execution, or any warrant of distress for any rent or taxes in respect of the premises 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 in case 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 taxes, rates, duties 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, to remain unpaid or unsatisfied for a period of ——— days after demand lawfully made therefor, or if the mortgagor shall fail to pay the rent arising out of the land and premises upon which are situate and lying the said goods and chattels, at any time during the currency of this mortgage or any renewal thereof ——— days at least before the same shall become due, or if the mortgagee, his executors or 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 in case default shall be made in the performance of any of the covenants by the mortgagor in this indenture contained; 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 writ of attachment shall issue against the mortgagor, 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 it shall and may be lawful for the mortgagee, his executors, administrators or assigns, with his or their servant or servants, and with such other assistant or assistants, as he or they may require at any time during the day or night, to enter into and upon any lands, tenements, houses and premises wheresoever and whatsoever where the said goods and chattels, or any part thereof, may be, and for such persons to 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; and upon and from and after the taking possession of such goods and chattels as aforesaid, it shall and may be lawful, and the mortgagee, his executors, administrators or assigns, and each or any of them is and 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 and reimburse himself, or themselves, all such sum and sums of money and interest as may then be due by virtue of these presents, and all costs and expenses as may have been incurred by the mortgagee, his executors, administrators or assigns, in consequence of the default, neglect or failure of the mortgagor, his executors, administrators or assigns, in the payment of the said sum of money, with interest thereon, as above mentioned, or in consequence of such sale or removal as above mentioned, and in the next place to pay unto the mortgagor, his executors, administrators and assigns

all such surplus as may remain after such sale, and after payment of all such sum or sums of money and interest thereon as may be due by virtue of these presents at the time of such seizure, and after payment of the costs, charges and expenses incurred by such seizure and sale as aforesaid :

And the mortgagor doth hereby for himself, his executors and administrators further covenant, promise and agree to, and 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 of principal, interest, costs and expenses due at the time of such sale, the mortgagor, his executors or administrators shall and will forthwith pay or cause to be paid unto the mortgagee, his executors, administrators and assigns, all such deficiency, as well as and including all costs and expenses which may have been incurred by the mortgagee, his executors, administrators or assigns in and about such seizure and sale ;

Provided that the mortgagee, his executors, administrators or assigns, may, in default of payment of any of the payments of interest or instalments hereinbefore mentioned or any part thereof, distrain for the whole principal sum then unpaid ;

Provided always, nevertheless, 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 sum of money or the interest thereon or any sum due hereunder as aforesaid, or any part thereof, it shall and may be lawful for the mortgagee, his executors, administrators or assigns, peaceably and quietly, to 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 or persons whomsoever ;

And the mortgagor doth put the mortgagee in full possession of the said goods and chattels, by delivering to him, at the sealing and delivery hereof, this indenture in the name of all the said goods and chattels ;

And 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 mortgage and any renewal or renewals thereof, keep up the amount of the stock in trade in 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 should the same at any time during such period not be of such value (as to which the mortgagee, his executors, administrators and assigns shall be sole judge) all the money 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 shall thereupon have liberty forthwith to take any and all proceedings for the better securing himself or themselves, and for the enforcing and obtaining payment of the moneys secured hereby, as though default had actually been made in the payment of the moneys secured hereby or any part thereof.

And the mortgagor for himself, his executors and administrators further covenants that he will, during the continuance of this mortgage, and any and every renewal thereof, insure the goods and chattels hereinbefore mentioned against loss or damage by fire, in some insurance company authorized to transact business in Canada, and approved by the mortgagee, his executors, administrators or assigns, in the sum of not less than ——— dollars [*or* in a sum not less than 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 three days at least before the same become due, 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 the said 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 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 be at any time situate, 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 bear interest at the said rate from the day of such payment, and shall be repayable with the moneys next falling due thereafter under these presents.

Provided that until default shall be made in any of the covenants or provisoes herein contained, the mortgagor shall have peaceable and quiet possession and use of the said goods and chattels.

Provided always that the mortgagee, his executors, administrators or assigns may at any time and from time to time accept the bills, notes, or other negotiable instruments of the mortgagor, his executors or administrators, or of any other person, for the said moneys or any of them, or as further or collateral security for the same or any part thereof, and may accept renewals of the same in whole or in part from time to time, and may compound the same or any of them, or relinquish the same or any of them, with or without security, without affecting or prejudicing the rights and remedies of the mortgagee under these presents [which shall be a security collateral to all other claims and rights of the mortgagee in the premises].

[Provided that neither the execution nor registration of this mortgage shall bind the mortgagee to advance the mortgage moneys, or, having advanced part, to advance the remainder].

And the mortgagor for himself, his executors and adminis-

trators covenants with the mortgagee, his executors, administrators and assigns 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.

[And it is hereby understood and agreed that these presents are a collateral security only.]

In witness whereof the parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered, in the presence of [having first been read over and explained]. [*Signed*] E. F. — [*Signed*] A. B. [*Seal*] — [*Signed*] C. D. [*Seal*]

AFFIDAVIT OF BONA FIDES

to accompany above chattel mortgage.

R. S. O. 1897, c. 148, ss. 2, 3.

ONTARIO, County of ——— To wit: I, C. D., of the ——— of ——— in the County of ———, ——— (*occupation*) the mortgagee in the foregoing mortgage [*or* bill of sale by way of mortgage (*a*)] named, make oath and say:

(1) That A. B., the mortgagor in the foregoing mortgage [*or* 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.

(2) The said mortgage [*or* 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 mortgage [*or* 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 obtain-

ing payment of any claim against him the said mortgagor A. B..

Sworn before me, at the ——— of ———, in the County of ——— this ——— day of ——— A. D., 18 . } [*Signed*] C. D.

[*Signed*] X. Y.,
A Commissioner, etc.

AFFIDAVIT OF EXECUTION

of a chattel mortgage.

R. S. O. 1897, c. 148, s. 2.

ONTARIO, County of ——— To wit: } I, E. F., of the ——— of ——— in the County of ———, ——— (*occupation*) make oath and say:

(1) That I was personally present and did see the foregoing mortgage [*or* bill of sale by way of mortgage (*a*)] duly signed, sealed and executed by A. B., one of the parties thereto.

(2) That the name E. F., set and subscribed as a witness to the execution of the said mortgage is of the proper handwriting of me this deponent.

(3) That the said mortgage was executed at the ——— of ———, in the said County of ——— on the ——— day of ——— A.D. 18—.

Sworn before me, at the ——— of ———, in the County of ——— this ——— day of ——— A. D. 18 —. } [*Signed*] E. F.

[*Signed*] X. Y.,
A Commissioner, etc.

(*a*) It has been usual hitherto in the affidavits accompanying chattel mortgages to use the expression *bill of sale by way of mortgage*. There is however no authority for the italicised words in the Act, if the instrument is, in reality, a mortgage, and these words should therefore in such a case properly be omitted. If, however, the instrument is a "conveyance intended to operate as a mortgage" (section 2), the words put in brackets in the form may properly be used.

AFFIDAVIT OF BONA FIDES BY AGENT

of a chattel mortgagee.

R. S. O., 1897, c. 148, s. 2.

ONTARIO, County of ——— To wit: } I, G. H., of the ——— of ——— in the County of ———, ———, make oath and say:

(1) I am the properly authorized agent of C. D., the mortgagee in the foregoing mortgage [*or* bill of sale by way of mortgage (*a*)] named, for the purposes of the said mortgage [*or* bill of sale by way of mortgage] and I am aware of all the circumstances connected therewith.

(2) I am properly authorized in writing to take such said mortgage [*or* bill of sale by way of mortgage], and the paper-writing marked "B" attached to the said mortgage [*or* bill of sale by way of mortgage] is [my authority *or*] a true copy of my authority to take such mortgage.

(3) That A. B., the mortgagor in the said mortgage [*or* bill of sale by way of 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 [*or* 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 mortgage [*or* 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. 18—.

[*Signed*] X. Y.
A Commissioner, etc.

[*Signed*] G. H.

(*a*) See foot note on page 431

CHATTEL MORTGAGE

to secure future advances of money.

R. S. O. 1897, c. 148, s. 7.

THIS INDENTURE made (in duplicate) the ——— day of ——— A. D., 18— between A. B., of the ——— of ——— in the County of ———, ———, hereinafter called the mortgagor, of the first part; and C. D., 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 year from the making of the agreement for such advances, which is the day of the date of these presents;

Now this indenture witnesseth that the mortgagor in pursuance of the said agreement, and for the consideration hereinbefore recited, and in consideration of the covenants of the mortgagee in these presents contained doth hereby grant, bargain, sell and assign unto the mortgagee, his executors, administrators and assigns, all and singular, the goods, chattels, property and effects particularly mentioned and described in the schedule hereunto annexed, marked "A."

To have and to hold all and singular the said goods, chattels, property, and effects hereinbefore granted, bargained, sold and assigned or mentioned or intended so to be, unto the mortgagee, his executors, administrators and assigns, to the sole and proper use and behoof of the mortgagee, his executors, administrators and assigns for ever;

Provided always, and these presents are upon this condition, that if the mortgagor, his executors or administrators do and shall well and truly pay or cause to be paid unto the mortgagee, his executors, administrators or assigns, the full 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 centum (*a*) per annum from the date of the several advances so to be made as aforesaid on such advances, and do and shall well and truly save harmless the mortgagee, his executors, administrators and assigns, of and from all loss and damage by reason of these presents, then these presents and every matter and thing herein contained shall cease, determine, and be utterly void to all intents and purposes, anything herein contained to the contrary thereof in any wise notwithstanding, but provided that if default shall be made in the payment of any sum due hereunder, whether for principal, interest, or otherwise, that interest shall be paid on any sum so in arrear at the said rate until the whole sum shall be fully paid.

And the mortgagor for himself, his executors and administrators shall and will warrant and forever defend by these presents all and singular the goods and chattels and property 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 doth hereby, for himself, his executors and administrators, covenant, promise and agree to and with the mortgagee, his executors, administrators and assigns, that he, the mortgagor, his executors or administrators, or some or one of them, will well and truly pay or cause to be

(*a*) See ante, p. 116, note (1).

paid unto the mortgagee, his executors, administrators or assigns, the said sum of money in the above proviso mentioned, with interest as aforesaid, on the day and time and in the manner above limited for the payment thereof ;

And in case default shall be made in the payment of the said sum of money in the said proviso mentioned, or the interest thereon, or any part thereof, or in case the mortgagor shall 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 attempt to remove the same or any part thereof out of the County of ——— [*or* the premises where they now are] without the consent of the mortgagee, his executors, administrators or assigns, to such sale, removal or disposal thereof, first had and obtained in writing, [or if there shall be issued against the mortgagor, his executors or administrators, any writ or summons for a money demand, or any writ of execution, or any warrant of distress for any rent or taxes in respect of the premises, 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 in case 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 taxes, rates, duties 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, to remain unpaid or unsatisfied for a period of ——— days, after demand lawfully made therefor, or if the mortgagor shall fail to pay the rent arising out of the land or premises, upon which are situate and lying the said goods and chattels, at any time during the currency of this mortgage, or any renewal thereof, ——— days at least before the same shall become due, 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 in case default shall be made in the performance of any of the covenants by

the mortgagor in this indenture contained; 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 writ of attachment shall issue against the mortgagor, 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 it shall and may be lawful for the mortgagee, his executors, administrators or assigns, with his or their servant or servants, and with such other assistant or assistants, as he or they may require at any time during the day or night, to enter into and upon any lands, tenements, houses and premises, wheresoever and whatsoever where the said goods and chattels, or any part thereof, may be, and for such persons to 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; and upon and from and after the taking possession of such goods and chattels as aforesaid, it shall and may be lawful, and the mortgagee, his executors, administrators or assigns, and each or any of them is and 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 and reimburse himself, or themselves, all such sum and sums of money and interest as may then be due by virtue of these presents, and all costs and expenses which may have been incurred by the mortgagee, his executors, administrators or assigns, in consequence of the default, neglect or failure of the mortgagor, his executors, administrators or assigns, in the payment of the said sum of money, with interest thereon, as above mentioned, or in consequence of such sale

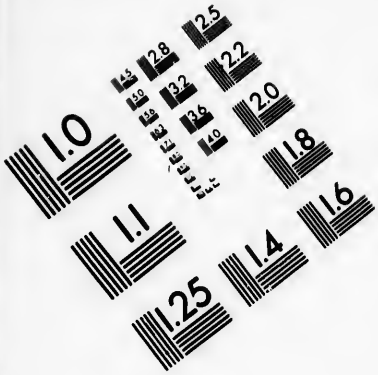
or removal as above mentioned, and in the next place to pay unto the mortgagor, his executors, administrators and assigns all such surplus as may remain after such sale, and after payment of all such sum or sums of money and interest thereon, as may be due by virtue of these presents at the time of such seizure, and after payment of the costs, charges and expenses incurred by such seizure and sale as aforesaid:

And the mortgagor doth hereby for himself, his executors and administrators further covenant, promise and agree to and 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 of principal, interest, costs and expenses due at the time of such sale, the mortgagor, his executors or administrators shall and will forthwith pay or cause to be paid unto the mortgagee, his executors, administrators and assigns, all such deficiency, as well as and including all costs and expenses which may have been incurred by the mortgagee, his executors, administrators or assigns in and about such seizure and sale;

Provided that the mortgagee, his executors, administrators or assigns, may, in default of payment of any of the payments of interest or instalments hereinbefore mentioned or any part thereof, distrain for the whole principal sum then unpaid;

Provided always, nevertheless, 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 sum of money or the interest thereon or any sum due hereunder as aforesaid, or any part thereof, it shall and may be lawful for the mortgagee, his executors, administrators or assigns, peaceably and quietly, to 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, of any other person or persons whomsoever;

And the mortgagor doth put the mortgagee in full posses-



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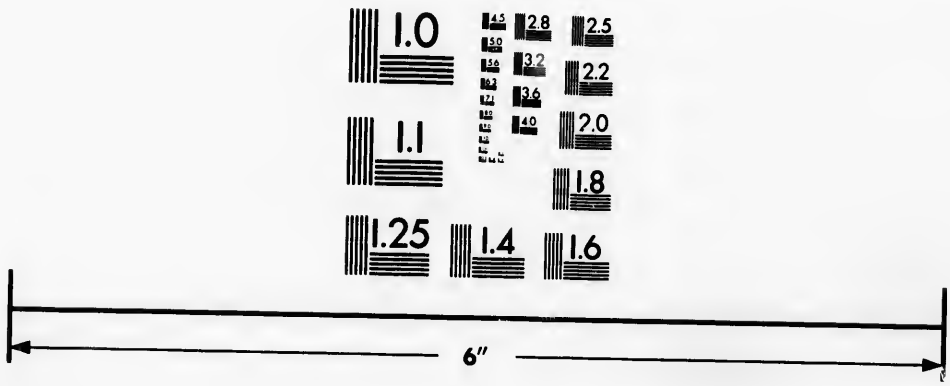

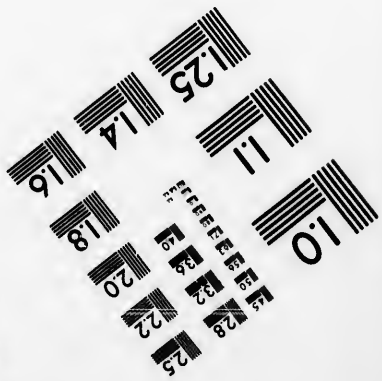

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WEBSTER, N.Y. 14580
(716) 872-4503

sion of the said goods and chattels, by delivering to him at the sealing and delivery hereof this indenture in the name of all the said goods and chattels ;

And the mortgagor for himself, his executors and administrators, further covenants that he will, during the continuance of this mortgage, and any and every renewal thereof, insure the goods and chattels hereinbefore mentioned against loss or damage by fire in some insurance company authorized to transact business in Canada, and approved by the mortgagee, his executors, administrators or assigns, in the sum of not less than ——— dollars [*or* in a sum not less than their full insurable value] as security for the moneys secured by this indenture for the benefit of the mortgagee, his executors, administrators or assigns, and will pay all premiums and moneys necessary for that purpose, three days at least before the same become due, 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 the said 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 and assigns every 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 be at any time situate, 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 bear interest at the said rate from the day of such payment, and shall be repayable with the moneys next falling due thereafter under these presents.

Provided that until default shall be made in any of the

covenants or provisoes herein contained, the mortgagor shall have peaceable and quiet possession and use of the said goods and chattels.

Provided that the mortgagee, his executors, administrators or assigns may at any time, and from time to time accept the bills, notes, or other negotiable instruments of the mortgagor, his executors or administrators, or of any other person for the said moneys or any of them, or as further or collateral security for the same or any part thereof, and may accept renewals of the same in whole or in part from time to time, and may compound the same or any of them, or relinquish the same or any of them, with or without security, without affecting or prejudicing the rights and remedies of the mortgagee under these presents, [which shall be a security collateral to all other claims and rights of the mortgagee in the premises].

And in consideration of the execution of these presents the mortgagee covenants for himself, his executors, administrators and assigns with the mortgagor, his executors and administrators, 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.

And the mortgagor covenants for himself, his executors and administrators, with the mortgagee, his executors, administrators and assigns that he, the mortgagor, his executors or administrators 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.

In witness whereof the parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of [*Signed*] E. F.) [*Signed*] A. B. [*Seal.*]) [*Signed*] C. D. [*Seal.*]

AFFIDAVIT OF BONA FIDES.

Mortgage to secure future advances.

R. S. O., 1897, c. 148, s. 7.

County of ——— } I, C. D., of the ——— of ——— in
To wit : } the County of ———, ———, the mortgagee in the foregoing mortgage [*or* bill of sale by way of mortgage (*a*)] named, make oath and say :

(1) The foregoing 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 such agreement, and covered by the said mortgage ;

(2) The said mortgage was executed in good faith, and for the express purpose of securing me, the said mortgagee, repayment of the said advances which I have agreed to make to the said mortgagor, as set out in the said mortgage ;

(3) The said mortgage was not executed for the purpose of securing the goods and chattels mentioned therein [*or* in the Schedule attached thereto marked "A,"] 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 before me at the ——— of ———, in the County of ——— this ———day of———A.D. 18—. } [*Signed*] C. D.

[*Signed*] X. Y.
A Commissioner, etc.

For affidavit of execution see page 431.

(*a*) See note (*a*) on p. 431.

AFFIDAVIT OF BONA FIDES BY AGENT.

Mortgage to secure future advances.

R. S. O., 1897, c. 148, s. 7.

ONTARIO,
County of ——— } I, E. F., of the ——— of ——— in the County of ———, ———, make
To wit : } oath, and say :

(1) The agreement set forth in the foregoing mortgage [*or* bill of sale by way of mortgage (*a*)] 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 all the circumstances connected therewith.

(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 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.

The said mortgage was executed in good faith, and for the express purpose of securing 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 [*or* in the schedule attached thereto marked "A,"] 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 before me, at the ——— of ———, in the County of ——— this ——— day of ———, A.D. 18—. } [*Signed*] E. F.

[*Signed*] X. Y.
A Commissioner, etc.

(*a*) See note (*a*) on page 431.

CHATTEL MORTGAGE

To secure future advances of goods.

R. S. O., 1897, c. 148, s. 7.

THIS INDENTURE made the ——— day of ——— 18—, 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 of goods to be supplied to him upon the usual terms of credit, from time to time, for the term of ——— calendar 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 of such goods not to extend in any case beyond the ———day of ———, 18—, [*such date not to be more than one 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 of 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 ——— calendar months from the date hereof, provided he shall not be bound to advance in all goods to the amount of more than ——— dollars in value, and provided the term of credit for any of such goods shall not in any case extend beyond the ——— day of ———, 18—, [*such date not to be more than one year from the date of the mortgage*].

Now therefore the mortgagor for the consideration hereinbefore recited, and in pursuance of the said agreement, hath granted, bargained, sold and assigned, and by these presents doth grant, bargain, sell and assign unto the mortgagee, his executors, administrators and assigns, all and singular, the

goods, chattels and effects particularly mentioned and described in the schedule hereunto annexed marked "A."

To have and to hold all and singular the said goods, chattels and effects hereinbefore granted, bargained, sold and assigned, or mentioned or intended so to be, unto the mortgagee, his executors, administrators and assigns, to the sole and only proper use and behoof of the mortgagee, his executors, administrators and assigns for ever.

Provided always, and these presents are upon this express condition, that if the mortgagor, his executors or administrators, do and shall well and truly pay or cause to be paid to the mortgagee 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 same shall become payable according to the terms of credit, which shall not extend in any case beyond the ——— day of ——— 18 , then these presents and every matter and thing herein contained shall cease, determine, and be utterly void to all intents and purposes, anything herein contained to the contrary thereof in any wise notwithstanding;

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, chattels and effects 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 doth hereby for himself, his executors and administrators, covenant, promise and agree to and 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 same become payable according to the said terms of credit, which shall not extend in any case beyond the ——— day of ——— 18—.

Provided that should default occur in payment of the price of any of the goods so to be advanced, or in case the mortgagor shall 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 attempt to remove the same or any part thereof out of the County of ———, [*or* out of the premises where they now are] without the consent of the mortgagee, his executors, administrators or assigns, to such sale, removal or disposal thereof, first had and obtained in writing, or if there shall be issued against the mortgagor, his executors or administrators, any writ or summons for a money demand, or any writ of execution, or any warrant of distress for any rent or taxes in respect of the premises, 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 in case the mortgagor shall suffer, allow or permit a judgment to be obtained against him for any debt, or shall suffer the said goods or chattels or any of them to be seized or taken in execution, or shall suffer, allow or permit any taxes, rates, duties 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, to remain unpaid or unsatisfied for a period of ——— days, after demand lawfully made therefor, or if the mortgagor shall fail to pay the rent arising out of the land and premises, upon which are situate and lying the said goods and chattels, at any time during the currency of this mortgage or any renewal thereof, ——— days at least before the same shall become due, or if the mortgagee, his executors, administrators or assigns, shall at any time feel unsafe or insecure, or deem the said goods and chattels in danger of being sold or removed, or in case default shall be made in the performance of any of the covenants by the mortgagor in this indenture contained; 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 writ of attachment shall issue against the mortgagor, 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 it shall and may be lawful for the mortgagee, his executors, administrators or assigns, with his or their servant or servants, and with such other assistant or assistants, as he or they may require at any time during the day or night, to enter into and upon any lands, tenements, houses and premises, wheresoever and whatsoever where the said goods and chattels, or any part thereof, may be, and for such persons to break and force open any doors, locks, bars, bolts, fastenings, hinges, gates, fences, houses, buildings, enclosures, and places, for the purposes of taking possession of and removing the said goods and chattels; and upon and from and after the taking possession of such goods and chattels as aforesaid, it shall and may be lawful, and the mortgagee, his executors, administrators or assigns, and each or any of them is and 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 and reimburse himself, or themselves, all such sum and sums of money and interest as may then be due by virtue of these presents, and all costs and expenses which may have been incurred by the mortgagee, his executors, administrators or assigns, in consequence of the default, neglect or failure of the mortgagor, his executors, administrators or assigns, in the payment of the said sum of money, with interest thereon, as above mentioned, or in consequence of such sale or removal as above mentioned, and in the next place to pay unto the mortgagor, his executors, administrators and assigns

all such surplus as may remain after such sale, and after payment of all such sum or sums of money and interest thereon as may be due by virtue of these presents at the time of such seizure, and after payment of the costs, charges and expenses incurred by such seizure and sale as aforesaid :

And the mortgagor doth hereby for himself, his executors and administrators further covenant, promise and agree to and 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 of principal, interest, cost and expenses due at the time of such sale, the mortgagor, his executors or administrators shall and will forthwith pay or cause to be paid unto the mortgagee, his executors, administrators and assigns, all such deficiency, as well as and including all costs and expenses which may have been incurred by the mortgagee, his executors, administrators or assigns in and about such seizure and sale ;

Provided that the mortgagee, his executors, administrators or assigns, may, in default of payment of any of the payments of interest or instalments hereinbefore mentioned or any part thereof, distrain for the whole principal sum then unpaid ;

Provided always, nevertheless, 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 sum of money or the interest thereon of any sum due hereunder as aforesaid, or any part thereof, it shall and may be lawful for the mortgagee, his executors, administrators or assigns, peaceably and quietly, to 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 or persons whomsoever :

And the mortgagor doth put the mortgagee in full possession of the said goods and chattels, by delivering to him at the sealing and delivery hereof this indenture in the name of all the said goods and chattels ;

And the mortgagor for himself, his executors and administrators further covenants that he will, during the continuance of this mortgage, and any and every renewal thereof, insure the goods and chattels hereinbefore mentioned against loss or damage by fire in some insurance company authorized to transact business in Canada, and approved by the mortgagee, his executors, administrators or assigns, in the sum of not less than ——— dollars [*or* in a sum not less than their full insurable value] as security for the moneys secured by this indenture for the benefit of the mortgagee, his executors, administrators or assigns, and will pay all premiums and moneys necessary for that purpose, three days at least before the same become due, 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 the said 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 and assigns every 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 premium or of any sum of money, or of the rent for the premises whereon the said goods and chattels may be at any time situate, 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 bear interest at the said rate from the day of such payment, and shall be repayable with the moneys next falling due thereafter under these presents.

Provided that until default shall be made in any of the covenants or provisoes herein contained, the mortgagor shall have peaceable and quiet possession and use of the said goods and chattels.

Provided that the mortgagee, his executors, administrators or assigns may at any time, and from time to time accept the bills, notes, or other negotiable instruments of the mortgagor, his executors or administrators, or of any other person for the said moneys or any of them, or as further or collateral security for the same or any part thereof, and may accept renewals of the same in whole or in part from time to time, and may compound the same or any of them, or relinquish the same or any of them, with or without security, without affecting or prejudicing the rights and remedies of the mortgagee under these presents, [which shall be a security collateral to all other claims and rights of the mortgagee in the premises].

[Provided that neither the execution nor registration of this mortgage shall bind the mortgagee to advance the mortgage moneys, or, having advanced part, to advance the remainder].

And the mortgagor for himself, his executors and administrators convenants with the mortgagee, his executors, administrators and assigns 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.

[And it is hereby understood and agreed that these presents are a collateral security only].

In witness whereof the parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered, in the presence of [having first been read over and explained] [*Signed*] A. B. [*Seal*] [*Signed*] C. D. [*Seal*]

[*Signed*] E. F.

For affidavit of bona fides, see page 430.

For affidavit of execution, see page 431.

CHATTEL MORTGAGE

To secure a mortgagee against his liability as indorser for a mortgagor.

R. S. O., 1897, c. 148, s. 8.

THIS INDENTURE made the ——— day of ——— A. D., 18—, between A. B., of the ——— of ———, in the County of ———, ———, hereinafter called the mortgagor, of the first part: and C. D., 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 of lawful money of Canada, 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 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 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 for payment of the said recited note or the liability of the mortgagor beyond the period of one year 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 endorsement of said recited note or any renewal thereof.

Now this indenture witnesseth that the mortgagor for and in consideration of the premises, and of the sum of one dollar of lawful money of Canada, to him in hand 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, the goods and chattels hereinafter particularly mentioned and described, that is to say : [*Here insert a particular description of the articles intended to be mortgaged.*]

To have and to hold, all and singular, the goods and chattels hereinbefore granted, bargained, sold and assigned, or mentioned or intended so to be, unto the mortgagee, his executors, administrators and assigns, to the only proper use and behoof of the mortgagee, his executors, administrators and assigns for ever ;

Provided always, and these presents are upon this condition, that if the mortgagor, his executors or administrators, do and shall well and truly 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 do and shall well and truly 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 recited note in the said recital to this indenture set forth, which shall not extend the liability of the mortgagee beyond one 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 respect of the said recited note or renewals thereof as hereinbefore set forth ; then these presents, and every matter and thing herein contained, shall cease, determine, and be utterly void to all intents and purposes, anything herein contained to the contrary thereof notwithstanding.

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, chattels and property unto the mortgagee, his executors, administrators, and assigns, against him, the mortgagor, his executors, and administrators, and against all and every other person and persons whomsoever ;

And the mortgagor doth hereby for himself, his executors and administrators, covenant, promise and agree to and with the mortgagee, his executors, administrators and assigns, that he, the mortgagor, his executors or administrators, or some or one of them, shall and will well and truly pay, or cause to be paid, the said recited note in the above recital and proviso mentioned, and any renewal of said note, and all future and other notes 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 well and truly indemnify and save harmless the mortgagee, his heirs, executors, and administrators, from all loss, costs, charges, damages, or expenses in respect thereof;

And also, that in case default shall be made in the payment of the said recited note, or any renewal as in the said proviso mentioned, or the interest thereon, or any part thereof, or otherwise, as aforesaid, or in case the mortgagor shall 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 attempt to remove the same, or any part thereof, out of the County of ——— [*or* the premises where the same now are], without the consent of the mortgagee, his executors, administrators, or assigns, to such sale, removal or disposal thereof first had been obtained in writing, [or if there shall be issued against the mortgagor, his executors or administrators, any writ or summons for a money demand, or any writ of execution, or any warrant of distress for any rent or taxes in respect of the premises 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 in case the mortgagor shall suffer, allow or permit a judgment to be obtained against him for any debt, or shall suffer the said goods or chattels or any of them to be seized or taken in execution, or shall suffer, allow or permit any taxes, rates, duties 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, to remain unpaid or

unsatisfied for a period of ——— days, after demand lawfully made therefor, or if the mortgagor shall fail to pay the rent arising out of the land and premises, upon which are situate and lying the said goods and chattels, at any time during the currency of this mortgage or any renewal thereof, ——— days at least before the same shall become due, 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 in case default shall be made in the performance of any of the covenants by the mortgagor in this indenture contained; 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 writ of attachment shall issue against the mortgagor, 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 it shall and may be lawful for the mortgagee, his executors, administrators or assigns, with his or their servant or servants, and with such other assistant or assistants, as he or they may require at any time during the day or night, to enter into and upon any lands, tenements, houses and premises, wheresoever and whatsoever where the said goods and chattels, or any part thereof, may be, and for such persons to break and force open any doors, locks, bars, bolts, fastenings, hinges, gates, fences, houses, buildings, enclosures, and places, for the purposes of taking possession of and removing the said goods and chattels; and upon and from and after the taking possession of such goods and chattels as aforesaid, it shall and may be lawful, and the mortgagee, his executors, administrators or assigns, and each or any of them is and 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 and reimburse himself or themselves all such sums and sum of money as may then be secured by virtue of these presents on the said recited note or any renewal thereof, as aforesaid; and all such expenses as may have been incurred by the mortgagee, his executors, administrators, or assigns, 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 renewal thereof, as above mentioned, 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, all 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 promissory note in the said recital and proviso mentioned, or any future notes 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, or otherwise, 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 in payment of the said recited note or any renewal thereof, as aforesaid, it shall and may be lawful for the mortgagee, his executors, administrators and assigns, peaceably and quietly to 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 or persons, whomsoever; and the mortgagor doth hereby for himself, his heirs, executors and administrators, further covenant, promise and agree to and 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 at

the time of such sale, that he, the mortgagor, his executors or administrators shall and will forthwith pay, or cause to be paid unto the mortgagee, his executors, administrators or assigns, all such sum or sums of money, with interest thereon, as may then be remaining due upon or under the said promissory note or any renewal thereof.

And the mortgagor doth put the mortgagee in full possession of the said goods and chattels by delivering to him at the sealing and delivery hereof, this indenture in the name of all the said goods and chattels.

And the mortgagor for himself, his executors and administrators covenants with the mortgagee, his executors, administrators and assigns that he will, during the continuance of this mortgage, and any and every renewal thereof, insure and keep insured the goods and chattels hereinbefore mentioned against loss or damage by fire in some insurance company authorized to transact business in Canada, and approved by the mortgagee, his executors, administrators or assigns, in the sum of not less than ——— dollars, [*or* in a sum of not less than their full insurable value] as security for the moneys secured by this indenture, for the benefit of the mortgagee, his executors, administrators or assigns, and will pay all premiums and moneys necessary for that purpose three days at least before the same become due: 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 the said 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 and assigns every 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 be at any time situate, 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 bear interest at the said rate from the day of such payment, and shall be repayable with the moneys next falling due thereafter under these presents.

Provided that until default shall be made in any of the covenants or provisoes herein contained, the mortgagor shall have peaceable and quiet possession and use of the said goods and chattels.

Provided that the mortgagee, his executors, administrators or assigns may at any time, and from time to time accept the bills, notes, or other negotiable instruments of the mortgagor, his executors or administrators, or of any other person for the said moneys or any of them, or as further or collateral security for the same or any part thereof, and may accept renewals of the same in whole or in part from time to time, and may compound the same or any of them, or relinquish the same or any of them, with or without security, without affecting or prejudicing the rights and remedies of the mortgagee under these presents, [which shall be a security collateral to all other claims and rights of the mortgagee in the premises].

And the mortgagor for himself, his executors and administrators covenants with the mortgagee, his executors, administrators and assigns 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.

In witness whereof the parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered in the presence of } [*Signed*] A. B. [*Seal*]

[*Signed*] E. F.

AFFIDAVIT OF BONA FIDES.

Mortgage to secure indorser.

ONTARIO, County of ——— To wit :

I, C. D., of the ——— of ——— in the County of ———, ———, the mortgagee in the foregoing mortgage [*or* bill of sale by way of mortgage (*a*)] named, make oath, and say :

(1) The foregoing mortgage truly states the extent of the liability intended to be created and covered by such mortgage ;

(2) The said mortgage was 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 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 mortgagor.

Sworn before me, at the ——— of ———, in the County of ———, this ——— day of ———, A.D. 18—.

[*Signed*] C. D.

[*Signed*] A. Y.,
A commissioner, etc.

For affidavit of execution see form page 431.

AFFIDAVIT OF BONA FIDES BY AN AGENT.

Mortgage to secure indorser.

ONTARIO, County of ——— To wit: } I, E. F., of the ——— of ——— in the County of ———, ———, make oath, and say:

(1) The foregoing mortgage [*or* bill of sale by way of mortgage (*a*)] 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 all the circumstances connected therewith;

(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 truly states the extent of the liability intended to be created and covered by such mortgage.

(4) The said mortgage was 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, nor to prevent such creditors from recovering any claims which they may have against such mortgagor.

Sworn before me, at the ——— of ———, in the County of ——— this ——— day of ———, A.D. 18—.

[*Signed*] X. Y.
A commissioner, etc.

[*Signed*] E. F.

See note (*a*) page 431.

AFFIDAVIT OF BONA FIDES.

Mortgage given by a Company to secure bonds or debentures.

R. S. O., 1897, c. 148, s. 23.

Ontario, County of ——— To wit:

I, L. M., of the ——— of ——— in the County of ———, ——— (*a*) the mortgagee named in the foregoing mortgage [*or* bill of sale by way of mortgage] make oath and say:

[I am a trustee for the bond holders of the company named in the foregoing mortgage (*or as the case may be*)].

The said 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 therein named, or of preventing the creditors of such mortgagors from obtaining payment of any claim against them the said mortgagors.

Sworn before me at the ——— of ——— in the County of ——— this ——— day of ——— A.D. 18—.

[*Signed*] X. Y.
A Commissioner, etc.

[*Signed*] L. M.

(*a*) See Section 23, Sub-Section (4), p. 343.

AUTHORITY TO AGENT

To take a certain chattel mortgage.

R. S. O., 1897, c. 148, ss. 2, 3.

Know all men by these presents, that I, C. D., of the ——— of ——— in the County of ———, ———, do hereby nominate, 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 for my sole use and benefit, to take and receive from one A. B., of the ———, of ——— in the County of ———, ———, a mortgage [*or* a bill of sale by way of 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 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 all proceedings to take, necessary to be taken in and about the premises, I hereby ratifying, confirming and allowing, and hereby 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 whereof, I have hereunto set my hand and seal this ——— day of ———, A.D. 18—.

Signed, sealed and delivered, in the presence of [*Signed.*] G. H. } [*Signed,*] C. D. [*Seal.*]

AUTHORITY TO AGENT

To renew a chattel mortgage (*a*).

R. S. O., 1897, c. 148, s. 18.

Know all men by these presents, that I, C. D., of the ——— of ——— in the County of ———, ———, do hereby nominate, 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 for my sole use and benefit 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 ——— A.D. 18—, and was filed in the office of the Clerk of the County Court of the County of ——— on the ——— day of ———, A.D. 18—, at the hour of ——— o'clock in the ——— noon.

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, 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 hereby 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 whereof I have hereunto set my hand and seal, the ——— day of ———, A.D. 18—.

Signed, sealed and delivered, in the presence of } [*Signed,*] C. D. [*Seal.*]
[*Signed.*] G. H.

(*a*) A copy of this authority, or the authority itself, must be filed with the renewal statement (s. 18.)

AUTHORITY TO AGENT

To take and renew mortgages generally.

R. S. O., 1897, c. 148, ss. 2, 3, 31.

Know all men by these presents, that I, C. D., of the ——— of ———, in the County of ———, ———, do hereby nominate, 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 for my sole use and benefit, to take and renew all and any chattel mortgages, and bills of sale by way of chattel 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 and matters 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 hereby 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 whereof I have hereunto set my hand and seal, this ——— day of ——— A.D. 18—.

Signed, sealed and delivered, in the presence of [*Signed.*] G. H. } [*Signed,*] C. D. [*Seal.*]

STATEMENT ON RENEWAL

of chattel mortgage.

R. S. O., 1897, c. 148, ss. 18-21.

Statement exhibiting the interest of C. D., [*mortgagee assignee of mortgagee, or their agent*] of the ——— of ——— in the County of ———, ———, in the property mentioned in a chattel mortgage dated the ——— day of ———, 18—, made between A. B., of the ——— of ———, in the County of ———, ———, of the one part; and C. D., of the ——— of ———, in the County 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 ——— 18—, [*if renewed, add* and renewed by statements filed on the ——— day of ———, 18—, and on the ——— day of ——— 18—, *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, 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 ——— 18—, *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.

1886, January 1—Cash received..... $100.]

The amount still due for principal and interest on the said mortgage is the sum of ——— dollars, computed as follows: [*Here give the computation.*]

[*Signed,*] C. D.

AFFIDAVIT TO ACCOMPANY STATEMENT ON RENEWAL.

R. S. O., 1897, c. 148, s.s. 18, 19.

County of ———, } I, C. D., of the ——— of ——— in the
To wit: } County of ———, ———, the mortgagee [*or* the agent of, *or* the assignee 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 the ——— of ———, in the County of ———, this ——— day of ——— 18—. } [*Signed,*] C. D.

[*Signed,*] X. Y.,
A Commissioner, etc.

ASSIGNMENT OF CHATTEL MORTGAGE.

R. S. O., 1897, c. 148, s. 28.

This Indenture made the ——— day of ———, A.D. 18—, between C. D., of the ——— of ———, in the County of ———, ———, hereinafter called the assignor, of the first part, and E. F. 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 ——— one thousand eight hundred and ———, and duly filed in the office of the Clerk of the County Court of the County of ———, one [*give name of mortgagor in full*] did grant and mortgage 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 on the said mortgage the sum of ——— dollars, and interest thereon at the rate aforesaid from the ——— day of ———, A.D. 18—.

And whereas it has been agreed for the consideration hereinafter mentioned to assign to the assignee the said mortgage and all money due or to become due thereon, and also to grant to the assignee the goods and chattels therein contained and hereinafter set out.

Now this indenture witnesseth that in consideration of ——— dollars of lawful money of Canada, 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 the 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 provisoes 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, that is to say: [*Here set out the list of the chattels as contained in the mortgage*] [*or* described in the schedule endorsed thereon (*or* hereto annexed) marked "A."] 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;

To have and to hold the said hereinbefore recited mortgage, and the moneys secured thereby, and also the said goods and chattels, and every of them, with their appurtenances, unto the assignee, his executors, administrators and assigns absolutely; subject to the proviso for redemption contained in the said mortgage;

And the assignor for himself, his executors and administrators doth hereby covenant 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 ———, 18—, 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 to be done 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, 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 whereof the parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered, in the presence of) [*Signed*] C. D. [*Seal*]

AFFIDAVIT OF BONA FIDES.

By assignee of chattel mortgage.

ONTARIO, County of ——— To wit: } I, E. F., of the ——— of ——— in the County of ———, ———, the assignee in the foregoing assignment of chattel mortgage named, make oath and say:

That the sale therein made is bona fide, and for good consideration, namely in consideration of the sum of ——— dollars, as set forth in the said assignment, and is not for the purpose of holding or enabling me, this deponent, to hold the goods mentioned therein against the creditors of C. D., the assignor therein named.

Sworn before me, at the ——— of ———, in the County of ——— this ——— day of ———, A.D., 18—. [*Signed*] X. Y., A Commissioner, etc.) [*Signed*] E. F.

AFFIDAVIT OF EXECUTION

Of assignment of chattel mortgage.

ONTARIO, County of ——— To wit: } I, G. H., of the ——— of ——— in the County of ———, ———, make oath and say:

(1) That I was personally present and did see the foregoing assignment of chattel mortgage duly signed, sealed and executed by C. D. [one of] the parties thereto;

(2) That I, this deponent, am a subscribing witness to the said assignment;

(3) That 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) That the said assignment was executed at the ——— of ——— in the County of ———, on the ——— day of ———, A. D., 18—.

Sworn before me, at the ——— of ——— in the County of ——— this ——— day of ———, A.D., 18—. } [*Signed*] G. H.

[*Signed*] X. Y.
A Commissioner, etc.

NOTICE OF ASSIGNMENT OF MORTGAGE

Given to mortgagor by assignee of mortgage.

To Mr. A. B.:

TAKE notice that I have this day become the purchaser and 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 ——— A.D., 18—, 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 ——— this ——— day of ——— A.D., 18—.

Witness
[*Signed*] E. F. } E. F.

DISCHARGE OF CHATTEL MORTGAGE.

R. S. O., 1897, c. 148, s. 25.

To the Clerk of the (County) Court of the County of ———:

I, E. F., of the ——— of ———, in the County of ———, ———, do certify that 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 C. D., which mortgage bears date the ——— day of ——— A.D., 18—, 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 ——— A.D., 18—, as No. ——.

[That such mortgage has not been assigned by me [*or* and that such mortgage was assigned by the said C. D. to me, by indenture of assignment dated the ——— day of ———, 18—, and registered in the office of the Clerk of the County Court of the County of ———, on the ——— day of ———, 18—, as No. ——, and that such mortgage has not been further assigned.]

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., 18—.

Signature of witness and state residence and occupation. } [*Signed*] E. F.

AFFIDAVIT OF EXECUTION.

Of discharge of chattel mortgage.

County of ——— } I, G. H., of the ——— of ———,
To wit: } in the County of ———, ———,
make oath and say:

1. That I was personally present and did see the within certificate of discharge of chattel mortgage duly signed and executed by C. D., one of the parties thereto.

2. That the said certificate was so executed at the ——— of ———, in the County of ———.

3. That I know the said party.

4. That I am a subscribing witness to the said certificate.

Sworn before me at the ——— of ———, in the County of ——— this ——— day of ——— A.D. 18—.
[*Signed*] X. Y.
A Commissioner, etc.

[*Signed*] G. H.

DISCHARGE OF CHATTEL MORTGAGE

By assignee of the mortgagee.

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 ———, A.D., 18—, and was registered in the office of the Clerk of the County Court of the County of ——— on the ——— day of ——— A.D., 18—, as No. ———, and which said mortgage was, by assignment thereof bearing date the ——— day of ——— A.D. 18—, duly assigned by the said C. D. to me, [*if the assignment has been registered then add* and which said assignment was duly registered in the office of the Clerk

of the said County Court on the ——— day of ——— A.D. 18—, 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 ——— A.D., 18—.

Signature of witness giving residence and occupation. } [*Signed*] E. F.

BY-LAW OF COMPANY.

Giving authority to agent to take and renew chattel mortgages and bills of sale.

By-Law Number —— passed ——— 18—.

Whereas it is sometimes expedient for the Company 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 Company;

It is therefore enacted that the [manager] of the ——— 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 favor 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 favor 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 favor 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., a certain mortgage.

Know all men by these presents that we, the ——— Company, do hereby make, nominate, constitute and appoint ——— of the ——— of ———, in the County of ———, ———, our true and lawful attorney and agent, for us and in our name, place and stead to take and receive from ———, of the Township of ———, in the County of ———, a certain chattel mortgage, dated the ——— day of ———, 18—, for ——— dollars and interest thereon, payable as therein provided; and to renew the said mortgage when and as often as it may be necessary to do so, and to make such affidavit or 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 the said company could act; the said com-

pany hereby ratifying and agreeing to ratify and confirm all and whatsoever their said attorney shall lawfully do or cause to be done by virtue hereof.

As witness our corporate seal and the hand of ——— [manager] of the said company this ——— day of ———, 18—.

[*Witness*] } J. K., [Manager.] [*Company Seal.*]

AUTHORITY TO AGENT BY A COMPANY

To take and renew all mortgages.

Know all men by these presents, that we, the ——— Company do hereby make, nominate, constitute and appoint ——— of the ——— of ——— in the County of ———, ———, our true and lawful attorney and agent for us and in our name, place and stead to take and renew all chattel mortgages and bills of sale by way of chattel mortgage, necessary or expedient to be taken and renewed from time to time, and to make such affidavit or 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 the said company could do; the said company 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 and the hand of ——— [Manager] of the said company, this ——— day of ——— 18—.

[*Signed,*] L. M., [Manager.] [*Company Seal.*]

DISTRESS WARRANT

Under chattel mortgage.

To E. F., my bailiff in this behalf:

You are hereby authorized and required to seize and take all the goods and chattels, mentioned in the mortgage [a copy whereof is] hereunto annexed, wherever the same may be found, and the same to sell and dispose of 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 this ——— day of ———, 18—.

Witness } [*Signed*] C. D. [*Seal*]
[*Signed*] G. H.

DECLARATION OF TRUST.

Where a mortgage is taken for several lenders.

Memorandum made (in triplicate) this ——— day of ———, 18—, between A. B., of the ——— of ——— in the County of ———, ———, hereinafter called the trustee, of the first part; C. D., of the ——— of ———, in the County of ———, ———, of the second part; and E. F., of the ——— of ———, in the County of ———, ———, of the third part.

Whereas by indenture of chattel mortgage [bearing even date with these presents], G. H., of the ——— of ——— in the County of ———, ———, (in consideration of the sum of ——— dollars expressed to be paid to him by A. B., the trustee above mentioned) did grant and mortgage certain goods and chattels situate at ——— in the County of ———, [described in the schedule hereunto annexed] and more particularly described in the said indenture, to the trustee to secure the payment to him of the sum of ——— dollars, with interest thereon at the rate of ——— per cent. per annum.

And whereas the said sum of ——— dollars in the said indenture mentioned as having been advanced by the trustee was in fact contributed by the parties hereto of the second and third parts in the proportions or sums following, that is to say: the sum of ——— dollars by the said party of the second part, and the sum of ——— dollars by the said party of the third part.

And whereas the trustee has at the request of the said parties of the second and third parts, by whom the said sum of ——— dollars was loaned as aforesaid, agreed to make and execute such declaration of trust as is hereinafter contained.

Now these presents witness that in pursuance of the said agreement and in consideration of the premises, the trustee hereby declares that he, his executors, administrators and assigns, shall henceforth stand possessed of all interest in the

said principal sum of ——— dollars secured by the hereinbefore recited indenture of mortgage, and the interest thereon, upon the trusts following, that is to say: upon trust out of the moneys which shall be received from time to time under the said mortgage in the first place to pay thereout all the costs, charges and expenses of and incident to the demanding, recovering and enforcing payment of the said moneys, and of the execution of the trusts of these presents; and subject thereto in trust ratably and pari passu for the said parties of the second and third parts, by whom the said sum of ——— dollars was contributed, or their respective executors, administrators, or assigns, according and in proportion to the several sums so contributed and advanced by them respectively as aforesaid.

Provided always and it is hereby further declared that all powers vested in a mortgagee by virtue of the said indenture or otherwise shall be forthwith exercisable and put in force upon the request in writing of either of the parties hereto of the second and third parts, by whom the said principal sum of ——— dollars was so contributed as aforesaid, or of any other person or persons for the time being entitled to the whole or a part or share of any of the several sums so contributed as aforesaid.

In witness whereof the parties hereto have hereunto set their hands and seals,

Signed, sealed and delivered in the presence of } [*Signed*] A. B. [*Seal*]
[*Signed*] J. K.

BILL OF SALE.

R. S. O., 1897, c. 148, s. 6.

THIS INDENTURE made the ——— day of ———, A. D. 18—, between A. B., of the ——— of ———, in the County of ———, ———, hereinafter called the bargainor, of the first part; and C. D., of the ——— of ———, in the County of ———, ———, hereinafter called the bargainee, of the second part:

Witnesseth, that in consideration of the sum of ——— dollars, of lawful money of Canada, now paid by the bargainee to the bargainor, (the receipt whereof is hereby acknowledged), the bargainor doth hereby bargain, sell, assign, transfer and set over unto the bargainee, his executors, administrators and assigns, all the goods, chattels and personal effects hereinafter described, that is to say, [*here insert a full description of the goods so that they may be easily known and distinguished*] all of which said goods, chattels and effects are now in the possession of the bargainor, and are situate, lying and being on, upon and about [*here set out accurately the premises where the goods are at the time of the execution of the instrument*]:

And all the right, title, interest, property, claim and demand whatsoever of the bargainor of, in, to and out of the same, and every part thereof:

To have and to hold the said hereinbefore assigned goods, chattels and effects, and every of them and every part thereof, with the appurtenances, and all the right, title and interest of the bargainor thereto and therein, as aforesaid, unto and to the use of the bargainee, his executors, administrators and assigns, to and for his and their sole and only use for ever:

And the bargainor doth hereby for himself, his heirs, executors and administrators, covenant, promise and agree with the bargainee, his executors, administrators and assigns in manner following, that is to say: That the bargainor is now rightfully and absolutely possessed of and entitled to the said hereby assigned goods, chattels and effects, 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 costs of the bargainor], effectually indemnified from and against all former and other bargains, sales, gifts, grants, titles, charges and encumbrances whatsoever ;

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, chattels and effects, 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, make, do and execute, or cause or procure to be made, done and executed, all such further acts, deeds and assurances of the same, for the more effectually assigning and assuring the said hereby assigned 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 bargainee, 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 in the presence of } [*Signed*] A. B. [*Seal*].
[*Signed*] E. F.

AFFIDAVIT OF BONA FIDES

to accompany foregoing bill of sale.

R. S. O., 1897, c. 148, s. 6.

ONTARIO, County of ——— To wit: } I, C. D., of the ——— of ———, in the County of ———, ———, the bargainee (*a*) in the foregoing 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 me, this deponent, to hold the goods mentioned therein against the creditors of A. B., the bargainor therein named.

Sworn before me at the ——— of ———, in the County of ———, this ——— day of ——— A.D., 18—. } [*Signed*] C. D.

[*Signed*] X. Y.

A Commissioner, etc.

(*a*) Where there are two bargainees, one of them may make this affidavit.

AFFIDAVIT OF EXECUTION

of bill of sale.

R. S. O., 1897, c. 148, s. 6.

ONTARIO, County of ——— To wit: } I, E. F., of the ——— of ———, in the County of ———, ———, make oath and say:

1. I was personally present and did see the within bill of sale duly signed, sealed and executed by ——— [one of] the parties thereto:

2. I am a subscribing witness to the said bill of sale.

3. The name [*signature of witness*] set and subscribed as a witness to the execution thereof, is of the proper handwriting of me, this deponent:

4. The said bill of sale was executed at the ——— of———, in the County of ———, on the ——— day of ——— 18—.

Sworn before me at the ——— of ———, in the County of ———, this ——— day of ——— A.D., 18—.

[*Signed*] X. Y.
A Commissioner, etc.

[*Signed*] E. F.

AFFIDAVIT OF BONA FIDES

by agent of bargainee.

R. S. O., 1897, c. 148, s. 6.

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 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 the said conveyance or bill of sale, and is marked with the letter "B."

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 A. B., the bargainor therein named.

Sworn before me at the ——— of ———, in the County of ———, this ——— day of ——— A.D., 18—.

[*Signed*] X. Y.
A Commissioner, etc.

[*Signed*] E. F.

AUTHORITY TO AN AGENT

to take a bill of sale.

R. S. O., 1897, c. 148, s. 6.

Know all men by these presents, that I, C. D., of the ——— of ———, in the County of ———, ———, do hereby nominate, 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 for my sole use and benefit, to take and receive from one A. B., of the ——— of ———, in the County of ———, ———, a bill of sale of certain chattel property, the property of the said A. B., for and in consideration of the sum of ——— dollars, to be paid by me for the purchase thereof; 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 all proceedings to take 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 hereby 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 whereof I have hereunto set my hand and seal, this ——— day of ——— A.D., 18—.

Signed, sealed and delivered in the presence of } [*Signed*] C. D. [*Seal*].
[*Signed*] G. H.

CLERK'S CERTIFICATE

Of copy of mortgage, when goods removed to another county.

R. S. O., 1897, c. 148, s. 17.

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 ———, 18—, which was filed in the office of the said court at —— o'clock in the —— noon on the ——— day of ———, 18—. [*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 ———, 18—.

[*Seal of Court.*] [*Signed*] L. M.
C.C.C.

CLERK'S CERTIFICATE

Of instruments being received and filed, when such required for evidence in court.

R. S. O., 1897, c. 148, s. 24.

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 indorsements on the said original mortgage, which bears date the ——— day of ———, 18—, and was filed in the office of the said court at ——— o'clock in the —— noon on ——— the ——— day of ———, 18—.

Dated this ——— day of ———, 18—.

[*Seal of Court.*] [*Signed*] L. M.
C.C.C.

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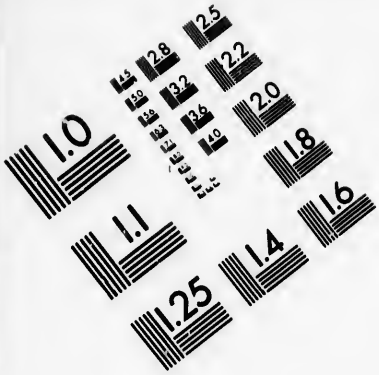

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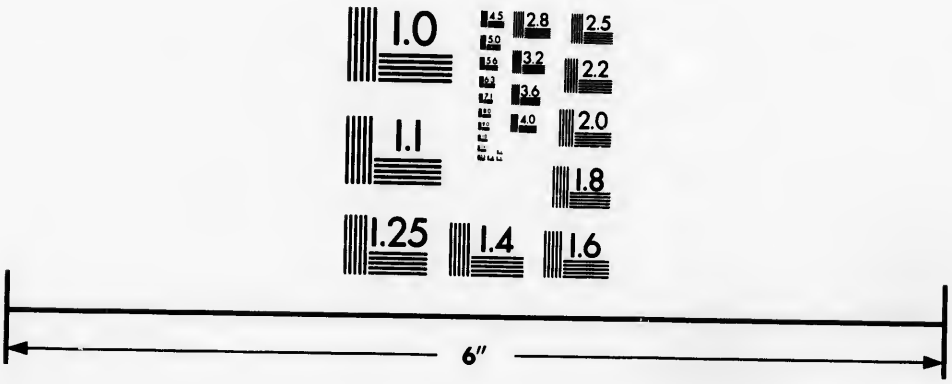

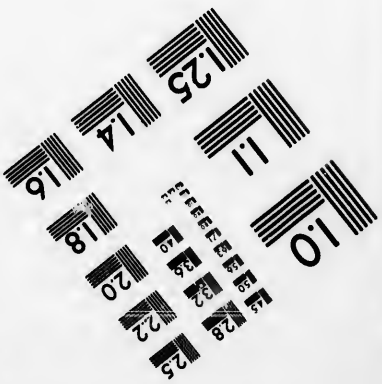

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